

ARTICLE

THE FORGETFULNESS OF NOBLESSE: A CRITIQUE OF THE GERMAN FOUNDATION LAW COMPENSATING SLAVE AND FORCED LABORERS OF THE THIRD REICH

LIBBY ADLER*
PEER ZUMBANSEN**

This Article analyzes the Law on the Creation of the Foundation “Remembrance, Responsibility and Future” which the German Legislature passed on July 17, 2000. The law established a foundation designed to compensate individuals who were victims of the Nazi slave and forced labor program. Because of their roles in this atrocity, the German government and German industry both contributed billions of dollars to the Foundation. In this Article, the authors identify numerous flaws with the law. They argue that, despite the monetary payments, no entity took true responsibility for the forced labor program. Various groups were excluded from the negotiations and some had their claims extinguished by the law but were not afforded compensation by it. The authors also contend that much of the justification for the Foundation Law originates in flawed and unexamined assumptions about the strength of the victims’ legal claims. These factors, and others, have led the authors to conclude that this law fails to achieve its primary goal, the remembrance of the horrific acts committed by the Nazis.

I. INTRODUCTION

In August 2000, Germany’s twin houses of parliament enacted a law establishing a foundation to compensate survivors of the Nazi forced la-

* Assistant Professor of Law, Northeastern University; A.B., University of Michigan, 1989; J.D., Northeastern University School of Law, 1994; LL.M., Harvard Law School, 1998. I am grateful to Nathaniel Berman, Karl Klare, Wendy Parmet, and Lucy Williams for their helpful comments on earlier drafts and to Brian Birke and Roy Karp for their research assistance. I also wish to express appreciation to my friend, colleague, and co-author, Peer Zumbansen. It will be years before I complete the inventory of all that I have learned from our time working together. My contribution to this Article is dedicated to my grandfather, Ed Adler.

** Academic Assistant and Lecturer, University of Frankfurt, Institute of Economic Law; Jean Monnet Fellow, European University Institute, Florence, Italy; Licence en Droit, Université Paris-X-Nanterre, 1991; 1st German Law Exam 1995; Dr. iur., University of Frankfurt, 1998; LL.M., Harvard Law School, 1998; 2d German Law Exam 2000. My heartfelt gratitude goes to Günter Frankenberg, Alexander Hanebeck, Dominik Hanf, and to Libby Adler, who has been a friend and companion, and who, during both the joint seminar at the University of Frankfurt in December 2000 and during the work for this Article, has been an overwhelming source of encouragement and inspiration.

bor program.¹ The Foundation Law has been acclaimed as a victory for Holocaust survivors. In this Article, we examine the recent events and post-war historical developments that led to the Foundation Law and conclude that the victory is ambiguous at best.

While the Foundation Law provides compensation to Nazi-era slave and forced laborers, it also sharply limits compensation amounts, denies recovery to some potential claimants, and purports to preclude further litigation of Holocaust-era claims. Proponents of the Foundation Law have defended the choice to use legislation to resolve Holocaust-related claims initially brought in a judicial forum on the grounds that litigation is inherently ill-suited to that task, and have justified the terms of the Law by reference to claimants' poor chances in the courtroom. In this Article, we identify some troubling assumptions underlying these rationales and highlight the historical and political context in which they are offered.

Germany enacted the Foundation Law pursuant to an international agreement designed to resolve legal claims against German companies arising out of their use of slave and forced labor during the Third Reich.² In accordance with the Law, *slave laborers*, including Jews, Sinti and Roma (or Gypsies), gay men and lesbians, and others whom the Nazis incarcerated in concentration camps and who worked under extraordinarily inhumane conditions,³ are eligible to receive up to DM 15,000 each.⁴ *Forced laborers*, including Poles, Czechs, and other nationals, who worked under slightly less brutal conditions and varying degrees of coercion for no (or extremely low) wages,⁵ are eligible to receive up to DM 5,000 each.⁶ Awards available under the Law are capped at these maximums. For the most part, heirs are not eligible to recover.⁷

¹ Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung, Zukunft" [Law on the Creation of the Foundation "Remembrance, Responsibility and Future"], v. 2.8.2000 (BGBl. I S.1263), available in English at <http://www.stiftungsinitiative.de/eindex.html>; see generally Hugo J. Hahn, *Individualansprüche auf Wiedergutmachung von Zwangsarbeit im Zweiten Weltkrieg*, 53 NEUE JURISTISCHE WOCHENSCHRIFT 3521 (2000); Christoph Safferling, *Zwangsarbeiterentschädigungsgesetz und Grundgesetz. Zur Frage der Verfassungsmäßigkeit des Gesetzes zur Errichtung einer Stiftung "Erinnerung, Verantwortung, Zukunft"*, 34 KRITISCHE JUSTIZ 208 (2001).

The Law also deals with insurance, property and personal injury claims, see Law on the Creation of the Foundation § 9(3)–(4), and creates a fund for educational and humanitarian projects, see *id.* §§ 2, 9(7).

² *Agreement Between the Government of the United States and the Government of the Federal Republic of Germany Concerning the Foundation "Remembrance, Responsibility, and Future"* (July 17, 2000) [hereinafter Agreement], at http://www.state.gov/www/regions/eur/holocaust/000717_agreement.html.

³ See ULRICH HERBERT, *A HISTORY OF FOREIGN LABOR IN GERMANY, 1880–1980* 176 (1990).

⁴ Law on the Creation of the Foundation, §§ 9(1), (11)1.

⁵ See HERBERT, *supra* note 3, at 142.

⁶ Law on the Creation of the Foundation, §§ 9(1), (11)1. At an approximate exchange rate of DM 2 to \$1, claimants will receive close to \$7,500 and \$2,500, respectively.

⁷ *Id.* § 13(1).

The Foundation itself was funded jointly by public and private entities. The German government and a consortium of German companies each committed DM 5 billion to the fund.⁸ Non-governmental agencies, referred to in the Law as *partner organizations*, are cooperating to distribute this money to approximately one million people⁹ residing primarily in the United States, Israel, Poland, the Czech Republic, Ukraine, Belarus, and other former Soviet republics.¹⁰ These partner organizations are expected to publicize the work of the Foundation¹¹ as well as to evaluate claims and convey payment.¹² Judicial review of adverse determinations by the partner organizations appears to be precluded.¹³

This arrangement is the product of intense diplomatic negotiation in which officials of the United States as well as representatives of German industry and government played the most important roles.¹⁴ The diplomatic efforts came on the heels of a slew of lawsuits filed in United States courts against German industry, European and American insurance companies, and Swiss banks, all of which allegedly acted tortiously or in breach of contract to the detriment of victims of Nazism or their heirs.¹⁵

Although litigation spurred the negotiations that led to the enactment of the Foundation Law, litigation ultimately was displaced by other legal practices. Since passage of the Foundation Law, virtually all lawsuits pending in United States courts involving claims arising out of slave or forced labor during the Third Reich have been dismissed. German courts, including the German Federal Court of Justice (*Bundesgerichtshof*) and the Federal Constitutional Court (*Bundesverfassungsgericht*), have dis-

⁸ William Drozdiak, *Germans Reach Settlement with Slave Laborers*, WASH. POST, Dec. 18, 1999, at A20. This is not the first time German companies were called upon to compensate Jewish slave laborers. See generally BENJAMIN B. FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* (1979). In the years following World War II, a handful of the hundreds of German companies that used concentration camp labor turned over a total sum of approximately \$13 million, which was shared by fewer than 15,000 of the Jewish survivors. Many received less than \$1,000. *Id.* at 188.

⁹ Estimates range from 700,000 to 2.3 million, but the one million estimate is cited most frequently. See Michael J. Bazzyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. RICH. L. REV. 1, 192 (2000).

¹⁰ See Law on the Creation of the Foundation § 9.

¹¹ See *id.*, § 10(2).

¹² *Id.* § 10.

¹³ *Id.* § 19.

¹⁴ For a recent account, see Lothar Evers, *Verhandlungen konnte man das eigentlich nicht nennen . . .*, in *STIFTEN GEHEN: NS-ZWANGSARBEIT UND ENTSCHÄDIGUNGSDEBATTE* 222–34 (Ulrike Winkler ed., 2000).

¹⁵ See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999). See generally Bazzyler, *supra* note 9; Derek Brown, *Litigating the Holocaust: A Consistent Theory In Tort For The Private Enforcement Of Human Rights Violations*, 27 PEPP. L. REV. 553 (2000); Stuart M. Kreindler, *History's Accounting: Liability Issues Surrounding German Companies For The Use Of Slave Labor By Their Corporate Forefathers*, 18 DICK. J. INT'L. L. 343 (2000).

missed lawsuits filed in Germany, holding that the Law precludes claims of this nature.¹⁶

This is because in exchange for the *quid* of a commitment to create and fund the Foundation, Germany sought only one *quo*: *legal peace*, i.e., an end to the lawsuits. For this reason, the United States agreed to minimize the legal threat to German industry by filing a *Statement of Interest* in every American lawsuit involving a claim arising out of slave or forced labor during the Third Reich. The Statement of Interest calls for dismissal of the suit on political question or other grounds and states that it is in the national interest of the United States that the Foundation be the sole avenue for former slave and forced laborers to obtain compensation.¹⁷

The Law provides for the German parliament (*Bundestag*) to declare that legal peace has been achieved once the last lawsuit pending before a United States court is dismissed. This declaration was a prerequisite for the compensation provisions of the Law to become effective.¹⁸ The Bundestag made this declaration on May 30, 2001.¹⁹

Proponents of the Law, such as former United States Deputy Treasury Secretary Stuart Eizenstat, who devoted tremendous effort to securing restitution for the survivors of Nazism,²⁰ offer various reasons why the United States has obliged itself to intervene in any future lawsuits on the side of German industry: Litigation can be costly and time-consuming.²¹ The survivor population is rapidly aging and dying at a rate of one percent per month.²² Moreover, German industry has strong legal defenses; even plaintiffs who live long enough to see the outcome of their suits are unlikely to prevail.²³ For these reasons, proponents of the Law urge, it is most prudent to curtail access to judicial remedies and redirect

¹⁶ See, e.g., BGH [Federal Court of Justice], NEUE JURISTISCHE WOCHENSCHRIFT (“NJW”), 54 (2001), 1069 (citing Law on the Creation of the Foundation § 16), *cert. denied*, Bundesverfassungsgericht (“BVerfG”) [Federal Constitutional Court], NJW, 54 (2001), 2159; OLG Northrhine-Westfalia, NJW 53 (2000), 3577.

¹⁷ See Agreement, *supra* note 2, Annex B.

¹⁸ According to the Foundation Law, “[t]he first allocation of funds to the Foundation requires as a precondition the entry into force of the German-American Intergovernmental Agreement Concerning the Foundation ‘Remembrance, Responsibility and Future,’ and the establishment of adequate legal security for German enterprises. The German Bundestag shall determine whether these preconditions exist.” Law on the Creation of the Foundation § 17(2).

¹⁹ Roger Cohen, *Last Chapter: Berlin to Pay Slave Workers Held by Nazis*, N.Y. TIMES, May 31, 2001 at A7.

²⁰ See Stuart Eizenstat, *Justice for the Survivors*, WASH. POST, Jan. 16, 2001 at A21.

²¹ *Eizenstat Testimony on Worldwide Holocaust Restitution Efforts: Hearing before the Senate Foreign Relations Comm.*, 106th Cong. (Apr. 5, 2000) (statement of Eizenstat, U.S. Deputy Sec’y and Special Rep. for Holocaust Issues).

²² *Id.*

²³ *Id.* These arguments echo the position of corporate defendants in past suits for compensation and are bolstered by the affidavits of sympathetic academics attesting to a total lack of corporate legal responsibility. See RUDOLF RANDELZHOFFER & OLIVER DÖRR, ENTSCHÄDIGUNG FÜR NS-ZWANGSARBEIT, 1994 (affidavit prepared for German government in case of forced labor compensation before the BVerfG in 1996).

claimants to the Foundation, which promises expeditious processing and disbursement. Private distribution, proponents declare, is designed to ensure the speediest, least bureaucratic avenue to satisfying valid claims.²⁴

Supporters' arguments, however, go beyond mere pragmatism. Proponents often argue that the claims for compensation were "not about the money"; it was *memory* or *acknowledgement* that claimants really sought.²⁵ To such a hallowed purpose, litigation—the site of objections, cross-examinations, delay tactics, and greedy lawyers—appears ill-suited, even indecent. Visualize instead an affirmative legislative act agreed to through international cooperation and accompanied by a solemn profession of a moral obligation to those who have awaited justice for so many years.²⁶ When litigation is juxtaposed against this noble alternative, for a cause as sacrosanct as compensating the survivors of Nazism, the proper course seems clear.

On the other hand, this course also enabled German industry to avert the assignment of legal responsibility for the enslavement of millions of civilian workers from 1933 to 1945.²⁷ From the outset, the companies consistently and sternly denied any legal culpability, preferring instead to assume a "moral obligation" to compensate the survivors of their predecessors' brutality.

In this Article, we do not establish that the continuation of lawsuits under the current American class action regime would have generated a larger financial settlement. Our thesis concerns the Law's pretense to providing not only material restitution to survivors of the Nazi labor program, but also acknowledgement of responsibility for the atrocities that the survivors endured. We contend that a close look at the Law belies any real acknowledgement of responsibility by German industry. A close look reveals no remorse, no confession, and no sense of debt for the mer-

²⁴ See, e.g., Stuart Eizenstat White House briefing, Dec. 15, 1999.

²⁵ See Evers, *supra* note 14, at 225–26 (quoting Volkswagen's Head of Media Relations as saying, "No, I really think that we ought to proceed in encouraging and funding political publicity work under the Heading: 'Never again Fascism . . .' We should not go the way of individual compensation payments and backroom agreements. I don't even think that there is an adequate sum—and I am repeating it again, for us this is not about money." (transl. by Zumbansen)).

²⁶ The Foundation Law's Preamble contemplates historical, political, and moral responsibility. Law on the Creation of the Foundation, Preamble, v. 2.8.2000 (BGBl. I S.1263).

²⁷ Recently, the responsibility of governmental and private actors for slavery during Hitler's reign has been widely researched, in the academy as well as by the corporations themselves. See, e.g., BARBARA HOPMANN ET AL., ZWANGSARBEIT BEI DAIMLER-BENZ (1994); HANS MOMMSEN & MANFRED GRIEGER, DAS VOLKSWAGENWERK UND SEINE ARBEITER IM DRITTEN REICH (1996); ZWANGSARBEIT BEI FORD (Projektgruppe "Messelager" im Verein EL-DE-Haus e.V. Köln ed. 1996); I. G. FARBEN, VON ANILIN BIS ZWANGSARBEIT (Coordination gegen BAYER-Gefahren e.V./CGB, eds., 1995); Bernd C. Wagner, IG AUSCHWITZ: ZWANGSARBEIT UND VERNICHTUNG VON HÄFTLINGEN DES LAGER MONOWITZ 1941–1945, Darstellungen und Quellen zur Geschichte von Auschwitz (Institut für Zeitgeschichte ed., 2000); Peter Hayes, *Zur umstrittenen Geschichte der I. G. Farbenindustrie AG*, 18 GESCHICHTE UND GESELLSCHAFT 405 (1992).

ciless treatment of these people who exerted themselves beyond human capacity. A close look reveals not a crack in the companies' unwavering avowal of their blamelessness.

It may be true that some claims against the German companies were "not about the money," but from this it does not necessarily follow that any settlement suffices. If acknowledgement or memory was the claimants' primary objective, it is at least worthwhile to ask whether the Law achieved it. This Article examines the Law, the process by which agreement on its terms was reached, the promises exchanged for it, and the rationales offered in its support, in an effort to address that question. We argue that with the aid of German and American courts, the German companies made a series of shrewd institutional maneuvers that quietly defeated claimants' acknowledgement objective, again and again avoiding confrontation with their pasts. Furthermore, the companies and their partners in negotiation bolstered support for these moves, perversely, by reference to the sanctity of the memory of the Holocaust and its incompatibility with money damages and litigation. In the end, while the Foundation Law was touted as achieving memory, it achieved forgetting.

It may be too much to expect a piece of legislation to perform the comprehensive work of coming to terms with the past, but one can at least be skeptical about representations that credit the Foundation Law for having achieved such an admirable goal. As we will discuss, claims alleging specific corporate culpability have consistently been channeled away from concrete, plaintiff-versus-defendant confrontations, toward more abstract declarations of "moral," "historical," or "political" responsibility. We attempt to demonstrate that the Law is a recent development in a trend reaching back to the post-war years. Since World War II, redress for victims of the Holocaust has been treated as a matter of foreign affairs and international reparations rather than litigation between private parties. This preference for extra-judicial remedies originated in a desire to enable German industry to recuperate economically following World War II. Now, with German industry long since recovered, the notion that litigation is an inappropriate means of addressing Holocaust victims' concerns has persisted and lawsuits for individual relief have met largely with failure.

Consistent with its history, the Law conditions the disbursement of compensation payments on legal peace and purports to limit all future claimants to its terms. Moreover, the preamble acknowledges the propriety of compensating victims, but does not specifically assign responsibility for perpetrating the offenses that gave rise to the need for compensation. Literature on the topic of personal and collective responsibility for historical misdeeds is not scant,²⁸ but the Foundation Law reflects none of this grappling; this is what troubles us.

²⁸ See, e.g., THEODOR W. ADORNO, *The Meaning of Working Through the Past*, in

Recently, other racial and national groups that have endured historical atrocities have come forward with claims against governments and private entities that participated in their subjugation. African American scholars and activists have commenced a national debate on restitution for American slavery.²⁹ Women from the Pacific who were forced to serve as “comfort women” to the Japanese military in the 1930s and 1940s seek restitution from the government of Japan.³⁰ On occasion, spokespersons for these efforts cite the German Foundation as an example of the kind of restitution they seek, admiring the success that victims of Nazism had in obtaining compensation and acknowledgement for the wrongs they suffered.³¹ We hope that the Foundation will serve as an example to these other claimants, but not as a model to be emulated—rather as a cautionary tale to be heeded.

Part II of this Article provides an account of the steps that led to enactment and implementation of the Law, from the initiation of lawsuits in United States courts in the 1990s, through transatlantic negotiations, to the Bundestag’s clearing the way for payments to flow. Part III places the Law in historical context, showing how German and American courts repeatedly have blocked private claims, describing the claims in terms that render them best resolved by international diplomacy. This Part also unearths the tangle of political and moral judgments underlying the persistent denial of corporate legal responsibility. Part IV examines the rhetorical strategy that proponents deployed to bolster the legitimacy of the Foundation Law. Proponents spoke of the Holocaust as if it were uniquely incompatible with litigation. In so doing, they created a hostile climate for legal claims and diverted attention to an acknowledgement objective that was never achieved. Finally, Part V concludes that the Foundation Law, far from being an unambiguous success for Holocaust survivors, defeated memory and instead produced forgetfulness.

CRITICAL MODELS: INTERVENTIONS AND CATCHWORDS 89–103 (Henry W. Pickford trans., 1998) (1963); ALEXANDER & MARGARETE MITSCHERLICH, *THE INABILITY TO MOURN: PRINCIPLES OF COLLECTIVE BEHAVIOR* (Beverly R. Placzek trans., 1975) (1967); CHRISTIAN MEIER, *VIERSIG JAHRE NACH AUSCHWITZ* (1990); JÜRGEN HABERMAS, *Was Bedeutet »Aufarbeitung der Vergangenheit« Heute? in DIE NORMALITÄT EINER BERLINER REPUBLIK* 21–45 (1995); PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* (1999); CHARLES MAIER, *THE UNMASTERABLE PAST. HISTORY, HOLOCAUST AND GERMAN NATIONAL IDENTITY* (1988).

²⁹ E.g., RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* (2000).

³⁰ *All Things Considered: Comfort Women* (NPR broadcast, Aug. 1, 2001).

³¹ *See id.*

II. BACKGROUND OF THE FOUNDATION LAW:
THE MOVE FROM LITIGATION TO DIPLOMACY AND LEGISLATION

A. *American Lawsuits in the 1990s*

In the 1990s,³² Holocaust survivors began filing lawsuits in United States courts against Germany and German companies for enslavement during the Third Reich.³³ One such plaintiff was Hugo Princz.³⁴ At age 16,³⁵ Princz and his family, all American citizens, found themselves trapped in Czechoslovakia when the United States declared war against Germany in 1942.³⁶ All six were arrested as enemy aliens and sent to concentration camps.³⁷ Princz's parents and sister were executed at Treblinka.³⁸ Princz and his brothers were sent to Birkenau, where they performed slave labor at a chemical plant owned by I. G. Farben.³⁹ Only Princz survived.⁴⁰ He was subsequently transferred to Dachau, where he performed slave labor at an underground airplane factory,⁴¹ and was *en route* to a third concentration camp for extermination when, at the end of the war, the United States liberated the freight train in which Princz was being transported.⁴²

Nearly a half-century later, after years of failed attempts to obtain payments directly from the German government,⁴³ Princz sued Germany

³² Litigation arising out of the Holocaust began much earlier, but the lawsuits initiated between the 1950s and 1980s received little public or academic attention. See Walter Schwarz, *Abschied*, RECHTSPRECHUNG ZUM WIEDERGUTMACHUNGSRECHT (RzW), 32 (1981), 114 (discussing suits from 1950 to 1981).

³³ These lawsuits were spurred in part by the conclusion of the Cold War and the reunification of Germany, both of which resulted in the declassification of documents previously unavailable to plaintiffs. See Allyn Z. Lite, *Another Attempt to Heal the Wounds of the Holocaust*, 27 SPG HUM. RTS. 12, 14 (2000).

³⁴ *Princz v. Federal Republic of Germany*, 26 F.3d 1166 (D.C. Cir. 1994).

³⁵ *Id.* at 1176 (Wald, J., dissenting).

³⁶ *Id.* at 1168.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* I. G. Farben, now in liquidation, is a large chemical concern composed of several smaller companies; the most well-known in the United States is probably Bayer. See JOSEPH BORKIN, *THE CRIME AND PUNISHMENT OF I. G. FARBEN* 4, 160–63 (1978). Its notorious Buna IV plant exploited the slave labor of Auschwitz-Birkenau inmates in the production of *buna*, a synthetic rubber that Hitler hoped would help sustain his war effort. See *id.* at 111–27.

⁴⁰ See *Princz*, 26 F.3d at 1168.

⁴¹ *Id.* at 1177 (Wald, J., dissenting).

⁴² *Id.* at 1168.

⁴³ *Id.* at 1177 (Wald, J., dissenting). Princz was deemed ineligible for an existing compensation program operated by the German government because he was a citizen of the United States at the time of his enslavement. *Id.* The program, known as the Bundesentschädigungsgesetz (“BEG”), enacted on June 26, 1956, (BGBl. I S.559), and amended on September 14, 1965, (BGBl. I S.1315), provides compensation to those who were persecuted by the Nazis for political, racial, religious or ideological reasons, but does not provide specific compensation for forced laborers. See WIEDERGUTMACHUNG UND KRIEGSFOLGENLIQUIDATION. GESCHICHTE-REGELUNGEN-ZAHLUNGEN 104–12 (Hermann-Josef

in federal district court in Washington, D.C., seeking to recover damages for injuries arising out of his enslavement.⁴⁴ The German government moved to dismiss Princz's complaint on the grounds that the Foreign Sovereign Immunities Act of 1976 ("FSIA")⁴⁵ immunized Germany against the claims asserted.⁴⁶ On appeal from the district court's denial of the motion,⁴⁷ the D.C. Circuit dismissed the case, pursuant to the FSIA, for lack of subject matter jurisdiction.⁴⁸

Other former slaves took a cue from Princz's failed efforts at suing the German government and sought to avoid the FSIA by naming as defendants the private companies that profited from the use of slave labor. Former slaves of, among others, Ford Werke,⁴⁹ Degussa,⁵⁰ and Siemens⁵¹

Brodesser et al. eds., 2000) [hereinafter *WIEDERGUTMACHUNG UND KRIEGSFOLGENLIQUIDATION*]; see CORNELIUS PAWLITA, "WIEDERGUTMACHUNG" ALS RECHTSFRAGE? 301-07 (1993).

⁴⁴ See *Princz*, 26 F.3d at 1168.

⁴⁵ 28 U.S.C. §§ 1330, 1602-11.

⁴⁶ See *Princz*, 26 F.3d at 1168.

⁴⁷ 813 F. Supp. 2d, 26 (D.D.C. 1992), *rev'd* 26 F.3d 1166 (D.C. Cir. 1994). The district court reasoned that the FSIA "has no role to play where the claims alleged involve undisputed acts of barbarism committed by a one-time outlaw nation which demonstrated callous disrespect for the humanity of an American citizen, simply because he was Jewish." *Princz*, 813 F. Supp. at 26. The Second Circuit, however, held that "that is not the law." *Princz*, 26 F.3d at 1169.

⁴⁸ *Princz*, 26 F.3d at 1168. After Princz's claims against the German government were dismissed, he attempted to bring essentially the same claims against four private companies, which he alleged to be the corporate successors to the companies that enslaved him. See *Princz v. BASF Group*, No. 92-0644, 1995 U.S. Dist. LEXIS 22104, at *1-3 (D.D.C. Sep. 18, 1995). In addition to BASF Group, Princz sued Hoechst AG, Bayer Group, and Daimler-Benz AG. The first three were alleged to be the successors to I. G. Farben. *Id.* at *3. Again, Princz's claims were dismissed, this time by stipulation of the parties. *Id.* at *17. In his order dismissing the case, District Court Judge Stanley Sporkin cited not only the court of appeals' reversal of his decision in the first suit, but also the availability of "meritorious legal defenses," including lack of personal and subject matter jurisdiction, *id.* at *6, *16, and the existence of pending government-to-government negotiations intended to resolve the sorts of claims that Princz raised in a litigation context, *id.* at *4. In 1994, then President Clinton raised Princz's claim in a meeting with then German Chancellor Helmut Kohl, who reportedly declined to discuss the matter. See *Princz*, 26 F.3d at 1177 (Wald, J., dissenting). Princz finally obtained financial remuneration pursuant to an agreement between Germany and the United States called *The Hugo Princz Agreement of 1995*, awarding Princz and ten other United States citizens caught in the Third Reich \$2.1 million. See Bazyler, *supra* note 9, at 25; Symposium, *What Happens Next?*, 20 WHITTIER L. REV. 91 (1998).

⁴⁹ See *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999). Ford Werke AG is a wholly owned subsidiary of Ford, the American motor company. Ford established Ford Werke in 1925. See *id.* at 432. See also Michael Dobbs, *Ford and GM Scrutinized for Alleged Nazi Collaboration*, WASH. POST, Nov. 30, 1998, at A01 (discussing Ford's war-time engagement with Germany).

⁵⁰ See *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999). Degussa (formerly Aktiengesellschaft Deutsche Gold- und Silber-Scheideanstalt, since 1999 Degussa-Hüls AG) is a large German chemical company that was incorporated in Frankfurt in 1873 and is a world leader in the development of exclusive metal applications as well as chemical products innovations. Degesch, a subsidiary of Degussa, developed and distributed Zyklon B, the gas used in the Nazi gas chambers. See *id.* at 252.

⁵¹ See *id.* at 250 (naming Siemens as a co-defendant). Siemens AG, a large German

brought class action lawsuits against their former corporate masters in federal district court in the late 1990s.⁵²

In addition to the prospect of substantial class action awards, the defendants feared that the lawsuits would damage their public image and thereby adversely affect German export industries.⁵³ The German corporate community faced criticism in the United States and elsewhere as the details of the forced labor program reached the public.⁵⁴ In early 1999, public attention in the United States reached its peak when New York officials asked regulators to delay a proposed merger between Deutsche Bank AG and Bankers Trust until the compensation issue was satisfactorily resolved.⁵⁵

Around this time, respected art galleries were confronted with claims that valued items in their collections had been stolen during the “Aryanization”⁵⁶ of Jewish property in the 1930s.⁵⁷ Life insurance com-

close corporation founded in 1847, developed into a world leader in electric, electronic and technical equipment. Among Siemens’s employees during the war were numerous slave and forced laborers from the Oranienburg, Buchenwald, Sachsenhausen, Flossenbürg and Auschwitz camps. See FERENCZ, *supra* note 8, at 117–22.

⁵² See, e.g., *Iwanowa*, 67 F. Supp. 2d at 424; *Degussa*, 65 F. Supp. 2d at 248; Class Action Complaint 1, *Pollack v. Siemens AG*, No. CV 98-5499 (E.D.N.Y., filed Aug. 30, 1998) (in which Krupp, Henkel, Audi, Daimler-Benz, Volkswagen, BMW, and other companies were also named as defendants); *Fishel v. BASF*, 175 F.R.D. 525 (S.D. Iowa 1997) (naming I. G. Farben and its successor companies as well as Daimler-Benz and Krupp as defendants). We discuss some of the issues in these cases in Part III below.

These companies were by no means the only entities to use slave labor during the Hitler years. Hundreds of companies (including Krupp, Daimler-Benz, and Volkswagen to name just a few) as well as farms, churches, and private households made widespread use of this cheap resource. See generally FERENCZ, *supra* note 8; Ulrich Herbert, *Labor as Spoils of Conquest, 1933–1945*, in *NAZISM AND GERMAN SOCIETY* 219–73 (David F. Crew ed., 1994); ULRICH HERBERT, *FREMDARBEITER: POLITIK UND PRAXIS DES “AUSLÄNDER-EINSATZES” IN DER KRIEGSWIRTSCHAFT DES DRITTEN REICHES* (2d ed. 1999) [hereinafter HERBERT, *FREMDARBEITER*]; Wolfgang Benz, *Zwangsarbeit im nationalsozialistischen Staat*, 16 *DACHAUER HEFTE* 3, 3–17 (2000); Katharina Hoffmann, *Lebensverhältnisse von ausländischen Zwangsarbeiterinnen und Zwangsarbeitern in der Stadt Oldenburg während des Zweiten Weltkriegs*, in *NATIONALSOZIALISMUS UND ZWANGSARBEIT IN DER REGION OLDENBURG* 79–122 (Katharina Hoffman & Andreas Lembeck eds., 1999).

⁵³ See Justin H. Roy, *Strengthening Human Rights Protection: Why the Holocaust Slave Labor Claims Should be Litigated*, 1 *SCHOLAR: ST. MARY’S L. REV. MINORITY ISSUES* 153, 155 (1999).

⁵⁴ See, e.g., Ian Traynor, *Poles Seek Reparations for Forced Labor by Nazis*, *DETROIT NEWS*, Jan. 11, 1999, at A4.

⁵⁵ See Christopher Rhoades, *Bonn Aims Plan on Slave-Labor Claims: Fund, Foundation are Seen; Deutsche Bank’s Deal in U.S. Could Benefit*, *WALL ST. J.*, Feb. 10, 1999, at A19. In addition to having maintained accounts containing gold and proceeds from the sale of “Aryanized” property, Deutsche Bank disclosed in 1999 that it had helped finance the construction of Auschwitz. See Christopher Rhoades, *Deutsche Bank Discloses Involvement in the Financing of Nazi Death Camp*, *WALL ST. J.*, Feb. 5, 1999, at A13.

⁵⁶ See Bazyley, *supra* note 9, at 96.

⁵⁷ See Stephan J. Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 *CASE W. RES. L. REV.* 87, 96–98 (1999) (generally describing recent claims regarding art stolen during World War II); Bazyley, *supra* note 9, at 161–90 (discussing the theft of art by the Nazis and recounting the details of some recent stolen art claims).

panies such as the Italian insurer *Generali*⁵⁸ faced claims by unpaid surviving beneficiaries.⁵⁹ Renewed allegations surfaced that Swiss banks also owed an overdue debt stemming from their concealment of records of deposits made by victims of Nazism, their collusion with the Nazi regime in laundering looted gold and other property, and their transactions in the profits of slave labor.⁶⁰ The insurers and Swiss banks were named in lawsuits that eventually resulted in substantial settlements.⁶¹

The late 1990s also saw a flurry of legislative activity at both state and federal levels concerning restitution for Nazi era crimes.⁶² California, for example, enacted dramatic provisions in 1998 aimed at ensuring that California residents who are unpaid beneficiaries of Nazi era life insurance policies have an opportunity to recover under state law.⁶³ The following year, California statutorily granted jurisdiction to its courts to

⁵⁸ See Bazylar, *supra* note 9, at 97 (discussing Generali's founding and position in Europe).

⁵⁹ See Symposium, *supra* note 48, at 126. These companies denied their obligations to pay on such grounds as the claimant's failure to produce a death certificate for a decedent who had perished in a Nazi death camp, or that payments were already made to the Nazis as policy-holders. *See id.* at 126–27, 136–37 (1998).

⁶⁰ See Jeffrey Craig Mickletz, *An Analysis of the \$1.25 Billion Settlement Between Swiss Banks and Holocaust Survivors and Holocaust Victims' Heirs*, 18 DICK. J. INT'L L. 199, 200 (1999). The banks claimed that they could not find the accounts or insisted that the heirs of the account holders produce death certificates, which of course could not be done. *See id.* at 203–04, 208. Initially, the Swiss banks also denied knowing the origins of the looted gold they received from the Nazis; they later abandoned this contention in light of evidence to the contrary. *See id.* at 207–08; *see also In re Holocaust Victims' Assets Litigation*, July 28, 2000 N.Y.L.J. 36 (col. 5).

⁶¹ Generali, among other European insurers, was named in a federal class action filed in New York in 1997. *See Amended Complaint, Connell v. Generali*, No. 97-2262 (S.D.N.Y. filed June 26, 1997). Generali agreed to pay \$100 million to compensate Holocaust era beneficiaries and make its records available for inspection. *See Leonid Krechmer, Holocaust-Related Claims and Limitations: Familiar Issues in a New Context*, 67 DEF. COUNS. J. 80, 83 (2000). Generali also was sued in a high profile case in state court in California that settled for an undisclosed amount. *See Complaint, Stern v. Assicurazioni Generali S.p.A.*, No. BC 185376 (Cal. Super. Ct. filed Feb. 5, 1999); Bazylar, *supra* note 9, at 123–34; Symposium, *supra* note 48, at 136–38.

Four separate lawsuits were filed against Swiss banks and consolidated before Judge Korman of the Eastern District of New York, resulting in a \$1.25 billion settlement approved July 28, 2000. *See In re Holocaust Victims' Assets Litigation*, July 28, 2000 N.Y.L.J. 36 (col. 5). For an analysis of the Swiss banks' settlement, see generally Mickletz, *supra* note 60.

German, Austrian and French banks also faced class action lawsuits in the United States for various war-time transgressions. *See In re Austrian and German Bank Holocaust Litigation*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000); *Complaint, Bodner v. Banque Paribas*, No. CV-97-7433 (E.D.N.Y. filed Dec. 17, 1997).

⁶² See Bazylar, *supra* note 9, at 272 app. B (listing "Federal and State Laws Regarding Holocaust Restitution").

⁶³ See CAL. CIV. PROC. CODE § 354.5 (entitling unpaid life insurance beneficiaries to bring a claim in California Superior Court until the year 2010); 1998 Cal. Legis. Serv. ch. 963, sec. 2 at 5564–65, codified in scattered sections of Cal. Ins. Code (requiring insurance companies to disclose information related to Nazi era insurance policies and creating a specialized team within the state's Department of Insurance to review insurance company archives). *See Michael R. Santiago, Victims No More: The War Over Holocaust Insurance Claims*, 30 McGEORGE L. REV. 683, 684–88 (1999).

hear claims against corporations (and the successors of corporations) that used slave labor during the Nazi era and extended the statute of limitations for these claims to the year 2010.⁶⁴

Amid this eruption of legal activity, representatives of German industry began holding meetings and soliciting affidavits from sympathetic experts as they deliberated on how to escape the American legal actions unscathed. The newly elected government of Germany, a center-left coalition of the Social Democrats and the Green Party, declared that compensation of slave laborers of the Third Reich would be one of its programmatic goals.⁶⁵ In October, 1998, less than a month after installation of the new coalition, members of the German corporate community asked their government to join them in establishing a foundation to compensate slaves of the Third Reich's industrial sector.⁶⁶

⁶⁴ CAL. CIV. PROC. CODE § 354.6. See generally Diane Richard Foos, *Righting Past Wrongs or Interfering in International Relations? World War II-Era Slave Labor Victims Receive State Legal Standing After Fifty Years*, 31 MCGEORGE L. REV. 221 (2000); Russell A. Miller, *Much Ado, But Nothing: California's New World War II Slave Labor Statute of Limitations and Its Place in the Increasingly Futile Effort to Obtain Compensation From American Courts*, 23 WHITTIER L. REV. 121 (2001).

⁶⁵ See Bazylar, *supra* note 9, at 194. These parties, as well as the Free Democrats [FDP], had been proposing compensation for years, beginning with proposals by the Green Party, since their election into the Bundestag in 1983. They were joined by the Social Democrats in 1987 and 1989, but this and succeeding attempts never met with the Christian Democratic government's consent. See BT-Drs. 11/142 (parliamentary report issued on April 4, 1987, Otto Schily, Antje Vollmer, members of the Green Party and the German Bundestag, and the Green Parliamentary Group); BT-Drs. 11/4704 (parliamentary report issued on June 6, 1989, Antje Vollmer and the Green Parliamentary Group); BT-Drs. 11/4706 (parliamentary report issued on June 6, 1989, Antje Vollmer, Helmut Lippelt and the Green Parliamentary Group); BT-Drs. 11/5176 (parliamentary report issued on September 14, 1989, the Social Democratic Parliamentary Group). A public hearing in 1995 led to the provision of limited funds for certain groups of victims without providing for an encompassing regulation that would also benefit many of those persons now residing in Eastern European States. See Volker Beck, *Entschädigung für alle Verfolgten des Nationalsozialismus: Eröffnungsrede zur Anhörung der Bundestagsfraktion "Entschädigung für NS-Unrecht," in ANERKENNUNG, REHABILITATION, ENTSCHÄDIGUNG: POLITISCHE INITIATIVEN FÜR DIE OPFER DES NATIONALSOZIALISMUS 50 JAHRE NACH KRIEGSENDE* (Bündnis 90/Die Grünen im Bundestag et al., eds., 1995) (speech by Member of Parliament from the Green Party). *Wiedergutmachung und Kriegsfolgenliquidation. Geschichte Regelungen Zahlungen* (Hermann-Josef Brodesser et al. eds. 2000) at 54–55, listing agreements between Germany and Estonia on 22 June 1995, Lithuania on 26 July 1996 and Lettland on 27 August 1998, leading to one-time payments of 2 Million DM each to be distributed to victims suffering from health damage incurred by Nazi persecution and now living in financial distress.

⁶⁶ It is difficult to discern which party initially proposed establishing a Foundation. The idea came up intermittently over the course of the 1980s and 1990s among participants in various lawsuits. See *supra* note 65 (citing Green Party proposals). Growing pressures on German industry in the late 1990s, mostly due to class action suits filed in United States courts, paved the way to passage of the Foundation Law. See Brief by Stuart Eizenstat (May 12, 1999) (reporting on the start of the negotiations and the participating parties), at http://www.ess.uwe.ac.uk/genocide/slave_labour2.htm (last visited Nov. 25, 2001).

For an account of individual settlements of the Jewish Claims Conference with German companies in the 1950s and 1960s, see FERENCZ, *supra* note 8. Ferencz himself proposed years ago that German industry create an "overall settlement" that would "diminish the prospects of a substantial number of lawsuits against many German firms." *Id.* at 181.

B. International Negotiations Regarding the Possibility of a Settlement

Litigation had drawn attention to the unsettled debt owed by German industry, but diplomatic negotiation would now entirely displace litigation as the institutional setting in which to resolve the claims.⁶⁷ In February 1999, Chancellor Gerhard Schröder announced a plan to establish a \$1.7 billion foundation to be funded by a consortium of originally twelve, and quickly thereafter sixteen and then seventeen, German companies with a separate government fund to be established later.⁶⁸ Soon afterwards, representatives of Germany and German industry met with representatives of the United States and Jewish groups.⁶⁹ Attorneys for many of the United States plaintiffs participated in the meetings,⁷⁰ but some of the plaintiffs suing under California state law were denied permission to attend by the other participants.⁷¹ The initial German offer of \$1.7 billion was rejected, and negotiations progressed and faltered over the course of 1999, largely on the matter of the sum.⁷²

On December 17, 1999, the parties agreed that the government and industrial sector of Germany would contribute DM 5 billion each, for a total of DM 10 billion or about \$4.6 billion.⁷³ By this time, seventy companies had pledged to contribute.⁷⁴ In exchange for the fund, the United States agreed to oppose slave and forced labor lawsuits with a standard court filing stating that such suits are contrary to the national interests of the United States and should be dismissed.⁷⁵

One industry representative responded that “a global approach was not considered feasible.” *Id.* Another concluded “that any such agreement would be viewed as a confession of guilt by German industry, and efforts to pursue a global approach would only unite the companies in a solid front of opposition.” *Id.* at 182.

⁶⁷ See, e.g., D. Maimon, *Class Action Lawyers Charge German Slave Labor Fund Unacceptable*, at <http://fido.seva.net:8090/pipermail/holocaust/1999-March/000042.html> (last visited Nov. 25, 2001).

⁶⁸ See Bazylar, *supra* note 9, at 197 n.803; see also Burt Herman, *German Industry Raises Its Share of Nazi Labor Compensation Fund*, JERUSALEM POST, Mar. 14, 2001.

⁶⁹ See *id.* at 197.

⁷⁰ See *id.*

⁷¹ Telephone Interview with Plaintiffs’ Attorney Lisa Stern (Nov. 14, 2000). Stern speculated that she and her colleagues suing under California law were excluded from negotiations because the lawyers involved in the federal class actions had a much greater incentive to settle due to the perception that their cases were “in the toilet.” *But see* Press Release, Lief, Cabraser, Heimann & Bernstein (Dec. 15, 1999) (reporting on participation by some of the California lawyers), at http://www.lieffcabraser.com/slave_press.htm (last visited Nov. 25, 2001).

⁷² See Bazylar, *supra* note 9, at 197–200.

⁷³ See William Drozdiak, *Germans Reach Settlement with Slave Laborers*, WASH. POST, Dec. 18, 1999, at A20.

⁷⁴ See Edmund L. Andrews, *Germany Accepts \$5.1 Billion Accord to End Claims of Nazi Slave Workers*, N.Y. TIMES, Dec. 18, 1999, at A10. The contributions of the seventy committed companies were not expected to total the 5 billion DM that German industry was obligated to pay. *Id.*

⁷⁵ See *id.*

During the winter and spring of 2000, negotiations grew rancorous.⁷⁶ The principle issue of contention was how the money ought to be distributed among the survivors of the Nazi labor program, divided now into the categories of *slave laborers* and *forced laborers*.⁷⁷ *Slave laborers* encompass those workers who were imprisoned in concentration camps or detained in ghettos under extraordinarily brutal conditions.⁷⁸ *Forced laborers* include those who were deported from their home countries into the territory of the 1937 borders of the German Reich or to a German-occupied area;⁷⁹ they were subjected to forced labor in industry or for public authorities, and held in conditions less inhumane than a concentration camp.⁸⁰

In March 2000, negotiators agreed that slave laborers would be eligible to receive up to DM 15,000 each, while forced laborers would be eligible for up to DM 5,000 each.⁸¹ This disparity led to friction between Jews and non-Jewish, Central and Eastern European nationals.⁸² Jews compose most of the population of concentration camp survivors and currently number in the hundreds of thousands.⁸³ Non-Jewish Central and Eastern Europeans compose most of the population of survivors of forced labor and number over a million.⁸⁴ Negotiations engendered further resentment among some Central and Eastern Europeans who complained about being excluded from the decision-making process and strong-armed by the United States into accepting the deal despite what they perceived to be low compensation amounts.⁸⁵

⁷⁶ See, e.g., Marilyn Henry, *German Firms Want Immunity from Israeli Suits in Slave-Labor Deal*, JERUSALEM POST, Mar. 5, 2000, at 3.

⁷⁷ See *id.*

⁷⁸ See Law on the Creation of the Foundation § 11(1), v. 2.8.2000 (BGBl. I S.1263).

⁷⁹ See *id.*

⁸⁰ See, e.g., MARK SPOERER, *ZWANGSARBEIT UNTER DEM HAKENKREUZ: AUSLÄNDISCHE ZIVILARBEITER, KRIEGSGEFANGENE UND HÄFTLINGE IM DEUTSCHEN REICH UND IM BESETZTEN EUROPA 1939–1945*, 116–21 (2001) (describing the inhumane living conditions for forced laborers after 1942); HERBERT, *FREMDARBEITER*, *supra* note 52, at 170–73 (describing the high death rate of Russian forced laborers); *id.* at 334 (describing the difficult working and living conditions Russian forced laborers encountered due to malnutrition and lack of heating in work camps).

⁸¹ See Law on the Creation of the Foundation § 9(1). In § 9(9), however, the Law limits initial payments to a percentage of the amounts set forth in § 9(1) until all applications have been processed, presumably in anticipation of discovering that the Foundation has insufficient funds to compensate everyone with a valid claim.

⁸² See Andrews, *supra* note 74, at A10; Bazylar, *supra* note 9, at 201 n.814.

⁸³ See Andrews, *supra* note 74, at A10; Imre Karacs, *Germany's Pounds 3.2BN Bid to Close Book on Nazi Past Leaves only Rifts and Rancour in its Wake*, INDEP., July 18, 2000, at 3. The Nazi plan was to work Jewish camp inmates to death, and indeed only about five per cent of them survived. See *id.*; see also FERENCZ, *supra* note 8, at xvii (1979) (noting that Ferencz chose the title “Less Than Slaves” for his book “because our vocabulary has no precise word [for] unpaid workers who are earmarked for destruction.”)

⁸⁴ See Andrews, *supra* note 74; Bazylar, *supra* note 9, at 201 n.814. Eighty-five percent of laborers in this category survived the war. See Karacs, *supra* note 83, at 3.

⁸⁵ See *id.*

In addition to the matter of distribution, negotiations hit a snag over the comprehensiveness of the *legal peace* to be guaranteed to Germany in exchange for the Foundation.⁸⁶ In an effort to advance the negotiations, the United States urged the governments of Israel and the Central and Eastern European states to promise German companies legal closure in their jurisdictions.⁸⁷ By May 2000, however, the discord focused on the degree of uncertainty inherent in the American system of separation of powers, according to which the executive branch could merely hope to persuade, but not require, a court to dismiss future lawsuits.⁸⁸

On July 17, 2000, the Agreement was concluded.⁸⁹ Germany had committed itself to enacting legislation to create and fund the Foundation,⁹⁰ German industry had committed itself to contributing half of the money,⁹¹ and the United States had committed itself to filing a *Statement of Interest* in all current and future cases in an effort to minimize the

⁸⁶ See Statement by Klaus Kohler, Chief, Deutsche Bank's Legal Department (Feb. 6, 2001) (stating that the provision of an "all-embracing and enduring legal peace" was the central objective of both the German industry representatives and the American and German governments participating at the negotiations), at <http://www.spiegel.de/static/download/kohlerbrief.pdf> (last visited Nov. 25, 2001).

⁸⁷ See Henry, *supra* note 76, at 3. The Agreement, while negotiated by the United States, is to be implemented through bilateral pacts in Eastern Europe. See Andrews, *supra* note 74, at A10. Some representatives from Eastern Europe were not happy with the deal negotiated by the United States but felt bullied into accepting it. See Karacs, *supra* note 83, at 3.

⁸⁸ See Richard Wolffe, *Clash of Cultures Threatens Holocaust Compensation Deal*, FIN. TIMES, May 27, 2000, at 6. While deliberating on the legality of President Carter's decision to negotiate a resolution to the Iranian crisis that curtailed court access for private litigants suing Iranian entities, however, then Justice Rehnquist observed that:

the United States has repeatedly exercised its sovereign authority to settle the claims of its nationals against foreign countries. Though those settlements have sometimes been made by treaty, there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate. Under such agreements, the President has agreed to renounce or extinguish claims of United States nationals against foreign governments in return for lump-sum payments or the establishment of arbitration procedures.

Dames & Moore v. Regan, 453 U.S. 654, 679 (1981).

⁸⁹ See Edmund L. Andrews, *Germans Sign Agreement to Pay Forced Laborers of Nazi Era*, N.Y. TIMES, July 18, 2000, at A3.

⁹⁰ See Agreement, *supra* note 2, at Preamble ¶ 8.

⁹¹ By this date, 3,127 companies had pledged to contribute, but only \$1.6 billion had been raised. See William Drozdiak, *Germany Sets Fund For Slaves Of Nazis; \$5 Billion Will Go To Aging Survivors*, WASH. POST, July 18, 2000, at A17. At least 200 German companies who had used slave and forced labor during Hitler's reign had yet to ante up. See Karacs, *supra* note 83, at 3. Though the Agreement does not explicitly say that funds will be contributed half by the German Government and the German industry, it provides that the Foundation be "funded by contributions from the Federal Republic of Germany and the German companies." This is in accordance with the wording of the Law on the Creation of the Foundation § 3(2), v. 2.8.2000 (BGBl. I S.1263). After accounting for tax relief the companies will have been responsible for only about one-quarter of the Foundation's funding. See Jürgen Jeske, *Das lange Warten*, in FRANKFURTER ALLGEMEINE ZEITUNG No. 116, May 19, 2001, at 1.

threat to German industry in United States courts.⁹² Despite objections to being excluded from key decisions, Poland, the Czech Republic, Russia, Belarus and the Ukraine also approved the Agreement.⁹³ Finally, Israel, the Conference on Jewish Material Claims Against Germany (the Jewish Claims Conference), and participating plaintiffs' attorneys also signed the deal.⁹⁴

On August 2, 2000, Germany's Bundestag enacted the Law that established and funded the Foundation.⁹⁵ By its own terms, the Law took effect the same day.⁹⁶

C. *Complications in the Resolution of the American Lawsuits*

Although the Law "took effect," the payments did not begin to flow. It would be almost a year before any of the survivors would begin to receive compensation.⁹⁷

On January 24, 2001, plaintiffs in fifty class actions against German banks that had been consolidated before Judge Shirley Wohl Kram of the Southern District of New York asked the court to dismiss their claims in favor of recovery under the Foundation Law.⁹⁸ Despite this request, Judge Kram declined to dismiss the cases; instead, she took the matter under advisement, even though this decision meant postponing distribution of funds from the Foundation.⁹⁹ Representatives of the plaintiff class ex-

⁹² See Agreement, *supra* note 2, at Art. 2 ¶ 1, Annex B.

⁹³ See Andrews, *supra* note 89, at A3.

⁹⁴ See Linda Gerstel et al., Joint Statement, On Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation "Remembrance, Responsibility and the Future" (July 17, 2000) [hereinafter *Joint Statement*], at http://www.state.gov/www/regions/eur/holocaust/000717_joint_statement.html (last visited Nov. 25, 2001).

⁹⁵ BGBl. I S.1263.

⁹⁶ Law on the Creation of the Foundation § 20.

⁹⁷ The Bundestag declared legal peace on May 30, 2001. See Roger Cohen, *Last Chapter: Berlin to Pay Slave Workers Held by Nazis*, N.Y. TIMES, May 31, 2001, at A7. The Foundation began making payments on June 19, 2001. See Stephanie Flanders, *Payments Begin for Laborers Forced to Work for the Nazis*, N.Y. TIMES, June 20, 2001, at A10.

After Eizenstat and members of the Austrian government concluded a separate compensation agreement in October 2000, payments were similarly halted until pending cases were resolved. Once an Austrian lawyer agreed to dismiss a forced labor suit before a New York court, payments were scheduled to begin after July 19, 2001. See *Zwangsarbeit: Erste Zahlungen ab August*, DER STANDARD, July 19, 2001. Even after the payments began to flow, conflict persisted over the matter of the companies' fulfilling their obligations. See Christoph Irion, *Wirtschaft will Restbetrag in den Entschädigungsfonds einzahlen. Noch fehlen 580 Millionen Mark für frühere Zwangsarbeiter*, in BERLINER MORGENPOST, July 25, 2001.

⁹⁸ See *In re Austrian and German Bank Holocaust Litigation*, No. 98 CIV 3938 SWK, 2001 WL 228107 (S.D.N.Y. Mar. 8, 2001). These cases involved primarily property rather than labor claims. See *id.* at *2.

⁹⁹ See Mark John, *Nazi Slave Fund Suffers Legal Blow*, JERUSALEM POST, Jan. 26, 2001, at A9. Among Judge Kram's concerns were the possibility of a conflict of interest among plaintiffs' attorneys and the impact the settlement would have on absent claimants. See *id.* When asked about this issue, plaintiffs' counsel conceded the presence of a conflict

pressed astonishment. “This is devastating and frustrating to me and the people I represent,” proclaimed Karl Brozik of the Jewish Claims Conference.¹⁰⁰

Around this time, a new book entitled *IBM and the Holocaust* reached the shelves.¹⁰¹ In it, journalist Edwin Black attempted to demonstrate that custom-built IBM technology enabled the Nazis to deport and exterminate with the efficiency and systemization for which they are so notorious.¹⁰² In February, some of the same lawyers who had signed onto the Agreement the preceding July filed suit against IBM for its alleged complicity with the Nazi regime, relying chiefly on evidence presented in Black’s book.¹⁰³

Still awaiting a decision from Judge Kram, the Germans were incensed. “It is really annoying that a climate of uncertainty can grow out of new complaints that come precisely from where you don’t expect it, namely those who signed the compensation agreement,” Dr. Michael Jansen of the Foundation said to DeutschlandRadio.¹⁰⁴

On March 8, 2001, Judge Kram issued her order denying the plaintiffs’ motion for voluntary dismissal.¹⁰⁵ She set forth two reasons.

First, Judge Kram was concerned that dismissal would prejudice absent class members.¹⁰⁶ Normally, in a class action in which the class has yet to be certified, Judge Kram stated, “pre-certification dismissal does not legally bind absent class members,” so the risk of prejudice is minimal.¹⁰⁷ This case, however, differed in three important respects:

First, the [Agreement] provides that the Foundation is to be the exclusive forum for persons with claims against the German banking institutions that arise out of Nazi-era wrongs and atrocities. Second . . . the United States has agreed to issue a “Statement of Interest” urging dismissal of any and all new litigation against German entities for Nazi-era claims. Finally, the Foundation is not yet fully funded, and the parties submit that

of sorts, but argued that the conflict was typical of cases involving a capped fund. *See id.*

¹⁰⁰ *Id.*

¹⁰¹ EDWIN BLACK, *IBM AND THE HOLOCAUST* (2001).

¹⁰² *See generally id.*

¹⁰³ *See Suit Alleges IBM Aided Third Reich; Nazis Benefitted from Technology, Firm Says*, DALLAS MORNING NEWS, Feb. 12, 2001, at A3.

¹⁰⁴ *German Firms Not Getting Guarantees Against Slave Labor Lawsuits*, AGENCE FRANCE PRESSE, Feb. 28, 2001.

¹⁰⁵ *See In re Austrian and German Bank Holocaust Litigation*, No. 98 CIV 3938 SWK, 2001 WL 228107 (S.D.N.Y. Mar. 8, 2001). FED. R. CIV. P. 23(e) prohibits dismissal of a class action by consent of the parties alone; the court must approve the dismissal.

¹⁰⁶ *See In re Austrian and German Bank Holocaust Litigation*, No. 98 CIV 3938 SWK, 2001 WL 228107, at *5–*7 (S.D.N.Y. Mar. 8, 2001).

¹⁰⁷ *Id.* at *4 (citations and internal quotation marks omitted).

such funding is contingent upon the Court dismissing the instant case.¹⁰⁸

According to Judge Kram, the plaintiffs' motion could therefore be summed up as follows:

the named plaintiffs ask the Court to voluntarily dismiss their claims, and thus subject all absent class members to the detrimental statement of interest and the other terms of the [Agreement], even though the absent class members' only source of compensation for their claims has yet to be fully funded.¹⁰⁹

This set of circumstances, Judge Kram concluded, “constitutes unacceptable prejudice to the absent plaintiff class . . . and it would be unjust to divert their claims to a forum whose funding remains in question.”¹¹⁰

The second reason cited by Judge Kram concerned the peculiar circumstances of one sub-class.¹¹¹ In a prior order, Judge Kram allowed a motion for voluntary dismissal by a sub-class with claims against Austrian banks.¹¹² One of the terms of the approved settlement provided for the assignment to the sub-class of any claims the Austrian banks may have had against German banks or other institutions that dominated them during World War II. The sub-class's original claims had thus been dismissed, leaving the sub-class no viable claim under the Foundation Law.¹¹³ The class members' only remaining claims were now those of Austrian banks against German banks.

This limitation on relief for the sub-class troubled Judge Kram.¹¹⁴ Allowing the voluntary motion to dismiss, Judge Kram reasoned, “would unduly prejudice the Assigned Claims sub-class,” for it would permit plaintiffs's counsel to consent to a result—implementation of the Foundation Law as an exclusive remedy—that would not benefit the sub-class.¹¹⁵

Having set forth these two separate grounds, Judge Kram denied the motion, explicitly allowing for renewal of the motion “in the event full funding of the Foundation is accomplished, and the prejudice to the Assigned Claims sub-class is eliminated.”¹¹⁶

¹⁰⁸ *Id.* at *5. Judge Kram also stated that the Statement of Interest was expected to be “a highly compelling and persuasive consideration to a court in favor of dismissal” according to the Special Master appointed to review the parties' accord. *Id.* at *6.

¹⁰⁹ *Id.* at *6.

¹¹⁰ *Id.* at *7.

¹¹¹ *See id.* at *7–*8.

¹¹² *See In re Austrian and German Bank Holocaust Litigation*, 80 F. Supp. 2d 164, 180 (S.D.N.Y. 2000).

¹¹³ *See In re Austrian and German Bank Holocaust Litigation*, No. 98 CIV 3938 SWK, 2001 WL 228107, at *7 (S.D.N.Y. Mar. 8, 2001).

¹¹⁴ *See id.*

¹¹⁵ *See id.* at *8.

¹¹⁶ *See id.*

The Germans reacted with acrimony. Count Otto Lambsdorff, German industry's chief negotiator, called the decision "erroneous, bad, [and] unjustified."¹¹⁷ Volker Beck, Green Party legal expert and a trustee of the Foundation, complained that the ruling "costs time that we don't have."¹¹⁸ Executives at Deutsche Bank and DaimlerChrysler circulated angry letters to other German industry leaders arguing that no money should be paid while cases are still pending.¹¹⁹ The United States Department of State also condemned Judge Kram's ruling, stating that it was "contrary to the recommendations of all parties having an interest in the case and will delay justice and payments to Holocaust victims, a significant number of whom are dying each month."¹²⁰

Not everyone blamed the judge, however. As the *New York Times* reported, "[L]awyers representing Holocaust victims said . . . that . . . German industry had created its own problems [by refusing] to settle the claims as a conventional class-action lawsuit 'The reason we are in this position is that German industry and German parliamentarians insisted from the very first day on using the wrong legal mechanism,' [one lawyer said]."¹²¹ Furthermore, some blamed the companies for failing to raise the full amount of their pledged contribution.¹²²

In response to the latter criticism, a German industry spokesman announced on March 13, 2001, that the companies had raised their share of the Foundation money.¹²³ While six thousand companies had pledged to contribute by this time, it was the seventeen original companies that guaranteed the amount of the shortfall.¹²⁴ Still, the spokesman said, no payments would be made until legal peace had been achieved.¹²⁵

¹¹⁷ Edmund L. Andrews, *New Legal Disputes Put Holocaust Victim Payments in Doubt*, N.Y. TIMES, Mar. 9, 2001, at A3.

¹¹⁸ *Federal Judge Declines to Dismiss Holocaust-Reparations Suit*, N.Y. TIMES, Mar. 8, 2001, at A8.

¹¹⁹ Andrews, *supra* note 117, at A3.

¹²⁰ Press Statement, United States Dep't of State, spokesman Richard Boucher, United States Court Decision on Holocaust-Era Payments (Mar. 7, 2001).

¹²¹ Andrews, *supra* note 117, at A3.

¹²² See *German Industry Under Fire after U.S. Slave-Labor Ruling*, DESERET NEWS (SALT LAKE CITY, UT), Mar. 9, 2001 at A7.

¹²³ See Edmund L. Andrews, *Germans, Citing Suits, Say They're Holding War Slaves' Fund*, N.Y. TIMES, Mar. 15, 2001, at A11.

¹²⁴ See Herman, *supra* note 68 (reporting that the Foundation Initiative's Spokesman, Wolfgang Gibowski, confirmed that the founding companies of the Foundation Initiative would increase their contribution substantially in order to fulfill the Initiative's obligation to provide for its 50% share of the Foundation's DM 10 billion fund).

¹²⁵ See *German Industry at 2.5 Billion Euro Target for Slave Labor Fund*, AGENCE FRANCE PRESSE, Mar. 13, 2001. Another spokesman indicated that not every lawsuit had to be dismissed, but of the seventeen outstanding, all but the obscure claims had to go. See Stephen Graham, *Slave-Labor Compensation Flow Linked to Lawsuit Dismissals*, JERUSALEM POST, Mar. 15, 2001 at 1. United States Secretary of State Colin Powell sent a letter to the German Foreign Minister pointing out that fifty-five cases had been dismissed so far and that the United States was complying with its obligations under the Agreement. See Press Statement, U.S. Dep't of State Spokesman Richard Boucher, Contribution of German Industry to German Foundation, (Feb. 23, 2001), at <http://www.state.gov/r/pa/prs/ps/2001/>

On March 20, Judge Kram denied a motion to reconsider her ruling.¹²⁶ She told litigants that while she accepted that the Foundation was now fully funded, her concerns regarding the assigned claims sub-class were still outstanding.¹²⁷

By this time, the parties in the suit against IBM had agreed to dismiss¹²⁸ and, as the *Frankfurter Allgemeine Zeitung* observed, just one “almost eighty-year old lady in New York” stood in the way of payments.¹²⁹ The parties not only appealed the ruling, but also filed a motion to disqualify the judge.¹³⁰

Nearly two months later, with the Foundation fully funded and \$2 million set aside for the assigned claims sub-class, Judge Kram finally capitulated.¹³¹ In the May 11 order granting the motion to dismiss, Judge Kram indicated, however, that her order was based on the assumption that it would permit the German Bundestag to make a finding of “legal peace” and authorize the disbursement of Foundation funds “by the close of the present session of the Bundestag.”¹³² “If any of the assumptions on which this renewed motion is made are not realized or prove to be untrue,” the judge wrote,

plaintiffs have represented that they will file motions . . . to vacate the orders granting motions for voluntary dismissal. . . . Plaintiffs may also move . . . to vacate this Order in the event

index.cfm?docid=1254 (last visited Nov. 25, 2001).

¹²⁶ See Gail Appleton, *Judge Refuses to Dismiss Holocaust Suits*, JERUSALEM POST, Mar. 22, 2001, at 6.

¹²⁷ See *id.*

¹²⁸ See Press Statement, U.S. Dep’t of State, spokesman Richard Boucher, IBM Lawsuit and Opening of Holocaust-era Corporate Archives (Mar. 29, 2001), at <http://www.state.gov/r/pa/prs/ps/2001/index.cfm?docid=1783> (last visited Nov. 25, 2001).

¹²⁹ Jürgen Jeske, *Das Entschädigungsdebakel*, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 9, 2001, at 1 (“Nobody could have or wanted to imagine that, eight months later [after the Foundation Agreement of 17 July 2000, L.A./P.Z.] an almost eighty-year-old lady in New York with the will to fight would call into question the legal peace that had been established by a German-American Agreement.” (transl. by Zumbansen)).

The international pressure to begin making payments cannot be overstated. See, e.g., Roger Cohen, *Germany: Dispute on Holocaust Payments*, N.Y. TIMES, Apr. 7, 2001, at A4 (regarding Prime Minister Jerzy Buzek of Poland insisting in a meeting with Chancellor Gerhard Schröder that payments begin immediately).

¹³⁰ See Roger Cohen, *Germany: Holocaust Lawsuit*, N.Y. TIMES, Mar. 30, 2001, at A6.

The parties petitioned the Second Circuit for a writ of mandamus directing the district court to dismiss the case and also asking that the case be remanded to a different district court judge. See *Duveen v. United States Dist. Court (In re Austrian & German Holocaust Litig.)*, 250 F.3d 156, 165 (2d Cir. 2001). The Second Circuit did not act on the petition until Judge Kram conditionally dismissed the case in May; the court found that at that point the petition met the criteria for either mandamus or an appeal, but ordered mandamus, remanding the case to Judge Kram. See *id.*

¹³¹ See Jane Fritsch, *Judge Clears Obstacles to Pay Slaves of the Nazis*, N.Y. TIMES, May 11, 2001, at A15.

¹³² *Duveen*, 250 F.3d at 161–62 (citing paragraph 4(b) of Judge Kram’s order).

the eligibility criteria of the German Foundation . . . are not revised [to protect the assigned claims sub-class].¹³³

This conditional dismissal was not good enough for the parties, who sought relief before the Second Circuit on the grounds that Judge Kram had exceeded her authority in this portion of the opinion.¹³⁴ The Second Circuit agreed.¹³⁵ While cases and controversies are committed to the judiciary under Article III of the United States Constitution, the Second Circuit held, “[t]he conduct of foreign relations is committed largely to the Executive Branch.”¹³⁶ The court pointed to the *political question doctrine*, which “restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been ‘constitutional[ly] commit[ted].’”¹³⁷

The Second Circuit went on to observe that paragraph 4(b) of the district court order “seemingly requires the German legislature to make a finding of legal peace and to do so before its summer recess,”¹³⁸ and “paragraph 7 appears to indicate that if the German legislature failed to change the German law,”¹³⁹ it would be grounds for vacating the dismissal.¹⁴⁰ The district court does not have the authority, the Second Circuit found, “to require . . . the legislature of a foreign sovereign” to declare such things,¹⁴¹ nor “is it the office of the [district] court . . . to decide what legislation should be enacted.”¹⁴² The Second Circuit remanded the case with instructions to Judge Kram to amend her order, eliminating paragraphs 4(b) and 7.

Following the Second Circuit decision, Chancellor Schröder predicted that payments would begin flowing soon, a Germany industry spokesman expressed confidence that adequate legal security had been realized, a spokeswoman for the Jewish Claims Conference welcomed the decision, and a Foundation trustee and member of the German parliament stated “[t]he time is ripe for payment.”¹⁴³ On May 30, 2001, the Bundestag declared that legal peace had been attained, as was its charge

¹³³ *Id.* (citing paragraph 7 of Judge Kram’s order).

¹³⁴ *Id.* at 162. Since the parties were of one mind before the Second Circuit, the district court defended its decision through counsel; representing the district court was attorney David Boies of Bush v. Gore, 531 U.S. 98 (2000), and Microsoft antitrust litigation fame.

¹³⁵ *See id.*

¹³⁶ *Id.* at 163.

¹³⁷ *Id.* at 164 (citations omitted). For analysis, *see infra* Part III.A.1.d.

¹³⁸ Duveen, 250 F.3d at 164.

¹³⁹ *Id.* at 165.

¹⁴⁰ *See id.*

¹⁴¹ *Id.* at 164.

¹⁴² *Id.* at 165.

¹⁴³ Steven Silber, *German Industry Okays Payments*, JERUSALEM POST, May 23, 2001, at 6.

under section 17 of the Law.¹⁴⁴ The Foundation began making payments the following month.¹⁴⁵

D. Representational Shortcomings in the Negotiations and Limitations on Eligibility

The Law was designed to provide the exclusive avenue to recovery from the German government or German industry for injuries arising out of the Nazi labor program.¹⁴⁶ All claimants had to renounce future claims when they filed their applications for recovery.¹⁴⁷ Originally, most claims had to be filed within eight months of the Law's becoming effective (that is, by April 2001), but the deadline was eventually extended to the end of that year.¹⁴⁸ As a general matter, heirs are not eligible to recover, but the Law does permit recovery for heirs whose predecessors died after February 16, 1999, the date of the initial decision to establish the Foundation.¹⁴⁹

While one might presume such restrictions to be the result of a negotiated compromise among affected parties, in fact representatives from key victim groups such as gay workers and disabled workers were absent from the negotiations.¹⁵⁰ An American lawyer named Barry Fisher joined discussions in the middle to speak to the interests of the Roma, but no one actually consented to the Agreement on their behalf.¹⁵¹ Representa-

¹⁴⁴ Roger Cohen, *Last Chapter: Berlin to Pay Slave Workers Held by Nazis*, N.Y. TIMES, May 31, 2001 at A7.

¹⁴⁵ See Stephanie Flanders, *Payments Begin for Laborers Forced to Work for the Nazis*, N.Y. TIMES, June 20, 2001, at A10. In the time since the Foundation began making payments, some of the same attorneys have filed a new lawsuit claiming *inter alia* that the companies have failed to turn over the interest that accrued on the base amount (DM 10 billion) and that the claims assigned to the Austrian claim subclass are worthless. Telephone Interview with Deborah Sturman, Special Counsel, *In re Holocaust Victims Assets Litigation* (Nov. 29, 2001).

¹⁴⁶ Law on the Creation of the Foundation § 16(1), v. 2.8.2000 (BGBl. I S.1263) (“Payments from public funds, including social security, and from German business enterprises for injustice suffered under National Socialism as defined in Section 11 may be claimed only under the terms of this Law. Any further claims in connection with National Socialist injustices are excluded.”) Note that this language may preclude recovery outside of the Law for abuses of the Nazi era other than slave and forced labor.

¹⁴⁷ *Id.* § 16(2).

¹⁴⁸ *Id.* § 14. This section provides an exception to the original deadline for non-Jewish claimants outside Central and Eastern Europe, applying instead a twelve-month deadline, presumably because these claimants will be most difficult to locate. See *Poles Start Receiving Payments for Slave Labor Under Nazis*, N.Y. TIMES, June 29, 2001, at A5.

¹⁴⁹ Law on the Creation of the Foundation § 13(1).

¹⁵⁰ See Stuart Eizenstat, Statement at Conclusion of Eighth Plenary Meeting of Slave and Forced Labor Negotiations, Washington, D.C. (Feb. 1, 2000), at http://www.state.gov/www/policy_remarks/2000/000201_eizenstat_labor.html. See also *Joint Statement*, *supra* note 94.

¹⁵¹ See *id.* For an introduction to the Roma as well as an account of Roma experiences during and since their persecution under National Socialism, see Symposium, *supra* note 48, at 92–122. The Roma and Sinti were excluded from German compensation law from the beginning. German courts viewed prosecution of Roma and Sinti as legitimate law

tives from five Central and Eastern European countries attended the negotiations.¹⁵² They found themselves in a weak bargaining position, however, and complained that the United States goaded them into accepting the terms in spite of their sense that the compensation amounts were too low.¹⁵³

In addition, an untold number of potential plaintiffs who had not signed on with any of the lawsuits were necessarily unrepresented in the negotiations.¹⁵⁴ Perhaps they were thought to be represented in the manner of a class action.¹⁵⁵ In fact, many of the lawsuits that prompted the

enforcement activity well into the 1960s; as a result, they had no claim under the BEG. Cord Brüggmann, “Wiedergutmachung” und Zwangsarbeit. *Juristische Anmerkungen zur Entschädigungsdebatte*, 16 DACHAUER HEFTE 177, 184 (2000).

¹⁵² See *Joint Statement*, *supra* note 94. In addition to the United States, Germany, and Israel, the signatories include Belarus, the Czech Republic, Poland, Russia, and the Ukraine. *Id.*

¹⁵³ See Imre Karacs, *Germany’s £3.2BN Bid to Close Book on Nazi Past Leaves only Rifts and Rancour in its Wake*, THE INDEPENDENT, July 18, 2000, at 3 (“Washington . . . said, ‘If you don’t like it we’re going to sign anyway,’ said Markiyam Demidov, head of the Ukraine’s Union of Victims. ‘They forced us to accept it. The amounts are a joke, an insult from Germany.’”); William Drozdiak, *Germany Sets Fund For Slaves Of Nazis: \$5 Billion Will Go To Aging Survivors*, WASH. POST, July 18, 2000, at A17 (“Many survivors said they were distraught by the long delays and the relatively trivial compensation. ‘It’s not so much, when you consider the scale of our suffering, the bestial treatment we were subjected to and the wounds that stayed for life,’ said Marian Nawrocki, head of the Association of Polish Victims of the Third Reich.”).

¹⁵⁴ Of course, this depends on one’s view of what constitutes representation. Eizenstat has equivocated on this question. Consider his comments during the Swiss banks negotiations: “I am not part of an advocacy group . . . I was the chief enunciator of the [United States] government’s position, which was that we wanted a settlement, we wanted to see justice—but we did not want to see sanctions imposed, or conditions put on the merger of Swiss banks.” June D. Bell, *The Man in the Middle: Atlanta Son Stuart Eizenstat Balances Responsibilities of a Government Insider with Jewish Claims on His Loyalty*, ATLANTA JEWISH TIMES INTERNET EDITION at 8–9 (Feb. 19, 1999), at <http://www.atljewishtimes.com/archives/1999/021999cs.htm> (last visited Nov. 25, 2001).

Compare that to his comments at a briefing on the slave labor negotiations:

QUESTION: Since the meeting today was primarily composed of country delegates and NGOs were generally not invited, my question is who is representing those refugees, displaced persons and other people who have emigrated from Central Europe and are currently U.S. citizens, or even those that may be found in other continents of the world? Is there a process by which those survivor groups can take part in these working groups, or will they have to file class actions in order to be part of the conversation?

UNDER SECRETARY EIZENSTAT: I hope they won’t have to file class actions. . . .

I like to think, frankly, the U.S. government should represent the interests of U.S. citizens, regardless of their original nationality. And that is, indeed, who we are trying to represent.

Stuart Eizenstat, Briefing on establishing a process to achieve legal closure and make payments in connection with forced and slave labor and other outstanding claims under the Nazi regime, Washington, D.C., (May 12, 1999), at http://www.state.gov/www/policy_remarks/1999/990512eizenstat_slavelabor.html (last visited Nov. 25, 2001).

¹⁵⁵ See FED. R. CIV. P. 23.

negotiations were intended to be class actions.¹⁵⁶ Even assuming, however, that two classes of laborers from the United States, Israel, Central and Eastern Europe and elsewhere would have been certified,¹⁵⁷ the putative class members did not have an opportunity to “opt out” of the Law as they would have had in a traditional class action settlement.¹⁵⁸

In a traditional class action settlement, “the judgment, whether favorable or not, will include all members who do not request exclusion.”¹⁵⁹ As a general matter, “[i]f all of the requirements and prerequisites for a class action have been satisfied, the resulting decree will be binding on all class members whether they actually participated in the case or not.”¹⁶⁰ Nevertheless, “an absent class member will not be bound if he can demonstrate” that one of the requirements has not been met.¹⁶¹ If, for example, a class member was not provided with an opportunity to opt out of the action, he or she will not be bound.¹⁶²

The requirements for a class action maintained under the Federal Rules of Civil Procedure, rule 23(b)(1)(B), however, differ from those for one maintained under subdivision (b)(3) in an important way: there is no opportunity to opt out.¹⁶³ The United States Supreme Court recently addressed the suitability of a case for treatment as a so-called “mandatory class action” in *Ortiz v. Fibreboard Corp.*¹⁶⁴

Fibreboard concerned liability for personal injuries caused by exposure to asbestos.¹⁶⁵ In the 1970s the number of asbestos cases grew to an “elephantine mass,” prompting the implicated companies to initiate negotiations in pursuit of a “global settlement” resulting in “total peace,” i.e., no liability outside the purview of a single, mass settlement for \$1.535 billion.¹⁶⁶ The district court certified a mandatory class and approved a global settlement and the Fifth Circuit affirmed.¹⁶⁷

Class actions can be mandatory (i.e., without an opportunity to opt out) in cases in which “adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially im-

¹⁵⁶ See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 475 (D.N.J. 1999).

¹⁵⁷ See FED. R. CIV. P. 23(b).

¹⁵⁸ See FED. R. CIV. P. 23(c)(2).

¹⁵⁹ FED. R. CIV. P. 23(c)(2)(B).

¹⁶⁰ JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 16.8 (2d ed. 1993).

¹⁶¹ *Id.*

¹⁶² See *id.* This is because “when a class action is maintained under subdivision (b)(3) . . . individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.” FED. R. CIV. P. 23(c)(2) advisory committee’s note (1966).

¹⁶³ See FED. R. CIV. P. 23(c)(2)–(3).

¹⁶⁴ 527 U.S. 815, 824 (1999).

¹⁶⁵ *Id.* at 821.

¹⁶⁶ *Id.* at 821–24.

¹⁶⁷ *Id.* at 828.

pair or impede their ability to protect their interests.”¹⁶⁸ The Fifth Circuit found that the *Fibreboard* case presented just such a circumstance because the “limited fund” threatened the possibility of future recovery by any non-participating class member.¹⁶⁹

The Supreme Court reversed, in part based on its rejection of the application of the “limited fund rationale.”¹⁷⁰ In some cases, the Court conceded, “equity required absent parties to be represented, joinder being impractical, where individual claims to be satisfied from . . . one asset would . . . prejudice the rights of absent claimants against a fund inadequate to pay them all.”¹⁷¹ “‘Classic’ limited fund class actions,” the Court wrote, involved things like “‘trust assets, a bank account, insurance proceeds, [or] company assets in a liquidation sale.’”¹⁷² In *Fibreboard*, however, the Supreme Court found that the record “failed to demonstrate that the fund was limited except by the agreement of the parties.”¹⁷³

In particular, the Court was troubled by the fact that “*Fibreboard* was allowed to retain virtually its entire net worth.”¹⁷⁴ This “arrangement” the Court thought, “seems irreconcilable with . . . denying any opportunity for withdrawal of class members.”¹⁷⁵

After *Fibreboard*, it is difficult to imagine a lower court certifying a mandatory class under the Federal Rules of Civil Procedure 23(b)(1)(B) in a case in which the funds were limited only by agreement and the defendants included thriving German companies such as Daimler-Chrysler or Volkswagen. The Law, nonetheless, purports to bind all potential claimants in precisely this fashion. The terms of the Agreement,¹⁷⁶ the Law,¹⁷⁷ and the Statement of Interest¹⁷⁸ all indicate unequivocally that the Foundation Law henceforth provides the *exclusive* avenue to recovery. Thus, the Law is intended to preclude future claims, even though there is no settlement in the usual sense. Even the California plaintiffs are intended to be bound, despite the fact that some of their lawyers were denied a seat at the table.¹⁷⁹

¹⁶⁸ FED. R. CIV. P. 23(b)(1)(B).

¹⁶⁹ *Fibreboard*, 527 U.S. at 829.

¹⁷⁰ *Id.* at 848–53.

¹⁷¹ *Id.* at 836.

¹⁷² *Id.* at 834 (citations omitted).

¹⁷³ *Id.* at 848.

¹⁷⁴ *Id.* at 859–60.

¹⁷⁵ *Id.* at 860. The Court also thought that certification of a mandatory class under such circumstances provided too great an incentive for global settlement and raised serious issues regarding the adequacy of representation, including possible conflicts of interest for class counsel. *Id.* at 852, 860 n.34.

¹⁷⁶ Agreement, *supra* note 2, at art. 1 ¶ 1.

¹⁷⁷ Law on the Creation of the Foundation § 16(1), v. 2.8.2000 (BGBl. I S.1263).

¹⁷⁸ See Agreement, *supra* note 2, at Annex B.

¹⁷⁹ Further, the Statement of Interest effectively voids California’s law extending the statute of limitations for slave labor claims until 2010. See *infra* note 64 and accompanying text.

In short, individual survivors of the Nazi labor program brought their disputes before United States and German courts with the help of retained counsel, but their claims were settled by lawyers—sometimes not their own—in conjunction with representatives of some of the affected nations and ill-defined non-national constituencies. Following the Agreement, those whose attorneys and representatives were excluded from meaningful participation in negotiations, along with those who lacked representation entirely, are intended to be barred from pursuing recovery in any other forum.

The Law's eligibility criteria reflect similar deficiencies. The Law affords compensation only to victims who labored in industry or for public institutions.¹⁸⁰ Those who performed forced labor in ecclesiastical institutions, private households, or the agricultural sector have no claim under the Foundation Law, though the Law purports to preclude their lawsuits.¹⁸¹

The Foundation's money is being distributed by seven *partner organizations*.¹⁸² These organizations are not agencies of any government but private entities that have contracted their services to the Foundation.¹⁸³ Most formed over the course of the 1990s (after the fall of the Iron Curtain) with the cooperation of the German government for the explicit purpose of distributing funds to survivors of Nazism.¹⁸⁴ The part-

¹⁸⁰ See Law on the Creation of the Foundation § 11(1).

¹⁸¹ See *id.* Compensation for agricultural workers is left to the discretion of the partner organizations. See *id.*

¹⁸² *Id.* §§ 9, 10. Section 9(2) assigns responsibility for specific regions to the seven partner organizations as follows:

1. Poland; 2. Ukraine and Moldova; 3. Russia, Latvia and Lithuania; 4. Belarus and Estonia; 5. The Czech Republic; 6. Non-Jewish claimants outside the states listed in 1–5 above; 7. Conference on Jewish Material Claims Against Germany for Jewish claimants living outside the states listed in 1-5 above.

Id. § 9(2).

¹⁸³ See *id.* § 10(1).

¹⁸⁴ The partner organizations were founded by interest groups and in cooperation with the German Government in the aftermath of German reunification and the dissolution of the Eastern bloc states. See WIEDERGUTMACHUNG UND KRIEGSFOLGENLIQUIDATION, *supra* note 43, at 189. Prior to the fall of the Soviet Union, many forced laborers might have been reluctant to bring claims. According to Ulrich Herbert, “a quite substantial number of Soviet prisoners of war and civilian workers were suspected by the Soviet authorities of having collaborated with the Germans It is surmised that there were severe repressive measures implemented against them after their repatriation.” HERBERT, *supra* note 3, at 185.

The Conference on Jewish Material Claims Against Germany (the “Jewish Claims Conference”) is an exception in that it formed not long after the conclusion of World War II. On October 26, 1951, delegates from twenty-two major Jewish national and international organizations convened in New York. See NANA SAGI, GERMAN REPARATIONS, A HISTORY OF THE NEGOTIATIONS 74–76 (1980). The purpose of the conference was to organize a unified Jewish stance that could secure reparations from Germany while ensuring that the State of Israel did not usurp Jewish representation during negotiations. See *id.* Jews from every continent except Asia and Antarctica met and declared that although Germany could never propitiate its moral debt through material reparations, justice de-

ner organizations have assumed responsibility for outreach to potential claimants in their respective constituency populations, determining the credibility of individual claims and disbursing funds.¹⁸⁵

While section 11 of the Law sets forth eligibility standards for the partner organizations to follow, it provides scant guidance on how to evaluate the veracity of claims.¹⁸⁶ Similarly, the Law obligates partner organizations to establish appellate organs¹⁸⁷ yet provides no standards to govern appeals. Further, these organs must be “independent and subject to no outside instruction”;¹⁸⁸ presumably, this language is intended to preclude judicial review of adverse decisions.¹⁸⁹

manded the restoration of seized Jewish property and indemnification of victims of persecution. *Id.* at 75–76; CONFERENCE ON JEWISH MATERIAL CLAIMS AGAINST GERMANY, 1998 ANNUAL REPORT WITH 1999 HIGHLIGHTS at 25, 42 (1999); *see generally* SAGI, *supra*, at 76 (“No indemnity, however large, could make good the destruction of human life and cultural values. But every elementary principle of justice and human decency required that the German people should, at the least, restore seized Jewish property, indemnify the victims of persecution, their heirs and successors, and pay for the rehabilitation of the survivors.”). The delegates established the Jewish Claims Conference as a representative body for future activity. *Id.* at 77.

¹⁸⁵ Law on the Creation of the Foundation §§ 9–10.

¹⁸⁶ *See id.* § 11(2) (“Eligibility shall be demonstrated by the applicant by submission of supporting material. The partner organization shall bring in relevant evidence. If no relevant evidence is available, the claimant’s eligibility can be made credible in some other way.”) Of course, the paucity of guidance available to decision-makers on how to evaluate claims could work to the benefit or detriment of an individual claimant, depending on the concrete circumstances of his or her claim.

¹⁸⁷ *Id.* § 19.

¹⁸⁸ *See id.*

¹⁸⁹ The Law’s apparent prohibition against judicial review arguably is in tension with the German constitutional principle of “access to justice,” according to which citizens have a right to bring claims before a judge. Article 10(2) of the German Basic Law (Germany’s constitution) provides:

Restrictions may only be ordered pursuant to a statute. Where a restriction serves the protection of the free democratic basic order or the existence or security of the Federation or a State [Land], the statute may stipulate that the person affected shall not be informed and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

Grundgesetz [Basic Law] art. 10. (F.R.G.), *available in English at* http://www.uni-wuerzburg.de/law/gm00000_.html (last visited Nov. 25, 2001). *See also* BVerfGE 30 (1970), 1 (30–32) [first “G-10” decision] (holding that the installation of a parliamentary review council through a law providing for surveillance measures that touch upon the liberties protected under Art. 10 to control these surveillance measures is constitutional, as long as the individual reserves a right to bring the case before an administrative court); *see also* BVerfGE 100 (1999), 313 [second “G-10” decision] (holding that Art. 10 GG also protects the individual against the electronic use of the data collected in the process of legitimate surveillance); *see generally* Christoph J. M. Safferling, *Zwangsarbeiterentschädigungsgesetz und Grundgesetz*, 34 KRITISCHE JUSTIZ 208, 219 (2001) (arguing that access to justice and judicial review emanates from the principle of rule of law, as laid down in Art. 19 ¶ 4 art. 20 ¶ 1 of the German Basic Law); Ilse Staff, *Sicherheitsrisiko durch Gesetz. Anmerkung zum Urteil des Bundesverfassungsgerichts zum G-10 Gesetz*, 32 KRITISCHE JUSTIZ 586 (1999) (arguing that the FCC fails to draw distinctive lines between the competencies of surveillance agencies and those of the criminal prosecution). International agreements to which Germany is a party may also prohibit such competencies

In sum, the Foundation Law imposes strict temporal restrictions on recovery, denies compensation entirely to certain victim groups and most heirs, and purports to prevent claimants from contesting compensation denials before national courts. Moreover, these constraints did not receive the assent of those affected.

E. Rationales for the Foundation Law

In justifying to the Senate Foreign Relations Committee the United States government's decision to oppose legal claims by Holocaust victims, former United States Deputy Treasury Secretary and Special Representative for Holocaust Issues Stuart Eizenstat¹⁹⁰ argued that such opposition would benefit the victims themselves. "Conventional litigation," he contended, "would be a highly unsatisfactory solution for elderly slave and forced laborers and others injured by German companies during the War."¹⁹¹ Eizenstat set forth three reasons for his claim:

First, the success of litigation is problematic, given the variety of legal defenses available. Already, federal judges have dismissed two of the cases.

Second, litigation would take years to reach fruition, with lengthy discovery, motions and appeals. Survivors average around 80 years of age and are passing away at a rate of some one percent a month. Thus, few survivors would benefit from litigation, even if it were successful [and]

. . . .

Third, any litigation would benefit only, at best, a small subset of surviving slave and forced workers, compared to the number who would benefit from the German Foundation Initiative [T]he Foundation Initiative will cover, under relaxed standards of proof, some one million workers, including those who worked for German companies now defunct or not subject

delegation without opportunity for judicial review. *See, e.g.*, International Covenant of Civil and Political Rights, Dec. 16, 1966, art. 14, 1966 U.S.T. Lexis 521 at 105-08; European Convention on Human Rights, Art. 6 (Nov. 4, 1950), at <http://www.echr.coe.int/Convention/Convention%20countries%20link.htm> (last visited Nov. 25, 2001).

¹⁹⁰ Though Eizenstat was appointed by President Clinton, he continued to perform the role of Holocaust Issues Representative at the invitation of President Bush. *See Federal Judge Declines to Dismiss Holocaust-Reparations Suit*, N.Y. TIMES, Mar. 8, 2001, at A8.

¹⁹¹ *Eizenstat Testimony on Worldwide Holocaust Restitution Efforts: Hearing before the Senate Foreign Relations Comm.*, 106th Cong. (Apr. 5, 2000) (statement of Eizenstat, U.S. Deputy Sec'y and Special Rep. for Holocaust Issues).

to U.S. jurisdiction including SS companies and companies owned by the German government.¹⁹²

Eizenstat's arguments are compelling, suggesting that the Foundation, even with its capped amounts and limitations on eligibility and appeals, was the best deal that survivors could have struck. A closer look, however, reveals some shortcomings in this cluster of rationales.

First, litigation's alternatives have not been so speedy. Negotiations took a year and a half, followed by post-negotiation wrangling for another year.¹⁹³ At this writing, the funds still have not been entirely disbursed.¹⁹⁴ It is not self-evident that settlement and distribution confined to a judicial forum would have proceeded at a slower pace.

Furthermore, given the size of the sums available under the Foundation, it is not clear that the settlement was much more of a material victory for victims than an unsuccessful lawsuit would have been. On June 28, the day she received at most \$2,200, Alicja Chyl of Poland told the Associated Press, "It's a piteous amount of money It's nothing for my work."¹⁹⁵ Aron Krell, a Polish-born survivor living in New York, lamented, "To me this is partial back pay—very little, very late Even if you said we were owed the minimum wage that was prevalent then in Germany, with a tiny rate of interest the amounts would have to be much, much larger than what we're getting."¹⁹⁶ It is not clear that a settlement is made better by arriving quickly or covering more people.

In any event, Eizenstat's claims prove too much; they could support any number of approaches to compensation, not just the Foundation Law. Germany and the United States could, for instance, have removed legal defenses and placed the litigation on an expedited schedule as has been used in other cases in which time was critical to satisfactory resolution.¹⁹⁷ Legislation could just as easily have been used to improve litigation's chances, as the legislature of California surely recognized when it extended the statute of limitations for insurance and slave labor claims.¹⁹⁸

Our primary concern, however, is with Eizenstat's contention that the claimants were unlikely to prevail in court. This statement is important, not only because of its implications for the bargaining relationships

¹⁹² *Id.*

¹⁹³ *See infra* Part II.

¹⁹⁴ Telephone Interview with Arie Bucheister, Director, Survivor's Assistance Program, Jewish Claims Conference (Nov. 28, 2001). Each partner organization is processing claims at its own pace; no specific deadline governs. *Id.*

¹⁹⁵ *Poles Start Receiving Payments for Slave Labor Under Nazis*, N.Y. TIMES, June 29, 2001, at A5.

¹⁹⁶ Stephanie Flanders, *Payments Begin for Laborers Forced to Work for the Nazis*, N.Y. TIMES, June 20, 2001, at A10.

¹⁹⁷ *See, e.g.*, *Bush v. Gore*, 531 U.S. 98 (2000). Alternatively, allowing heirs to recover in their predecessors' stead could have mitigated the urgency of relief.

¹⁹⁸ *See infra* notes 60–61 and accompanying text.

among participants in the negotiations, but also because it adds credence to German industry's refrain that it owes merely a moral and not a legal obligation.¹⁹⁹ This view is echoed in the preamble to the Foundation Law, which contemplates the "historic" responsibility of German industry and the "political and moral" responsibility of the entire country, but conspicuously neglects to assign legal responsibility to anyone.²⁰⁰

The notion that Germany and German companies owe every brand of responsibility except legal responsibility comes a little too easily and generally has been offered without any real discussion of the legal issues. In the next Part, we discuss the legal issues and their historical context in an effort to highlight the key political and moral judgments they implicate.

III. THE HISTORICAL CONTEXT

A. *The Treaties*

Since the 1950s, German courts have interpreted international treaties to preclude litigation by individual claimants. In this section, we dis-

¹⁹⁹ "The German companies have made it a great sense of pride that they're doing this as a moral, not a legal, gesture." Eizenstat press conference, Mar. 10, 2000.

We were unable to find any comments by Eizenstat regarding his own position on the matter of legal responsibility or on any of the legal questions raised by plaintiffs' claims, though he was asked about it on at least two occasions. On May 12, 1999 Eizenstat was asked whether the United States "recognize[s] any legal claims for forced labor, or is this really a moral affair?" He answered as follows:

Well, there was a great deal of discussion, actually, by both sides on the issue of moral and legal. The plaintiffs' attorneys, as you would expect, talked a great deal about the legal nature of the claims. Interestingly, a number of survivor groups stressed the fact that it was the moral issues that were involved. The German companies and the German Government talked about a moral contribution, a voluntary contribution.

I think that it's fine to talk in those terms. But quite frankly, to be practical, instead of trying to pigeon-hole whether it's a moral or legal issue, we have one basic goal in mind. That goal is to make the German initiative work. . . . I think, frankly, it's better to concentrate on that rather than to talk about, at this point, whether this is a moral or legal issue. It's obviously a combination of both and the two are almost inseparable.

At a White House briefing on December 15, 1999 (p. 102), Eizenstat was asked a related question: "Mr. Eizenstat, as you know, there were two lawsuit [sic] in New Jersey on slave labor claims that were dismissed. What did the dismissal of those suits—how did those dismissals impact the negotiations? And why didn't the United States intervene in those lawsuits with an amicus brief, with some kind of interpretation of the treaties that were being decided?" Eizenstat answered "I think I would have to leave it up to the lawyers to tell you what impact it had" and "we were not asked by those judges for our opinion, so we did not provide it."

²⁰⁰ See Law on the Creation of the Foundation, Preamble, v. 2.8.2000 (BGBl. I S.1263).

cuss the relevant treaties and how they affect questions critical to the resolution of restitution claims.

German legislation dealing with restitution for stolen property and compensation for injustices committed during the Third Reich is generally referred to as *Wiedergutmachung* (“making good again”).²⁰¹ Immediately after Germany’s surrender and the creation of the Allied zones on German territory, an intensive “juridification”²⁰² in the field of restitution and compensation set in. Initially, American military law predominated,²⁰³ but in the 1950s, the Bundestag passed several pieces of domestic legislation²⁰⁴ in accordance with its obligations under the Transition Agreement of 1952 (*Überleitungsvertrag*).²⁰⁵ The most significant of these, the Bundesentschädigungsgesetz (BEG),²⁰⁶ had the declared purpose of providing compensation for injustices suffered under Nazi rule.

Several restrictions severely reduced the law’s reach. First, the BEG imposed a territorial requirement. Only those victims who resided within

²⁰¹ For a critique of this term, see Karl Brozik, *Einmalig und voller Lücken: Entschädigung und Rückerstattung*, in *TÄTER-OPFER-FOLGEN. DER HOLOCAUST IN GESCHICHTE UND GEGENWART* 183, 183 (Heiner Lichtenstein & Otto R. Roberg eds., 1995); Sandro Blanke, *Der lange Weg zur Entschädigung von NS-Zwangsarbeitern*, 34 *KRITISCHE JUSTIZ* 195, 199 (2001). See generally Brüggemann, *supra* note 151, at 180 n.9 (“The usage of the problematic term ‘Wiedergutmachung’ is often times justified by its having been used by Holocaust victims outside of Germany during the period of the Nazi rule. The term has been established.”); HELGA & HERMANN FISCHER-HÜBNER, *DIE KEHRSEITE DER “WIEDERGUTMACHUNG”* 11 (1990).

²⁰² PAWLITA, *supra* note 43, at 3 (claiming that this juridification constituted a “state run, lawfully organized appropriation of history”). As Pawlita observes, the matter of compensation concerns the continuity or discontinuity of a state; thus, Germany’s politics of compensation clearly had to be seen as a “parameter of its treatment of National Socialism.” *Id.*

²⁰³ See Hans-Dieter Kreikramp, *Zur Entstehung des Entschädigungsgesetzes der amerikanischen Besatzungszone*, in *WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND* 61 (Ludolf Herbst & Constantin Goschler eds., 1989).

²⁰⁴ See BUNDESRÜCKERSTATTUNGSGESETZ [Federal Restitution Law], v. 19.7.1957 (BGBl. I S.734); BEG, v. 26.6.1956 (BGBl. I S.550) (going into effect retroactively on October 1, 1953 and replacing BUNDESERGÄNZUNGSGESETZ [Federal Supplementary Law], v. 21.9.1953 (BGBl. I S.1387)). For a thorough and comprehensive account of how this legislation played out in administrative practice, see generally FISCHER-HÜBNER, *supra* note 201. See also Walter Schwarz, *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland: Ein Überblick*, in *WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND* 33 (Ludolf Herbst & Constantin Goschler eds., 1989); Ernst Féaux de la Croix, *Vom Unrecht zur Entschädigung: der Weg des Entschädigungs-rechts*, in *DIE WIEDERGUTMACHUNG NATIONALSOZIALISTISCHEN UNRECHTS DURCH DIE BUNDESREPUBLIK DEUTSCHLAND*, VOL. III, 1, 1–118 (Bundesjustizminister der Finanzen [German Finance Ministry] & Walter Schwarz eds., 1985).

²⁰⁵ See Brüggemann, *supra* note 151, at 181.

²⁰⁶ BUNDESENTSCHÄDIGUNGSGESETZ [Federal Compensation Law] (BEG), v. 26.6.1956 (BGBl. I S.559), at §§ 1, 43(2). The BEG recognized claims only for personal and asset injury due to persecution for political, racial, religious, and ethnic reasons, and excluded all potential claimants living in states to which Germany had no diplomatic ties, including (at the beginning of the Cold War) Eastern European countries. *Id.* at § 238a. Those countries, however, had provided a majority of the slave and forced laborers. See Sandro Blanke, *Der lange Weg zur Entschädigung von NS-Zwangsarbeitern*, 34 *KRITISCHE JUSTIZ* 195, 199–200 (2001).

German territory, who were stateless, or who belonged to the group of exiled, deported or “expelled” persons, and who could establish the required territorial connection to the German Reich within the 1937 parameters, were eligible.²⁰⁷ Second, the BEG did not recognize slave or forced labor per se as grounds for compensation.²⁰⁸ As most of the slave and forced laborers had come from Eastern Europe,²⁰⁹ and many survivors returned to these countries after their liberation, most former laborers had no claim under the BEG.²¹⁰ Third, the BEG-Schlussgesetz of 1965²¹¹ imposed an expiration date, barring claims made under the BEG after 1969.

At the time the original BEG legislation was enacted, Germany expressed fear to the international community that individual compensation for each of the Third Reich’s victims would be financially impossible.²¹² As a result, collective compensation emerged as the favored approach, and Germany became nearly immune to individual suits.²¹³ Even in the immediate aftermath of World War II, therefore, litigation for individual plaintiffs held little promise.

In addition to the Transition Agreement of 1952, the German government entered into a number of other post-World War II treaties.²¹⁴ The earliest treaties primarily concerned security matters.²¹⁵ Parties to subsequent agreements, however, quickly realized that plans to integrate post-war Germany with the anti-Soviet West would have significant repercus-

²⁰⁷ BEG §§ 4, 167.

²⁰⁸ *Id.* at § 43(2). The BEG recognized claims for deprivation of freedom, injury, or death that might arise in connection with forced labor, but forced labor itself did not entitle a person to recovery. *Id.* Compensation also was provided for general persecution because of race, religion, political opinion, furthermore for professional damage (“*Berufsschaden*”), i.e., the termination of one’s career. *Id.* See also Walter Schwarz, *Zur Einführung: Das Recht der Wiedergutmachung und seine Geschichte*, 26 JURISTISCHE SCHULUNG 433, 437–39 (1986); *Wiedergutmachung und Kriegsfolgenliquidation* 82–88 (HERMANN-JOSEF BRODESSER ET AL. EDS. 2000).

²⁰⁹ Herbert, *supra* note 52, at 221–29; Benz, *supra* note 52, at 4; PAWLITA, *supra* note 43, at 34–38, 48–52.

²¹⁰ BEG §§ 4, 167.

²¹¹ Zweites Gesetz zur Änderung des Bundesentschädigungsgesetzes (BEG-Schlussgesetz), v. 14.9.1965 (BGBl. I S.1315) (amending the BEG).

²¹² See BGH, RzW 14 (1963), 525 (526); BGH, NJW, 35 (1973), 1549 (1550).

²¹³ Blanke, *supra* note 206, at 200; Brüggemann, *supra* note 151, at 183.

²¹⁴ See PAWLITA, *supra* note 43, at 110, 146. These treaties followed the Yalta and Potsdam Agreements between Victorious Nations of February and July/August 1945 and precede the London Debt Agreement of 1953. See *Abkommen über deutsche Auslandsschulden*, v. 27.2.1953 (BGBl. II S.333) (available in English, French, and German). Among the most prominent are the Paris Reparation Treaty of 1946 and the Peace Treaties of 1947 with Italy, Romania, Hungary, Bulgaria and Finland. See Hess, *Völker- und zivilrechtliche Beurteilung der Entschädigung für Zwangsarbeit vor dem Hintergrund neuerer Entscheidungen deutscher Gerichte*, in: *Entschädigung für NS-Zwangsarbeit* 65, 81 (1998); *Wiedergutmachung und Kriegsfolgenliquidation. Geschichte—Regelungen—Zahlungen* (Hermann-Josef Brodesser, et al. eds. 2000), *supra* note 43, at 63–64.

²¹⁵ PAWLITA, *supra* note 43, at 110, 146.

sions on prospects for reparations.²¹⁶ If Germany were burdened with onerous reparation obligations, the likelihood of a speedy economic and political recovery would be slim.²¹⁷

As a result, Germany's obligations following World War II differed substantially from its obligations under the Treaty of Versailles after World War I.²¹⁸ The post-World War II scheme reflected more cautious reparation politics. Under the German-Israeli Treaty of 1952 (known as the Luxembourg Agreement),²¹⁹ Germany agreed to pay DM 3 billion to the State of Israel,²²⁰ while under an agreement with the Jewish Claims Conference concluded the same day, Germany paid DM 450 million.²²¹ A series of bi- and multilateral international agreements signed between 1954 and 1964 set free nearly DM 900 million in pension and one-time compensation payments to former victims of Nazi persecution now residing in eleven Western signatory states.²²² German law professor Burkhard Hess recently noted that "both the compensation paid under the BEG as well as under global compensation agreements have pushed aside holding the individual companies liable."²²³

The preference for global over individual compensation prevented most of the Third Reich's victims from recovering. Non-Germans, who formed a majority of those persecuted by the Nazis, were considered residents of former enemy states and were largely excluded from compensation.²²⁴ Global compensation also eliminated opportunities for individualized compensation. Courts regularly dismissed individual lawsuits by referring to existing compensation legislation; indeed, courts held that compensation legislation and international treaties precluded the claims

²¹⁶ *Id.* at 71–87.

²¹⁷ *Id.*

²¹⁸ It would not be unfair to view this result as a windfall for Germany, given the traditional use of the reparations instrument by formerly warring nations. Ignaz Seidl-Hohenveldern, *Reparations*, in 4 *ENCYCLOPEDIA OF PUBLIC INT'L LAW* 178, 178–80 (2000).

²¹⁹ Abkommen zwischen der Bundesrepublik und Israel, Sept. 10, 1952, art. 1–5, v. 21.3.1953 (BGBl. II S.35).

²²⁰ See Karl Brozik, *Einmalig und voller Lücken: Entschädigung und Rückerstattung, in TÄTER-OPFER-FOLGEN. DER HOLOCAUST IN GESCHICHTE UND GEGENWART* 183, 187 (Heiner Lichtenstein & Otto R. Roberg eds., 1995). For an analysis of the differing views of the Treaty, see generally PAWLITA, *supra* note 43, at 269–84.

²²¹ See *id.* at 269, 284–89.

²²² Brüggemann, *supra* note 151, at 182; ULRICH HERBERT, *ARBEIT, VOLKSTUM, WELTANSCHAUUNG: UBER FREMDE UND DEUTSCHE IM 20 JAHRHUNDERT* 177 (1995) (citing BT-Drs. 6287/30 (parliamentary report of Oct. 31 1986)); *Bundestagsdrucksache* (Parliament report of 31 October 1986) 10/6287, p. 30/50. These agreements drew both praise and disapproval, inside and outside Germany. See, e.g., Michael Wolffsohn, *Globalentschädigung für Israel und die Juden? Adenauer und die Opposition in der Bundesregierung*, in *WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND*, *supra* note 203, at 161; Norbert Frei, *Die deutsche Wiedergutmachungspolitik gegenüber Israel im Urteil der öffentlichen Meinung der USA*, in *WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND*, *supra* note 203, at 215.

²²³ Burkhard Hess, *Entschädigung für NS-Zwangsarbeit vor US-amerikanischen und deutschen Zivilgerichten*, 44 *DIE AKTIENGESELLSCHAFT* 145, 151 (1999).

²²⁴ See Herbert, *supra* note 222, at 178–81.

even of plaintiffs who failed to meet the eligibility criteria of the compensation laws.²²⁵

The compensation regime enacted by the German parliament shortly after the war thus amounted to domestic statutory law compensating a small minority of victims and a series of agreements with foreign governments and the Jewish Claims Conference. The most critical diplomatic agreement for our purposes is the London Agreement on Germany's External Debts ("London Debt Agreement" or "LDA"). Concluded February 27, 1953,²²⁶ the LDA was contemporaneous with Germany's compensation negotiations with Israel and the Jewish Claims Conference.²²⁷ According to its preamble, the main purpose of the LDA was to enable Germany to establish normal economic relations with other nations.²²⁸ The LDA contemplated a series of payments by the German government to the signatory states (the United States, Great Britain, France and the Soviet Union) but postponed reparation claims by these states until Germany regained its economic footing:

Consideration of claims *arising out of the Second World War* by countries which were at war with or were occupied by Germany during that war, and by nationals of such countries, against the Reich, or *agencies of the Reich . . .* shall be deferred until the final settlement of the problem of reparations.²²⁹

German courts interpreted this provision to postpone various plaintiffs' claims until conclusion of "a final reparation treaty."²³⁰ The German courts therefore rejected claims made before a final reparation settlement because they were "derzeit unbegründet" ("as yet unfounded").²³¹ Consequently, the length of time between the events giving rise to the claims and the adjudication of those claims grew.

To this day, no formal peace treaty has ever been concluded between Germany and the former Allies. The so-called "2+4 Treaty" of 1990²³²

²²⁵ See, e.g., BGH, RzW, 12 (1963), 525; BGH, NJW, 35 (1973), 1549 (1550).

²²⁶ Abkommen über deutsche Auslandsschulden, v. 27.2.1953 (BGBl. II S.333) (available in English, French, and German).

²²⁷ See HERBERT, *supra* note 222, at 163.

²²⁸ See BGH, NJW, 35 (1973), 1549 (1551–52).

²²⁹ Abkommen über deutsche Auslandsschulden, v. 27.2.1953 (BGBl. II S.333), at Article 5(2) (emphasis added).

²³⁰ Entscheidungen des Bundesgerichtshofes in Zivilsachen (BZHZ) 18 (1955), 22 (22, 27, 32). See also BGH, Versicherungsrecht (VersR), 22 (1964), 637; BGH, RzW, 14 (1963), 525; BGH, NJW, 35 (1973), 1549 (1550).

²³¹ *Id.* at 1552 (noting the ill effects a reparation agreement would have on Germany's recovery, especially if compensation claims for forced labor figured among these reparations). See, e.g., BGH, Monatsschrift des Deutschen Rechts (MDR), 17 (1963), 492; OLG Stuttgart, RzW, 15 (1964), 425; LG Frankfurt, NJW, 13 (1960), 1575 (1576); FERENCZ, *supra* note 8, at 132.

²³² The 2 refers to West Germany and East Germany, and the 4 refers to the United States, Great Britain, France and the Soviet Union. Vertrag über die abschließende Rege-

("2+4"), however, has come to serve the basic functions of a peace treaty.²³³ This document, which was signed at the time of German reunification, restored total sovereignty to the newly unified Germany.²³⁴ It makes no mention of reparations arising out of World War II. The question therefore arose whether 2+4 fulfills the vision of the London Debt Agreement. As § 12 of the preamble of 2+4 states, the signatory parties understand the treaty to conclude World War II-related matters with Germany;²³⁵ 2+4 therefore seems to preclude further reparation treaties among the signatory states, notwithstanding the LDA's being entirely mute on the issue of reparations.

Since it eliminated the obstacle posed by the LDA, one might have expected that 2+4 would have spurred a wave of lawsuits. Instead, the significance of 2+4 and the possibilities it presented took time to sink in—too much time for many potential plaintiffs in Eastern Europe.²³⁶ Uncertainty remained as to whether the LDA's concept of state-to-state reparations would still block individual forced labor claims.

At the same time, two lawsuits were launched against Germany before the Bremen and Bonn *Landgerichte* (Regional Courts) in an effort to break through the dual barriers erected by the restrictive BEG and the casting of compensation claims as reparations under the LDA.²³⁷ After 2+4, it became clear that there would be no final reparation agreement. It seemed the only way to reopen avenues for compensation was to challenge Germany's post-war claim that compensation outside the purview of the BEG threatened to put Germany into insolvency.

In 1993, the Bonn Court, dealing with claims by plaintiffs who allegedly were excluded from recovery under national compensation laws like the BEG, presented to the *Bundesverfassungsgericht* (FCC) [federal constitutional court] the question of whether section 1 of the 1957 law

lung in Bezug auf Deutschland [Treaty on the Final Settlement with Respect to Germany], v. 12.9.1990 (BGBl. II S.1317) (including treaty text in English as well as German).

²³³ See Dietrich Rauschnig, *Beendigung der Nachkriegszeit mit dem Vertrag über die abschließende Regelung in bezug auf Deutschland*, in DEUTSCHES VERWALTUNGSBLATT (DVBl.) 105 (1990), 1275 (1279); Dieter Blumenwitz, *Der Vertrag vom 12.9.1990 über die abschließende Regelung in bezug auf Deutschland*, NJW, 48 (1990), 3041; PAWLITA, *supra* note 43, at 468–71.

²³⁴ Vertrag über die abschließende Regelung in bezug auf Deutschland, v. 12.9.1990 (BGBl. II S.1317).

²³⁵ See Rauschnig, *supra* note 233, at 1279.

²³⁶ See, e.g., OLG Stuttgart, NJW, 53 (2000), 2680 (rejecting a claim for compensation in tort with reference to the three-year statute of limitations in German tort law, since the statute was activated on the day the 2+4 treaty went into force, on March 15, 1991). WIEDERGUTMACHUNG UND KRIEGSFOLGENLIQUIDATION. GESCHICHTE REGELUNGEN ZAHLUNGEN (Hermann-Josef Brodesser/Bernd Josef Fehn/Tilo Franosch/Wilfried Wirth eds. 2000), *supra* note 43, oppose this view, arguing that as 2+4 was mute on the matter of reparations but, instead, was aimed at erecting a durable peace agreement for Europe, *id.* at 185–86. Nevertheless, Brodesser et al. conclude that the political developments and the German payments since 1945 had rendered another reparation agreement superfluous.

²³⁷ See Burkhard Heß, *Entschädigung für NS-Zwangsarbeit vor deutschen und US-amerikanischen Gerichten*, 44 DIE AKTIENGESELLSCHAFT 145, 151 (1999).

Allgemeines Kriegsfolgesgesetz (AKG) [General Law on the Consequences of the War]²³⁸ was constitutional. Section 1 of the AKG had been interpreted to preclude any claims against Germany not expressly recognized in that statute. This lawsuit presented the question of whether the political justifications offered by the German government at the law's enactment forty years earlier still held true, since there remained no doubt about Germany's successful economic recovery.

The FCC ruled that neither economic recovery nor German reunification necessitated a review of decisions made in the context of immediate post-war consolidation.²³⁹ While the FCC acknowledged the possibility of revising the AKG's provisions, it considered this prerogative to reside with the German legislature. The FCC upheld section 1 of the AKG, explicitly cognizant of the historical and political circumstances that led to the AKG's curtailment of compensation claims.²⁴⁰

The Court added in *dictum* that no rule of international law impeded the legislature if it wished to recognize individual compensation claims, even if such claims were grounded in facts falling under the rubric of reparations (i.e., state-to-state compensation).²⁴¹ This portion of the FCC's decision was received by plaintiffs' representatives as a triumph,²⁴² but only for a brief period.

In 1997, following the FCC's decision, the Bonn Court awarded victory to a Polish woman, who (like twenty-one other plaintiffs involved in the suit) had taken on Israeli citizenship after the war. The court noted that § 8 para. 1 of the BEG prevented recovery by the other plaintiffs who had received prior compensation, yet held that the Polish woman had established a tort claim against Germany under § 839 of the German Civil Code (BGB).²⁴³ The court found forced labor to be a clear case of violation of personal freedom and damage to health. Section 839 of the BGB and Art 34 *Grundgesetz* (German Basic Law), created a cause of action in tort against the State authority—here the SS at Auschwitz—for coercing the plaintiff into the forced labor.

Germany appealed the decision, and the Appeals Court reversed, finding the lone appellee's claim also barred by § 8 para. 1 of the BEG.²⁴⁴ The Appeals Court held that the BEG's residency requirement (§ 4) ex-

²³⁸ Gesetz zur allgemeinen Regelung durch den Krieg und den Zusammenbruch des Deutschen Reiches entstandener Schäden (Allgemeines Kriegsfolgesgesetz), v. 5.11.1957 (BGBl. I S.1747).

²³⁹ Entscheidungen des Bundesverfassungsgerichts ("BVerfGE"), 94 (1996), 315 (325).

²⁴⁰ *Id.*

²⁴¹ BVerfGE, 94, 315 (331–34).

²⁴² See *id.* at 330–34. But see Hugo J. Hahn, *supra* note 1 (failing even to mention the decision when referring to the governing law in this field).

²⁴³ LG Bonn, 16 STREIT 101 (1998), *overruled by* OLG Köln, 52 NJW 1555 (1999), *appeal docketed* BGH, IX ZR 439/98 (JURIS); cf. Herbert Küpper, Die neuere Rechtsprechung in Sachen NS-Zwangsarbeit, in 31 KRITISCHE JUSTIZ 246 (1998).

²⁴⁴ See OLG Köln, 52 NJW 1555, 1555 (1999).

cluded the appellee from recovery, *and* that § 8 para 1 made her ineligible for any *other* compensation. According to the Appeals Court's decision, compensation for Nazi-era persecution under the BEG (which does not specifically recognize forced labor as a claim *per se*) was the only avenue to compensation. Having failed to meet the residency requirement, the woman was effectively blocked from claiming any compensation from Germany, even outside of the BEG. The appeal before the Federal Court of Justice (*Bundesgerichtshof*) is, at this writing, still pending.

In sum, Nazi-era laborers asked German courts to examine whether existing law blocked avenues for individual compensation outside the BEG. Courts consistently held that it did. Though the BEG regime denied compensation on the basis of slave or forced labor, limited the number of eligible claimants, and precluded all claims against Germany outside the BEG, German courts held that the choice of a particular compensation regime was a matter for the legislature which courts could not review. Thus the German case law interpreting international treaties and national legislation reflects the same choice as the Foundation Law: it diverts claims from the courtroom to the legislature. Moreover, courts not only declined to assign legal responsibility, but also obscured any traces of the post-war political judgments that guided their decisions or those of the German legislature.

B. Problems Raised by the Treaties

1. Statute of Limitations

Cases brought before German courts in the past few years have confronted a charge of untimeliness according to the applicable statute of limitations.²⁴⁵ These cases, like their predecessors, reveal a highly fragmented understanding of the applicability of this total bar. For instance, a lawsuit brought in 1959 by a German national against his former "employer" was rejected on the ground that his claim had expired.²⁴⁶ This case established a two-year statute of limitations by tying the compensation claim to the civil law provisions dealing with pay for work, notwithstanding the fact that the plaintiff had not consented to his employment.²⁴⁷ Since this decision, the precise legal category appropriate for a

²⁴⁵ See, e.g., LG Hamburg, NJW, 52 (1999), 2825; LG Berlin, NJW, 53 (2000), 1958; OLG Hamm, NJW, 53 (2000), 3577.

²⁴⁶ See *Entscheidungen des Bundesgerichtshofes in Zivilsachen (BZHZ)*, 48 (1967), 126 (126). Plaintiff asserted that he had worked under gruesome conditions for more than two years for the defendant without pay; the defendant had instead paid the monthly sum of 132 Reichsmark to the Nazis. The Court denied the necessity of employment-at-will for an assessment of plaintiff's claim for wages, ruling that plaintiff had worked under a *de facto* contract. The Court rejected both the unjust enrichment claim for wages and the tort claim on the ground that they had expired.

²⁴⁷ See Heß, *supra* note 237, at 151 (noting simply that the "Bartl" case had been re-

claim of enslavement has changed from case to case, and is reflected in the varying limitation periods that German courts have applied.²⁴⁸

In the 1990s, German courts continued to apply different statutes of limitations. While some courts began with the assumption that there is a general two-year statute in the context of employment, the *Bundesarbeitsgericht*, the highest employment court in Germany, refused to recognize any employment relationship in a forced labor case and referred the case back to the civil courts.²⁴⁹ The *Arbeitsgericht Koblenz*, a regional employment court, denied the existence of an employment contract between a Polish former forced laborer and the company for which the labor was performed, referring the case to the civil courts. The court also noted, however, “that civil law is made to react neither to the millions of cases of forced labor in this century nor to the takings, deportations and other mass crimes against life and health.”²⁵⁰

In a 1999 case before the *Landgericht Hamburg*, the court held that claims brought this late regardless of the envisioned foundation solution had expired in 1979, i.e., thirty years after the enactment of the German Basic Law.²⁵¹ Evaluating the merits of the lawsuit to determine whether the court would be obliged to provide legal aid, the court raced through several alternative bases for the suit before dismissing it on statute of limitations grounds. Even if the generally applicable thirty-year statute of limitations²⁵² governed the claims, the plaintiff had failed to file suit before this thirty-year period expired. The clock had begun ticking the last time the plaintiff performed forced labor, or, at the very latest, at the time the *Grundgesetz* (German Basic Law) was enacted. The court concluded by observing: “[a]fter all, judicial aid cannot be granted, although for moral reasons which in the judicial aid procedure, however, cannot be of penetrating importance, claimant—if he has not been indemnified under the BEG—should at least, if he meets the requirements, receive compensation as a Polish forced laborer under the to-be-created Foundation Act,

jected because of the two-year statute of limitations).

²⁴⁸ See, e.g., BGH, BGHZ 48, 125 (1967) (2 years, § 196 Abs. 1 Nr. 9 BGB); LG Hamburg, NJW, 38 (1999), 2825 (30 years, § 195 BGB); Landesarbeitsgericht (LAG) [labor court of appeals] Nürnberg, Arbeit und Recht (AuR), (1999), 405; LAG München, AuR, (1999), 449; LAG Hessen, AuR, (1999), 450; Arbeitsgericht (ArbG) Hannover, AuR, (1999), 451; Bundesarbeitsgericht (BAG) [supreme labor court], NJW, 19 (2000), 1438 (all four cases: denying employment character and referring to trial court); BAG, Arbeit und Arbeitsrecht (AuA), 48 (2000), 228 (followed by critical commentary by Achim Seifert); OLG Stuttgart, NJW, 36 (2000), 2680.

²⁴⁹ BAG, NJW, 19 (2000), 1438. See also BAG, AuA, 48 (2000), 228 (followed by Achim Seifert’s critical commentary, which emphasizes that the Court neglects a number of legal considerations which would have produced the opposite result).

²⁵⁰ ArbG Koblenz, NJW, 38 (1999), 2838 (2839) (trans. by Zumbansen).

²⁵¹ LG Hamburg, NJW, 38 (1999), 2825, 2825 (trans. by Zumbansen).

²⁵² See § 852 Abs.1 2. Alt. BGB (§ 852 para. 1 alt. 2 of the German Civil Code).

a Fund that is designed—as is commonly known—to preclude individual suits.”²⁵³

Former slave and forced laborers were thereby left with no path to compensation. Prior to 2+4, German courts read the language of the London Debt Agreement (LDA) (deferring claims “arising out of the Second World War” until a “final settlement of the problem of reparations”) to defer slave and forced labor claims. They regarded claims arising out of slave and forced labor as claims for reparations, or state-to-state payments, rather than as matters suited to private compensation for individuals.²⁵⁴

Though this might have been the case only until a final reparation agreement was concluded, after 2+4, claims were rejected for new reasons. The political forces that guided the LDA and the German compensation laws of the 1950s cast a long shadow on the prospects for litigating individual claims, even after 2+4. In more recent cases, claims for compensation have been caught between the post-World War II political impulse to avoid repeating the purported mistakes of Versailles, and the global settlement (the Foundation), which provides compensation for those who meet the criteria but excludes all individual claims outside its purview.

A conspicuously brief decision handed down by the FCC on April 25, 2001 illustrates and reinforces this trap.²⁵⁵ The plaintiff asserted that section 16 of the Foundation Law deprived him (and other former slave and forced laborers) of the right to sue, in violation of Article 14 of the German Basic Law.²⁵⁶ His argument could succeed, the court reasoned, only if the Foundation Law deprived him of an otherwise valid legal claim.²⁵⁷ The FCC held that the complainant did not have a compensation claim outside of the one provided by the Foundation Law. Section 16 of the Foundation Law, therefore, did not collide with Article 14 of the German Basic Law. The FCC, certainly aware of the bluntness of such an assertion, based its decision on the existence of “not a single case” in which a forced labor claim had prevailed.²⁵⁸ Notwithstanding the intricacies of the treaties, the national compensation legislation, and the case

²⁵³ LG Hamburg, NJW, 52 (1999), 2825 (2825).

²⁵⁴ See *infra* Part III.A.

²⁵⁵ BverfG, NJW, 54 (2001), 2159.

²⁵⁶ See Safferling, *supra* note 189, at 211–17.

²⁵⁷ *Id.*

²⁵⁸ BverfG, NJW, 54 (2001), 2159. The FCC apparently overlooked the Wollheim case. After winning in a lower court, Wollheim settled the suit for the sum of DM 30 million, DM 26.25 million of which were distributed to Jewish victims, while the remaining DM 3.75 million went to non-Jewish forced laborers of Polish descent. See Wolfgang Benz, *Der Wollheim Prozeß: Entschädigung für Zwangsarbeit in Auschwitz*, in *ZWISCHEN HITLER UND ADENAUER: STUDIEN ZUR DEUTSCHEN NACHKRIEGSGESELLSCHAFT* 128, 153 (1991).

law, the FCC declined to confront the complexities of the forced labor issue, readily telling a story of failure.

In the German context, this decision probably marked the end of “litigating the Holocaust”²⁵⁹—at least for the slave and forced labor claims. The decision by Germany’s highest court does not leave much room to pursue avenues of relief other than the one offered by the Foundation.²⁶⁰

Given these decisions, we do not contend that additional litigation would have resulted in victories for the survivors of the Nazi labor program. We merely illustrate the political forces at work throughout the legal reckoning with slave and forced labor during the Third Reich. From the earliest legal decisions, one can discern the impact of the Versailles Treaty, which laid a heavy financial and political burden on Germany after World War I; the beginning of the Cold War; and the Allied Treaty politics with regard to international reparations and the resulting exclusion of individual claims.²⁶¹ Moreover, courts concluded in the 1960s and 70s that corporate actors were *agencies of the Reich*²⁶² within the meaning of the LDA,²⁶³ thereby extending the LDA’s deferment of claims to protect the companies on the basis of these historical-political influences.

Years later, judges deliberating on forced labor claims paid no attention to the circumstances under which post-war and Cold War judges had handled initial cases arising out of the National Socialist period. When the FCC allotted a mere two pages for a case of immense historical dimensions, declining to consider the complexities of the LDA and 2+4 and focusing exclusively on the outcomes of the earlier claims, it failed to account for the real animus behind the decisions upon which it relied. The court’s decision represents the ultimate denial of victims’ legal claims and a culmination of years of decisions adverse to the victims of Nazism. Their losses were counted in the record of *stare decisis*, but the political context, and therefore the real significance of the losses, was erased.

²⁵⁹ See Brown, *supra* note 15, at 553.

²⁶⁰ BVerfG, NJW, 30 (2001), 2159.

²⁶¹ The fact that many pre-war judges remained in office after 1945 may also have contributed. See, e.g., INGO MÜLLER, FURCHTBARE JURISTEN: DIE UNBEWÄLTIGTE VERGANGENHEIT UNSERER JUSTIZ 203 (1989); Bernhard Diestelkamp, *Rechts- und verfassungsgeschichtliche Probleme zur Frühgeschichte der Bundesrepublik Deutschland*, 21 JURISTISCHE SCHULUNG 492 (1981); Günter Frankenberg & Franz J. Müller, *Juristische Vergangenheitsbewältigung—Der Volksgerichtshof vorm BGH*, 17 KRITISCHE JUSTIZ 145 (1983); Joachim Perels, *Die Restauration der Rechtslehre nach 1945*, 18 KRITISCHE JUSTIZ 359 (1984); Rolf Lamprecht, *Lesarten für Rechtsbeugung*, 47 NEUE JURISTISCHE WOCHENSCHRIFT 562 (1994).

²⁶² We mean that private entities engaged in the employment of forced and slave laborers were considered to be “agencies of the Reich” in the meaning of Art. 5(2) of the LDA and thereby immunized against individual claims until the signing of a peace treaty with Germany. For analysis, see *infra* Part III.B.2.

²⁶³ See BGH, RzW, 14 (1963), 525; BGH, NJW, (1973), 1549.

2. *Justiciability of Private Claims*

Like the German courts, two federal district courts in New Jersey found that the LDA and 2+4 barred plaintiffs' claims. After a lengthy examination of the multiple post-war treaties from 1945 through 2+4 in 1991,²⁶⁴ the *Degussa* court found that "individual claims for forced labor against the German government and private industry were subsumed by national governments in the treaties which concluded the war with Germany."²⁶⁵ The court reached this conclusion notwithstanding plaintiffs' efforts to distinguish their private claims from claims for reparations arising out of war.²⁶⁶ The *Iwanowa* court agreed.²⁶⁷ In the view of both courts, plaintiffs' claims raised political questions that were not fit for judicial resolution.

To reach these conclusions, the New Jersey courts had to answer (explicitly or implicitly), two related questions inherent in their application of the LDA. First, did the plaintiffs' claims *arise out of* World War II? Second, were the companies acting *as agencies of the Reich* when they utilized slave and forced labor? An affirmative answer to both would mean that the LDA and 2+4 combined first to defer and then to preclude altogether plaintiffs' claims. We discuss each below ((a) and (b), respectively).

a. Arising out of War (Reparations vs. Compensation)

As German historian Ulrich Herbert, a leading expert in the field of slave and forced labor, declared in the summer of 2000 (just after Germany and German industry agreed to fund the Foundation with DM 10 billion), "[o]ne ought to keep in mind that forced labor had—for the longest time and until very recently—not been considered a [Nazi-era] crime as such. Instead forced labor had been regarded as an inevitable war related effort to confront war time labor shortages."²⁶⁸

In the early 1940s, there was already widespread belief that Germany would be called to account for the actions of its government and industries, and that a far-reaching restitution and compensation program was likely.²⁶⁹ Nevertheless, it was still far from evident how it would be

²⁶⁴ *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 262–72 (D.N.J. 1999).

²⁶⁵ *Id.* at 281.

²⁶⁶ See *infra* Part III.B.3 for a discussion of justiciability and the political question doctrine.

²⁶⁷ *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 460 (D.N.J. 1999).

²⁶⁸ Ulrich Herbert, "Ein Element der Verunsicherung, der Irritation, des Erschreckens," *Der Umgang mit der NS-Vergangenheit und die Entschädigung von Zwangsarbeitern*, 45 *BLÄTTER FÜR DEUTSCHE UND INTERNATIONALE POLITIK* 555, 558 (2000) (trans. by Zumbansen).

²⁶⁹ FISCHER-HÜBNER, *supra* note 201, at 11. See also PAWLITA, *supra* note 43, at 160–91 (discussing various proposals by the Allied governments and by Jewish authors).

executed. Well into the post-war years, the distinctions between reparations and compensation in the case of Nazi Germany were only vaguely contemplated, eventually resulting in a dynamic that strongly favored state-to-state reparation over private compensation models.²⁷⁰

Furthermore, lawyers practicing compensation law did so in relative isolation. As post-war Germany focused on economic recovery and putting its past behind it, such lawyers found themselves marginalized by their colleagues.²⁷¹ The political climate in Germany in the 1950s was one of recovery, rebuilding and integration into the west—not one of turning back, regret or open discussion of the past.²⁷²

Even today, one would have difficulty finding a lawyer who can comfortably distinguish between reparations and compensation. Only a handful of lawyers have ever practiced in this field.²⁷³ The situation for plaintiffs was further complicated by the heterogeneity of the claimants and claims. Individuals, organizations and states lodged competing claims for asset restitution, individual and collective compensation, and

²⁷⁰ See HERBERT, *supra* note 222, at 160–61 (describing Germany's intent to subsume compensation payments for slave and forced laborers under a state-to-state reparation scheme); see also Hess, *Völker- und zivilrechtliche Beurteilung*, *supra* note 214, 86–89 (describing that while Germany succeeded in reaching a reparations moratorium with the London Debt Agreement, it was still obliged to provide compensation by national legislation); see also *supra* Part III.A. (regarding the scope of this legislation, namely the restrictive BEG, effectively excluding many potential recipients of compensation).

This was the case notwithstanding the fact that Germany enacted a substantial restitution scheme. See SPOERER, *supra* note 80, at 242 (2001) (regarding DM 85 billion distributed under the BEG); PETER REICHEL, VERGANGENHEITSBEWÄLTIGUNG IN DEUTSCHLAND: DIE AUSEINANDERSETZUNG MIT DER NS-DIKTATUR VON 1945 BIS HEUTE 74 (2001) (regarding an overall sum of DM 160 billion distributed under the *signum* of *Wiedergutmachung*).

²⁷¹ See, e.g., PAWLITA, *supra* note 43, at 5. See also Schwarz, *supra* note 32, at 114. In this farewell note, Editor-in-Chief Schwarz noted that the weekly journal was neither read nor regarded as a promising publication by mainstream lawyers in post-war Germany. On occasion of the journal's last issue in 1981, Schwarz bitterly recalled that only four tenured professors chose to publish pieces in the journal and that, of the scant feedback the journal received, most was harsh criticism of the journal's publication policy, which was alleged to cast Germany's compensation politics in bad light. *Id.* at 115.

²⁷² See Schwarz, *supra* note 32; Blanke, *supra* note 208, at 201. Germany's treatment of its Nazi past has been the subject of intense research. See, e.g., EUGEN KOGON, DIE UNVOLLENDETE ERNEUERUNG: DEUTSCHLAND IM KRÄFTEFELD 1945–1963 (1964); NORBERT FREI, VERGANGENHEITSPOLITIK: DIE ANFÄNGE DER BUNDESREPUBLIK UND DIE NS-VERGANGENHEIT (1996); LUTZ NIETHAMMER, DEUTSCHLAND DANACH: POST-FASCHISTISCHE GESELLSCHAFT UND NATIONALES GEDÄCHTNIS 53, 53–58 (1999) (discussing the forms of “de-nazification” in the four occupation zones); ULRICH HERBERT & OLAF GROEHLER, ZWEIERLEI BEWÄLTIGUNG: VIER BEITRÄGE ÜBER DEN UMGANG MIT DER NS-VERGANGENHEIT IN DEN BEIDEN DEUTSCHEN STAATEN (1992); HELMUT DUBIEL, NIEMAND IST FREI VON DER GESCHICHTE: DIE NATIONALSOZIALISTISCHE VERGANGENHEIT IN DEN DEBATTEN DES DEUTSCHEN BUNDESTAGES (1999); ALEIDA ASSMANN & UTE FREVERT, GESCHICHTSVERGESSENHEIT, GESCHICHTSVERSESSENHEIT: VOM UMGANG MIT DEUTSCHEN VERGANGENHEITEN NACH 1945 (1999).

²⁷³ See Walter Schwarz, *Zur Einführung: Das Recht der Wiedergutmachung und seine Geschichte*, 26 JURISTISCHE SCHULUNG 433 (1986), at 433; see also, Abschied, *supra* note 32, at 115.

reparations.²⁷⁴ As the German political scientist Peter Reichel has observed in his recent book on “Vergangenheitsbewältigung” (“the coming to terms with the past”), individual victims faced a politically difficult struggle in competing against these rival claims.²⁷⁵ Acknowledgment of the post-war decision to avoid repeating the perceived mistakes of Versailles relieved Germany and German industry of any obligation to respond to individual compensation claims; the claims were simply subsumed under the concept of state-to-state reparations.²⁷⁶ By grounding their decisions in this conceptualization of the claims, as well as in early interpretations of the treaties reflecting this conceptualization, German courts effectively conceded the historical contingency of their reasoning.

This concession, however, has done little for plaintiffs. Given the choice between accepting compensation along with an acknowledgement of “political, moral, and historical” responsibility under the Foundation Law or receiving nothing at all because “no case is known where plaintiffs succeeded,”²⁷⁷ the choice for plaintiffs seems obvious.²⁷⁸ If German courts had decided not to treat the use of slave and forced labor as war-related, plaintiffs might have presented claims for individual relief outside the context of state-to-state reparations.

b. Agencies of the Reich

As a related matter, companies have argued that, when they employed forced laborers, they were not autonomous employers in a private labor market, but were instead “agencies of the Reich.”²⁷⁹ The claims against them, they therefore argue, should meet with the demise contemplated under the LDA.

The language of the LDA appears to contemplate broad incorporation of private actors into a zone of impunity by postponing all claims

²⁷⁴ REICHEL, *supra* note 270, at 76.

²⁷⁵ *Id.* at 76.

²⁷⁶ See HERBERT, *supra* note 222, at 160.

²⁷⁷ Such was the formula reiterated by the *Bundesverfassungsgericht* in its dismissal of April 25, 2001. BVerfG, NJW, 54 (2001), 2159.

²⁷⁸ See DEBORAH STONE, POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING 242–56 (1997). Stone advises readers to “be on the lookout for Hobson’s choices. Whenever you are presented with an either/or choice, you should be tipped off to a trap. You can disengage it by . . . expanding the range of consequences you bring into the analysis.” *Id.* at 256.

²⁷⁹ The famous (yet unpublished) Wollheim case before the Frankfurt Regional court on November 3, 1951, was one of the very rare instances in which this line of defense was not accepted by the judge. For an intriguing background account, see Benz, *supra* note 258, at 128–54; see also Wolfgang Benz, *In Sachen Wollheim gegen I. G. Farben*, 9 DACHAUER HEFTE 142–47 (1993); cf. Otto Küster, *Das Minimum der Menschlichkeit: Plädoyer*, 9 DACHAUER HEFTE 156–74 (1993) (one of Wollheim’s lawyers providing the argument to the court). In contrast, the defendant companies in *Iwanowa* argued that they were *not de facto* state actors for purposes of the Alien Tort Claims Act. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 443 (D.N.J. 1999).

until the time of a final peace treaty. Certainly when a country is at war, the private sector is heavily implicated. No doubt this was the case for employers (and employees) in wartime manufacturing and production. One *could* adopt a position that would render all private actors *agents* as long as their actions were connected to the war. To the extent, however, that the applicability of the term *agent* relies on the companies having been *coerced* by the German wartime authorities to employ forced labor, the historical evidence is, at best, disputed.²⁸⁰ In either event, if the companies were agents of the Reich, according to the conventional German construction of the LDA, the claims against the companies would be deferred. Then, with the signing of 2+4 nearly forty years later, that deferment would become permanent.

3. *The Political Question Doctrine*

Similar issues arose before the Second Circuit when it invoked the *political question doctrine* and determined that Judge Kram had exceeded her authority by imposing conditions in her order of voluntary dismissal.²⁸¹ The court explained, “the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been constitutional[ly] commit[ted].”²⁸² Judge Kram’s decision to condition dismissal on the Bundestag’s prompt declaration of legal peace as well as its amending the Law to protect the assigned claims sub-class, therefore, caused the Second Circuit “considerable difficulty.”²⁸³

The political question doctrine was famously expounded by Justice Brennan in *Baker v. Carr*.²⁸⁴ In that case, which concerned a Tennessee reapportionment statute, the Court set forth six criteria, any of which would render a question nonjusticiable and all of which share the aim of

²⁸⁰ See, e.g., FERENCZ, *supra* note 8, at 33 (reproducing a translated version of a 1943 letter from the chairman of the board of I. G. Farben to Chief of Police Heinrich Himmler requesting expansion of a factory “as was done at Auschwitz”). Thousands of similar documents were submitted in the criminal trials of I. G. Farben’s officers at Nuremberg to establish that the company bore “[r]esponsibility for taking the initiative in the unlawful employment.” *Id.* at 34.

The decision to define the term “agent” broadly for this purpose is, of course, a moral one, not compelled by the legal materials. See Brüggmann, *supra* note 151, at 186.

²⁸¹ See *Duveen v. United States Dist. Court (In re Austrian & German Holocaust Litig.)*, 250 F.3d 156 (2d Cir. 2001).

²⁸² *Id.* at 164 (citations omitted).

²⁸³ *Id.* Recall, however, that the claims arose in the first instance in a judicial forum. The parties became embroiled in international diplomacy and legislation by a foreign sovereign in order to resolve pending litigation. Once the terms of resolution were brought before the court for approval, it seems strange to deem them suddenly nonjusticiable. Judge Kram merely issued an order regarding the case before her. She did not purport to order the Bundestag to act; she spoke to the adequacy of resolution of the claims pending in her court.

²⁸⁴ 369 U.S. 186, 208–37 (1962).

ensuring that federal courts avoid upsetting the balance of powers by intruding on questions best left to the political branches.²⁸⁵

This vexatious doctrine²⁸⁶ also turned up to rationalize dismissal in the New Jersey cases, *Degussa* and *Iwanowa*.²⁸⁷ In deciding to dismiss claims against *Degussa* and *Siemens*, Judge Debevoise observed: “Every human instinct yearns to remediate in some way the immeasurable wrongs inflicted upon so many millions of people by Nazi Germany so many years ago, wrongs in which corporate Germany unquestionably participated”²⁸⁸ Nevertheless, Judge Debevoise applied the six-prong

²⁸⁵ See *id.* at 217. Justice Brennan explained:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. The Court found that none of these six criteria justified a finding of nonjusticiability with regard to Tennessee’s statute. See *id.*

In what appears to be dicta, the *Baker* Court discussed several lines of cases that implicate the political question doctrine, including cases involving “[f]oreign relations” and “[d]ates of duration of hostilities.” *Id.* at 211, 213. In these sections, Justice Brennan stated, for example, that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,” but also that “recognition of foreign governments . . . strongly defies judicial treatment.” *Id.* at 211–12. Furthermore, “the war power includes the power ‘to remedy the evils which have arisen from its rise and progress,’” though “deference rests on reason, not habit.” *Id.* at 213 (citations omitted). A question that does “not seriously implicate considerations of finality,” i.e., whether hostilities have ceased, may be considered. *Id.*

²⁸⁶ Whether the political question doctrine constitutes prudent judicial deference to the political branches for the sake of our constitutional framework or an anti-democratic abdication of judicial responsibility, especially as applied to foreign affairs, has been the subject of extensive scholarly debate. See, e.g., David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439 (1999) (arguing that there is reason to be concerned about excessive judicial deference in the area of foreign affairs); Michael J. Glennon, *Foreign Affairs and the Political Question Doctrine*, 83 AM. J. INT’L L. 814 (1989) (arguing that the political question doctrine is an abdication of judicial responsibility); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597 (1976) (criticizing the political question doctrine as unnecessary); Anne-Marie Slaughter (Burley), *Are Foreign Affairs Different?*, 106 HARV. L. REV. 1980 (1993) (reviewing THOMAS FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992) and refuting Franck’s insistence that the political question doctrine is as much an abdication of judicial responsibility in the context of foreign affairs as it is in other contexts).

²⁸⁷ We will focus in our discussion on the application of the political question doctrine in *Burger-Fischer v. Degussa* AG, 65 F. Supp. 2d 248, 272–85 (D.N.J. 1999). Accord *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 483–89 (D.N.J. 1999).

²⁸⁸ *Degussa*, 65 F. Supp. 2d at 285.

Baker analysis and concluded that the court lacked “the power to engage in such remediation.”²⁸⁹

Like the German courts, Judge Debevoise concluded that the plaintiffs’ claims were not justiciable because they arose out of war:

Beginning with the Versailles Treaty concluding World War I, the term “reparations” has been deemed to refer to “all the loss and damage to which . . . Governments and their nationals have been subjected as a consequence of the war imposed upon them” Specifically, “reparations” include “[d]amages caused to civilians by being forced by Germany or her allies to labour without just remuneration.”²⁹⁰

Claims for reparations, according to conventional international law, are reserved to governments; individuals have no claims to reparations.²⁹¹

The plaintiffs in *Degussa* maintained, however, that they were not seeking reparations, but merely compensation for a private wrong. Plaintiffs’ expert, Dr. Christian Wolf, “argue[d] that in the context of World War II forced labor claims are different from forced labor claims arising out of World War I and should not be included in reparation claims.” Dr. Wolf distinguished between typical “acts of war” and “unprecedented acts of extermination . . . based on racial motives.” The relationship between them, Dr. Wolf asserted, was a “mere temporal coincidence.” Explaining that “reparations” are associated with war, Dr. Wolf concluded that the claims before the court concerned something different—namely “racial and ideological persecution under the Nazi regime.”²⁹²

Judge Debevoise was not convinced. He concluded, “[T]he forced labor program was primarily an act of war designed to enable the Third Reich to pursue its war of conquest.”²⁹³ According to the court, the fact that many of the laborers were victims of racial persecution imprisoned in concentration camps “did not change the nature of the program as primarily a war related effort, subject to reparations as negotiated by the victorious nations.”²⁹⁴

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 275.

²⁹¹ *Id.* at 274 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 902 cmt. (h)(I) (1987) and LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 262 (1972)).

²⁹² *Id.* at 275–76. Cf. RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 643–62 (1961); HERBERT, *supra* note 3, at 158 (identifying a conflict between the dual goals of exterminating Jews on the one hand and waging war on the other; limited resources made it difficult to pursue both aims simultaneously).

²⁹³ *Degussa*, 65 F. Supp. 2d at 276.

²⁹⁴ *Id.* Judge Debevoise appears to have found Dr. Wolf’s argument more compelling as to the concentration camp inmates from Germany than as to those laborers who were forcibly deported from conquered countries into the Reich. *See id.*

While Dr. Wolf's argument did not persuade the court, his analysis casts doubt on the determinacy of the *arising out of war* formula that would purport to classify plaintiffs' claims as either justiciable or non-justiciable on political question grounds. On the one hand, the forced labor program was no doubt conceived in part to further the Nazi war of aggression by sustaining armament and other production while much of the German labor force was otherwise occupied with military obligations.²⁹⁵

On the other hand, the Nazis embraced an extensive and complicated ideology of racial hierarchy.²⁹⁶ This hierarchy structured the forced labor program, determining who was subject to it, for which jobs they would be eligible, and how they would be treated.²⁹⁷ As the Reich's racial policy changed, so changed the labor program. After the Final Solution was declared at the Wannsee Conference in 1942, decisively adopting a policy of extermination (rather than deportation) of Jews,²⁹⁸ the labor program instituted "annihilation by labor" for Jews as a consequence, harmonizing the dual goals of wartime production and extermination.²⁹⁹

Moreover, the conventional historical explanation for the decision to implement the forced labor program—that the Nazis were responding to a labor shortage as a result of German men having military obligations—is itself questionable. Nazi ideology precluded German women from entering the industrial work force; they were expected instead to stay at home and tend to the reproduction of the race.³⁰⁰ Among non-Germans,

²⁹⁵ See FERENCZ, *supra* note 8, at 17; HERBERT, *supra* note 3, at 132.

²⁹⁶ See *id.* at 162–63. Herbert explains how the nuances of the Nazi racial ideology translated into living conditions for various workers:

The workers from western countries were in a worse condition than native Germans, but in a far better position than workers from the East when it came to food rations, the interior furnishings and physical state of living quarters A hierarchy arose on this basis . . . French civilian workers ranked above all others . . . after these came workers from southern European countries. . . . Those workers were followed on a lower rung by laborers from Czechoslovakia . . . and beneath them were the Poles. At the bottom of the heap were workers from the Soviet Union—along, since the summer of 1943, with Italian military internees The concentration camp inmates . . . formed their own special category far beneath the bottom rung of this racist ladder, since their exploitation . . . was not tempered by any sort of treatment ordered [toward] productivity on the job.

Id. at 162–63.

²⁹⁷ See *id.* at 163–64.

²⁹⁸ See FERENCZ, *supra* note 8, at 16; see also HERBERT *supra* note 3, at 177.

²⁹⁹ See FERENCZ, *supra* note 8, at 17–18 (regarding "extermination by labor"); HERBERT, *supra* note 3, at 177. Herbert argues that "[t]he thesis that the policy toward the Jews had a central primary aim—namely, their exploitation as forced laborers—is untenable. Instead it is more accurate to contend that the policy of the Final Solution was implemented beneath the camouflaging cover of forced labor deployment." *Id.* Later, Herbert explains more generally, "[r]acism was not some sort of mistaken belief serving to mask and cloak the true interests of the regime, which were in essence economic. Rather, racism was the very lodestar of the system, its unwavering fixed point." *Id.* at 179.

³⁰⁰ See HERBERT, *supra* note 3, at 132. *But see* MARTIN JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RE-*

the percentage of women expected to work in a particular national group bore an inverse relationship to that group's position in the Nazis' racial hierarchy; *i.e.*, the lower a group ranked, the greater the percentage of its female population could be found in the forced labor pool.³⁰¹

We co-taught a seminar on the Nazi labor program and its legal fallout to German law students at the University of Frankfurt in December, 2000.³⁰² The students uniformly appeared to have accepted the truism that the program arose in response to a labor shortage. When we pointed out to them that World War II was an occasion for women in the United States to join the industrial work force at a higher rate than ever before due to the military obligations imposed on men,³⁰³ they responded blankly at first, but then with the dawning realization that ideology played a role in the truism that there had been a labor shortage. Half of the German labor pool went untapped. The alleged labor shortage was due not to any fixed condition of war, but rather to constraints imposed by a racist and sexist ideology governing domestic life.

As it turns out, therefore, the Nazi labor program can be viewed as either war-related or as a matter of racial ideology. Judge Debevoise's decision was neither compelled by historical evidence nor conclusively rebutted by it. War as well as racist ideological motives propelled the program and gave rise to plaintiffs' injuries, so neither the legal conclusion that plaintiffs were seeking reparations nor the contrary conclusion that they were seeking compensation for a private wrong was required.

In adopting uncritically the explanation of wartime necessity rather than focusing on the ideological source of the wrongs suffered by the plaintiffs, Judge Debevoise already began deliberating on the merits of the plaintiffs' claims, not merely their justiciability. He addressed, perhaps unwittingly, some of the most difficult questions associated with the Holocaust: questions about causation, motive and agency.

To decide the *merits* of the claims, he and a jury would have had to sort through such thorny questions as whether the companies used slave labor because they were compelled by the Nazis to maintain production quotas; whether the companies took advantage of cheap labor primarily for profit; whether the companies adopted Nazi ideology and whether

SEARCH, 1923–1950, 247 (1973) describing work conducted by researchers associated with the Frankfurt School and reported in the famous study *The Authoritarian Personality* suggesting that the mother in the authoritarian family did not provide the “warmth and protectiveness [that] had once served as a buffer against the arbitrary harshness of the patriarchal world,” and that the Nazis “undermin[ed] the family, despite their propaganda to the contrary.”; see also THEODOR W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950).

³⁰¹ HERBERT, *supra* note 3, at 153.

³⁰² See *German Law Journal Co-Editor, Dr. Peer Zumbansen, Leads Trans-Atlantic Seminar on Nazi Slave Labor Compensation at University of Frankfurt*, 2 GERMAN L.J. (Jan. 15 2001) (describing seminar), at http://www.germanlawjournal.com/past_issues.php?id=48.

³⁰³ See, e.g., STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP* 159–60 (1992).

abuse of the slaves by the companies' German employees established the companies' adoption of the ideology; and so on. Even before reaching the merits, on a motion to dismiss on grounds of nonjusticiability, Judge Debevoise addressed these same sorts of questions by attributing the wrongs to war.

Our contention is not that the decision to categorize the plaintiffs' claims as reparations was an incorrect legal conclusion, but rather that it was not legally required. Legal ambiguity is important here because it gives rise to the question of how Judge Debevoise reached his decision. While ostensibly predicated on the necessities of law, his decision was instead driven by what might just as fairly be characterized as moral and political judgments, his own as well as those embodied in decades of German cases grounded in post-war politics.³⁰⁴ Even at this early procedural phase, Judge Debevoise touched on vital questions in a matter of civil liability: What motivated the defendants to engage in the disputed conduct? How much choice did they have? How much responsibility can they fairly be assigned? Whether the plaintiffs' claims were justiciable, therefore, was not merely a threshold question, but really went to the ultimate question of culpability, whether described in legal or moral terms.

³⁰⁴ To ensure the consistency of his decision, Judge Debevoise reviewed some of the same German case law we have reviewed. *See* *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 279–81 (D.N.J. 1999).

C. Substantive Defenses Historically Used by German Defendants

It is the historian's task to uncover "the reality of forced labor" many years after the actual occurrence.³⁰⁵ While this task has met many obstacles—both psychological³⁰⁶ and evidentiary³⁰⁷—the recent opening up of companies' archives³⁰⁸ promises further revelations. Improved access to historical documentation will no doubt prove integral to the assessment of state and private responsibility.³⁰⁹

³⁰⁵ For historical research, see, for example, ULRICH HERBERT, *FREMDARBEITER*, *supra* note 52; SPOERER, *supra* note 80; REINHOLD BILLSTEIN ET AL., *WORKING FOR THE ENEMY. FORD, GENERAL MOTORS AND FORCED LABOR IN GERMANY DURING THE SECOND WORLD WAR* (2000); GERALD D. FELDMAN, *UNTERNEHMENSGESCHICHTE DES DRITTEN REICHS UND VERANTWORTUNG DER HISTORIKER: RAUBGOLD UND VERSICHERUNGEN, ARISIERUNG UND ZWANGSARBEIT* (1999).

³⁰⁶ For an analysis of both reluctance and outright anger about confronting the Nazi past among Germans in the aftermath of WW II, see generally ALEIDA ASSMANN & UTE FREVERT, *GESCHICHTSVERGESSENHEIT, GESCHICHTSVERSESSENHEIT: VOM UMGANG MIT DEUTSCHEN VERGANGENHEITEN NACH 1945* (1999); Ulrich Herbert, *Zweierlei Bewältigung*, in *ZWEIERLEI BEWÄLTIGUNG: VIER BEITRÄGE ÜBER DEN UMGANG MIT DER NATIONALSOZIALISTISCHEN VERGANGENHEIT IN DEN BEIDEN DEUTSCHEN STAATEN* 9–10 (Ulrich Herbert & Olaf Groehler eds., 1992) (declaring that the denazification "experiment" had failed for a number of reasons, among which figured the sheer immensity of such an undertaking and the fact that the processes started in the Nuremberg aftermath against war criminals were stopped due to a changed political climate and the circumstance of a dawning cold war). See also NORBERT FREI, *VERGANGENHEITSPOLITIK: DIE ANFÄNGE DER BUNDESREPUBLIK UND DIE NS-VERGANGENHEIT* 25 (1996) (describing a "politics of the past" pursued by conservatives who, shortly after the German Bundestag's taking session, already aimed at the conclusion of the de-nazification politics); HELMUT DUBIEL, *NIE-MAND IST FREI VON DER GESCHICHTE: DIE NATIONALSOZIALISTISCHE HERRSCHAFT IN DEN DEBATTEN DES DEUTSCHEN BUNDESTAGES* 39–40 (1999) (describing how early references to the Nazi crimes were disassociated from individual actors and, instead, attributed to the "criminal system" as such); Christopher R. Browning, *German Memory, Judicial Interrogation and Historical Reconstruction: Writing Perpetrator History from Postwar Testimony*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE "FINAL SOLUTION"* 25 (Saul Friedlander ed., 1992) (addressing the intricacies of writing about the events from an historiographic perspective).

³⁰⁷ Compare, for example, the varying indications as the total numbers of forced laborers under Nazi rule. See, e.g., HERBERT, *supra* note 222, at 121 (7.8 million forced laborers and 500,000 slave laborers/concentration camp inmates in August 1944); SPOERER, *supra* note 80, at 9 (7.6 million forced laborers and 400,000 camp inmates); PAWLITA, *supra* note 43, at 15 (7.8 million forced laborers in August 1944).

³⁰⁸ See, e.g., MICHAEL EHRMANN, *DIE GESCHICHTE DES WERKES SINDELFINGEN DER DAIMLER-MOTOREN-GESELLSCHAFT UND DER DAIMLER-BENZ AG* (1998); NEIL GREGOR, *DAIMLER-BENZ IN THE THIRD REICH* (1998); BERND GREINER, "IG-JOE": IG FARBEN-PROZESS UND MORGENTHAU-PLAN (1996); MOMMSEN & GRIEGER, *supra* note 27; HANS POHL ET AL., *DIE DAIMLER-BENZ AG IN DEN JAHREN 1933 BIS 1945: EINE DOKUMENTATION* (1986).

³⁰⁹ See HANS MOMMSEN, *THE LEGACY OF THE HOLOCAUST AND GERMAN NATIONAL IDENTITY* 5–6 (The Leo Baeck Memorial Lecture 42, 1999) ("More and more the Holocaust becomes the central reference point for any critical evaluation of the Nazi system at large. In addition to that, the generational change accelerated the sweeping process of lifting hitherto well established taboos regarding those aspects of Nazi history which formerly had been put into oblivion because of their actual and painful implications.").

This is not to say that historical evidence has been wholly unavailable until recently. As historian Ulrich Herbert recently noted, “[t]he claims were known since 1945.”³¹⁰ While some believed that the public learned about the labor program as a result of the suits in the United States, research reveals a complex web of biography, historiography and politics.³¹¹ We cannot exhaustively review the historical evidence establishing the relative responsibility of the state and private sector for the Nazi labor program in this Article. Instead, our goal is to review the common assertions regarding the “fateful entanglement” (“*schicksalshafte Verstrickung*”)³¹² of German industry in the employment of slave and forced laborers. The defensive posture that corporate actors were involuntarily mixed up in a web of essentially war-related, state-run activity is reflected in the Foundation Law, notwithstanding that this conception has always rested on shaky evidentiary grounds. Nevertheless, even poorly founded refutations of plaintiffs’ allegations won the day initially because of the political climate that existed when the earliest claims were made. Claims heard in post–World War II Germany during a period of economic reconstruction prepared the ground for an altogether superficial set of judicial decisions.³¹³

In 1951, when Norbert Wollheim sued I. G. Farben for DM 10,000 for injuries arising out of his enslavement at an I. G. Farben plant at Auschwitz,³¹⁴ the defendant company argued that “Wollheim had been neither beaten nor injured, and that whatever happened to him was the responsibility of the SS, the Nazi party, the State, the subcontractors, or possibly the corrupt inmates themselves.”³¹⁵ The company further claimed that “it tried to improve conditions of the workers by providing a supplementary soup”³¹⁶ Indeed, the company asserted, “if the in-

³¹⁰ HERBERT, *supra* note 272, at 558 (trans. by Zumbansen).

³¹¹ See MOMMSEN, *supra* note 309, at 5 (attributing the newly gained international recognition of Third Reich research by German historians mainly to paradigmatic changes in the perception, centering now on the Holocaust as reference point for other evaluations of the Nazi system).

³¹² This defensive posture, often occurring with regard to the cooperation between the industry and state authorities in the context of forced labor, was used, for example, by Manfred Gentz, Daimler-Chrysler’s Head of Finance and one of the key initiators and later the coordinator of the German Industry’s Foundation Initiative, in a speech delivered in Frankfurt in December 2000. Manfred Gentz, Address in Frankfurt (Dec. 2000).

³¹³ None of the American lawsuits surpassed the procedural defenses and reached the so-called merits, so we draw the substantive defenses mainly from the history of these cases in German courts, merely anticipating that they would have been replayed in some form had they proceeded beyond summary judgment in United States courts.

³¹⁴ In the Wollheim case, after the plaintiff had defeated the defendant I. G. Farben in the first instance, the plaintiff received very negative press coverage. The Wollheim victory (DM 10,000) was appealed and settled before a final verdict could be issued by the Oberlandesgericht (Higher Regional Court). The settlement deliberations, aided by the Jewish Claims Conference, eventually brought about a compensation sum of DM 30 Million to be distributed to former forced laborers. See Benz, *supra* note 258.

³¹⁵ FERENCZ, *supra* note 8, at 36.

³¹⁶ *Id.* The soup referred to is the notorious “Buna soup,” named for the synthetic rub-

mates had not been employed they would have been killed even sooner. The implication was that Wollheim should have been grateful to [I. G.] Farben that he was still alive.”³¹⁷

Corporate leaders usually generate three interrelated substantive defenses when confronted with claims by former laborers. The first is that the use of slaves was justified on grounds of *necessity*,³¹⁸ in using slave and forced laborers in their production processes, the companies argued, they were acting at the state’s behest and without the freedom to refuse.³¹⁹

The second substantive defense is that in comparison to the conditions the workers were facing in the death camps, the workplace was a better and safer place to be.³²⁰ This argument was generally offered immediately after a plaintiff had established the active participation of corporate actors in the forced labor program.³²¹ It was deployed mainly to thwart claims based on abusive treatment. While research shows that the “supplementary soup” was devoid of nutritional value and that foremen often amused themselves by kicking over the soup pot, the supplementary soup argument successfully defeated allegations of maltreatment in German courts.

The third defense can be called the *Schindler defense*.³²² This line of argument maintains that by accepting the laborers as their charges, the companies actually saved their lives. As to slave laborers in particular, the Schindler defense ought to be tough to make out, considering only about five percent of slave laborers survived the war.³²³ It has, nonetheless, been an industry mainstay.

What is critical about these defenses for purposes of our argument is not their factual plausibility. To rebut them conclusively would require a

ber produced at Farben’s Auschwitz facility. See BORKIN, *supra* note 39, at 125.

³¹⁷ FERENCZ, *supra* note 8, at 36.

³¹⁸ See Bazylar, *supra* note 9, at 194, 208; Brown, *supra* note 15, at 583.

³¹⁹ See BGH, RzW, 26 (1963), 525; BGH, NJW, 19 (1973), 1549; in this vein Ernst Féaux de la Croix, *Schadensersatzansprüche ausländischer Zwangsarbeiter im Lichte des Londoner Schuldenabkommens*, 13 NJW 2268 (1960), 2269. See also FERENCZ, *supra* note 8, at 109 (regarding the use of this defense by German electric companies and the acceptance of this defense by the Berlin appellate court).

³²⁰ This line ignores the hierarchy among the laborers; while the work conditions were better for some, they were just as terrible for others. See SPOERER, *supra* note 80, at 90; HERBERT, FREMDARBEITER, *supra* note 52, at 17; CHRISTOPHER R. BROWNING, NAZI POLICY, JEWISH WORKERS, GERMAN KILLERS 93 (2000) (concerning Jewish workers in Poland specifically).

³²¹ SPOERER, *supra* note 80, at 96, and others have shown that corporate actors not only applied to the respective authorities for forced laborers, but that they actively formed joint ventures with the authorities to organize the deportation, the incarceration and the exploitation of workers they selected at the ramps, see FERENCZ, *supra* note 8, at 1–32.

³²² See THOMAS KENEALLY, SCHINDLER’S LIST (1993) and Stephen Spielberg’s movie SCHINDLER’S LIST (Universal Pictures 1994), telling the story of a heroic German industrialist who saved the lives of Jews who would have been sent to the gas chamber but for his willingness to pay the Nazis for their labor. See also FERENCZ, *supra* note 8, at 190.

³²³ See Imre Karacs, *Germany’s Pounds 3.2BN Bid to Close Book on Nazi Past Leaves only Rifts and Rancour in its Wake*, INDEPENDENT, July 18, 2000, at 3.

mountain of historical evidence that would vary from company to company.

Instead, what is important is what a finder of fact or law would have to consider in order to determine the extent to which the evidence established the companies' legal responsibility for the use of slaves. It is not enough for a judge or jury to determine that the lost and starving spelunker in Lon Fuller's famous parable killed and ate his companion; to determine whether the defendant is guilty of murder, someone must determine whether the circumstances justified it.³²⁴ Any factual finding would have to be followed by what amounts finally to a moral judgment.

The evidence may show a requisition form ordering a new batch of laborers;³²⁵ or the payment of fees to the regime for the slaves; or abuse of slaves by a company's German employees; or inhumane living conditions. Whether these facts establish the companies' liability, however, requires something more. The necessity defense in particular requires a finding that the companies had no choice, but to decide whether the companies had a choice, the decision-maker will have to decide what constitutes a choice. Does, for example, a company's failure to defy production quotas establish its responsibility? This is a moral question as well as a legal one.

Moreover, that a moral question underlies or is coextensive with a legal question is no less true of the procedural defenses than it is of these substantive defenses. As the court proceeds through issues of timeliness and justiciability, it will deliberate on some dimension of the ultimate question. By determining whether the claims arose out of war and whether the companies acted as agents of the Reich, courts must implicitly determine whether the companies bear responsibility for their participation in the Nazi labor program. Courts are forced to confront the immense questions raised by the Holocaust, including what causes such a calamity and who fairly can be held responsible for it.

The strategy of separating moral or political responsibility from legal responsibility has served the companies well. Today's "enlightened German industrialists"³²⁶ have earned endless congratulations for "courageously com[ing] to terms with injuries largely ignored for 55 years,"³²⁷ while at the same time leaving themselves room to deny the validity of the legal claims. A close examination of the legal issues reveals, however, that the separation is a false one, and that some of the most difficult moral questions associated with the Holocaust—questions about agency and about why it happened—underlie the particular legal issues raised. It

³²⁴ See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

³²⁵ See FERENCZ, *supra* note 8, at 189.

³²⁶ Marilyn Henry, *Germany Finalizes Slave Labor Fund*, JERUSALEM POST, July 18, 2000, at 1.

³²⁷ *Id.* at 12.

is impossible to make a legal claim in this context without making a moral one as well.

Ultimately, therefore, the refrain offered by the companies that they owe a moral responsibility but not a legal one is untenable. Each of the defenses that the companies proffered implies not just a disclaimer of legal liability, but also a larger denial of remorse.

Stuart Eizenstat may have been right that the claimants' chances of success in the courtroom were poor, but this cannot be said to be the unfortunate byproduct of dry, technical rules. It is the result of a mountain of political and moral judgments that have coalesced over the course of more than a half-century, even as the historical context has changed – judgments that relieve German industry of far more than just legal responsibility.

Predictions of the plaintiffs' failure did much of the work of directing the claims toward their diplomatic and legislative resolution. In the next Part, however, we argue that a potent rhetorical strategy buttressed the impression that litigation was ill-suited to addressing the slave and forced labor claims and deflected criticism of the compensation amounts.

IV. THE RHETORIC OF REVERENCE: IS THE HOLOCAUST INCOMPATIBLE WITH LITIGATION?

Supporters of the Foundation Law have justified diversion of legal claims from judicial to diplomatic and legislative fora by reference to the sanctity of the Holocaust. The claims of Holocaust survivors, the argument goes, deserve a more dignified setting than the courtroom, where lawyers quibble over evidentiary and procedural rules for the sake of pecuniary gain. Such assertions, though couched in reverence for the Holocaust, flip reverence on its head, disadvantaging victims in their quest to obtain legal redress.

Critics of the Holocaust-related lawsuits have charged that “[t]he pursuit of billions in Holocaust guilt money has gone from the unseemly to the disgraceful . . . a treasure hunt for hungry tort lawyers and major Jewish organizations.”³²⁸ To such critics, “[t]he Holocaust commands the preservation of memory . . . [b]ut contingency fees? Class-action suits? . . . Is this what honoring the Holocaust has come to? A shakedown?”³²⁹ Commentator Charles Krauthammer went so far as to say “[T]o focus memory on money is literally to debase the sacred.”³³⁰

Norman Finkelstein gained international attention by taking a particularly flashy whack at the claims: “[t]he current campaign of the Holocaust industry to extort money from Europe in the name of ‘needy Holo-

³²⁸ Charles Krauthammer, *The Holocaust Scandal*, WASH. POST, Dec. 4, 1998, at A29.

³²⁹ *Id.*

³³⁰ *Id.*

caust victims' has shrunk the moral stature of their martyrdom to that of a Monte Carlo casino."³³¹ Finkelstein might be regarded as a fringe commentator, but long-time national director of the Anti-Defamation League Abe Foxman had similar things to say about the litigation efforts, derisively calling the lawsuits "[a] new 'industry'"³³² and the "opportunity of a lifetime"³³³ for lawyers.

Further, some commentators could not help but worry about the "revival of Shylockian stereotypes"³³⁴ that the claims were sure to evoke. Incredibly, even Foxman, at the helm of what is perhaps the leading organization in the fight against anti-Semitism, expressed anxiety that "all the talk about Holocaust-era assets is . . . making the century's last word on the Holocaust that the Jews died not because they were Jews, but because they had bank accounts."³³⁵ Then, (as if to establish the continuing saliency of anti-Semitic imagery), Foxman disparaged one of the more high-profile lawyers associated with the lawsuits, Ed Fagan, calling him an "ambulance chaser," who has no place "in this serious and sacred undertaking."³³⁶

³³¹ NORMAN G. FINKELSTEIN, *THE HOLOCAUST INDUSTRY* 8 (2000).

³³² Abraham Foxman, *The Dangers of Holocaust Restitution*, WALL ST. J., Dec. 4, 1998, at A18.

³³³ *Id.*

³³⁴ Krauthammer, *supra* note 328, at A29 (referring to the stereotypical Jewish character Shylock in William Shakespeare's *A Merchant of Venice*).

³³⁵ Foxman, *supra* note 332, at A18. *But see* Richard Cohen, *The Money Matters*, WASH. POST, Dec. 8, 1998, at A21 (arguing that "there's something perverse for Jews to have their money or property taken and then to have to worry about being called cheap or avaricious for demanding it back;" and that while evoking anti-Semitic images is a risk, "it is worse to implicitly honor the stereotype by refraining from doing what others would do as a matter of course—including suing for damages.") *Id.*

³³⁶ Foxman, *supra* note 332, at A18. This sentiment was echoed by Melvyn Weiss, another of the claimants' attorneys who called Fagan "a relatively small-time lawyer who thought himself bigger than he is." Steve Chambers, *Holocaust Lawyer Inspires Range of Emotions*, STAR-LEDGER, Dec. 20, 1998, at 27.

Perhaps Foxman was unaware of the dubious history of the ambulance chaser archetype in American law. As Deborah Rhode has observed, "[a]t the close of the nineteenth century, the recently-founded American Bar Association . . . began spearheading a campaign for higher professional standards. While the quest was 'aimed in principle against incompetence, crass commercialism, and unethical behavior,' the ostensibly 'ill-prepared' and 'morally weak' candidates were often . . . 'of foreign parentage, and, most pointedly, Jews.'" Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 YALE L.J. 491, 500 (1985) (citing MAGALI SARFATTI LARSON, *THE RISE OF PROFESSIONALISM* 173 (1977)). The ethical canons governing solicitation were drafted as a rebuke and prohibition "against those in personal injury practice, who bore the pejorative label 'ambulance chasers.'" JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) in DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 695 (1992). Auerbach writes that "[n]ot only were [the so-called ambulance chasers] criticized for professional malfeasance; their speech was mocked (many were recent immigrants) and their perseverance was denigrated as aggressiveness (many were Jewish)." *Id.* at 696. "The ethical crusade that produced the Canons concealed class and ethnic hostility [toward] Jewish and Catholic new-immigrant lawyers of lower-class origin." *Id.* This hostility was expressed, in part, in the term "ambulance chaser."

Reverberations of this notion that the memory of the Holocaust is debased by the pursuit of money damages can be heard in some of the defensive posturing by Foundation proponents who can frequently be heard to say that the claims were “not about the money” but rather about memory or acknowledgement. Gideon Taylor of the Jewish Claims Conference described his own job as

fundamentally impossible . . . You’re taking the greatest moral challenge, the Holocaust, and putting it together with the most base form of human interaction—money. You can’t really do compensation, you can’t be made whole. So I speak of a measure of justice, something that’s symbolic, that helps survivors live with a measure of dignity.³³⁷

The message from German industry sounds strikingly similar. This from Volkswagen’s marketing director, Klaus Kocks: “for us . . . this is not about money. But what is adequate? 400 German Marks? 600 German Marks? 4,000 German Marks? The questions contain an inner cynicism that is outright irritating.”³³⁸

The Law’s preamble confirms this sentiment. “[T]he injustice committed and the human suffering it caused cannot be compensated by financial payments.”³³⁹

The alleged incompatibility of the memory of the Holocaust with money also gave rise to a controversy regarding the propriety of attorneys’ fees. In March 1999, the American Gathering of Jewish Holocaust Survivors passed a resolution admonishing attorneys to perform their work *pro bono* on the grounds that charging fees “‘demeans the rights and memories’ of Holocaust victims and survivors.”³⁴⁰ The executive director of the World Jewish Congress agreed, saying, “Our view is that lawyers should take this on *pro bono*.”³⁴¹ After the conclusion of negotiations resulting in the Foundation, the *New York Times* opened its report on lawyers’ fees this way: “Lawyers who represent Nazi-era slave laborers split more than \$52 million in legal fees yesterday for work on a case that will bring Holocaust victims \$5,000 to \$7,500 each.”³⁴²

³³⁷ Jan Hoffman, *Public Lives: Nazi Reparations Require Attention to Detail*, N.Y. TIMES, June 16, 2000, at B2.

³³⁸ Evers, *supra* note 14, at 225–26. Eizenstat somehow managed to answer Kocks’s question without committing the offense of which Kocks speaks with the strange phrase “dignified sum.” *Eizenstat Testimony on Worldwide Holocaust Restitution Efforts: Hearing before the Senate Foreign Relations Comm.*, 106th Cong. (2000) (statement of Eizenstat, U.S. Deputy Sec’y and Special Rep. for Holocaust Issues).

³³⁹ Law on the Creation of the Foundation, Preamble, v. 2.8.2000 (BGBl. I S.1263).

³⁴⁰ Elissa Gootman, *Holocaust Survivors Criticize Lawyers for High Fees*, FORWARD, Mar. 26, 1999, at 4.

³⁴¹ *Id.*

³⁴² Jane Fritsch, *\$52 Million for Lawyers’ Fees in Nazi-Era Slave Labor Suits*, N.Y. TIMES, June 15, 2001, at A10. The article reported that because “it would be unseemly to

We can understand why one might experience unease with the prospect of compensating survivors of such an immense tragedy as the Holocaust with dollars. Surely Taylor was right when he denied the possibility that money could ever make whole the victims of as bestial a program as that of the Nazis.' "[W]e . . . experience the universality of money as somehow degrading," observes Michael Walzer.³⁴³ Sometimes "money fails to represent value; the translations are made, but as with good poetry, something is lost in the process."³⁴⁴

Money damages is the way of a legal system that can only do so much. We may lament, but we do not protest, the use of money damages to compensate, for example, the parent of a child struck and killed by a drunk driver. Still, "if money answereth all things, it does so . . . behind the backs of many of the things and in spite of their social meanings."³⁴⁵

Anxiety about trivializing the Holocaust by monetizing it is not a new feature of Holocaust debate. The first post-war German chancellor, Konrad Adenauer, secretly initiated compensation talks with representatives of the Israeli government and Jewish organizations in the face of widespread resentment from the German public.³⁴⁶ Israel was torn apart by the emotionally charged dilemma over whether to accept the financial restitution he offered.³⁴⁷

Moreover, it is not only money's association with the Holocaust that has provoked impassioned discord. It seems that any analogy to, or any categorization of, the Holocaust can be experienced as degrading. Historians and social commentators spar obstinately over whether the Holo-

pay the lawyers the traditional contingency fee of one-third[,] . . . [t]he lawyers agreed to split a pool of money from 1 to 1.5 percent of the total." *Id.* (quoting E. Stuart Eizenstat, the American Government's chief negotiator).

³⁴³ MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 97 (1983).

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 103.

³⁴⁶ WIEDERGUTMACHUNG UND KRIEGSFOLGENLIQUIDATION, *supra* note 43, at 106–07. For critical accounts of the German political context of these compensation talks, *see, e.g.*, FREI, *supra* note 272; REICHEL, *supra* note 270, at 73–74; Yeshayahu A. Jelinek, *Israel und die Anfänge der Shilumim*, in WIEDERGUTMACHUNG IN DER BUNDESREPUBLIK DEUTSCHLAND 123 (Ludolf Herbst & Constantin Goshler eds., 1989); Benz, *supra* note 258, at 138–40; Constantin Goshler, *Streit um Almosen: Die Entschädigung der KZ-Zwangsarbeiter durch die deutsche Nachkriegsindustrie*, 2 DACHAUER HEFTE 175 (1986).

³⁴⁷ *See* WIEDERGUTMACHUNG UND KRIEGSFOLGENLIQUIDATION, *supra* note 43, at 107, 123–24.

caust is “unique”³⁴⁸ and “unrepresentable.”³⁴⁹ Lucy Dawidowicz, a leading historian on the subject, insists “[t]he fate of the Jews under National Socialism was unique.”³⁵⁰ She continues, “[A]ll too often the necessary and essential distinction between the murder of the six million Jews and the accelerating violence and terror of our time is blurred, sometimes erased, whether mindlessly or with political intent.”³⁵¹ Elie Wiesel also has maintained the uniqueness of the Holocaust, as well as its essential mystery, warning that no one who did not experience it could ever begin to understand it or “transform [it] into knowledge.”³⁵²

³⁴⁸ See, e.g., INGA CLENDINNEN, *READING THE HOLOCAUST* 10–12 (1999); LUCY S. DAWIDOWICZ, *THE HOLOCAUST AND THE HISTORIANS* 15–19 (1981); PETER NOVICK, *THE HOLOCAUST IN AMERICAN LIFE* 9, 14–15 (1999). While some who have engaged in this debate have done so by going through the rather lawyerly exercises of analogizing the Holocaust to and distinguishing it from other historical tragedies, Novick takes a more critical approach, looking to the political meaning of uniqueness arguments. In its typical usage, Novick dislikes the uniqueness position, calling it “deeply offensive. What else can [it] mean [he asks] except ‘your catastrophe, unlike ours, is ordinary; unlike ours is comprehensible; unlike ours is representable.’” *Id.* at 9. Novick remains focused, however, on the political context in which uniqueness is invoked. For instance, he recalls

the insistence of Chancellor Helmut Kohl’s party that as a price for supporting the law against denying the Holocaust, the law had to include a provision making it illegal to deny the suffering of Germans expelled from the East after 1945. In this German context—and context, as always, is decisive—“relativization” meant equating crimes *against* Germans to crimes *by* Germans Those Germans who insisted on the uniqueness of the Holocaust, who condemned its relativization, did so to block what they correctly regarded as a move to evade confrontation with a painful national past The identical talk of uniqueness and incomparability surrounding the Holocaust in the United States performs the opposite function: it promotes *evasion* of moral and historical responsibility [for wrongs committed against] blacks, Native Americans, Vietnamese, or others

Id. at 14–15.

³⁴⁹ See, for example, *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE “FINAL SOLUTION,”* (Saul Friedlander ed., 1992) for a range of perspectives on whether the Holocaust defies all of our pre-existing modes of expression and analysis. As Clendinnen explains, “we expect the magic of art to intensify, transfigure and elevate actuality. Touch the Holocaust and the flow is reversed. The matter is so potent in itself that when art seeks to command it, it is art which is rendered vacuous and drained of authority.” CLENDINNEN *supra* note 348, at 164–65. Fiction readers, for example, “typically expect to be seduced into concern for particular characters, who are then pursued through time and different contexts to some plausible and emotionally satisfying outcome [But when the story regards the Holocaust], *any* good outcome, *any* act of dignity or defiance, appears as a falsification or sentimentalisation of the general condition.” *Id.* at 167–68.

³⁵⁰ DAWIDOWICZ, *supra* note 348, at 11.

³⁵¹ *Id.* at 16. See also LUCY S. DAWIDOWICZ, *THE WAR AGAINST THE JEWS 1933–1945* xxxvi (1975) (“The Final Solution transcended the bounds of modern historical experience.”).

³⁵² CLENDINNEN, *supra* note 348, at 11, 21 (citations omitted). Clendinnen finds Wiesel’s view “abstract and remote,” more “theological” than concerned with “the human.” *Id.* at 44.

Stuart Eizenstat, on the other hand, seems to find Wiesel’s view authoritative: “No one can exceed his . . . towering moral stature on this subject.” *Eizenstat Testimony on Worldwide Holocaust Restitution Efforts: Hearing before the Senate Foreign Relations Comm.*, 106th Cong. (2000) (statement of Eizenstat, U.S. Deputy Sec’y and Special Rep. for Holo-

The refusal to analogize to the Holocaust likely derives from the understandable desire to secure the appropriate degree of awe and respect, but defying analogy is precarious when it comes to law. In his captivating article, *Film as Witness*,³⁵³ Lawrence Douglas explains how the prosecutors at Nuremberg “anticipated the crisis of representation that has come to characterize efforts to . . . captur[e] the Holocaust’s central horror.”³⁵⁴ The need to “establish incredible events by credible evidence”³⁵⁵ prompted prosecutors to turn to film rather than rely on eyewitness testimony to describe the camps. Douglas’s article studies the

consequence[s] of an attempt to comprehend an unprecedented evil through an idiom whose authority is anchored in the concept of precedent—and in the belief that all crimes can and must be judged according to familiar principles filtered through past experience.³⁵⁶

Douglas demonstrates that the very horror that so demanded prosecution of the Nuremberg defendants acted as an obstacle to proving the defendants’ guilt.

The film *Music Box*³⁵⁷ dramatizes a quite similar point.

[t]he film’s action centers on the trial in the United States in the late 1980’s of a man accused of having perpetrated atrocities in Hungary in 1944–45. A quietly dressed woman, reserved in a manner as middle-class European women tend to be, is in the witness box. She is saying incredible things, things she seems to find incredible herself even as she is saying them, about the vile and most carnal connection there had been, one dreadful day, between herself and the impassive old man seated opposite her.

Her listeners are outraged by what they are hearing; they are angry, or they weep. But they are also bewildered. They know that what they are hearing is true. It remains, nonetheless, incredible. Imagination makes its accustomed leap—and falls. The difficulty does not lie in the representation: the woman’s

caust Issues), at 1.

³⁵³ Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps Before the Nuremberg Tribunal*, 105 *YALE L.J.* 449 (1995).

³⁵⁴ *Id.* at 452.

³⁵⁵ *Id.* (citing a report by the United States Supreme Court Justice Robert H. Jackson in his capacity as chief prosecutor).

³⁵⁶ *Id.* at 453. Douglas argues that this dilemma explains the prosecution’s decision to use film footage that “understands the crimes to be the consequence of aggressive militarism rather than genocide.” *Id.* at 477. His theory is that this conception of the crimes enabled prosecutors to harmonize shocking (unprecedented) imagery with “concepts of ordered legality” (precedent). *Id.* at 479.

³⁵⁷ *MUSIC BOX* (Artisen Entertainment 1989).

words are all too graphic. It is we, the listeners, who recoil, who are baffled, who are at both an imaginative and a cognitive loss We are persuaded of the truth of her words. It is just that we cannot believe them.³⁵⁸

The perception that the Holocaust is unique, or unprecedented, or incredible may derive of grief and respect. But in law at least, uniqueness and incredibility come with certain risks.

So it goes with sanctification, as well. Sanctification of the memory of the Holocaust does not necessarily protect Holocaust survivors in every context.

Rather than protecting or honoring the survivors, reverence for the memory of the Holocaust created a hostile atmosphere for their legal claims. The appeal to sanctity suppressed criticism of the low payment amounts available under the Foundation Law by subjecting such criticism to the charge that it is crass. The barrage of derision levied at the lawsuits and the lawyers created the impression that litigation is too vulgar a mechanism for resolving claims arising out of the Holocaust. It impelled the claims to other fora, such as diplomacy, legislation, and private distribution, all imagined to epitomize noblesse when contrasted with the dirty rough and tumble of litigation.

Finally, the defensive assertion that the claims were “not about the money,” steered observers’ attention to an alternative objective for the claims: *acknowledgement*. *It is not fitting to decry the low amounts*, the suggestion went, *because the claims were about something else altogether*.³⁵⁹ The mere identification of acknowledgement as the foremost objective, however, does not establish that it has been achieved. As we argued in Part III, the companies never really acknowledged any wrongdoing.³⁶⁰ They denied legal culpability from the outset, preferring instead to recognize a “moral obligation.” Yet once the particular defenses they offered are scrutinized, this combination of claims seems untenable. If acceptance of the restitution amounts rests on the belief that something greater than money was gained, we should think again.

³⁵⁸ CLENDINNEN, *supra* note 348, at 19.

³⁵⁹ One could certainly object to this line of thinking on the grounds that while any one survivor might wish to adopt the position that her claim is not about the money, it is entirely a different matter for this position to be taken for her.

³⁶⁰ Martin Jay’s comment in an essay about literary representation of the Holocaust is applicable to the legal quest for acknowledgement: “it is precisely the distinction between those who acted and their victims that must be scrupulously retained in any responsible account of the horror of those years.” Martin Jay, *Of Plots, Witnesses, and Judgments*, in *PROBING THE LIMITS OF REPRESENTATION: NAZISM AND THE “FINAL SOLUTION,”* 101 (Saul Friedlander ed., 1992).

V. CONCLUSION

Had the people who sued Degussa, Ford Werke, Siemens, and other German companies proceeded through conventional litigation processes, they might have lost. They might also have died before the verdicts were delivered. This Article is not an homage to the promise of litigation to bring justice to the wronged. It is an inquiry into the termination of claims asserted in a judicial forum in favor of a public law, drafted using a diplomatic process and implementing an exclusively private distribution scheme. This move drastically limited payments and left claimants with truncated avenues to pursue relief.

This outcome might have been justified by the attainment of some other, perhaps higher, objective, but there was none. The legal practices leading to and constituting the Foundation enabled the culprits to evade accepting any real responsibility for the enslavement of millions, while cloaking this evasion in reverence for the slaves. Through careful institutional maneuvering and shrewd justificatory rhetoric, the successors to the legacy of slave and forced labor managed to create an impression of honor and noblesse, while undermining what they trumpeted as the one legitimate objective of the process.