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# JUSTICE FOR THE COLLECTIVE: THE LIMITS OF THE HUMAN RIGHTS CLASS ACTION

*Paul R. Dubinsky\**

HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS. By *Michael J. Bazylar*. New York: New York University Press. 2003. Pp. xix, 411. Cloth, \$34.95.

IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II. By *Stuart E. Eizenstat*. New York: Public Affairs. 2003. Pp. xi, 401. Cloth, \$30.

The class action lawsuit is our grand procedural experiment in collective justice. As against the U.S. legal system's strong orientation toward individual rights rather than group rights, the class action is a countercurrent. Through Rule 23 of the Federal Rules of Civil Procedure, large numbers of previously unaffiliated individuals can proceed in federal court as a group, litigating through representatives. A recent form of this litigation, the human rights class action, takes this experiment to its far reaches. In the human rights class action, the tension between individual claimants and the group as a whole can be heightened. The class representatives and other forces behind the litigation mediate this tension. The representatives constitute the public face of the victim in suits that are about extreme victimization. They can focus on the horrifying stories of individual victims, or they can emphasize the systemic nature of the wrongs. In terms of potential remedies, strategic choices made by the representatives and their lawyers invite the court and the wider world either to see the case from the perspective of individual suffering or from the wider perspective of a shattered People.

This tension between justice for individual victims and justice for the collective runs through *Imperfect Justice* by Stuart Eizenstat and *Holocaust Justice* by Michael Bazylar, two recent and extensive

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accounts of the Holocaust restitution cases, a set of related mega-class action suits brought in the late 1990s. Both authors chronicle the efforts of elderly Holocaust victims and their supporters to obtain a remedy for wrongs suffered during the Nazi era and afterwards. For these victims, the litigation weapon of choice was the class action lawsuit. With the aid of Rule 23 of the Federal Rules of Civil Procedure, Holocaust-era claims went forward as a collective effort.

Both authors analyze the Holocaust suits and settlement negotiations thoughtfully and in great detail. Both acknowledge that the class action device contributed much to the overall financial success of the Holocaust restitution movement.<sup>1</sup> Both are quick to acknowledge, however, that class action litigation likely would not have produced results for Holocaust survivors absent other advocacy efforts: efforts in Congress, in state legislatures, in state regulatory bodies, at the highest levels of the Clinton administration, and in the court of public opinion.<sup>2</sup> Simultaneous effort on all fronts enabled Holocaust survivors, after fifty years of being rebuffed in Europe, finally to sit across the settlement table from European governments and the world's leading corporations.

The success of this endeavor was so impressive (or at least perceived that way) that it has drawn much attention from other victim reparations movements. African Americans are encouraged by the Holocaust slave labor settlement.<sup>3</sup> Armenians take heart from the Holocaust insurance and banking litigation.<sup>4</sup> South African victims of Apartheid rely upon these cases as a bellwether, an indication that there is momentum in favor of holding corporations accountable for human rights violations.<sup>5</sup> All view the result in the Holocaust cases as a

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1. For a summary, by country, of the programs providing restitution and other forms of compensation to Holocaust victims, see the website of the Conference on Jewish Material Claims Against Germany (the "Claims Conference") available at [http://www.claimscon.org/index.asp?url=compensation\\_guide](http://www.claimscon.org/index.asp?url=compensation_guide).

2. See BAZYLER pp. 3-4, EIZENSTAT pp. 339-56.

3. Several suits have been filed against defendants alleged to have profited from slavery or the slave trade in the United States. See, e.g., *In re African-American Slave Descendants Litigation*, 304 F. Supp. 2d 1027 (N.D. Ill. 2004) (dismissing claim for lack of standing, statute of limitations, political question, and failure to state a claim on which relief can be granted); *Cato v. United States*, 70 F. 3d 1103 (9th Cir. 1995) (dismissing claim for lack of standing, sovereign immunity, and lack of a specific, individualized grievance).

4. See *Marootian v. New York Life Ins. Co.*, 2001 U.S. Dist. LEXIS 22274 (C.D. Cal. Nov. 30, 2001); Beverly Beyette, *He Stands Up in the Name of Armenians*, L.A. TIMES, Apr. 27, 2001, at E1.

5. See, e.g., *In re South African Apartheid Litigation*, 238 F. Supp. 2d 1379 (2002); Apartheid Debt & Reparations Campaign, Briefings on the Reparations Lawsuit facilitated by the Apartheid Debt Campaign of Jubilee South Africa, <http://www.africaaction.org/action/adrc0211.htm>. These suits are opposed by the South Africa government. See Christelle Terreblanche, *Government Opposes Reparations Claims*, SUNDAY INDEPENDENT, July 26, 2003 [http://www.iol.co.za/general/news/newprint.php?art\\_id=ct20030726175801448P200250](http://www.iol.co.za/general/news/newprint.php?art_id=ct20030726175801448P200250) (noting claim by Justice Minister Penuell Maduna that class action lawsuits in the U.S. were in effect creating a "surrogate government").

broad collective victory: cases litigated on a class basis, settled with few class members opting out,<sup>6</sup> propelled forward by the efforts of the collective's main advocacy organizations and supplemented by broad support among the Jewish collective at large.<sup>7</sup> All of which leads Bazyler and Eizenstat to speculate that there may be a "Holocaust restitution model" for other victims of past injustice.<sup>8</sup>

Notwithstanding the authors' optimism and the number of new human rights class actions that have been filed in the past few years, other groups should proceed with caution. Before any "model" is identified and followed, the limitations of the Holocaust restitution cases need to be acknowledged. Chief among these limitations is that those cases were more about individual justice than collective justice. Little was awarded in the way of remedies to address injuries suffered by the collective. Nearly all the money generated by the settlements was paid out in the form of individual cash awards. Proposals for group-oriented remedies were rejected. Other victim groups should take note. Seeking collective remedies through the Holocaust model is risky business.

## I. DIFFERENT PERSPECTIVES: THE HUMAN RIGHTS SCHOLAR AND THE WASHINGTON INSIDER

Disputes arising from the Holocaust have been in courts (here and elsewhere) for sixty years. Nearly all of these proceedings have focused on individual perpetrators and how they acted at a time when they possessed extraordinary power over others and where the "others" were people that statutes, decrees, or judicial practice had put outside the law's protection.<sup>9</sup> From the trials at Nuremberg in the 1940s to those in national courts in later decades, Holocaust cases had familiar themes: good and evil, obeying orders, personal ambition, and the bureaucratic mindset.

The class action suits filed in the Eastern District of New York, beginning with the Swiss banks case in 1996, were different. The defendants were corporate entities, not individuals. The complaints

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6. See Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. L.F. 279 (2003) (assessing advantages and disadvantages of class-action device for enforcing human rights).

7. Support ran strong among Jewish communities in Israel and the United States. Support among Jewish communities in Europe was mixed.

8. See BAZYLER pp. 286-306, EIZENSTAT pp. 339-56. The beneficiaries of the Holocaust restitution cases included not only several hundred thousand Jewish survivors but also more than a million non-Jews who had been slave laborers.

9. For purposes of many routine questions of civil law, German courts during the Nazi period equated Jews with deceased persons. See Vivian Grosswald Curran, *Fear of Formalism, Indications from the Fascist Period in France and Germany*, 35 CORNELL INT'L L. J. 101, 166-75 (2003).

were more about profit than malice. The causes of action arose not merely from events during the War, but also after it. The defendants were not those who had conceived of and carried out genocide. Daimler Benz had not devised the Final Solution, but it had worked with the Nazi regime to keep its assembly lines filled with slave laborers. Swiss Bank Corporation (SBC) had not liquidated the Lodz Ghetto, but it had looted the assets of its Jewish depositors trapped there and in other ghettos across Poland. After the War, SBC had worked in coordination with other Swiss banks to prevent heirs from claiming the assets of family members who had perished. In other words, the Holocaust restitution cases of the 1990s opened the door to ever wider circles of complicity. Had the Swiss banks acted with the support of the Swiss Government and the larger Swiss business community? Did wrongdoing occur on the other side of the Atlantic among America's blue-chip corporations, some of whom had close ties to Nazi Germany? The cases raised expectations of collective relief — remedies not only for individual victims but for the collectives of which they are a part. If the defendants had acted collectively, had not the victims suffered collectively?

Both Eizenstat and Bazylar lead us to consider these questions, but they lead us along two different paths. *Imperfect Justice* is partly a memoir and partly a diplomatic primer from a longtime Washington insider who became U.S. Ambassador to the European Union in 1993. As the Clinton administration came into office, Eizenstat (prompted by Richard Holbrooke)<sup>10</sup> seized upon a window of opportunity for nudging the new governments of Eastern Europe to deal with their wartime past and the many properties that had been confiscated from religious orders, private associations, and other components of civil society. In the case of churches, the culprits were the post-War Communist governments. In the case of Jewish properties, there were two culprits. Synagogues and cemeteries had been seized and destroyed during the Nazi period. After the War, these properties were then expropriated by Communist governments.

When Eizenstat begins discussions with the post-Communist governments, knotty issues quickly surface: Who now held these properties? To whom should they be returned? Did a tiny community of elderly Holocaust survivors have the resources to restore and maintain these properties? Should the properties instead be transferred to international Jewish organizations functioning in essence as trustees? Could these latter organizations, many based in

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10. Holbrooke at the time was Assistant Secretary of State for European Affairs. U.S. government policy in the former Communist countries was that property restitution was to be part of a "broader U.S. policy to encourage the rule of law, respect for property rights, [and] tolerance toward minorities." EIZENSTAT p. 23.

New York or Jerusalem, see eye-to-eye with local Jewish communities?

Over the course of six years, Eizenstat is drawn steadily deeper into these and other questions of Holocaust restitution. Like a freelance photographer, he carries his Holocaust portfolio with him from post to post, from the U.S. Embassy in Brussels to the Commerce Department to the State Department and finally to the number two spot at Treasury. It is difficult to think of another executive branch official in recent memory who invested so much effort and so much of his reputation in trying to resolve claims among private parties, most of whom were not even U.S. citizens.<sup>11</sup>

*Holocaust Justice*, on the other hand, is the work of a human rights lawyer and scholar. Bazylzer's narrative is grounded in the cases themselves — their theories of liability and their implications for the larger field of international human rights. In this, his basic perspective and Eizenstat's are quite different. Eizenstat repeatedly lets us know that he has little patience for class action litigation in general and plaintiff-side class action lawyers in particular.<sup>12</sup> Bazylzer, on the other hand, is a sympathetic observer and perhaps even a fellow traveler.<sup>13</sup> When he takes someone to task, it is the defendants and their counsel, especially over delay and deceit.<sup>14</sup> Bazylzer also puts some distance between himself and the views of prominent Jewish intellectuals reluctant to be engaged in monetizing the Holocaust.<sup>15</sup> That, in his view, is not the chief danger. Rather it is in acquiescing to a human rights regime that lacks real remedies. For him, the hero of the drama is the American judicial system. Unlike tribunals elsewhere, U.S. courts stood ready to do justice for vast numbers of victims, even those who were not U.S. citizens.<sup>16</sup> For Eizenstat, the heroes are not the

11. As Eizenstat puts it: "There was no precedent in American history for such a legal negotiation by the U.S. government with private companies and for intervening this way in present and future private lawsuits." P. 257.

12. EIZENSTAT p. 75 ("The class-action lawyers who entered the scene were a witches' brew of egos and mutual jealousies, greatly complicating my responsibility to keep the Swiss affair from careening out of diplomatic control"); *id.* p. 77 ("The lawyers were not in it to find historical truth. Most were in it for the money.").

13. Bazylzer played an important role in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992), a case limiting the sovereign immunity of foreign countries and an important human rights precedent.

14. See BAZYLZER p. 27; *In re Holocaust Victim Assets Litigation*, 319 F. Supp. 2d 301, 303-16 (E.D.N.Y. 2004) (finding "[d]ecades of improper behavior by the Swiss banks," including systematic document destruction and delay).

15. See, e.g., Leon Wieseltier, *Assets*, NEW REPUBLIC, Nov. 8, 1998, at 98 ("I would rather grieve than sue"); Gabriel Schoenfeld, *Holocaust Reparations — A Growing Scandal*, COMMENTARY, Sept. 2000, at 1.

16. See BAZYLZER p. xii ("The unique features of the American justice system are precisely those factors that made the United States the only forum in the world where the Holocaust claims could be heard today."). In comparison, consider this from a Swiss scholar

lawyers and not the judges, even those he admires.<sup>17</sup> When it comes to righting great historical injustices, Eizenstat's view seems to be that litigation is not a necessary evil; it is an unnecessary evil. At every turn, the lawsuits made his job more difficult. The suits stirred up chauvinism, he says, at a time when cool heads were needed. They placed the tone of U.S.-European relations under the influence of a small number of egotistical, self-promoting lawyers with the ability to make inflated demands on U.S. allies. In contrast, Eizenstat venerates statesmen, people like Otto Lamsdorf, guided by national and multinational interest and prepared to seize upon an historical moment for reconciliation.<sup>18</sup>

## II. THE HUMAN RIGHTS CLASS ACTION: LITIGATING ON BEHALF OF THE COLLECTIVE

Holocaust survivors filed four kinds of actions: (1) suits against the three largest Swiss banks<sup>19</sup> alleging self-dealing and theft as the banks blocked the efforts of Survivors and their heirs to claim tens of thousands of Swiss bank accounts that had been opened for safekeeping by now-deceased family members of these claimants before or during World War II; (2) suits against European insurance companies for failing to pay death benefits on policies purchased by Holocaust victims;<sup>20</sup> (3) suits against multinational businesses whose exploitation of slave labor allowed them to flourish during the War and to recover quickly afterward;<sup>21</sup> and (4) suits against art collectors,

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reacting to the Holocaust restitution cases: "Where I come from, the prevailing view of adjudication remains relatively formalist, perhaps too much so. The main concern is to cabin judicial power." Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835 (2002) (footnotes omitted).

17. EIZENSTAT p. 122 (noting the "wisdom and sophistication" of Judge Edward Korman, who presided over *In re Holocaust Victim Assets Litigation*).

18. Lamsdorf, former leader of the centrist Free Democratic Party, was chosen by Chancellor Gerhard Schroeder to be the Chancellor's personal representative to the negotiations over the German slave labor cases. Eizenstat admires Lamsdorf's sense of duty and moral obligation, his gravitas, his intelligence, and his farsightedness. See EIZENSTAT pp. 236-37.

19. These were three different suits initially brought against Credit Suisse, Swiss Bank Corporation, and Union Bank of Switzerland. During the course of the litigation, the latter two merged, and the former acquired a U.S. investment bank to become Credit Suisse First Boston. See David E. Sanger, *How a Swiss Bank Gold Deal Eluded a U.S. Mediator*, N.Y. TIMES, July 12, 1998, at 6. In 1997, the three suits were consolidated before Judge Edward Korman in the Eastern District of New York under the name *In re Holocaust Victim Assets Litigation*. See *In re Holocaust Victim Assets Litigation*, No. CV-96-4849, 2000 U.S. Dist. LEXIS 20817 (E.D.N.Y. Nov. 22, 2000).

20. See, e.g., *Cornell v. Assicurazioni Generali, S.p.A.*, 97 Civ. 2262, 2000 U.S. Dist. LEXIS 11991 (S.D.N.Y. Aug. 22, 2000); *Stern v. Assicurazioni Generali S.p.A.*, BC 185376 (Cal. Super. Ct., filed Feb. 5, 1998).

21. An estimated ten million people, Jews and also many non-Jews from Eastern Europe, were forced into Nazi Germany's slave labor force. Most worked for private

dealers, and even world renowned museums whose collections included artwork plundered from the private collections of Holocaust victims.<sup>22</sup> Much of this was complicated class action litigation,<sup>23</sup> with class members often having more allegiance to local Holocaust survivor organizations than to the large Jewish umbrella organizations that had taken the lead in confronting the Swiss banks and other defendants and that had dominated all matters of Holocaust reparations since the early 1950s. The class action suits were to some extent a challenge to these preexisting allegiances.

In the typical class action lawsuit, the ties among class members are a creation of the legal process. Those ties emanate from one thing: plaintiffs were injured by the same product, they were misled by the same brokerage firm, they were overcharged by the same utility. Rule 23 creates a grouping of individuals and claims, but one that is artificial and ephemeral. Before the complaint is filed, class members do not even know one another. After the litigation is over, they likely will go back to having nothing to do with one another. In this context, Rule 23's purposes are procedural and practical: There must be common questions of fact or law applicable to all claims,<sup>24</sup> a limited fund for recovery,<sup>25</sup> or something else to indicate that litigation as a class is the most efficient way to proceed. Nothing in the class certification process invites a court to pause over whether or not the putative class is composed of members who have any real connection to one another that predates the filing of the complaint.

Several ramifications follow from this. In the typical commercial class action suit, damages are the sum of the injuries to each of the members of the class. The whole is equal to the sum of the parts. There is no entity separate from the class members, no disembodied collective that has sustained injury in its own right, an injury distinct from that suffered by individuals.

In the human rights class action, the situation is often different. The ties among class members are more likely to predate the litigation and to be lasting and deep. Suit is brought on behalf of people who have suffered similar atrocities, often for the same reasons. Holocaust victims were singled out because of traits central to their identity:

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German companies. *See generally* BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* (1979).

22. *See, e.g.*, *United States v. Portrait of Wally*, 105 F. Supp. 2d 288 (S.D.N.Y. 2000); *In re Subpoena Duces Tecum Served on Museum of Modern Art*, 93 N.Y.2d 729 (1999).

23. The suits over stolen artwork were individual actions, not class actions. Some of the insurance cases also were individual suits. *See, e.g.*, *Stern v. Assicurazioni Generali, S.p.A.*, 1999 WL 167546 (Cal. App. Super. 1999).

24. *See* FED. R. CIV. P. 23(a)(2).

25. *See* FED. R. CIV. P. 23(b)(1)(B).

religion,<sup>26</sup> race,<sup>27</sup> sexual preference,<sup>28</sup> and disability.<sup>29</sup> Subsequent to such persecution and atrocity, victims can be expected to form tight bonds to one another and to the persecuted group. They survived while others perished. A human rights class action composed of class members with this perspective is quite unlike one that temporarily aligns a million people all of whom owned the same automobile with the same safety defect.

In addition to being grounded in shared experience, the Holocaust suits were “collective” in the sense that they were strongly supported by many who were not part of the plaintiff class. They were supported in this way because of the identity-reinforcing nature of persecution in general and the Holocaust in particular.<sup>30</sup> The filing of Holocaust suits also triggered financial support, research help, public relations activities, and political clout stretching far beyond the plaintiff class. This help came from the larger universe of Holocaust survivors, from major international Jewish organizations, from Jewish foundations, and from prominent Jewish individuals, many of whom were not Holocaust survivors themselves or children of Survivors. These lawsuits became their struggle because, for them, support was a duty of group membership.

The collective nature of the endeavor is underlined by Eizenstat’s richly detailed account of the first meeting, in Bern, between the leadership of the World Jewish Congress (WJC)<sup>31</sup> and the three largest Swiss banks: Credit Suisse (CS), Swiss Bank Corporation (SBC), and

26. For Nazi Germany, Jews were not only members of a religion, they were members of a race. The Nuremberg laws were race-based legislation. Their prohibitions applied based on a person’s hereditary Jewishness, not religious practice, affiliation, or belief. See 1 SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933-1939, at 151-55 (1997).

27. Roma, also known as Gypsies, were considered to be “carriers of alien blood” and were barred from having sexual contact with Germans under the Nuremberg laws. Beginning in 1936, Robert Ritter of the University of Tübingen, with the backing of the SS, the German Research Society and the Reich Health Ministry, concluded that Gypsies were 90% racially impure. That conclusion became the basis for their segregation, deportation, and extermination. See 1 SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933-1939, at 204 (1997).

28. During the Nazi period, some ten to fifteen thousand homosexuals were incarcerated and many others were killed in concentration camps. See *id.* at 205-07.

29. See *id.* at 208 (describing campaign for sterilizing those with hereditary diseases and the “feeble-minded,” with determinations based on special intelligence tests and medical examinations).

30. See EIZENSTAT p.6.

31. The World Jewish Congress was created in 1936. Its original purpose was to combat Nazism. After the War, under the leadership of Nahum Goldmann, the WJC became an umbrella organization for nearly one hundred Jewish communities around the world. Edgar Bronfman has served as President, and Israel Singer as Deputy, since 1981. See EIZENSTAT p. 55; World Jewish Congress, About the World Jewish Congress, <http://www.worldjewishcongress.org/about/index.cfm> (last visited Aug. 27, 2004).

Union Bank of Switzerland (UBS). Edgar Bronfman and Israel Singer of the WJC are there as intermediaries and group spokesmen, a position with a long lineage in Jewish history.<sup>32</sup> They are there on behalf of the Jewish People as a whole.<sup>33</sup> They have not come to discuss individual bank accounts or individual cases. They have come to resolve the entire controversy surrounding dormant bank accounts belonging to Jewish depositors.<sup>34</sup> They want to create a transparent process for identifying all Holocaust-related accounts, a process that will be regarded as fair not only by claimants but by all members of the Jewish community who are already rallying behind the claimants.

The Swiss bankers are hesitant about the wholesale nature of what Bronfman and Singer propose. For fifty years the banks have done well for themselves by denying claims one at a time. They have successfully resisted muted calls for a comprehensive audit of all accounts in which there has been no activity since the 1940s. Beginning right after the War's end, they eluded any serious accounting to the Allied victors with respect to gold and proceeds that had made their way from Germany to Switzerland. They stick to this strategy. They brush aside Bronfman's and Singer's call to do more. Instead, they offer \$32 million to settle everything.

To Bronfman and Singer, the offer feels like a proposed payoff, a token payment to make them go away.<sup>35</sup> It also suggests that the leading bankers in Europe are somehow unaware that the rules have changed. For fifty years the Swiss banking industry has rejected claimants based on a variety of legalisms: lack of sufficient account

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32. The role of spokesman for the Jews goes back to Moses and Aaron in the Book of Exodus and repeats itself throughout Jewish history. During the Holocaust, representative Jewish councils were recognized by Nazi Germany and required to implement the harshest measures on the Jewish population, such as choosing who was fit for work and who would be sent to death camps in the East. See LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS: 1933-1945*, at 301-26 (1975). For an account of the agonizing choices made by the Jewish leaders of the Lodz Ghetto, see LUCJAN DOBROSZYCKI, *THE CHRONICLE OF THE LODZ GHETTO: 1941-44* (1987). The website of the WJC states: "The core principle of the World Jewish Congress is that all Jews are responsible for one another." World Jewish Congress, *supra* note 31.

33. In a recent submission to the United States Supreme Court, the WJC described itself as "represent[ing] Jews from the entire political spectrum and from all Jewish religious denominations, and serv[ing] as a diplomatic arm of the Jewish people to world governments and international organizations." See *Sosa v. Alvarez-Machain*, Brief for World Jewish Congress and American Jewish Committee as Amici Curiae, 2004 WL 419426 (2004).

34. The dormant accounts are bank accounts in Switzerland that were opened in the 1930s and early 1940s only for all transactions in the account abruptly to have stopped on some date during the War. The date on which an account went dormant, when correlated with various Holocaust events (e.g., the liquidation of a particular ghetto) can be a strong indication that the account belonged to a Jewish owner who perished in the Holocaust.

35. See BAZYLER p. 13. Three years later, the banks settled for \$1.25 billion. See *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (approving settlement).

information,<sup>36</sup> lack of proof of the death of the account owner,<sup>37</sup> lack of assets still left in the account after having been churned by fees.<sup>38</sup> That approach has worked for a long time. One at a time, claimants gave up.

By the 1990s, the rules have changed. Bank secrecy laws are out. Transparency is in. Moral standards are increasingly global. World public opinion matters. Institutions of all kinds have taken big steps in confronting their past.<sup>39</sup> After decades of appearing at the branches of Credit Suisse one at a time, now victims are taking action en masse. They are pooling their resources. They are receiving support from the wider Jewish community, the human rights community, and people of all persuasions who see the dispute in terms of equity.<sup>40</sup>

Bronfman and Singer belong to a new generation of Jewish leaders who understand the new rules and the power of victims in an age of apology.<sup>41</sup> They are more confident and assertive than their predecessors. Having come of age in the American civil rights movement, the campaign to free Soviet Jews, and earlier Holocaust-related controversies,<sup>42</sup> they have an intuitive feel for the power of

36. See *In re Holocaust Victim Assets Litigation*, 319 F. Supp. 2d 301 (2004).

37. See BAZYLER p. 15 (the death certificate of the person who opened the account).

38. See EIZENSTAT pp. 46-51 (describing large administrative fees and account search fees used to run accounts down to a zero balance).

39. See, e.g., International Theological Commission of the Roman Catholic Church, *Memory and Reconciliation: The Church and the Faults of the Past*, Mar. 7, 2000, [http://www.vatican.va/roman\\_curia/congregations/cfaith/cti\\_documents/rc\\_con\\_cfaith\\_doc\\_20000307\\_memory-reconc-itc\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_con_cfaith_doc_20000307_memory-reconc-itc_en.html); Pope John Paul II, "Day of Pardon," Mar. 12, 2000, [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/homilies/2000/documents/hf\\_jp-ii\\_hom\\_20000312\\_pardon\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/homilies/2000/documents/hf_jp-ii_hom_20000312_pardon_en.html).

40. It is one of the great ironies of the Holocaust cases that they run so far counter to old Jewish stereotypes. Dating at least as far back as the Gospels, Jews are portrayed as legalistic, as pedantically concerned with technical rules rather than with simple justice. In the Holocaust cases, the claims advanced by Jewish victims were not legalistic at all. They were based on appeals to equity, on the unfairness of requiring complete documentation from people whose homes and businesses had been ransacked and destroyed, people who had been forcibly transported across Europe, imprisoned, and traumatized. In contrast, the arguments advanced by the banks and also by various insurance companies were highly legalistic and technical: failure to meet the statute of limitations, lack of sufficient documentation, and so forth.

41. See, e.g., Roy L. Brooks, *The Age of Apology in WHEN SORRY ISN'T ENOUGH: THE CONTROVERSY OVER APOLOGIES AND REPARATIONS FOR HUMAN INJUSTICE* 1-12 (Roy L. Brooks ed., 1999); Erin Ann O'Hara & Douglas Yarn, *On Apology and Consilience*, 77 WASH. L. REV. 1121 (2002).

42. See World Jewish Congress, *supra* note 31. Bronfman and Singer played important roles in isolating Kurt Waldheim, President of Austria and a former U.N. Secretary General, who had been an officer in a German army unit that had committed atrocities in Yugoslavia during World War II. Waldheim became the first acting head of state to be placed on the U.S. Justice Department's watch list. See Michael J. Jordan, *WJC Debates a New Focus Amid Changes in Leadership*, JTA PRINT NEWS, [http://www.jta.org/page\\_print\\_story.asp?inarticlid=10785](http://www.jta.org/page_print_story.asp?inarticlid=10785), Jan. 15, 2002; Kurt Waldheim, COLUMBIA ENCYCLOPEDIA (6th ed. 2001), at <http://www.bartleby.com/65/wa/Waldheim.html>.

group solidarity and the extent to which calls for equity resonate deeply with the American public.

The Bern meeting is so disastrous that it forecloses any chance of resolving the bank account claims without the public relations equivalent of hand-to-hand combat. A gale becomes a category-4 hurricane, with specific events feeding the storm: UBS is caught red-handed destroying World War II-era bank records.<sup>43</sup> The Senate Banking Committee holds public hearings on the Swiss banking industry.<sup>44</sup> The proposed merger of SBC and UBS is held up by the New York State Banking Department.<sup>45</sup> Eizenstat's office at the State Department releases an inter-agency report highly critical of wartime gold laundering by the Swiss National Bank. The report suggests that actions by the Swiss may even have prolonged World War II.<sup>46</sup> The plaintiffs bar joins the fray and enlists Holocaust survivors in public relations efforts.<sup>47</sup> European business executives, displaying a certain

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43. The bank defendants had agreed not to destroy records that potentially could be relevant to the cases in New York. Subsequently, however, a security guard at the Zurich headquarters of UBS discovered UBS employees in the process of shredding just such evidence, including ledgers from the 1930s and 1940s and records of real estate that had been confiscated by the Nazis with proceeds placed in Swiss banks. EIZENSTAT pp. 96-98. The security guard, Christoph Meili, went public with the information, testifying before the Senate Banking Committee in the United States. In another blunder, UBS pressed criminal charges against Meili in Switzerland, making him a martyr of the restitution movement. Meili was ultimately granted U.S. citizenship pursuant to a special bill introduced by Senator Alphonse D'Amato, chairman of the Senate Banking Committee. See James M. Thurman, *U.S. Lawmakers Lay Plans to Intervene in Elian's Case*, CHRISTIAN SCI. MONITOR, Jan. 20, 2000 (referring to special bill enacted by Congress on behalf of Meili).

44. See, e.g., *Assets Stolen from Holocaust Victims and Placed in Swiss Bank Accounts by the Nazi Regime in Germany: Hearings on H.R. 3662 Before the Banking and Financial Services Committee*, 105th Cong. (1996); *Holocaust Victims Assets in Swiss Banks: Hearing on H.R. 3662 Before the Banking and Financial Services Committee*, 105th Cong. (1996) (statement of Dr. Georg Krayer, Chairman, Swiss Bankers Association); *Deposits of WWII Jews in Swiss Banks: Hearing on S. Res. 1900 Before the Senate Banking Committee*, 105th Cong. (1996) (statement of Mrs. Greta Beer).

45. See John Authers & William Hall, *Holocaust Deal Ends Sanctions Threat*, FIN. TIMES (LONDON), Aug. 14, 1998; David Cay Johnston, *New York Officials to Impose Sanctions on Swiss Banks*, Sept. 1, N.Y. TIMES, July 3, 1998, at A3; *Reject Bank Merger, New York Tells Fed*, N.Y. TIMES, Mar. 25, 1998, at B1; Press Release, New York State Banking Board Approves Application Which Furthers Merger Plan of Two Swiss Banks, June 4, 1998, <http://www.claims.state.ny.us/pr980604.htm>.

46. See STUART E. EIZENSTAT & WILLIAM Z. SLANY, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II, A PRELIMINARY STUDY (1997), at [www.state.gov/www/regions/eur/holocausthp.html](http://www.state.gov/www/regions/eur/holocausthp.html); [www.giussani.com/holocaust-assets/welcome.html](http://www.giussani.com/holocaust-assets/welcome.html). The report was prepared with the participation of the Central Intelligence Agency, the Department of Commerce, the Department of Defense, the Department of Justice, the Department of State, the Department of the Treasury, the Federal Bureau of Investigation, the Federal Reserve Board, the National Archives and Records Administration, the National Security Agency, and the U.S. Holocaust Memorial Museum. See EIZENSTAT p. 370, nn.99-111.

47. New York attorney Edward Fagan took American-style tactics to the heart of Germany in leading Holocaust Survivors on a march through Frankfurt's financial district. See Jonathan Weisman, *Redress Sought in Nazi-Era Labor*, BALT. SUN, Aug. 23, 1999, at 1A.

moral obtuseness, feed the fire.<sup>48</sup> The WJC launches attack ads.<sup>49</sup> The Swiss public, initially critical of the banks, does an about-face when scrutiny moves from the post-War behavior of the banks to the wartime actions of the Swiss government.<sup>50</sup> Two blue-ribbon commissions conclude that complicity was rife in Switzerland during the War and afterwards.<sup>51</sup> Small but vocal minorities call for economic

48. Herbert Hansmeyer, a managing director at the German insurer Allianz, made the following observation about Holocaust-era insurance policies for which insurers had long avoided paying death benefits: "I cannot become very emotional about insurance claims that are 60 years old." See BAZYLER p. 116; Michael Maiello & Robert Lenzner, *The Last Victims*, FORBES, May 14, 2001, at 12. Swiss Foreign Minister Flavio Cotti, referring to what he saw as unfair attacks on Switzerland, said: "[They] come from limited geographic areas, for example, the East Coast of the United States, and in particular from New York." EIZENSTAT p. 132.

49. Bazyler reproduces one such ad directed at Mercedes-Benz, stating in bold type: "Design. Performance. Slave Labor." See BAZYLER p. 68.

50. The Swiss public was initially critical of the behavior of Swiss banks and their refusal to return assets to the heirs of Jewish depositors who perished in concentration camps. In the words of Thomas Borer, Swiss Ambassador to the U.S., until early 1997 most Swiss were sympathetic to Jewish requests because "they do not like Swiss banks." See EIZENSTAT p. 109. These sentiments quickly shifted, however, once the focus of external criticism moved to Swiss neutrality during World War II and the role of the Swiss Central Bank in laundering Nazi gold. In 1997, the Swiss response to the Eizenstat Report was overwhelmingly negative. See generally William Hall, *Switzerland Seeks to End Bitter Debate Over War*, FIN. TIMES (LONDON), Mar. 23, 2002, at 6; *Switzerland and the Jewish Gold. More Questions, More Squirring*, ECONOMIST, May 10, 1997, at 49 (noting that a plan to distribute income from fund of Swiss National Bank's gold reserves was opposed by Christoph Blocher, a populist Swiss politician who characterized the Eizenstat Report as an example of "foreign pressure"); Regula Ludi, *The Swiss Case*, in CENTER FOR EUROPEAN STUDIES WORKING PAPER SERIES NO. 80, [http://www.ces.fas.harvard.edu/working\\_papers/LudiDreyfus.pdf](http://www.ces.fas.harvard.edu/working_papers/LudiDreyfus.pdf). *Imperfect Justice* contains Eizenstat's defense of the Report ("[M]y presidential mandate was to set forth the facts and the conclusions, however harsh") and his mea culpa ("A few ill-chosen words in my foreword would set off the final avalanche with Switzerland. In retrospect, the same points could have been made less provocatively."). EIZENSTAT pp. 108-09.

51. The first was the so-called Bergier Commission established by the Swiss government with Jean-François Bergier, a Swiss historian, at its helm. The second was the Independent Committee of Eminent Persons (ICEP), formed pursuant to an agreement among the Swiss banks, the World Jewish Restitution Organization (WJRO), and Israel's Jewish Agency. EIZENSTAT p. 69. The latter is commonly referred to as the Volcker Committee, for its chairman, Paul Volcker, who was formerly chairman of the U.S. Federal Reserve Board of Governors under Presidents Carter and Reagan. The mandate of the Volcker Committee was to carry out an independent audit of all accounts in Swiss banks that might contain assets belonging to victims of Nazi persecution. It carried out this mandate on its own timeframe, one that was independent of litigation taking place in the U.S., with extraordinary thoroughness at a staggering total cost of \$200 million. EIZENSTAT p. 72. For ICEP's final report finding over 50,000 accounts possibly linked to persons persecuted by the Nazis, see INDEPENDENT COMMITTEE OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION (1999), [www.icep-iaep.org](http://www.icep-iaep.org). The Bergier Commission had a broader mandate. It examined a much wider range of Swiss behavior during World War II. For the Commission's findings, see INDEPENDENT COMMISSION OF EXPERTS SWITZERLAND — SECOND WORLD WAR, SWITZERLAND, NATIONAL SOCIALISM AND THE SECOND WORLD WAR (final report) (2002).

boycotts.<sup>52</sup> The Swiss bank litigation begets other litigation — against French banks,<sup>53</sup> German manufacturing companies,<sup>54</sup> the French national railroad,<sup>55</sup> Italian insurers,<sup>56</sup> the Austrian national museum,<sup>57</sup> Ford Motor Company,<sup>58</sup> and IBM.<sup>59</sup>

The Holocaust Restitution Movement has mushroomed into transnational public law litigation on a grand scale.<sup>60</sup> Though the various restitution cases (the Swiss, the German, the Austrian, the French) are separate from one another, they come together in the public mind. Swiss-American relations sour.<sup>61</sup> Anti-Semitism rises.<sup>62</sup>

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52. Seventy members of the Swiss Parliament called for a boycott of U.S. goods. So did the President of the Swatch watch company. See EIZENSTAT pp. 109, 161; Peter Capella, *Swiss Jews Face Backlash Over Nazi Gold*, INDEPENDENT, Aug. 1, 1998, at 12; *Is This Marriage a Mistake?*, ECONOMIST, Jan. 31, 1998, at 5 (proposed boycott of UBS after Meili was fired); Elizabeth Olsen, *Vienna's Woe Is Heartening Isolationists Among Swiss*, N.Y. TIMES, February 10, 2000, at A6.

53. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000); *Mayer v. Banque Paribas*, no. 302226 (Cal. Super. Ct. Mar. 24, 1999); *Benisti v. Banque Paribas*, 98 CV 97851 (E.D.N.Y. Dec. 23, 1998).

54. Among the defendants were Bayerische Motoren Werke AG, Daimler Benz AG, Degussa AG, I.B. Farben AG, Leica Camera AG, Siemens AG, and Volkswagen AG. See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 48 (D.N.J. 1999); Christopher Rhoads, *German Companies Face U.S. Lawsuits Over Slave Labor*, WALL ST. J. (INT'L), Sept. 1, 1998, at A14.

55. See *Abrams v. Société Nationale des Chemins de Fer Français*, 332 F.3d 173 (2d Cir. 2003) (alleging that government-owned railroad knowingly transported Jews from France to Nazi death camps).

56. See *Winters v. Assicurazioni Generali, S.p.A.*, 98 Civ. 9186 (S.D.N.Y. 1998); *Cornell v. Assicurazioni Generali, S.p.A.*, 97 Civ. 2262 (S.D.N.Y. 1997).

57. See *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004) (denying motion to dismiss in suit seeking return of paintings taken from Austrian Jews by Nazis in 1930s and now held by state-owned Austrian gallery).

58. See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing suit as barred by statute of limitations and political question doctrine).

59. *Grossman v. Int'l Bus. Machines* was filed in the Eastern District of New York on February 11, 2001 and then voluntarily dismissed on March 29, 2001. The complaint alleged that IBM aided, assisted or consciously participated in the commission of crimes against humanity and violations of human rights by Nazi Germany. For details about the case, see Dominic Rushe, *IBM Faces Fresh Revelations of Nazi Collaboration*, SUNDAY TIMES OF LONDON, Mar. 31 2002, at 3; <http://cmht.com/casewatch/cases/cwholocaust0406.htm>. For an extensive study of IBM's wartime activities, see EDWIN BLACK, *IBM AND THE HOLOCAUST: THE STRATEGIC ALLIANCE BETWEEN NAZI GERMANY AND AMERICA'S MOST POWERFUL CORPORATION* (2001).

60. See Harold Hongju Koh, *The Haitian Refugee Litigation: A Case Study in Transnational Public Law Litigation*, 18 MD. J. INT'L L. & TRADE 1 (1994); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2347 (1991) (defining the term as "suits brought in United States courts by individual and governmental litigants challenging violations of international law"); Harold Hongju Koh, *Civil Remedies for Uncivil Wrongs: Combating Terrorism Through Transnational Public Law Litigation*, 22 TEX. INT'L L.J. 169, 193-201 (1987).

61. EIZENSTAT p. 98. (quoting the chairman of Credit Suisse as explaining that the Swiss middle class opposed the whole reparations process and that "anti-American sentiment was growing in Switzerland"). Eizenstat also quotes from a leaked cable authored by Carlo

The conflict is no longer driven by individual stories. It is now about the Swiss, French, Austrian, and German pasts and the collective Jewish future.

### III. WHY NOW? WHY HERE?

The foreword to *Imperfect Justice* is written by Elie Wiesel. He, more than anyone, has assumed the role of translating the Holocaust to the non-Jewish world: to millions of his readers, to Ronald Reagan,<sup>63</sup> to the Nobel Prize Committee.<sup>64</sup> He asks: “Why this late concern for stolen money and wealth?”<sup>65</sup>

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Jagmetti, Swiss Ambassador to the U.S., recommending that the Swiss government “wage war” against its opponents. Among those opponents were Americans who were becoming increasingly aggressive in their attitude toward Switzerland. EIZENSTAT pp. 93, 98; see also Rolf H. Weber, *Holocaust-Related Claims and Liability of Swiss Banks — Political and Legal Implications*, 36 INT’L L. 1213 (2002).

62. See EIZENSTAT pp. 96, 340 (describing Swiss-Jewish community’s fear of anti-Semitic repercussions of the Meili affair and quoting Swiss politician Christophe Blocher as publicly stating that “Jews are only interested in money.”); FEDERAL COMMISSION AGAINST RACISM, ANTI-SEMITISM IN SWITZERLAND: A REPORT ON HISTORICAL AND CURRENT MANIFESTATIONS WITH RECOMMENDATIONS FOR COUNTER-MEASURES 36-44 (Nov. 1998) (noting an “outpouring of anti-Semitic tinted letters” to editors and to individual Jews and threats against Jewish institutions and that nearly half of Swiss polled in 1997 by Swiss Broadcasting Corporation said focus on Switzerland’s role in World War II created “bad blood” and “divisions”); U.S. Dep’t State, Bureau of Democracy, Human Rights and Labor, 1999 Country Reports on Human Rights Practices: Switzerland (Feb. 25, 2000) (reporting convictions for violations of antiracism law, frequency of public anti-Semitic slurs, and “continued existence of anti-Semitic sentiment”); Dors Angst Yilmaz, *What Can be the Role of National Human Rights Institutions in the Prevention and Resolution of Conflict and Tension?*, Council of Europe Doc. NHRI(2002)011, Nov. 4, 2002 (remarks of Secretary General, Swiss Federal Commission Against Racism); Julia Goldman, *A Young Activist Punctures Swiss Myths of Tolerance*, FORWARD (Dec. 21, 2001) (quoting executive director of Intercommunal Committee Against Anti-Semitism and Defamation as observing that anti-Semitism in Switzerland rose as a reaction to the Holocaust-era litigation).

63. In 1985, President Ronald Reagan agreed to make a Presidential visit to a military cemetery in Bitburg, Germany. The cemetery contained the remains not only of ordinary German soldiers but also those of Waffen SS troops. Wiesel and others publicly called upon the President to cancel the visit. He did not. What followed, however, were several exchanges that amounted to a nationwide seminar on the Holocaust, which some Americans were learning about for the first time. See generally Robert V. Friedenberg, *Elie Wiesel vs. President Ronald Reagan: The Visit to Bitburg* in ORATORICAL ENCOUNTERS: SELECTED STUDIES AND SOURCES OF TWENTIETH-CENTURY POLITICAL ACCUSATIONS AND APOLOGIES 267-79 (Halford Ross Ryan ed., 1988).

64. In awarding Wiesel the Nobel Peace Prize in 1986, the Nobel Committee said the following:

Wiesel is a messenger to mankind, his message is one of peace, atonement and human dignity. His belief that the forces fighting evil in the world can be victorious is a hard won belief. His message is based on his own personal experience of total humiliation and of the utter contempt for humanity shown in Hitler’s death camps. The message is in the form of a testimony, repeated and deepened through the works of a great author.

The Norwegian Nobel Peace Committee Presentation Announcement (1986), <http://www.pbs.org/eliewiesel/nobel/citation.html>.

65. EIZENSTAT p. x.

The question is susceptible of many answers. First, there is Wiesel's own response: "The task of protecting the memory of the dead was conceived by us as so noble, so painful, and so compelling that we considered it undignified and unworthy to think of anything else, and surely not bank accounts[.]"<sup>66</sup> It is the perspective of an individual victim and a spokesman for many victims, moved by calls for justice but also wary of mixing the sacred and the profane.<sup>67</sup> It also calls to mind the phrase Hannah Arendt used in witnessing the trial of Adolf Eichmann: "the banality of evil."<sup>68</sup> The pursuit of compensation invariably brings to light both the monstrous and the prosaic, the horrific and the petty. The nature of litigation is that it unearths much banality, in this case the banality of profit,<sup>69</sup> the banality of bureaucracy,<sup>70</sup> the banality of allowing human tragedy to be buried underneath mind-numbing legalese.<sup>71</sup> For individual victims,

66. *Id.*

67. See EIZENSTAT pp. ix-x (Wiesel was reluctant to "define the greatest tragedy in Jewish history in terms of money"). Wiesel declined to be head of one of the funds set up by the Swiss banks.

68. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1963). Adolf Eichmann, the Nazi official most in charge of carrying out the Final Solution, was tried by an Israeli court, found guilty and executed.

69. Austria was an especially methodical example of mass theft. A Property Exchange was created to confiscate Jewish property and transfer it to so-called Aryans, mostly Nazi party members. All items were carefully catalogued and documented. Jews were required to sign declarations disclaiming further ownership of the property. See Itamar Levine, *Inst. of the World Jewish Congress The Fate of Stolen Jewish Properties: The Cases of Austria and the Netherlands*, Policy Study No. 8, at 5-9 (1997).

70. One survivor of Buchenwald described an insurance company's response to his request for payment on the family's insurance policies:

They stated that I would have to produce a death certificate and copies of the relevant insurance policies before they would process the claims. I explained that Hitler did not pass out death certificates and that all family insurance documentation was confiscated by the Third Reich. They declined my request to retrieve from Generali's own files the insurance and annuity policies sold to my family. The officials said that Generali could not help me and they had me forcibly removed from the premises by a security guard. I was humiliated.

BAZYLER p. 119.

71. The settlement agreement in *In re Holocaust Victims Assets Litigation* defines the term Claims or Settled Claims as follows:

[A]ny and all actions, causes of action, claims, Unknown Claims, obligations, damages, costs, expenses, losses, rights, promises, and agreements of any nature and demands whatsoever, from the beginning of the world to now and any time in the future, arising from or in connection with the actual or alleged facts occurring on or before the date of this Settlement Agreement, whether in law, admiralty or equity, whether class or individual, under any international, national, state, provincial, or municipal law, whether now accrued or asserted hereafter arising or discovered, that may be, may have been, could have been or could be brought in any jurisdiction before any court, arbitral tribunal, or similar body against any Releasee directly or indirectly, for, upon, by reason of, or in connection with any act or omission in any way relating to the Holocaust, World War II and its prelude and aftermath, Victims or Targets of Nazi Persecution, transactions with or actions of the Nazi Regime, treatments of refugees fleeing Nazi persecution by the Swiss Confederation or other Releasees, or any related cause or thing whatever, including, without limitation, all claims in the Filed Actions and all other claims relating to Deposited Assets, Looted Assets, Cloaked

compartmentalizing the Holocaust into legal categories — unjust enrichment, constructive trusts, etc. — is to trivialize personal and collective tragedy.

Bazyler and Eizenstat approach the question from entirely different directions. For them, the question is what were the forces in the world that prevented the Jewish People collectively from obtaining restitution earlier. Bazyler's analysis focuses on legal developments. Eizenstat concentrates on historical and political developments.

For those accustomed to a post-Chayes world of public law litigation,<sup>72</sup> Bazyler takes us on a brief tour of formalism and the preeminence of state sovereignty in the decades when courthouse doors repeatedly closed in the faces of Holocaust survivors. It is, he shows, a myth that Survivors idly sat on their claims, allowing statutes of limitations to run out. Many vigorously pursued restitution soon after the War's end, only to have claims dismissed. These initial efforts came at a time when judicial power was less expansive and the individual had not yet secured a place in international law.<sup>73</sup>

In the 1960s, class action suits were attempted, only to be dismissed because the claims were seen as posing political questions or as being otherwise non-justiciable.<sup>74</sup> Slave labor actions were brought unsuccessfully against German companies.<sup>75</sup> Other actions were dismissed because statutes of limitations were applied rigidly.<sup>76</sup> In yet other instances, Survivors became trapped in absurd Catch-22s. For instance, Jews were stripped of their German citizenship when forced to flee Germany. That made them stateless persons from the perspective of German law. Other countries, however, deemed them

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Assets, and/or Slave Labor, or any prior or future effort to recover on such claims directly or indirectly from any Releasee.

[http://www.swissbankclaims.com/PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf); cf. Anthony Sebok, *Prosaic Justice*, 1 LEGIS. AFF., Sept./Oct. 2002, at 39 (stating that lawyers in the Holocaust cases and African American slavery cases “abandon the vocabulary of human rights and repair to the more quotidian language of property and restitution law”).

72. See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

73. See generally IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 57-68 (5th ed. 1998); LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 76-81 (2d ed. 2000).

74. *Kelberine v. Société Internationale*, 363 F.2d 989, 995 (D.C. Cir. 1966) (dismissing claim brought on behalf of a class of victims seeking funds in possession of German corporation in order to satisfy claims arising out of Nazi atrocities, as “not presently susceptible of judicial implementation”).

75. For a detailed account of this litigation, see BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* (1979).

76. See *Handel v. Artukovic*, 601 F. Supp. 1421 (C.D. Cal. 1985) (dismissing class action suit brought by Survivors from Yugoslavia against former Croatian official).

still German, and thus enemy aliens not entitled to the return of their property.<sup>77</sup>

In still other cases, Survivors were thwarted by traditional sovereignty doctrines. Arnold Bernstein sued for the return of a shipping company seized by the Nazis in 1942. The Second Circuit held that the Act of State doctrine barred the claim.<sup>78</sup> Hugo Princz, an American citizen and enemy alien living in occupied Czechoslovakia, sued Germany for his three years as a slave laborer. A divided panel of the D.C. Circuit ruled against him; Germany possessed sovereign immunity even as it carried out crimes against humanity.<sup>79</sup>

Despite the perversity of these results, legislative changes were slow in coming. Congress did not enact the Foreign Sovereign Immunities Act (FSIA), limiting the immunity of foreign states, until 1976.<sup>80</sup> Not until much later did the Supreme Court hold that the FSIA could be applied retroactively in litigation involving the wartime behavior of states.<sup>81</sup> Congress did not begin clearly to incorporate basic components of international human rights law into domestic law until the late 1980s.<sup>82</sup> Not until 1996 did Congress enact the first

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77. For a summary of *Kurzmann v. O'Hea* in English, see H. Lauterpacht, *The Nationality of Denationalized Persons*, 1948 JEWISH YEARBOOK INT'L L. 164, 165-66 (1949) (Jewish citizen of Germany stripped of German citizenship by the Decree of 25 November, 1941). Professor Lauterpacht also refers briefly to a Swiss case, *Madeleine Levita-Muhlstein v. Federal Department of Justice*, with a similar result.

78. See *Bernstein v. Van Heyghen Frères, S.A.*, 163 F.2d 246 (2d Cir. 1947). The harsh result of this case became the basis for the "Bernstein Exception" to the Act of State doctrine, which permits U.S. courts to decline to apply the Act of State doctrine when the State Department concludes that judicial scrutiny of the acts of a foreign government would not, in the specific case before the court, interfere with the executive branch's conduct of foreign relations. See *Bernstein v. Nederlandsche-Ameriaansche Toomvaart-Maatschappij*, 210 F.2d 375 (2d Cir. 1954).

79. See *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994). Subsequently, Germany settled the *Princz* claims and those of ten other Americans for a total of \$2.1 million. See Agreement Concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, U.S.-Germany, Hein's No. KAV 4453, Temp. State Dep't No. 95-226 reprinted in 1995 FCSC Ann. Rep., at 11, <http://www.usdoj.gov/fcsc/readingroom/report.pdf> (last visited July 10, 2004). See generally Ronald J. Bettauer, *The Role of the United States Government in Recent Holocaust Claims Resolution*, 20 BERKELEY J. INT'L L. 1 (2002); Delissa A. Ridgway, *Justice for the "Forgotten Victims": U.S. Survivors of the Holocaust*, 9 J.L. & POL'Y 767, 768 (2001); Kimberly J. McLarin, *Holocaust Survivor Will Share \$2.1 Million in Reparations*, N.Y. TIMES, Sept. 20, 1995, at B1.

80. Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (1976) (codified at 28 U.S.C. §§ 1330, 1602-11).

81. This past term, the Supreme Court ruled that the FSIA applies retroactively, so as to bar Nazi Germany and other foreign states from claiming absolute immunity for their actions during World War II. See *Republic of Austria v. Altmann*, 124 S. Ct. 2240 (2004).

82. The U.S. did not ratify the 1948 Genocide Convention until 1988 and the International Covenant on Civil and Political Rights until 1992.

express human rights exception to the FSIA.<sup>83</sup> In short, the legal environment for Holocaust-era claims was, for much of the last fifty years, unsympathetic, even in the United States. Decades had to pass before international law, as incorporated into domestic law, became somewhat receptive to the claims of Holocaust victims.<sup>84</sup>

Eizenstat addresses the geopolitical context in which the Holocaust restitution movement arose. From 1945 to 1995, the world had drastically changed. Realignments in power made it possible to reopen questions that had been dealt with summarily in the years between the War's end and the onset of the Cold War. In the former context, Austria and Switzerland were not called to account for their wartime behavior.<sup>85</sup> By 1996, however, Communism had collapsed, Germany had reunited,<sup>86</sup> NATO and the EU were expanding eastward,<sup>87</sup> the Swiss were reexamining their traditional neutrality,<sup>88</sup> and large numbers of Holocaust survivors and their children had emigrated from the former Soviet Union to Israel.<sup>89</sup>

Each of these developments favored a reexamination of the past. For Germans, reunification was an occasion to investigate and judge not only the East German Communist regime but the regime before

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83. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 221(a), 110 Stat. 1214, 1241 (1996) (codified at 28 U.S.C. § 1605(a) (7)).

84. See, e.g., *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995) (holding that non-state actors may be liable for violations of international law); *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980) (holding that officially sanctioned torture violates law of nations and is actionable in U.S. courts); *In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 910 F. Supp. 1460 (D. Haw. 1995) (awarding over \$766 million in compensatory damages to victims of the regime of Philippine President Ferdinand Marcos); *Regina v. Bow Street Metropolitan Stipendiary Magistrate, Ex Parte Pinochet Ugarte*, 2 W.L.R. 827 (H.L. 1999) (officially sanctioned torture violates international law).

85. As Eizenstat recounts, in the many negotiations relating to World War II, the Swiss capitalized on their strategic position in the Cold War. In the negotiations concerning return of looted central bank gold, for instance, the "Swiss agreed to return the paltry sum of \$58 million." See EIZENSTAT p. 106.

86. See Treaty on the Final Settlement with Respect to Germany (with Agreed Minute), Sept. 12, 1990, 1696 U.N.T.S. 124 (1990).

87. See generally JOHN GILLINGHAM, *EUROPEAN INTEGRATION, 1950-2003: SUPERSTATE OR NEW MARKET ECONOMY?* (2003); LOUKAS TSOUKALIS, *WHAT KIND OF EUROPE?* (2003); Charles A. Kupchan, *Reviving the West*, FOREIGN AFF., May/June, 1996, at 92.

88. The end of the Cold War brought difficult choices: joining the European Union, becoming a member of the United Nations, reexamining neutrality. See EIZENSTAT p. 60; *The Stubborn Question of European Integration*, SWISS REV. OF WORLD AFF., Jan. 5, 1994; *Swiss Troops for the UN?*, SWISS REV. OF WORLD AFF., June 1, 1994; *An Interview With Fred Luchsinger, Coping With Uncertainty*, SWISS REV. OF WORLD AFF., July 4, 1994. See generally Brian F. Havel, *An International Law Institution in Crisis: Rethinking Permanent Neutrality*, 61 OHIO ST. L.J. 167 (2000).

89. Events were also influenced by the Clinton Administration's receptiveness, at the highest levels, to Survivors and their claims for restitution. On two occasions, President Clinton sent personal letters to Chancellor Gerhard Schroeder, urging the German government to contribute more money to the overall settlement. EIZENSTAT pp. 243, 248-49.

it.<sup>90</sup> Coming to terms with the past was, for some, a cost of reunification and, for others, a moral gateway to the future. For the Swiss, the end of the Cold War and the rising influence of the EU meant less ability to go it alone on such things, as bank secrecy laws and money laundering. In France, de Gaulle's strategy of complete denial had become less useful.<sup>91</sup> For a million non-Jewish former slave laborers living in Eastern Europe, the fall of Communism meant the end of the social safety net. It meant poverty and bitterness toward those (Jews) who had received decades of reparations from Germany while they had received none.<sup>92</sup> The influx of a million immigrants from the former Soviet Union had ramifications for Israel's orientation toward the Holocaust.<sup>93</sup> A country that for decades had experienced a drift away from Europe, as refugees from Arab countries came to make up much of the population, suddenly welcomed the largest wave of European immigrants since the state's founding. Among the new immigrants were many who were personally familiar with old-fashioned European anti-Semitism.

From 1945 to 1995, there were also profound changes in the United States, changes that influenced the receptivity of American Jews to the Holocaust restitution movement. The civil rights era and the further diversification of America made it possible to live free of pervasive anti-Semitism. American Jews became able to enjoy a social acceptability that was an historical oddity.<sup>94</sup> Under these new circumstances, they did the opposite of what might be expected. Rather than put the Holocaust behind them as an earlier generation had done,<sup>95</sup> they clung to it. They explored the period from 1933 to

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90. See, e.g., Border Guards Prosecution Case, 5 StR 370/92 (BGH 1992), 100 INT'L L. REP. 366 (eng. trans.) (upholding criminal conviction of East German border guards for shooting civilians attempting to flee from East Germany to West Germany).

91. See Vivian Grosswald Curran, *Competing Frameworks for Assessing Contemporary Holocaust-Era Claims*, 25 FORDHAM INT'L L.J. 108-09 (2001) (stating that de Gaulle's position was that he had embodied the legal government of France from 1940 to 1944, a government in exile, a government of a people trapped in military defeat, but allegedly resisting at every opportunity the enemy occupier and the enemy's mere handful of French-born henchmen); Symposium, *The Evolution and Objectives of the Holocaust Restitution Initiatives*, 25 FORDHAM INT'L L.J. 145, 155-56 (2001) (noting that in 1982 French scholars discouraged work relating to the Holocaust period). See also Calvin Peeler, *The Politics of Memory: Reconstructing Vichy and the Past the French Chose to Forget*, 19 WHITTIER L. REV. 353 (1997).

92. See EIZENSTAT pp. 23 & 28.

93. Since 1989 more than 700,000 Jews from the former Soviet Union (FSU) have settled in Israel, making the FSU the largest source of immigrants in Israel's history. See *Immigration Since the 1930s*, ISRAEL RECORD, [http://www.adl.org/Israel/Record/immigrati\\_on\\_since\\_30.asp](http://www.adl.org/Israel/Record/immigrati_on_since_30.asp).

94. See generally HOWARD M. SACHAR, *A HISTORY OF THE JEWS IN AMERICA* (1992).

95. See EIZENSTAT p. 13 (in the decades immediately after the War, "the attempted extermination of European Jewry had been buried in public consciousness").

1945 in extraordinary detail.<sup>96</sup> People who otherwise had little in common and no religious affiliation shared the pain of a common historical memory.<sup>97</sup> The Holocaust became communalized. Community bonds were reinforced through the creation of an extraordinary number of films, novels, plays, museums, memorials, works of art, works of history, public education programs, video archives, Internet sites, and an annual day of remembrance.<sup>98</sup> American Jews became, in certain respects, more of a collective as a result of the Holocaust.

In sum, both Eizenstat and Bazylar demonstrate that the rise of the Holocaust restitution movement took place in the wake of major legal and political changes and the evolution of a collective Jewish confrontation with the Holocaust. The Cold War ended before the last Survivors had died off. There was a window, albeit a small one, for a final accounting of the past. The timing of the Holocaust cases was not accidental. Historical and legal transformations had brought the restitution movement to that point.

Often overlooked, however, is the large extent to which the Holocaust restitution movement was the product of changes in procedural law. Holocaust cases were not brought in Switzerland or Germany. They were brought in courts in the United States, where five decades of legal reform had brought about a profound change in procedural law. The plaintiffs in the Holocaust cases, like other plaintiffs, were drawn to American courts by the fruits of a procedural revolution that began just as the German legal system was headed into the Nazi abyss. By the 1990s, U.S. procedural law was extraordinary in its ability to allow plaintiffs with small claims and small means to take on bigger opponents. It was also extraordinary in holding out the possibility of collective justice through adjudication.

The late 1930s brought the Federal Rules of Civil Procedure (FRCP), a standardized set of procedural rules that were destined to

96. This came about gradually. Consider the following milestones: Elie Wiesel published *Night* in 1958 (in Yiddish) and 1960 (English translation). The America-Israel Public Affairs Committee (AIPAC) was founded in 1954. The movement to free Soviet Jews began in the late 1960s. Widescale popularization of the Holocaust arrived in the 1980s and 1990s with such works as *Maus*, *Schindler's List*, and *Hitler's Willing Executioners*. See DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996); ART SPIEGELMAN, *MAUS: A SURVIVORS TALE* (1986); THOMAS KENEALY, *SCHINDLER'S LIST* (1982); *SCHINDLER'S LIST* (Universal Studios 1993) (adapting Kenealy's novel to film). The American Gathering of Holocaust Survivors was formed by Roman Kent in 1983. The Holocaust Memorial Museum opened in Washington, D.C. in 1993. By the turn of the century, more than 400 colleges and universities offered courses on the Holocaust in such departments as history, literature, religion, Judaic studies, film, and political science. See Holocaust Educational Foundation, <http://www.holocaustef.org/programs1c.html>.

97. See EIZENSTAT p. 6 ("Holocaust memory is one of the few uniting themes in American Jewish life").

98. See, e.g., *supra* works noted in note 96.

exert enormous influence on the American conception of civil litigation. Not only did the FRCP introduce important innovations such as notice pleading, a more liberal approach to joining parties and claims, and wider access to discovery, they also cut through much of the formalism that had previously characterized civil practice in American courts.<sup>99</sup> Another watershed was *International Shoe*,<sup>100</sup> which placed the law of personal jurisdiction on an expansive trajectory. Coupled with the attractiveness of the American economic market, *International Shoe* and its progeny<sup>101</sup> made foreign defendants of all stripes far more susceptible to suit in the United States than previously.<sup>102</sup> Extraterritorial jurisdiction was further expanded by new applications of agency<sup>103</sup> and conspiracy.<sup>104</sup> The law of remedies and standing responded to the civil rights movement, the consumer movement, and the environmental movement.<sup>105</sup> By the 1980s the class action had become the great leveler in conflicts between many small claimants and the world's largest corporate entities.<sup>106</sup>

These procedural changes mattered. Had Survivors sought to file the Holocaust restitution cases in 1945, they might not have attracted counsel. The suits required a formidable amount of work, the need to advance considerable expenses, and, at that time, offered the prospect of only a modest recovery. Absent some way of grouping the cases together, few would be financial winners.

When some lawyers in the immediate postwar era nonetheless did boldly file actions, the suits typically did not survive procedural hurdles. For suits against foreign corporate defendants, there were two problems: insufficient contacts with the United States and lack of

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99. See generally Geoffrey C. Hazard, *Forms of Action Under the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 628 (1988).

100. *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945).

101. See, e.g., *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

102. See generally Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. CHI. L.F. 141 (2001).

103. See, e.g., *Frummer v. Hilton Hotels Int'l*, 281 N.Y.S.2d 41 (N.Y. 1967) (finding jurisdiction over British hotel based on activities of New York-based reservations service).

104. See, e.g., *Simon v. Philip Morris, Inc.*, 86 F. Supp. 2d 95 (E.D.N.Y. 2000) (finding jurisdiction over British tobacco companies based on acts of co-conspirators in the United States).

105. See 13 CHARLES ALAN WRIGHT ET. AL., *FEDERAL PRACTICE AND PROCEDURE JURIS.2D* § 3531.1 (1984 & Supp. 2004) (arguing that in the 1960s a more pragmatic and functional strain of standing doctrine emerged).

106. In 1966 Congress overhauled Rule 23 of the Federal Rules of Civil Procedure, making class action suits much more attractive to plaintiffs. See 1 NEWBERG ON CLASS ACTIONS 2:1 & 2.2 (4th ed.) (stating that the 1966 amendments ushered in a more functional approach allowing collective litigation when either necessary or desirable as a practical matter).

precedent for suing corporate entities for claims of this sort, claims thought to be grounded in public international law.<sup>107</sup> By 1995, however, foreign corporations were susceptible to jurisdiction in U.S. courts by virtue of the activities of their U.S. branches.<sup>108</sup> In 1945, the statute of limitations problem would have been insurmountable. By 1995 there was precedent for tolling statutes of limitations for long periods of time.<sup>109</sup> In 1945, the scope of document and deposition discovery was narrow.<sup>110</sup> By 1995, U.S. discovery practice was so powerful, so expensive, and so potentially intrusive as to be both envied and ridiculed worldwide. As part of that revolution in discovery practice, American courts became increasingly ready to order foreign defendants to turn over documents notwithstanding foreign laws to the contrary.<sup>111</sup> In 1945, the principle of territoriality thoroughly dominated American choice of law.<sup>112</sup> By the late 1990s, American methodology in choice of law was a free-for-all.<sup>113</sup> Even in

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107. See generally David Weissbrodt & Muria Kruger, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001); Joel R. Paul, *Holding Multi-National Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285 (2001).

108. See, e.g., *DCA Food Industries, Inc. v. Hawthorn Melody, Inc.*, 470 F. Supp. 574 (S.D.N.Y. 1979) (holding that where affiliated corporations are "mere departments" of one another, jurisdiction over those not doing business in New York in their own right can be based on doing-business jurisdiction over the others that are).

109. See, e.g., *Bowen v. City of New York*, 476 U.S. 467 (1986) ("Where the [defendant's] secretive conduct prevents plaintiffs from knowing of a violation of rights, statutes of limitations have been tolled until such time as plaintiffs had a reasonable opportunity to learn the facts concerning the cause of action"); Adam Bain & Ugo Colella, *Interpreting Federal Statutes of Limitations*, 37 CREIGHTON L. REV. 493 (2004) (describing the traditional approach — that the limitations period begins to run once the plaintiff has a right to apply to a court for relief, even if he or she lacks knowledge of underlying facts giving rise to this right).

110. See Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 748 (1998) (noting that document discovery until 1946 was subject to narrow scope and, until 1970, available only on motion and a showing of "good cause."). Historically, U.S. courts were reluctant to order discovery abroad that would conflict with foreign law. See, e.g., *Ings v. Ferguson*, 282 F.2d 149 (2d Cir. 1960) (refusing to order production of documents located in Quebec); *S.E.C. v. Minas De Artemisa, S.A.*, 150 F.2d 215 (9th Cir. 1945) (same with respect to documents in Mexico); RESTATEMENT (FIRST) CONFLICT OF LAWS § 94 (1934).

111. See, e.g., *Société Internationale v. Rogers*, 357 U.S. 197 (1958) (finding that a federal district court may order Swiss defendant to produce documents in Switzerland notwithstanding Swiss laws to the contrary); *United States v. First Nat'l City Bank*, 396 F.2d 897 (2d Cir. 1968).

112. See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 311 (Place of Contracting), § 332 (Law Governing Validity of Contract), § 358 (Law Governing Performance), § 377 (The Place of Wrong), § 378 (Law Governing Plaintiff's Injury).

113. See, e.g., *Babcock v. Jackson*, 12 N.Y.2d 473 (N.Y. 1963) (center of gravity methodology); *Bernkrant v. Fowler*, 55 Cal. 2d 588 (Cal. 1961) (interest analysis), *Bernhardt v. Harrahs Club*, 16 Cal. 3d 313, (Cal. 1976) (comparative impairment approach); Symeon C. Symeonides, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts)*, 75 IND. L.J. 437, 440 (2000) (observing that the "Second Restatement's prevalence is nothing

circumstances in which all relevant events had occurred in one place, a court might still apply the law of the forum or the law of some other place.<sup>114</sup> In 1945, awards of punitive damages were rare.<sup>115</sup> By 1995, punitive damages had become so common and so large that the Supreme Court began to rein them in.<sup>116</sup>

In 1945, litigation was a weak element in any restitution strategy. Half a century later, changes in procedural law had altered the equation.<sup>117</sup>

#### IV ARE THE HOLOCAUST CASES A MODEL FOR OTHERS?

The victims of other historical injustices are filing suits in U.S. courts. So are their heirs. In some cases, they are here for many of the same procedural reasons that brought the Holocaust cases to the U.S., especially the availability of class actions. If the financial success of the Holocaust cases was a function of trends in substantive law, procedural law, and geopolitics, what are the prospects for other reparation movements?

*Imperfect Justice* and *Holocaust Justice* attempt to gauge the likely impact of the Holocaust cases on other movements. Bazylar concludes that one of the “enduring legacies” of the Holocaust restitution movement is the “precedent it has set for addressing other injustices of the past.”<sup>118</sup> Eizenstat observes, “Other victims of human rights violations have already followed our model.”<sup>119</sup> There is some

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but a race down to the lower common denominator” and that choice of law in the United States is characterized by much confusion).

114. *Compare* Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981) (applying Minnesota insurance law although accident took place in Wisconsin, all drivers were resident in Wisconsin, and insurance policy was delivered in Wisconsin), *with* Home Ins. Co. v. Dick, 281 U.S. 397 (1930) (rejecting application of Texas law where insurance policy issued by Mexican company in Mexico to Mexican policyholder and policy contained Mexican choice of law clause).

115. See Semra Mesulam, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma With Class*, 104 COLUM. L. REV. 1114 (2004) (stating that punitive damages were not available as a remedy for unintentional torts until the 1960s, and large punitive damages awards were not common until the late 1970s).

116. See *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (finding that a 145 to 1 ratio between punitive damages and compensatory damages violates due process); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (finding a 500 to 1 ratio of punitive damages to compensatory damages grossly excessive).

117. As a Swiss scholar recently wrote: “Chief among the reasons for th[e] attractiveness [of a U.S. forum] is the enormous flexibility and latitude of U.S. procedure — including its ability to create new remedies, judicial discretion, liberal pleading, the availability of the class-action device, and the ability of the parties to join every conceivable claim.” Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835, 841 (2002).

118. BAZYLAR p. 307.

119. EIZENSTAT p. 350.

evidence to support these views. Randall Robinson argues that if Jews were entitled to billions of dollars for Nazi persecution over a twelve year period, African Americans are entitled to at least as much from White Americans.<sup>120</sup> The first Pan-African conference on reparations and colonialism called for colonialism-based reparations, citing “historic precedents” including “payments of restitution to the Jews.”<sup>121</sup> Congressman John Conyers has repeatedly introduced bills calling for a formal study of the desirability and feasibility of reparations for African Americans.<sup>122</sup> He relies in part on the example of Jewish survivors of World War II.<sup>123</sup>

These comparisons between restitution for Holocaust-era wrongs and restitution for other historical injustices can be enlightening but also misleading. They suggest an underlying similarity to all oppression. Slavery in one generation is like slavery in another. Victims of one form of injustice can take heart in the victories of victims of other injustices. But important aspects of the Holocaust restitution movement differentiate it from the restitution sought by others, and other reparations movements need to be cautious about following the Holocaust model too closely. It may not be as useful as many seem to think.

One can see this by returning to the relationship between the individual and the collective briefly explored above. Clearly, there were collective aspects to the Holocaust litigation. Individual claims were consolidated into class actions. The settlement negotiations involved not only the lawyers for the class but also representatives of the World Jewish Congress. In submissions filed in connection with class certification and court approval of the settlement agreement, many concerns about the collective surfaced: Was the future of the Jewish People in revitalizing the dying communities of Eastern Europe or in channeling resources to younger and potentially more

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120. See RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000). Robinson repeatedly draws comparisons between injuries that European Jews suffered at the hands of Nazi Germany and injuries that African Americans suffered in the U.S. See *id.* at 204-05, 219, 222-23. He refers to the enslavement of Blacks as “an American holocaust.” *Id.* at 33.

121. See Declaration of First Abuja Pan-African Conference on Reparations for African Enslavement, Colonisation and Neo-Colonisation, <http://www.ncobra.org/pdf/files/TheAbujaProclamation.pdf>.

122. See Commission to Study Reparations for African Americans Act, H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991); H.R. 40, 103d Cong. (1993); H.R. 891, 104th Cong. (1995); H.R. 40, 105th Cong. (1997); H.R. 40, 106th Cong. (1999); H.R. 40, 107th Cong. (2001); H.R. 40, 108th Cong. (2003). For background on this proposed legislation, see John Conyers, Jr. & Jo Ann Nichols Watson, *Reparations: An Idea Whose Time Has Come, in SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 16-20 (Raymond A. Winbush ed., 2003).

123. Conyers & Watson, *supra* note 122, at 18; see also Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?* 40 B.C. L. REV. 429 (1998).

vibrant communities elsewhere? More generally, the potential impact of these cases on the collective was always a kind of “brooding omnipresence.”<sup>124</sup> The decision to litigate had been made from the perspective of Jews living in North America. But what about the potential negative consequences of that decision for Jewish communities in Switzerland and elsewhere in Europe?

Notwithstanding these communal aspects of the cases, at the remedy stage the balance tipped in favor of the individual rather than the group. The many thousands of individual claims that had been zipped up into a class action complaint were, at the remedy stage, unzipped into many thousands of individual claims again. There were no legal claims advanced on behalf of the large collective. The complaints did not seek damages on behalf of the “Jewish People” or the “Jewish community of Romania.” They could not. No credible legal theory could be mustered for why such a collective entity is a proper plaintiff in a U.S. court. Even with its liberal joinder rules, U.S. procedural law does not embrace the remedial aspirations of groups that lack legal personality, no matter how much those groups in fact embody collective aspirations.<sup>125</sup> If the goal of other reparations movements is money damages for harm done to a collective as such — harm that is distinct from injury to individual members of the collective — the Holocaust cases did not achieve that result. Instead, they showed that class-action law in the United States was never designed with human rights class actions in mind.

The most vivid illustration of this was during the court’s evaluation of the settlement and plan of allocation in the Swiss banks case. At one critical juncture, collective restitution was a possibility. That juncture arrived when it became clear that the \$1.25 billion in settlement funds would be more than enough to pay the claims of the deposited-assets subclass,<sup>126</sup> the refugee subclass,<sup>127</sup> and the slave labor

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124. *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting). Holmes was referring to the common law, which in his view was not a brooding omnipresence.

125. In other instances, procedural law is less grudging. For people who are equity owners of a corporation, the law provides a device to vindicate their collective interest; the corporation can sue and be sued.

126. The Settlement Agreement defines “Deposited Assets” as anything of value deposited in any Swiss bank prior to May 9, 1945 by a Victim or Target of Nazi Persecution. See *Class Action Settlement Agreement*, at 1 (Jan. 26, 1999), [www.swissbankclaims.com.PDFs\\_Eng/exhibit1toPlanofAllocation.pdf](http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf). The members of the deposited-assets subclass are those with claims to such assets. *Id.* at 8.2(a).

127. This subclass consisted of Victims or Targets of Nazi Persecution who sought entry into Switzerland in order to avoid persecution but were excluded, deported, or mistreated. See *id.* at 8.2(e).

subclasses.<sup>128</sup> After payments to those groups of claimants, as much as \$600 million might still be left over.<sup>129</sup> After deciding not to provide funds to the looted-assets subclass,<sup>130</sup> the Court invited proposals for *cy pres* remedies.<sup>131</sup> Numerous proposals, falling into four main categories, were submitted.<sup>132</sup>

- 1) Distribute everything to individuals within the three subclasses defined by the settlement agreement, even if the administrative costs of distribution to some subclasses are extremely high;<sup>133</sup>

128. Individuals in these two subclasses were those who had performed slave labor in Switzerland, for Swiss companies elsewhere, or for non-Swiss entities that subsequently deposited the proceeds generated by that labor in a Swiss financial entity. *See id.* at 8.1(c-d).

129. How did the settlement generate such a large sum of money not clearly targeted to specific recipients? The \$1.25 billion settlement was never based on hard data. Neither side was prepared to wait three years for the Volcker Committee to complete its analysis of more than four million Swiss bank accounts to determine which ones had likely been owned by a Holocaust victim. Thus, in the settlement negotiations, no one knew what the total value of the deposited-asset claims would be. As it turned out, the plan of allocation set aside far more money for these claims than their eventual dollar value. There was also a second reason for the large pot of left-over money. The claims of one of the subclasses, the so-called looted assets subclass, posed special problems. The definition of that subclass, see *infra* note 130, was so broad as potentially to include all living Holocaust victims. Authorizing a distribution to the individuals in that subclass would have resulted in each claimant receiving a trivial distribution and with much funds consumed by the costs of administration. For these reasons, the Court decided it was unworkable to distribute any money to the looted-asset subclass. It was preferable to deal with the excess from the deposited-asset subclass and the amount not distributed to the looted-assets subclass by way of a *cy pres* remedy. *See In re Holocaust Victim Assets Litigation*, 132 F. Supp. 2d 89 (E.D.N.Y. 2004). For more on *cy pres* remedies, see *infra* note 131.

130. The Settlement Agreement defines Looted Assets as “[a]ssets actually or allegedly belonging in whole or in part to Victims or Targets of Nazi Persecution that were actually or allegedly stolen, expropriated, Aryanized, confiscated, or that were otherwise wrongfully taken by, at the request of, or under the auspices of, the Nazi Regime.” Settlement Agreement § 8.2(b).

131. The *cy pres* doctrine first developed in the law of trusts and estates. In that context, it provides flexibility when a bequest cannot be carried out because of subsequent changes in law or facts. A court employing the *cy pres* doctrine can order that funds be put to another use that is consistent with the testator’s general intent. *See, e.g., Fay v. Hunster*, 181 F.2d 289 (D.C. Cir.1950) (allowing funds to be given to existing home for the aged where money was insufficient to build and maintain entirely new institution). Beginning in the 1970s, the *cy pres* concept was applied to analogous issues in class action law, such as when funds generated by settlement or by trial verdict turn out to be larger than the sum of all claims. Under these circumstances, the court may order that the funds be directed to their next best use. *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 818 F. 2d 179 (2d Cir. 1987) (concluding that district court may set aside portion of settlement proceeds for programs designed to assist the class provided it designates and supervises specific programs); *United States v. Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff’d* 773 F.2d 1240 (Temp. Emer. Ct. App. 1985) (ruling that where impossible to trace specific oil price overcharges, funds to be used for federal energy conservation programs).

132. *See* Summaries of Proposals Received by the Special Master, <http://www.swissbankclaims.com>.

133. Support for this view lay in the fact that suit had been brought on behalf of a specific, defined class of individuals. They, not others, would have faced *res judicata* and issue preclusion if the suits had been unsuccessful. As Professor Burt Neuborne put it:

- 2) After fully compensating members of the first two subclasses, distribute any left over amount to other Holocaust survivors, even those whose Holocaust injuries have no nexus to Swiss banks or to Switzerland;
- 3) After fully compensating members of the first two subclasses, allow any left over amount to be spent on projects that will address the future needs of the Jewish people.<sup>134</sup> Projects funded in this way need not specifically serve the population of Holocaust survivors;
- 4) After fully compensating members of the first two subclasses, distribute some of the left over amount to combat problems similar to those confronted by Jews during the Holocaust: intolerance, xenophobia, indifference to the plight of refugees. Such projects need not specifically serve Holocaust survivors or even be directed at anti-Semitism specifically.

Most Holocaust survivor organizations favored the second approach.<sup>135</sup> Prominent Jewish organizations favored the third. They argued that in considering what to do with funds available for restitution, one ought to acknowledge that injury and suffering was not confined to individuals. Under the *cy pres* doctrine, the Jewish People as a whole could be regarded as a victim of the Holocaust. Jewish life in all its forms had suffered immeasurably. Sixty years later, Jewish communities around the globe are still reeling from the loss of one third of the worldwide Jewish population, the dislocation of millions more, the largest mass theft in history, and the fear that in some form it could happen again. For these reasons, the World Jewish Restoration Organization (WJRO)<sup>136</sup> maintained that a substantial

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[T]he fund is the result of the settlement of a lawsuit involving precisely defined legal claims against Swiss banks. In working out a plan of allocation and distribution, Judge Korman, Special Master Gribetz and I are under a legal duty to attempt to distribute the funds to persons who have valid legal claims against the Swiss bank defendants.

See BAZYLER p. 283 (citing Letter from Burt Neuborne to Leo Rechter, July 2002). Neuborne, a professor of law at New York University, was appointed by the court to serve as special settlement counsel in the Swiss banks case.

134. See Israel Singer, *Transparency, Truth, and Restitution*, SH'MA, June 2002, at 1. Singer has spent more than two decades in senior leadership positions with the Conference for Material Claims Against Germany and the World Jewish Congress.

135. See, e.g., Proposal from National Association of Jewish Child Holocaust Survivors, Inc., at A-18 (opposing allocation from the Fund for charitable purposes of American Jewish organizations); Proposal from Association of Holocaust Survivors from the Former Soviet Union, at A-4; Proposal from Child Survivor Association of Great Britain, at A-7; Proposal from Federation of Jewish Childhood Survivors, Holocaust Survivors Inc., Queens Chapter, at A-12. These and other proposals can be found at <http://www.swissbankclaims.com/index.asp>. (Proposals on Allocation (2000)).

136. Established in 1992 by the World Jewish Congress and the State of Israel, the WJRO was charged with regaining Jewish properties in former Communist countries.

portion of any surplus funds should be used to make some effort to replace what had been destroyed — the cultural and spiritual cradle of Ashkenazic Jewry<sup>137</sup> — and to address the needs of Jewish communities worldwide, even those geographically far away from Europe.

The latter views were rejected. Judge Korman ruled that priority was to be given to the individual needs of living Holocaust survivors.<sup>138</sup> Nearly all leftover funds were to go to elderly Holocaust survivors living in the former Soviet Union, many with extremely critical day-to-day needs.<sup>139</sup> The court's order sought to alleviate current suffering whether or not causally related to past injustice, and not to fund forward-looking measures, such as Holocaust education, Holocaust scholarship, or rebuilding the properties and communal infrastructure of the Eastern European past.

What conclusions can one draw from the court's ruling? The result reflected the dire circumstances of Survivors in the former Soviet Union, but not just that. It was also shaped by the limitations of American class action law. The complaint had been filed on behalf of specific people. The subsequent settlement agreement had defined three subclasses. Nothing on the face of Rule 23 authorized the court to look beyond these claimants and these subclass definitions to a wider Jewish community that had been impacted. Nothing in the Advisory Committee notes to Rule 23 makes reference to whether a class action suit embodies the aspirations of a collective and not solely members of the class. In this respect our current jurisprudence under Rule 23, while perhaps adequate for much tort and commercial class action litigation, falls short of the pursuit of full and useful reparations in human rights class actions, where the effects of widespread and severe oppression go beyond individual injury.

Other restitution movements sometimes seem to misunderstand or ignore this aspect of the Holocaust cases when they view them as precedent for group-oriented remedies.<sup>140</sup> They are not. Relief for

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Eizenstat reports one leader of a Slovakian-Jewish community as saying that the WJRO "treats us like retarded children." EIZENSTAT p. 40.

137. Ashkenazic Judaism refers to the traditions and religious practices of Jewish communities located in Christendom. The geographic heart of Ashkenazic Jewry during the Middle Ages was in the Holy Roman Empire, especially what would become France and Germany. In contrast, the Jewish traditions and religious practices that developed under Islamic rule are referred to as "Sephardic" Judaism. *See generally*, JACOB R. MARCUS, *THE JEW IN THE MEDIEVAL WORLD, A SOURCE BOOK* (1938); NORMAN A. STILLMAN, *THE JEWS OF ARABLANDS: A HISTORY AND SOURCE BOOK* (1979).

138. *See In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89 (E.D.N.Y. 2004).

139. *See id.* at 99 ("The last elderly Jews of Eastern Europe, whose lives were ruined by the Holocaust, and who choose to live out their days in the towns of their ancestors, are suffering acutely from malnutrition, poverty and lack of medicine.").

140. *See, e.g.*, Elizabeth Tyler Bates, *Contemplating Lawsuits for the Recovery of Slave Property: The Case of Slave Art*, 55 ALA. L. REV. 1109 (2004); Westley, *supra* note 123.

individuals is what triumphed. The losses suffered by the whole were not recognized.

Leaders of other reparations movements do not seek individualized justice of this sort.<sup>141</sup> The African American community does not press for reparations so that every African American will receive a reparations check in the mail.<sup>142</sup> What is sought are better schools, better housing, and a pool of capital that will allow Black-owned businesses to flourish. The demands of the Herero People against Germany focus on the equivalent of a new Marshall Plan geared toward revitalizing a collective that was nearly wiped out in the early part of the 20th century.<sup>143</sup> Suits relating to Shell Oil's treatment of the Ogoni People seek broad collective remedies aimed at restoring the land in the Ogoni region of Nigeria and the Ogoni People's self-sufficiency.<sup>144</sup> Among those advancing or supporting suits against corporations that allegedly propped up the Apartheid regime are many who oppose individual remedies and favor instead that funds be spent on communal needs.<sup>145</sup> Goals of this sort, however, were not

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Some of the plaintiff lawyers in the Holocaust cases have been involved in advising those pursuing the South African Apartheid claims in the U.S. See Apartheid Debt & Reparations Campaign, Briefings on the Reparations Lawsuit facilitated by the Apartheid Debt Campaign of Jubilee South Africa, <http://www.africaaction.org/action/adrc0211.htm>.

141. See, e.g., Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279 (2003); Conyers & Watson, *supra* note 122, at 14-21 (2003); Jon M. Van Dyke, *Reparations for the Descendants of American Slaves Under International Law*, in SHOULD AMERICA PAY?, *supra* note 122, at 57-78.

142. See ROBINSON, *supra* note 120, at 224 (arguing that there is an obligation to compensate the *group* in a way that will make it whole); BORIS I. BITTKER, THE CASE FOR BLACK REPARATIONS 72 (1973) ("A program of group reparations would be profoundly different in its consequences from payments to individuals"); see also the website of the National Coalition of Blacks for Reparations in America (N'COBRA); [http://www.ncobra.com/ncobra\\_info.htm](http://www.ncobra.com/ncobra_info.htm) (referring to the need to "develop a plan for how reparations could be used collectively to enable the African community to become independent from racist institutions and economically self-sufficient for at least seven generations").

143. Eighty percent of the Herero population in Namibia was killed between 1904 and 1907 under a policy of extermination pursued by the colonial power, Germany. See Jeremy Sarkin, *Reparation for Past Wrongs: Using Domestic Courts Around the World, Especially the United States, To Pursue African Human Rights Claims*, 32 INT'L J. LEGAL INFO. 426, 452-55 (2004). Suit has been brought in the U.S. by the Herero Peoples' Reparation Corporation against Germany, Deutsche Bank, and the Woermann shipping line. See *Germany Urges Herero to Drop Lawsuit*, DEUTSCHE WELLE, Aug. 5, 2004. The complaints seek a total of \$4 billion. On Herero financial demands, see *Herero Chief Wants Massive Aid*, NEWS24.COM, Aug. 19, 2004, available at [http://www.news24.com/News24/Africa/News/0,,2-1447\\_1575712,00.html](http://www.news24.com/News24/Africa/News/0,,2-1447_1575712,00.html), which quotes Kuaima Riruaka as stating that "a Marshall Plan and programme must be presented to the Herero People."

144. See Movement for the Survival of the Ogoni People, <http://www.dawodu.net/mosop.htm>. For litigation involving these and other claims, see *Wiwa v. Royal Dutch Petroleum and Shell Transport and Trading Co.*, 226 F.3d 88 (2d Cir. 2000).

145. See, e.g., Apartheid Debt & Reparations Campaign, Briefings on the Reparations Lawsuit facilitated by the Apartheid Debt Campaign of Jubilee South Africa, <http://www.africaaction.org/action/adrc0211.htm> (referring to Apartheid suits in U.S. courts against

furthered by *In re Holocaust Victim Assets Litigation*, which does not augur well for those who seek *cy pres* remedies that go far beyond directly benefiting class members.

## V. THE LEGISLATIVE CASE FOR COLLECTIVE REMEDIES

If Rule 23 did not yield truly collective remedies, why are the Holocaust cases sometimes regarded as milestones with respect to group rights?

The non-Swiss Holocaust cases, settled outside the context of Rule 23, did produce some collective remedies. They did so by acting as a spur to treaty negotiation and legislation. The German slave labor cases, for instance, were resolved through a bilateral treaty between the Federal Republic of Germany and the United States.<sup>146</sup> There was no Rule 23 settlement and no district court approval or supervision. Seven percent of the settlement amount (DM 700 million out of a total of DM 10 billion) flowed into a "Future Fund" designed to "send a forward-looking signal of continuing moral and political responsibility."<sup>147</sup> The Austrian-U.S. treaty established a similar fund, the Austrian Reconciliation Fund, from which monies have been spent on Holocaust-related education and scholarship.<sup>148</sup>

Moreover, the Holocaust cases, to a greater extent than any previous human rights litigation in U.S. courts, allowed for the articulation (both in court and in the wider public discourse) of the affirmative case for collective remedies. That affirmative case goes something like the following: A profound and lasting injury is done to a large number of people. Some are killed, some imprisoned, some enslaved. All are singled out for persecution because of characteristics that they share, characteristics that establish common bonds among them in a deep rather than a superficial way. By virtue of these common traits, these individuals regard themselves as a collective, as some form of coherent, identifiable group with an identity that endures over time. They are a product of shared history, and they have an expectation of a shared future.

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multinational corporations as seeking to generate funds for broad social programs and the reconstruction and development of affected communities).

146. Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-Germany, 39 I.L.M. 1298, <http://www.state.gov/www/regions/eur/holocaust/germanfound.html> (last visited Aug. 9, 2004).

147. See "Remembrance and Future" Fund: Principles for Funding, <http://www.zukunftsfonds.de/fremdsp/en/grundsaeetze.en.html>.

148. See Joint Settlement on Holocaust Restitution, U.S.-Austria, Jan. 17, 2001, Annex A, [http://vienna.usembassy.gov/en/policy/annex\\_a.htm](http://vienna.usembassy.gov/en/policy/annex_a.htm) (providing for Austrian government funding to restore Jewish cemeteries in Austria, to restore sports facilities in Vienna, to provide better research access to Austrian state archives, and to provide subsidies to the annual Holocaust Education Program at the Salzburg Seminar).

If the persecution is vast and severe, there may come a point at which there emerges a harm to the collective that is distinct from the injuries suffered by individual members. Members of the group, even those never physically in harm's way, may suffer indirectly from persecution inflicted on others. The murder of intellectuals or religious leaders drains the collective of tradition, leadership, and optimism. Repression of artists and writers undermines the group's ability to preserve its language, literature, and artistic expression. Destroying sacred sites and exiling large numbers of individuals can render the group vulnerable to assimilation and loss of identity. If the group's numbers fall below a critical mass, its very survival may be in jeopardy. In each of these scenarios, there is a collective harm, one that is different from those inflicted on individual group members. The injury stretches geographically to places far from the site of atrocity. It also stretches into the future to those who are the collective's hopes for carrying its traditions forward.

The overall impact of sustained persecution and atrocity may be a sense of profound loss and confusion enduring far into the future, leaving behind an emaciated tradition and a People in danger of losing its soul. Analyzed in these terms, the Holocaust presents a compelling case of group injury and the need for group relief. The Final Solution was not primarily a plan for persecuting specific individuals. It was a blueprint for destroying an entire people.<sup>149</sup> Hitler sought to destroy not individual Jews, not even merely all Jews, but also all facets of Jewish culture and Jewish contributions to Western civilization. The Nazi bonfire consumed all things even tangentially Jewish, sacred books and objects, scientific works,<sup>150</sup> "degenerate art,"<sup>151</sup> and

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149. Scholars disagree as to whether genocide was inherent in Nazism from the outset. Compare SAUL FRIEDLANDER, NAZI GERMANY AND THE JEWS: THE YEARS OF PERSECUTION, 1933-1939 (suggesting an evolution in Nazi policies toward Jews from marginalization to expulsion to genocide), with DANIEL JONAH GOLDHAGEN, HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST 131-63 (1997) (arguing that the impulse toward genocide was present early on but that initial obstacles prevented Germany from immediately carrying out genocide and that Nazis nonetheless were "more consistent than it has generally been recognized" in moving toward total annihilation of European Jewry).

150. See *Sigmund Freud: Conflict & Culture*, Library of Congress ("As a Jew and as the founder of psychoanalysis, Freud was regarded as an enemy of [Nazi] Germany"), <http://www.loc.gov/exhibits/freud/freud03a.html> (last visited Aug. 9, 2004); *1933 Book Burnings* (listing notable books publicly burned on May 10, 1933, including works by Brecht, Einstein, Freud, Mann and Remarque), <http://www.ushmm.org/research/library/index.utp?content=bibliography/bookburning/right.htm> (last visited Aug. 10, 2004).

151. In 1927, the National Socialist Society for German Culture was formed for the purpose of halting the "corruption" of art. The works deemed offensive included almost all of modern art, including Cubism, Surrealism, Expressionism, Dadaism, Impressionism, and Fauvism and any work produced by a Jewish artist. In 1937, Nazi authorities purged German museums of art that was deemed to reflect an aesthetic contrary to Aryan values. See generally *Degenerate Art (Entartete Kunst)*, in A TEACHERS GUIDE TO THE HOLOCAUST,

literature produced by highly secular and assimilated Jews.<sup>152</sup> Future generations were targeted for destruction. The ultimate enemy was the possibility for Jewish renewal.

That goal was nearly realized. Before the War, Yiddish was spoken across Europe by more than ten million people. Hundreds of Yiddish newspapers circulated throughout Poland alone.<sup>153</sup> Today the number of native speakers is measured in the thousands, probably too few to sustain it as a living language. The city of Vilna in Lithuania was a great center of scholarship in Jewish law. It was home to academies whose ideas and output influenced every community in the Jewish world.<sup>154</sup> That unique world was destroyed when the Jews of Vilna were marched to the Ponary Forest to dig their own graves.<sup>155</sup> Sixty years have passed and Vilna's unique contribution to Jewish life has not fully been recreated elsewhere.

Gone also are the *shtetls*<sup>156</sup> of Eastern Europe, preserved in Roman Vishniac's pre-War black-and-white photographs.<sup>157</sup> These villages were vast reservoirs of custom, not those of the intellectuals in Vilna but rather those of the millions living in poor rural communities with traditions on everything from how to conduct a marriage ceremony to what to name a child. The communities that nurtured these customs are gone, perhaps forever. Where once there were vital and creative Jewish communities of ideas and spirituality, today there is a vast Jewish cemetery.<sup>158</sup>

Every Jewish community in the world today feels this loss. Even thriving communities in Israel are missing important bridges to the

<http://feit.coedu.usf.edu/holocaust/arts/artDegen.htm>. For images of specific works that were banned, see *Degenerate Art in Nazi Germany*, <http://www.personal.psu.edu/users/c/a/caf215/>.

152. For a list of specific literary works that were banned or destroyed, see the online exhibit of the University of Arizona library on book burnings at <http://www.library.arizona.edu/images/burnedbooks/indexpage.htm>. The exhibit begins with a quotation from the German-Jewish writer, Heinrich Heine: "When one burns books, one will soon burn people."

153. See Salo W. Baron, *The Modern Age, in GREAT AGES AND IDEAS OF THE JEWISH PEOPLE* 315, 386 (Leo W. Schwarz, ed., 1956) (noting that in 1928 over a thousand Yiddish books were published in Europe); Michael Tarm, "A Forgotten Yiddish Past," *CITY PAPER: THE BALTIC STATES*, available at <http://www.balticsww.com/news/features/yidish.htm>.

154. See *ENCYCLOPEDIA JUDAICA*, vol. 16 (Keter Publishing House 1996).

155. See LENI YAHIL, *THE HOLOCAUST: THE FATE OF EUROPEAN JEWRY, 1932-1945*, 278-79, 445-46 (1987).

156. See, e.g., EVA HOFFMAN, *SHTIETL: THE LIFE AND DEATH OF A SMALL TOWN AND THE WORLD OF POLISH JEWS* (1997).

157. See, e.g., *TO GIVE THEM LIGHT: THE LEGACY OF ROMAN VISHNIAC* (Marion Wiesel ed., 1993).

158. Eizenstat would probably disagree with this characterization. His chapter on Eastern Europe, pp. 23-45, emphasizes the dynamism of young Jewish leaders in the region. See EIZENSTAT pp. 30-38.

past. The Holocaust has diminished the Jewish People in a way that is very real, albeit difficult to quantify.<sup>159</sup>

Although this group-oriented conception of injury fared poorly in U.S. courts, it has been central to the post-War dialogue between Germans and Jews for nearly sixty years. The conception of the Jewish People as an injured collective was built into the first German-Jewish reparations treaty, the 1952 Luxembourg Agreement.<sup>160</sup> In negotiating that document, Germany might have insisted that all payments to claimants be made directly from the German treasury. It did not. From the start, the German commitment to pay reparations was an acknowledgment that a debt was owed from one people to another and not solely from Germany to individual victims. Moreover, the original design, which remains in place, was that representative Jewish organizations would have discretionary authority in deciding where funds should be directed so as best to repair the damage to the collective.<sup>161</sup> Ultimately, two intermediaries were chosen: the State of Israel (for Survivors living in Israel)<sup>162</sup> and the Claims Conference<sup>163</sup> (for Survivors living elsewhere). In the former case, funds were spent on resettling Jewish refugees from Europe to Israel. In the latter case most of the reparations money was distributed to individual Holocaust survivors, but sizeable amounts went to fund projects aimed at the

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159. Support for this group-oriented conception of injury can be found in recent work on the ties between the individual and various communities beneath the level of the nation state. See, e.g., Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 101, 102 (2001) (arguing that “[b]ecause they maintain important relationships that defy national borders, diasporas today do not fit easily into the Cartesian geography of the nation state system”); Thomas Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT’L L. 359 (1996).

160. See Agreement Between Israel and the Federal Republic of Germany, Sept. 10, 1952, 162 U.N.T.S. 205. The events leading up to the treaty are discussed in detail in NICHOLAS BALABKINS, WEST GERMAN REPARATIONS TO ISRAEL 81-154 (1971).

161. For example, pursuant to Protocol II to the Luxembourg Agreement, the FRG agreed to pay DM 450 million to the Claims Conference, with the funds to be used for the benefit of victims of Nazism according to “principles and priorities determined by the Claims Conference.” See Karen Heilig, *From the Luxembourg Agreement to Today: Representing a People*, 20 BERKELEY J. INT’L L. 176, 180 (2002). For more on the Claims Conference, see *infra* note 163.

162. The primary rationale offered for these payments was that Israel was entitled to reimbursement for absorbing 500,000 European Holocaust Survivors who had been brought to Israel as refugees at high resettlement costs. This public rationale, however, was in part crafted in order to create a climate in which receiving such payments from Germany would be acceptable to Israelis. See Heilig, *supra* note 161, at 176.

163. The “Claims Conference,” or Conference on Jewish Material Claims Against Germany, was created in 1951 to represent Jews from all over the world in negotiating with West Germany regarding claims related to World War II. Since then it has had a large role in every significant German and Austrian indemnification and restitution program relating to Nazi victims. See generally RONALD ZWEIG, GERMAN REPARATIONS AND THE JEWISH WORLD: A HISTORY OF THE CLAIMS CONFERENCE 13 (2d ed. 2001); Heilig, *supra* note 161, at 182.

“social and educational reconstruction” of Jewish communities around the world.<sup>164</sup>

Over a period of fifty years, this collective approach to German-Jewish reparations has drawn relatively little opposition. To the contrary, all German-Jewish discussion of Holocaust reparations has followed this basic framework.<sup>165</sup>

Some injuries suffered by other groups can be seen in a similar light. The mass slaughter, enslavement, and dispossession of Native Americans calls out for collective remedies. To some extent, the U.S. government has acknowledged this.<sup>166</sup> Chinese policy toward Tibet also has inflicted such extensive injury upon the collective that it is hard to imagine how the Tibetan people, its religion, and its way of life can substantially recover from decades of repression without a vigorous and imaginative set of collective remedies.<sup>167</sup>

If group injuries like these are real — real enough to be acknowledged in treaties and legislation — then why were they not recognized in the Swiss banks cases? Why also are the group injuries at the heart of more recently filed cases by other groups unlikely to be vindicated? Two very different sorts of reasons suggest themselves. One has to do with our legal system’s aversion to speculative damages and attenuated causation. The other, which goes more to the point of this essay, is the precarious relationship between the substantive law of human rights and the procedural law available to enforce it.

Collective remedies pose difficulties in terms of tracing a straight line between the remedy that has been ordered and any discernable remedial effect. These difficulties tend to be fatal in a legal system with many doctrines designed to filter out alleged damages that are speculative. Consider, for instance, some of the *cy pres* proposals in the Swiss case. The World Association of Belarusan Jewry sought \$3.5 million for the creation and operation of schools to provide Jewish education in their community.<sup>168</sup> The YIVO Institute for Jewish Research requested funds to publish the *YIVO Encyclopedia of the*

164. See generally ZWEIG, *supra* note 163; Heilig, *supra* note 161, at 182. In the last fifty years, over DM 100 billion has been paid out in this manner. See EIZENSTAT pp. 208 & 279; Lisa Davidson, *The Conference on Jewish Material Claims Against Germany Marks its 50th Jubilee*, YAD VASHEM ON-LINE MAG., at [http://www.yad-vashem.org.il/about\\_yad/magazi/ne/data5/claims.html](http://www.yad-vashem.org.il/about_yad/magazi/ne/data5/claims.html).

165. See generally Kurt Schwerin, *German Compensation for Victims of Nazi Persecution*, 67 NW. U. L. REV. 479 (1972-73).

166. For recent proposals, see William Bradford, “With a Very Great Blame in Our Hearts”: *Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2002-2003).

167. See generally Barry Sautman, *Cultural Genocide and Tibet*, 38 TEX. INT’L L.J. 173 (2002); Note, *Chinese Population Transfer in Tibet*, 9 CARDOZO J. INT’L & COMP. L. 173 (2001).

168. The World Ass’n of Belarusan Jewry Proposal for Holocaust Victim Asset Distribution, Nov. 16, 1999, at [http://www.swissbankclaims.com/PDFs\\_Eng/belarus11199.pdf](http://www.swissbankclaims.com/PDFs_Eng/belarus11199.pdf).

*History and Culture of Jews in Eastern Europe.*<sup>169</sup> Others proposed ways to revive the Yiddish language.<sup>170</sup>

Although these proposals suggested plausible avenues for repairing the ways in which whole communities were devastated, they also presented serious problems of accountability. Reparations-oriented litigation, to a far greater extent than treaties and legislation, has stalled at confronting difficult matters of proof and conceptualization. In a world in which no one variable can be held constant, how does one determine whether the Yiddish language would have died out on its own, through the Jewish People's ongoing encounters with modernity and assimilation? Would the State of Israel have come into being in the absence of the Holocaust? Do the contributions made by the State of Israel to the vitality of the Jewish People outweigh what was lost in the Holocaust?<sup>171</sup> Specialized education programs may be a plausible response to a group's losses, but they may also be a means of empowering some group members (those who design the schools and control the curriculum) over others. Is that what court-ordered remedies should do in the context of human rights class actions?<sup>172</sup>

There is a second reason why the short-term future of the human rights class action is less than bright. When Rule 23 was overhauled in the 1960s, no one had in mind suits like the German slave labor litigation. Instead, reparations movements have made use of a procedural device that was designed with other kinds of litigation in mind. They do so because Congress has never enacted procedural rules specifically designed to litigate mass reparations claims in U.S. courts. From the beginning of the modern international human rights litigation movement, human rights suits in U.S. courts have been riding the same rails as those used to transport shareholders' derivative suits and ordinary commercial litigation, types of litigation that lack the collective quality typical of suits arising from mass

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169. Yivo Inst. for Jewish Research, Proposal for Holocaust Victim Asset Distribution, Sept. 5, 2000, at [http://www.swissbankclaims.com/PDFs\\_Eng/YivoInstitute.pdf](http://www.swissbankclaims.com/PDFs_Eng/YivoInstitute.pdf).

170. See, e.g., Yeshiva Chofetz Chaim of Radin, Proposal for Holocaust Victim Asset Distribution, Mar. 13, 2000, at [http://www.swissbankclaims.com/PDFs\\_Eng/Yeshiva.pdf](http://www.swissbankclaims.com/PDFs_Eng/Yeshiva.pdf) (requesting annual budget of \$1.5 million to publish a Yiddish-language journal).

171. African American descendants of slaves seek remedies that are similarly difficult to correlate with actual injury. Robert Westley proposes that a private trust be established for the benefit of descendants of African American slaves and that trust funds be used to promote the "educational and economic empowerment" of the trust beneficiaries. See Westley, *supra* note 123. Randall Robinson argues in favor of creating residential educational facilities for Black children "at risk in unhealthy family and neighborhood environments," fully funded college tuition for qualified Black students, and funding for continued "broad civil rights advocacy" by Black organizations. See ROBINSON, *supra* note 120, at 244-45.

172. Of course individualized remedies can suffer from imprecision and lack of efficacy also.

persecution. Indeed, there is a counterpart to this railroad analogy in substantive human rights law. Since the 1970s, the cause of action of choice for victims of human rights abuses committed abroad has been the Alien Tort Claims Act (ATCA), a statute enacted in 1789.<sup>173</sup> It is the principal statute underlying the Holocaust slave labor cases, the Apartheid cases, and the recent cases brought by native communities allegedly targeted for persecution by governments and multinational corporations in pursuit of mineral exploration.<sup>174</sup> As a human rights instrument, the ATCA is less than ideal. It was enacted in 1789, when the scope of international law — what the statute calls the “law of nations” — was so limited as not to include slavery or ethnic cleansing or massive wartime pillaging. At that time, it certainly did not extend to the behavior of non-State actors such as banks, insurance companies, and plantation owners. Nonetheless, for more than two decades, human rights litigators have sued under the ATCA because it was available, because there was little else, and because its broad language was capable of being interpreted to apply to violations of modern international law.

In the short term, the usefulness of the ATCA and Rule 23 to contemporary reparations movements will be modest. The human rights movement’s early victories in ATCA cases<sup>175</sup> have predictably led to a backlash, with strong opposition from big business,<sup>176</sup> foreign governments,<sup>177</sup> the foreign policy establishment,<sup>178</sup> the ATCA’s

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173. The Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, creates a cause of action for aliens for “a tort only, committed in violation of the law of nations or a treaty of the United States.” During its most recent term, the Supreme Court resolved a long debated question, holding that the ATCA is more than just a jurisdictional statute. It creates a cause of action. *See Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004).

174. *See, e.g., Wiwa v. Royal Dutch Petroleum and Shell Transport and Trading Co.*, 226 F.3d 88 (2d Cir. 2000).

175. *See, e.g., Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Filartiga v. Pena-Irala* 630 F.2d 876 (2d Cir. 1980); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003). Some of these victories can be characterized as pyrrhic in the sense that plaintiffs were unable to enforce the award.

176. *See Sosa v. Alvarez-Machain*, Brief for National Foreign Trade Council et. al., 2004 WL 162760 (2004).

177. *See, e.g., Wendell Roelf, Swiss Gov’t Against Apartheid Reparations Case*, iAfrica.com, Feb. 10, 2004, <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=9460>; *Christelle Terreblanche, Government Opposes Reparations Claims*, SUNDAY INDEP. ON-LINE, July 26, 2003, [http://www.iol.co.za/general/news/newprint.php?art\\_id=ct20030726175801448P200250](http://www.iol.co.za/general/news/newprint.php?art_id=ct20030726175801448P200250) (quoting South African Justice Minister Penuell Maduna as opposing Apartheid-related class action lawsuits in the U.S.); *Sosa v. Alvarez-Machain*, Brief for United States as Respondent Supporting Petitioner, 2004 WL 182581, at \*40-44 (advising the Court of complications for U.S. government in dealing with foreign governments).

178. *See, e.g., Henry Kissinger, The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. (Jul./Aug. 2001).

academic critics,<sup>179</sup> and from the Bush administration.<sup>180</sup> This opposition to ATCA litigation reached a critical mass when human rights class actions were seen as posing a real economic threat to transnational corporate investment, triggering a response by such influential pro-business lobbies as the International Chamber of Commerce<sup>181</sup> and the U.S. Council for International Business.<sup>182</sup>

In what is increasingly being framed as a threat by human rights groups and the plaintiff's bar to the executive branch's ability to maneuver flexibly in the realm of foreign relations, Eizenstat's sympathies seem to be with the critics of the ATCA class action.<sup>183</sup> His frustration with the new "plaintiffs' diplomacy"<sup>184</sup> comes across in the many passages in *Imperfect Justice* when he decries having to

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179. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997); Jack Goldsmith & Stephen Krasner, *The Limits of Idealism*, 132 *DAEDALUS* 47 (2001).

180. In the first major international human rights case to reach the Supreme Court in a decade, the Justice Department argued that continuing to permit sensitive human rights suits to go forward in U.S. courts could undermine the efforts of the Executive Branch to work with foreign governments:

The State Department has determined that, to the extent that the pending apartheid litigation impedes South Africa's domestic efforts to promote reconciliation and equitable economic growth, the litigation will undermine the United States' foreign policy objectives of promoting both foreign investment in South Africa and redress for the wrongs of apartheid.

Sosa v. Alvarez-Machain, Brief for United States as Respondent Supporting Petitioner, 2004 WL182581 at \*40-46 (2004). The World Jewish Congress also filed an amicus brief in the case. See Sosa v. Alvarez-Machain, Brief for World Jewish Congress and American Jewish Committee as Amici Curiae, 2004 WL 419426 at \*2 (2004) (maintaining that Holocaust cases do not fit the "parade of horrors" that U.S. government presents as characterizing international human rights litigation in U.S. courts).

181. See, e.g., U.S. Urged to Halt Extraterritorial Abuse of its National Law, Dec. 5, 2002, [http://www.iccwbo.org/home/news\\_archives/2002/stories/appl-nat\\_law.asp](http://www.iccwbo.org/home/news_archives/2002/stories/appl-nat_law.asp); Commentary by the ICC Chairmanship, Extra-territorial Application of National Laws, [http://www.iccwbo.org/home/statements\\_rules/statements/2002/extra-territorial%20application%20of%20national%20laws.asp](http://www.iccwbo.org/home/statements_rules/statements/2002/extra-territorial%20application%20of%20national%20laws.asp).

182. See, e.g., *Update on Alien Tort Claims Act*, USCIB NEWSL., July 2, 2002 (asserting that ATCA litigation incorporating principles of vicarious liability will "make it impossible for U.S. companies to do business in large parts of the world" and "would strongly discourage foreign companies from investing in the U.S."), <http://www.uscib.org/index.asp?DocumentID=2175>.

183. In the German slave labor cases, the U.S. government negotiated for months to secure a settlement with Germany but found itself unable to promise German companies an end to all Holocaust-related litigation in U.S. courts. Germany settled for a second-best arrangement — an executive agreement committing the United States government to file a "Statement of Interest" in any future Holocaust-related litigation against German defendants in U.S. courts. This document informs the court that the foreign policy interests of the United States call for dismissing the action in favor of the dispute resolution process established by the U.S.-German treaty. See *American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2397-98 (2003) (Ginsburg, J., dissenting).

184. See Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, 79 *FOREIGN AFF.* 102 (2000) (defining "plaintiff's diplomacy" as a "new trend toward lawsuits that shape foreign policy").

negotiate with lawyers who, in his view, lack any concern for how their actions will affect the larger picture — the future of Jewish life in Europe, the impact of litigation on the accuracy of the historical record, the ability of European progressives to nudge their fellow citizens to look at the wartime record and the current policies without feeling under siege.<sup>185</sup> When it comes to mass reparations and restitution, Eizenstat favors old-fashioned government-to-government negotiations.

Bazyler disagrees. He reminds us that fifty years of sporadic government-to-government talks on Holocaust restitution produced very little. Securing reparations for Holocaust victims was not a foreign policy priority for any of the countries from which victims had come or to which they had gone after the War, not even Israel. Essentially every post-War initiative related to Holocaust restitution or reparations has originated with NGOs (especially the Claims Conference) and victim organizations.

If Eizenstat's perspective currently seems to be gaining the upper hand, it is unlikely to be the final word. As he would likely acknowledge, the victims' movement is here to stay. Despite what might appear to be recent setbacks for the human rights litigation movement,<sup>186</sup> there is no indication that the international system will substantially return to the days when reparations were purely a government-to-government matter. In fact there continue to be indications to the contrary. The subject of procedural mechanisms for awarding compensation to atrocity victims is recurrently on the table as new international tribunals are created and as the overall U.N. human rights system is reevaluated.<sup>187</sup>

The future of collective justice through litigation lies in these efforts. Supporters of the human rights class action in the United States should pay heed. An optimistic future will be found less in creative interpretations of Rule 23 than in continuing to pursue the procedural revolution launched in U.S. courts in the 1930s. Collective victims need procedural rules specifically written with human rights class actions in mind. Also needed are substantive legal instruments

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185. See, e.g., EIZENSTAT p. 250 (referring to the "lion's den, the plaintiffs' lawyers' holding room").

186. In the past year, for example, Belgium and Spain have taken steps to cut back on their courts' exercise of universal jurisdiction. See *Peruvian Genocide Case*, STS, Feb. 25, 2003 (No. 712/2003), reprinted in 42 I.L.M. 1200, 1205 (2003), available at [www.derechos.org/nizkor](http://www.derechos.org/nizkor); Human Rights Watch, *Belgium: Universal Jurisdictional Law Repealed*, HUM. RTS. NEWS, Aug. 1, 2003, <http://www.hrw.org/press/2003/08/belgium080103.htm>.

187. See, e.g., ANNE F. BAYEFKY, *THE U.N. HUMAN RIGHTS TREATY SYSTEM: UNIVERSALITY AT THE CROSSROADS* (2001), <http://www.bayefsky.com/report/finalreport.pdf>.

that go beyond the ATCA.<sup>188</sup> More generally, that means that human-rights-specific procedural rules should be on the negotiating table domestically and internationally. Until now, most reparations movements have focused on immediate results and not on the procedural infrastructure for their own claims and for future claims like theirs. Even now, several years after the settlements in the Holocaust cases were reached, little effort has been expended to secure better procedural tools for other reparations claims. Little attention has been directed to the possibilities for procedural reform in the area of human rights enforcement.

In the immediate aftermath of World War Two, an old procedural order proved terribly ineffective in delivering compensation to victims of profound injustice. Over the course of fifty years, some of the inadequacies of that procedural order have been addressed. But only some. Still unaddressed are the unique injuries that result when mass atrocities are inflicted on collectives. The Holocaust cases overcame some of these procedural deficiencies. A monumental award of damages to millions of victims was achieved. But this result was accomplished not because Rule 23 was an effective human rights instrument, but because it was adequate for the case at hand, a case that benefited from many other sources of support, including the desire of Germany and Austria to close the books on Holocaust restitution, the relatively powerful diplomatic hand of the United States in the post-Cold War era, and public sympathy for the plaintiffs' claims — a product of decades of Holocaust education. This was a unique confluence of forces. It will be difficult to replicate. Other victims of injustice should not count on being able to do so. Their path to recovery lies in creating new rules that address in detail the procedural means for enforcing the substantive norms at the heart of current and future reparations claims. The source of such rules will be in Congress, in treaty conferences, in the work of the new international tribunals,<sup>189</sup> and in the example set by foreign legislation.<sup>190</sup>

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188. In 1991, Congress enacted the Torture Victim Protection Act (TVPA). See Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350, note). That statute, however, only provides a cause of action against individuals, and only against those who act under the "apparent authority, or color of law, of any foreign nation." *Id.* at § 2(a). The TVPA is also limited in providing causes of action only for torture or extrajudicial killing, making it of little use in litigating most reparations claims.

189. For example, the Rome Statute contains provisions that enable the ICC to provide compensation to those victimized by violations of the Statute. See ICC Statute, art. 75.

190. I address the relationship between human rights and procedural law at greater length in a forthcoming work, Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT'L L. (forthcoming 2005).