

# The Judge and the Historian

## *Transnational Holocaust Litigation as a New Model*

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Since the Nuremberg trials, the relationship between the legal process and historical research has been the subject of much scrutiny, leading to a consensus that courts produce distorted and poor historical accounts of mass atrocity. The recent shift in legal treatment of the Holocaust from criminal to civil litigation, with the Holocaust restitution lawsuits brought before American federal courts in the 1990s, has only exacerbated historians' critique of the law. In contrast, this article argues that the restitution litigation represents a new and fruitful model for the relation of law to historical inquiry. In this model, the judge plays a facilitative and supervisory role vis-à-vis the historian, encouraging the production of broad and contextualized historical narratives.

### INTRODUCTION

The law's treatment of the Holocaust has been a topic of continuing discussion between historians and lawyers, with the discussion centering on criminal law. In recent years, however, researchers' attention has been drawn to a new manifestation of the Holocaust in the courts: the transnational Holocaust restitution lawsuits (THL) brought before American federal courts in the 1990s. This was not the first time law other than criminal law had been used in connection with the Holocaust. In the 1950s the governments of Germany and Israel agreed to the establishment of a large reparations program for Jewish victims of Nazi persecution. In addition, there were various libel trials concerning Holocaust denial and a few attempts to sue Germany and private corporations in restitution for

looted property and forced labor. The reparations program, however, was administrative in nature, and the attempts to use private law were sporadic and mostly unsuccessful. THL therefore represents the first significant instance of the use of civil litigation and private law doctrines in relation to the Holocaust.<sup>1</sup>

Beginning in 1996 with claims filed against Swiss banks on behalf of Holocaust survivors for the restitution of monies held in bank accounts since the war, the litigation soon expanded to include claims against banks in other countries, as well as claims for life insurance plans and for compensation for slave and forced labor from German and other private corporations. As Michael Marrus has noted, all lawsuits were initiated by private lawyers representing groups of victims, and in 1998 Swiss banks were the first to settle a claim, for an unprecedented \$1.25 billion.<sup>2</sup> Shortly thereafter, a series of claims against German corporations led to the establishment of a \$5 billion fund to which the German government and corporations contributed in equal shares, and to the signing of an Executive Agreement between the governments of Germany and the United States.<sup>3</sup> Though these lawsuits were settled for unprecedented amounts, the defendants never formally assumed any legal responsibility, insisting that the money paid as part of the settlement reflected moral responsibility only.<sup>4</sup>

The litigation has been sharply criticized by both legal scholars and historians, who raise doubts as to the measure of justice achieved for victims and criticize the historical representation of the Holocaust in these lawsuits. Thus, Marrus argues that the concept of unjust enrichment, one of the lawsuits' principal legal grounds, is inadequate because many corporations were not actually enriched as a result of their activities during the war. In addition, the corporations against which the lawsuits were filed were not chosen according to their relative fault in using forced and slave labor, but rather for their financial standing and their international activity. Going after the "deep pocket" was considered, in this respect, an arbitrary choice.<sup>5</sup> More fundamentally, he argues that the focus of the lawsuits on monetary gains shifts attention away from the gravest crime committed during World War II—mass murder—to the lesser offense of theft. Furthermore, by highlighting the role of a few private corporations with deep pockets, the lawsuits diminish the role of the state as well as of the public and agricultural sectors, which had also used forced and slave

labor. Thus, according to the critics, THL distanced us from the insights of historical research, distorted our understanding of the involvement of private corporations in the Holocaust and, finally, was settled without a legal judgment attempting to clarify the historical picture.

This seems to be the prevailing interpretation of THL among the critics.<sup>6</sup> I offer a different perspective on THL's contribution to legal justice, which I have elaborated elsewhere.<sup>7</sup> In my view, criminal law's focus on individual intent has persistently prevented it from addressing the collective nature of bureaucratic and corporate wrongdoing. Hence, no corporation has ever been charged with or convicted for an international war crime or similar offense.<sup>8</sup> Only by turning to the American class action did jurists find a way to hold corporations accountable for their involvement in the Nazi crimes, due to such factors as the group structure of the claim and the change in the role of the judge.<sup>9</sup> In this article, I focus on a different contribution of THL, concerning the relationship between judge and historian, and argue that the litigation develops a new and fruitful paradigm in the relation of law to historical inquiry.

I argue that the scathing criticism voiced by historians derives in part from the attempt to understand THL in light of the model of criminal law. Only if we see THL through a post-national lens—that is, as litigation that unravels the link, characteristic of domestic criminal law, between time, place and community—will we see how this transnational litigation<sup>10</sup> sketches a new relationship between law and history. In this new relationship, law is disconnected from the nation-state, and the judge abandons his or her didactic role in favor of an administrative, supervisory role. Private parties are given control of the litigation and of historical enquiry, which is also pursued by historical commissions independent of the court. In sum, historical research, though produced in interaction with the law, is less constrained by the requirements of the legal process than under the criminal law paradigm.

After presenting an overview of the legal theories underpinning THL and briefly explaining how this litigation created a new legal paradigm apt to address bureaucratic liability, I examine how this litigation alters the relationship between law and historical research, not only by uncovering precious data for historical research, but also by enabling the emergence of new historical narratives concerning corporate involvement in the Holocaust.

TRANSNATIONAL HOLOCAUST LITIGATION: A NEW LEGAL PARADIGM

The plaintiffs alleged a combination of violations of private law (tort and property, in particular the doctrine of “unjust enrichment”) and international law (prohibition against slave and forced labor). However, beyond the legal doctrines invoked, in its underlying approach THL was an innovative attempt to bring together two distinct bodies of law, the international criminal law of atrocity and the American class action for human rights violations, in order to make European corporations answerable for their complicity in gross human rights violations during the Holocaust. American class actions share a common concern with international criminal law: the systematic attempt to overcome structural sources of impunity from liability for human rights violations. However, these two bodies of law, which had developed separately until the mid-1990s, have taken a very different approach to the bureaucratic aspects of human rights violations. While the international law of atrocity developed tools to pierce the shield of state sovereignty in order to attribute responsibility to individuals for past violations,<sup>11</sup> the American civil rights class action adopted a “future-oriented” response by focusing on the reform of bureaucratic organizations.<sup>12</sup>

THL implicitly relied on international criminal law’s innovations in respect of the temporal, spatial and procedural framework for litigating collective crimes such as genocide and crimes against humanity. These crimes are not governed by prescriptive periods and can be tried under universal jurisdiction by third-party domestic courts.<sup>13</sup> The “jurisprudence of atrocity”<sup>14</sup> developed by national and international criminal courts has resulted in a radical transformation of criminal procedure from being concerned mainly with the rights of the accused to a sustained attempt to facilitate prosecution by protecting the rights of victims. The goals of the criminal trial have also been altered, with a long line of modern writers now recognizing the legitimacy of didactic goals for criminal litigation.<sup>15</sup> These developments, in particular overcoming time and space limitations, were crucial precedents paving the way for THL to take place more than fifty years after the crimes occurred. American federal courts were particularly receptive to civil litigation for international atrocities, as international human rights litigation under the Alien Tort Statute (ATS)

since the 1980s had established that universal jurisdiction is not confined to the sphere of criminal law.<sup>16</sup>

Alongside these developments, THL also relied on the legacy of American civil rights class action, and in particular, its redirection of the legal question from individual guilt to the structural impediments to human rights posed by bureaucratic organizations, the recognition of the class of plaintiffs, and the transformation of the American judge into a “managerial judge,” with a more managerial than adjudicative role.<sup>17</sup> THL brought these two bodies of law together in order to tackle the problem of the involvement of business corporations in the Holocaust. Thus, the lawsuits created a hybrid legal form (between private and public, domestic and international law) in order to overcome a persisting lacuna in the jurisprudence of the Holocaust and to abolish the *de facto* immunity of private corporations for the use of slave and forced labor, robbery and plunder during the Holocaust. Such a hybrid form was required as each body of law—international criminal law, on the one hand, and the American class action on the other—was inadequate in itself to address the complicity of the business organization in the Holocaust.<sup>18</sup> What implications does this new legal paradigm carry for the relationship between law and history?

Criminal law, the dominant framework for judging the Holocaust in the last six decades, aims to produce a uniform and hegemonic narrative pronounced in the official judgment of the court. In contrast, THL took the form of a civil class action, and relied on a transnational model of litigation. The shift to the transnational class action implies a number of structural changes in comparison with criminal trials, with important ramifications for the relationship between law and history. One of the most pertinent constraints on law’s ability to develop a critical history of a nation’s “dark past” stems from the territoriality principle that confines criminal adjudication to national courts. Assessing the superiority of international tribunals over national tribunals, one commentator writes: “The most obvious contrast between domestic courts and international tribunals is that the latter are not constituted in the institutional framework of the nation-state.... Because the nation-state is not in its usual place, the compulsion to engage in nation-building rhetoric or in nationalist mythmaking is not as acute as in national settings.”<sup>19</sup>

THL, as a transnational legal process, shares with international criminal trials the shift away from the nation-state, opening the door to

critical enquiry by courts of a third-party state. However, in contrast with international criminal trials, the litigation was not confined to the task of assessing the liability of individuals but also examined the liability of organizations. Moreover, relying on the legal tool of the class action with its *group* structure, the litigation created a group out of victims from around the world. Furthermore, whereas international criminal law disconnects law from the nation-state by transferring control of the legal proceedings to an international body, in THL, the disconnection operated so as to *privatize and decentralize* litigation, by granting control of the proceedings to victims and their private representatives—entrepreneurial lawyers and nongovernmental organizations—without the filter of a national or international prosecutorial body. It therefore gave the victims, and in particular their representatives, not only more voice, but also more control over the proceedings and the historical story.<sup>20</sup> In addition, the resulting need to fund the litigation (the lawyers' fees consisting of a percentage of the damages under the American contingency fee system) led to the tendency to sue defendants with deep pockets, affecting the subjects of historical enquiry resulting from the litigation. Finally, civil litigation's objective of monetary compensation, and the central place American civil procedure gives to *settlement* to achieve that objective, mean that the parties not only have heightened control of the shape and content of the historical narrative but appear to be able to renounce producing a narrative altogether.

Since the Nuremberg trials, the relationship between the legal process and historical research has been the subject of much scrutiny, leading to a consensus that courts produce distorted and poor historical accounts of the causes of mass atrocity. The critique voiced by historians has found support in two very different schools of legal thought. Proponents of legal liberalism warn that courts' attempts to write history compromises the rights of the defendant, while the law and society movement points to the law's inability to reflect history's complexity.<sup>21</sup>

Until recently the criticism of law's representation of history focused on criminal trials. Yet it seems that the recent shift in legal treatment of the Holocaust from criminal to civil litigation has attracted particularly sharp opprobrium.<sup>22</sup> In criminal trials, the historical distortion produced by the legal proceedings can be justified by the need to clarify liability for collective crimes, such as genocide and crimes against humanity, which

require some historical understanding. In THL, in contrast, no such justification is apparent, as the main objective of the litigation is not the determination of liability in an authoritative legal judgment but rather the creation of pressure on the defendants to settle. Moreover, civil litigation, and in particular the amounts at stake in settlement, create incentives for the parties to present partisan versions of history that are not likely to be corrected absent a court judgment. Furthermore, the class structure of the lawsuit and the goal of monetary compensation raise the specter of commodification and the loss of personal narratives, as victims are turned into anonymous members of a group whose entitlements are calculated with the help of statistics. Finally, the focus on corporations with deep pockets appears to distort the historical understanding of responsibility for the Nazi crimes by shifting attention from the state and direct perpetrators to a few indirect perpetrators.

It therefore seems that the consensus regarding courts' poor historical analysis is only strengthened in THL, in particular due to the centrality of settlement and monetary compensation. However, a closer look at the litigation reveals that it provides new possibilities for the relationship between law and history. In particular, by avoiding the individualistic bias of criminal law and focusing on the organization, the civil class action enabled the emergence of data and narratives regarding the involvement of business corporations in the Nazi crimes. Furthermore, I would like to suggest that settlement represents an opportunity rather than a danger to the clarification of history. As a result of settlement, we witness not the disappearance of narrative but a renewed division of the judicial and historical functions. Contrary to didactic criminal trials, where the historical and legal functions of judging are blended in the judgment, here the judge takes on a facilitative role, providing incentives to the parties to cooperate and supervising and shaping the historical research undertaken by nonlegal actors. The privatization and decentralization of the litigation means, however, that these new narratives are not to be found in the judgment of a court but are produced in various locations and times alongside the litigation.

Before elaborating on these points, a word of clarification is in order. It is important to distinguish between the collection of historical data, both documents and testimony, by which the legal process creates a sort of archive for historians,<sup>23</sup> and the synthesis of historical findings into a

narrative. In criminal cases, this latter function is usually performed in the court's decision. The two types of historical contribution are of course linked, and it may be difficult to rigidly distinguish between them. The rules of procedures and evidence, such as the disqualification of hearsay testimony, the rules of cross-examination, the burden of proof, as well as substantive law doctrines requiring, for example, special intent in offenses such as genocide, all affect the shape and content of the historical evidence collected for the purpose of trial, and therefore the narrative produced by the court.<sup>24</sup> Yet it seems that critics of the judge as historian recognize the value of the archive produced by the criminal process; their critique is mainly directed against the complacent acceptance of the historical narrative emerging from the court's decision.<sup>25</sup>

#### HISTORICAL RESEARCH UNDER THL

THL signals a new paradigm in which the narrative produced by the legal process is no longer controlled by the state or the court. In order to understand the ramifications of the class action for historical inquiry, I now consider important characteristics of American class actions, such as pre-trial discovery, the managerial judge, post-settlement distribution procedures (including plaintiff questionnaires, the settlement distribution plan, and the award process), that led to the production of precious historical findings.

##### 1. Pre-trial discovery

Marrus argues that American civil procedure encouraged plaintiffs in THL to distort history in order to plead a strong complaint.<sup>26</sup> Indeed, the process of pre-trial discovery unique to American law allows parties to obtain from each other a broad range of written and oral information relevant to the case after the initial claim has been filed.<sup>27</sup> This encourages plaintiffs to file claims before they come into possession of large amounts of evidence, with no requirement to commit from the outset to one version of the facts, which in turn carries the risk that plaintiffs will exaggerate their claims in order to initiate the litigation. Taken out of the larger legal context, such a distortion seems unjustified. However, the possibility of



using discovery is pivotal in legal struggles against business corporations, from which it is otherwise difficult to obtain information as, contrary to public bodies, they are not subject to broad obligations to provide information under domestic freedom of information legislation. This was also true of Swiss banks, which have even turned banking secrecy into a business asset. Though banks are subject to numerous regulations and reporting obligations, these do not include the provision of information about specific accounts.

Indeed, in the restitution litigation against Swiss banks, the main obstacle before the plaintiffs was banking secrecy. In 1934, Swiss bankers, sensing a marketing opportunity, had pressed the Swiss parliament to enact a law that criminalized revealing information about a Swiss bank account to any third party. Initially, this policy was intended to encourage those persecuted by the Nazi regime to transfer their money to a safe haven. Massive sums poured into Swiss banks from Jews and other targets of Nazi repression.<sup>28</sup> However, after the war, banking secrecy was used against the survivors and their descendants to justify withholding information about accounts, reducing any chances of success of individual requests and civil actions in domestic European courts to practically nothing. Most of the claimants knew that their family had opened an account in Switzerland, but did not know the name of the bank, let alone the account number and other identification details. Furthermore, heirs of accounts holders in possession of information about the specific account were countered with requests for official death certificates, which could not of course be provided for loved ones killed in a concentration camp or in mass shootings. Against the growing pressures of descendants of Holocaust victims to provide information about “dormant accounts,” Swiss banks coordinated their legal response in order to be able to systematically deflect enquiries.<sup>29</sup> The banks also urged the Swiss government to refrain from enacting laws that would have forced them to reveal the accounts.<sup>30</sup> Without such disclosure laws, “the claims of surviving Holocaust victims were usually rejected under the pretext of banking secrecy.”<sup>31</sup> Thus, the existence of broad and liberal rules of discovery in American courts was a main source of attraction for plaintiffs.

The transnational aspects of the litigation mitigated this procedural advantage as Judge Edward R. Korman, who was in charge of the Swiss banks case, refused to formally order discovery to allow the plaintiffs’

accounting experts to inspect the banks' records, fearing that such an order would have forced Swiss banks to commit a criminal act in their country. Instead, he pressured the defendants to reveal some information, by chastising the banks for failing to publish their lists of dormant accounts and by refusing to validate the settlement as fair according to the law until access to information required for a fair claims procedure was secured.<sup>32</sup> An intermediate solution was found, as under court pressure the Swiss banks agreed to form an independent group called the International Committee of Eminent Persons, headed by Paul Volcker, to carry out a Swiss government-approved audit of the Swiss banks in the search for unpaid Holocaust-era accounts.<sup>33</sup> In a conservative estimate, the Volcker Committee discovered 35,000 relevant accounts.<sup>34</sup> Thus, although discovery rules were not formally applied in the Swiss case, American civil procedure allowed the plaintiffs to file their claims notwithstanding the lack of evidence and pressured the banks into overriding their secrecy policy and revealing at least some valuable information.

## 2. The historian as expert

One aspect of the privatization entailed by the civil class action was the hiring by plaintiff law firms of historians on a full-time basis to collect evidence for the case. In addition, Jewish organizations as well as the defendants sent historians to archives in the attempt to find data supportive of their position.<sup>35</sup> The reliance on historians in Holocaust trials is not new. In most criminal Holocaust trials, the prosecution relied on historians' expert testimonies to clarify the historical context. This is required in part by the collective aspect of the crimes.<sup>36</sup> However, historians have lamented the loss of professional autonomy resulting from the summoning of historians as expert witnesses subjected to cross-examination. Such is the critique voiced by French historian Henry Rousso in the letter in which he publicly explained his refusal to serve as expert witness in the trial of Maurice Papon: "In my soul and conscience, I believe that an historian cannot serve as a 'witness,' and that his expertise is poorly suited to the rules and objectives of a judicial proceeding."<sup>37</sup>

THL did not pose this problem. While the data produced by historical research certainly helped build the legal case and sharpen the legal issues, the historian in the pre-settlement stage was confined to her traditional

role of researching the archive, with the lawyers and parties retaining control of the legal process.<sup>38</sup> The settlement also meant that the historian was not called upon to act as expert witness to connect the deeds of the individual perpetrator to the larger historical context.

### 3. Managerial judges

While the civil class action allows the historian to retain her role as expert, it casts the judge in a more managerial than adjudicative function. Whereas Anglo-American criminal law assigns the judge a passive and reactive role, class actions require supervision on a continuing basis, and the judge therefore becomes involved and proactive.<sup>39</sup> American civil litigation has therefore been the site of the development of a new judicial role which Judith Resnik has termed “managerial judging,” whereby the judge actively manages the case from its inception through its implementation, encouraging the parties to reduce the area of dispute by agreeing on points of fact and law, and ideally, by settling.<sup>40</sup> American judicial managerialism was of particular importance in the case against the Swiss banks, in light of their long-standing refusal to publish lists of dormant accounts. Thus, as we have seen above, Judge Korman actively encouraged the parties to settle, used his control over the settlement process to pressure the Swiss banks to cooperate in disclosing additional account information, and supervised the distribution of the settlement.

The advent of the managerial judge is not unique to class actions, as we can trace a similar development in the international tribunals for the former Yugoslavia and Rwanda in the 1990s. It has been suggested that the inefficiency and lengthiness of international trials led the tribunals to gradually adopt a more managerial procedure.<sup>41</sup> The advent of the managerial judge in international criminal law, however, should be distinguished from the judicial managerialism of American civil class actions. Whereas judicial managerialism in international criminal proceedings is intended to expedite *adjudication* in order to reach judgment, in a class action, the ultimate objective of active case management is *settlement*, with the judge fulfilling a more facilitative than adjudicatory role. Furthermore, unlike international criminal trials in which the trial phase is still central, in class actions, the trial phase is no longer the center of litigation and much more attention is given by the judge to the pre-trial and post-trial

phases, including supervision of enforcement.<sup>42</sup> The American managerial judge is more bureaucratized and better equipped to deal with the group nature of the litigation and the organizational structure of the defendants.

How does this judicial role influence the division of labor between judge and historian? Critics of the judge's role as historian find fault mostly with the way the historical narrative becomes subordinated to the needs of the legal process and therefore tends to produce a partial or distorted picture. The introduction of judicial managerialism in didactic international criminal trials may reinforce this problem: granted more discretion, the judge is expected to produce a legal judgment that also clarifies the historical narrative.<sup>43</sup> In contrast, the judicial managerialism of THL led to the renewed separation of the legal and historical functions in the legal process. Although the judge was granted far-reaching powers that allowed him to deal with large bureaucratic organizations, these powers were more procedural than substantive in nature: ordering disclosures of information, supervising negotiations, approving settlement and monitoring its complex implementation.<sup>44</sup> These powers allowed him to encourage productions of historical data without himself making historical pronouncements. Thus American managerialism contributed to the separation of functions between the judge and the historian in THL.

#### 4. The distribution stage

While in criminal cases the court usually ends the trial with a decision in which one party's version of the facts is adopted as correct, in THL the settlement marks the beginning of a new phase of implementation in which new and important information is collected. The managerial judge does not only supervise the implementation of the settlement but actively participates in the process, and can for this purpose appoint "special masters" who are involved on a daily basis in implementation.<sup>45</sup> Thus, in order to distribute the global settlement amount, the court in the Swiss case relied on historical research but also encouraged the production of data, through victim questionnaires, the distribution plan and the award process.

Questionnaires were sent to approximately one million survivors and their families, seeking to allow potential class members to express support or opposition to the settlement, as well as to gather information to assist the court in designing a fair scheme of allocation of the settlement funds.

In the view of Professor Burt Neuborne, one of the counsels for the plaintiffs, a central reason for bringing the cases was “to speak to history—to build a historical record that could never be denied.”<sup>46</sup>

After having gathered information and suggestions on how to distribute the settlement proceeds, the Special Master appointed by the court in the Swiss banks litigation prepared a distribution plan which relied on, and in turn contributed to, the historical archive.<sup>47</sup> While the plan provides an extensive review of historical research, relying on numerous sources, including primary sources, in order to determine the feasibility of holding an individualized claims process, it also reveals previously unpublished data.<sup>48</sup> For example, in order to administer the distribution to the class of victims of slave labor who had worked for German entities owning assets in Swiss entities, the Special Master established a list of German entities owning assets held in a Swiss company.<sup>49</sup>

In addition, the settlement, and in particular the possibility of obtaining a legal release from future claims, provided incentives for Swiss corporations to self-identify as having used slave labor during World War II and contribute historical information in a manner reminiscent of the South African Truth and Reconciliation Commission (TRC).<sup>50</sup> The settlement agreement had created a class of claims for persons who performed slave labor for Swiss entities (Slave Labor Class II).<sup>51</sup> Because of a lack of information, the court asked that companies seeking release from claims identify themselves and provide information, such as the names of slave laborers used by them. Several companies, including Nestlé, provided lists of thousands of individuals who had worked for them during the war and may have performed slave labor.<sup>52</sup> These examples show how the legal process, while heavily reliant on existing historical research, can also contribute to historical research. As the Special Master, emphasized in his discussion of the class of claims for persons who performed slave labor for German entities holding assets in Switzerland (Slave Labor Class I):

There had been no prior research regarding financial transactions with Swiss [defendants] involving the revenues or proceeds of companies or entities that exploited slave labor. This lack of scholarly attention is understandable. Until the settlement of this action, it is likely that no scholar ever studied the members of Slave Labor Class I—a class created not by historians but by attorneys in order

to settle a lawsuit—in the terms in which the Settlement Agreement defined them.<sup>53</sup>

Account-related claims against Swiss banks were only partially successful in causing the banks to reveal information, as even after settlement the banks persisted in their attempts to release only the smallest amounts of information. Nevertheless, by relying on the American class action, which offered the promise of finality in the form of a release from future litigation, litigators managed to provide sufficient incentives for the banks and the Swiss government to begin a serious audit and release some information.<sup>54</sup>

Finally, the distribution stage contributed short personal histories to the historical “archive” through the elaborate individualized claims programs established for the claims related to bank accounts.<sup>55</sup> The Special Master appointed by the court to oversee the distribution directed that a Claims Resolution Tribunal be set up in Zurich, under the direct supervision of the Brooklyn court, to adjudicate the more than 100,000 claims for bank accounts that followed the posting of 35,000 names on the internet.<sup>56</sup> The tribunal resolved more than 100,000 claims, memorializing every award in a written opinion, now publicly available on a website.<sup>57</sup> Each award contains information provided by the claimant, including the name of the account owners, a personal story consisting of information regarding the owners followed by a brief explanation of family ties, and in some cases a description of the family’s whereabouts during the war. According to Neuborne, “The thousands of CRT opinions ... constitute a priceless addition to the historical record.”<sup>58</sup>

#### *NOMOS WITHOUT NARRATIVE: THE CHALLENGE OF SETTLEMENT*

And yet, paradoxically, if the separation of historical and legal functions allows the civil class action to contribute to the historical record, does settlement not also preclude the formation of a historical narrative? Civil litigation is linked to settlement as a dispute-resolution mechanism, and settlement, by definition, undermines the attempt to determine legal and historical responsibility, as it allows the defendant to pay without the issue of liability being established. Thus, it could appear as though the defendants emerged victorious—the story of the corporations’ involvement in

the Holocaust remains concealed from the law. In this section, I would like to argue, contrary to the critics of settlement, that THL encouraged the decentralized production of narratives about corporate involvement in the crimes of the Third Reich. Before fully fleshing out this argument, it is necessary to point to the underlying tension between accounting and narrating present throughout Holocaust jurisprudence.

### 1. Between accounting and narrating

The tension between law and history evident in the Holocaust trials conducted since the end of World War II is linked to the law's vacillations between accounting and narrating. "Auschwitz" symbolizes the evil of the Nazi crimes—mass, bureaucratic and industrial crimes which erase the individual faces of the victims and seek to turn them into numbers.<sup>59</sup> The collective and organized character of the crime also created a sense of distance between victim and perpetrator, eroding the latter's sense of personal responsibility.<sup>60</sup> The initial decision at Nuremberg to deal with Nazi crimes through criminal trials of individual perpetrators was therefore particularly important, as it purported to give a human face to the perpetrator. However, Nuremberg's focus on proving the perpetrators' guilt through German documents led to exclusion of the victims' stories. The Eichmann trial attempted to correct this bias by giving voice to the victims.<sup>61</sup> Notwithstanding this significant difference, from the perspective of the tension between law and history, the criminal law's need to tell an individual story by pointing to guilty individuals who bear criminal intent also contributed to the distortion of the broader context.<sup>62</sup> Two schools of thought have developed among historians to explain the Nazi crimes: the intentionalist or programmatist school (which centered on Hitler and his intentional program to exterminate the Jews) and the functionalist or structuralist school (which emphasized the structural factors leading to the crimes).<sup>63</sup> While in recent years the two perspectives have been more integrated, criminal law's focus on *mens rea* tended to reinforce the "intentionalist" interpretation of the Holocaust.<sup>64</sup> Moreover, because criminal law has proven unable to address corporate liability, the hegemony of criminal law over Holocaust jurisprudence has further distanced the law from the insights of the functionalist school, which has researched the organizational, economic and social causes of the crimes of the Third

Reich, including the complicity of elites who helped sustain the regime. From this perspective, the privileging of the criminal paradigm made it difficult for the law to tell the story of the participation of private business organizations in the Nazi crimes.<sup>65</sup>

Alongside the path of criminal law, which focused on the guilt of individuals, the law also offered an administrative path, that of reparations. One can roughly distinguish between the two by saying that while the criminal path told the larger narrative of the Nazi regime through the individualized stories of perpetrators and victims, the reparations path was more comprehensive and methodical but focused on numbers and money, without producing a meta-narrative. Moreover, reparations were paid by the state and represented state—not corporate—liability. THL appears to form a middle way between these two paths, as it attempts to address the involvement of organizations by means of mass compensation through the courts. However, in doing so, the litigation relied on the American class action, which bureaucratized and collectivized the legal process. The centrality of money to this litigation further swings the pendulum from “narrating” to “accounting.” The parties argued about the number of potential claimants and the compensation due them, appointed expert committees composed of accountants to investigate and report about these numbers, and established complex bureaucratic mechanisms to assess victims’ claims.<sup>66</sup> In this sense, THL reduced the Nazi crimes to quantitative data.<sup>67</sup> Moreover, this data consists not simply of numbers, but of *statistics*, framed in the language of probability as opposed to certainty.<sup>68</sup> Thus, the litigation seems to point to a loss of narrative, while resulting in formidable gains for the historical “archive,” as seen above.

I suggest that critics of THL looked for the historical narrative in the wrong place. In the absence of a court decision on liability, they assumed that the litigation did not produce any narrative, and they criticized the few rulings issued in THL for distorting history.<sup>69</sup> True, the judge abandoned control of the historical narrative in exchange for a facilitative role. However, as a result, narratives were produced in various sites, at different times and by various players in the shadow of the litigation. Personal victim stories emerged outside the courtroom, in the media campaigns launched by plaintiffs in cases both against Swiss banks and German corporations. Thus, for example, the story of Estelle Sapir, lead plaintiff in the litigation against Swiss banks, was prominently featured in the media and became



a symbol of the Swiss banks' obstruction of access to Holocaust-era accounts.<sup>70</sup> Personal narratives also emerged in the court proceedings, as Holocaust survivors told their stories at the fairness hearings required by the federal rules of procedure in order for the court to approve the settlement,<sup>71</sup> as well as in the victim questionnaires and CRT awards discussed above.<sup>72</sup> Most significantly, the litigation encouraged the production by historical commissions of historical narratives about corporations' involvement in the crimes of the Third Reich. Though formed outside the court, these narratives are inextricably linked to the legal process. I suggest that the monetary settlement, which was perceived by the critics as "anti-narrative," in fact triggered the writing of a story that had not yet been written due to criminal law's inherent limitations—the story of corporate involvement in the Holocaust.

## 2. Historical commissions

One of the most interesting results of the legal pressure produced by THL was the creation of a new model of historical research: historical commissions consisting of distinguished historians from various countries, with the mandate to investigate the accusations and to produce a written report. These commissions were created in the course of the litigation and some continued their work after settlement had been reached. Their findings were used both to reach and design the settlement, as well as to guide its distribution.

Two types of commissions emerged, national and private. In response to the restitution campaign, twenty-four European governments commissioned historians to research property spoliation in their countries during World War II.<sup>73</sup> The best-known government-appointed commission was the Bergier Commission formed in Switzerland in direct response to the lawsuits. The commission reported a concerted wartime policy on the part of Swiss banks to comply with German requests for transfers from Jewish accounts even when this was contrary to their customers' interest and to the law. It also confirmed the plaintiffs' claims that after the war, the Swiss banks had deliberately failed to return assets deposited with them by victims of the Holocaust. According to the report,

The banks were able to use the amounts remaining in the accounts and to earn income from them. They showed little interest in actively seeking accounts of Nazi victims, justifying their inaction with the confidentiality desired by their customers. What the victims of National Socialism and their heirs thought to be the advantages of the Swiss banking system turn out to be disadvantageous for them.... The unwillingness of the Swiss financial institutions in the immediate post-war period to find the legal owners of unclaimed assets or to support rightful claimants in their search, constitutes the main point of criticism of the banks' behaviour, behaviour already tainted by certain dubious decisions and questionable attitudes in the period between January 1933 and May 1945.<sup>74</sup>

Michael Bazyler attributes the enhanced prestige of the report to the fact that it was the product of nine distinguished historians from various countries (Switzerland, U.S., Israel, Poland) and was appointed by the Swiss parliament (unlike the Volcker report that was issued under the auspices of the Swiss banks) which gave the commission unprecedented powers and resources. It was to have unimpeded access to the archives held by Swiss private companies, including banks and insurance companies; the companies were prohibited from destroying any files relating to the period being examined by the commission; and the initial budget of 5 million Swiss francs was increased to a total of 22 million.<sup>75</sup> The commission's findings of improper behavior by the Swiss banks formed the basis of legal presumptions adopted in the rules for distribution of the settlement (as will be discussed below).

The second type of commission consisted of one or more historians hired by German companies to investigate the company's relationship with the Third Reich. While some companies had begun investigating their Nazi past prior to the 1990s, THL is seen by many historians as the main engine leading German and European businesses to investigate their own history.<sup>76</sup> As historian Gerald Feldman—who was commissioned by Allianz to investigate its Nazi past—explains: "It was inconceivable that German corporations prior to the 1990s would have gone around looking for, let alone publicly announcing the kinds of documents I mentioned in connection with the Deutsche Bank, let alone ask people like myself ... what other awful things we could find."<sup>77</sup> While this new model raises

the specter of privatization (that is, of corporations gaining increasing power over the writing of history),<sup>78</sup> the quality of the research produced is undeniable. For example, the Deutsche Bank's Nazi past was investigated by a number of prestigious historians working separately, but who read each other's drafts, in a process reminiscent of academic research. Furthermore, the bank's archives were left open for other researchers to evaluate the work of the commissioned historians.<sup>79</sup> This model has even spread beyond private corporations, to be adopted by government ministries which had nothing to do with the litigation. Thus, in 2005 the German Foreign Ministry hired an international committee of historians to investigate its role in the Holocaust.<sup>80</sup>

How do we make sense of this new constellation—litigation without a court judgment accompanied by the creation of historical commissions—private and public—that produce historical reports? In my view it is precisely settlement that laid the ground for the production of new historical narratives concerning German corporations. The lack of legal determination encouraged the defendant corporations, including some of the largest German firms—Daimler Benz, Volkswagen, Degussa, Hugo Boss and Bayer (as well as numerous non-defendant corporations) to go beyond the formal requirements of the law and act in accordance with what they insisted were moral obligations, opening their archives, hiring historians to do research and publish their findings, all at a substantial cost.<sup>81</sup> It is important to remember that these archives were private and would not have been opened if not for the lawsuits.<sup>82</sup>

We can again compare the litigation to the mechanism created by the South African TRC, which granted individual amnesties in exchange for detailed confessions of individual perpetrators.<sup>83</sup> Though the settlement agreements did not contain any formal undertaking of the defendants to give researchers access to their archives, the lack of formal determination of liability and the immunity from future lawsuits encouraged them to open their archives to prestigious historians and fund their research. Indeed, as Feldman has stated, "Some major corporations that had claimed to have lost their documents or had stonewalled on the question for years, have miraculously found that which they denied having or had never sought."<sup>84</sup> This move from (legal) responsibility to (social) responsabilization is not unique to THL and expresses the general trend toward dissolution of the distinction between economic and non-economic spheres produced by

neoliberal practices.<sup>85</sup> From a strictly legal point of view, the settlement of the restitution litigation signifies immunity from legal liability.<sup>86</sup> Furthermore, the corporations' attitude can be explained as cold economic calculation, as it is less costly to research one's history after settlement has been reached.<sup>87</sup> Yet the "softer" type of responsibility embraced by the German corporations is much broader than legal liability and led to extensive self-investigation, which from a historical perspective represents a substantial advance.

We can now see how the production of narratives in the shadow of settlement avoids the pitfalls of didactic criminal trials. Precisely because the class actions were tailored to bypass adjudication, the judges used their powers to trigger disclosures of historical data and the production of historical narratives by outside players and did not purport to provide a definitive historical narrative themselves. Settlement thus recreated the separation between the judge and the historian, leaving to the latter the task of historical inquiry.<sup>88</sup> Settlement also avoids incentivizing historians to present partisan versions of history in an adversarial process. Though the parties initially hired historians to find evidence supporting their positions, it is the work of nonpartisan historical commissions—such as the Bergier Commission—which provided the most extensive narratives and in turn affected the legal process most significantly after settlement had been reached.<sup>89</sup>

### 3. Business history: Complicity and indirect perpetrators

Beyond the litigation's role as a trigger of historical narratives, does the legal process affect the *content* of the narrative? The gray area of complicity is very difficult to capture under the binary structure of criminal law that attributes responsibility only in cases of clear knowledge, intent and lack of duress. In cases in which choice and duress were mingled, and where considerable public pressure and terror existed alongside individual initiation and choice, criminal law is ill fitted for the job. Private law covers a broader and more varied spectrum of action than criminal law, enabling it to apprehend cases of indirect participation in wrongdoing. Thus, the turn to the civil class action, a path that is both based on private law and encourages settlement, allowed for a more sophisticated evaluation of the business company's responsibility by historians. By abandoning

the requirement of subjective intent and using doctrines such as unjust enrichment (which does not require any type of intent at all, the fact of holding the property sufficing if certain conditions are met), the law was able to reach entire sectors of the population, including corporations and other “enablers.”<sup>90</sup> Furthermore, the shift to civil class action procedure provided tools to deal with giant corporate entities, allowing the law to address the responsibility of the bureaucratic entity as such. This led to a boom in research on the business and economic history of Germany and Europe of the 1930s and 1940s, as well as to a proliferation of research on the subject of complicity of third parties in the Nazi crimes<sup>91</sup> and to a new historical approach to the role of private business in the Holocaust.<sup>92</sup>

Of course, the lack of historical research on the role of business in Nazi persecution until the 1990s was the product not only of the legal lacuna but also of the political situation until the end of the Cold War and the fact that most corporate archives were closed.<sup>93</sup> Nonetheless, THL focused public attention on the corporations, creating great pressure on them to deal with their past, and thereby constituted an important trigger for historians, who in the 1990s began to alter their research paths.<sup>94</sup> The scholarship written before the 1990s had concentrated on the ways in which business facilitated Hitler’s rise to power, taking for granted that the search for profit was the main motive of private corporations. The Bergier Report revealed a more complex picture of corporate decision making, as Swiss banks sought not simply profits but the long-term sustainability of their relationship with the Nazi regime.<sup>95</sup> Following the class actions, historians also began paying more attention to victims’ experiences. This led to a new interest in slave labor and in the role of business in aryanization and destruction—“the economic side of persecution.”<sup>96</sup>

The extensive historical research conducted as a result of THL led to interesting findings which contradicted some of the claims made by German corporations throughout the years, in particular in their presentation of themselves as victims of the Nazi regime operating under conditions of duress and lack of real choice. Part of this image had derived from the defenses afforded to individual business managers by criminal law in the trials of industrialists at Nuremberg, as well as from the *de facto* immunity granted to German corporations under the London Debt Agreement.<sup>97</sup> As Feldman explains:

One thing we have learned from the recent researches into the business history of the “Third Reich” is that even within the constricted conditions created by that regime, businessmen faced more alternatives than they later pretended and often made very reprehensible choices, not simply because they were bad or evil persons, although some were, but rather because of their political and cultural socialization. Even under those conditions, however, some of them made better choices than others.<sup>98</sup>

#### 4. From narrative to *nomos*?

We have seen that although historical research proliferated under THL, the task of storytelling was taken from the judge and transferred back to the historian. The question arises whether there are any normative ramifications to the historical narratives triggered by this litigation. An order issued in 2004 by Judge Korman in the litigation against Swiss banks is illuminating in this respect. As mentioned above, in order to adjudicate the post-settlement individual claims to Swiss bank accounts, the court had designed legal presumptions based on the findings of the Bergier Commission that the banks had systematically destroyed documents relating to Jewish Nazi-era accounts. One such presumption was that the account owner or heirs did not receive the proceeds of the account since “the Account Owners, the Beneficial Owners, and/or their heirs would not have been able to obtain information about the Account after the Second World War from the Swiss bank due to the Swiss banks’ practice of [destroying records or] withholding or misstating account information in their responses to inquiries by Account Owners and heirs because of the banks’ concerns regarding double liability.”<sup>99</sup> The banks vehemently objected to these presumptions, insisting that they had never engaged in any substantial misconduct, even though, at the distribution stage, the presumptions did not affect their overall financial liability which had been set by the settlement agreement. Visibly exasperated by what he deemed “a series of frivolous and offensive objections to the distribution process,” Judge Korman upheld the distribution rules, after an extensive discussion and analysis of the Bergier Report’s findings.<sup>100</sup> In doing so, the judge expressly sought to set the historical record straight, and in addition

assigned moral responsibility to the defendants for historic wrongdoing during the Nazi era and after the war, as well as for the present-day denial of responsibility:

The critical fact, and the one that the defendants appear to miss, is that the Swiss banks did not comport with basic notions of equity. For over half a century they destroyed evidence they knew to be relevant to legitimate claims that were being made and that, if substantiated through documentation, would expose the banks to liability. The fact that the destruction may not have violated Swiss law—which was not amended to accommodate the claims of heirs of account holders who the Swiss knew were slaughtered in the Holocaust and who could not make a successful claim if records were destroyed—is nothing more than a sad commentary on the manner in which the banks were permitted to operate.<sup>101</sup>

This judicial order constitutes an exceptional instance of historical determination by the judge in THL. As an exception, it highlights the lack of didactic narrative in the litigation as a whole. However, the decision is also instructive of the new relationship between judge and historian created by the litigation and of the possible normative implications of historical narratives under this new constellation. In this new relationship, even this exceptional judicial pronouncement on history avoids the risks of didactic criminal trials, as the judge takes on the modest task of interpreting the findings of the Volcker Committee and Bergier Commission which were acceptable to all sides. Thus, the judge's endorsement of a historical interpretation based on these reports does not imply choosing among competing, partisan versions of history especially produced for each party.<sup>102</sup> In determining that the Volcker committee's statements that it found no evidence of systematic document destruction "merit less weight than those of the Bergier Commission" because they emanate not from historical research but from an audit by accountants, Korman returns to the traditional judicial role of choosing among different types of expertise.<sup>103</sup> The decision however also reveals the disadvantages of privatization. Because the legal process is no longer constructed as a pyramid culminating in judgment, only legal experts can find this decision hidden among a long list of legal documents, even though it is published on a public website.

I believe that Judge Korman's decision sheds new light on the relationship between *nomos* and historical narrative. The banks' challenge to the presumptions despite their financial irrelevance suggests that settlement can have normative implications, as even legal presumptions of the post-settlement stage can produce a historical narrative.<sup>104</sup> In light of the unexpected normative implications of historical narrative, it becomes important to preserve the court's supervision of settlement. While the Swiss banks' litigation remained under court supervision, one of the settlement terms important to the German state and corporations was that the German litigation be removed in its entirety from the courts and administered by a German foundation. This additional step in the privatization of litigation risks granting the defendants the power to make normative decisions based on one-sided historical interpretations of their own past. Thus, in the absence of a judge, German authorities interpreted alone who qualifies as a forced laborer and refused to recognize the claims of Italian military internees, categorizing them instead as prisoners of war even though during the war their prisoner of war status had been removed.<sup>105</sup> And because the historical narrative is connected to the legal process, one should bear in mind the possibility that in the future even monetary settlement can be given precedential value in interpretations of corporate liability under international law. This analysis suggests that the dichotomy prevalent among legal scholars between normative judgment and settlement cannot hold in the face of the narratives produced by settlement.

## CONCLUSION

The word history contains the word story and reveals the main objective of its practitioner. When courts were called to judge history under the new legal paradigms created at Nuremberg in the wake of World War II, they were judged by historians for the quality of the story they offered in their judgments. This, in turn, brought jurists to reconsider the goals of the criminal trial and to adopt as legitimate its "didactic" goals of clarifying history and shaping collective memory. The didactic judgment, however, was met with suspicion and criticism by historians, beginning with the famous criticism of Hannah Arendt of the goals of the Israeli prosecution in the Eichmann trial, and continuing till this very day.



The Holocaust-era class actions offer an alternative. The huge financial settlements and lack of judgment clarifying legal responsibility stand, in the eyes of the critics, as a clear manifestation for the victory of “power” or politics over “justice.”<sup>106</sup> However, a more nuanced reading of the litigation reveals that the historical narrative is not missing. It is simply not found in the place we are used to looking for it—the judgment of the court. Thus, the litigation offers a new constellation for the relationship between judge and historian. While more active administratively, the judge takes a more modest, facilitative role in the narration of history, which is released from the blinders imposed by criminal adjudication. In a metaphoric way, the judge serves as “midwife” to historical investigation.

#### NOTES

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1. See Ronald W. Zweig, *German Reparations and the Jewish World: A History of the Claims Conference* (Boulder: Westview Press, 1987); Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001); Michael Thad Allen, “The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-de-Sac of International Human-Rights Law,” *Widener Law Review* 17, no. 1 (March 2011): 1–68.

2. Michael R. Marrus, *Some Measure of Justice: The Holocaust Era Restitution Campaign of the 1990s* (Madison: University of Wisconsin Press, 2009), 10–25. For a detailed exposition of the settlement mechanism, see Madeline Doms, “Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Victims,” *Transnational Lawyer* 14, no. 1 (Spring 2001): 171–206.

3. Under-Secretary Stuart Eizenstat played a pivotal role in the shaping of this agreement. See Doms, “Compensation.” For an overview of the litigation

campaign until 2006, see Michael J. Bazyler and Roger P. Alford, eds., *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (New York: New York University Press, 2006).

4. Roger M. Witten, "How Swiss Banks and German Companies Came to Terms with the Wrenching Legacies of the Holocaust and World War II: A Defense Perspective," in Bazyler and Alford, eds., *Holocaust Restitution*, 90.

5. Marrus, *Some Measure of Justice*, 90.

6. For example, Samuel Baumgartner, "Human Rights and Civil Litigation in United States Courts: The Holocaust Era Cases," *Washington University Law Quarterly* 80, no. 3 (January 2002): 835–54; idem, "Class Actions and Group Litigation in Switzerland," *Northwestern Journal of International Law and Business* 27, no. 2 (Winter 2007): 315–16. See also Constantin Goschler, "German Compensation to Jewish Nazi Victims after 1945," in Peter Hayes and Jeffrey M. Diefendorf, eds., *Lessons and Legacies VI: New Currents in Holocaust Research* (Evanston, IL: Northwestern University Press 2004): 401.

7. Leora Bilsky, "Transnational Holocaust Litigation," *European Journal of International Law* 23, no. 2 (2012): 349–75. (The present article and this previous work form part of a larger book project on THL.)

8. Jonathan A. Bush, "The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said," *Columbia Law Review* 109, no. 5 (June 2009): 1094–262. The criminal prosecutions of German and Japanese industrialists and bankers before the victors' military tribunals after World War II had targeted the individuals managing the firms and not the legal entity themselves. Anita Ramasastry, "Corporate Complicity, From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact of the Liability of Multinational Corporations," *Berkeley Journal of International Law* 20, no. 1 (2002): 104–17. Managers of private corporations have rarely been the subject of criminal trials for their involvement in the Holocaust. Even when they were, courts have been reluctant to convict defendants in the absence of unquestionable criminal intent. For example, in the postwar trials in Germany of the members of the board of I. G. Farben, most defendants were acquitted of charges relating to the use of slave labor due to lack of clear evidence of knowledge and direct engagement of the defendants. See Alberto L. Zuppi, "Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert," *Louisiana Law Review* 66, no. 2 (Winter 2006): 495–526; and Benjamin Ferencz, *Less Than Slaves, Jewish Forced Labor and the Quest for Compensation* (Cambridge, MA: Harvard University Press, 2002), 34–67. The fumbling beginnings at Nuremberg were further stunted by the 1953 London Debt Agreement, which froze individual claims for compensation against private German defendants until a peace treaty with Germany formally ending World War II be signed, and this in part following pressure from German

business. Gerald D. Feldman, "Holocaust Assets and German Business History: Beginning or End?" *German Studies Review* 25, no. 1 (February 2002): 25. Such a peace treaty was, of course, never formally signed.

9. See Bilsky, "Transnational Holocaust Litigation." Domestic civil proceedings in Europe did not prove more successful than criminal law. German compensation legislation's failure to pay "slave laborers" gave rise to lawsuits against a few of the big industrial firms whose abuses had been revealed in the Nuremberg trials. Despite intensive litigation on many test cases, Germany's highest court held that these claims, being in the nature of reparations, could be considered only as part of a peace treaty with a united Germany. The exception to this rule was a case brought against I.G. Farben which ended in settlement. See Ferencz, *Less Than Slaves*, 34–67.

10. Harold Honju Koh, "Transnational Public Law Litigation," *Yale Law Journal* 100, no. 8 (June 1991): 2347–402.

11. Lawrence Douglas, "Shattering Nuremberg: Toward a Jurisprudence of Atrocity," *Harvard International Review*, November 21, 2007, <http://hir.harvard.edu/shattering-nuremberg> (accessed May 22, 2012). See generally Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2001).

12. Owen J. Fiss, "The Supreme Court, 1978 Term—Foreword: The Forms of Justice," *Harvard Law Review* 93, no. 1 (November 1979): 1–58.

13. With the Convention on the Non-Applicability of Statutory Limitations of 1968, the international legal community agreed that supranational crimes such as crimes against humanity and genocide should be controlled by no prescriptive period. Ratner and Abrams, *Accountability for Human Rights*, 143.

14. Douglas, "Shattering Nuremberg."

15. See Leora Bilsky, *Transformative Justice: Israeli Identity on Trial* (Ann Arbor: University of Michigan Press, 2004); Douglas, *The Memory of Judgment*; Mark Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction, 1997); Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964); Martti Koskenniemi, "Between Impunity and Show Trials," *Max Planck Yearbook of United Nations Law* 6, no. 1 (2002): 1–32; and Robert Sloane, "The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law," *Stanford Journal of International Law* 43, no. 1 (Winter 2007): 39–94.

16. The ATS grants federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. See George P. Fletcher, *Tort Liability for*

*Human Rights Abuses* (Oxford and Portland: Hart, 2008). Since the end of the 1990s, federal courts have allowed ATS lawsuits to be brought against corporations, however with very limited success. See Beth Stephens, "Judicial Deference and the Unreasonable Views of the Bush Administration," *Brooklyn Journal of International Law* 33, no. 3 (2008): 815–16. Corporate liability under the ATS has become increasingly uncertain since the decision in *Kiobel v. Royal Dutch Petroleum Co., et al.*, 621 F.3d 11 (2d Cir. Sept. 17, 2010), *cert. granted* (U.S. Oct. 17, 2011) (No. 10-1491). The U.S. Supreme Court heard oral arguments in the case on February 28, 2012, and ordered reargument so as to include the additional question of whether the ATS applies to violations of the law of nations occurring outside the territory of the United States. *Transcript of Oral Argument, Kiobel v. Royal Dutch Petroleum Co., et al.* (U.S. Feb. 28, 2012) (No. 10-149), available at *Kiobel v. Royal Dutch Petroleum Co., et al.*, 621 F.3d 11, order for reargument (U.S. Mar. 5, 2012), available at <http://www.supremecourt.gov/orders/courtorders/030512zr.pdf> (accessed August 8, 2012).

17. Fiss, "The Supreme Court, 1978 Term"; and Judith Resnik, "Managerial Judges," *Harvard Law Review* 96, no. 2 (December 1982): 374–448. See also Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* (New Haven: Yale University Press, 1983), 147–81.

18. See Michael J. Bazyler, *Holocaust Justice: The Battle for Restitution in America's Courts* (New York: New York University Press, 2003), 54–58. On the emergence of hybrid human rights mass tort litigation that merges international law with American class action procedures, see Katharyn L. Boyd, "Collective Rights Adjudication in U.S. Courts: Enforcing Human Rights at the Corporate Level," *Brigham Young University Law Review*, no. 4 (1999): 1139–214; Margaret G. Perl, "Note, Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations," *Georgetown Law Journal* 88, no. 4 (April 2000): 773–98; and Beth Van Schaack, "Unfulfilled Promise: The Human Rights Class Action," *University of Chicago Legal Forum* (2003): 279–352.

19. Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge and New York: Cambridge University Press, 2011), 37.

20. For a discussion of the distinction between voice and control with respect to the victim's standing in the criminal trial, see George P. Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (New York: Addison-Wesley, 1995). While in THL control of the lawsuit was privatized, one should not overestimate the degree of control granted to the victims themselves. Class actions are vulnerable to severe representation problems. See for example John Coffee Jr., "Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation," *Columbia Law Review* 100, no. 2 (March 2000): 370–439. These problems were reflected in THL, which were criticized for enriching the lawyers at the expense

of victims. See Bazylar, *Holocaust Justice*, 92–95. A comparison with the active role played by victims in the Mauthausen trial—where “former inmates worked as translators, clerks, personal assistants, and interrogators ... wrote histories of the camp, identified perpetrators for arrest, and later helped choose defendants for trial”—highlights the low level of control given to the victims in THL relative to their lawyers. Tomaz Jardim, *The Mauthausen Trial: American Military Justice in Germany* (Cambridge, MA: Harvard University Press, 2012), 4.

21. Wilson, *Writing History*, 1–2.

22. See for example Stephen Whinston, “Can Lawyers and Judges Be Good Historians? A Critical Examination of the Siemens Slave-Labor Cases,” *Berkeley Journal of International Law* 20, no. 1 (2002): 160–75.

23. Christopher R. Browning, “German Memory, Judicial Interrogation, and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony,” in Saul Friedlander, ed., *Probing the Limits of Representation: Nazism and the “Final Solution”* (Cambridge, MA: Harvard University Press, 1992), 22.

24. The mental requirement for genocide is the specific intention to destroy the group, in addition to the criminal intent to kill, cause bodily harm or perpetrate other acts that can amount to genocide. See Antonio Cassese, “Genocide,” in idem, ed., *The Oxford Companion to International Criminal Law* (Oxford and New York: Oxford University Press, 2008), 335.

25. See Robert M. W. Kempner, “The Nuremberg Trials as Sources of Recent German Political and Historical Materials,” *American Political Science Review* 44, no. 2 (June 1950): 447–59; Wilson, *Writing History*, 6–11.

26. Marrus, *Some Measure of Justice*, 98–99.

27. See Oscar G. Chase, “American “Exceptionalism” and Comparative Procedure,” *American Journal of Comparative Law* 50, no. 1 (Winter 2002): 292; Robert M. Cover, Owen M. Fiss and Judith Resnik, *Procedure* (New York: The Foundation Press, 1988), 826–30.

28. Independent Commission of Experts Switzerland—Second World War, *Switzerland, National Socialism and the Second World War: Final Report* (Zurich: Pendo Verlag, 2002) (hereafter *Bergier Report*), 255–61; and Leonard Orland, *A Final Accounting: Holocaust Survivors and Swiss Banks* (Durham: Carolina Academic Press, 2010), 21.

29. *Bergier Report*, 446.

30. Bazylar, *Holocaust Justice*, 47.

31. *Bergier Report*, 455. Additional aspects of Swiss law, such as the unusual absence of an escheat law requiring unclaimed accounts to be transferred to the state, combined with regulations authorizing the destruction of account records after ten years, provided economic incentives for Swiss banks to hide the existence of accounts. In addition, the Swiss banks were keen to avoid any close examination

of the large transfers of money made from Jewish accounts to the Reichsbank, as access to such information would surely have led to liability. See *In re Holocaust Victim Assets Litigation*, 319 F. Supp. 2d 301 (2004), Amended Memorandum and Order (June 1, 2004) (hereafter *Victim Assets Litigation*, 319F).

32. Bazzyler, *Holocaust Justice*, 39.

33. The Volcker Committee, though independent, was subject to much pressure from the Swiss banks. For a description of the compromises it had to make in order to produce findings that were susceptible of being complied with, see *Victim Assets Litigation*, 319F, 323–26. However, it avoided a long process of discovery that could have taken years, and it transferred the cost of this very expensive audit to the banks.

34. The Volcker Committee, in its published findings from December 6, 1999, had identified nearly 54,000 accounts that it believed “possibly” or “probably” belonged to victims of Nazi persecution. “The conservative estimate of 54,000 relevant accounts was met with surprise and disfavor by the Swiss Bankers’ Association and the Swiss Federal Banking Commission. They turned to the Volcker Committee’s auditors and asked them to further ‘scrub’ the accounts the auditors identified. After two rounds of ‘scrubbing’ the auditors decided that out of the 54,000 accounts previously identified, there were only 21,000 accounts that ‘probably’ belonged to Nazi victims and 15,000 accounts that ‘possibly’ belonged to Nazi victims.” *Ibid.*, 324.

35. The Simon Wiesenthal Center used its team of researchers to gather evidence implicating the Swiss banks. Furthermore, the World Jewish Congress, D’Amato’s Senate Banking Committee and the U.S. Holocaust Memorial Museum, as well as the Swiss government, the Swiss banks and their lawyers each sent teams to research the wartime documents housed in the U.S. National Archives. Bazzyler, *Holocaust Justice*, 8–9.

36. Historical expertise is required at various stages of international criminal trials. It is required in the trials of the higher echelons of power, in order to link them to the crimes committed by their subordinates. See Wilson, *Writing History*, 22. Historical understanding may also be required in order to determine the extent of the application of international humanitarian law, which depends upon the particular character of the conflict. In addition, an understanding of the historical context of crimes such as genocide is necessary in order to make sense of individual criminal acts, as well as to prove the special intent to destroy a group which forms part of the crime of genocide (*ibid.*, 71–73, 86–111). Historians also served as expert witnesses in civil libel trials and in Holocaust denial trials. Douglas, *The Memory of Judgment*, 226–56; Richard J. Evans, “History, Memory and the Law: The Historian as Expert Witness,” *History and Theory* 41, no. 3 (October 2002): 328.

37. Letter to the President of the Bordeaux Assizes Court, in Richard J. Golsan, ed., *Memory, the Holocaust and French Justice: The Bousquet and Touvier Affairs* (Hanover: University Press of New England, 1996), 194. See also Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, trans. Ralph Schoolcraft (Philadelphia: University of Pennsylvania Press, 2002), 48–83.

38. Bazyler, *Holocaust Justice*, 8–9. For example, to evaluate the extent of its potential liability toward slave and forced laborers, the German government consulted with historian Lutz Niethammer, who estimated that between 1.2 million and 1.5 million laborers were still alive. Stuart E. Eizenstat, *Imperfect Justice, Looted Assets, Slave Labor, and the Unfinished Business of World War II* (New York: Public Affairs, 2003), 238–39. Otto Graf Lambsdorff, who served as Germany's representative in the settlement negotiations, notes that the decision of the German state to contribute to the settlement fund “was made after it became known that a very high percentage of forced laborers had been employed—or rather used—by the public sector of the Third Reich.” Otto Graf Lambsdorff, “The Negotiations on Compensation for Nazi Forced Laborers,” in Bazyler and Alford, eds., *Holocaust Restitution*, 173.

39. Fiss, “The Supreme Court, 1978 Term.”

40. Resnik, “Managerial Judges,” 387–91.

41. From 1999 to 2003 the International Criminal Tribunal for the Former Yugoslavia (ICTY) adopted reforms permitting judges to actively supervise their cases and to exercise discretion in relation to historians' expert testimony. This change has been interpreted as a move toward a more inquisitorial style of adjudication, which can be partly attributed to the mixed nature of international law (combining elements of Anglo-American and civil law systems), and partly to the need of judges to have a good grasp of the historical context of crimes such as genocide. Expert testimony by historians is treated as hearsay testimony under common law, and hence the need arose to give the judge more discretionary powers with respect to historians' testimonies. Wilson, *Writing History*, 59–61. One author has argued that the ICTY reforms are better explained as an instance of judicial managerialism aimed at efficiency, similar to the model developed in the context of U.S. civil procedure. Máximo Langer, “The Rise of Managerial Judging in International Criminal Law,” *American Journal of Comparative Law* 53, no. 4 (2006): 835–909. This analysis ignores, however, a major difference between U.S. civil procedure and international criminal law: in the ICTY, the ultimate goal of efficient case management is adjudication, whereas in civil procedure it is settlement.

42. Resnik, “Managerial Judges,” 391–95.



43. Wilson states that the blurring of the historical and legal functions of courts was most apparent in the trial of Slobodan Milošević before the ICTY (*Writing History*, 1).

44. The court's managerial activism is exemplified in particular by Judge Korman of the Brooklyn Federal Court in the Swiss banks litigation, who, among other things, initiated the consolidation of the three initial claims, urged the plaintiffs to appoint Burt Neuborne as special counsel to the plaintiffs and is credited with being the architect of the settlement and with overseeing the process of distribution (Bazylar, *Holocaust Justice*, 11, 27, 38–44).

45. Special masters are extrajudicial personnel used by the court to perform a wide variety of judicial functions, such as negotiating settlement or determining the size and allocation of damages. They are increasingly used to assist with complex cases in light of crowded dockets. John J. Cound et al., *Civil Procedure: Cases and Materials*, 6th ed. (St. Paul, MN: West Publishing, 1993), 872–73.

46. Burt Neuborne, "Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts," *Washington University Law Quarterly* 80, no. 3 (2002): 830. In response to the criticism leveled at the questionnaires, Neuborne writes that "approximately 580,000 questionnaires were returned, demonstrating overwhelming support for the settlement. Only 300 persons elected to opt out of the class" (827–28 n. 117).

47. On September 11, 2000, the Special Master filed the Proposed Plan of Allocation and Distribution of Settlement Proceeds, a two-volume document of approximately 900 pages, which recommends how to allocate the settlement funds among the five classes of claims created by the settlement agreement; see <http://www.swissbankclaims.com/Chronology.aspx> (accessed March 26, 2012). The main text of the plan presents the historical context, including summaries of the Volcker, Bergier and Eizenstat reports.

48. For example, Appendix H to the Plan, which deals with the Slave Labor II Class, states that it has consulted the work of "leading scholars in the field": Keith Allen, David Bankier, Avraham Barkai, Yehuda Bauer, Randolph L. Braham, Christopher R. Browning, Martin Dean, Benjamin Ferencz, Henry Friedlander, Martin Gilbert, Israel Gutman, Peter Hayes, Ulrich Herbert, Raul Hilberg, Felicja Karay, Shmuel Krakowski, Konrad Kwiet, Falk Pingel, Franciszek Piper, Daniel Romanovsky, Christopher Simpson, Sybille Steinbacher, Aharon Weiss and Leni Yahil. Similarly, Appendix J, which deals with the Refugee Class, surveys the history of Switzerland's treatment of refugees during the war, to conclude that an individualized claims process is possible, and that "claimants alleging 'detention' ... 'mistreatment' or 'abuse' ... should receive compensation more limited than that allocated to those whom Switzerland expelled or turned away" (J-37).



49. In the absence of historical research on the subject, he compared a list of German entities known to have used slave labor with the findings of the Volcker Committee (which identified German companies with a Swiss bank account) and the Swiss Federal Archives (which had a list of German assets frozen in 1945) (H-52-54). The class action's website makes public the long list of German companies with Swiss assets, including a list of the locations in which slave labor was used. See [http://www.swissbankclaims.com/Documents\\_New/667202.pdf](http://www.swissbankclaims.com/Documents_New/667202.pdf) (accessed March 26, 2012). Though the appendix states that the lists are incomplete and that further research is necessary, the lists show that virtually all German entities that used slave labor had assets in Switzerland.

50. See Martha Minow, *Between Vengeance and Forgiveness, Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998), 52–90. In the absence of incriminating documents, the ingenuity of the TRC was to find a way to use the law as a facilitator for writing history by promising individual amnesty from criminal liability in return for confessions. We can think of THL as adapting this kind of solution to private law, by creating a process whose main aims are monetary compensation, clarification of history and reconciliation, the combination of multiple objectives being a hallmark of TRCs.

51. During the settlement negotiations, the defendants had claimed that very few Swiss companies had used slave labor. Once the settlement was reached and the amount of liability became fixed, however, the defendants retracted this statement. Order of Edward R. Korman, *In re Holocaust Victim Assets Litigation*, April 4, 2001, available at [http://www.swissbankclaims.com/Documents/DOC\\_29\\_slis.pdf](http://www.swissbankclaims.com/Documents/DOC_29_slis.pdf) (accessed March 26, 2012).

52. Ibid. The list of companies that identified themselves and the information they provided can be found at [http://www.swissbankclaims.com/Documents\\_New/697505.pdf](http://www.swissbankclaims.com/Documents_New/697505.pdf) (accessed March 26, 2012).

53. *In Re Holocaust Victim Assets Litigation (Swiss Banks) Special Master's Proposal, September 11, 2000*, Appendix H, H52-53, available at <http://swissbankclaims.com/DistributionPlan.htm> (accessed May 22, 2012).

54. For a discussion of the settlement's objective of extinguishing "all World War II-related claims against Switzerland and its industries through this settlement," see Bazzyler, *Holocaust Justice*, 36.

55. The "looted assets" class, for example, could not be administered according to an individualized program because of insufficient information regarding cases of looted property. Instead, the American Joint Distribution Committee administered looted property payments to impoverished survivors in the former Soviet Union. *Special Master's Proposal*, 39 and 57–58.

56. Orland, *A Final Accounting*, 63–70. The tribunal operates according to elaborate rules of evidence, with special burdens of proof and rebuttable presump-

tions designed to deal with the banks' concerted destruction of the historical record. See "Rules Governing the Claims Resolution Process (As Amended)," available at [http://www.crt-ii.org/\\_pdf/governing\\_rules\\_en.pdf](http://www.crt-ii.org/_pdf/governing_rules_en.pdf) (accessed March 26, 2012) (hereafter "CRT Rules").

57. See [http://www.crt-ii.org/\\_awards/index.phtml](http://www.crt-ii.org/_awards/index.phtml) (accessed March 26, 2012).

58. Burt Neuborne, "A View from the United States—Potentials and Pitfalls of Aggregate Litigation: The Experience of the Holocaust Litigation" (unpublished ms. on file with author), 47.

59. Thus the metaphor of "statistic" (as opposed to narration) captures the essence of the crime. Dan Diner, "Varieties of Narration," in idem, *Beyond the Conceivable: Studies on Germany, Nazism, and the Holocaust* (Berkeley: University of California Press, 2000), 179.

60. Ibid., 180.

61. See Bilsky, *Transformative Justice*, 85–116.

62. Thus, for example, Arendt argued that the Eichmann court's reliance on the concept of "criminal intent," premised on an understanding of crime as deviance, was in tension with the goal of judging the way in which the Nazi regime operated as a system. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963), 276. Similarly, with respect to the trials of Maurice Papon and Klaus Barbie, Henry Rousso has criticized the attempt to learn about the Vichy regime in general through the idiosyncratic personalities of the defendants (*The Haunting Past*, 56). For a discussion of the distortion created by German criminal law at the Auschwitz-Frankfurt trial by the requirement of base motives, excluding most concentration camp functionaries, see Devin. O Pendas, *The Frankfurt Auschwitz Trial, 1963–1965: Genocide, History and the Limits of Law* (Cambridge: Cambridge University Press, 2006), 53–79.

63. For a review of the intentionalist/functionalist debate, see Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation* (London and Baltimore, MD: E. Arnold, 2000), 69–92.

64. Richard Bessel, "Functionalists vs. Intentionalists: The Debate Twenty Years on or What Has Happened to Functionalism and Intentionalism?" *German Studies Review* 26, no. 1 (February 2003): 15–20; Diner, "Varieties of Narration," 178. However, the 2011 conviction of John Demjanjuk by a criminal court in Munich for taking part in the murder of 28,000 at Sobibor, which was based solely on his having served as a guard in the Sobibor camp, in the absence of any evidence of direct participation in murder, brings the criminal law closer to the functionalist school. It also confirms Arendt's observation in her review of the Frankfurt-Auschwitz trial, that any person who served in a concentration camp, and not just the extraordinary sadists, should be held responsible on the basis of

his service. Hannah Arendt, "Auschwitz on Trial," reprinted in Jerome Kohn, ed., *Responsibility and Judgment* (New York: Schocken Books, 2003), 243–44. See Lawrence Douglas, "Ivan the Recumbent, or Demjanjuk in Munich: Enduring the 'Last Great Nazi War-Crimes Trial,'" *Harper's Magazine*, March 2012, 45–52.

65. Kershaw, *The Nazi Dictatorship*, 74–78; Leora Bilsky, "Hannah Arendt's Judgement of Bureaucracy," in Marco Goldoni and Christopher McCorkindale, eds., *Hannah Arendt and the Law* (Oxford: Hart, 2012), 271–90.

66. For example, the Volcker Committee conducted what has been referred to as "the most costly audit in history"—\$700 million. Bazylar, *Holocaust Justice*, 300. The investigation was conducted by more than 600 accountants from the four leading accounting firms in the world. *Ibid.*, 301.

67. For a similar critique of the way class actions undermine individual stories, see Catharine A. MacKinnon, "Collective Harms under the Alien Tort Statute: A Cautionary Note on Class Actions," *ILSA Journal of International & Comparative Law* 6, no. 2 (1999–2000): 567–74.

68. For example, since the Swiss banks had destroyed many relevant transactional records, the Special Master in the Swiss banks litigation drafted rebuttable presumptions governing the size and payment status of categories of matched accounts with no surviving transactional records, relying on statistical averages developed by the Volcker auditors. See "CRT Rules," Art. 29.

69. In "Can Lawyers and Judges Be Good Historians?" Whinston analyzed two court rulings granting motions to dismiss in German slave labor cases, in order to show how the court drew incorrect historical conclusions regarding Jewish slave labor from the record before it. Specifically, the basis for the court's dismissal of the suits on grounds of nonjusticiability was the portrayal of Jewish slave labor as part of the war effort, contrary to historical findings that it was primarily part of genocidal persecution independent of the war. However, the historical narrative about the nature of the involvement of Siemens and other German corporations in the Nazi regime is to be found not in a court decision but in the reports of historical commissions and of individual historians commissioned by German firms, partly as a result of the litigation. For a history of Siemens during the Third Reich, see Wilfried Feldenkirchen, *Siemens, 1918–1945* (Columbus: Ohio State University Press, 1999). Feldenkirchen was a professor of business history commissioned by Siemens, before the restitution lawsuits were filed, to research the company's history. See Kees Gispén, "Review: *Siemens, 1918–1945*," *Technology and Culture* 41, no. 3 (July 2000): 606–8.

70. Sapir's father, a wealthy Polish banker, had deposited money with Credit Suisse. Before being deported to his death in Majdanek concentration camp, he told his daughter about his bank account, and she promised him she would find it. After the war, Credit Suisse refused to even search for the account, asking to

see her father's death certificate. Her documentation, including photographs of him on a train with Jews bound for Majdanek and Nazi records of his transport there were not sufficient. Bazylar, *Holocaust Justice*, 15–16.

71. *In re Holocaust Victim Assets Litigation*, Transcript of Civil Cause for Fairness Hearing before the Honorable Edward R. Korman United States District Judge, November 29, 1999. See Elizabeth J. Cabraser, "Human Rights Violations as Mass Torts: Compensation as a Proxy for Justice in the United States Civil Litigation System," *Vanderbilt Law Review* 57, no. 6 (November 2004): 2209–38.

72. These narratives are more difficult to find, because they are not concentrated in a court decision as in a criminal case, but they are nevertheless accessible to the public through the media and the Swiss banks class action's website.

73. Helen B. Junz, "Confronting Holocaust History: The Bergier Commission's Research on Switzerland's Past," *Jerusalem Center for Public Affairs*, no. 8, May 1, 2003. For a list of research commissions relating to Holocaust-era assets and slave labor established by national governments, see <http://www.ushmm.org/assets/> (accessed March 26, 2012). Historical commissions were commissioned not only by countries occupied by Germany during the war but also by former neutral states and even enemies of the Nazis. Constantin Goschler and Philipp Ther, "A History without Boundaries: The Robbery and Restitution of Jewish Property in Europe," in Martin Dean, Constantin Goschler and Philipp Ther, *Robbery and Restitution: The Conflict over Jewish Property in Europe* 3 (New York: Berghahn, 2007), 7.

74. *Bergier Report*, 277.

75. *Ibid.*, 498–99.

76. Researchers point to various geopolitical and legal factors to explain the defendant companies' acceptance of moral responsibility in the 1990s, among them the end of the Cold War, the opening of archives in East and West, the rise of the question of restitution of property in Central and Eastern Europe, the regrouping of Jewish organizations around the question of restitution, as well as economic processes of globalization, leading to the opening of the American market to European companies. See Marrus, *Some Measure of Justice*, 75–84; and Elazar Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York: Norton, 2000), 90–91. Moreover, no large foreign financial institution can afford to have its license to do business in the State of New York withdrawn. A campaign led from New York City and drawing the support of public officials was therefore particularly threatening to the Swiss and other European banks sued. Nonetheless, the class action procedure played a key role in making the general claims against the corporations credible and threatening, in turn transforming the history of corporate wrongdoing during the war.

77. Feldman, "Holocaust Assets," 26. His investigation resulted in his study, *Allianz and the German Insurance Business, 1933–1945* (Cambridge and New York: Cambridge University Press, 2001). See also Harold James, *The Deutsche Bank and the Nazi Economic War against the Jews* (New York: Cambridge University Press, 2001), 4.

78. In the criminal investigations leading to war crimes trials, the state often employed historians. See, for example, Konrad Kwiet, "A Historian's View: The War Crimes Debate Down Under," *Dapim: Studies on the Shoah*, no. 24 (2009): 319–39. Kwiet was a historian employed by the Australian Ministry of Justice to examine war crimes charges brought against Australian citizens and residents. Similarly, historians studying the archives of German corporations are not independent but employed by the corporations.

79. See Jonathan Steinberg, *The Deutsche Bank and Its Gold Transactions during the Second World War* (Munich: Beck, 1999), 9–12. For discussion of the threats to researcher independence presented by this new model of historical research, see Feldman, "Holocaust Assets"; Gerald D. Feldman, "The Historian and Holocaust Restitution: Personal Experiences and Reflections," *Berkeley Journal of International Law* 23, no. 2 (2006): 347–57; and Christopher Simpson, "Letter to the Editor: Clash over Corporate Accountability and the Holocaust," *German Politics and Society* 20, no. 3 (2002): 132–41.

80. Friedmann and Wiegrefe, "Historians Deliver Damning Verdict: Study Highlights German Foreign Ministry's Role in Holocaust," *Der Spiegel Online*, October 25, 2010.

81. See, for example, Peter Hayes, *From Cooperation to Complicity: Degussa in the Third Reich* (Cambridge and New York: Cambridge University Press, 2004), xv. Since the 1970s Germany's official public culture has sought to distinguish between guilt and responsibility by rejecting the collective nature of guilt and insisting on the German population's collective responsibility. See Daniel Levy and Natan Sznaider, *Human Rights and Memory* (University Park: Pennsylvania State University Press, 2010), 109. The response of German defendants to the restitution litigation reflects this position. See Witten, "How Swiss Banks," 90.

82. Although records relating to the companies whose executives were tried at Nuremberg were made public, they only related to the companies in question—Krupp, IG Farben, and Flick. Kempner, "The Nuremberg Trials," 448, 456. In this sense the restitution lawsuits constitute another example of the ways in which trials can mobilize resources to collect research material. Following the Nuremberg, Eichmann and other criminal trials, historians relied greatly on material exposed in those trials to alter the historical narrative, as for example regarding "ordinary soldiers." See Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: HarperCollins, 1998).

83. For the failed attempt to create an archive of business involvement in Apartheid, notwithstanding the TRC's harsh judgment of business, see Jaco Barnard-Naudé, "For Justice and Reconciliation to Come: The TRC Archive, Big Business and the Demand for Material Reparations," in François Du Bois and Antje Du Bois-Pedain, eds., *Justice and Reconciliation in Post-Apartheid South Africa* (Cambridge and New York: Cambridge University Press, 2008), 172.

84. Feldman, "Holocaust Assets," 27.

85. Ronen Shamir, "The Age of Responsibilization: On Market-Embedded Morality," *Economy and Society* 37, no. 1 (2008): 1–19.

86. Moreover, while in the past one's responsibility for involvement in the Holocaust was based on the answer to the question "what did you do?" (the question asked by criminal law when it attempts to determine guilt), today the focus of attention is on a question of a secondary order: "how did you deal with your past?" This was pointed out by Jose Brunner, at the opening of the Holocaust Survivors Clinic, Tel Aviv University, April 3, 2011. The legal significance of this development is ambiguous. When the law encourages corporations to investigate their past as a measure of their good "citizenship," it encourages historical research and the production of new narratives. However, the disconnection between legal and moral responsibility allowed by the civil class action and its settlement also prevented the creation of a formal legal precedent of corporate liability.

87. See Michael R. Marrus, "The Case of the French Railways and the Deportation of Jews in 1944," in David Bankier and Dan Michman, eds., *Holocaust and Justice: Representation of the Holocaust in Post-War Trials* (Jerusalem: Yad Vashem, and New York: Berghahn Books, 2010), 245–64. Whereas the finality offered by settlement in THL provided incentives for corporations to investigate their past, in the case of the French railways a civil lawsuit by a deportee was initiated after historical research had exposed the railways' role in deportation, thereby having an inhibiting effect on historical inquiry.

88. My assessment of the importance of settlement for the production of the historical narrative goes against the view elaborated by Owen Fiss, according to which settlement stands in direct conflict with the expressive functions of structural reform litigation. See Owen J. Fiss, "Against Settlement," *Yale Law Journal* 93, no. 6 (May 1984): 1073–92. I elaborate on this point in Bilsky, "Transnational Holocaust Litigation."

89. The Bergier Report was extensively quoted and its findings used in the settlement distribution plan and the court decisions approving it. See Settlement Distribution Plan, available at <http://www.swissbankclaims.com/Distribution-Plan.htm> (accessed March 26, 2012), and *Victim Assets Litigation*, 319 F.

90. See Götz Aly, *Hitler's Beneficiaries: Plunder, Racial War, and the Nazi Welfare State* (New York: Metropolitan Books, 2005), 183. Though Aly is critical of

the focus on large corporations at the expense of ordinary people when trying to understand complicity with the Third Reich, his quest for structural explanations of complicity leads him to turn his gaze to financial organizations.

91. Ulrich Herbert, *Hitler's Foreign Workers: Enforced Foreign Labor in German Under the Third Reich*, trans. William Templer (Cambridge and New York: Cambridge University Press, 1997); Christopher R. Browning, *Nazi Policy, Jewish Workers, German Killers* (Cambridge and New York: Cambridge University Press, 2000). It has been argued that, ironically, while lawyers have increasingly been willing to assign culpability to companies committing human rights violations, historians of big business under the Nazis have turned away from judgmental history, preferring the professional standards of history to those of law. See Bush, "The Prehistory of Corporations," 98–99 n. 32. I believe, however, that the lawyers themselves have turned away from the criminal law paradigm to civil law and to settlement, which brings the two fields closer together.

92. Constantin Goschler, "Die Enteignung der Juden und die Europäisierung des Holocaust," in Hartmut Berghoff, Jürgen Kocka and Dieter Ziegler, eds., *Wirtschaft im Zeitalter der Extreme: Beiträge zur Unternehmensgeschichte Deutschlands und Österreichs* (Munich: Beck, 2010) 337–53; Dan Diner and Gotthart Wunberg, eds., *Restitution and Memory: Material Restoration in Europe* (New York: Berghahn Books, 2007). New historical research in France about the role of French banks during the Vichy regime points to the initiatives and enthusiasm of the French banks and industrial sector, acting out of an interest in profits, to cooperate with the Third Reich, even when it was against the interests and policies of the Vichy regime. See Vivian Grosswald Curran, "Competing Frameworks for Assessing Contemporary Holocaust-Era Claims," *Fordham International Law Journal* 25, no. 6 (2001): S121–27.

93. Feldman explains the way the ideological framework of the Cold War froze historical research on the role of business corporations under the Third Reich as follows: "The historical discussion, insofar as there was one, was framed by Cold War-generated ideological fantasies, one side making unprovable, and ... absurd claims about business as the promoter of National Socialism and dominant force in the Nazi regime, while critics of the left position often labored with might and main to disprove easily disprovable arguments but did not really do much to uncover the actual relationship between business and Nazi regime in the various phases of the 'Third Reich's' hyperactive twelve-year history" ("Holocaust Assets," 26). Feldman himself was not free of the influence of ideology. See Peter Novick, *That Noble Dream: The "Objectivity Question" and the American Historical Profession* (Cambridge: Cambridge University Press, 1988), 612–21.

94. Feldman, "Holocaust Assets," 25.

95. *Bergier Report*, 264, 265 and 301.

96. James, *The Deutsche Bank*, 1–6.

97. Many (though not all) defendants in the trials of industrialists at Nuremberg were acquitted due to the defense of necessity. See Ramasastry, “Corporate Complicity,” 139–41. For the London Debt Agreement see n. 8 above.

98. Feldman, “Holocaust Assets,” 28.

99. “CRT Rules,” Art. 28 (h).

100. *Victim Assets Litigation*, 319 F, 302.

101. *Ibid.*, 320–21.

102. It is true that the Volcker Committee has been criticized for being too lenient with the defendants due to the accountants’ general interest in the well-being of the Swiss banking industry. Burt Neuborne, “Toward Common Procedures in Seeking Compensatory Relief for the Violation of Core Aspects of Customary International Law: The Experience of the Holocaust Cases,” paper presented at the Conference of the International Association of Procedural Law, Toronto, 2009 (ms. on file with author). Nevertheless, the committee was formed by joint agreement of the parties and its findings do not constitute expert testimony produced especially for one party as in a criminal trial.

103. *Victim Assets Litigation*, 319 F, 320.

104. Another example of a normative interpretation of a non-adjudicatory legal measure is the postwar dissolution of German companies that had assisted in the Nazi war effort. This dissolution has recently been invoked as a precedent for the proposition that corporations are subject to customary international law. See *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, (7th Cir. 2011), and *Kiobel v. Royal Dutch Petroleum Co. Brief of Amici Curiae Nuremberg Scholars to the Supreme Court*, December 21, 2011.

105. International Court of Justice, “Jurisdictional Immunities of the State (Germany v. Italy, Greece Intervening),” February 3, 2012, 15.

106. Marrus, *Some Measure of Justice*, 27.



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