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## Stoney Road out of Eden: The Struggle to Recover Insurance for Armenian Genocide Deaths and Its Implications for the Future of State Authority, Contract Rights, and Human Rights

Jeffrey W. Stempel

*William S. Boyd School of Law, University of Nevada Las Vegas*

Sarig Armenian

David McClure

*William S. Boyd School of Law, University of Nevada Las Vegas*

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# STONEY ROAD OUT OF EDEN: THE STRUGGLE TO RECOVER INSURANCE FOR ARMENIAN GENOCIDE DEATHS AND ITS IMPLICATIONS FOR THE FUTURE OF STATE AUTHORITY, CONTRACT RIGHTS, AND HUMAN RIGHTS

*Jeffrey W. Stempel*  
*Sarig Armenian*  
*David McClure\**

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\* The authors are, respectively: Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas; Attorney, Washington, D.C., Member, District of Columbia Bar and State Bar of Nevada, Boyd School of Law Class of 2009; Assistant Professor and Head of Research and Curriculum Services, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Rachel Anderson, Chris Blakesley, and Ann McGinley for ideas and comments on this issue and to Bill Boyd, Doris and Ted Lee, Judge James Mahan, Kate Nahapetian, Jim Rogers, Mike Saltman and John White for continuing support. Thanks also to Jeanne Price, Annette Mann, Shannon Gallo, Kathleen Wilde, Rachael Samberg, Robert Opdyke, Erica Boutte, Derek Marr, Ammon Francom, and Reed McGinley-Stempel for help with research and processing.  
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## INTRODUCTION

In 1915, Turkey was known as the “sick man of Europe” due to its substantial economic, social, political, and military problems.<sup>1</sup> Soon, World War I would bring Turkey’s problems into larger relief and usher in a transition from fading Muslim empire to secular nation.<sup>2</sup> During this same time, Turkey engaged in one of the largest campaigns of mass murder in history: an attempt to eradicate its Armenian population—“genocide” by any definition of the word.<sup>3</sup> Between 1915 and 1920, an estimated 1.5 million Armenians were slaughtered, with another million deported during death marches

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<sup>1</sup> See R. R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD SINCE 1815*, 655 (8th ed. 1995) (“Since the loss of Hungary in 1699 the Ottoman Empire had entered on a long process of territorial disintegration” but “was still huge” in the nineteenth century). The phrase “sick man of Europe” derives from a reference made by Czar Nicholas I of Russia to Sir George Hamilton Seymour, the British ambassador to St. Petersburg in 1854. The Czar’s comment was made in the context of the declining Ottoman Empire and negotiations between the Russian Empire and its European counterparts to extend their spheres of influence after the dissolution of the Ottoman state. See, JOSEPH H. WILLSEY, *HARPER’S BOOK OF FACTS: A CLASSIFIED HISTORY OF THE WORLD* 703 (Charleston T. Lewis ed., 1895); Vernon J. Puryear, *New Light on the Origins of the Crimean War*, 3 *J. MOD. HIS.* 219 (Jun. 1931). See *infra* Section I. H. See also JANE BURBANK & FREDERICK COOPER, *EMPIRES IN WORLD HISTORY: POWER AND THE POLITICS OF DIFFERENCE* 128-43 (2010) (describing generally the rise and structure of Ottoman Empire).

<sup>2</sup> See PALMER & COLTON, *supra* note 1, at 654-61, 718-22, 791-93. See also SEAN MCMEEKIN, *THE BERLIN-BAGHDAD EXPRESS: THE OTTOMAN EMPIRE AND GERMANY’S BID FOR WORLD POWER* chs. 3, 18 (2010) (outlining the collapse of Ottoman Empire and development of modern Turkey during World War I era); ERSIN KALAYCIOĞLU, *TURKISH DYNAMICS: BRIDGE ACROSS TROUBLED LANDS* 15-43 (2005); Osman Okyar, *Atatürk’s Quest for Modernism*, in *ATATÜRK AND THE MODERNIZATION OF TURKEY* 45-53 (Jacob M. Landau ed., 1984) (describing the historical context of Turkey’s transition to secularism).

<sup>3</sup> See SAMANTHA POWER, “A PROBLEM FROM HELL”: AMERICA AND THE AGE OF GENOCIDE ch. 3 (2002) (summarizing large scale carnage from intentional Turkish government actions against Armenian population); PALMER & COLTON, *supra* note 1, at 710-12; GRIGORIS BALAKIAN, *ARMENIAN GOLGOTHA: A MEMOIR OF THE ARMENIAN GENOCIDE, 1915-1918* (2009) (originally published in 1922) [hereinafter *ARMENIAN GOLGOTHA*] (detailing horrors inflicted on Armenian population by Turkish government); ARNOLD TOYNBEE, *ARMENIAN ATROCITIES: THE MURDER OF A NATION* (1915). The United Nations Convention on the Prevention and Punishment of the Crime of Genocide describes genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277, U.N. G.A. Res. 260, U.N. G.A.O.R., 3d

out of the collapsing Ottoman Empire and into the Syrian Desert.<sup>4</sup> Submerged even more than these atrocities, which have largely been downplayed in the public and historical consciousness,<sup>5</sup> is the refusal of life

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Sess., 179th Plen. Mtg. at 174, U.N. Doc. A/810 (1948). The term is generally credited to Raphael Lemkin, who observed that genocide was

[a] coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. Genocide has two phases; one: destruction of the national pattern of the oppressed group; the other, the imposition of the national pattern of the oppressor. This imposition, in turn, may be made upon the oppressed population which is allowed to remain, or upon the territory alone, after removal of the population and colonization of the area by the oppressor's own nationals.

RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944). *See also* POWER, *supra*, note 3, at 43:

The perpetrators of genocide would attempt to destroy the political and social institutions, the culture, language, national feelings, religion, and economic existence of national groups. They would hope to eradicate the personal security, liberty, health, dignity, and lives of individual members of the targeted group. A group did not have to be physically exterminated to suffer genocide.

<sup>4</sup> *See infra* text accompanying notes 106-107; McMEEKIN, *supra* note 2, at chs. 2, 3, 6, 11 & 14 (reviewing Genocide and long history of Turkish abuse of Armenians); TANER AKCAM, *A SHAMEFUL ACT: THE ARMENIAN GENOCIDE AND THE QUESTION OF TURKISH RESPONSIBILITY* chs. 1-2, 4-5 (2006) (providing background of Genocide); POWER, *supra* note 3, at 7-16 (noting large scale of Genocide); PALMER & COLTON, *supra* note 1, at 711 (noting large scale of Genocide); VAHAKN DADRAN, *THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS* (1995); *ARMENIAN GOLGOTHA*, *supra* note 3; VISCOUNT BRYCE, *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-16* (1916); TOYNBEE, *supra* note 3.

<sup>5</sup> *See infra* Part IV. Although within academia the Armenian Genocide is largely accepted as historical fact, wider political recognition and social awareness has been slower to develop due to strong opposition and pressure from the Turkish government. *See* AKCAM, *supra* note 4, chs. 6-10 (noting failure of attempts to hold culpable Turks and Turkish institutions accountable for Genocide due to various political factors); PETER BALAKIAN, *THE BURNING TIGRIS: THE ARMENIAN GENOCIDE AND AMERICA'S RESPONSE* 375-90 (2003).

insurers to pay death benefits to the beneficiaries of their Armenian policyholders.<sup>6</sup>

Ironically, the life insurers were not Turkish companies but American, British, German, and Western European insurers, commercial citizens of nations that officially opposed the Genocide.<sup>7</sup> But these insurers were not above taking opportunistic advantage of the mass killing and its disruption of law, order, and record keeping, as well using the practical barriers the Genocide erected to collection of insurance benefits.<sup>8</sup> For decades, the lost insurance of the Genocide victims was seemingly forgotten.<sup>9</sup> Only in the late twentieth century did the issue surface, spurring legislative efforts and litigation to collect on the policies and vindicate the rights of victims and beneficiaries.<sup>10</sup> Despite aggressive defense by the insurers and their allies, many of the descendants of the victims (and, of course, their fee-earning lawyers) eventually achieved some belated compensation, settling with one insurer for more than three million dollars.<sup>11</sup> But an insurer that refused to budge from its position of no compensation initially prevailed in a judicial

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<sup>6</sup> See *infra* text accompanying notes 115-17. In addition, Armenians residing in Turkey with funds on deposit in Turkish financial institutions suffered financial injury. After these Armenians in Turkey were killed in the genocide of 1915-1920, much of their deposited wealth was seized by the banks or the Turkish government. See HRAYR S. KARAGUEUZIAN & YAIR AURON, A PERFECT INJUSTICE: GENOCIDE AND THEFT OF ARMENIAN WEALTH 99, 113 (2009); UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, 150-51 (Ara Sarafian ed. 2004). An examination of the conduct of Turkish banks is beyond the scope of this paper, which focuses on efforts to collect insurance from policies sold to victims of the Armenian Genocide.

<sup>7</sup> Among the Western companies doing business in Turkey were major insurers such as New York Life, Equitable Life Insurance of New York, L'Union de Paris, Assicurazioni Generali de Trieste, Commercial Union of London, Union Assurance Soc., Metropolitan Life, Liverpool and London and Globe Ins. Co., Le Phoenix Autrichien de Vienne, Star of London, La Federale and companies now part of Munich Re, the largest insurer in the world. See *infra* text accompanying notes 233; Letter from the Spectator Company to G. P. Ravndal, U.S. Consul-General (Nov. 14, 1912) (on file with author); see also KARAGUEUZIAN & AURON, *supra* note 6, at 23.

<sup>8</sup> See *infra* text accompanying notes 115-17 (describing insurer response to the genocide).

<sup>9</sup> See *infra* text accompanying notes 218-19.

<sup>10</sup> See *infra* Part II.

<sup>11</sup> See *infra* text accompanying notes 232.

decision that is both legally flawed and morally embarrassing.<sup>12</sup> Although the appellate court panel subsequently reversed itself, a subsequent en banc Ninth Circuit reinstated the initial decision striking down the California law. This decision essentially stands for the absurd proposition that that U.S. foreign policy required termination of the attempt to collect rightfully owed insurance benefits because the mere mention of the words “Armenian Genocide,” was bothersome to Turkey.<sup>13</sup>

This article describes the long and treacherous path of the effort to hold insurers to contractual promises made a century ago in a now-bygone world.<sup>14</sup> Part I describes the Ottoman Empire and its Armenian popula-

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<sup>12</sup> See *infra* text accompanying notes 249-62 (describing Munich Re litigation and defenses based on deference to presidential power over foreign policy, a foreign policy perceived as insulating Turkey from any U.S. litigation it might find offensive).

<sup>13</sup> See *infra* text accompanying notes 233-305, describing reversal of initial decision in Munich Re litigation and remaining review of the case.

<sup>14</sup> Although life in the nineteenth century for the Armenian minority in Ottoman Turkey was hardly an “Eden,” the analogy suggested by this article’s title is apt in that the Genocide of 1915-20 to a large degree cast the Armenian population out of its homeland either through expulsion, flight, or death. The resulting diaspora extended to scores of countries on four continents as the Armenians of the Ottoman Empire (also known as “Western” Armenians as distinguished from Armenians residing in what is now the Republic of Armenia) and nearby portions of the former Soviet Union attempted to reconstitute their lives, leaving little practical opportunity to also seek enforcement of their life insurance contract rights, an effort that took shape only decades later. See Robert Mirak, *The Armenians in America*, in THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES VOL. 2, 389 (Richard G. Hovannisian ed., 1997); DAVID MARSHALL LANG, THE ARMENIANS 120-36 (1981). For the victims of the genocide and their dependents, it was indeed a rough road out of whatever Eden they had previously had in Turkey.

The exile from Eden metaphor (Genesis 2:15-3) is not perfect, but neither has it applied literally in the other instances in which it has been used. See PAUL W. KAHN, *OUT OF EDEN: ADAM AND EVE AND THE PROBLEM OF EVIL* (2006) (using Bible story as springboard for philosophical analysis of nature of evil); RICHARD DAWKINS, *RIVER OUT OF EDEN: A DARWINIAN VIEW OF LIFE* (1995) (defending evolutionary theory as source of creation as alternative to biblical tale of Adam and Eve); Owen M. Fiss, *Out of Eden*, 94 YALE L. J. 1669 (1985) (comparing adjudication to a dispute resolution Eden left behind by some adherents of alternative dispute resolution movement); EAGLES, *LONG ROAD OUT OF EDEN* (Lost Highway Records 2007) (seventh studio album of prominent American rock band Eagles employs Eden metaphor as illustration of path of human travails) (not to be confused with albums by the American Gospel group Out of Eden, which made several albums on the Gottee Records label in the 1994-2000 period).

tion,<sup>15</sup> life insurance activity during the early twentieth century,<sup>16</sup> and the horrific Armenian Genocide<sup>17</sup> that provided insurers with the opportunity for fraudulent gain. Part II tells the story of the Armenian battle for justice through legislation<sup>18</sup> and litigation<sup>19</sup> designed to call insurers to account, including the technical but pitched battles waged by insurer defense counsel. Part III describes and assesses the outcome of the battle and compares it to the similar struggle waged by the descendants of the Jewish victims of the Nazi Holocaust<sup>20</sup> and to the efforts of torture victims to obtain recompense.<sup>21</sup> These episodes reveal litigation, despite its imperfections, to be a potentially powerful corrective force even in the face of adverse financial and political opposition. But they also reveal the degree to which overly brittle legal concepts and undue judicial deference to outside political forces can needlessly impede the pursuit of justice. In addition, the story of the quest for the Armenian insurance payments demonstrates the occasional ability of a small group of advocates and victims to launch an effort of far-reaching consequence. The story of the Armenian insurance litigation, despite being one of mixed tenuous success, is also a story of courage and persistence in the face of long odds.

## I. THE LONG ROAD TO THE GENOCIDE INSURANCE LITIGATION

### A. *The Millet System of Non-Geographic Ethno-Religious Administrative Autonomy*

Since its inception in 1299, the Ottoman Empire was an Islamic state that governed its affairs through the legal framework of the *sharia* principles as recited by the Prophet Mohammed.<sup>22</sup> The Islamic *sharia* drew distinctions between Muslims and non-believers who resided within the jurisdiction of

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<sup>15</sup> See *infra* text accompanying notes 22-39.

<sup>16</sup> See *infra* text accompanying notes 79-85.

<sup>17</sup> See *infra* text accompanying notes 95-110. There appears to be no established convention as to whether “genocide” should be capitalized when referring to the Turkey’s attack on its Armenian population. We elect capitalization, just as many or most refer to the “Jewish Holocaust” or “Nazi Holocaust” in light of the similar nature and magnitude of the crimes.

<sup>18</sup> See *infra* text accompanying notes 205-209.

<sup>19</sup> See II.D.

<sup>20</sup> See III.B.3.

<sup>21</sup> See III.B.

<sup>22</sup> AKCAM, *supra* note 4, at 20-22; WILLIAM YALE, *THE NEAR EAST: A MODERN HISTORY* 19 (1968); see PHILLIP K. HITTI, *THE NEAR EAST IN HISTORY: A 5000 YEAR STORY* 329, 336 (1961).



the Ottoman Empire.<sup>23</sup> Based on this principle of Islamic law, the *sharia* did not apply to non-Muslims.<sup>24</sup> Thus, these non-Muslim communities of various Christians and Jews were organized into non-geographic religious communities, known as *millets*, which provided a bureaucratic system of governance.<sup>25</sup>

Each *millet* was recognized through a Sultan's letter of permission and administered its own affairs, including areas of life that extend beyond religion.<sup>26</sup> The *millets* often regulated issues such as inheritance, education, divorce, guardianship, and adjudication of disputes between non-Muslims.<sup>27</sup> The *millet* system in one sense created a government within a government where the leadership of each *millet* was mainly chosen from and by the clergy of that religious community.<sup>28</sup> Those leaders served as intermediary liaisons with the Ottoman government.

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<sup>23</sup> AKCAM, *supra* note 4, at 23; YALE, *supra* note 22, at 19.

<sup>24</sup> *Id.*

<sup>25</sup> AKCAM, *supra* note 4, at 23. *Accord.* PALMER & COLTON, *supra* note 1, at 654-55 (describing millet system but not using that term). The three major *millets* were the Greek Orthodox, Armenian, and Jewish *millets*. The Greek Orthodox *millet* encompassed Greeks, Serbs, Bulgarians, Romanians, Macedonians, Vlachs, and others. Other Christian religious groups such as Armenian Catholics and Armenian Protestants were later authorized by the Sultan to form separate *millets*. The *millet* system was later reformed to allow laymen to share authority with religious leaders. See Hagop Barsoumian, *The Eastern Question and the Tanzimat Era*, in *THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES VOL. II* 175, 182-83 (Richard G. Hovannisian ed., 1997). Although the *millet* system superficially seems to have provided some autonomy for the religious minorities, it did not counter-balance their inferior treatment by the authorities as well as the society. MARY MANGIGIAN TARZIAN, *THE ARMENIAN MINORITY PROBLEM 1914-1934* 30 (1992); SARKIS ATAMIAN, *THE ARMENIAN COMMUNITY: THE HISTORICAL DEVELOPMENT OF A SOCIAL AND IDEOLOGICAL CONFLICT* 22-23 (1955).

<sup>26</sup> AKCAM, *supra* note 4, at 23. See also Bruce Masters, *Christians in a Changing World*, in *THE CAMBRIDGE HISTORY OF TURKEY VOL. III* 272, 273-74 (Suraiya N. Faroqhi ed. 2006).

<sup>27</sup> AKCAM, *supra* note 4, at 23. Fatma Müge Göçek, *Ethnic Segmentation, Western Education, and Political Outcomes: Nineteenth-Century Ottoman Society*, *POETICS TODAY* Autumn 1993, at 507, 514-15.

<sup>28</sup> See ARYEH SHMULEVITZ, *THE JEWS OF THE OTTOMAN EMPIRE IN THE LATE FIFTEENTH AND THE SIXTEENTH CENTURIES* 15-18 (1984). These reforms were implemented during the *Tanzimat* era where the Ottoman government sought to reorganize and reform the empire. See Barsoumian, *supra* note 25, at 175, 182-83.

Furthermore, the *millet* system also served to isolate and limit the religious minorities when dealing with their Muslim counterparts.<sup>29</sup> For example, these non-Muslim communities were forbidden from practicing their religions in any way that would disturb Muslims.<sup>30</sup> These limitations illustrate the uneven exchange in the quasi-contract between the Ottoman rulers and the non-Muslim religious minorities. Although the *millets* were semi-autonomous, they had little power or influence in the relationship with the central government and ruler.<sup>31</sup>

### B. *The Ottoman Empire and Its Armenian Population*

The condition of the religious minorities in the Ottoman Empire depended largely upon the relations with foreign nations as well as the ruling Sultan's predispositions. Beginning in the late eighteenth century, the Ottoman Empire struggled with the European powers to maintain its influence in Eastern Europe, and specifically in Serbia, Bulgaria, and Greece.<sup>32</sup> In response to the weakening power over these provinces, the Sultan issued two major decrees of reform. The reform or *tanzimat*<sup>33</sup> decree of 1839, and the similar decree of 1856, provided for inter-religious equality and secularization.

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<sup>29</sup> See Müge Göçek, *supra* note 29, at 507, 514-15.

<sup>30</sup> AKCAM, *supra* note 4, at 24. See Roderick Davison, *Turkish Attitudes Concerning Christian-Muslim Equality in the Nineteenth Century*, AM. HIST. REV. 59 (1954) 846-47.

<sup>31</sup> AKCAM, *supra* note 4, at 24. The non-Muslim minorities were also referred to as "gavour," meaning non-believer, and carried a negative connotation. See ROBERT F. MELSON, *REVOLUTION AND GENOCIDE* 44 (1992).

<sup>32</sup> See, AKCAM, *supra* note 4 at 27; DADRAN, *supra* note 4, at 7. See generally MCMELKIN, *supra* note 2. The European powers recognized that the ethnic and religious tensions between Ottoman authorities and non-Muslim communities offered an opportunity to influence and expand their sphere of influence. When uprisings and rebellions developed, European powers and the Russian Czar would intervene. See DENNIS P. HUPCHICK, *THE BALKANS: FROM CONSTANTINOPLE TO COMMUNISM* 238-39 (2002).

<sup>33</sup> This period of reform in the Ottoman history is largely referred to as the "Tanzimat Era" and began in the middle of the eighteenth century. Although the Arabic word *tanzimat* directly translates to "reorganization," the underlying objective for these treaties was to preserve the Ottoman Empire by incorporating, at least superficially, Western principles. See HUPCHICK, *supra* note 32, at 238-39. See also DONALD BLOXHAM, *THE GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS* 31 (2005).

Some scholars comment that this increasing movement toward religious equality and tolerance was shocking to the Ottoman cultural identity.<sup>34</sup>

Despite these foreign and mainly western efforts to elevate the status of religious minorities, Armenians were subjected to various discriminatory restrictions.<sup>35</sup> The most significant was that Armenians were forbidden from bearing weapons, as well as serving in the military, which made them a population vulnerable to violence.<sup>36</sup> Further discrimination took place in the taxation process. Tax collectors would collect poll taxes, property taxes, and other taxes several times a year from both rich and poor, in what amounted to functional extortion of the Armenian populace.<sup>37</sup>

The most difficult burden for Armenians to endure, particularly in the eastern provinces, was the obligation of providing winter quartering to the nomadic Kurds, their families, and flocks.<sup>38</sup> Knowing that Armenians

<sup>34</sup> AKCAM, *supra* note 4 at 32; PALMER & COLTON, *supra* note 1, at 654-66. See also BLOXHAM, *supra* note 33, at 31, 39.

<sup>35</sup> See CHRISTOPHER J. WALKER, ARMENIA: SURVIVAL OF A NATION 88 (1990); MANGIGIAN TARZIAN, *supra* note 25, at 30. See also BENJAMIN BRAUDI & BERNARD LEWIS, CHRISTIANS AND JEWS IN THE OTTOMAN EMPIRE: THE ARABIC-SPEAKING LANDS VOL. II 14 (1982) (discussing references made to Christians and Jews by the Ottoman authorities and the maintenance of distinctions between the Muslim majority and non-Muslim minorities).

<sup>36</sup> See, WALKER *supra* note 35, at 88; BLOXHAM, *supra* note 33, at 39-40; PALMER & COLTON, *supra* note 1, at 655.

<sup>37</sup> See, WALKER *supra* note 35, at 88. In the Anatolian provinces where the Armenian population was mostly rural, local, and regional authorities imposed a variety of taxes. Property taxes were applied to houses, pasture-land, farm-animals, and fruit-bearing trees. There were also administrative taxes for births, marriage, death, transfer of goods, use of roads, and in some areas, a general tithe. See Barsoumian, *supra* note 25, at 175, 193. One British author provides detailed examples of the treatment of the non-Muslim population through taxation methods imposed by the central Ottoman government and the implementation of taxation methods by the regional authorities. See E. J. Dillon, *The Condition of Armenia*, THE CONTEMPORARY REVIEW, Vol. 68 153-89 (Aug. 1895), reprinted in THE ARMENIAN MASSACRES 1894-1896: BRITISH MEDIA TESTIMONY 231, 241 (Arman J. Kirakossian ed. 2008).

<sup>38</sup> See, WALKER *supra* note 35, at 88; BLOXHAM, *supra* note 33, at 39-40. See JEREMY SALT, IMPERIALISM, EVANGELISM AND THE OTTOMAN ARMENIANS, 1878-1896, 24 (1993); BLOXHAM, *supra* note 33, at 39-40. Ironically, the Kurds, like the Armenians, are a distinct ethnic group spread across several countries in the Mideast/Central Asia, frequently a minority group oppressed by a different ethnic group. But because they were Muslim, they enjoyed greater favor with the Ottoman government than did the Armenians.

were forbidden from bearing arms, the nomadic guests would often take advantage of their hosts' dwellings, possessions, wives, and daughters.<sup>39</sup> Faced with these conditions, the Armenian population, like other religious or ethnic minorities, understandably sought out opportunities to obtain greater financial security, even if it could not guarantee physical safety. Savings in foreign banks and the purchase of life insurance were natural responses to the perils faced by Armenians in Turkey.

### C. *The Russo-Turkish Wars and the Armenian Question*

Although the Ottoman Sultan was challenged by the demands for reform by all religious minorities, the Armenian Question became more defined after

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The fall of the Soviet Union and the U.S.-Iraq-Kuwait Gulf War provided some greater semblance of homeland for both groups in that the Republic of Armenia emerged from the collapse of the Soviet empire and the Kurds of Northern Iraq were granted substantial autonomy through U.S. enforcement of a no-fly zone prohibiting attacks by the Iraqi army then controlled by Saddam Hussein. See Peter Rutland, *Democracy and Nationalism in Armenia*, 46 EUR-ASIA STUD. 839 (1994) (describing "process of political democratization" in Armenia that led to independence from the Soviet Union); DAVID McDOWALL, A MODERN HISTORY OF THE KURDS 277, 374-76, 390-91 (3d rev. ed. 2004) (describing the establishment of the Kurdish "safe haven," subsequent U.S. enforcement efforts, and the "relative national freedom from 1991 onwards" of the Iraqi Kurds). The 2003 U.S-Iraq War subsequently deposed Saddam and led to greater Iraqi Kurdish autonomy. See David Romano, *IDP and Refugee Return in Post-Saddam Iraq*, 18 J. REFUGEE STUD. 430, 443 (2005) ("After twelve years of autonomy, Iraqi Kurds are less willing than ever to live at the convenience or mercy of Arabs. "). Kurds in Turkey and Iran, however, continue to be a largely disadvantaged minority. See generally McDOWALL, *supra* this note, at 277-80 (discussing Iran) and at 444-46, 449-50 (discussing Turkey). But see Sebnem Arsu, *Step by Step, Gulf Between Turkey and Kurds Narrows*, N.Y. TIMES, Jan. 10, 2011, at A8 (discussing Turkey's historical difficulties with the Kurds, but noting Turkey's recent steps toward reconciling with the Kurds); DENISE NATALI, THE KURDS AND THE STATE: EVOLVING NATIONAL IDENTITY IN IRAQ, TURKEY, AND IRAN 158-60 (2005) (noting more Kurdish progress in Iraq and Turkey than in Iran).

<sup>39</sup> See FLORENCE MAZIAN, WHY GENOCIDE: THE ARMENIAN AND JEWISH EXPERIENCES IN PERSPECTIVE 10-11 (1990); BALAKIAN, *supra* note 5, at 41-43. The winter quartering requirement of Kurdish nomads placed a heavy burden on the rural population, by forcing impoverished families to serve the daily needs of their "guests," and to endure the theft and looting of their few possessions as well as the assault and rape of Armenian women without reprieve. See BLOXHAM, *supra* note 33, at 39-40.

the four Russo-Turkish wars that took place between 1806 and 1877.<sup>40</sup> In the early nineteenth century, the Russian Czar sought to expand his sphere of influence and geopolitical domination into the Balkans, the Black Sea, and the Caucasus, and thus produce a pan-Slavic sphere.<sup>41</sup>

In 1853, Russia entered into war with the Ottoman Empire over Crimea, a small peninsula in the northern part of the Black Sea.<sup>42</sup> The French and British entered on the side of the Ottoman Empire, possibly out of fear that the Russian sphere of influence would expand into Eastern Europe.<sup>43</sup> With the British military's assistance, as well as support from France, Turkey prevailed. The peace treaty following the 1853 Crimean War specifically promised more equitable treatment of Christians, but also disallowed any further involvement in Turkey by foreign powers.<sup>44</sup> This exchange of promises effectively gave Turkey unchecked dominion over the Armenians and other minorities, even though its struggle with Russia and other Ottoman neighbors remained largely unresolved.

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<sup>40</sup> See BALAKIAN, *supra* note 5, at 36-37. As western European powers endeavored to expand their influence and support toward minorities in the western provinces of the Ottoman Empire (geographically located in present day eastern Europe), the Russian Empire also sought to extend its control over the Black Sea's Crimean peninsula. The continuing challenge by the Russians aligned the interests of the Ottoman Sultan and the competing European powers. The large Armenian population in the eastern provinces of Anatolia and in the south Caucasus region of the Russian Empire raised geopolitical questions for all the powers involved. See ARMAN J. KIRAKOSSIAN, *THE ARMENIAN MASSACRES 1894-1896: BRITISH MEDIA TESTIMONY* 18 (2008).

<sup>41</sup> See BALAKIAN, *supra* note 5, at 36-37; HITT, *supra* note 22, at 342. See also WALKER, *supra* note 35, at 64. Despite their antagonism in the Crimean War, the Russian and Ottoman Empires shared many characteristics. Specifically, both were the Czar and Sultan govern autocratic states, respectively, who created a trickle-down system of repression through a variety of taxation methods, as well as other social restrictions. See MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING* 112-13 (2005).

<sup>42</sup> Although scholars point to differing causes of the conflict, the Crimean War is generally credited with ending one of the longest eras of peace in Europe and causing unfathomable suffering and loss for both civilians and states. See YALE, *supra* note 22, at 73; See also ROBERT B. EDGERTON, *DEATH OR GLORY: THE LEGACY OF THE CRIMEAN WAR* 5-31 (1999).

<sup>43</sup> See BALAKIAN, *supra* note 5, at 37-38; HITT, *supra* note 22, at 342.

<sup>44</sup> See BALAKIAN, *supra* note 5, at 38.

In 1876, triggered by cries for autonomy and equality from Eastern Europe, Russia again entered into war with the Ottoman Empire.<sup>45</sup> During this battle, Czar Alexander II of Russia sent his forces across the Turkish border with the specific agenda of guaranteeing the security of the Christian minorities through occupation.<sup>46</sup> During this same time period, Bosnia, Herzegovina, Serbia, Montenegro, and later Bulgaria also sought independence from the Ottomans, opening a front in the western part of the empire.<sup>47</sup> The Russian military's movement across the border, and the occupation of the eastern provinces that were heavily populated by Armenians provided some breathing room from Ottoman oppression.<sup>48</sup>

The final Russo-Turkish war ended with the San Stefano Treaty, which would have granted autonomy to Bulgaria, Bosnia, and Herzegovina while providing independence for Montenegro, Romania, and Serbia.<sup>49</sup> It also would have granted the Armenians protection in the form of a temporary Russian occupation that would remain until improvements and reforms were implemented.<sup>50</sup> But the treaty was never implemented.

The European Powers, and the British in particular, were concerned with the Treaty of San Stefano and the Russian occupation of the Armenian territories because European trade passed through these territories on the way to and from Persia (modern Iran).<sup>51</sup> With these political and economic

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<sup>45</sup> See *id.*; McMEEKIN, *supra* note 2, ch. 14; HETTI, *supra* note 22, at 345. During the second half of the 19th century, European society began to accept the concept of the individual nation-state over the large and multi-ethnic empire. Caught between the Hapsburgs, Russian Czar, and the Ottoman Sultan, the Balkan educated and intellectual circles espoused an independent national identity for the state. As such, the Balkan national movements developed out of these ideas. See HUPCHICK, *supra* note 32, at 275-88.

<sup>46</sup> See BALAKIAN, *supra* note 5, at 38; McMEEKIN, *supra* note 2, ch. 14; SIR EDWARD HERTSLET, *THE MAP OF EUROPE BY TREATY*, VOL. 4, 1875-1891 2598-99 (1891).

<sup>47</sup> See BALAKIAN, *supra* note 5, at 38; McMEEKIN, *supra* note 2, ch. 14; Richard G. Hovannisian, *The Armenian Question in the Ottoman Empire, 1876-1914*, in *THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES VOL. 2*, 206-207 (Richard G. Hovannisian ed., 1997).

<sup>48</sup> See BALAKIAN, *supra* note 5, at 38. Hovannisian, *supra* note 47, at 206-207.

<sup>49</sup> See BALAKIAN, *supra* note 5, at 38-39; HERTSLET, *supra* note 46, at 2685-86; HUPCHICK, *supra* note 32, at 262.

<sup>50</sup> See E. B. Lanin, *Armenia and the Armenian People*, *THE FORTNIGHTLY REV.*, Vol. 54 258-73 (Aug. 1890), reprinted in *THE ARMENIAN MASSACRES 1894-1896: BRITISH MEDIA TESTIMONY* 67, 77-78 (Arman J. Kirakossian ed. 2008).

<sup>51</sup> See BALAKIAN, *supra* note 5, at 38; HUPCHICK, *supra* note 32, at 266. The geographic area that covers present day eastern Turkey, Armenia and northern Iran

concerns at play, a new treaty was drafted in Berlin in 1878 that also addressed the Armenian Question, but not in a manner particularly salutary for Armenians.

The Treaty of Berlin effectively nullified the promises and guarantees of reform promised in the Treaty of San Stefano.<sup>52</sup> In the Berlin treaty, promises were made, but the guarantor of implementation was the Sultan.<sup>53</sup> The treaty required that two of the occupied Armenian provinces be returned to Ottoman control without any Russian ground-level presence that could guarantee the safety and security of the local population.<sup>54</sup> As one author explained, the situation created by the Treaty of Berlin was essentially “a classic case of having the fox guard the henhouse.”<sup>55</sup>

The Crimean Wars and the resulting treaties effectively defined the problem that the Ottoman Sultan faced with the existence of the Armenian population in the eastern provinces. This Christian population opened the door to constant intervention and intrusions by the European and Russian powers.

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represents the ancient trade route of Marco Polo’s “silk road” that connected Asia to the Middle East and Europe. See MARCO POLO, *THE BOOK OF MARCO POLO* 39-43 (Sir Henry Yule, trans., ed., 1871); LAURENCE BERGREEN, *MARCO POLO: FROM VENICE TO XANADU* 42-44 (2008).

<sup>52</sup> See BALAKIAN, *supra* note 5, at 39-40. See also Mark D. Kielsingard, *Restorative Justice for the Armenians, Resolved: It’s the Least We Can Do*, 24 *CONN. J. INT’L L.* 1, 5 (2008).

<sup>53</sup> See BALAKIAN, *supra* note 5, at 39.

<sup>54</sup> See SIR EDWIN PEARS, *LIFE OF ABDUL HAMID* 217-19 (1917).

<sup>55</sup> See BALAKIAN, *supra* note 5, at 39. The far-reaching changes from the Treaty of San Stefano to the Treaty of Berlin regarding the status and treatment of the Armenian population in the Ottoman Empire deeply disappointed the Armenian people around the world. The Armenian delegation at the Berlin Congress was headed by Archbishop Mgerdich Khrimian. Upon returning from Berlin to Constantinople, Archbishop Khrimian preached an often-remembered sermon describing his experience in Berlin through the metaphor of an Armenian barley stew called, “herisa.” He preached that the various Balkan representatives came to Berlin with iron ladles to take their portions of the “herisa,” but that the Armenian delegation came forth with a paper petition that disintegrated into the stew, leaving them with nothing. Archbishop Khrimian warned the Armenian congregation that they must place any hope of liberation in themselves. (An English translation of the sermon is available at <http://armenianhouse.org/khrimyan-hayrik/loving-father.html>). See Hovannisian, *supra* note 47, at 211.

*D. The Massacres of 1895 and the Role of Sultan Abdul Hamid II*

In the late 1890s, Sultan Abdul Hamid II, who later earned the name the “Bloody Sultan,” made every effort to quell the call for reforms and maintain the traditional administrative system of ethno-religious communities.<sup>56</sup> Despite the promises of reform and equality, the Armenian population living in the eastern provinces, particularly agrarian peasants who inhabited the remote highlands of Anatolia, continued to endure tax extortion, compulsory winter-quartering of nomadic Kurds, as well as ethnically-motivated violence and rape.<sup>57</sup>

The Treaties of San Stefano and Berlin represented both the hope for and disappointing reality of reform of the Ottoman Empire and the implementation of western principles of equality, tolerance, and civil rights.<sup>58</sup> After suffering the empty-promises and consequences of the Treaty of Berlin, the Armenian population began to organize resistance against local authorities.<sup>59</sup> For example, in 1891, grain farmers and ranchers in the region of Sassoon resisted a system of double taxation, and after confrontation were driven into the mountains by the local authorities.<sup>60</sup> To quell this ongoing rebellion in Sassoon, the sultan eventually sent his military to burn the villages.<sup>61</sup>

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<sup>56</sup> See HENRY MORGENTHAU, SR., *AMBASSADOR MORGENTHAU’S STORY* 304 (1918) (noting that the British Prime Minister William Gladstone “stigmatized” Sultan Abdul Hamid II as “the great assassin”). In response to the reform movement that developed under previous Sultans, Abdul Hamid II sought to restore authority in his centralized government by brushing aside any constitutional right to equality and a resurrecting repressive scheme based on the constant threat of massacre. See MANN, *supra* note 41, at 112-13; Edward S. Creasy, *THE HISTORY OF NATIONS: TURKEY* 489-91 (1913).

<sup>57</sup> See BALAKIAN, *supra* note 5, at 53-55. See also Barsoumian, *supra* note 25, at 175, 193.

<sup>58</sup> See MANN, *supra* note 41, at 112-13; PEARLS, *supra* note 54 at 217-19.

<sup>59</sup> See BALAKIAN, *supra* note 5, at 55; MANN, *supra* note 41, at 119.

<sup>60</sup> See BALAKIAN, *supra* note 5, at 55; Richard Davey, *Turkey and Armenia*, *FORT-NIGHTLY REVIEW*, Vol. 62197-210 (February 1895) reprinted in *THE ARMENIAN MASSACRES 1894-1896: BRITISH MEDIA TESTIMONY* (Arman J. Kirakossian ed., 2008). See also *Armenia and the Sultan*, *N.Y. TIMES*, Dec. 16, 1894 (available at <http://query.nytimes.com/search/>). The Sassoun massacre is largely viewed as the precursor to Sultan Abdul Hamid II’s larger massacres of the Armenian population of Anatolia, which in and of itself, is the precursor to the Armenian Genocide. The Sultan’s attitude toward the Armenian population set the tone for increased intolerance and extremism implemented by the Young Turk leadership.

<sup>61</sup> See MELSON, *supra* note 31, at 44. See also *Turkey’s Mail Censorship: Statement Made by Porte Regarding Armenian Massacres*, *N.Y. TIMES*, Dec. 31, 1894,



Similarly, in 1895, nearly two thousand Armenians began a march from the Armenian Patriarchate to the Sublime Porte (Grand Vizier) to deliver a petition that protested the treatment of Armenians and the lack of action by the central government in Constantinople.<sup>62</sup> This petition included demands for fair taxation, freedom of public assembly, equality before the law, and protection of life and property.<sup>63</sup> Additionally, the petition emphasized that the Armenian population sought implementation of the Treaty of Berlin's promised reforms. As this public demonstration moved through the

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available at <http://query.nytimes.com/search/> [hereinafter *Turkey's Mail Censorship*].

<sup>62</sup> See BALAKIAN, *supra* note 5, at 58. *Text of the Armenian Protest: Reforms the Demand of Which Caused the Riot at Constantinople and Intervention of Powers*, N.Y. TIMES, Nov. 10, 1895 (on file with author, *Times* archives); *Fanatics in Stamboul; Agitators for Redress Made a Deliberate Provocation*, N.Y. TIMES, Oct. 2, 1895 (on file with author, *Times* archives).

<sup>63</sup> See BALAKIAN, *supra* note 5, at 58. See also DADRAN, *supra* note 4, at 119-120. The Armenian petition for reforms specifically included a demand for the protection of women because of the widespread practice of Turkish and Kurdish chieftains kidnapping and raping women and girls, forcing conversion to Islam, and marriage to fellow tribesmen. A spotlight was shined on this gender-based harassment, and the Ottoman state's condoning and even sponsoring this activity, in the story of a fifteen year old Armenian girl named Gulizar from the village of Bulanukh in the region of Moush. In this region, a Kurdish chieftain named Musa Bey, who had influential connections throughout the Ottoman government, continuously harassed and pillaged the local Armenian villages with the assistance of hundreds of his tribesmen. One evening in 1889, he and his cohorts attacked Bulanukh, murdered dozens of Armenian men and boys and kidnapped the fifteen year old Gulizar. Fed up with the continuous harassment of Musa Bey, the local villages protested the loss of Gulizar until European and American foreign diplomats finally intervened with the Ottoman authorities. After three months of being held hostage and enduring continuous rape and abuse, Gulizar was restored to her family and Musa Bey was brought to trial. In the first trial, the Ottoman court acquitted Musa Bey. When foreign diplomats intervened again, Musa Bey was found guilty after a three year trial and exiled to Mecca for two years. Gulizar's story spread throughout Europe and even became the subject of Gladstone's Letter to the Daily Mail. Gulizar married Kegham Kevonian, survived the Genocide, and settled in Paris, France. See KARO SASUNI, PATMUT'IWN TARONI ASHKHAHRI 542-545 (1957) (the author includes a facsimile copy of British Prime Minister Gladstone's August 27, 1889 letter to the Daily Mail); CHRISTOPHER DE BELLAGUIE, REBEL LAND: UNRAVELING THE RIDDLE OF HISTORY IN A TURKISH TOWN 82 (2010). See also LEVON CHORMINASIAN, HAMABADKER AREVMDAHAYOTS 126-127 (1972); ARMENOUHI KEVONIAN, LE NOCES NOIRES DE GULIZAR (2005) *supra* note 5, at 55. See also DADRAN, *supra* note 4, at 120.

streets of Constantinople, the authorities unleashed soldiers and police to attack and massacre the protestors.<sup>64</sup> These horrors, documented by foreign diplomats, continued for more than a week in the broad daylight of Constantinople.<sup>65</sup>

A wave of Armenian massacres spread throughout the eastern provinces from 1894 to 1895.<sup>66</sup> With these massacres the Sultan earned his title as the “great assassin,” and provoked further international inquiry of the Armenian Question.<sup>67</sup> By 1896, estimates of the number of Armenians killed ranged from 88 thousand to three hundred thousand.<sup>68</sup>

### *E. The American Protestant Missionary Movement—Education and Liberalism*

At the turn of the nineteenth century, the Christian missionary movement—both Catholic and Protestant—spread throughout the world and entered into the Ottoman Empire, a prime target.<sup>69</sup> The American Protestant missionaries, who hailed from well-known seminaries in New England, were inspired by their experience of Christian revival and sought to broaden the movement beyond the American shores.<sup>70</sup> Two young American missionaries from the Andover Theological Seminary spearheaded this effort with

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<sup>64</sup> See BALAKIAN, *supra* note 5, at 55.

<sup>65</sup> See *id.*

<sup>66</sup> See *Turkey's Mail Censorship*, *supra* note 61. See also *Appeals to Civilization*, N.Y. TIMES, Dec. 31, 1895, available at <http://query.nytimes.com/search/>. The New York Times archives include hundreds of articles, including first hand accounts, of Armenian massacres during this time period.

<sup>67</sup> See MORGENTHAU, SR., *supra* note 56, at 304 (Gladstone denounced Sultan Abdul Hamid II as the “great assassin” in response to these atrocities). See also *Were Ordered by the Sultan: Charges That Armenian Massacres Were Designed by the Porte*, N.Y. TIMES, Aug. 18, 1896.

<sup>68</sup> See AKCAM, *supra* note 4, at 42; RICHARD G. HOVANNISIAN, *THE ARMENIAN GENOCIDE: CULTURAL AND ETHICAL LEGACIES* 4 (2007). Turkish scholar Taner Akcam notes that Kaiser Wilhelm II believed the estimate of the number of people killed as 80,000, while French and English reports estimated 200,000. The Armenian patriarchate (the leadership of the Armenian *millet*) placed the number of murder victims at 300,000. See AKCAM, *supra* note 4, at 42.

<sup>69</sup> See AKCAM, *supra* note 4, at 42; SALT, *supra* note 38, at 30. See also Thomas Otakar Kutvirt, *The Emergence and Acceptance of Armenia as a Legitimate American Missionary Field*, ARMENIAN REV. VOL. 37 Autumn 1984 at 7-32.

<sup>70</sup> SALT, *supra* note 38, at 30; see also Kutvirt, *supra* note 69, at 9.

an initial expedition through the region in 1810.<sup>71</sup> Based on their report, a formal foreign missionary movement was initiated by the Andover Theological Seminary and carried out by missionaries from Princeton, Yale, Dartmouth, Middlebury, and Bowdoin.<sup>72</sup> In an effort to provide support and coordination, the American Board of Commissioners for Foreign Missions ["American Board"] governed this expansion, and put particular emphasis on developing operations in the Middle East, India, China, and Africa.<sup>73</sup>

In 1831, the American Board recognized that the original purpose of converting Muslims and Jews was fraught with challenges, and decided to shift the focus to evangelizing "degenerate churches of the East," specifically the Armenian, Greek, and Syrian Orthodox churches.<sup>74</sup> As United States Ambassador to Turkey Henry Morgenthau noted, "Christian missionaries in Turkey were carrying forward a magnificent work of social service, education, philanthropy, sanitation, medical healing and moral uplift."<sup>75</sup> By the second half of the nineteenth century, the American Board was responsible for twelve missionary stations, 270 outstations, 114 churches and 150 missionaries.<sup>76</sup>

One of the most important achievements of the missionary movement was the educational system that it established throughout the Ottoman Empire to serve their new congregants. During this period, the missionaries created 1,100 elementary schools, 132 high schools, and six colleges, with the vast majority of students being Armenian.<sup>77</sup> This educational system represented the missionary movement's effort to increase literacy and intro-

<sup>71</sup> JOSEPH L. GRABILL, *PROTESTANT DIPLOMACY AND THE NEAR EAST: 1810-1927* 8 (1971). Samuel Newell and Gordon Hall were sent to the Far East to explore communities that would be conducive environments for missionary work. In India, Newell and Gordon interacted with the Armenian community and sent back reports noting that the "Armenian church may be rendered an important instrument in the work of evangelizing the western part of Asia." See Kutvirt, *supra* note 69, at 12-15.

<sup>72</sup> See GRABILL, *supra* note 71, at 8.

<sup>73</sup> See *id.*; Suzanne Moranian, *Bearing Witness: The Missionary Archives as Evidence of the Armenian Genocide* in *THE ARMENIAN GENOCIDE: HISTORY, POLITICS, ETHICS* (Richard G. Hovannisian, ed., 1992). Samuel Colcord Bartlett, *HISTORICAL SKETCHES OF THE MISSIONS OF THE AMERICAN BOARD: TURKEY* 11 (1972).

<sup>74</sup> See GRABILL, *supra* note 71, at 8.

<sup>75</sup> *Id.* at 65.

<sup>76</sup> See BALAKIAN, *supra* note 5, at 25; see also ALAN PALMER, *THE DECLINE AND FALL OF THE OTTOMAN EMPIRE 176-77* (1992).

<sup>77</sup> See BALAKIAN, *supra* note 5, at 25. See also MALCOLM V. MALCOLM, *THE ARMENIANS IN AMERICA* 18 (1919).

duce the democratic concepts of individual liberty, gender equality, individualism, and freedom from oppression.<sup>78</sup>

As literacy and education increased, and western ideas entered the Armenian community's consciousness, the Armenian *millet* became more vibrant and cognizant of its place in the Turkish Empire. Additionally, the exposure to western culture created a natural affinity for America by these Ottoman subjects, and played a role in the passage of emigrants from Turkey to the United States.

#### *F. Foreign Life Insurers Invade Turkey*

In the late nineteenth century, as the concept of life insurance became more socially acceptable in America, New York Life Insurance Company ["New York Life"] expanded the scope of its business activities beyond the United States, and opened regional offices in Europe.<sup>79</sup> As part of this corporate growth, New York Life, along with European insurance companies, expanded into the Ottoman Empire to offer a life and fire insurance in a new market.<sup>80</sup>

When New York Life came ashore in the Ottoman capital Constantinople the company implemented its then-unique strategy of using agents and sub-agents to promote their life insurance products on a one-on-one basis with consumers.<sup>81</sup> In the larger urban centers of Constantinople and Smyrna, these life insurance agents were often American citizens living

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<sup>78</sup> See BALAKIAN, *supra* note 5, at 27-29.

<sup>79</sup> See JAMES MONROE HUDNUT, *HISTORY OF THE NEW-YORK LIFE INSURANCE COMPANY, 1895-1905* 173 (1906). New York Life Insurance Company was founded in 1845 and quickly established itself as one of the nation's most prominent insurance companies. The expansion into the European market began with New York Life's construction of buildings in the European capitals. The company's first European building was built in Paris in 1882-84. The company's finance committee had recommended this purchase based on the increased income being generated from the business on the European continent. In 1876, New York Life had \$374,300 in income from Europe, which later increased to \$1,384,190 in 1882.

<sup>80</sup> See *Marootian et al. v. N.Y. Life Ins. Co.*, No. 99-cv-12073 (C.D. Cal. filed Nov. 1999). PLTF 0316-0317 (on file with author).

<sup>81</sup> See Viviana Zelizer, *Human Values and the Market: The Case of Life Insurance and Death in 19th Century America*, *AM. J. SOC.*, Vol. 84, No. 3 (Nov. 1978), p. 591-610. New York Life enjoyed early success in the life insurance business due to its person-to-person marketing technique. Although secular, agents selling insurance were often seen as "missionaries" reaching out to ordinary Americans to assist in financial planning.

abroad.<sup>82</sup> But in the “interior” parts of the Ottoman Empire, in smaller cities and towns like Harput, Van, and Bitlis, the vast majority of New York Life sub-agents were native Armenians, as well as some Greeks.<sup>83</sup>

As life in the Ottoman Empire was organized into ethno-religious communities, these sub-agents naturally turned to their relatives, friends, fellow-church-goers, and compatriots as a market for this new financial planning product. Many of the individuals who purchased life insurance came from a variety of backgrounds and trades including grocers, teachers, shopkeepers, merchants, housewives, cobblers, and clergy.<sup>84</sup> However, the overwhelming majority were urbanized people whose families were dependent on the breadwinner’s wage-earning income.<sup>85</sup> Having moved away from the economic self-sufficiency of the agricultural and rural lifestyle and being under constant suspicion by the local and national Turkish authorities, Armenians and Greeks were the perfect customers. Based on the historical circumstances, these communities appear to have sought financial security and wealth protection mechanisms to compensate for the precarious state of affairs in the Ottoman Empire, becoming comparatively large purchasers of insurance.

In the early twentieth century, opposition to Sultan Abdul Hamid II’s control over the Ottoman Empire continued to grow, primarily in the form of minority, nationalist, and left-wing groups who requested democratic reforms. But with the growing and hungry market, New York Life was willing to overlook ethnic friction, inhospitable authorities, and political unrest.

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<sup>82</sup> See Letter from John G. A. Leishman, American diplomat serving in Turkey, to Mr. Hayes, American Legation in Constantinople (August 26, 1902) (on file with authors).

<sup>83</sup> *Id.*

<sup>84</sup> See Marootian Settlement Insurance Policy List, ARMENIAN INSURANCE SETTLEMENT FUND.COM, <http://web.archive.org/web/20060422051258/http://armenianinsurancesettlementfund.com/PolicyList.pdf> (last visited Mar. 19, 2012) (accessed by searching for “<http://armenianinsurancesettlementfund.com/PolicyList.pdf>” in the Internet Archive Wayback Machine). See Armenian Insurance Settlement Fund, Policyholders List, <http://www.armenianinsurancesettlementfund.com/PolicyList.pdf> (last visited June 17, 2009). The list of more than three thousand Armenian policyholders found in the corporate archives of New York Life and marked “do not destroy” included occupations. Most, if not all, of the policyholders were urban tradesman (e.g., cobblers, tailors, and ironmongers) or shopkeepers.

<sup>85</sup> See also PALMER & COLTON, *supra* note 1.; Zelizer, *supra* note 81, at 597.

G. *World War I and the Young Turks*

The Sultan's continuing repression of his subjects led to the "Young Turk" Revolution of 1908, which promised a democratic and constitutional government that included the participation and representation of all minorities.<sup>86</sup> However, the nationalist leaders of the Young Turk Revolution soon abandoned these democratic ideals and began to push out of leadership the liberal-minded supporters of the revolution.<sup>87</sup> This shift was partly moti-

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<sup>86</sup> See DADRIAN, *supra* note 4, at 179; YALE, *supra* note 22, at 159-60. See also MCMEEKIN, *supra* note 2, ch. 3, AKCAM, *supra* note 4, chs. 3, 4. The group became known as the "Young Turks" because of both their age and their objective of change from the Ottoman hierarchy to one more receptive to modern values and government systems. See PALMER & COLTON, *supra* note 1, at 657 (in reaction to Sultan's resistance to modernity and oppression, "some tens of thousands of Young Turks, the activists of the reform era before 1876, or their children and successors, lived in exile in Paris, London, or Geneva, plotting their return to Turkey and vengeance upon [Sultan] Abdul the Damned.").

<sup>87</sup> DADRIAN, *supra* note 4, at 180-81; YALE, *supra* note 22, at 169. Ironically, but perhaps symptomatically (in view of the centrality of the Young Turks' role in one of the world's great human rights crimes and the degree to which the world has largely forgotten the Armenian Genocide), the term "Young Turk" is one with a generally positive connotation in the United States. Technically defined as "an insurgent or a member of an insurgent group esp. in a political party" or "one advocating changes within a usually established group" (see MERRIAM-WEBSTER'S NINTH COLLEGIATE DICTIONARY 1374 (10th ed. 1996)), the term is often identified with younger persons seeking to shake up an excessively stodgy establishment by disregarding older, worn-out, or excessively proper folkways. For example, irreverent athletes challenging the conventional wisdom in their sports are often referred to as "Young Turks." See, e.g., *Sports: Basketball*, NEW YORK MAGAZINE, Mar. 27, 1995, at 134 ("Press-box weenies waxing about Michael Jordan returning to the game [of basketball] to rein in the hot-headed Young Turks who bring the playground to the hardwood have it all wrong."). Boston Bruins star center Derek Sanderson, the NHL's 1968 Rookie of the Year, was nicknamed "Turk" in part because of his similarity in appearance to Turkish nationals but also because of his irreverent ways, particularly an inclination to party hard despite the physical demands of playing a professional sport. See Pat Jordan, *The Vita's Still Dolce, But Hockey's Chief Nonconformist and Big Spender, Derek Sanderson of the Bruins, Tastes Life in the Minor Leagues*, SPORTS ILLUSTRATED, Jan. 7, 1974, at 24-25 ("He was a firebrand who aroused the fans and, off the ice, a character who made lively newspaper copy — just the kind of athlete to fill an arena."); DEREK SANDERSON, I'VE GOT TO BE ME (1970) (autobiography in which Sanderson glories in Young Turk image); STAN FISCHLER, THE BURLY BRUINS: HOCKEY'S TEMPESTUOUS TEAM 19, 66-73 (1971) (featuring photographs of Sanderson on the ice). See also ELLEN JOAN POLLOCK, TURKS AND BRAHMINS: UPHEAVAL AT MILBANK,

vated by the need to appeal to the conservative Turkish population concerned with preserving Islamic authority and superiority in the Ottoman Empire. The Young Turk leaders embraced an aggressive version of Islam in order to gain credibility and popularity that would secure their political position and a new form of dictatorship.<sup>88</sup> Led by Talaat Pasha, Enver Pasha, and Jemal Bey, the Young Turk government set to work on purging the country of Armenians who occupied a strategic geographic area and were, as Christians, considered a disloyal minority.<sup>89</sup>

The Ottoman Empire, under the governing authority of the Young Turks, joined the Central Powers by entering World War I in October

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TWEED: WALL STREET'S GENTLEMEN TAKE OFF THEIR GLOVES (1990) (describing generational division at venerable New York law firm Milbank Tweed Hadley & McCloy in which Young Turk partners are generally painted as positive forces trying to modernize the firm even if somewhat at the cost of collegiality and lifestyle); Jonathan Glater, *Joseph H. Flom, Pioneering Lawyer in Mergers and Acquisitions, Dies at 87*, N.Y. TIMES, Feb. 24, 2011 at A24, col. 1 (term is used with positive connotation regarding famous attorney who built Skadden Arps law firm by bucking the legal and business establishment and creating situation in which "major corporations . . . bypassed their own legal advisers and turned to young Turks like Mr. Flom at Skadden and [celebrated mergers and acquisitions specialist] Martin Lipton of Wachtell, Lipton, Rosen & Katz."). And, of course, Kemal Ataturk, the penultimate product of the Young Turk movement, is generally well regarded in the West for making Turkey more secular and westward-looking. See, e.g., PALMER & COLTON, *supra* note 1, at 791-93 (text widely used in American high school history courses) (crediting "energetic drive" of Ataturk and followers for creating modern, secular Turkey with separation of church and state as well as greater rights for women, including abolition of polygamy). *But see id.* at 792 (consequence of change was greater nationalism and ethnocentrism. "The Turks wanted a modern Turkey – by and for the Turks."). As this fuller view of Ataturk, the Young Turks, and the Armenian Genocide reveals, a more secular, westernized, and modern government is not necessarily a consistently humane government.

In a rational world, notwithstanding the benefits of a secular Turkey that is an ally rather than an avowed enemy, one would expect the Young Turk label to carry a little more baggage. That it does not is testament to the degree to which the Armenian Genocide and the Young Turk role in it has been largely airbrushed out of history. See MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* 3 (Michael Henry Keim trans., Penguin Books 1981) (1978) (describing degree to which Eastern Bloc regimes literally airbrushed disfavored politicians out of photographic records to accord with prevailing official versions of past events).

<sup>88</sup> See AKCAM, *supra* note 4, chs. 3, 4; DADRAN *supra* note 4, at 5. See also YALE, *supra* note 22, at 168, 206.

<sup>89</sup> See BALAKIAN, *supra* note 5, at 160; McMEKIN, *supra* note 2, chs. 4-6, 14; AKCAM, *supra* note 4, chs. 3, 4. See also YALE, *supra* note 22, at 208, 228-29.

1914.<sup>90</sup> The Turkish leaders had been in secret negotiations with Germany and were particularly interested in promoting their interests in the region, especially in regard to realigning relationships with their neighbors in the Caucasus and Russia.<sup>91</sup> By joining the Central Powers, Turkey expanded the war to a new Russian front that included the vital ports in the Black Sea and the Bosphorus.<sup>92</sup> As part of this expansion, Turkey also opened a front against Russia through the east by attacking the Russian border that was mainly populated by eastern Armenians living under the Czar's rule.<sup>93</sup> Although the Young Turks expected a relatively easy victory on this eastern front in the oppressive winter months of 1914, they were surprised by any enemy army of 100,000 soldiers—including Russian and Armenian battalions—who thwarted their plans. This initial defeat in the winter of 1914 added to the animosity that the Young Turks felt toward the Armenians in the Ottoman Empire.<sup>94</sup>

#### *H. The Armenian Genocide 1915-1920*

With the outbreak of World War I in the summer of 1914, as a precautionary measure and a response to the war mobilizations throughout Europe, New York Life “discontinued making new contracts of insurance in the Turkish Empire.”<sup>95</sup> Company management likely had concerns regarding the political maneuverings of the Young Turk authorities and the Austro-Hungarian Empire. For an insurance company, the climate and spread of

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<sup>90</sup> See Richard G. Hovannisian, *Armenia's Road to Independence*, in *THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES VOL. 2*, 280 (Richard G. Hovannisian ed., 1997); BERNARD LEWIS, *THE MIDDLE EAST: A BRIEF HISTORY OF THE LAST 2,000 YEARS* 338 (1995).

<sup>91</sup> See also YALE, *supra* note 22, at 204-206.

<sup>92</sup> See McMEEKIN, *supra* note 2, *passim*; AKCAM, *supra* note 4, chs. 3-5; Hovannisian, *Armenia's Road to Independence*, *supra* note 90, at 280; PALMER & COLTON, *supra* note 1, at 791-93; FRANK HERBERT SIMONDS, *HISTORY OF THE WORLD WAR, VOL. 1* 180 (1917).

<sup>93</sup> The Armenian population was largely divided into two groups: western Armenians living in the Ottoman Empire and eastern Armenians living in the Russian Empire. Although these groups were divided by a political and geographic border, their political and national aspirations were consistent. See Hovannisian, *Armenia's Road to Independence*, *supra* note 90, at 280-85.

<sup>94</sup> See *id.* at 280. SARKIS ATAMIAN, *THE ARMENIAN COMMUNITY* 222 (1955).

<sup>95</sup> See Pl. 's Opp'n to Def. 's Mot. to Dismiss, Exhibit J, Letter from James McIntosh, General Counsel to the William J. Bryan, Secretary of State, Washington D.C., dated Mar. 20, 1915.



war presents changes in the risk assessments, even when life insurance policies include war exclusions.

In the early months of 1915, U.S. diplomats stationed in fourteen consulates throughout the Ottoman Empire sent reports and messages to Washington D.C. noting a change in the political conditions and increasing intolerance and terror towards Christian minorities, specifically naming Greeks, Armenians, and Chaldeans.<sup>96</sup> These communications indicated that the increasing reports of violence occurred in all parts of the Ottoman Empire, were religiously motivated, and in some cases involved either direct or silent participation of the local authorities.<sup>97</sup> Under these conditions, all foreign diplomats experienced communication difficulties in the form of dispatch interception, censorship, and continuous monitoring of activities.<sup>98</sup>

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<sup>96</sup> See Letter from Charles F. Brissel, American Consul, Baghdad, Turkey, to William J. Bryan, Secretary of State, Washington D.C. (Apr. 1, 1915), in UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, *supra* note 6, at 4 (describing arrests of Christians, institution of martial law, and confiscation of arms from Armenian soldiers serving in the Ottoman military). Chaldeans are a Christian-Catholic ethnic group emanating primarily from what is now Iraq. See MARY C. SENGSTOCK, CHALDEAN AMERICANS: CHANGING CONCEPTIONS OF ETHNIC IDENTITY 8 (2d ed. 1999).

<sup>97</sup> See Letter from J. B. Jackson, American Consul, to Henry Morgenthau, American Ambassador, Constantinople, Turkey (Apr. 21, 1915), in UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, *supra* note 6, at 7 (describing conditions and reports from Marash, Zeitoun, and Aintab, and enclosing the written eye-witness report of Rev. John E. Merrill); Letter from William S. Dodd, Konia, Turkey, to Henry Morgenthau, American Ambassador (May 6, 1915), in UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, *supra* note 6, at 37 (describing the arrival of two thousand Armenian refugees from Zeitoun by train and foot, mostly women and children, and the Turkish military's efforts to prevent aid from the American hospital to treat the starvation); Letter from J. B. Jackson, American Consul, Aleppo, Syria to Henry Morgenthau, American Ambassador (May 12, 1915), in UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, *supra* note 6, at 40 (describing arrival of 28,000 Armenians from Konia, Caesaria, Zeitoun, Marash by government order, and the division of men, women, and children into separate groups); Letter from Edward I. Nathan, American Consul, Mersina, Turkey to Henry Morgenthau, American Ambassador (May 18, 1915), in UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, *supra* note 6, at 44-45 (reporting the deportation of seventy Armenian families from Adana, Mersina, and Tarsus).

<sup>98</sup> See UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, *supra* note 6, at 1-19. Several of the telegrams and reports indicate that they were transmitted in red or green cipher. Leslie Davis, Consul-General of Harpoot, also noted in his final report continuous censorship by the Turkish authorities, a

Foreign companies and their foreign employees were not immune to this sudden change in atmosphere and the rise of reigning terror against minority groups. In one dispatch from the American Consulate in Smyrna to the State Department in Washington, an American Consul stated:

American employees of the MacAndrews Forbes Company, returning from trips into the interior report that there is great hostility to Englishmen. The Americans understand this from their treatment when they are mistaken for British. As this feeling is something new in this region, and is shown especially by the military, it is doubtless being artificially worked up from the headquarters.<sup>99</sup>

These dispatches note that the relative ease of doing business in Turkey evaporated, and that neither these foreign companies nor the Turkish authorities guaranteed the safety of foreign employees working in the interior parts of the former Ottoman Empire. By October 1914, when the Turkish government joined Germany and the Central Powers, New York Life immediately began the process of closing down its operation in the Ottoman Empire. In an effort to maintain its life insurance contracts, New York Life reduced its presence to a representative office in Constantinople with two Greek employees. Policyholders continued to make payments through American consulates located throughout the country.<sup>100</sup>

In 1915, the Young Turk government shifted its policy toward the Armenians from oppression to a systemic premeditated extermination and

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perhaps surprising Turkish clampdown considering that the United States did not enter World War I until 1917, and was a neutral party during the early years of the Armenian Genocide.

<sup>99</sup> See Letter from George Horton, American Consul-General in Smyrna to William J. Bryan, Secretary of State, Washington D.C. (Feb. 4, 1915). in UNITED STATES OFFICIAL RECORDS ON THE ARMENIAN GENOCIDE 1915-1917, *supra* note 6, at 1 (describing “Turkish bands” terrorizing Christians, and MacAndrews Forbes Co. employees describing a new sense of intolerance increasing in the interior of the Ottoman Empire).

<sup>100</sup> Telephone Interview with Vartkes Yeghiayan, Yeghiayan & Associates, lead attorney in *Marootian v. New York Life*. (March 20, 2009). Upon being given access to the New York Life corporate archives, Mr. Yeghiayan found documentation of policyholders continuing to make payments on their policies during the time of the Armenian Genocide until they were presumably killed or sent on deportation marches. These actions could be interpreted as policyholders attempting to secure resources for their families in the face of likely clashes and violence.

deportation of the entire Armenian population.<sup>101</sup> On the night of April 24, 1915, days after Easter celebrations, 235 Armenian lawyers, doctors, politicians, clergy, and teachers were arrested in Constantinople.<sup>102</sup> The arrests and subsequent deportation or massacre of the arrestees wiped out the leadership of the Armenian community and left the population fearful and vulnerable.<sup>103</sup> From late May to early June 1915, the Turkish military put out an order to deport all non-Turks. However, all non-Armenian populations were exempt from deportation.<sup>104</sup> During the remaining months of 1915, the authorities' evacuation and deportation orders were implemented by gathering Armenian men, and separately the elderly, women, and children into convoys.<sup>105</sup> These convoys were forced to march on foot through harsh ter-

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<sup>101</sup> See DADRIAN, *supra* note 4, at 221; ARMENIAN GOLGOTHA, *supra* note 3, at 77-82; MERRILL D. PETERSON, "STARVING ARMENIANS" 30-33 (2004); In his memoir describing his experience as American Ambassador to Turkey in 1915, Morgenthau notes several signs of a change in the Young Turk leadership and the impending doom that was about to befall the Armenian population. He notes that in early 1915 the Young Turk government downgraded Armenian soldiers serving in the Turkish army from combatants to laborers, and thus stripped these soldiers of their arms, medical treatment, and in many cases, food. He also describes reports where Armenian men and women were arrested, tortured until they confessed to being part of a resistance or hiding weapons, and finally killed. See MORGENTHAU SR., *supra* note 56, at 302-308.

<sup>102</sup> See YAIR AURON, *THE BANALITY OF INDIFFERENCE* 42 (2000); POWLER, *supra* note 3, at 1-29; ADAM JONES, *GENOCIDE: A COMPREHENSIVE INTRODUCTION* 106 (2006); see WALKER, *supra* note 35, at 209; see MAZIAN, *supra* note 39, at 88; see also Christopher J. Walker, *World War I and the Armenian Genocide*, in *THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES VOL. 2*, 256-366 (Richard G. Hovannisian ed., 1997) (quoting several eye-witness accounts by diplomats about the atrocities that followed in the days, weeks, and months following April 24, 1915); ARMENIAN GOLGOTHA, *supra* note 3.

<sup>103</sup> See AURON, *supra* note 102, at 42; ARMENIAN GOLGOTHA, *supra* note 3, at 52; see Christopher J. Walker, *World War I and the Armenian Genocide*, in *THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES VOL. 2*, 252 (Richard G. Hovannisian ed., 1997).

<sup>104</sup> See DONALD BLOXHAM & A. DIRK MOSES, *THE OXFORD HANDBOOK OF GENOCIDE STUDIES* 375 (2010); BEN KIERNAN, *BLOOD AND SOIL: A WORLD HISTORY OF GENOCIDE AND EXTERMINATION FROM SPARTA TO DARFUR* 409 (2007).

<sup>105</sup> See AURON, *supra* note 102, at 43; Walker, *supra* note 103, at 256-366 (noting that the "Temporary Law of Deportation" authorized by the Turkish Council of Ministers was officially published three days prior to its actual approval, and provided the necessary euphemism and legality for the massacres). The systemic nature of the "deportations" is apparent in the eye-witness account of Henry H. Riggs, an American missionary living in the city of Harpoot (known in Armenian as

rain toward the vast Syrian Desert in the south.<sup>106</sup> Along the way, the convoys were subject to starvation, looting, beating, rape, and murder.<sup>107</sup>

Numerous foreign diplomats, including U.S. Ambassador Henry Morgenthau, documented and reported on the campaign of massacres and forced deportation marches.<sup>108</sup> As the Turkish mass-murder and deportations of Armenians continued, the governments of France, Great Britain, and Russia made a declaration denouncing these acts as “crimes against humanity and civilization.”<sup>109</sup> It was during this period that the Turkish Minister of Interior, Talaat Pasha, discussed the New York Life Insurance policies taken out by Armenians.<sup>110</sup> Ambassador Morgenthau recounted:

One day Talaat made what was perhaps the most astonishing request I had ever heard. The New York Life Insurance Company and the Equitable Life of New York had for years done considerable business with the Armenians. The extent to which this people insured their lives was merely another indication of their thrifty habits. ‘I wish,’ Talaat

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Kharpert) at the time. In vivid detail, he describes the condition and treatment of the Armenian population, as well as the arrival of caravans of Armenian deportees from other cities. Riggs was born in the Ottoman Empire to a family of missionaries, after his experiences in Harpoot, he later became a teacher and evangelist amongst the Armenian refugees in Beirut. See HENRY H. RIGGS, *DAYS OF TRAGEDY IN ARMENIA: PERSONAL EXPERIENCES IN HARPOOT, 1915-1917* 78-80 (1997).

<sup>106</sup> See AURON, *supra* note 102, at 43; Rouben Paul Adalian, *The Armenian Genocide*, in *CENTURY OF GENOCIDE: CRITICAL ESSAYS AND EYEWITNESS ACCOUNTS* 45, 47 (Samuel Totten & William S. Parsons eds., 3d ed. 2009).

<sup>107</sup> See AURON, *supra* note 102, at 43. Foreign diplomats and missionaries stationed throughout the former Ottoman Empire documented their observations of the inhumane mistreatment of the Armenian population. In communications with their respective home offices, many of these individuals requested foreign intervention and assistance. See Letter from Members of the German Mission Staff in Turkey to the German Foreign Ministry (Oct. 8, 1925), in *THE TREATMENT OF ARMENIANS IN THE OTTOMAN EMPIRE 1915-16*, at xxxiii (Viscount Bryce ed. 1916); LESLIE A. DAVIS, *THE SLAUGHTERHOUSE PROVINCE: AN AMERICAN DIPLOMAT’S REPORT ON THE ARMENIAN GENOCIDE, 1915-1917* (Susan Blair, ed.) (1989).

<sup>108</sup> See BRYCE, *supra* note 4; DAVIS, *supra* note 107; MORGENTHAU SR., *supra* note 56.

<sup>109</sup> This declaration’s use of the phrase “crime against humanity” can be viewed as an early reference to the concept of genocide and the need for new terminology. See U.N ECON. & SOC. COUNCIL [ECOSOC] COMMISSION ON HUMAN RIGHTS, U.N WAR CRIMES COMMISSION REPORT, E/CN. 4/W. 20 (May 28, 1948). See also DADRAN, *supra* note 4, at 239.

<sup>110</sup> See MORGENTHAU SR., *supra* note 56, at 339.

now said, 'that you would get the American life insurance companies to send us a complete list of their Armenian policy holders. They are practically all dead now and have left no heirs to collect the money. It of course all escheats to the State. The government is the beneficiary now. Will you do so?' This was almost too much and I lost my temper. 'You will get no such list from me' I said, and I got up and left him.<sup>111</sup>

As this exchange between the American Ambassador and the Turkish Minister of Interior indicates, authorities on all sides recognized the value of life insurance as wealth and as personal property. The Turkish Ministry of Commerce sent a similar request to the New York Life Insurance Company's headquarters in Constantinople.<sup>112</sup> In a letter dated February 18, 1916, the New York Life director in Paris forwarded the Turkish request for a list of Armenian policyholders to Ambassador Morgenthau.<sup>113</sup> The New York Life director explained that it would be difficult to comply with the request and that there were concerns that the Turkish authorities would respond negatively.<sup>114</sup> Additionally, these requests imply that the Turkish authorities were aware that Armenians had purchased life insurance and that the government was interested in confiscating these assets.

As the attempted extermination of the Armenian people became increasingly apparent, New York Life's management recognized that the genocidal massacres could create an unexpectedly high financial burden if the survivors or their heirs demanded payment of the insurance benefits all at once. In 1922, in a letter addressed to the U.S. Secretary of State, New York Life's vice president explained that a large portion of company's business in the Ottoman Empire was

written upon the lives of subject peoples, such as the Armenians and others who have . . . been subjected to mas-

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<sup>111</sup> *Id.* See also Letter from P. Duncanson, Financial Director, European Department, New York Life Ins. Co. to U.S. Ambassador Henry Morgenthau (Feb. 18, 1916) (this letter describes the same request from the Turkish Ministry of Commerce, for a list of Armenians residents of the Ottoman Empire and insured by New York Life. The letter notes that the insurance company did not keep a nationality-based listing of policyholders, and further described compliance with the request as a "delicate matter.").

<sup>112</sup> See SHAVARSH TORIGUIAN, *THE ARMENIAN QUESTION AND INTERNATIONAL LAW* 140-41 (1988).

<sup>113</sup> *Id.* See also MORGENTHAU SR., *supra* note 56, at 339.

<sup>114</sup> TORIGUIAN, *supra* note 111. *Id.*

sacre and illegal killing and fatal exposure by or with the acquiescence of the Turkish authorities. In consequence of such illegal action and willful failure of the Turkish Government to protect the lives of those within its jurisdiction, the [New York Life Insurance Company] has incurred heavy and extraordinary losses.<sup>115</sup>

This letter continues to explain that, in accordance with New York state law, the company maintained reserve levels that correlated to the life expectancy levels, however, those life expectancy tables did not account for genocide.<sup>116</sup> The letter states that, as a result, New York Life incurred \$320,000 of losses beyond its reserve levels, in claims and benefits paid out under the Armenian insurance policies.<sup>117</sup>

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<sup>115</sup> See, e.g., Letter from W. Buckner, vice-president, New York Life Insurance Co. to Charles E. Hughes, U.S. Secretary of State, (Nov. 20, 1922) (on file with author) (requesting that treaty include provision recognizing “obligation of the Turkish government to indemnify insurance companies for losses suffered by such companies through the premature death of Armenian and other clients formerly resident on Ottoman territory who were massacred or deported.”) Letter from William Phillips, U.S. Under-Secretary of State to Sullivan & Cromwell (Jan. 15, 1923) (on file with author). See also Letter from Sullivan & Cromwell to Charles E. Hughes, U.S. Secretary of State, (Dec. 12, 1922) (on file with author) (noting that State Department would not comply with the request to include indemnification in the U.S.’s position at Lausanne, and yet still pressing that the request be forwarded to the U.S. representatives at Lausanne in case a similar issue is raised in Lausanne by other delegations on behalf of foreign insurance companies); Letter from William Phillips, U.S. Under-Secretary of State to Sullivan & Cromwell, (Jan. 15, 1923) (on file with author) (stating that it is in receipt of the prior requests. The letter states that the request will be forwarded to the American mission at Lausanne but further advocacy for indemnification is unlikely); Letter from Charles E. Hughes, U.S. Secretary of State to American Mission at Lausanne, (Jan. 16, 1923) (on file with author) (forwarding New York Life’s requests and stating the U.S. State Department’s position on the issue); Letter from Joseph C. Grew, Special Mission of the U.S., Lausanne, to Charles E. Hughes, U.S. Secretary of State (Jan. 29, 1923) (on file with author) (noting receipt of the New York Life correspondence forwarded by the State Department and stating that should the issue of life insurance indemnification be contemplated at the Lausanne Conference, the U.S. mission will inform the State Department immediately).

<sup>116</sup> Letter from W. Buckner, *supra* note 115. See MORGENTHAU SR., *supra* note 56, at 339.

<sup>117</sup> *Id.*

### I. *The 1917 Russian Revolution*

In February 1917 the Russian Revolution began, forcing the abdication of Czar Nicholas II and the ascendancy of a provisional government that took the reins of the collapsed empire with promises of a new liberal state.<sup>118</sup> Although many hailed this revolution a democratic revolution and an end to the three hundred year Romanov dynasty, there were many questions about the role of Russia in the Great War, as well as in the Caucasus.<sup>119</sup> In the second stage of the Russian revolution, Vladimir Lenin seized power and demanded a withdrawal of Russian forces from the Turkish-Russian front.<sup>120</sup> As part of this plan, Lenin also demanded Armenian self-determination, but the realistic implication was that the Armenians in the Caucasus would lose their shield from further Turkish advances.<sup>121</sup>

### J. *Treaties and Diplomacy*

#### 1. The Treaty of Brest-Litovsk

The Young Turk leadership was aware of the unrest in Russia and the opportunity that the withdrawal of the Russian forces presented for Turkish forces to move east.<sup>122</sup> As Russia's turmoil continued, the newly established Soviet leadership under Lenin acquiesced to the Central Powers and Turkish demands by signing the Treaty of Brest-Litovsk as an attempt to end the war and possibly spread the socialist ideology.<sup>123</sup> The main provisions of the treaty included: (1) Russian renunciation of sovereignty over what would later be termed the Soviet Eastern Bloc; (2) recognition of Ukraine's independence; (3) self-determination of the Armenian provinces in the Ottoman Empire "in agreement with neighboring States, [sic.] especially Tur-

<sup>118</sup> See SHEILA FITZPATRICK, *THE RUSSIAN REVOLUTION* 40 (3d rev. ed. 2008); Tsuyoshi Hasegawa, *The February Revolution*, in *CRITICAL COMPANION TO THE RUSSIAN REVOLUTION 1914-1921*, at 48-61 (Edward Acton, Vladimir Iu. Cherniaev & William G. Rosenberg eds. 1997).

<sup>119</sup> See Hovannisian, *Armenia's Road to Independence*, *supra* note 90, at 283.

<sup>120</sup> See *id.* at 283; SIMON PAYASLIAN, *THE HISTORY OF ARMENIA: FROM THE ORIGINS TO THE PRESENT* 148 (2007); RONALD GRIGOR SUNY, *LOOKING TOWARD ARARAT: ARMENIA IN MODERN HISTORY* 123 (1993).

<sup>121</sup> See WALKER, *supra* note 35, at 248; PAYASLIAN, *supra* note 120, at 148; SUNY, *supra* note 120, at 123.

<sup>122</sup> See WALKER, *supra* note 35, at 250; MICHAEL BOBELIAN, *CHILDREN OF ARMENIA* 33 (2009); Hovannisian, *Armenia's Road to Independence*, *supra* note 90, at 283 (discussing the turmoil in Russia).

<sup>123</sup> See JACOB SCHAPIRO & JAMES THOMSON SHOTWELL, *MODERN CONTEMPORARY EUROPEAN HISTORY 1815-1922* 747-49 (1922).

key; (4) independence for Georgia and Finland; (5) payments by Russia to Germany for losses suffered.<sup>124</sup> For the Turkish forces, this treaty opened the door for expansion eastward over the Armenian plateau and into the formerly Russian-controlled Armenian territories.<sup>125</sup>

## 2. The Armenian Republic (1918-1920) and Diplomacy

In the spring of 1918, the Armenian volunteer battalions who were supported in their efforts by peasants, tradesman, and clergy, halted the Turkish offensive 75 miles from the Armenian city of Yerevan.<sup>126</sup> On May 28, 1918, the Armenian National Council, a quasi-governmental administration of the Armenian population in the region, declared the independence of the Republic of Armenia with a bare document that cited the “grave circumstances” but omitted any statements of freedom or rights.<sup>127</sup> As an independent state, the Armenian Republic sought to develop infrastructure that could respond to the famine and epidemics spreading throughout the population, as well as develop relationships with neighboring states and the west that could guarantee territorial security.

In January 1919, when the war ended, the leaders of the Allied and the Central powers gathered in Paris for a conference that would draft the agreement to finalize the terms of peace and establish a world organization that would maintain the peace.<sup>128</sup> The Paris Peace Conference declared:

because of the historical mis-government by the Turks of subject peoples and the terrible massacres of Armenians and others in recent years, the Allied and Associated Powers are agreed that Armenia, Syria, Mesopotamia, Palestine and Arabia must be completely severed from the Turkish

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<sup>124</sup> *Id.* at 749; MICHAEL GRAHAM FRY, ET AL., *GUIDE TO INTERNATIONAL RELATIONS AND DIPLOMACY* 185-88 (2002). Germany later renounced the treaty when it signed the Treaty of Versailles at the Paris Peace Conference. See MICHAEL GRAHAM FRY, ET AL., *supra* this note, at 188-89; Hakan Kirişli, *Diplomatic Relations Between the Ottoman Empire and the Ukrainian Democratic Republic, 1918-21*, 34 *MIDDLE EASTERN STUD.* 201, 227 (1998).

<sup>125</sup> See WALKER, *supra* note 35, at 254.

<sup>126</sup> See BOBELIAN, *supra* note 122, at 34.

<sup>127</sup> SIMON VRATZIAN, *HAYASTANI HANRAPETUTIUN (The Republic of Armenia)* 131-32 (1928). See also HOVANNISIAN, *Armenia's Road to Independence*, *supra* note 90, at 298-99.

<sup>128</sup> See ERIK GOLDMAN, *THE FIRST WORLD WAR PEACE SETTLEMENTS, 1919-1925*, at 9 (2002); Richard G. Hovannisian, *The Republic of Armenia*, in *THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES VOL. 2*, 319 (Richard G. Hovannisian ed., 1997).



Empire . . . . [and] subject to the rendering of administrative advice and assistance by a mandatory power . . .<sup>129</sup>

The declaration put forth the concept of a mandatory power that would guarantee the security and viability of the newly formed states that emerged from the former Ottoman Empire and would operate on behalf of the newly formed League of Nations.<sup>130</sup> This declaration represented the only statement that the Paris Peace Conference provided regarding the newly independent republic, as well as the survivors of genocide.<sup>131</sup>

Although the mandate system was implemented in certain geographic areas by France and Britain,<sup>132</sup> British Prime Minister Lloyd George suggested that the United States should take responsibility for the mandate for Armenia, while the other Allied powers took on other areas of the former Ottoman Empire.<sup>133</sup> President Woodrow Wilson accepted the mandate for Armenia subject to the consent of the United States Senate.<sup>134</sup>

When President Wilson returned the United States, he faced the formidable task of lobbying the Senate to ratify the Treaty of Versailles and the mandate for Armenia. This effort was supported by a group of Armenian-Americans, politicians, and high-ranking government officials in Washington who had formed the American Committee for the Independence of Armenia.<sup>135</sup> Among these individuals was Vahan Cardashian, a young lawyer who received his law degree from Yale University in 1908 and had taken on the task of lobbying the United States government on

<sup>129</sup> See 3 U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: THE PARIS PEACE CONFERENCE 1919, at 795-96 (1943).

<sup>130</sup> See generally Andrew J. Crozier, *The Establishment of the Mandates System 1919-25: Some Problems Created by the Paris Peace Conference*, J. OF CONTEMP. HIST., VOL. 14, NO. 3, pp. 483-513 (Jul., 1979). See also HEATHER LEHR WAGNER, *THE DIVISION OF THE MIDDLE EAST THE TREATY OF SÈVRES* 88-89 (2004).

<sup>131</sup> See Hovannisian, *The Republic of Armenia*, *supra* note 128, at 320.

<sup>132</sup> The precursor to the mandate system was the secret 1916 Sykes-Picot secret agreement between the British and French that allocated control over the eastern territories after the fall of the Ottoman Empire. See YALE, *supra* note 22, at 253-54.

<sup>133</sup> Vahan Cardashian, *The Turkish Question and Armenia*, 108 ANNALS AM. ACAD. POL. & SOC. SCI. 141, 143-44 (1923); 1 RICHARD G. HOVANNISIAN, *THE REPUBLIC OF ARMENIA* 323 (1971).

<sup>134</sup> See 3 HOVANNISIAN, *supra* note 133, at 324. See also JAMES B. GIDNEY, *A MANDATE FOR ARMENIA* (1967).

<sup>135</sup> See ROBERT GEORGE KOOLAKIAN, *STRUGGLE FOR JUSTICE: A STORY OF THE AMERICAN COMMITTEE FOR THE INDEPENDENCE OF ARMENIA, 1915-1920*, at 97 (2008).

behalf of the Armenian people.<sup>136</sup> Through the efforts of eyewitness government officials like Davis and Morgenthau, as well as Protestant missionaries and relief organizations, the American public became aware of the plight of the Armenians.<sup>137</sup> President Wilson promoted the mandate in appearances throughout the United States, but his isolationist adversaries did not support the vision of an American mandate for Armenia.<sup>138</sup> The United States Senate, led by Henry Cabot Lodge, delivered a defeat to President Wilson and rejected the American mandate by a vote of 52 to 23.<sup>139</sup>

### 3. The Treaty of Sèvres (1920)

In February 1920, the Allied powers came together in London to draft a peace treaty with Turkey that would address the post-war conditions of the Ottoman Empire and the Armenian Question.<sup>140</sup> At the London conference it became apparent that the Armenian Question had been altered by the withdrawal of the American mandate for Armenia and the still pending questions regarding refugees, territorial borders, and continued harassment and massacres of the survivors.<sup>141</sup> Although the war was over, during the London conference, representatives received reports that the Ottoman military was targeting Armenian survivors of the genocide living in the Ottoman Empire.<sup>142</sup> The Allied powers realized that this treaty could only be imposed by force, but were unwilling to commit their own resources.<sup>143</sup>

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<sup>136</sup> See BOBELIAN, *supra* note 122, at 41-42. See generally VARTKES YEGHIAYAN, VAHAN CARDASHIAN: ADVOCATE EXTRAORDINAIRE FOR THE ARMENIAN CAUSE (2008). Cardashian (no relation to the late attorney Robert Kardashian, or his daughters), born in 1883, attended American missionary schools in the Ottoman Empire until he arrived in the United States in 1902. After graduating from Yale University, he initially practiced law in New York City and was appointed to a position in the Ottoman Embassy. In 1915, he received word that his mother and sister had fallen victim to the massacres of the Armenians. After a confrontation with the Ottoman Ambassador, Cardashian resigned his position and dedicated his advocacy efforts to bringing awareness to the plight of the Armenian people.

<sup>137</sup> See BALAKIAN, *supra* note 5, at 358; Dennis R. Papazian, *The Changing American View of the Armenian Question: An Interpretation*, 39 ARMENIAN REVIEW 47, 51-53, 57-58 (Winter 1986).

<sup>138</sup> See BOBELIAN, *supra* note 122, at 45; BALAKIAN, *supra* note 5, at 360.

<sup>139</sup> See BALAKIAN, *supra* note 5, at 361; 59 CONG. REC. 8073 (1920).

<sup>140</sup> See RICHARD G. HOVANNISIAN, THE REPUBLIC OF ARMENIA 20-23 (1971); GRAHAM FRY, ET AL., *supra* note 124, at 191.

<sup>141</sup> See HOVANNISIAN, *supra* note 140, at 23-27, 42.

<sup>142</sup> See *id.* at 42-43.

<sup>143</sup> See *id.* at 69-70.

The conference reconvened in April 1920 in San Remo to complete the Turkish peace treaty. The terms of the treaty relevant to Armenia provided that: (1) Turkey recognized Armenia as a free and independent state;<sup>144</sup> (2) the boundaries between the two countries would be determined by President Wilson;<sup>145</sup> and (3) Turkey recognized the injustice of 1915 and promised to facilitate the return of non-Turkish subjects who were forcibly driven from their homes by fear of massacre since 1914.<sup>146</sup> The San Remo draft of the Treaty of Sèvres was signed by representatives of Turkey, Armenia, Great Britain, France, and Italy on August 20, 1920.<sup>147</sup> This treaty was never implemented.

#### 4. The Treaty of Lausanne (1923)

From 1920 to 1923, the post-World War I environment in the Near East was still experiencing geopolitical shifts, as well as renewed interests by the Allies who had divided up the oil fields in the area amongst themselves through the mandate system.<sup>148</sup> Although American public sympathy for the Armenians and their failed settlement was strong, the political strategy moved more strongly toward “dollar diplomacy.”<sup>149</sup> Mustafa Kemal Atatürk, a member of the Young Turks who had participated in the massacres, renounced the Ottoman Sultan’s signing of the Treaty of Sèvres and the principle of Armenian autonomy.<sup>150</sup> Atatürk and his supporters renewed their nationalist agenda and assumed Turkish leadership by attacking the Armenian Republic in the east and the Greek administration in western Anatolia.<sup>151</sup>

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<sup>144</sup> See The Peace Treaty of Sèvres, art. 88, Aug. 10, 1920.

<sup>145</sup> See *id.*, art. 89.

<sup>146</sup> See *id.*, art. 144.

<sup>147</sup> See *Allies Are Ready to Compel Turks to Accept Treaty*, N.Y. TIMES Apr. 22, 1920 (on file with author and *Times* archives).

<sup>148</sup> See BALAKIAN, *supra* note 5, at 366; ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 115-95 (2005) (describing the mandate system of the League of Nations).

<sup>149</sup> ANGHIE, *supra* note 148, at 115-95. The term dollar diplomacy refers to the foreign policy of strengthening American commercial and trade interests by creating stability abroad. U.S. Dept. of State Office of the Historian, Dollar Diplomacy, 1909-1913, <http://history.state.gov/milestones/1899-1913/DollarDiplo> (last visited Jan. 27, 2011).

<sup>150</sup> See BALAKIAN, *supra* note 5, at 323. See also JONES, *supra* note 102, at 112.

<sup>151</sup> See BALAKIAN, *supra* note 5, at 327-28; KARAGUEUZIAN & AURON, *supra* note 6, at 57 (2009).

Even though the Turkish massacres of ethnic minorities continued, particularly in the province of Cilicia<sup>152</sup> and the multi-ethnic city of Smyrna,<sup>153</sup> the Allied response shifted. In Smyrna, Ataturk's forces went door-to-door murdering Greek and Armenian families as the Allied warships looked on from the Aegean Sea.<sup>154</sup> Recognizing that Ataturk represented the new leadership for the Turkish population as well as the victor in Smyrna, the United States was pressured into drafting a new "second-chance" treaty for Turkey.<sup>155</sup>

In 1922, the Lausanne Peace Conference convened in Switzerland to provide a new Allied peace treaty with Turkey after the Turkish nationalist movement under Ataturk had rejected the Treaty of Sèvres and taken control of the leadership.<sup>156</sup> The key Allied representatives, Great Britain and France, and to a lesser extent, the United States, sought to include in the treaty commercial trade initiatives with the new Turkish leadership.

As part of this effort to address commercial interests, New York Life lobbied the State Department and the American representatives at Lausanne to include language regarding the outstanding life insurance policies held by Armenian victims' families. New York Life sought to impose an obligation of indemnification on the Turkish representatives for the "losses suffered by such [life insurance] companies through the premature death of

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<sup>152</sup> See *Armenian Villages Besieged By Turks*, N.Y. TIMES, Mar. 12, 1920 (on file with author and *Times* archives); *Americans Give Up Orphans to Turks* N.Y. TIMES, Jun. 16, 1920 (on file with author, *Times* archives).

<sup>153</sup> In the early twentieth century, Smyrna (presently known as Izmir) was a city on the Aegean coast with a multi-ethnic population of Greeks, Armenians, and Turkish Muslims. From 1919 to 1922, under the Allied partitioning of the Ottoman Empire, Greece took administration of the city of Smyrna and its surrounding areas in part due to the large ethnic Greek population. In 1922, the Turkish nationalist movement under Mustafa Kemal Ataturk attacked Greek forces, slaughtered the Greek and Armenian inhabitants, and burned the city. This Turkish attack and brutal massacre is often referred to as the "Burning of Smyrna." See YALE, *supra*, note 22, at 283-87. See also *Smyrna Now Faces Plague and Famine*, N.Y. Times Sept. 20, 1922 (*Times* Archival search and on file with author).

<sup>154</sup> See *Smyrna Burning, 14 Americans Missing 1,000 Massacred as Turks Fire City*, N.Y. TIMES Mar. 15, 1922, (*Times* archival search and on file with author). See also MARJORIE DOBKIN, *SMYRNA 1922: THE DESTRUCTION OF A CITY* (1998); PETERSON, *supra* note 101, at 129-31.

<sup>155</sup> BALAKIAN, *supra* note 5, at 369; HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS* 83-84 (1990).

<sup>156</sup> See PETERSON, *supra* note 101, at 132. YALE, *supra* note 22, at 288. See, KARAGUEUZIAN & AURON, *supra* note 6, at 60.

Armenian and other clients formerly resident on Ottoman territory who were massacred or deported.”<sup>157</sup> The Secretary of State informed New York Life that it was unwilling to comply with their request but conceded to inform the American representative at Lausanne of this request, perhaps, in case a similar request was raised by the French representatives.<sup>158</sup>

The Turkish delegates firmly insisted that any discussion of the Armenian Question, Armenian autonomy within its borders, or mention of massacres would foreclose the possibility of any agreement.<sup>159</sup> The Allies backed down, with the result that the Treaty of Lausanne abolished the Armenian homeland in modern-day Turkey, re-established the Greco-Turkish boundaries, and adopted the concept of a homogenous Turkish Republic, effectively airbrushing the Armenian Genocide from history—at least for awhile.<sup>160</sup>

### K. *Building a New Life in America*

In the aftermath of the Armenian Genocide, survivors were scattered throughout Europe, the Middle East, South, and North America.<sup>161</sup> They were mainly women and orphaned children who were haunted by the dehu-

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<sup>157</sup> See *Marootian et al. v. N.Y. Life Ins. Co.*, No. 99-cv-12073 (C.D. Cal. filed Nov. 1999), PLTF1201 and PLTF1202 (on file with author). Letter from Joseph C. Grew, Special Mission of the United States of America, Lausanne to U.S. Sec’y of State (Jan. 23, 1923) (on file with authors).

<sup>158</sup> See *Marootian et al. supra* note 157; Letter from Sullivan Cromwell on behalf of New York Life to Sec’y of State (Dec. 13, 1922).

<sup>159</sup> See *ATAMIAN, supra* note 94, at 246. This policy was the first indication of Armenian Genocide denial by Ataturk’s leadership as well as his successors. Taner Akcam notes that there is a strong link between the establishment of a new Turkish Republic, and the Armenian Genocide because many of the perpetrators rose to leadership in the new republic, and gained economically from the Armenian Genocide. See TANER AKCAM, *DIALOGUE ACROSS AN INTERNATIONAL DIVIDE: ESSAYS TOWARD A TURKISH-ARMENIAN DIALOGUE* 92-95 (2001) (*The Genocide of the Armenians and the Silence of the Turks*).

<sup>160</sup> See *BALAKIAN, supra* note 5, at 370. Ratification of the Treaty of Lausanne by the U.S. Senate was initially delayed by a vocal minority of pro-Armenian Senators, Armenian-American lobbyists, and supporters seeking to prevent ratification and establish a U.S. presence in Turkey that would guarantee the safety of the local population. See ALEXANDER DECONDE, *ETHNICITY, RACE, AND AMERICAN FOREIGN POLICY: A HISTORY* 95 (1992); Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 *YALE J. INT’L L.* 503, 511-16 (1998).

<sup>161</sup> See *BOBELIAN, supra* note 122, at 107-109. It is estimated that in 1920 there were 45,000 Armenian refugees in Greece, 90,000 in Lebanon and Syria, and

manizing brutality of the Genocide and had little or no resources for rebuilding their lives again. The diaspora survivors, despite the magnitude of the tragedy, sought to rebuild their lives and communities. Although these survivors remembered their experiences and often penned memoirs, the consensus was that the great powers of the world had failed the Armenians and that calls for justice would be futile.<sup>162</sup>

From 1920 to 1965, Armenian communities throughout the world and particularly in the United States rebuilt their communities by establishing churches, community centers, schools, weekly newspapers, and organizations dedicated to cultural, athletic, and scouting activities.<sup>163</sup> During this era, these communities focused on maintaining ethnic cultural and linguistic heritage in their new homelands.

In the late 1950s and the 1960s, the American cultural environment changed with the civil rights and anti-Vietnam war movements. By this time, a new generation of Armenians had come of age with a re-energized sense of historical justice. The sons and daughters of the survivors of the Armenian Genocide, i.e. the first generation, were now the proud natives of the United States. Many were graduates of America's best institutions of higher learning. A large number served in the Armed Forces during World War II and many were decorated heroes. Throughout the war years, they had witnessed the atrocities of the Nazism in a very personal way. To them, the Holocaust was the tragic replay of what their parents and their grandparents had endured.<sup>164</sup>

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65,000 in France, as well as thousands more in Argentina, Canada, and the United States.

<sup>162</sup> See DONALD BLUXHOM, *THE GREAT GAME OF GENOCIDE: IMPERIALISM, NATIONALISM, AND THE DESTRUCTION OF THE OTTOMAN ARMENIANS*, 219 (2005); Lorne Shirinian, *Survivor Memoirs of the Armenian Genocide as Cultural History*, in *REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE* 166 (ed. Richard G. Hovannisian, 1999). It has been observed that survivors of large scale massacres, such as the Jewish Holocaust and the Armenian Genocide, often exhibit "survivor syndrome" where the individual has feelings of guilt, anxiety, and reactive depression. See Kristin Platt, *Witnessing the Catastrophe*, in *GENOCIDE: APPROACHES, CASE STUDIES, AND RESPONSES* 269-70 (eds. Graham C. Kinloch & Raj P. Mohan, 2005).

<sup>163</sup> See Interview with (name withheld), Armenian-American Community Leader, in Washington, D. C., (Sept., 2010).

<sup>164</sup> The first wave of Armenian immigration to America took place from 1890 to 1930, where Armenians sought to flee from the Sultan Abdul Hamid II's massacres, the Young Turk violence, and the massacres later perpetrated by Atatürk in Smyrna. In America, Armenians initially settled in New York, Worcester (Massachusetts), Boston, Providence, Hartford, Philadelphia, Troy, Chicago, and Fresno.

Another generational milestone for the children of the Armenian Genocide survivors was the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide.<sup>165</sup> The word “genocide” was first coined by a Jewish-Polish lawyer, Raphael Lemkin, in his book *Axis in Occupied Europe*, published in 1943 by the Carnegie Endowment for International Peace.<sup>166</sup> Lemkin had analyzed the recurrence of ethnic mass annihilation throughout history including, the massacres of the Armenians.<sup>167</sup> Through publications, presentations, and intense lobbying, Lemkin fought to have genocide recognized as an international crime by the United Nations through the 1948 Genocide Convention Treaty.<sup>168</sup> The signing of this treaty was a first significant post-war step toward justice because the crime of genocide was given statutory recognition.

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The first generation was composed primarily of merchants, craftsmen, shopkeepers, skilled laborers, and some farmers. Although the first generation Armenians had typical immigrant experiences, the second generation integrated into American society and often assumed a new American identity but in many cases, still maintained an inwardly Armenian character. The best example of this new Armenian-American identity is that of the Pulitzer-prize winning playwright and author William Saroyan. A native of Fresno, Saroyan authored many short stories about his family life and Armenian community life in Fresno, California that were uniquely Californian, and yet also Armenian. *See generally* WILLIAM SAROYAN, *MY NAME IS SAROYAN* 22-23 (James H. Tashjian ed. 1983).

<sup>165</sup> *See* United Nations Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, U.N. T. S. 78.

<sup>166</sup> *See* LEMKIN, *supra* note 3, at 79 (Lemkin’s definition of genocide was that of a “coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves.”); POWER, *supra* note 3, at 17-23 (2002); *see generally* YAIR AURON, *THE BANALITY OF DENIAL* 45-6 (2003) [hereinafter *BANALITY OF DENIAL*].

<sup>167</sup> *See* POWER, *supra* note 3, at 17; WILLIAM SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 24-30 (2000).

<sup>168</sup> The United Nations Convention on the Prevention and Punishment of the Crime of Genocide describes genocide as “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group.” *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. The Genocide Convention went into effect after the twentieth nation ratified the treaty. The United States became a party to the treaty on November 25, 1988 due to the perseverance of Senator William Proxmire (D-WI). From 1967 to 1986, every day that the Senate was in session, Senator Proxmire would rise to advocate the passage of this U.N. Convention. When it was finally ratified, the Senator had given a total of 3,211 speeches in favor of ratification. *See* POWER, *supra* note 3, at 155-69.

On April 24, 1965, in an unprecedented coordinated effort, Armenians around the world gathered to commemorate the fiftieth anniversary of the genocide and to call for justice.<sup>169</sup> The most notable of these demonstrations took place in Soviet Armenia, where students and faculty led a spontaneous public commemoration of the genocide that attracted more than a hundred thousand people in the center of the capital of Yerevan.<sup>170</sup> Similar demonstrations took place in Italy, Canada, Syria, Egypt, France, Australia, and throughout the United States. The initial spark of this political movement went beyond demonstrations and entered the political arena when forty-two members of Congress, including Senator Edward Kennedy and then Representative Gerald Ford delivered speeches in the legislative chambers and on the Congressional Record commemorating the Armenian Genocide.<sup>171</sup>

The Turkish government responded to the 50th anniversary commemorations with outrage and complete denial that any genocide had taken place in 1915. In the aftermath of the Genocide and World War I, the Turkish government undertook a campaign to erase any trace of Armenians by destroying medieval Armenian churches, monuments, cemeteries, and changing the names of towns, villages, and geographic locations.<sup>172</sup> Through a campaign of denial, Turkish leaders sought to revise history by persuading journalists, teachers, and public officials to blame the victimized Armenians and wartime conditions for the government's actions during the 1915-1920 period.<sup>173</sup> After the 1965 commemorations, the policy of Genocide denial arrived in the United States through Turkish government funding of public relations campaigns that sought to influence U.S. foreign

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<sup>169</sup> See BLUXHOM, *supra* note 162, at 215-16.

<sup>170</sup> This demonstration was particularly courageous in light of the Soviet prohibition of studying, speaking publicly, or tangibly acknowledging the Genocide. See Interview with (name withheld), Armenian-American Community Leader, in Washington D.C., (Sept., 2010).

<sup>171</sup> See BOBELIAN, *supra* note 122, at 127.

<sup>172</sup> BLUXHOM, *supra* note 160, at 211, 228. See also ROBERT BEVAN, *THE DESTRUCTION OF MEMORY: ARCHITECTURE AT WAR* (2006).

<sup>173</sup> See AURON, *BANALITY OF DENIAL*, *supra* note 166 at 47. Auron also notes the Turkish government efforts to influence foreign and academic policy in Israel. He describes one instance where the Turkish government attempted to disrupt an academic conference addressing the Holocaust and the Armenian Genocide in Tel Aviv with threats to the safety of Jews in Turkey.



policy and the funding of American university endowments aimed at influencing scholarship on the topic.<sup>174</sup>

More than 50 years after a genocidal campaign that was so effective it provided a blueprint for Hitler,<sup>175</sup> the perpetrator country continued to deny culpability<sup>176</sup> and the entire episode, despite brief periods of attention, largely continued to lurk outside the periphery of American and world consciousness.<sup>177</sup> In this sense, the Armenian genocide was arguably more effective than the Jewish Holocaust of the Third Reich in that the Axis perpetrators were punished,<sup>178</sup> Germany acknowledged its culpability,<sup>179</sup> and all but the most under-educated know of Hitler's barbarism.<sup>180</sup> By con-

<sup>174</sup> See BLUXHOM, *supra* note 160, at 211, 228. See also Michael J. Kelly, *Genocide: The Power of a Label*, 40 CASE W. RES. J. INT'L L. 147, 150 (2007-2008) (discussing recent Turkish efforts to thwart U.S. legislative recognition of the Armenian Genocide).

<sup>175</sup> See *infra* text and accompanying note 331.

<sup>176</sup> See *infra* text and accompanying notes 296-99 (Turkey denies Armenian Genocide ever occurred and criminally punishes use of term).

<sup>177</sup> See and accompanying notes 303 (Armenian Genocide gets little or no mention in high school history but Jewish Holocaust and Nazi atrocities widely written on and known).

<sup>178</sup> See and accompanying notes 304-306 (noting Nuremberg trials and other punishment of Nazis).

<sup>179</sup> See *infra* text and accompanying notes 305 (noting German acknowledgment of evils of Holocaust, Nazism, prejudices).

<sup>180</sup> Or are at least aware that Hitler was an evil man. In stark contrast to the Young Turks and the Armenian genocide, which is hardly referenced at all in contemporary American writings, although there are some exceptions. See, e.g., POWER, *supra* note 3, at ch. 1 (bestselling book addresses Armenian genocide); AKCAM, *supra* note 4; ARARAT (Alliance Atlantis 2002) (movie in general release addresses Armenian genocide in flashbacks interspersed with personal stories).

Hitler references—even wildly inappropriate Hitler references—are common. Most recently, conservative media commentator Glenn Beck's comparisons of President Barack Obama to Hitler have served as the most extreme example of such misplaced invocations of Hitler. See DANA MILBANK, *Tears of a Clown: Glenn Beck and the Tea Bagging of America* 117-26 (2010) (describing Beck's frequent Hitler references in challenging the political views of President Obama and others). Even without Beck's over-the-top use of the Hitler metaphor, there is little shortage of similar (if less extreme) attempts to invoke Hitler or Nazism as synonymous with great evil. See, e.g., JONAH GOLDBERG, *LIBERAL FASCISM: THE SECRET HISTORY OF THE AMERICAN LEFT, FROM MUSSOLINI TO THE POLITICS OF CHANGE* 317-57 (2007) (describing how Hillary Clinton's policy views, while not "evil," are susceptible to the same "totalitarian temptation" that motivated Hitler and the Nazis); *Living Centers of Texas, Inc. v. Penalver*, 256 S.W.3d 678 (Tex.

trast, the Young Turks and their allies of the early twentieth century appeared to have escaped judgment and buried the episode as well as its victims.

## II. THE ARMENIAN GENOCIDE INSURANCE LITIGATION

### A. *Is There a Client?*

In 1987, Vartkes Yeghiayan, an Armenian-American attorney in southern California, read about the infamous request for the list of insurance policies by the Turkish authorities in Ambassador Morgenthau's book.<sup>181</sup> Yeghiayan recognized that there was a potential cause of action for claiming those outstanding insurance policies.<sup>182</sup> According to Yeghiayan, "[t]he question was do we have a client?" He contacted the State Department, and began searching the U.S. Archives for any clues of unpaid insurance policy benefits.<sup>183</sup> More than six hundred U.S. documents from the era mentioned Armenian insurance policies. Yeghiayan decided to place advertisements in all

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2008) (Texas Supreme Court's finding of incurable error in closing argument that compared opposing trial counsel to participants in Nazi Germany's T-4 Project "in which elderly and infirm persons were used for medical experimentation and killed"); *State v. Walters*, 588 S.E.2d 344, 366 (N.C. 2003) (finding prosecutor's argument improper because "using Hitler as the basis for the example has the inherent potential to inflame and to invoke passion in the jury, particularly when defendant is compared to Hitler in the context of being evil"). Of course, media debate or political campaign rhetoric can sometimes be excessive. *See* Howard Kurtz, *Obama Adviser Quits Over 'Off the Record' Crack at Clinton*, WASH. POST., Mar. 8, 2008, at C1 (noted journalist Samantha Power, author of a deservedly Pulitzer Prize-winning book on genocide (POWER, *supra* note 3) refers to Hillary Clinton as a "monster" during interview with British television, precipitating her forced resignation as an Obama campaign advisor). But notwithstanding the excesses of some commentators, even the most inappropriate Hitler references serve to illustrate the degree to which a negative concept of Hitler as personifying evil is well established.

<sup>181</sup> Telephone Interview with Vartkes Yeghiayan, Principal, Yeghiayan & Associates (Mar. 27, 2009).

<sup>182</sup> *Id.* The existence of these insurance policies was further established by correspondence between the insurance companies and the U.S. State Department. Facsimile copies of these letters were published in a book entitled, *THE ARMENIAN QUESTION AND INTERNATIONAL LAW* by S. Toriguian that was widely circulated within the Armenian community worldwide. *See* TORIGUIAN, *supra* note 112.

<sup>183</sup> *See* Telephone Interview with Vartkes Yeghiayan, *supra* note 181. Principal, Yeghiayan & Associates (Mar. 27, 2009).

of the Armenian newspapers throughout the Diaspora and in response, received nearly a thousand responses.<sup>184</sup>

One of these responses came from Alice Asoyan, a woman in her late eighties living in Irvine, California.<sup>185</sup> She had in her possession a life insurance policy purchased by her uncle, Setrak Cheytanian, on July 13, 1910, in Harput, Turkey.<sup>186</sup> Asoyan explained that in 1913, when she and her mother immigrated to the United States to join her father, Asoyan's mother brought with her a copy of her brother-in-law's insurance policy for safekeeping.<sup>187</sup> When Asoyan and her mother left the Ottoman Empire, her uncle Setrak was living in Kharpert (modern day Harpoot) with his wife, their two children, and his parents. A few years after arriving in New York, Asoyan's mother, Yeghsa Marootian, learned about the massacres of the Armenians.<sup>188</sup>

In 1925, Yeghsa Marootian received word that her brother-in-law and his family had perished. Yeghsa attempted to collect the life insurance benefits by contacting the company headquarters in the New York. The insurance company declined to pay the benefits to Yeghsa asserting that there was no proof of the insured's death. In 1956, having moved to Los Angeles with her family, Yeghsa obtained a death certificate from the Armenian Patriarch in Istanbul, the administrative authority for the community, stating that Cheytanian died in June 1915. She sent this certificate to the insurance company who responded by asking her to visit their Pasadena office to discuss the matter. There is limited information about whether Yeghsa went to visit New York Life and how they responded, but the insurance policy was left unpaid.

After her mother's death in 1982, Asoyan inherited the shoebox containing the original life insurance policy, payment stubs, and the more recent communication between Yeghsa and New York Life. Asoyan brought the old shoebox of materials and showed Yeghiayan, who must have felt as if he had located the Holy Grail or the lost treasure of the Flying Dutchman. Yeghiayan immediately explained to Asoyan his plans on a class action lawsuit and the responsibilities of a class representative.

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<sup>184</sup> *See id.*

<sup>185</sup> *See id.* Upon discussing the possibility of a lawsuit against New York Life, Ms. Asoyan stated "maybe this is why God kept me alive for so long."

<sup>186</sup> *See id.*

<sup>187</sup> *See id.*

<sup>188</sup> The U.S. Consul, Leslie A. Davis, was stationed in Harpoot from 1915 to 1917. His report on the events that took place during his assignment as well as numerous dispatches provides vivid descriptions of the treatment and suffering of the Armenians in Harpoot/Kharpert. *See DAVIS, supra* note 107.

She responded, "I've been wondering why God has kept me alive all these years. Go ahead and file." But by the time that the lawsuit was filed, Alice Asoyan died and the new Cheytanian policy beneficiary was Martin Marootian, Alice's younger brother, a retired pharmacist from Pasadena, California. Marootian was born in the United States and had never known his uncle, but in his new role in the forthcoming litigation, he found himself taking on the role as the sole survivor of his extended family.

### *B. The Armenian Life Insurance Policies*

The insurance policy typically sold to Armenians in Turkey was a form of mixed life insurance-endowment policy that paid three thousand French francs at the time of the insured's death or in twenty years, with an additional payment of dividends depending on whether the insured, out-lived the contract's twenty year term.<sup>189</sup> For example, each July, Cheytanyan, a 35-year-old father of three, paid the annual insurance premium of 155 French Francs, roughly \$28 in 1915 American dollars and \$601 in today's dollars.<sup>190</sup> The policy provided that when the insured died, the legal heirs may collect the amount of three thousand French francs at the New York Life offices in Paris.<sup>191</sup> Although the policy was originally written in French, Cheytanian, who spoke exclusively Armenian and Turkish, signed his name and initialed the appropriate lines in Armenian only.<sup>192</sup> The exclu-

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<sup>189</sup> See Pl. 's Opp'n to Def. 's Mot. To Dismiss, Decl. of M. Marootian, and Exhibits A & B, Premium Payments and Insurance Policy, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me, Docket # 33. (C.D. Cal. filed Oct. 2, 2000). See also HUDNUT, *supra* note 79, at 36-38 (noting general absence of war risk exclusion in New York Life policies; after onset of Spanish-American War, New York Life continued to provide coverage for war-related deaths but charged an additional premium to policyholders in military service).

<sup>190</sup> See BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANKING AND MONETARY STATISTICS 1914-1941, at 670 (1943) (listing average yearly international exchange rate for France in 1915); Bureau of Labor Statistics, Table Containing History of CPI—U.S. All Items Indexed and Annual Percent Changes From 1913 to Present, <http://www.bls.gov/cpi/tables.htm> (last visited Jan. 23, 2011) (listing average annual Consumer Price Index for 1915 and 2010).

<sup>191</sup> See Pl. 's Opp'n to Def. 's Mot. To Dismiss, Decl. of M. Marootian, and Exhibits A & B, Premium Payments and Insurance Policy, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me, Docket # 33, (C.D. Cal. filed Oct. 2, 2000).

<sup>192</sup> Neither Turkish, nor the Armenian language share a common written alphabet with French or English. The Turkish language, at the time, was written with the Arabic script, and the Armenian language was and still is written with a unique alphabet of 36 characters created in 405 A. D by an Armenian monk and scholar, Mesrob Mashtots. See VAHAN M. KURKJIAN, A HISTORY OF ARMENIA 108-10

sions listed in the standard form policy included death due to the insured's participation in war or in a duel, as well as suicide.<sup>193</sup> The policy also listed a jurisdictional forum selection of the "civil Courts of France," even though the insured's and beneficiary's election of residence was "Harput, Turkey."<sup>194</sup>

The conditions and clauses listed in the policy created a strong inference that this insurance contract was a standard form geared specifically to a European consumer and European beneficiaries, who, if necessary, could freely travel to Paris. Due to the travel restrictions on Armenians in Turkey, which required permits to move from town to town or province-to-province, it is unlikely that the policy was tailored to the needs or circumstances of the individual Armenian policyholder. Moreover, assuming that the agent knew of the circumstances, the policy's first condition states that "no agent has the right to change or modify, in the name of the Company, the present contract of insurance . . . These powers belong only to the President, or Vice-Presidents or Secretaries and the Treasurer of the Company."<sup>195</sup>

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(2008); V. H. HAGOPIAN, OTTOMAN-TURKISH CONVERSATION-GRAMMAR 3-5 (1907) (The author of this book was likely a victim of the Armenian genocide).

<sup>193</sup> See Pl.'s Opp'n to Def.'s Mot. To Dismiss, Decl. of M. Marootian, and Exhibits A & B, *supra* note 191. Premium Payments and Insurance Policy, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me, Docket # 33, (C.D. Cal. filed Oct. 2, 2000).

<sup>194</sup> *See id.*

<sup>195</sup> *See id.* Because of the practically unreasonable burden of traveling from Turkey to Paris to collect life insurance death policies of this type would probably be deemed unconscionable by most American courts. *See* JEFFREY W. STEMPPEL, *STEMPEL ON INSURANCE CONTRACTS* § 4.08 (discussing unconscionability generally and noting that contract terms are unconscionable if achieved through deception or taking advantages of weaker party and that particular terms can be substantively unconscionable as well as procedurally unconscionable). *See also* E. ALLAN FARNSWORTH, *CONTRACTS* §§ 4.26-4.29 (4th ed. 2004); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (introducing concepts of procedural and substantive unconscionability). Courts frequently state that a contract term must be tarred by both procedural and substantive unconscionability to be unenforceable. *See, e.g.,* *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). However, there is not logical reason why substantive unconscionability alone cannot suffice to empower courts from enforcing a contract.

*C. The Lawyers*

Vartkes Yeghiayan was the son of a wealthy Armenian family, most recently from Addis-Ababa, Ethiopia, and had attended boarding school in Cyprus.<sup>196</sup> He came to the United States in 1954 and enrolled at the University of California, Berkley as a history major. As a student, he often heard Armenian-American students discuss their families' stories of survival and hardship but, having been raised in a sheltered environment, he had no understanding of the Genocide or any of the events that left such an indelible mark on his classmates' lives. In 1961, when Yeghiayan's father died, his mother finally explained that Yeghiayan's father survived the Genocide as a young boy and moved to Ethiopia later in life. Yeghiayan's mother had no other details about his father's survival and the family he presumably lost.

After studying law at the University of California, Hastings and graduating from Lincoln Law School, Yeghiayan started his legal career at the public-interest firm, California Rural Legal Assistance, where he gained invaluable experience in transforming public policy through class action lawsuits. Although later on Yeghiayan shifted his career to that of a sole practitioner specializing in personal injury cases, Yeghiayan's experience in class action litigation provided him with the necessary background for Marootian's case.

Realizing the costs and manpower required for a successful class action lawsuit, Yeghiayan searched for a partner with a larger firm and resources to take on New York Life. Yeghiayan first turned to the late Eugene R. Anderson, a founding member of Anderson Kill & Olick, P. C., who had extensive experience in insurance litigation as well as Holocaust insurance recovery cases. Yeghiayan also collaborated with Roman Silberfeld of Robins, Kaplan, Miller & Ciresi, who made the initial contact with New York Life. The response was an offer of settlement. But Yeghiayan sought a larger resolution that involved publicity for the underlying issue.

In May 1999, Yeghiayan was joined by Brian Kabateck, a plaintiffs' attorney with extensive insurance and class action experience. Yeghiayan felt comfortable with Kabateck because Yeghiayan thought that, though distant, Kabateck's Armenian-American heritage provided a better understanding of the underlying objective. In turn, Kabateck recommended the addition of William Shernoff to the team because of his background with Holocaust-era insurance litigation. At this stage, the workload was divided according to each attorney's expertise: Kabateck and his firm drafted

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<sup>196</sup> See Interview with Vartkes Yeghiayan, *supra* note 181. (Mar. 27, 2009). Unless otherwise indicated, unattributed personal background information concerning attorney Yeghiayan is based on this interview or litigation documents.

the briefs. Shernoff organized the negotiations, and Yeghiayan oversaw the process and maintained contact with the plaintiffs.

#### *D. The New York Life Insurance Litigation*

##### 1. Framing the Case

Nearly seventeen years after finding the first policy, Yeghiayan filed a class action against New York Life Insurance Company in November 1999 with twelve named plaintiffs in the Federal District Court for the Central District of California.<sup>197</sup> The complaint alleged six claims for relief against the insurance company, including unjust enrichment, breach of contract, breach of good faith and fair dealing, and unfair and fraudulent business practices.<sup>198</sup> The plaintiffs and their attorney prepared to take on the insurance company by litigating the issue of New York Life's profiting from the Turkish perpetration of the Armenian Genocide. Although many of the plaintiffs were well over eighty years old, litigating the genocide issue and demanding some form of even symbolic justice was supremely important for the victims and for Yeghiayan. The case was assigned to Judge Christina Snyder. Within weeks, Yeghiayan filed an amended complaint, to which New York Life responded with a motion to dismiss. The litigation also raised issues of class action certification, forum selection, and the statute of limitations.

##### 2. Procedural Skirmishes

In March 2000, New York Life responded to the amended complaint with a motion to dismiss for improper venue under Federal Rule of Civil Procedure 12(b)(3)<sup>199</sup> and asserted that the subject policies' express forum-selection clauses precluded litigation in the United States. Citing *Bremen v. Zapat Off-Shore Co.*, New York Life argued that the subject policies contained mandatory forum selection clauses requiring any claims arising from the policies to be brought in the courts of London and Paris.<sup>200</sup> New York Life further argued that no exception to enforcement, such as fraud, undue influence, or "overweening bargaining power," applied in the case at hand and in light of the commercial origins of the policy transactions, the Euro-

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<sup>197</sup> See Complaint, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me, Docket # 4, (C.D. Cal. filed Jan. 18, 2000).

<sup>198</sup> *Id.*

<sup>199</sup> Under FED. R. CIV. P. 12(b)(3), a court may consider evidence outside of the pleadings without necessarily construing the pleadings as true. See *Argueta v. Banco Mexicano, S. A.*, 87 F.3d 320, 324 (9th Cir. 1996).

<sup>200</sup> Motion to dismiss at 3-5.

pean courts would be better suited to resolve the dispute. The insurer also argued that the United States lacked sufficient connection to the dispute because the policies were issued by the insurance offices in France and England to individuals residing in the Ottoman Empire.<sup>201</sup>

New York Life attached to their motion several declarations of French and British lawyers in support of the motion to dismiss. In one declaration, a French lawyer explained that French courts recognized and enforced forum selection clauses in international contracts, even if neither the dispute nor the parties have any contacts with France.<sup>202</sup> Furthermore, the same lawyer noted that the concept of forum non conveniens does not exist under French law.<sup>203</sup> Similarly, a British lawyer provided that under the English common law “contractual jurisdiction clauses” would be enforced by the English courts and no particular words of construction were necessary to make the clause enforceable.<sup>204</sup>

In addition to questions regarding forum selection clauses and jurisdiction, the motion to dismiss highlighted the statute of limitations as another obstacle for the plaintiffs’ recovery. Immediately upon the filing of the defendant’s motion to dismiss, the plaintiffs’ legal team approached California State Senator Adam Schiff<sup>205</sup> and Chuck Poochigian<sup>206</sup> to de-

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<sup>201</sup> New York Life also filed declarations by French and British lawyers providing background information in regards to the British and French approach to forum selection clauses and the procedures for filing claims available to the plaintiffs. However, a review of these declarations as well as the plaintiffs’ expert declarations provided in opposition to the motion reveal that the legal framework for jurisdiction abroad remained open to debate.

<sup>202</sup> See Declaration of Bruno Leurent and Accompanying French Legal Authority in Support of Defendant New York Life’s Motion to Dismiss, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me, Docket # 9, p. 2 (C.D. Cal. filed Mar. 10, 2000).

<sup>203</sup> *Id.*

<sup>204</sup> See Declaration of Andrew Charles Crouchman and Accompanying English Authority in Support of Defendant New York Life’s Motion to Dismiss, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me, Docket # 11, p. 2-3 (C.D. Cal. filed Mar. 10, 2000).

<sup>205</sup> Former California State Senator Adam Schiff later won the congressional election in the fall of 2000 as a democratic candidate running against the incumbent Republican Congressman James Rogan. The electoral race for the 27th district was widely recognized as one of the costliest in terms of campaign spending which had topped \$10 million. James Bennet, *Is the Choice Between These Two Guys Worth \$10 Million?*, N.Y. TIMES MAGAZINE, Oct. 22, 2000.

Although President Clinton is credited with persuading the Republican House Speaker Dennis Hastert to prevent a House floor vote on this resolution, it is



velop a legislative solution that would extend the statute of limitations.<sup>207</sup> Working with legislative counsel, Vartkes Yeghiayan and the Armenian National Committee crafted Senate Bill 1915, the Armenian Genocide Victims Insurance Act.<sup>208</sup> The purpose of this legislation was to assert and solidify California's state interest in the rights of Armenian Genocide victims and their heirs based on its large Armenian-American population.

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highly unlikely that in a deeply divided political environment the Republican leader would bow under pressure from the President. A former Republican member of the House Rules Committee later revealed that when it became apparent that passage was likely, in a backroom discussion minutes before the vote, Congressman Rogan was asked whether passage of the Armenian Genocide resolution was vital to his reelection. Rogan expressed confidence that he could win re-election, and the support of the large Armenian-American constituency in his district, without a vote on the resolution. After Speaker Hastert pulled the resolution from the floor vote in October 2000, Rogan lost the election. The implication was that the Armenian-American community in southern California expressed their anger with the Republican Party by voting for Adam Schiff, and sending a strong message that there were consequences for political backroom deals. Interview with (name withheld), Armenian-American Community Activist, in Washington D.C., (Jan. 3, 2010).

A similar non-binding resolution, H. Res 252, was introduced by Representatives Adam Schiff, Frank Pallone, Mark Kirk, and George Radanovich in the 111th Congress (2009-2011), which called upon the President to ensure that U.S. foreign policy reflect the appropriate understanding of human rights, genocide, and the U.S. record regarding the Armenian genocide. On March 4, 2010, the House Foreign Affairs Committee, chaired by Representative Howard Berman, voted to recommend passage of the resolution by the entire House. In the (not so) lame-duck session of Congress ending in December 2010, H. Res. 252 had garnered a majority of bipartisan support in the House of Representatives based on member-to-member confirmation and 'whipping' efforts. Although it appeared that there would be no public opposition from the White House and State Department while the Turkish lobby seemed caught off guard, the House leadership failed to schedule a vote.

<sup>206</sup> Former Senator Charles "Chuck" Poochigian represented the eastern parts of the central California, from Bakersfield to Lodi, in the California State Assembly and later the California State Senate.

<sup>207</sup> Telephone Interview with Vartkes Yeghiayan, *supra* note 181. Principal, Yeghiayan & Associates (Mar. 27, 2009). Telephone Interview with Steven Dadaian, Armenian National Committee, Western Region (Oct. 16, 2009).

<sup>208</sup> Telephone Interview with Vartkes Yeghiayan, *supra* note 181. Principal, Yeghiayan & Associates (Mar. 27, 2009). KARAGUEUZIAN & AURON, *supra* note 6, at 90-91. The bill number was presumably derived from the year that the Armenian Genocide began. New York Life did not actively challenge the constitutionality of S. B. 1915, even though it had several opportunities to do so.

California Senate Bill 1915 extended the statutory limitations for filing Armenian Genocide era insurance claims and required California courts to retain jurisdiction. Specifically, beneficiaries of Armenian Genocide era insurance policies purchased between 1875 and 1923 could bring legal action to recover their claims in California as the proper forum until December 31, 2010.<sup>209</sup> The California Senate legislation provided the plaintiffs with the necessary tools for overcoming the issues raised in the motion to dismiss.

The legislation made its way through the California Senate Judiciary committee, received positive votes in the House and Senate, and went to the governor's desk, with the motion to dismiss essentially put on hold due to successive requests for continuance. In June 2000, then Senator Poochigian informed the court that tentative timeline for legislative action on S. B. 1915 was August and in fact, it reached the governor in September 2000.

On October 2, 2000, the Armenian insurance plaintiffs filed an opposition to New York Life's motion to dismiss by arguing that the forum selection clauses and statute of limitations were unenforceable and invalid. Specifically, plaintiffs argued that S.B.1915 extended the statute of limitations for filing claims under these policies and directed California to retain jurisdiction. The plaintiffs' opposition framed the case as "an insurance bad-faith case brought by representative members of a class of 10,000 ethnic Armenians, the majority of whom live in California." The opposition continued by laying out a very succinct history of the Armenians in the Ottoman Empire, the Armenian Genocide, and the capitulatory treaties that allowed New York Life to do business in the Ottoman Empire. Through this historical framework, the plaintiffs argued that in the aftermath of the Armenian Genocide, New York Life delayed and eventually denied valid insurance claims and thus, deprived genocide survivors of vital financial resources.

The plaintiffs further argued that the forum selection clauses were invalid at the time the parties contracted because they were standard forms

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<sup>209</sup> See California CIV. PROC. CODE § 354.4 (West 2000). This legislation was modeled largely on California's Holocaust Victim's Insurance Relief Act (HVIRA) which was passed into law in 1999. See Telephone Interview with Steven Dadaian, Armenian National Committee, Western Region (Oct. 16, 2009). The only significant differences between the two statutes is that HVIRA required insurers doing business in California to disclose the names of all Jewish policyholders in Nazi-controlled Europe. However, in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), the Supreme Court declared HVIRA unconstitutional because it interfered with U.S. foreign policy, specifically the German Foundation agreement.

likely printed outside the Ottoman Empire and the chosen forums were geographically distant from the Armenian provinces of the Ottoman Empire. Furthermore, the travel restrictions on Armenians living in the Ottoman Empire would have made it impossible for the policyholders to petition the courts in Europe. Therefore, in light of the unequal bargaining power of the parties and the political and historical context of the Ottoman Empire, the plaintiffs argued that the forum selection clauses were unenforceable. The plaintiff's also argued that under *Bremen v. Zapata*, the enforcement of the forum selection clause was discretionary where it would be unreasonable.

The plaintiffs' expert declarations painted a different picture of the French and British forum selection clauses. A British barrister clarified that the English courts would only exercise jurisdiction over resident litigants or litigants that could be served within the jurisdiction. For litigants outside the jurisdiction, the parties would apply for permission to serve process. According to rules enacted in May 2000, such permission would only be granted if the court was "satisfied that England and Wales is the proper place in which to bring the claim." Thus, the plaintiffs' expert declaration demonstrated that geographic convenience, costs, contingent-fee arrangements, and legislative interests all weighed in favor of the British court refusing to exercise jurisdiction over the litigants and their claims. The declaration also highlighted that the forum-selection clause appeared to be part of a standard form and did not provide any language of exclusivity of forum.

Similarly, the plaintiffs' French expert also explained French courts would not exercise jurisdiction due to the lack of contacts with France. Specifically, the French lawyer explained that the insurance policy contracts included clauses for the "election of residence" as the location where the contracting party would receive notices, in this case, France. However, the election of residence of France became invalid in 1925 when New York Life ceased doing business in France. Without residency in France or any connection with France, the plaintiff's expert explained the French courts would not exercise jurisdiction.

After briefing of the motion to dismiss, the parties returned to the negotiation table for settlement talks that lasted several months.<sup>210</sup> As part of that process, New York Life provided to the plaintiffs print-outs of poli-

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<sup>210</sup> New York Life retained Walter "Wally" Karabian as outside counsel primarily for the negotiation process. Karabian hailed from Fresno, California and was a former California Assemblyman and later majority leader for the democratic caucus in the California Senate. Yeghiayan describes the moment of walking into the negotiation and encountering Karabian, known for his political activism on behalf of the Armenian-American community, a "nightmare."

cies retrieved from their archives.<sup>211</sup> Although it was common practice by insurance companies to periodically purge their records, New York Life had maintained the archive of index cards detailing policies held by Armenians from the Ottoman Empire.<sup>212</sup> This archive was saved pursuant to a note, with no known author, directing that the records were never to be purged.<sup>213</sup>

The key outstanding issues between the parties during negotiation were class certification, value of the policies, and interest calculation. On April 11, 2001, New York Life and Kabateck distributed press releases announcing a general settlement between the parties, however, Yeghiayan's name was missing.<sup>214</sup> In this initial settlement, New York Life agreed to pay \$7 million to the claimants and \$3 million to Armenian civic organizations.<sup>215</sup> When Yeghiayan received news of the announcement, he was shocked and angry because his clients, particularly the Marootians, had not agreed to the settlement.

In response and through an article placed in the *Los Angeles Times*, Yeghiayan announced that Kabateck and Shernoff were being replaced with Mark J. Geragos<sup>216</sup> and that any previously announced settlement was rejected by the plaintiffs.<sup>217</sup> Yeghiayan also made it clear in the article that, from his perspective, the sticking points in the negotiation was the calculation of interest. He believed that \$7 million was not enough and stated, "They kept this money for 87 years. They invested this money. They profited with this money. What would be fair would be for them to return the money with the profits."<sup>218</sup> According to Yeghiayan's calculations the \$7

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<sup>211</sup> Telephone Interview with Vartkes Yeghiayan, *supra* note 181. Principal, Yeghiayan & Associates (Mar. 27, 2009). See Beverly Beyette, *He Stands Up In the Name of Armenians*, L. A. TIMES, April 27, 2001, at E1.

<sup>212</sup> Telephone Interview with Vartkes Yeghiayan, *supra* note 181. Principal, Yeghiayan & Associates (Mar. 27, 2009).

<sup>213</sup> *Id.*

<sup>214</sup> Joseph B. Treaster, *Insurer to Pay Armenian Massacre Claims*, N.Y. TIMES, Apr. 12, 2001, at A24.

<sup>215</sup> Beyette, *supra* note 211.

<sup>216</sup> Interview with Vartkes Yeghiayan, Principal, Yeghiayan & Associates (Nov. 27, 2009).

<sup>217</sup> See Beyette, *supra* note 211. Interview with Vartkes Yeghiayan, *supra* note 216. Principal, Yeghiayan & Associates (Nov. 27, 2009).

<sup>218</sup> Interview with Vartkes Yeghiayan, *supra* note 216. Interview with Vartkes Yeghiayan, Principal, Yeghiayan & Associates (Nov. 27, 2009) ("They kept this money for 87 years. They invested this money. They profited with this money. What would be fair would be for them to return the money with the profits.")

million settlement would amount to thirty-two dollars per year for eighty-seven years to each of two thousand five hundred claimants.<sup>219</sup>

Geragos, an Armenian-American attorney known for his celebrity criminal-defense practice, brought a new dynamic to the lawsuit through increased media attention.<sup>220</sup> Eventually, Geragos convinced Yeghiayan to bring Shernoff and Kabateck back into the legal team and to the negotiating table. On November 28, 2001, the parties met at the downtown Los Angeles federal courthouse for a last-ditch effort in bringing about a settlement. Although many of the attorneys on both sides were in agreement on the terms, Yeghiayan refused any further settlement proposals. He ended further discussions with the statement, "I'm not going to sign. Let's go to court."

Yeghiayan, along with the Marootians, entered Judge Christina Snyder's courtroom for a ruling on the motion to dismiss. The defendant's motion to dismiss was denied. The ruling explained that all forum-selection clauses were subject to judicial scrutiny for fundamental fairness and under *Bremen v. Zapata Oil*, there are three exceptions for enforcing a facially valid forum-selection clause.<sup>221</sup> Accordingly, the clause was unenforceable, if (1) the selected forum is "gravely difficult and inconvenient" that the complaining party will "for all practical purposes be deprived of its day in court;" (2) the clause was a product of "fraud, undue influence, or overweening bargaining power;" or (3) enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.<sup>222</sup>

Following *The Bremen* analysis, the district court held that the forum selection clauses were fundamentally unfair because forcing the plaintiffs to bring their claims in English or French courts would effectively deprive them of a judicial remedy due to the inconvenience.<sup>223</sup> Additionally, the court held the forum-selection clauses to be fundamentally unfair because socio-historic factors of the Ottoman Empire and language barriers

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<sup>219</sup> *Id.*

<sup>220</sup> Helen Gao, *Genocide Settlement Disputed; Insurer Challenges California Jurisdiction*, L. A. DAILY NEWS, Aug. 3, 2001, at N3 (noting addition of Geragos, the "high profile attorney" with a "string of prominent clients," to legal team representing Armenians in suit against New York Life).

<sup>221</sup> *Marootian v. New York Life Ins. Co.* (C.D. Cal. Nov. 28, 2001, No. 99-12073) 2001 U.S. Dist. LEXIS 22274, \*9 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12-18(1972)).

<sup>222</sup> *Id.*

<sup>223</sup> *Marootian v. New York Life Ins. Co.* (C.D. Cal. Nov. 28, 2001, No. 99-12073) 2001 U.S. Dist. LEXIS 22274, \*18.

realistically prevented the plaintiffs from reading and understanding the specific clause as well as physically accessing the selected-forums.<sup>224</sup>

### 3. New York Life Unsuccessfully Asserts Sovereignty and Foreign Affairs Defenses

The court also addressed the constitutionality of California Code of Civil Procedure § 354.4, which extended the statute of limitations for Armenian insurance claims, finding it controlling and not inconsistent with the U.S. Constitution or the powers of the national government.<sup>225</sup> Citing the decision in *Gering Global Reinsurance Corp. of America v. Low*,<sup>226</sup> the court interpreted the foreign affairs preemption doctrine narrowly. Unless the plaintiffs were a foreign government or the effect of the legislation would be more than incidental, the foreign affairs preemption doctrine did not apply.<sup>227</sup> Specifically, the court held that

*Section 354.4:* (1) is not intended to influence the affairs of Turkey, or any other country; (2) is not a form of economic sanction backed by significant assets; (3) has not been shown likely to be followed by other states; (4) has not elicited protests from any foreign country; and (5) has not been shown to directly conflict with any federal law.<sup>228</sup>

Based on this analysis, the court held that section § 354.4 was constitutional as an expression of public policy and that New York Life's motion to dismiss for improper venue was denied.

### 4. New York Life Settles

The court's decision effectively sent the parties back to the negotiating table, this time with the media spotlight on New York Life.<sup>229</sup> From 2002 to 2004, various settlement efforts and mediation sessions failed to move the parties any closer to reaching an agreement. Eventually, the plaintiffs' attorneys turned to the California insurance commissioner, John Garamendi, for

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<sup>224</sup> *Id.* at \*23.

<sup>225</sup> *Id.* at \*25.

<sup>226</sup> 240 F.3d 739 (9th Cir. 2001).

<sup>227</sup> *Marootian v. New York Life Ins. Co.* at \*35-36.

<sup>228</sup> *Id.* at \*39.

<sup>229</sup> Yeghiayan and New York Life's relations were strained by the end of 2001. In light of the perceived intransience, Yeghiayan attempted to publicly shame New York Life through the media as well as through public appearances and protests.

assistance as a mediator.<sup>230</sup> Garamendi flew to New York to meet with the New York Life chairman, Seymour Sternberg, and to see if the deadlock could be broken. According to Yeghiayan, the New York Life chairman made an offer through Garamendi and explained that the plaintiffs would not see “a penny more.”<sup>231</sup>

On January 28, 2004, the two sides announced a settlement of the lawsuit for a total of \$20 million.<sup>232</sup> According to the terms, \$11 million was set aside for potential claims by the heirs of 2,400 policyholders, \$3 million was to be distributed to nine Armenian charitable organizations and \$6 million was allocated for attorneys’ fees and administrative costs. As part of the claims distribution plan, the plaintiffs’ attorneys were directed to set up a website with information regarding the policyholders. Although the collective settlement amount was impressive, the resulting average payment per policyholder works out to only \$4,583.33 based on an estimated 2,400 policyholders—hardly a litigation windfall.

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<sup>230</sup> Garamendi had assisted in negotiating similar settlements on behalf of Holocaust victims as an American regulator to the International Commission on Holocaust Era Insurance Claims. See Joseph B. Treaster, *National Briefing—West: California: Attack on Holocaust Panel Chief*, N.Y. TIMES (Sept. 26, 2003), at A18.

<sup>231</sup> Interview with Vartkes Yeghiayan, *supra* note 216. Principal, Yeghiayan & Associates (Nov. 27, 2009).

<sup>232</sup> See Order Granting Preliminary Approval of Class Settlement Agreement, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me. Docket # 208 (C.D. Cal. filed Feb. 19, 2004). Two attorneys who were separately representing individual members of the class on a pro bono basis (John Pridjian and Steven Dadaian) filed objections to the settlement. Their objections were based on the patent unfair nature of the settlement amount, which they argued was based upon the face values of policies at the time, and not the modern contemporary value. They also objected on the basis that the settlement failed to require New York Life to disgorge itself of the substantial gains that money earned them during the intervening 89 years. These objections were ultimately overruled by Judge Snyder who stated that it was her belief that the Insurer may argue that without a demand and a rejection any claim for interest for the ensuing years may not be obtainable. Telephone Interview with Steven Dadaian, Armenian National Committee, Western Region (Jan. 13, 2011). See Preliminary Objections: Notice of Appearance and Intent to Appear at Final Approval Hearing; Joinder in Motion Regarding Class Notice, *Marootian v. New York Life Ins. Co.* No. 99-12073-CAS-Me. Docket # 233 (C.D. Cal. filed Jun. 14, 2004).

*E. The Munich Re Litigation and the Oscillating Hegemony of the Foreign Affairs Defense*

In contrast to New York Life, which settled in the face of litigation setbacks and socio-political pressure, Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft AG, better known as Munich Re, fought at the appellate level and was initially rewarded for its efforts in resisting any compromise with the beneficiaries and descendants of Armenian life insurance policyholders. Munich Re, the sixth largest insurance company and the largest reinsurance company in the world,<sup>233</sup> is the successor in interest to Victoria Versicherung AG and Ergo Versicherungsgruppe AG, two insurers that also sold policies to Armenians in Turkey prior to the Genocide.<sup>234</sup>

Responding to a class action filed by Vazken Movsesian in 2003, Munich Re declined to discuss settlement to any significant degree and raised a number of technical legal defenses<sup>235</sup> to the policyholder<sup>236</sup> claims, including the perhaps unsurprising contention that the statute of limitations had expired.

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<sup>233</sup> BUSINESS MONITOR INTERNATIONAL LTD., GERMANY INSURANCE REPORT 2011, at 5 (2010).

<sup>234</sup> See *Movsesian v. Victoria Versicherung AG (Movsesian I)*, 578 F.3d 1052 (9th Cir. 2009).

<sup>235</sup> By labeling the Munich Re defenses “technical,” we are not attempting to pre-judge their merits as in the oft-heard layperson’s complaint that a party in litigation “won on a technicality.” Technical defenses may reflect meaningful social policies protecting litigants, ensuring finality, foster efficiency, and so on. But a technical defense, in our lexicon, is one that does not address the merits of the dispute. In the Armenian Genocide Insurance litigation, the merits concerned whether the defendants had issued life insurance policies to persons who had subsequently died and whether the insurers had paid the policies’ required death benefits to the beneficiaries of the victims. To our knowledge, neither Munich Re nor any of the other insurers denies that they issued many policies, that the persons insured are no longer alive, and that they have not (absent litigation compulsion) paid the death benefits provided by the policies. In other words, the insurers tacitly concede that they were paid non-trivial amounts of premium, have been able to invest the money for approximately one hundred years, and have failed to honor the contracts they issued. Under these circumstances, one would logically hope that any technical defenses raised by these insurers would need to be quite compelling to be allowed to succeed.

<sup>236</sup> Although the term “policyholder” most accurately means the person who purchases and owns an insurance policy, we also use it for ease of reference in describing the litigation even though the plaintiffs were of course not the policyholders.



Specifically, Munich Re contended that the action should be governed by the standard four-year statute of limitations in such breach of contract matters,<sup>237</sup> rather than the extended statute of limitations provided by the California Legislature's amendment to California Code of Civil Procedure § 354.4, which specifically gave descendants of persons impacted by the Armenian Genocide until the end of 2010 (subsequently extended to

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<sup>237</sup> Under what might be termed generic California law free of any special sociopolitical considerations, the statute of limitations for contract actions is four years. *See* CAL. CIV. PROC. CODE § 337(1) (West 2011). In California, an insurer's bad faith can give rise to actions in tort and in contract, so plaintiffs may elect which theory they will pursue. *See* *Crisci v. Sec. Ins. Co. of New Haven, Conn.*, 426 P.2d 173, 178 (Cal. 1967); *Archdale v. Am. Int'l. Specialty Lines Ins. Co.*, 64 Cal. Rptr. 3d 632, 647-48 n.19 (Cal. Ct. App. 2007). Accordingly, the statute of limitations period may be two years for actions in tort under CAL. CIV. PROC. CODE § 339(1) (West 2011), or four years for actions in contract under CAL. CIV. PROC. CODE § 337(1) (West 2011). *See* *Archdale*, 64 Cal. Rptr. 3d at 647-48 n.19, 652. General personal injury tort claims have a two-year limitations period. *See* CAL. CIV. PROC. CODE § 335.1 (West 2011). To the extent that claims against an insurer sound in fraud, the applicable statute of limitations is three years. *See* CAL. CIV. PROC. CODE § 338(d) (West 2011).

California limitations law requires plaintiffs to bring a claim within the prescribed limitations period "after the cause of action shall have accrued." *See* CAL. CIV. PROC. CODE § 312 (West 2011). Generally, "a cause of action accrues at 'the time when the cause of action is complete with all of its elements.'" *Fox v. Ethicon Endo-Surgery, Inc.*, 110 P.3d 914, 919 (Cal. 2005). However, there are exceptions to the rule. One important exception is known as the "discovery rule" that "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *See id.* *See also* *Doe v. Roman Catholic Bishop of Sacramento*, 117 Cal. Rptr. 3d 597, 602 (Cal. Ct. App. 2010). Such rule "may be expressed by the Legislature or implied by the courts." *E-Fab, Inc. v. Accountants, Inc. Servs.*, 64 Cal. Rptr. 3d 9, 15 (Cal. Ct. App. 2007). In addition, as in most states, the running of the statute of limitations under California law is subject to tolling (suspension of the running of the statute) if there has been fraudulent concealment by the defendant, provided that the plaintiff acted with reasonable diligence. *See* *Grisham v. Philip Morris U.S. A., Inc.*, 151 P.3d 1151, 1159 (Cal. 2007). *See also* *Deirmenjian v. Deutsche Bank, A. G.*, 526 F. Supp. 2d 1068 (C.D. Cal. 2007) (addressing statute of limitations issues, including potential application of discovery rule, tolling, and equitable estoppels against defendants, finding plaintiffs not to have made requisite showing to trigger these doctrines, but permitting plaintiffs to amend complaint).

December 31, 2016) to commence litigation.<sup>238</sup> Although the extended statute of limitations was obviously applicable law, Munich Re contended that the extension was unconstitutional in that it “interferes with the [United States] national government’s conduct of foreign relations.”<sup>239</sup> Trial judge Christina Snyder rejected the argument<sup>240</sup> but was reversed in the Ninth Circuit panel’s initial 2-1 decision in favor of Munich Re<sup>241</sup>—which, in a surprising turn, was then reversed when a member of the panel changed her vote.<sup>242</sup> Munich Re obtained review before an en banc Ninth Circuit, which essentially reinstated the first panel decision, ruling that California’s extension of the statute of limitations was subject to field pre-emption because it conflicted with the federal government’s foreign policy, in particular the desire to enhance relations with Turkey as an ally by resisting congressional and state reference to the Genocide.<sup>243</sup>

In its first decision in the case [*Movsesian I*], the Ninth Circuit panel majority held that the extended limitations period violated the foreign affairs doctrine in that it conflicted with U.S. Executive Branch policy “prohibiting legislative recognition of an ‘Armenian Genocide.’”<sup>244</sup> The

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<sup>238</sup> See *Movsesian I*, 578 F.3d at 1052-54 (recounting the history of California’s Senate Bill 1915 (1999-2000 Reg. Sess. )); CAL. CIV. PROC. CODE § 354.4 (West 2011) (current deadline for filing is Dec. 31, 2016).

<sup>239</sup> *Id.* *Movsesian I*, 578 F.3d at 1053.

<sup>240</sup> See *Movsesian v. Victoria Versicherung AG*, No. CV-03-09407-CAS-JWJ (C.D. Cal. June 6, 2007) (order granting in part and denying in part defendant’s motion to dismiss the second amended complaint).

<sup>241</sup> See *Movsesian I*, 578 F.3d at 1053; *cf. id.* at 1063 (Pregerson, J., dissenting).

<sup>242</sup> See *Movsesian v. Victoria Versicherung AG (Movsesian II)*, 629 F.3d 901 (9th Cir. 2010); discussed *infra* text accompanying notes 276-81.

<sup>243</sup> See Petition for Panel Rehearing and Rehearing En Banc, *Movsesian v. Victoria Versicherung AG*, No. 07-56722 (9th Cir. Sept. 10, 2009) and (*Movsesian III*), 670 F.3d 1067 (9th Cir. 2012) (en banc). Because of the size of the Ninth Circuit, it has adopted the practice of providing “en banc” review by a panel of eleven judges rather than the entire Circuit membership, which numbered 25 judges as of March 19, 2012.

<sup>244</sup> See *Movsesian I*, 578 F.3d at 1056. Munich also argued that the foreign affairs doctrine preempted the California law because of the World War I-related Claims Agreement of 1922 and the War Claims Act of 1928, but the panel did not reach this issue. See 578 F.3d at 1053. However, in a lengthy opinion in similar litigation against German banks, a federal trial court found the Claims Act arguments convincing. See *Deirmenjian v. Deutsche Bank A. G.*, 526 F.Supp. 2d 1068, 1079-1088 (D.C. Cal. 2007). However, the *Deirmenjian* Court rejected the banks’ argument that the litigation was barred by the “act of state” doctrine, which forbids litigation in U.S. courts from rendering an adjudication that negates a foreign

panel majority based its conclusion on a multi-episode pattern of U.S. Presidents discouraging Congress from passing resolutions using the term “genocide” or criticizing Turkey, which has been seen as a useful or even necessary ally in the Middle East, particularly when the second Iraq War was active,<sup>245</sup> because of the U.S. use of Turkish airspace and facilities.<sup>246</sup>

The *Movsesian I* panel majority seemed particularly impressed by the Bush Administration’s response to the House’s 2007 resolution, which included a joint letter from Secretary of State Condoleeza Rice and Defense Secretary Robert Gates to House leaders in which

the Secretaries underscored the importance of Turkey’s contributions to the war in Iraq. . . . The Secretaries noted that when the French Assembly voted in favor of a similar bill, the Turkish military cut off contact with the French military and terminated defense contracts under negotiation [and] warned that ‘[a] similar reaction by the Government of Turkey to a House resolution could harm American troops in the field, constrain our ability to supply our troops in Iraq and Afghanistan, and significantly damage our efforts to promote reconciliation between Armenia and Turkey[.]’<sup>247</sup>

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state’s law. See *Deirmenjian v. Deutsche Bank*, A. G., 2006 U.S. Dist. LEXIS 96772, at \*73-\*94 (C.D. Cal. Sept. 25, 2006).

<sup>245</sup> We deem the period from the 2003 U.S. invasion of Iraq to the present as the “Second” Iraq War to distinguish it from the 1991 Gulf War. In 2009, the U.S. announced and commenced a gradual withdrawal of troops from Iraq and ushered in a period of relatively few American casualties in Iraq. The Iraq War, after being initially a very hot, largely conventional war during the first month of the 2003 invasion subsequently went through various periods of increased and reduced activity and American casualties, with notable periods of Iraqi “insurgency.” Things improved as a result of the 2007 “surge” of additional troops and the “Anbar Awakening” that enlisted Sunni Muslim tribal leaders against the insurgents, delivering better peacekeeping control of the country. Although as this is written the Iraq War appears to have receded from American public consciousness, it provided many periods of high intensity violence and active U.S. troop maneuvers. See generally DEXTER FILKINS, *THE FOREVER WAR* (2008); BOB WOODWARD, *THE WAR WITHIN: A SECRET WHITE HOUSE HISTORY 2006-2008* (2008); RAJIV CHANDRASEKARAN, *IMPERIAL LIFE IN THE EMERALD CITY: INSIDE IRAQ’S GREEN ZONE* (2006). See also James Fallows, *Blind Into Baghdad*, ATLANTIC MONTHLY, Jan./Feb. 2004, at 52 (describing chaos that ensued in the immediate aftermath of initial U.S. success in defeating Iraqi troops and deposing Saddam Hussein).

<sup>246</sup> See *Movsesian I*, 578 F.3d at 1057-61.

<sup>247</sup> *Id.* at 1058-59.

Discussing “several failed House Resolutions, H. R. Res. 106, 110th Congress (2007); HR. Res. 193, 108th Congress (2003); H. R. Res. 596, 106th Congress (2000),” the *Movsesian I* panel noted that “[e]ach of these resolutions formally recognized the ‘Armenian Genocide’ [and that] [e]ach time, the Administrations of President [George W.] Bush and President [Bill] Clinton took specific action, privately and publicly, to defeat these measures.”<sup>248</sup>The panel opinion quoted a letter from President Bill Clinton to then-House Speaker Dennis Hastert (R-III.):

[I] am deeply concerned that consideration of H. Res. 596 at this time could have far-reaching negative consequences for the United States. We have significant interests in this troubled region of the world: containing the threat posed by Saddam Hussein; working for peace and stability in the Middle East and Central Asia; stabilizing the Balkans; and developing new sources of energy. Consideration of the resolution at this sensitive time will not only negatively affect those interests, but could undermine efforts to encourage improved relations between Armenia and Turkey – the very goal the Resolution’s sponsors seek to advance. [I urge] in the strongest terms [that the House] not bring this Resolution to the floor at this time.<sup>249</sup>

The majority also noted a similar letter from a State Department official in response to House Resolution 193, introduced in 2003,<sup>250</sup> view-

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<sup>248</sup> *Id.* at 1057.

<sup>249</sup> *Id.* (quoting a Letter from President William J. Clinton to House Speaker Dennis Hastert on a Resolution on Armenian Genocide, 3 Pub. Papers 2225-26 (Oct. 19, 2000)).

<sup>250</sup> “An official from the State Department,” never named in the *Movsesian I* panel opinion, wrote:

I am writing to express the [Bush] Administration’s opposition to the working of H. Res. 193 of April 10, 2003 [W]e oppose HR 193’s reference to the “Armenian Genocide.” Were this wording adopted it could complicate our efforts to bring peace and stability to the Caucasus and hamper ongoing attempts to bring about Turkish-Armenian reconciliation. We continue to believe that fostering a productive dialogue on these events is the best way for Turkey and Armenia to build a positive and productive relationship. Declarations such as this one, however, hinder rather than encourage the process.

*See id.* at 1058.

ing the Bush “Administration’s opposition to House Resolution 193 [as] based solely on two words found in the resolution: ‘Armenian Genocide.’”<sup>251</sup> The panel was also aware that the government of Turkey sought to have the California statute overturned and had written to the Ninth Circuit urging this result.<sup>252</sup>

*Movsesian I* regarded this executive concern over displeasing Turkey as sufficient evidence of an established U.S. foreign policy to require the courts to strike down California’s extended statute of limitations for Armenian Genocide-related insurance claims, analogizing the case to *American Insurance Ass’n v. Garamendi*<sup>253</sup> in which the U.S. Supreme Court “recognized for the first time that ‘presidential foreign policy’ itself may carry the same preemptive force as a federal statute or treaty.”<sup>254</sup> In *Garamendi*, “[u]nlike in previous cases, the presidential foreign policy was not contained in a single executive agreement but was ‘embodi[ed]’ in several executive agreements, as well as in various letters and statements from executive branch officials at congressional hearings.”<sup>255</sup> Quoting *Garamendi*, *Movsesian I* found that the letters to Congress reflected a sufficiently established Executive Branch policy and ruled that “[t]he exercise of the federal executive authority means that state law must give way where . . . there is evidence of clear conflict between the policies adopted by the two.”<sup>256</sup>

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 1055 (noting a Letter from Turkish Ambassador Nabi Sensoy to Molly Dwyer, Ninth Circuit Court Clerk, but declining to take judicial notice of the letter).

<sup>253</sup> 539 U.S. 396 (2003).

<sup>254</sup> *Movsesian I*, 578 F.3d at 1056. Where U.S. foreign policy is reflected in a treaty (which must be ratified by the Senate as well as signed by the Executive) or in an executive agreement, there is significant precedent stating that conflicting state law is preempted. *See Dames & Moore v. Regan*, 453 U.S. 654 (1981) (finding that claims against Iran for the expropriation of property were barred by a U.S.-Iran agreement to secure the release of hostages taken in the 1979 seizure of the U.S. Embassy in Tehren); *United States v. Pink*, 315 U.S. 203, 229 (1942) (finding a national executive compact with Soviet Union valid and extinguishing state claims); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937) (upholding the same compact).

<sup>255</sup> *Movsesian I*, 578 F.3d at 1056.

<sup>256</sup> *Id.* at 1056 (citing *Garamendi*, 539 U.S. at 423.) The *Movsesian* panel also noted that:

Section 354.4 was modeled after § 354.5 and § 354.6, which extended the statute of limitations until 2010 for Holocaust-era in-

The *Movsesian I* court found a clear conflict “on the face of the statute” because by using the term Armenian Genocide, “California has defied the President’s foreign policy preferences.”<sup>257</sup> California’s extension of the statute of limitations for life insurance claims by displaced Armenians had, by using the word “genocide,” run sufficiently afoul of U.S. foreign policy to be struck down, precluding the *Movsesian* plaintiffs from making use of the elongated limitations period.<sup>258</sup> To the *Movsesian I* panel, at least at first blush, the case was essentially a repeat of *Garamendi*,<sup>259</sup> in which the U.S. Supreme Court in a 5-4 decision marked by atypical division within the Court<sup>260</sup> had invalidated California’s Holocaust Victims Insurance Relief Act of 1999 [“HVIRA”] that required “any insurer doing business in that State to disclose information about all policies sold in Europe between 1920 and 1945 by the company itself or any one ‘related’ to it.”<sup>261</sup>

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insurance claims and World War II slave labor claims, respectively. Sen. Jud. Comm., analysis of Sen. Bill No. 1915 (1999-2000 Reg. Sess.) May 9, 2000, pp. 2, 4. Both of these sister statutes have been found unconstitutional, because they interfered with the national government’s foreign affairs power. *Deutsch v. Turner*, 324 F.3d 692, 716 (9th Cir. 2003) (finding § 354.6 unconstitutional); *Steinberg v. Int. Comm. on Holocaust Era Ins. Claims*, 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944 (Cal. Ct. App. 2005) (finding § 354.5 unconstitutional).

*Movsesian I*, 578 F.3d at 1054-55 (italics in original).

<sup>257</sup> *Movsesian I*, 578 F.3d at 1060.

<sup>258</sup> See *id.* at 1056, 1062-63. Because there remained issues as to whether the regular statute of limitations for contract claims (without the extension for Armenian Genocide insurance claims enacted in 2000) might be tolled or the insurers stopped from asserting a limitations period defense, the case was remanded to the trial court for further proceedings. *Id.* at 1063. Without doubt, however, the *Movsesian I* panel decision was big victory for Munich Re and a likely harbinger of success in the litigation in light of the practical problems the plaintiff’s will have attempting to present claims on which the ordinarily applicable statute of limitations appears at first glance to have expired more than eighty years ago.

<sup>259</sup> See *id.* at 1060-62 (“As in *Garamendi*, the express presidential foreign policy and clear conflict raised by § 354.4 are ‘alone enough to require state law to yield.’”) (citing *Garamendi*, 539 U.S. at 425).

<sup>260</sup> Justice Souter authored the *Garamendi* majority opinion and was joined by Chief Justice Rehnquist and Justices O’Connor, Kennedy, and Breyer. Justice Ginsburg countered with a powerful dissent joined by Justice Stevens and, perhaps surprisingly, by infrequent allies Justices Scalia and Thomas. See 539 U.S. at 430-43 (Ginsburg, J., dissenting).

<sup>261</sup> *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 401 (2003).

As discussed below, the *Movsesian I* majority's initial assessment is subject to serious criticism, not only because of its failure to appreciate the distinctions between the instant matter and the HVIRA provisions at issue in *Garamendi*, but also because of its eagerness to expand a most problematic area of American jurisprudence—arguably excessive judicial deference to the Executive Branch.<sup>262</sup> Addressing these defects in a brief, but thought-provoking dissent to the *Movsesian I* opinion, Judge Pregerson noted that states have traditionally enjoyed wide authority to regulate insurance and that state regulation designed to enforce insurance contract commitments serves a substantial state interest:

The strength of this traditional state interest weighs against preemption in a case, such as the case before us, where there is doubt about the clarity of the conflict between state law and federal policy. Indeed, there is no conflict. I can find no evidence of any express federal policy forbidding states from using the term “Armenian Genocide.” The majority accurately states that the “federal government has made a conscious decision not to apply the politically charged label of ‘genocide’ to the death of Armenians during World War I. Nowhere, however, does the majority point to any evidence of an express federal policy barring states from so doing.

There is no express federal policy forbidding California from using the term “Armenian Genocide” in the course of exercising its traditional authority to regulate the insurance industry.<sup>263</sup>

The *Movsesian* plaintiffs filed a petition for rehearing en banc.<sup>264</sup> While the petition was pending, the initial panel decision received signifi-

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<sup>262</sup> See *infra* Part III.B.3.

<sup>263</sup> *Movsesian I*, 578 F.3d at 1063 (Pregerson, J., dissenting). See also 578 F.3d at 1063 (“The majority’s reliance on *Deustch v. Turner*, 324 F.3d 692 (9th Cir. 2003), is misplaced. Whether California has, while acting within its authority to regulate the insurance industry, intruded upon the province of the federal government has no bearing on the existence of, or conflict with an, express federal policy applicable to the states.”) (italics in original).

<sup>264</sup> See Petition for Panel Rehearing and Rehearing En Banc, *Movsesian v. Victoria Versicherung AG*, No. 07-56722 (9th Cir. Sept. 10, 2009). Because of its size, the Ninth Circuit has established a modified procedure for discretionary en banc review before a group of eleven circuit judges, rather than providing en banc review by the entire 29-judge Court of Appeals. See 9TH CIR. R. 35-3; 28 U.S.C. § 44(a) (2011).

cant scholarly criticism.<sup>265</sup> Particularly biting was Professor Michael Ramsey's critique of *Movsesian* as exhibiting excessive deference to the executive that gives the President an unofficial power to make law by decree<sup>266</sup> in violation of longstanding iconic precedents such as *Youngstown Sheet & Tube v. Sawyer*,<sup>267</sup> the famous steel mill seizure case, *Dames & Moore v. Regan*,<sup>268</sup> and most recently, *Medellin v. Texas*,<sup>269</sup> which he read as reining in the potential mischief of the *Garamendi* decision relied upon by the first *Movsesian* majority.<sup>270</sup> Professor Ramsey persuasively argued

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<sup>265</sup> See, e.g., Herbert R. Reginbogin, *Litigating Genocide of the Past*, 32 LOY. L. A. INT'L & COMP. L. REV. 83 (2010); Harut Sassounian, *Genocide Recognition and a Quest for Justice*, 32 LOY. L. A. INT'L & COMP. L. REV. 115 (2010). The entire issue of this *Review* was devoted to issues of justice regarding atrocities committed against minorities, in effect putting the Armenian Genocide and efforts at recompense for the crime on a par with the Nazi Holocaust directed toward Jews and other atrocities.

<sup>266</sup> See Michael D. Ramsey, *International Wrongs, State Laws and Presidential Policies*, 32 LOY. L. A. INT'L & COMP. L. REV. 19 (2010). Subsequent scholarship has also been highly critical of *Movsesian I* and expansive application of field preemption based on the foreign affairs power, which lacks a textual basis in the Constitution. See, e.g., Carolyn A. Pytynia, Note, *Forgive Me, Founding Fathers for I Have Sinned, A Reconciliation of Foreign Affairs Preemption After Medellin v. Texas*, 43 VAND. J. TRANSNAT'L L. 1413, 1433-34, 1441 (2010); Amir M. Tikriti, Note, *Beyond the Executive Agreement: The Foreign Policy Preference Under Movsesian and the Return of the Dormant Foreign Affairs Power in Norton Simon*, 38 PEPP. L. REV. 755 (2011). *But see* Matthew Schaefer, *Constraints on State-Level Foreign Policy: (Re)Justifying, Refining and Distinguishing the Dormant Foreign Affairs Doctrine*, 41 SETON HALL L. REV. 201 (2011) (generally supporting broad notions of field preemption pursuant to foreign affairs doctrine). See also Michael Aaron Granne, *Two-Dimensional Federalism and Foreign Affairs Preemption*, 44 VAL. U.L. REV. 863 (2010) (advocating refinement of preemption doctrine but unclear as to impact in case like *Movsesian*).

<sup>267</sup> *Youngstown Sheet & Tube Co. v. Sawyer (Youngstown)*, 343 U.S. 579 (1952). In *Youngstown*, the Court in a 6-3 decision struck down President Truman's seizure of American steel production facilities, which the President had attempted to justify as necessary to the Korean War effort. See Ramsey, *supra* note 266, at 28-29.

<sup>268</sup> *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Dames & Moore*, the Court unanimously rejected a challenge to President Reagan's negotiated resolution securing the release of American Embassy personnel imprisoned in Iran, finding the case distinguishable from *Youngstown*. See Ramsey, *supra* note 266, at 29-31.

<sup>269</sup> *Medellin v. Texas*, 552 U.S. 4901 (2008). In *Medellin*, the Court ruled that Texas state criminal law was not displaced by executive authority. See Ramsey, *supra* note 266, at 36-40.

<sup>270</sup> See Ramsey, *supra* note 266, at 41-43.



that the initial panel decision in *Movsesian* was severely flawed, not only as a matter of constitutional law, but as a matter of nuanced interpretation of precedent in that (as interpreted by *Medellin*), *Garamendi* did not require dismissal of the *Movsesian* claims in view of the differing nature of the reporting requirement imposed on insurers in *Garamendi* and the mere extension of the statute of limitations for state law contract claims in *Movsesian*.<sup>271</sup>

Simultaneously, the *Movsesian* plaintiffs, their counsel, and political allies could have considered seeking re-enactment of the extended limitations period shorn of the troublesome term “Armenian Genocide,” but did not pursue this option in earnest.<sup>272</sup> A fair reading of *Movsesian I* suggests that the first panel decision might have been different and found no conflict pre-emption for the extended limitations period if it had not contained the “politically charged” term that arguably was the sole basis for Executive Branch opposition during the past fifteen years.<sup>273</sup>

The *Movsesian* rehearing petition remained pending for nearly 18 months without action. The effort to obtain insurance proceeds for the descendants of Armenian Genocide victims appeared to have hit a seemingly definitive roadblock.<sup>274</sup> There also appeared to be no significant movement in favor of a negotiated reparations methodology for victims as took place regarding similar insurer failures to honor policies issued to European Jews.<sup>275</sup> It appeared that as a practical matter, the New York Life settlement

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<sup>271</sup> See *id.* at 35-38.

<sup>272</sup> See Telephone Interview with Vartkes Yeghiayan, Yeghiayan & Associates, lead attorney in *Marootian v. New York Life* (March 20, 2009 & Nov. 27, 2009).

<sup>273</sup> See *Movsesian I*, 578 F.3d 1052, 1058 (9th Cir. 2009) (noting that Executive Branch opposition to resolutions condemning actions against Armenians during 1915-1923 period focused almost exclusively on term “Armenian Genocide” and fears of strong Turkish reaction to use of term).

<sup>274</sup> There are, of course, considerable practical difficulties in attempting to overcome a statute of limitations defense by Munich Re or other insurers in the absence of extension by California legislature. See *Deirmenjian v. Deutsche Bank, A. G.*, 526, F.Supp. 2d 1068, 1092 (C.D. Cal. 2007) (while not completely foreclosing tolling and estoppel arguments concerning limitations period made by plaintiffs alleging wrongful, opportunistic conversion by banks of Armenian assets in conspiracy with Turkish government, the Court suggests great difficulty for plaintiffs seeking to overcome ordinary statute of limitations applicable to such actions); *Deirmenjian v. Deutsche Bank, A. G.*, 2006 U.S. Dist. LEXIS 96772 (C.D. Cal. Sept. 25, 2006), at \*108-42 (similar but more extensive discussion of limitations period issues).

<sup>275</sup> See *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 397-402 (2003) (discussing these efforts and their impact on the Court’s decision regarding California

would be the only compensatory victory in the Armenian Genocide insurance litigation.

Then, without warning, the *Movsesian I* panel reversed itself as Judge Dorothy Nelson changed her vote, producing the *Movsesian II* opinion in which formerly dissenting Judge Harry Pregerson was now the majority opinion author, while *Movsesian I* author the late Judge David Thompson became the dissenter in *Movsesian II*.<sup>276</sup> As one might expect, *Movsesian II* lies in diametric opposition to *Movsesian I*, almost as if the two majority opinions were issued from different planets. Although highlighting the common reality that adjudication is a highly pragmatic enterprise in which “the law” can hinge on the current preferences of a singly human being wearing a judicial robe,<sup>277</sup> *Movsesian II* is unusual in that such complete reversal of a panel opinion usually comes only at the hands of an en banc court composed of a larger and different mix of judges. In *Movsesian II*, the about-face came solely because of Judge Nelson’s change in position.<sup>278</sup> Because the change emanated from the same

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HVIRA); STUART EIZENSTAT, *IMPERFECT JUSTICE* (2003); MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990s* (2009).

<sup>276</sup> See *Movsesian II*, 629 F.3d 901 (9th Cir. 2010). Judge Thompson died on February 19, 2011 after taking ill while at an appellate panel sitting in San Francisco. He was 80 years old and had served on the Ninth Circuit for 25 years. See Carol J. Williams, *David R. Thompson dies at 80; Reagan appointee to 9th Circuit*, L. A. TIMES, Feb. 23, 2011, available at <http://articles.latimes.com/news/obituaries/lame-judge-david-thompson-20110223>.

<sup>277</sup> Since the legal realist movement of the 1930s, this is hardly a radical observation but it nonetheless is jarring (although pleasantly so in having the better reasoned *Movsesian II* replace *Movsesian I*) to see a single vote so dramatically shift the locus of the law regarding an issue. But see SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 278 (2010) (noting the frequency with which Justice Brennan in conversation with his law clerks would hold up five fingers, indicating that the outcome of a case under review depended upon a bare majority of the Court reaching a consensus as to the result).

<sup>278</sup> Although it is unusual to have a single judge change positions so dramatically in the same case, at the same stage of review (as opposed to after remand and additional developments of record), it is not dramatically rare and has occurred with more far-reaching consequences. See, e.g., NOAH FELDMAN, *SCORPIONS* 115-21 (2010) (describing Justice Owen Roberts’ change in attitude toward reach of the Commerce Clause of Justice Owen Roberts, the “switch in time that saved nine” that in turn ushered in the modern era of expansive interpretation of the Clause and the constitutional reach of federal government power). But the Roberts change in position occurred over the course of two Court terms (albeit a period of time less

panel, there remained the prospect of rehearing en banc, which later transpired.<sup>279</sup>

Shifted from dissenter to majority author in *Movsesian II*, Judge Pregerson expanded on his analysis to produce a sound opinion that could serve as a useful template for the future by requiring that there be an “express federal policy” barring the state legislative action as a prerequisite to striking down such legislation on foreign affairs grounds.<sup>280</sup> In contrast to the summary dissent in *Movsesian I*, the *Movsesian II* majority opinion detailed the mixed signals sent by the national government regarding the Genocide—a history in which presidents have both urged Congress to be sensitive to Turkish interests, but have also been happy to stand in solidarity with Armenian-Americans in remembering the Genocide.<sup>281</sup> Although pushed back by the White House in 2003 and 2007 when considering express resolutions about the Genocide, “the House of Representatives [had] had done so in the past [in 1975 and in 1984].”<sup>282</sup> In addition, noted the *Movsesian II* opinion, nearly forty states have officially recognized the Genocide without federal government opposition.<sup>283</sup>

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than that between *Movsesian I* and *Movsesian II*) and was reflected in two different cases.

<sup>279</sup> See *Movsesian III*, 670 F.3d 1067 (9th Cir. 2012) (en banc).

<sup>280</sup> See, 629 F.3d at 903, 905-908.

<sup>281</sup> See *id.* at 905-907 (noting that although there are “informal presidential communications” discouraging the use of the term “Armenian Genocide,” including executive opposition to 2003 and 2007 resolutions about the Genocide, such communications are not “sufficient to constitute an express federal policy.” *Id.* at 906. However, President Clinton and President Obama when Senators, both recognized and condemned the Genocide. See *id.* at 907-908. “The Executive Branch has repeatedly used terms virtually indistinguishable from” the term Armenian Genocide. *Id.* at 906-908 (citing examples of President Clinton in 1998, President Reagan in 1981, and statements of then-Senator Obama). In addition, in 2009, “President Obama publically remembered ‘the 1.5 million Armenians who were [ ] massacred or marched to their death in the final days of the Ottoman Empire.’” *Id.* at 907.

<sup>282</sup> See *id.* (“In 1975, the House observed a day of remembrance for ‘all victims of genocide, especially those of Armenian ancestry.’” H.J. Res. 148, 94th Congress (1975). In 1984, the House similarly recognized “victims of genocide, especially the one and one-half million people of Armenian ancestry.” H.J. Res. 247, 98th Congress (1984).

<sup>283</sup> See *Movsesian II*, 629 F.3d at 907. See also Plaintiff’s Response to Petition for Rehearing En Banc at 4 n.2, *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (2010) (No. 07-56722) (listing state proclamations regarding remembrance of Armenian Genocide).

Although there have been federal executive efforts to tread lightly because of concerns over relations with Turkey, *Movsesian II* emphasized that “not every executive action or pronouncement constitutes a proper invocation of that potentially preemptive policy-making power,”<sup>284</sup> by citing *Medillin v. Texas*<sup>285</sup> and giving a restrained construction to *Garamendi*.<sup>286</sup> Consequently, the *Movsesian II* court rejected Munich Re’s argument that California’s extension of the statute of limitations was barred by “conflict preemption”<sup>287</sup> or “field preemption”<sup>288</sup> with national foreign affairs policy. The *Movsesian II* court also rejected Munich Re’s preemption defense based on the 1922 Claim Agreement governing debts owed to Americans by Germany and the 1928 Settlement of War Claim Act: “The insurance

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<sup>284</sup> *Movsesian II*, 629 F.3d at 906. See also Ramsey, *supra* note 266, at 20. The *Movsesian II* approach is consistent with Professor Ramsey’s criticism of *Movsesian I* and suggested methodology, but is more deferential to federal executive power in that the *Movsesian II* majority, despite being unwilling to yield to informal or unclear expressions of presidential sentiment, appears to be willing to yield to sufficiently concrete and formal expressions of presidential authority while Professor Ramsey would require deference only in areas where the executive has been expressly given lawmaking power because in matters of domestic policy, “the President is not a lawmaker.”

<sup>285</sup> 552 U.S. 491 (2008). See also Ramsey, *supra* note 266, at 41-43 (discussing *Medillin v. Texas* at length in relation to *Movsesian I*).

<sup>286</sup> *American Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003). The *Movsesian II* approach is consistent with Professor Ramsey’s criticism of *Movsesian I* and suggested methodology (see Ramsey, *supra* note 266) but is more deferential to federal executive power in that the *Movsesian II* majority, despite being unwilling to yield to informal or unclear expressions of presidential sentiment, appears to be willing to yield to sufficiently concrete and formal expressions of presidential authority while Professor Ramsey would require deference only in areas where the executive has been expressly given lawmaking power because in matters of domestic policy, “the President is not a lawmaker.” See Ramsey, *supra* note 266, at 20. *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396 (2003).

<sup>287</sup> See *Movsesian II*, 629 F.3d at 905-909. (Stating “we cannot conclude that a clear, express federal policy forbids the state of California from using the term ‘Armenian Genocide.’”).

<sup>288</sup> See *id.* (Stating “California’s attempt to regulate insurance clearly falls within the realm of traditional state interests” and is not subject to field preemption, which “would only apply if a ‘State were simply to take a position on a matter of foreign policy with no serious claim to be addressing a traditional state responsibility.’” (quoting *Garamendi*, 539 U.S. at 420, n.11)).

policies were the private property of insured American citizens of the Ottoman Empire, not German debts owing to American citizens.”<sup>289</sup>

Now relegated to a dissenter’s role, Judge Thompson reiterated his majority opinion arguments from *Movsesian I*, in particular arguing that the *Movsesian II* decision was in tension with Supreme Court precedent such as *Garamendi*, as well as Ninth Circuit decisions exhibiting greater concern over impact of state laws in seeming tension with presidential preferences.<sup>290</sup> Based on the Thompson dissent, Munich Re successfully petitioned for rehearing before the Ninth Circuit en banc,<sup>291</sup> a move supported

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<sup>289</sup> See *Movsesian II*, 629 F.3d at 908. Expanding on this explanation and distinguishing potentially adverse precedent, the court concluded that

Munich Re’s reliance on *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003), is misplaced. In *Deutsch*, we invalidated a California statute that allowed World War II slave laborers to bring war-related claims against wartime enemies of the United States. *Deutsch*, 324 F.3d at 712. We held that California’s attempt to create a private right of action for war-related injuries intruded upon the federal government’s exclusive power over matters related to war. *Id.* at 712-716. Here, in contrast, § 354.4 does not implicate the government’s exclusive power over war. Section 354.4 covers private insurance claims, not wartime injuries. Furthermore, as the district court noted, the Claims Agreement was signed *before* the end of the Armenian Genocide. We reject Munich Re’s assertion that the Claims Agreement, which resolved claims from the concluded fighting in World War I, has any bearing on life insurance policies issued to citizens of the Ottoman Empire. The Claims Agreement and War Claims act therefore do not preempt § 354.4.

*Id.* at 908.

<sup>290</sup> See *Movsesian II*, 629 F.3d at 910-12 (Thompson, J., dissenting). In addition to his reading of *Garamendi* as blocking the California law, Judge Thompson noted several U.S. Supreme Court cases highly deferential to executive authority in foreign affairs (*id.* at 910) and made particular note of relatively recent Ninth Circuit cases viewed as inconsistent with *Movsesian II*. See *id.* at 911. See, e.g., *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 965-68 (9th Cir. 2010) (affirming the district court’s holding that a California statute dealing with recovery of art stolen by Nazis was preempted because the statute “intrudes on the federal government’s power to make and resolve war”); *Deutsch v. Turner Corp.*, 324 F.3d 692, 715-16 (9th Cir. 2003) (holding unconstitutional California statute providing recovery to World War II slave laborers because the statute intruded on the federal government’s power to resolve war claims.).

<sup>291</sup> See Petition for Rehearing En Banc, filed by Munich Re in *Movsesian v. Victoria Versicherung AG*, 629 F.3d 901 (2010) No. 07-56722 (arguing that the *Movse-*

by the government of Turkey.<sup>292</sup> In February 2012, the en banc Court, in what might be called *Movsesian III*, reinstated *Movsesian I*'s holding of field pre-emption, finding California's extension of the statute of limitations for these insurance claims in too much tension with U.S. foreign policy.<sup>293</sup>

Although better crafted than the initial panel decision in *Movsesian I*, and stripped of some of that decision's efforts to elevate correspondence to the level of national policy, *Movsesian III* is sweeping in its application of the foreign affairs doctrine, aggrandizement of even informal Executive Branch action, and disregard for traditional state prerogatives. *Movsesian III* held California's Code of Civil Procedure §354.4 pre-empted by the foreign affairs power of the national government because "even in the absence of any express federal policy, a state law still may be preempted under the foreign affairs doctrine if it intrudes on the field of foreign affairs without addressing a traditional state responsibility."<sup>294</sup>

Although the foreign affairs power of the national government is well established and has been invoked to strike down state law deemed inconsistent with U.S. foreign policy, *Movsesian III*, despite being clothed in precedent, is seriously flawed. The en banc Ninth Circuit erred in first, regarding California's elongated statute of limitations as an "intrusion" on

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*sian II* holding "is both incorrect and a danger to U.S. Interests" and accusing California of attempting "to establish its own foreign policy – which chooses sides in a dispute between Turkey and Armenia . . .").

<sup>292</sup> See Petition for Rehearing *En Banc*, filed by The Republic of Turkey in *Movsesian v. Victoria Versicherung AG*, No. 07-56722. United States Court of Appeals for the Ninth Circuit (Jan. 3, 2011). See also Sebnem Arsu. *Turkey Seethes at the U.S. Over House Genocide Vote*, N.Y. TIMES, Oct. 12, 2007, at A12 (labeling of "Armenian killings as genocide is considered an insult against Turkish identity" and "a crime.") (quoted in Munich Re Petition for Rehearing, *supra* note 290, at 4 n.1). But see Brief of Amici Curiae Human Rights Orgs. in Support of Plaintiffs-Appellees & in Opposition to Rehearing *En Banc* at 17-18, *Movsesian II*, 629 F.3d 901 (2010) (No. 07-56722 ("Turkey cannot create [U.S. state and federal] foreign policy conflicts.")).

<sup>293</sup> See text accompanying note 417, *infra*, discussing extensive line of cases reflecting considerable deference to Executive Branch concerns of congressional or state action impinging on foreign affairs. Although *Movsesian I* and Judge Thompson's dissent in *Movsesian II* are in our view disturbingly incorrect in their legal analysis, the fact remains that Judge Thompson or others (including, perhaps, five or more Supreme Court Justices) have a considerable body of law upon which they may draw to make a colorable (if incorrect) argument for precluding California's extension of the statute of limitations for Armenian Genocide insurance claims. See *Movsesian III*, 670 F.3d 1067 (9th Cir. 2012) (en banc).

<sup>294</sup> See *id.* at 1072.

foreign affairs and second, refusing to accept regulation of the statute of limitations for contract or insurance claims as a traditional state responsibility. Remarkably, *Movsesian III* did not even cite *Medellin v. Texas*, the U.S. Supreme Court's most recent exploration of the foreign affairs power in conflict with state law.<sup>295</sup>

Although the California legislature was obviously taking a position in opposition to the Genocide and its consequences, and using language the riled Turkey, this is hardly much of an "intrusion" on U.S. foreign policy. Nothing about the California law interferes directly with national government dealings; the law does not in any material way interfere with American trade or military objectives.

To be sure, the *Movsesian III* Court was able to cite seemingly favorable precedent to support its decision. But on closer examination, all of these instances in which preemption was imposed are distinguishable from California Code of Civil Procedure § 354.4, in that these other cases involved significantly more entanglement in foreign affairs by either the state itself or courts required to adjudicate the state law.<sup>296</sup> By contrast,

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<sup>295</sup> See *id.* at 1073-74 (extensively discussing *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003), but never mentioning *Medellin v. Texas*, 522 U.S. 491 (2008), which arguably revised the doctrine and constricts the precedential value of *Garamendi*). See also Ramsey, *supra* note 266; Tikriti, *supra* note 266; Pytynia, *supra* note 266.

<sup>296</sup> See *Movsesian III*, passim. See, e.g., *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003) (preempting California law requiring reporting by insurers of status of benefit payments pursuant to policies issued to policyholders impacted by Holocaust); *Zschernig v. Miller*, 389 U.S. 429 (1968) (finding Oregon probate law preempted); *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954 (9th Cir. 2010) (finding preempted California law permitting claims to recover art looted during Holocaust); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (striking down a California law providing right of action to prisoners of war conscripted into forced labor).

*Garamendi* is distinguishable because the disclosure regulations were viewed as rehashing and thus undermining a substantial federally led effort that had obtained an omnibus settlement of Holocaust-related insurance claims against European insurers. As *Movsesian III* acknowledged, *Garamendi* is actually a "conflict" preemption case because of perceived direct conflict between California's Holocaust Victim Insurance Relief Act and the federal settlement efforts, and is not a field preemption case. But the *Movsesian III* Court found *Garamendi* instructive regarding field preemption. Nonetheless, *Garamendi* is not controlling precedent mandating the *Movsesian III* result.

While the *Movsesian III* Court was being so broad and legal realist in its assessment of *Garamendi*, it might have taken the time to note that *Garamendi* was

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a 5-4 opinion with a powerful dissent by Justice Ginsburg. *Garamendi* barely found conflict preemption in spite of the arguably adverse federal actions on the same topic, a conflict lacking in *Movsesian*. And since *Garamendi* was decided, Chief Justice Rehnquist (who was part of the majority), and Justices Souter (who authored the opinion), O'Connor (also in the majority), and Stevens (one of the dissenters) have left the Court and been replaced by Chief Justice Roberts and Justices Alito, Sotomayor, and Kagan. And Justice Roberts authored the *Medellin v. Texas* opinion that has been interpreted by scholars as restricting the scope of *Garamendi*. Under these circumstances, it seems inappropriate to read *Garamendi* broadly as precedent justifying field preemption of a state's lengthening of its statute of limitations for pursuing life insurance claims merely because this is done to aid a particular adversely affected group and is done with nomenclature (use of the term "genocide") that is bothersome to an ally.

*Zschernig* is distinguishable because the Oregon probate law permitted aliens to inherit only if their own countries granted similar rights to American citizens, which in turn imposed significant burdens on American courts and made it "unavoidable" that courts would occasionally criticize other nations in ways viewed as undermining national foreign policy. See 389 U.S. at 440-41.

*Deutsch v. Turner Corp.* differs from *Movsesian* in that this portion of the California statute, although adjacent in the California Civil Procedure Code to the section at issue in *Movsesian*, was read by the Ninth Circuit panel as creating a cause of action for prisoners of war forced into slave labor. See 324 F.3d at 706-709. In addition, there had been federally led efforts to achieve a resolution of the problem. See 324 F.3d at 713-16. By contrast, the beneficiaries of Genocide-era insurance policies already had available to them a common law action for breach of contract and the statute merely extended the time limit for bringing this already existing cause of action. In addition, there has been no formal U.S. government effort to obtain payment for the beneficiaries of the policies. Further, although the litigation in *Deutsch* was directed at corporations rather than the enslaving governments, there was overt coercion between the defendant companies and the governments enslaving war prisoners. Although the insurer defendants in *Movsesian* took unfair opportunistic advantage of the dislocation caused by the Genocide, there is no evidence that they overtly cooperated with the Turkish government in the killings.

*Von Saher*, which struck down CAL. CIV. PROC. CODE § 354.3 is closest to *Movsesian* and perhaps not particularly distinguishable in that both the *Von Saher* Court and the *Movsesian III* Court acknowledged that regulation of stolen property was a traditional area of state responsibility. But both the *Von Saher* and *Movsesian III* Courts found preemption because the "real purpose" of the respective statutes was to assist the heirs of Holocaust and Armenian Genocide victims and that this meant that California could not make a "serious" claim to addressing an area of traditional state responsibility. See *Movsesian III* at 1074. Distinguishable or not, these portions of *Von Saher* and *Movsesian III* are just plain wrong. Statutes of limitation and other establishment or abrogation of contract, property, or tort rights



§ 354.4 simply permits courts to perform the common judicial function of adjudicating an insurance contract claim because of a lengthened statute of limitations.<sup>297</sup>

Indirectly, of course, the use of the “genocide” terminology is upsetting to the government of Turkey, as evidenced by the government’s submission of briefs aligned with *Munich Re.*<sup>298</sup> But such indirect offending of another sovereign, although undoubtedly creating difficulty for U.S. diplomats, seems to stop well short of “intrusion.”<sup>299</sup> A serious inconsistency of the “intrusion” argument is the national government’s longstanding failure to attempt to muzzle California and forty other American states that have passed resolutions or issued proclamations condemning the Armenian Ge-

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by a state remains a traditional state function regardless of the state’s motivation. Lengthening a statute of limitations does not suddenly fall outside the realm of traditional state regulation when the motivation is to assist those displaced by human rights violation any more than if the state had taken similar action for victims of floods, earthquakes, or hurricanes. Similarly, the language a state uses when taking such action cannot in and of itself interfere with U.S. foreign policy. To the extent that it does, both First Amendment rights of expression (enjoyed by states just as much as by corporations or individuals) and Tenth Amendment rights of state autonomy in a federal system would appear to preclude evisceration of the statute due to its allegedly inflammatory language.

<sup>297</sup> See *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F.3d 1, 11-12 (1st Cir. 2010) (enforcing Massachusetts statute of limitations notwithstanding the argument that it was inconsistent with U.S. policy regarding Nazi looting during World War II).

<sup>298</sup> See, e.g., Brief Amicus Curie of the Republic of Turkey in Support of Appellants’ [Munich Re’s] Petition for Rehearing En Banc in *Movsesian III*, No. 07-56722 (Jan. 13, 2011) (on file with authors and *Buffalo Human Rights Law Review*) (urging reversal of *Movsesian II* and preemption of Cal. Civ. Code § 354.4).

<sup>299</sup> Foreign nations like Turkey, which are more centralized and less federalist than the U.S., may have difficulty understanding that in America, the national government is more limited in its powers. The federal government may dislike certain state laws and its judiciary may ultimately refuse to enforce them, but there is little practical ability to make state governments toe Washington’s official line. To some extent, the task of U.S. diplomats is to educate foreign allies as to this practical reality of American government. Further, California is by far the nation’s largest state, accounting for more than twelve percent of its population. Presidential candidates, particularly Democrats, probably cannot win the White House without the electoral votes of California, which has a significant and politically influential Armenian-American population. Despite the importance of Turkey to Mideast policy, there is functionally little or nothing that can be done to muzzle California and its Armenian community just as there is little that can be done to pull the national government away from its embrace of Turkey for geopolitical reasons.

nocide.<sup>300</sup> These are undoubtedly just as offensive to Turkey as California's Code of Civil Procedure § 354.4, but Washington has done essentially nothing to attempt to prevent or overturn those criticisms, nor has it publically apologized to Turkey for those resolutions.<sup>301</sup>

Against this backdrop, it is hard to take seriously the notion that this California's statute using the words "Armenian Genocide" constitutes pre-emptible intrusion in foreign affairs while similar language in other state legislative or gubernatorial actions does not. States in criticizing the Genocide, including California's language in § 354.4, are not attempting to interfere with U.S. foreign policy, but rather are merely criticizing it, which should not in a free society constitute state action that can be struck down by a federal court. *Movsesian III* thus intrudes on state autonomy as a means of punishing its legislature for using statutory language viewed as intemperate.

One difference between California Code of Civil Procedure § 354.4 and Genocide resolutions, of course, is that § 354.4 provides entre to the courthouse for the beneficiaries of life insurance policies sold to victims of the Genocide. But this access to enforcement of contract rights is not directed against the government of Turkey (nor, as far as we can tell, any Turkish citizens) but only against the insurers who sold the policies and then opportunistically increased their profit by taking advantage of the mass extermination of the policyholders followed by the disruption of World War

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<sup>300</sup> See Brief of Armenian Bar Association, et al. in *Movsesian III*, No. 07-56722, Addendum A (Feb. 11, 2011) (on file with authors and *Buffalo Human Rights Law Review*) (listing recognition of Armenian Genocide by Alaska, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin as well as California, with several states recognizing and condemning the Genocide on multiple occasions).

<sup>301</sup> Admittedly, the thought of the United States apologizing to a foreign country because 80 percent of its member States has criticized the foreign country's slaughter of innocent civilians seems more than a bit ludicrous. But if the U.S. government was as serious as it purports to be about befriending Turkey and thwarting such state efforts, one would logically expect as least an apology—and perhaps efforts to cut off federal funding to states critical of the Genocide. None of this has happened, further suggesting that despite the soapbox posturing of various political actors regarding the Genocide and the importance of appeasing Turkey, state criticisms of Turkey or the Genocide have no discernibly significant impact on U.S. foreign policy.

I and its aftermath, aided by a continuing cover-up of the mass killings. Permitting plaintiffs to sue German insurers is a far cry from giving plaintiffs a right of action against a foreign ally in the face of national government disapproval.

Limitations periods have long been recognized as a classic domain of the States.<sup>302</sup> Likewise, contract law is largely state law, as is insurance law. The state-based nature of insurance law is further enshrined in the federal statutory law of the McCarran-Ferguson Act.<sup>303</sup> *Movsesian III* disregarded this largely because it found the language of the statute (the use of the term “Armenian Genocide”) overly at odds with current U.S. government diplomacy and because the motive underlying the statute was not one of general law reform but instead an obvious attempt to assist descendants of victims of the Genocide and to call attention to the atrocity: “[I]t is clear that the real purpose of section 354.4 is to provide potential monetary relief and a friendly forum for those who suffered from certain foreign events.”<sup>304</sup>

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<sup>302</sup> See *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) (holding that under the *Erie* Doctrine, federal courts presiding over cases where federal jurisdiction is founded upon diversity of citizenship must apply state law of limitations rather than federal common law doctrine of laches). Under *Erie/York*, it is clear that state statutes of limitations are “substantive” rather than procedural and reflect substantive state policy. Consequently, enactment of §354.4 as part of California’s Code of Civil Procedure does not remove its substantive status nor diminish §354.4 as an expression of state law and policy that covers state enforced contract rights.

<sup>303</sup> The McCarran-Ferguson Act, 15 U.S.C. §1101 et seq., provides that federal law generally does not govern insurance except to the extent that insurance is unregulated by relevant state law. In all states, including California, insurance is a regulated industry. State insurance law is displaced only if applicable federal law expressly overrides state insurance law. See e.g., *United States Dept. of Treasury v. Fabe*, 508 U.S. 491 (1993); JEFFREY W. STEMPEL, PETER NASH SWISHER & ERIC KNUTSEN, *PRINCIPLES OF INSURANCE LAW* 213-24 (4th ed. 2011) (also discussing limited federal regulation of insurance in portions of Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S. C. § 313, which does not apply to affect state statutes of limitation applicable to suits to collect insurance benefits).

<sup>304</sup> *Movsesian III*, at 1175. In an accompanying footnote, the Court weakly attempts to wash its hands of complicity in the Turkish government’s denial of its version of the Holocaust by stating that “[w]e express neither agreement nor disagreement with the California legislature’s viewpoint. We simply observe that California’s main goal in enacting section 354.4 was to provide redress for individuals who were, in its view, victims of a foreign genocide, and that that goal falls outside the realm of traditional insurance regulation.” *Id.* at 1175 n.4. As discussed below, the Court is simply incorrect. Regulation of limitations periods and efforts to modify or remove practical barriers to meritorious claims do not become any less of a

Even if one were to accept the *Movsesian III* Court's implicit suggestion that these are motives warranting corrective action by the federal judiciary (we think, quite to the contrary, that the California legislature's motives were admirable), this reasoning ignores that, unless precluded by the Equal Protection Clause, state governments traditionally have been free to vary statutes of limitations so long as there is a rational reason and to take remedial action when prompted by exceptional circumstances. Section 354.4 satisfies these criteria because it extends the limitations period in order to remedy problems posed by external events (e.g., the Genocide, World War I, silencing and displacement of victims, difficulty obtaining documents, World War II, the Cold War) that realistically delayed the opportunity for life insurance beneficiaries to exercise their rights to benefits on policies sold to Armenians in Turkey prior to the Genocide.

Like remedial legislation designed to protect victims from sharp insurance adjustment practices after a flood, earthquake, or hurricane, § 354.4 responds to special circumstances so that claims to be heard on the merits rather than defeated because external events acted to discourage or prevent earlier claims. This is classic state legal activity, just as much so as setting a tort statute of limitations at four years and a contract statute of limitations as six years (or vice versa). It is also classic state legal activity just as much as any state regulation simplifying proof of loss for victims of a natural disaster or establishing a center for facilitating claims. Such traditional state activities would become no less legitimate if the states in doing so took rhetorical shots at "unresponsive insurers" or "harassing adjustment practices." They become no less traditional state functions when the rhetoric involves "Armenian Genocide."

Similarly, the use in a state law of terms found objectionable by a foreign power clearly cannot overcome the core presumption of states rights in the American federal system, a presumption given textual support by the Tenth Amendment.<sup>305</sup> Although that Amendment is seldom used to strike down otherwise valid federal legislation, it should be given at least enough judicial deference to prevent invalidation of state law in the absence of a direct conflict with federal law or clear and reasonably concrete foreign policy propounded by the federal government. Instead, *Movsesian III* struck

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traditional state function when those barriers are the result of crimes against humanity or stem from a state's revulsion over the criminal activity creating the barriers.

<sup>305</sup> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." See U.S. CONST. amend. X.

down California law through application of a frighteningly broad notion of “field” preemption,<sup>306</sup> which it conceded, “is a rarely invoked doctrine.”<sup>307</sup>

### III. THE LIMITS OF LITIGATION AND LEGISLATION IN A HOBBSIAN WORLD OF REALPOLITIK

#### A. *A Seemingly Perfect Crime*

The Armenian Genocide<sup>308</sup> is perhaps the most successful atrocity in history. Turkey succeeded in its grim mission of killing or displacing the vast

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<sup>306</sup> Field preemption is distinguished from “conflict” preemption in that “[u]nder conflict preemption, a state law must yield when it conflicts with an express federal foreign policy” while under field preemption, or “dormant foreign affairs preemption,” a state law may be invalidated because it “intrudes” on the national government’s power over foreign affairs without sufficient justification according to a traditional state prerogative. *See Movsesian III*, at 1071-74. *See also Deutsch v. Turner Corp.*, 324 F.3d 692, 709 n.6 (9th Cir. 2003) (using the term “dormant foreign affairs preemption” to describe field preemption in the absence of direct conflict between state law and federal law or express foreign policy).

<sup>307</sup> *Movsesian III*, at 1075.

<sup>308</sup> As readers have undoubtedly noticed by now, we do not hesitate to refer to the events in Ottoman Turkey of 1915-1923 as the “Armenian Genocide,” in capital letters similar to the nomenclature and treatment of the Nazi “Holocaust” directed toward Jews. As previously outlined, the historical evidence of a state-sponsored campaign seeking to exterminate Armenians (a/k/a “genocide”) is undeniable. *See supra* Part I.H. The term Armenian Genocide is not excessively melodramatic but provides an accurate description of the episode. To be sure, the term is charged and carries with it highly negative connotative value, which undoubtedly explains the Turkish government’s rear guard action attempting to eradicate the term, just as it once attempted to eradicate the people.

While we find this sort of political “spin” relatively common, it seems particularly absurd to see this sort of unqualified denial of reality and even more absurd to watch the United States Executive Branch regularly participate in the charade. We like to think we are not naïve about the realities of foreign affairs, even though the ability of governments to make and break alliances can amaze even the most jaded observer, a trait well captured in George Orwell’s classic illustration of a politician who in mid-speech switches the identities of an ally and foe due to intervening circumstances. *See* GEORGE ORWELL, NINETEEN EIGHTY-FOUR 180-82 (1949).

But the attempt by Turkey and the U.S. Executive Branch to avoid even the use of the term Armenian Genocide has an unrealistic, almost infantile, quality reminiscent of the wizarding establishment in the popular *Harry Potter* series. *See e.g.*, J. K. ROWLING, HARRY POTTER AND THE SORCERER’S STONE (1998). Throughout these seven books, the establishment (portrayed in particular by the bureau-

majority of its Armenian population. The bulk of the Armenian wealth was seized by state or other individual non-Armenians taking advantage of the opportunity to convert or loot properties of the victims.<sup>309</sup> The Genocide was also a successful public relations campaign by the Young Turk government that proved popular with the bulk of the populace, stirring Turkish nationalism and ethnocentrism.<sup>310</sup> Nearly 100 years later, neither the current Turkish government nor any discernable portion of the Turkish citizenry will even acknowledge that this “shameful act” even took place.<sup>311</sup> Turkey is in full-scale denial: “identifying [the] Armenian killings as genocide is considered an insult against Turkish identity [and] a crime under Article 301 of the Turkish penal code.”<sup>312</sup> Modern Turks are taught a history that is

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cratic and infiltrated Ministry of Magic) is an often or even largely ineffectual group when faced with the evil wizard Voldemort. The wizards and witches gripped by conventional wisdom regularly refuse to refer to Voldemort by name, an avoidance strategy sensibly rejected by Potter, an aspect of the books intended to convey to young readers the common sense view that people, societies, and governments should not be so intimidated by evil that they are unwilling to refer to it plainly. The U.S. political establishment, including its judicial system, would do well to draw the same lesson.

<sup>309</sup> See *supra* Section I.H (describing the Genocide); ARMENIAN GOLGOTHA, *supra* note 3 (survivor describes attacks on Armenians and confiscation or conversion of their property); AKCAM, *supra* note 4, at 149-204 (2006) (describing Genocide and its effects); *supra* Part I.H (describing the Genocide).

<sup>310</sup> See *supra* Section I.G (describing rise of Young Turks and use of scapegoating of Armenians to increase and maintain government popularity); see AKCAM, *supra* note 4, at 82-148 (noting degree to which emerging Turkish nationalism and demonizing of Armenians fed off one another and popularity of persecution of Armenians); MORGENTHAU, *supra* note 56 at 290 (“[The Young Turks’] passion for Turkifying the nation seemed to demand logically the extermination of all Christians – Greeks, Syrians, and Armenians.”). See *supra* Part I.G (describing the rise of the Young Turks and use of scapegoating of Armenians to increase and maintain government popularity).

<sup>311</sup> See AKCAM, *supra* note 4, at 303-76.

<sup>312</sup> See Sebnem Arsu, *Turkey Seethes At the U.S. Over House Genocide Vote*, N.Y. TIMES (Oct. 12, 2007) at 1A, col. 4, available at 2007 WLNR 20039812 (cited in Brief of Munich Re in *Movsesian I* at p. 5). See Arsu, *supra* note 292. Munich Re, apparently reading the temperature of the Ninth Circuit bench better than we ever could, quoted the *Times* article and emphasized the criminalization of any mention of the Genocide as evidence of the degree to which any American invocation of the term ran counter to the asserted national government policy of appeasing Turkey to further foreign policy ends. As discussed above the argument resonated with two appellate judges, at least in *Movsesian I*. See *supra* text accompanying notes 244-46. We had expected that American jurists, trained in a system that privileges and

more than revisionist—it indoctrinates the population in a falsehood (denial of the Genocide) in a manner usually seen in only the most closed of societies.<sup>313</sup> And, for the most part, there were no sanctions of note imposed on Turkey.<sup>314</sup>

Although there were noises to this effect in the aftermath of World War I, Turkey ultimately paid essentially no price for the Genocide despite backing the losing side in the War.<sup>315</sup> Little has changed in a century despite

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protects free expression, would be uniformly appalled at the suggestion that because Turkey attempts to silence debate on the issue, the American national government should be able to gag American state legislatures as well.

Turkish government and society sensitivity to criticism is apparently not reserved for only criticism by outsiders. As a student in Turkey in the 1970s, Clark University Professor Taner Akcam was imprisoned for criticizing the government “before escaping and immigrating to Germany.” Since publication of *A SHAMEFUL ACT* (*supra* note 4), he “has received numerous death threats from Turkish ultranationalists, who have also vandalized his Wikipedia page and called him a terrorist.” See Andrea Fuller, *A Turkish Scholar Talks About the Armenian Genocide*, CHRONICLE HIGHER EDUC., Mar. 28, 2010, available at <http://chronicle.com/article/5-minutes-With-Taner-Akcam-a/64847>.

<sup>313</sup> Although Turkish government and society deserve strong criticism for their century-long refusal to admit and attempt to rectify the errors of 1915-23, it has since the reign of the Young Turks, particularly Atatürk, been a largely secular success story, particularly when compared to other countries in the Middle East and Central Asia, in that it historically has had less corruption, more freedom, a better economy, better education, and a more progressive society than many of its neighbors. See Michael Winter, *The Modernization of Education in Kemalist Turkey*, in *ATATÜRK AND THE MODERNIZATION OF TURKEY 192-93* (Jacob M. Landau ed., 1984); GRAHAM E. FULLER, *THE NEW TURKISH REPUBLIC: TURKEY AS A PIVOTAL STATE IN THE MUSLIM WORLD* 6, 55, 83, 91 (2008); E. Fuat Keyman & Senem Aydın Düzgit, *Europeanization, Democratization and Human Rights in Turkey*, in *TURKEY AND THE EUROPEAN UNION: PROSPECTS FOR A DIFFICULT ENCOUNTER* 69, 71 (Esra LaGro & Knud Erik Jørgensen eds., 2007); Mustafa Acar, *Towards a Synthesis of Islam and the Market Economy? The Justice and Development Party's Economic Reforms in Turkey*, 29 *ECON. AFF.* 16, 18 (2009); Jeffrey C. Dixon, *A Clash of Civilizations? Examining Liberal-Democratic Values in Turkey and the European Union*, 59 *BRIT. J. OF SOC.* 681, 686-87, 699 (2004). To a significant degree, Turkey's backward and strident views on the Armenian Genocide are out of character.

<sup>314</sup> See *supra* text accompanying notes 293-98; AKCAM, *supra* note 4, at 349-76; BALAKIAN, *supra* note 5, at 363-92.

<sup>315</sup> See *supra* text accompanying notes 159-60; AKCAM, *supra* note 4, at 349-76; BALAKIAN, *supra* note 5, at 363-92.

episodic but harsh criticism from human rights advocates.<sup>316</sup> As of early 2012, it appears that the only tangible punishment of Turkey for the atrocities perpetrated is some reluctance to admit it into the European Union in the absence of acknowledgment of its crimes, although cynics are perhaps justified in believing that if the Turkish economy becomes sufficiently stable, it will ultimately gain EU membership even in the absence of any admission or apology for the Genocide.<sup>317</sup> Any Turkish recognition, remorse, or reparations regarding the Genocide seem unlikely in the foreseeable future.

Indeed, one of the signal characteristics of the Armenian Genocide as contrasted with other past atrocities is that the perpetrators have both so steadfastly denied their crimes and been left largely unpunished and unremembered.<sup>318</sup> By contrast, Germany—which was “inspired” by the suc-

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<sup>316</sup> See *supra* text accompanying notes 293-345; AKÇAM, *supra* note 4, at 349-76; BALAKIAN, *supra* note 5, at 363-92; POWER, *supra* note 3, at xix, 1-17.

<sup>317</sup> See, e.g., Knud Erik Jørgensen & Esra LaGro, *Conclusion and Perspectives: Whither Turkey's Accession?*, in *TURKEY AND THE EUROPEAN UNION: PROSPECTS FOR A DIFFICULT ENCOUNTER* 221, 222 (Esra LaGro & Knud Erik Jørgensen eds., 2007) (“In order to stall the process, the EU or some of its member states will try to dwell on the Cyprus issue, and even if the Cyprus issue is resolved there will be other issues – for example, the Armenian genocide issue . . . Hence negotiations will be determined by the degree to which the Turkish government is ready to make political concessions.”); Gülnur Aybet, *Turkey and the EU After the First Year of Negotiations: Reconciling Internal and External Policy Challenges*, 37 *SECURITY DIALOGUE* 529, 547 (2006) (describing Turkey’s offer of full membership in the EU as a likely “acceptance/rejection” determination, regardless of whether Turkey adopts each EU-proposed reform); Anna Hakobyan, *Armenia: ‘Genocide’ on the Agenda*, *TRANSITIONS ONLINE*, Dec. 20, 2004 (“Istanbul’s recognition of the murder of Armenians from 1915 to 1917 as an act of genocide may be on the agenda when Turkey begins talks on accession to the European Union, but likely only as a side issue.”); Paul Kubicek, *Turkish Accession to the European Union: Challenges and Opportunities*, 168 *WORLD AFFAIRS* 67, 75 (2005) (suggesting that Turkey’s progress in complying with the Copenhagen Criteria will be the basis for its acceptance or rejection by the EU, rather than the Armenian genocide). See also M. Cherif Bassiouni, *Justice and Peace: The Importance of Choosing Accountability over Realpolitik*, 35 *CASE W. RES. J. INT’L L.* 191, 194-95 (2003) (describing how realpolitik of the 1930s trumped the recognition of, and accountability for, the Armenian genocide).

<sup>318</sup> It appears that many if not most history textbooks used in American high schools, for example, contain no significant discussion of the Armenian Genocide. For example, the European History course materials used in the Green Valley High School (Henderson, Nevada) International Baccalaureate program appears to make almost no mention of the Genocide and generally portrays the Young Turk govern-



cess of the Armenian Genocide during the Third Reich<sup>319</sup>—was severely punished for its actions during World War II,<sup>320</sup> while German society today has an ethic of apology and shame regarding the Jewish Holocaust.<sup>321</sup>

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ment that administered the Genocide in a favorable light. See JOHN P. MCKAY, BENNETT D. HILL, & JOHN BUCKLER, *A HISTORY OF WESTERN SOCIETY: FROM ABSOLUTISM TO THE PRESENT* (7th ed. 2003) (no mention of Armenian Genocide but omission arguably results from Western European focus in that there is also little discussion of Ottoman Empire); PALMER & COLTON, *supra* note 1, at 657, 710-11, 791-93 (brief discussion of Armenian massacre of 1894 and 1915 Genocide; Ataturk (Mustapha Kemal) and Young Turks portrayed in favorable light). See also note 97, *supra*, regarding modern connotations of “Young Turk” label.

<sup>319</sup> When questioned as to whether his persecution of Jews and other disfavored groups might be excessive and invite retaliation by other nations and the world community, Adolph Hitler is said to have replied that because Turkey had never been called to account for the Armenian Genocide, Germany was unlikely to face negative repercussions in its drive toward a “final solution” of exterminating Jews. See WILLIAM A. SCHABAS, *supra* note 167, at 1, n.2; Bassiouni, *supra* note 302, at 191, 195; Vahakn N. Dadrian, *supra* note 160, at 503, 530-541. Mussolini took a similar view. See *Not Just Hitler’s Fool*, THE ECONOMIST, Nov. 21, 2009, at 55 (“His mistress even recorded a remark by Mussolini in 1938 that foreshadowed the Final Solution: ‘I shall carry out a massacre, like the Turks did’—an apparent allusion to the mass killing of Armenians in 1915.”).

<sup>320</sup> See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992) (U.S. war crimes prosecutor describes trial and punishment of Nazi war crimes and human rights abuses); ABBY MANN, *JUDGMENT AT NUREMBERG* (2002); HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL*, 120-23, 133-34, 231 (1963) (describing trial of Nazi war criminal Adolph Eichman by Israel, famously terming robotic manner in which Germans complied with Hitler’s directives the “banality of evil.”). See also MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* 256-61 (4th ed. 2003) (discussing Nuremberg trials); GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 244-55 (3d ed. 2006) (discussing Nuremberg trials); SCHABAS, *supra* note 167, at 43-52 (discussing Nuremberg trials and genocide prosecutions of Germans after trial of major war criminals).

<sup>321</sup> See, e.g., ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 29 (2000) (“One could say that Auschwitz became the German emblem of the war because as their history and guilt became their contemporary identity, it symbolized for the Germans their own guilt and complicity.”); Roy L. Brooks, *The Age of Apology*, in *WHEN SORRY ISN’T ENOUGH: THE CONTROVERSY OVER APOLOGIES & REPARATIONS FOR HUMAN INJUSTICE* 3-4 (Roy L. Brooks ed., 1999) (“German society is a much better place today because Germans have been forced, and have forced themselves, to face their guilt with deep humility and penitence. So painful and enduring is the moral stain on the

On a political level, then, the Armenian Genocide succeeded. In this instance, crime did indeed pay for those fomenting and supporting the Genocide. Crime also appears to have paid for a variety of private actors able to capitalize on the slaughter and displacement of the Armenian population. Some of the Genocide's gangsters or opportunists took Armenian tangible property: land, homes, businesses. Banks allegedly wrongfully retained Armenian deposits that did not escheat to the state or worked with the state to convert Armenian property.<sup>322</sup> And, of course, insurers who sold policies to Armenians have for the most part been able to pocket the premiums, retain any investment income, and pay nothing or only a fraction of the value of the policies sold in spite of the undeniable fact that covered losses have taken place.<sup>323</sup>

The Armenian Genocide is also widely regarded as a "success" in that it paved the way for other state-sponsored atrocities by demonstrating that a government bent on assault and murder of a segment of its population could achieve its goals with near-impunity so long as it was sufficiently ruthless in executing its crimes and remorseless in denying guilt.<sup>324</sup> The

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German soul that it may lend some truth to Socrates' argument that it is better to be the victim than the perpetrator of an injustice."); MARY FULBROOK, *GERMAN NATIONAL IDENTITY AFTER THE HOLOCAUST* 48-78(1999) ("The absorption in constant confessions of guilt, the state of permanent penance, almost prevented West Germans from admitting anyone else to their community of the agonized soul."); KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (E. B. Ashton trans., 1947) (distinguishing concepts of German guilt concerning the Holocaust). *But see* Michael Slackman, *American Sues Ex-Nazi Over Killings, but Germany Doesn't See a War Criminal*, N.Y. TIMES, Dec. 8, 2010 at A9, col. 1 (Bernhard Frank, "once a trusted aide to Heinrich Himmler, the second most powerful man in Nazi Germany," has never been punished for his presumed involvement in Nazi atrocities at the "management" level because Frank did not individually and personally harm Jews).

<sup>322</sup> See *Deirmenjian v. Deutsche Bank, A. G.*, 526 F.Supp. 2d 1068 (C.D. Cal. 2007) (contending that German bank defendants collaborated with Turkish government to launder and conceal Turkey's illegal confiscation of Armenian wealth); KARAGUEUZIAN & AURON, *supra* note 6, at 99, 113; BOBELIAN, *supra* note 122, at 29.

<sup>323</sup> See *supra* Part II.D-E (describing New York Life and Munich Re litigation).

<sup>324</sup> BALAKIAN, *supra* note 5, at 299-392; AKCAM, *supra* note 4, at 368-76; Robert F. Melson, *The Armenian Genocide as a Precursor and Prototype of Twentieth Century Genocide*, in *IS THE HOLOCAUST UNIQUE? PERSPECTIVES ON COMPARATIVE GENOCIDE* 88, 126 (Alan S. Rosenbaum 3d ed. 2009) ("[T]he Armenian Genocide approximates the Holocaust; but at the same time its territorial and national aspects, which distinguish it from the Holocaust, make it an archetype for ethnic and national genocides in the Third World, as well as in the post-Communist

Genocide provided a blueprint to the Nazis and other governments.<sup>325</sup> Even when crimes of this type are in public view, such as the Chinese attack on peaceful demonstrators in Tiananmen Square, governments that deny the event, minimize its carnage, or invent an excuse for the action have been able to largely ride on without substantial punishment and perhaps even without sustained criticism.<sup>326</sup>

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states.”); David Matas, *Prosecuting Crimes Against Humanity: The Lessons of World War I*, 13 *FORDHAM INT’L. L.J.* 86, 104 (1989-1990) (“Nothing emboldens a criminal so much as the knowledge he can get away with the crime. That was the message the failure to prosecute for the Armenian massacre gave to the Nazis.”).

<sup>325</sup> See POWER, *supra* note 3, at 1-20; DADRAN, *supra* note 4, at 402 (describing Armenian Genocide as a blueprint for the Holocaust); Dadrian, *supra* note 160, at 504, 532-35, 537-38, 542 (describing Armenian Genocide as a blueprint for the Holocaust); Melson, *supra* note 309, at 126, 133-36 (describing Armenian Genocide as a “prototype” for the Nigerian and Bosnian genocides).

<sup>326</sup> Modern China serves as a disturbingly excellent example of this problem. Despite the highly visible mass slaughter of peaceful demonstrators in June 1989, China continues to be accepted in the world community, continues to hold a seat on the United Nations Security Council, continues to freely trade with the West, particularly the United States, and has never expressed so much as a moment of regret regarding the Tiananmen atrocity. See, e.g., WARREN I. COHEN, *AMERICA’S RESPONSE TO CHINA* 232-62 (5th ed. 2010) (discussing the United States’ continued engagement with, and overall deference towards, China despite China’s refusal to acknowledge any wrongdoing in the Tiananmen massacre). In similar fashion, Russia appears to have vigorously persecuted minorities and political dissidents while incurring few sanctions in return. See EDWARD LUCAS, *THE NEW COLD WAR: PUTIN’S RUSSIA AND THE THREAT TO THE WEST* xxiii (rev. ed. 2009) (“Yet Western policy remains paralyzed. Russia’s most threatening behavior – bullying neighbors, stitching up the energy market, turning money into power in Western Europe – remains, in effect, unchecked.”); William M. Burke-White, *Human Rights and National Security: The Strategic Correlation*, 17 *HARV. HUM. RTS. J.* 249, 278-79 (2004) (“In relations with Russia, U.S. policymakers have largely overlooked Russian human rights practices in Chechnya due to Russia’s important role on numerous issues—ranging from the intervention in Kosovo to the global war on terror.”); Jeffrey Kahn, *Vladimir Putin and the Rule of Law in Russia*, 36 *GA. J. INT’L. & COMP. L.* 511, 537-40 (2008); David J. Kramer, *A Russia Reset with Human Rights*, *WASH. POST*, Sept. 20, 2010, at A15 (discussing the Obama Administration’s policy of rejecting “linkage” between human rights issues and the relationship between the United States and Russia). Saudi Arabia and other Third World countries have an institutionalized policy of subjugating women and overtly discriminating against those who refuse to adopt the dominant national religion but the allegedly human rights-conscious U.S. is only too happy to purchase its oil and to commit American troops to defending it, including ousting Iraq from Kuwait in 1991. See ROBERT

To be sure, the Armenian Genocide has its competitors in this metaphoric race for most evil government-sponsored activities.<sup>327</sup> Genghis Khan is reported to have inflicted cruel, tortuous death on those who would not surrender to his horde.<sup>328</sup> The Spanish Inquisition tortured and killed many in what is often regarded as an exercise in paranoid religious hysteria.<sup>329</sup>

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BAER, *SLEEPING WITH THE DEVIL: HOW WASHINGTON SOLD OUR SOUL FOR SAUDI CRUDE* 169, 185, 201, 212 (2003) (noting Washington's ever-present tendency to overlook Saudi Arabian wrongs); TOBY CRAIG JONES, *DESERT KINGDOM: HOW OIL AND WATER FORGED MODERN SAUDI ARABIA* 33 (2010) ("[s]ince World War II, when the kingdom's oil riches became clear, the U.S. government has placed a high priority on the security and stability of the Saudi regime, no matter its brutality or excesses."). *But cf.* RACHEL BRONSON, *THICKER THAN OIL: AMERICA'S UNEASY PARTNERSHIP WITH SAUDI ARABIA* 255-62 (2006) (advocating continued engagement with Saudi Arabia, rather than detachment and a simple determination that "the regime is corrupt, morally bankrupt, illegitimate, and irredeemable").

<sup>327</sup> See generally POWER, *supra* note 3.

<sup>328</sup> See Timothy May, *The Mongols at War*, in *GENGHIS KHAN AND THE MONGOL EMPIRE* 195 (William W. Fitzhugh et. al. eds., 2009) ("Psychological warfare, particularly in the form of terror, underlay the Mongol form of 'diplomacy:' enemies were offered the choice to submit or die."); PAUL RATCHNEVSKY, *GENGHIS KHAN: HIS LIFE AND LEGACY* 163 (Thomas Nivison Haining trans., 1992) (noting Genghis Khan's custom of ordering the massacre of entire towns who resisted him); JEAN-PAUL ROUX, *GENGHIS KHAN AND THE MONGOL EMPIRE* 29 (Toula Ballas trans., 2003) (describing terrible massacres and destruction by Genghis Khan and the Mongols). See also JAMES A. MICHENER, *CARAVANS* 170-71 (1963) (recounting popular legend through Central Asia that when enemy soldiers refused initially to surrender and were eventually captured, Genghis had them all packed into a large pit until all died of asphyxiation, dehydration, hunger or other injuries). *But cf.* JACK WEATHERFORD, *GENGHIS KHAN AND THE MAKING OF THE MODERN WORLD* 115 (2004) ("[a]lthough the army of Genghis Khan killed at an unprecedented rate and used death almost as a matter of policy and certainly as a calculated means of creating terror [t]he Mongols did not torture, mutilate, or maim."). Comparisons between Genghis Khan and the perpetrators of the Holocaust and the Armenian Genocide are not new. In fact, the principals of both the Holocaust and the Armenian Genocide reportedly drew inspiration from Khan's "murderous legacy." See Dadrian, *supra* note 160 at 542-47 ("[t]here can be no doubt that the example of Genghis Khan impacted the organization and implementation of both the Armenian and Jewish genocides.").

<sup>329</sup> See HENRY CHARLES LEA, *A HISTORY OF THE INQUISITION OF SPAIN* 499-534 (1966) (discussing the fanaticism for religious conformity embodied in the Spanish Inquisition and its "conscientious cruelty"). *But cf.* HENRY KAMEN, *THE SPANISH INQUISITION: A HISTORICAL REVISION* 276 (1997) (painting more complex picture of the role and origins of the Spanish Inquisition and stating that "a good part of the

General Sherman tore apart much of the American South in marching to the sea as part of future President, then-General Ulysses Grant's plan to destroy the fighting capability of the Confederacy.<sup>330</sup> The English government of

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Inquisition's zeal for religion was little more than active xenophobia"); EDWARD PETERS, *INQUISITION* 86-104 (1988) (noting the Spanish Inquisition's constraint in imposing the death penalty and its concern with the intent of the accused as compared with other courts of that era); HELEN RAWLINGS, *THE SPANISH INQUISITION I* (2006) (reexamining the Spanish Inquisition's "reputation for being a barbarous, repressive instrument of racial and religious intolerance that regularly employed torture as well as the death penalty as punishments and severely restricted Spain's intellectual development for generations" and the image of the "Black Legend" that portrayed "Spain as a nation of fanatical bigots").

<sup>330</sup> See NOAH ANDRE TRUDEAU, *SOUTHERN STORM: SHERMAN'S MARCH TO THE SEA* (2008); LEE KENNETT, *SHERMAN: A SOLDIER'S LIFE* 257-82 (2001); BURKE DAVIS, *SHERMAN'S MARCH* (1980). When criticized for his harsh tactics, Sherman famously replied "war is hell." See ANNE J. BAILEY, *WAR AND RUIN: WILLIAM T. SHERMAN AND THE SAVANNAH CAMPAIGN* 134 (2003). And Sherman was not entirely off base. Both international law and conventional morality commonly distinguish between injuries inflicted in battle or in a theatre of war and those imposed as part of state or mob violence just as criminal law distinguishes between premeditated killing and self-defense. However, in systematically destroying much of the infrastructure of the South as part of his basic troop movements, Sherman arguably crossed the line from warrior to terrorist.

Lest Yankee partisans become too annoyed at this suggestion, we note that one might defend Sherman's seeming vandalism on the utilitarian ground that such tactics brought an earlier end to the Civil War and therefore saved lives and property overall. Perhaps. But we are skeptical. A similar debate has long surrounded the American decision to drop the atomic bomb on Hiroshima and Nagasaki. We remain uncomfortable with the utilitarian justification for arguably gratuitous killing and destruction. But this argument has long been accepted by the U.S. and has empirical support. Japan quickly surrendered after the atomic bombings, an accelerated end to the War that surely created benefits, although perhaps not enough to balance the large loss of civilian life. See, e.g., ROBERT JAY LIFTON & GREG MITCHELL, *HIROSHIMA IN AMERICA: FIFTY YEARS OF DENIAL* (1995) (describing negative moral, psychological, and political effects resulting from the "official narrative" of the Hiroshima bombing); *HIROSHIMA IN HISTORY: THE MYTHS OF REVISIONISM I* (Robert James Maddox ed., 2007) (challenging "Hiroshima revisionists" who dispute President Truman's reasons for authorizing the Hiroshima bombing); Gabriella Blum, *The Laws of War and the "Lesser Evil"* 35 *YALE J. INT'L L.* 1, 24-31 (2010) (discussing Hiroshima and Nagasaki bombings as a case study to debate humanitarian justification for violations of the laws of war). The fire-bombing of Dresden, Germany in World War II presents similar issues. See A. C. GRAYLING, *AMONG THE DEAD CITIES: THE HISTORY AND MORAL LEGACY OF THE WWII BOMBING OF CIVILIANS IN GERMANY AND JAPAN* 183-88, 247-70 (2006); Richard

the nineteenth century fueled by anti-Irish sentiment, enacted policies that exacerbated famine conditions in Ireland.<sup>331</sup> Germany largely succeeded in wiping out the Hereros of Africa when it determined to seize their land.<sup>332</sup> In the twentieth century alone, we have seen the Stalinist Soviet Union establish an infamous system of Gulag imprisonment for political dissidents,<sup>333</sup> the Third Reich engaged in mass extermination of Jews,<sup>334</sup> and the atrocities attending the disintegration of the former Yugoslavia.<sup>335</sup>

In addition, of course, state-sponsored oppression of disfavored groups appears perennially to fly under the radar while some totalitarian

Overy, *The Post-War Debate*, in FIRESTORM: THE BOMBING OF DRESDEN 1945 123-42 (Paul Addison & Jeremy A. Crang eds., 2006); Mark Selden, *A Forgotten Holocaust: U.S. Bombing Strategy, the Destruction of Japanese Cities, and the American Way of War From the Pacific War to Iraq*, in BOMBING CIVILIANS: A TWENTIETH-CENTURY HISTORY 80-82 (Yuki Tanaka & Marilyn B. Young eds., 2009); FREDERICK TAYLOR, DRESDEN: TUESDAY, FEBRUARY 13, 1945, 401-17 (2004). See also DAVID IRVING, THE DESTRUCTION OF DRESDEN (1964) (addressing the circumstances of the Dresden bombing and debate surrounding the decision); KURT VONNEGUT, SLAUGHTERHOUSE FIVE 146, 166-67, 169-70 (1969) (presenting the fire-bombing of Dresden as excessive, gratuitous violence by Allies that purported to be morally superior to Nazis).

<sup>331</sup> See JAMES LOUGHLIN, THE BRITISH MONARCHY AND IRELAND: 1800 TO THE PRESENT 62-63 (2007); George L. Bernstein, *Liberals, the Irish Famine and the Role of the State*, 29 IRISH HIST. STUD. 513-36 (1995). See also JONATHAN SWIFT, A MODEST PROPOSAL FOR PREVENTING THE CHILDREN OF POOR PEOPLE IN IRELAND FROM BEING A BURDEN TO THEIR PARENTS OR COUNTRY, AND FOR MAKING THEM BENEFICIAL TO THE PUBLICK (1729), reprinted in THE BASIC WRITINGS OF JONATHAN SWIFT 345-54 (Claude Julien Rawson ed., 2002) (parodying outrageous English treatment of Irish by suggesting that Irish famine be rectified through cannibalistic consumption of Irish newborns).

<sup>332</sup> See Rachel Anderson, *Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany*, 93 CAL. L. REV. 1155 (2005).

<sup>333</sup> See ALEXANDR I. SOLZHENITSYN, THE GULAG ARCHIPELAGO (Thomas P. Whitney trans., 1973); STEVEN ROSEFELDE, RED HOLOCAUST 63-77 (2010).

<sup>334</sup> See *supra* text accompanying notes 305-306; MICHAEL BURLEIGH, THE THIRD REICH: A NEW HISTORY 571-62 (2000); HENRY FRIEDLANDER, THE ORIGINS OF NAZI GENOCIDE: FROM EUTHANASIA TO THE FINAL SOLUTION (1995); SAUL FRIEDLANDER, THE YEARS OF EXTERMINATION (2007); GERALD REITLINGER, THE FINAL SOLUTION: THE ATTEMPT TO EXTERMINATE THE JEWS OF EUROPE (1961). See also WILLIAM L. SHIRER, THE RISE AND FALL OF THE THIRD REICH 946, 978 (1960) (describing the Holocaust).

<sup>335</sup> See Power, *supra* note 3, at 391-474; PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 39-61 (2002).

regimes, in addition to repressing their citizens generally (e.g., Iraq under Saddam Hussein, Spain under Francisco Franco<sup>336</sup>) appear occasionally to succeed in effectively lobotomizing them through a relentless, comprehensive cult of brainwashing (e.g., China under Mao Zedong, North Korea of Kim Jung-II).<sup>337</sup>

One might make similar criticisms of the less visibly homicidal but oppressive behavior toward disadvantaged socio-economic groups. Slavery, particularly the widespread trade in African slaves, stains the great European powers, nearly all of the Western Hemisphere, and even Africans

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<sup>336</sup> See STANLEY G. PAYNE, *THE FRANCO REGIME 1936-1975* 209-28 (1987); Madeleine Davis, *Is Spain Recovering its Memory? Breaking the Pacto del Olvido*, 27 HUMAN RTS. Q. 858, 860-62 (2005). See also HUGH THOMAS, *THE SPANISH CIVIL WAR* (Harper & Row rev. ed. 1977); Editorial, *An Injustice in Spain*, N.Y. TIMES, Apr. 8, 2010, at A18 (concluding that “Spain’s best-known investigative magistrate, Baltasar Garzon,” a jurist with noted human rights credentials. “[was] prosecuted in a politically driven case that should have been thrown out of court” for daring to examine the “disappearances” that took place during Franco era). Chile under the infamous Augusto Pinochet presented similar issues. See NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* 74-77 (2005) (describing the trail of dead and missing as a result of Chile’s “Caravan of Death”); MARK ENSALACO, *CHILE UNDER PINOCHET: RECOVERING THE TRUTH* xi (2000) (“Repression was policy in Chile under Pinochet, just as it is policy in any authoritarian regime. . . . Repression was a matter of state, and it was conducted relentlessly and ruthlessly.”); Jonathan Kandell, *Augusto Pinochet, 91, Dictator Who Ruled by Terror in Chile, Dies*, N.Y. TIMES, Dec. 11, 2006, at 1 (stating how, under Pinochet’s rule, “more than 3,200 people were executed or disappeared, and scores of thousands more were detained and tortured or exiled.”).

<sup>337</sup> See LIANG HENG & JUDITH SHAPIRO, *SON OF THE REVOLUTION* (1983) (describing oppression and abuses of Mao’s Cultural Revolution); MIKE KIM, *ESCAPING NORTH KOREA: DEFIANCE AND HOPE IN THE WORLD’S MOST REPRESSIVE COUNTRY* 10-18 (2008) (describing North Korean brainwashing techniques); Grace M. Kang, *A Case for the Prosecution of Kim Jong Il for Crimes Against Humanity, Genocide, and War Crimes*, 38 COLUM. HUM. RTS. L. REV. 51, 53-63 (2006) (describing North Korea’s human rights violations within its “unique regime structure that resembles a religion”); Choe Sang-Hun, *Nimble Agencies Sneak News Out of North Korea*, INT’L HERALD TRIB., Jan. 25, 2010, at 1 (“[w]hile North Korea shutters itself from the outside — it blocks the Internet, jams foreign radio broadcasts and monitors international calls — it releases propaganda-filled dispatches through the government’s mouthpiece, the Korean Central News Agency.”); Blaine Harden, *North Korean Prisons Have Become a System of Extortion, Refugees Say*, WASH. POST., Oct. 6, 2009, at A11 (describing how “brutal treatment” in North Korean prison camps represses political opposition and facilitates extortion by government officials).

themselves as many tribes sold their brethren to slave traders, many of whom were Arab.<sup>338</sup> Even after the American Civil War resulted in the abolition of slavery, both de jure and de facto discrimination against blacks was rampant until the civil rights revolution of the 1960's<sup>339</sup> and pockets of the United States continue to glorify the Confederacy.<sup>340</sup> The United States' treatment of its indigenous population was often cruel and could be characterized as genocidal.<sup>341</sup> And throughout the world, second-class treatment and even harsh persecution of women by governments and powerful, respected social institutions is common.<sup>342</sup> More recently, actions of the

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<sup>338</sup> See HUGH THOMAS, *THE SLAVE TRADE: THE STORY OF THE ATLANTIC SLAVE TRADE, 1440-1870* (1997); EDWARD BALL, *SLAVES IN THE FAMILY* (1998).

<sup>339</sup> See TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1998); TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1988).

<sup>340</sup> Actually some rather large pockets of the U.S., including prominent states adjacent to the nation's capital. See Jon Meacham, Op-Ed., *Southern Discomfort*, N.Y. TIMES, April 11, 2010, WEEK IN REVIEW, at 12, (noting Virginia's designation of April 2010 at "Confederate History Month," which the governor described as a celebration of those "who fought for their homes and communities and Commonwealth." Celebrating the Confederacy and its defense of a traditional southern way of life is merely a bad mask for continued racism, or at least racial insensitivity, by a surprisingly, disappointingly large number of Americans:

Advertently or not, [the Governor] is working in a long and dispiriting tradition. Efforts to rehabilitate the Southern rebellion frequently come at moments of racial and other social stress, and it is revealing that Virginia's neo-Confederates are reighting the Civil War in 2010 [while the nation's first black President is in office and pursuing a legislative agenda regarded as too progressive by many]. As the sesquicentennial of Fort Sumter approaches in 2011, the enduring problem for neo-Confederates endures: anyone who seeks an Edenic Southern past in which the war was principally about states' rights and not slavery is searching in vain, for the Confederacy and slavery are inextricably and forever linked.

*See id.*

<sup>341</sup> See PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST* (1987); HUGH THOMAS, *CONQUEST: MONTEZUMA, CORTES, AND THE FALL OF OLD MEXICO* (1993).

<sup>342</sup> See *A HISTORY OF WOMEN: TOWARD A CULTURAL IDENTITY IN THE TWENTIETH CENTURY* (Francoise Thebaud et al. eds., Arthur Goldhammer trans., 1994); Maureen Dowd, Op-Ed., *Worlds Without Women*, N.Y. TIMES, Apr. 11, 2010, WEEK IN REVIEW, at 12 (arguing that religion is often used to systematically discriminate



United States in the incarceration and “enhanced” interrogation of terrorism suspects has been characterized as war criminality.<sup>343</sup>

But without minimizing any of these wrongs, one can make a good case that the Armenian Genocide is different in degree and outcome. As compared to other totalitarian governments, Turkey inflicted death and destruction against a targeted group on a larger, more intensely violent scale than found in other such atrocities and achieved phenomenal “success” in terms of lives destroyed with little loss to the perpetrators and fellow travelers. Perhaps only the crimes of the Third Reich approach it in that regard, although a case can be made that the Soviet Union (particularly under Josef Stalin) and Genghis Khan’s rolling conquests were in the same league. But Genghis Khan’s carnage can arguably be described as war. He did not attempt to wipe out a subgroup of his own countrymen. Sherman’s “march to the sea” also took place as part of war. The Massacre at Tiananmen was obviously tragic, but had relatively few victims and was not prompted by ethnic dislike for the demonstrators.<sup>344</sup>

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against women. “To circumscribe women, Saudi Arabia took Islam’s moral codes and orthodoxy to extremes not outlined by Muhammad; the Catholic Church took its moral codes and orthodoxy to extremes not outlined by Jesus. Negating women is at the heart of the church’s hideous—and criminal—indifference to the welfare of boys and girls in its priests’ care.”); Rod Nordland & Taimoor Shah, *Afghan Police Arrest Suspect In Disfiguring of 18-Year-Old*, N.Y. TIMES, Dec. 8, 2010, at A6, (“When Bibi Aisha’s nose and ears were cut off by her husband and her in-laws, no one ever expected much to be done about it, especially because it happened in a remote area under Taliban control.” Her offense against the social order of rural, tribal Afghanistan was running away from her abusive husband, with whom her marriage was arranged by their respective families when she was an infant. After she ran away, her relatives returned her to the husband.)

<sup>343</sup> See DAVID COLE, *ENEMY ALIENS* (2003). See generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008). See also RICHARD A. CLARKE, *AGAINST ALL ENEMIES: INSIDE AMERICA’S WAR ON TERROR* (2004).

<sup>344</sup> Although ethnic differences and the ability to demonize disfavored persons as “the other” unworthy of respect or legal protection played a role. The Chinese government intentionally selected troops from a distant region to break up the demonstrations. The troops were thus of a different ethnic group and spoke a sufficiently different dialect that they could not communicate with the demonstrators, who had been described to the troops as “counter-revolutionaries” attempting to overthrow the government rather than demonstrators seeking greater personal freedoms for the citizenry. See Nicholas D. Kristof, *Reporter’s Notebook; Deng to Retire in the U.S., And Other Chinese Rumors*, N.Y. TIMES, May 23, 1989, at A1 (describing students’ concerns about Chinese government’s possible use of troops from remote regions

The atrocities of the Balkans during the 1990s, principally the Serbian ethnic cleansing directed toward Croats, Albanians, and Muslim Bosnians, has much in common with the Armenian Genocide, but appears to have been smaller in scale regarding the deaths and dislocation inflicted. The Balkan atrocities can be categorized as war-related, although the prevailing view is that Serbia-sponsored, Serb-led ethnic cleansing akin to genocide provides a more accurate description.<sup>345</sup> The Nazi Holocaust appears to approach the Armenian Genocide in terms of scope and impact, which is perhaps unsurprising since Hitler was to some extent following Turkey's playbook.<sup>346</sup> However, although the Nazis focused closely on a particular ethnic group over a sustained period, they also abused other "out groups," that were political (e.g., communists, union leadership) rather than ethnic or social.

Most important, however, is that in the other instances most similar to the Armenian Genocide, the perpetrating regime was not only displaced but there was also a period of truth and reconciliation, with prosecution of leading offenders and at least a symbolic calling into account of those responsible. In short, the perpetrators were ousted, ejected, subjugated, and punished by forces representing the victims or the world community. Concentration camps were liberated. A defeated genocidal Germany was occupied by Allied troops and remade into a country conscious of human rights and the risk that ordinary people could do monstrous things.<sup>347</sup> Serb-led

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who speak different dialects). See also Bernard E. Trainor, *Crackdown in Beijing: Civil War for Army?*, N.Y. TIMES, June 6, 1989, at A16 (noting belief that the troops from remote regions would not be able to identify with students' concerns or would likely believe Chinese government's explanation that students were counterrevolutionaries).

<sup>345</sup> See generally POWER, *supra* note 3, at 391-502; WILLIAMS & SCHARF, *supra* note 320.

<sup>346</sup> See *supra* text accompanying notes 304 (Hitler used the Armenian Genocide as a model and drew confidence from it because perpetrators were never punished).

<sup>347</sup> Unless, perhaps, they work in the banking or insurance industries. It is of course more than ironic and almost shocking that German companies such as Munich Re and Deutsche Bank would fight so hard to avoid paying Armenian Genocide victims based not on any merits-based defense but on the technical grounds that they should not be accountable due to successfully avoiding prosecution for decades and because Turkey, however genocidal its past, is now too important to U.S. foreign policy to risk offending through contract-based litigation. See *supra* Part II.E (describing defenses to banking and insurance litigation). Munich Re's decision to stand on principle, so to speak, in *Movsesian*, is particularly odd in light of the financial risk to the company. *Movsesian* counsel Brian Kabatek suggested at oral argument in *Movsesian I* that the cumulative face value of the policies at issue

violence against Bosnians was halted; troops and paramilitary gangs withdrew or were disbanded. War criminals were tried.<sup>348</sup> Confessions were made and apologies given.<sup>349</sup>

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in the case was less than \$1 million in 1915 dollars, perhaps as much as \$21 million in 2010 dollars. See Transcript of Oral Argument, *Movsesian v. Victoria Versicherung*, No. 07-56722, Dec. 8, 2008 at p. 12, available at 2008 WL 6059176. Although \$21 million is of course a considerable sum, one that would be increased by prejudgment interest, costs, and perhaps counsel fees if plaintiffs were to be totally victorious, plaintiffs undoubtedly realize that settlement for substantially less would be attractive. But Munich Re, which surely expended much in defense of the claims, appears not to have made a settlement offer in the case but has instead publically sided with forces unwilling to admit wrongdoing in the Genocide.

By way of full disclosure and personal observation, Stempel notes that he has been an expert witness for Munich Re in a major insurance coverage matter (where the insurer successfully disclaimed coverage for a loss in a case where the policyholder had failed to report problems with a venture, as required by the policy) and followed Munich Re's general activity in the risk management sphere, where it has been a progressive voice in the insurance community counseling greater concern about the collateral impact of climate change. This Munich Re bears little resemblance to the insurer in *Movsesian*, essentially hiding behind the happenstance of the U.S. need to placate Turkey in foreign affairs as an excuse for refusing to pay life insurance benefits for which premiums were collected and invested a century or more ago.

<sup>348</sup> The International Criminal Tribunal for the former Yugoslavia ("ICTY") provides status updates and case documents for current and previously completed trials relating to war crimes in the Balkans. See *The Cases*, UNITED NATIONS INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/action/cases/4> (last visited Dec. 23, 2010). See also WILLIAMS & SCHARF, *supra* note 320, at 51-54 (providing review of several important indictments of the ICTY).

<sup>349</sup> See Tim Judah, Op-Ed., *Serbia's Honest Apology*, N.Y. TIMES, Apr. 2, 2010, at A3. Regrettably, however, some regimes engaging in wrongful or even criminal behavior continue to both oppress and to deny. China remains an embarrassing example in that its government murdered Tiananmen Square protestors and continues to oppress and brutalize dissidents with no seeming consequences. See COHEN, *supra* note 326, at 263 ("Contrary to the expectations of many Western analysts, China recovered rapidly from the sanctions imposed on it after the Tiananmen massacre and the brutal repression that followed. As a potential market and as a source of cheap labor and inexpensive imports, China was very important to the international business community, which did not fret long about the human rights abuses of its government."). See also David M. Shribman, Editorial, *A Nation Haunted by Its Past: Russians are Fearful as they Stand in History's Shadow*, PITTSBURGH

*B. The Armenian Insurance Litigation as a Barometer of Law's Efficacy for Corrective Justice*

1. Jurispathos and Jurisprudence

The Armenian insurance litigation, like the Armenian Genocide itself, reflects contradictions in the law and the limits of law as a force for justice in a sociopolitical world that frequently turns prejudiced, ethnocentric, religiously intolerant, violent and cruel. Nearly a century after the Genocide, its victims remain dramatically unremembered, underappreciated, and undercompensated. For the most part, the descendants of the perpetrators continue to deny the scope and motivation for the deadly events of 1915-20, often denying the existence of the events themselves. Similarly, insurers for the most part have been able to retain funds without ever honoring the contracts they issued in return for payment. But as the New York Life litigation and settlement show, adjudicative law holds at least some potential for obtaining some recompense, however delayed and diminished.<sup>350</sup> Conversely, the *Movsesian* Munich Re litigation reveals real limits in law's power to adjudicate legal wrongs and to provide corrective justice.<sup>351</sup>

Perhaps most damningly, law may not only be an inadequate means of enforcing its own principles, but may itself be part of the process of injustice. The Armenian Genocide, like the genocide directed against Jews, was a creature of official state policy. Ottoman Turkey, as part of its controlling legal framework, subjugated its Armenian population, ensured its vulnerability, and eventually used the coercive power of the state in a largely successful attempt at extermination and dislocation.<sup>352</sup> A similar pattern is found in Nazi Germany and other fascist<sup>353</sup> or totalitarian regimes.<sup>354</sup>

Perpetrators of genocide and other crimes frequently use law as a means of both asserting control and turning the general populace against the targets of state-sponsored terror.<sup>355</sup> Although individual and mob acts of

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POST-GAZETTE, Apr. 4, 2010, at B3 (Russia "must come to grips with its history" of oppression of ethnic and religious groups).

<sup>350</sup> See *supra* Part II.D (describing New York Life litigation and settlement).

<sup>351</sup> See I.E (describing *Movsesian* litigation against Munich Re).

<sup>352</sup> See AKÇAM, *supra* note 4; BALAKIAN, *supra* note 5; I.H (describing the Armenian Genocide).

<sup>353</sup> See accompanying notes 303-306 (describing the parallels between the Nazi Holocaust and the Armenian Genocide).

<sup>354</sup> See ROSEHELDE, *supra* note 318; SOLZHENITSYN, *supra* note 318.

<sup>355</sup> However, foreign policy pressures may, contra-*Movsesian*, push American law in the direction of positive change. See, e.g., MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (concern that

violence are often precursors or accomplices, sustained and successful genocidal efforts appear to nearly always require the approval of a government, which in turn requires some semblance of legal authority for the actions against the disfavored group.<sup>356</sup> The transformative power of law can thus be an instrument of oppression and atrocity as well as an instrument of social progress.

Professor Robert Cover made this point well in *Justice Accused*, noting instances in which the coercive force of American positive law was enlisted not to protect civil rights but to enforce the property rights of slave owners.<sup>357</sup> More recently and informally, Judge Guido Calabresi made a similar point when addressing the 2010 Annual Meeting of the Association of American Law Schools.<sup>358</sup> The theme of the Annual Meeting was “The Transformative Power of Law,” which to most attendees probably conjured visions of law as a progressive social force such as the familiar American examples of civil rights and employment legislation, constitutional rights of equal protection and due process, and guarantees of procedural fairness. Calabresi, whose family came to the U.S. to escape Mussolini’s fascism,<sup>359</sup> noted that the transformative power of law is a double-edged sword. As an example, he described how within a decade after the passage of laws directed at Jews, his former country, community, and neighbors were engaging in discriminatory (and worse) conduct that could not have been

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Soviets were making political headway by pointing to segregation in America fueled part of U.S. efforts to desegregate and end social and economic discrimination against blacks); Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 *FORDHAM INT’L L.J.* 1464, 1470 (1996) (describing pressure by the United Nations, non-governmental organizations (“NGOs”), and individual nations as part of a “fifty-year global campaign” that resulted in the end of apartheid).

<sup>356</sup> See MARK J. OSIEL, *MAKING SENSE OF MASS ATROCITY* chs. 2-6 (2009); *supra* text accompanying note 337-39 (describing several instances of atrocity actively encouraged and implemented or at least aided and abetted by governments).

<sup>357</sup> See generally ROBERT M. COVER, *JUSTICE ACCUSED* (1975) (noting, among other things, judicial enthusiasm for enforcing Fugitive Slave Act, that required that captured runaway slaves be returned to their owners).

<sup>358</sup> Calabresi, a former Yale Law Dean and long-time professor and important legal scholar prior to becoming a Second Circuit Judge, was receiving a lifetime recognition award from the AALS. See Philip Bobbitt, *Guido Calabresi*, in *THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW* 92-93 (Roger K. Newman, ed., 2009).

<sup>359</sup> See *id.*

envisioned prior to the time that law gave “permission” to abuse and oppress or perhaps even required it of the citizenry.<sup>360</sup>

To a degree, of course, this is nothing new, although it is oft forgotten or overlooked. There have always been bad governments and good governments with bad or good positive law, just as there have always been more humane and less humane societies. But the United States maintains it is one of the good governments that on a public level supports a humane society in which its legal system vindicates justice rather than acts as an instrument for injustice. On a private law level, the U.S. prides itself on having a dependable, consistent, predictable, uncorrupted judicial system that can adjudicate private disputes fairly, even if not perfectly in all cases. In particular, America views itself as having a legal system that adequately enforces contracts.

Regarding the Armenian Genocide, however, both the U.S. government and its legal system have consistently come up short when measured by any reasonable yardstick of justice and objectively defensible legal principles. To be sure, the U.S. legal system deserves shining reviews and praise when compared to that of Turkey or other countries that would not permit either the limited relief accorded as yet to Armenian Genocide victims or even frank discussion of the matter. But as the legal saga of the Genocide unfolds, U.S. courts often fall short.

## 2. Error Within the Confines of Doctrine and Errors of Doctrine

The failure of American law to date occurs on two dimensions. First and perhaps most clearly, the U.S. judicial system—at least in the *Movsesian I* panel decision and the *Movsesian III* en banc ruling—failed according to its own declared norm of enforcing contracts and providing a legal infrastructure in which contracting parties and participants in the greater economy and risk management system can have confidence that the arrangements they make in furtherance of economic security and gain will be respected and protected in the courts. This failing is particularly baleful when insurance is involved.

Insurance is an arrangement for managing risk and protecting against unpredictable future events through risk shifting and risk distribution.<sup>361</sup> Although perhaps corny, the adage that a policyholder who

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<sup>360</sup> Guido Calabresi. Keynote Address and Remarks Accepting Triennial 2010 AALS Award for Lifetime Service to Legal Education and to the Law at the 2010 Association of American Law Schools Annual Meeting (January 8, 2010), <http://www.aalsweb.org/2010podcasts/friday/AALSlncheon.mp3>.

<sup>361</sup> See TOM BAKER, *INSURANCE LAW AND POLICY* 2-22 (2d ed. 2008); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE: LAW* 7-9 (4th

purchases insurance buys “peace of mind” has considerable truth and descriptive power. In buying insurance, a policyholder incurs a comparatively small but certain loss (the premium payment) in return for a contractual promise of protection from a comparatively much larger but contingent loss (e.g., an auto accident or house fire). Life insurance shares this characteristic in that while death is certain eventually, the time and circumstances of death are not.<sup>362</sup> Most obviously, younger and middle-aged policyholders buy insurance even though they expect to live for decades in order to protect their estates and families from the financial consequences of unforeseen early death.

To a degree, all contracts shift risk. More than average contracts, however, and more than even most hedging contracts or stock shorts, insurance shifts risk in a big way—something that is accomplished because the risk is pooled among a group of policyholders (with risks that are not correlated with one another).<sup>363</sup> But the insurance policy is an aleatory contract. The exchange between policyholder and insurer is not equal. The policyholder could die shortly after the policy takes effect, resulting in a large insurance death benefit in return for very little premium. Conversely, the policyholder could live for decades, continuing to pay premiums that, if successfully invested, result in revenues for the insurer surpassing any death benefit that is actually paid.<sup>364</sup>

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ed. 2007); STEMPER ON INSURANCE CONTRACTS, *supra* note 195, at 1-5; KENNETH S. ABRAHAM, INSURANCE LAW AND REGULATION 3-4 (4th ed. 2005); EMERIC FISCHER ET AL., PRINCIPLES OF INSURANCE LAW 14 (3d ed. 2004). *Accord* JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT 13 (2010) (“The purpose of insurance is to ameliorate the financial consequences of risk by transferring the risk from an individual to a group and sharing the cost of the risks that come to pass among the members of the group.”).

<sup>362</sup> See FISCHER ET AL., *supra* note 346, at 341-43, 364-75, 801; STEMPER ON INSURANCE CONTRACTS, *supra* note 195, at 16-3.

<sup>363</sup> See FISCHER ET AL., *supra* note 346, at 15; JERRY, *supra* note 346, at 14; STEMPER ON INSURANCE CONTRACTS, *supra* note 195, at 195.

<sup>364</sup> Insurers typically profit primarily because of the investment opportunity they have while holding premium dollars long before being called upon to pay claims. Insurers enjoy the time value of money and can “play the float” while awaiting claims that may or may not come. Where the insurer has underwritten the risk well, this should produce not only investment income but also underwriting profit in which premiums collected (without counting investment income) exceed claims paid. See FEINMAN, *supra* note 346, at 18.

The time lag between taking in premiums and paying out claims (the “float”) and the income earned in that time is a major source

Relatedly, insurance “is also different from most ordinary contracts because it requires sequential performance” in which the policyholder (and persons injured by the policyholder or dependent on compensation or rebuilding after losses) depends on the insurer to perform in the future if there is a triggering event.<sup>365</sup> The policyholder cannot insist on immediate perform-

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of profit; in 2007, industry investment profits totaled \$58 billion. As Warren Buffett, whose Berkshire Hathaway owns GEICO and other insurance companies, has said, float is the great thing about the insurance business, because it is “money we hold that is not ours but which we get to invest.”

In this way an insurance company is like a bank, which takes in customers’ money as deposits and lends that money out at a higher interest rate than it pays on depositors’ accounts.

Insurance companies have an advantage over banks, though, because their loss ratio can be less than 100 [or 1:1]. The bank depositor always gets back 100 percent of the amount deposited, plus interest. [But the] insurance company with [a lower loss ratio] is only paying its customers [pennies] on the dollar [and this] insurance company is ahead of the game even before its investment earnings.

*Id.* (citing Warren Buffett, 2006 *Berkshire Hathaway Inc. Shareholder Letter*, 2006, available at [www.berkshirehathaway.com/letters/2006ltr.pdf](http://www.berkshirehathaway.com/letters/2006ltr.pdf)) (Buffett frequently makes this point in his annual letters to shareholders).

Regarding the extra-contractual, socially important function of insurance, see Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 *MCGEORGE L. REV.* 203, 205 (2010); Jeffrey W. Stempel, *The Insurance Contract as Social Instrument and Social Institution*, 51 *WM. & MARY L. REV.* 1489, 1489 (2010); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 *TORT TRIAL & INS. L.J.* 813, 815 (2009).

<sup>365</sup> See FEINMAN, *supra* note 346, at 20. Elaborating, Professor Feinman notes that:

[i]n a typical contract, if one party doesn’t perform, the other party can procure a substitute performance and sue for any added cost. If a homeowner hires a contractor to renovate his house and the contractor fails to show, the homeowner can refuse to pay, hire another contractor, and, if he pays the second a higher price, sue the first contractor for the extra. But if the homeowner has a fire and his insurance company fails to pay the claim, it’s too late for the homeowner to buy alternate insurance. The best the homeowner can hope for is to sue the [insurance] company for the coverage that should have been paid. But even that is not an effective remedy: the lawsuit does not give the homeowner the money needed to rebuild until the litigation is concluded, perhaps years later, during which time the homeowner has lost the secur-



ance or performance simultaneous with the policyholder's performance because there must first be a triggering event—which may or may not take place. Further, the policyholder has already parted with premium dollars and is then highly dependent on whether the insurer honors the contract. The insurer has ample opportunity for opportunistic behavior that can deny the policyholder the benefit of the bargain in ways often more devastating than opportunistic behavior in other contracting contexts.

Although all contracts contain an implied covenant of good faith and fair dealing, the covenant has real meaning in the insurance context. As a result, insurance may be viewed as fiduciary in nature and insurers are required to give at least equal attention to the rights of policyholders.<sup>366</sup> If an insurer intentionally takes an unreasonable position regarding the policy's coverage, it commits bad faith. If the insurer engages in self-dealing rather than looking out for the policyholder, it commits bad faith. Further, in many states, an insurer's bad faith conduct or breach gives rise to a tort action that may be pursued by the policyholder and punitive damages may be awarded if the insurer acted with willful indifference to the policyholder.<sup>367</sup>

In short, American law has long and consistently treated insurance policies as a special form of contract where heightened duties apply to the insurer.<sup>368</sup> For these insurance purchases in particular, one would expect courts to demand enforcement of the contracts because of both the policy-

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ity and peace of mind for which he contracted. Accordingly, courts hold insurance companies to a higher standard and subject them to special remedies if they fail to honor their promises.

*Id.* at 20-21. *See also infra*, note 352 (regarding the possibility of bad faith claims against insurers).

<sup>366</sup> *See* STEPHEN ASHLEY, *BAD FAITH ACTIONS LIABILITY & DAMAGES* § 1.01 (2d ed. 1997); FISCHER ET AL., *supra* note 346, at 1041; JERRY & RICHMOND, *supra* note 346, at 176; STEMPEL ON INSURANCE CONTRACTS, *supra* note 195, at 10-4.2. *Accord* FEINMAN, *supra* note 346, at 18 (“[t]he most basic rule is that in adjusting a claim, the [insurer] must not put its own interests above the interest of its policyholder. [T]he company will not try to increase its own profit at the expense of the policyholder or take advantage of the insured precisely at the moment when she is most vulnerable.”).

<sup>367</sup> Regarding the doctrine of bad faith and the bad faith cause of action regarding insurance, see ASHLEY, *supra* note 351, at § 1.03; FISCHER ET AL., *supra* note 346; JERRY & RICHMOND, *supra* note 346, at 176; STEMPEL ON INSURANCE CONTRACTS, *supra* note 195, at 10-57.

<sup>368</sup> *See Insurance Contract as Social Instrument*, *supra* note 349, at 1489; *Insurance Policy as Statute*, *supra* note 349, at 206; *Insurance Policy as Thing*, *supra* note 349, at 816.

holder's dependency and the social importance of the insurance product as part of the commercial infrastructure. In addition, where the insurance product is a life insurance policy issued nearly a century ago, there is no serious question that the triggering contingent event has occurred. Even those who purchased insurance just prior to the Genocide would need to be older than 95 today to relieve insurers of their responsibility to pay—an unlikely result, since infants do not purchase insurance and parents of the era seldom purchased life insurance for their children. More realistically, adults purchase life insurance, which would require that any purchaser now be older than 115 to avoid the triggering event of death. The policyholder's beneficiaries or assignees are entitled to payment in accordance with the terms of the policy. In circumstances of this type, one would expect the legal system to require that the contracting party who took the premium to make good on its payment in the event of death absent an applicable exclusion.

### 3. The *Movsesian* Decisions: Confusion and Cowardice

Viewed against this backdrop, the first *Movsesian* panel decision and the Ninth Circuit's *Movsesian III* en banc ruling<sup>369</sup> look increasingly erroneous and problematic, both on their own terms and as an indication of insufficient judicial independence from the more overtly political branches.

Without doubt, *Movsesian I* and *Movsesian III* are inconsistent with prevailing insurance law and contract norms that mandate honoring contracts. These decisions invalidated a procedural statute that merely permitted plaintiffs to pursue contract remedies.<sup>370</sup> Although plaintiffs could conceivably still overcome a statute of limitations defense on grounds of equitable tolling or estoppel, this appears precluded by the en banc decision remanding the case to the trial court "with instructions to dismiss all claims revived" by California's Code of Civil Procedure § 354.4<sup>371</sup> as well as the length of time since the Genocide and the severe spoliation of evidence incurred (in large part due to intentional destruction). In effect, *Movsesian I*

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<sup>369</sup> *Movsesian I*, 578 F.3d 1052 (9th Cir. 2009); *Movsesian III*, 670 F.3d 1067 (9th Cir. 2012) (en banc). See also *supra* text accompanying notes 234, 238-44, 246-59, 263 (discussing the *Movsesian I*) and notes 294-96 (discussing *Movsesian III*).

<sup>370</sup> See CAL. CIV. PROC. CODE § 354.4 (West 2011) (the California legislature did not attempt to impose any liability upon Munich Re that it had not already assumed when its predecessor companies sold life insurance to Armenians for forty years. Only further adjudication would determine whether plaintiffs would succeed on the merits of the contract claims).

<sup>371</sup> See *Movsesian III*, at 1077.

and *Movsesian III* represent judicial immunization of breaching parties despite state legislative support for the victims of the breach.

Where the contracts are not merely bilateral promises<sup>372</sup> but are part of an extensive web of social ordering and risk management as well as financial and personal planning, a decision inhibiting a contract party's ability to enforce the policy's promises runs strongly counter to the legal norms of insurance and contract law.<sup>373</sup> Predictability, dependability, efficiency, reliance interests, and, of course, simple corrective justice are sacrificed when insurance coverage is not provided as promised. *Movsesian I* and *Movsesian III* are particularly bad decisions in that (absent the perhaps long-shot plaintiff victory with tolling or estoppel arguments) it not only denies some modest recompense to those displaced by the Genocide, but also protects the breaching party and prevents the substantive contract claim from even receiving consideration in the courts.

As a matter of private law jurisprudence and its internal norms, *Movsesian I* and *Movsesian III* are disasters. They stand for the "principle" that contracts will not be enforced, even under the most sympathetic of circumstances, if the breaching party has the good fortune of failing to honor contracts sufficiently connected to a politically sensitive topic or geographic region. In its finer moments, contract law has been relatively immune to such considerations, such as when courts refused to let sellers

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<sup>372</sup> The prevailing traditional view is that insurance policies are unilateral or "reverse-unilateral" contracts on the theory that the policyholder "performs" at the outset through paying the premium in return for the insurer's promise of future coverage. See JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS, § 2.10(a) (6th ed. 2009). However, others view insurance policies as bilateral contracts in which both sides exchange promises, particularly given the usual practice of automatic renewal of policies and periodic payment of premiums throughout the policy period. See JERRY & RICHMOND, *supra* note 346; Hazel G. Beh & Jeffrey W. Stempel, *Misclassifying the Insurance Policy: The Unforced Errors of Unilateral Contract Characterization*, 32 CARDOZO L. REV. 85, 110-34 (2010) (extensive discussion concluding bilateral classification more apt). Under any of these views, the insurer unquestionably makes a promise to pay benefits upon the happening of certain specified events, such as the death of the person whose life is insured under a life insurance policy.

<sup>373</sup> See BAKER, *supra* note 346, at ch. 1; JERRY & RICHMOND, *supra* note 346, at §§1, 10; STEMPEL, ON INSURANCE CONTRACTS, *supra* note 195, at ch. 1; FISCHER ET AL., *supra* note 346, at ch. 1; *The Insurance Policy as Social Instrument*, *supra* note 349; *The Insurance Policy as Statute*, *supra* note 349; *The Insurance Policy as Thing*, *supra* note 349.

avoid their obligations due to the 1957 Suez Canal crisis.<sup>374</sup> Insurance law has been particularly strong in this regard, usually taking a narrow view of the war risk exclusion typically found in insurance policies in order to vindicate the contract rights and reliance interests of policyholders, beneficiaries, and society.<sup>375</sup> In addition, it appears that the life insurance policies sold to Armenian residents of the Ottoman Empire for the most part contained no exclusions for war-related deaths.<sup>376</sup>

In addition to failing as a matter of insurance and private commercial law, *Movsesian I* and *Movsesian III* also represent a dismal failure of the American court system to permit litigants to pursue some small crumb of justice in the face of political power and expediency. On this dimension, these decisions are a violation of the system's own professed credos that justice is blind, no person is above the law, or that those who violate the law are ultimately to be held accountable. As discussed below, the American judiciary has become too deferential to the executive in matters even tangentially connected to war, terrorism, and public policy.<sup>377</sup> In this sense,

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<sup>374</sup> See, e.g., *Am. Trading & Prod. Corp. v. Shell Int'l Marine*, 453 F.2d 939 (2d Cir. 1972); *Glidden Co. v. Hellenic Lines*, 275 F.2d 253 (2d Cir. 1960); *Transatlantic Fin. Corp. v. U.S.*, 363 F.2d 312 (D.C. Cir. 1966). See also FARNSWORTH, *supra* note 195, at § 9.6 (describing the cases and force majeure doctrine generally).

<sup>375</sup> See, e.g., *Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487 (1924) (collision of two commercial ships in separate convoys carrying supplies as part of war effort not excluded loss under war risk exclusion); *Pan Am. World Airways v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974) (applying New York law and finding that the destruction of a commercial plane hijacked by Palestinian political activists was covered despite insurer invocation of war risk exclusion; a specific terrorism exclusion was required to avoid coverage); *Am. Fire & Cas. Co. v. Sunny S. Aircraft Serv., Inc.*, 151 So. 2d 276 (Fla. 1973) (hijacking of airplane is theft rather than war-related loss, even though plane was attacked by Cuban military when pilot attempted to return to United States). See also Jeffrey W. Stempel, *The Insurance Aftermath of September 11: Myriad Claims, Multiple Lines, Arguments Over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role*, 37 TORT & INS. L.J. 817, 843-57 (2002).

<sup>376</sup> See, e.g., HUDNUT, *supra* note 79, at 36-38 (New York Life policies sold in the late 1800s and early 1900s generally covered war-related deaths but U.S. policyholders in military service were assessed an additional premium). See also Plaintiffs' Opposition to Motion to Dismiss, *Marootian v. N.Y. Life Ins. Co.*, Case No. CV-99-12073 CAS (MCx) at 41-44 (reproducing New York Life policy issued to Armenian resident of Ottoman Empire; the policy, which was drafted in French, appears to have no war exclusion on coverage).

<sup>377</sup> See *infra* text accompanying notes 389-94.

perhaps *Movsesian I* and *Movsesian III* are guilty only of continuing a disturbing trend.

But the failings of *Movsesian I* and *Movsesian III* go beyond the questionable foreign affairs doctrine on which the decisions are based. Although there is ample precedent for deference to the Executive in matters of foreign policy, the Armenian insurance litigation is readily distinguishable from these precedents. For example, *Movsesian I*, tracking closely Munich Re's brief in the case, notes that the extension of the statute of limitations for Armenian Genocide insurance claims was modeled after other California laws "which extended the statute of limitations until 2010 for Holocaust-era insurance claims and World War II slave labor claims" and that "[b]oth of these sister statutes have been found unconstitutional, because they interfered with the national government's foreign affairs power."<sup>378</sup>

However, the underlying facts of these other situations leading to adverse judicial decisions for claimants were far different than those of the Armenian insurance claims. Concededly, *Deutsch v. Turner* struck down the statute extending time for filing slave labor claims.<sup>379</sup> But these claims arguably were resolved by negotiations ending World War II in which the U.S. was the major participant.<sup>380</sup> Munich Re had raised a similar claim in its *Movsesian I* and *Movsesian III* appeals, but the Ninth Circuit, quick to conclude that California law was swept away by general U.S. foreign policy designed not to offend Turkey, declined to decide the narrower question of whether treaties ending World War I had effectively precluded the *Movsesian* claims.<sup>381</sup>

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<sup>378</sup> See *Movsesian I*, 578 F.3d 1052, 1054 (9th Cir. 2009).

<sup>379</sup> 324 F.3d 692, 716 (9th Cir. 2003).

<sup>380</sup> See *id.* at 712-14.

<sup>381</sup> See 578 F.3d at 1055. We disagree with the argument that treaties ending World War I effectively extinguished private citizen claims against private insurance companies or other contracting parties. The treaties and related agreements may govern relations between the victorious and vanquished governments, but absent express agreement, treaties governing nations do not address or eliminate private contract or tort claims a person may have against another private actor. Even if such documents did expressly purport to eliminate such claims, there would of course be serious questions regarding whether such agreements exceed the U.S. government's treaty power or violate other constitutional provisions. At a minimum, a person deprived of a property right (and contract rights are property rights) by the government would appear to be entitled to fair compensation pursuant to the Takings Clause and Due Process Clause.

But whatever the deficiencies of the treaty argument, it has the virtue (absent in the more sweeping foreign affairs power argument) not only of being a narrower, less constitutionally disruptive option but also being based on official

Similarly, *Steinberg v. Int'l Comm. on Holocaust Era Ins. Claims*<sup>382</sup> struck down the extended statute of limitations for filing claims for coverage under life insurance policies sold to Jews in Europe killed or displaced by the Holocaust.<sup>383</sup> And in *American Ins. Ass'n v. Garmendi*, the United States Supreme Court ruled that the California Holocaust Victim Insurance Relief Act of 1999 ["HVIRA"], which required insurers to disclose information about policies sold in Europe between 1920 and 1945, was an unconstitutional interference with "the National Government's conduct of foreign relations."<sup>384</sup>

But the cases striking down legislation related to the Holocaust are quite distinct from the Armenian Genocide because of the federal government's affirmative role in brokering a settlement of Holocaust-related claims concerning insurance policies and bank accounts. As the *Garamendi* Court noted, in response to suits and complaints from "defendant companies and their governments," the "Government of the United States took action." Under Secretary of State and later Deputy Treasury Secretary Stuart Eizenstat acted as mediator in negotiations resulting in the

German Foundation Agreement, signed by President Clinton and German Chancellor Schroder in July 2000, in which Germany agreed to enact legislation establishing a foundation funded with 10 billion deutsche marks contributed equally by the German Government and German companies, to be used to compensate all those "who suffered at the hands of German companies during the National Socialist era."

Further, "[t]he willingness of the Germans to create a voluntary compensation fund was conditioned on some expectation of security from lawsuits in United States courts, and after extended dickering President Clinton put his weight behind two specific measures toward that end." . . . First,

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acts of the government. By contrast, the California statute at issue in *Movsesian* was obliterated based on mere Executive Branch expressions of opinion rather than any real positive law in the form of an Executive Order, a treaty, an executive-led resolution of the dispute, or other more tangible expression of the President's foreign policy.

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<sup>383</sup> *Steinberg v. Int'l Comm. on Holocaust Era Ins. Claims*, 133 Cal. App. 4th 689, 34 Cal. Rptr. 3d 944, 953 (Cal. Ct. App. 2005).

<sup>384</sup> *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 401 (2002). *See also* Ramsey, *supra* note 266, at 33-36 (distinguishing *Garamendi* from *Movsesian* on both facts, magnitude of federal interest, and purported interference of state law).

the Government agreed that whenever a German company was sued on a Holocaust-era claim in an American Court, the Government of the United States would submit a statement that “it would be in the foreign policy interests of the United States for the Foundation to be the exclusive forum and remedy for the resolution of all asserted claims against German companies arising from their involvement in the National Socialist era and World War II . . . Though unwilling to guarantee that its foreign policy interests would “in themselves provide an independent legal basis for dismissal,” that being an issue for the courts, the Government agreed to tell courts “that U.S. policy interests favor dismissal on any valid legal ground. . . .” On top of that undertaking, the Government promised to use its “best efforts, in a manner it considers appropriate,” to get state and local governments . . . respect the foundation as the exclusive mechanism . . . .<sup>385</sup>

California’s HVIRA thus faced a situation in which the federal government had brokered a deal with European governments and insurers resulting in substantial payments to policyholders. By contrast, no such arrangement or alternative form of reparations or compensation exists regarding the Armenian Genocide. Although, as stated in *Movsesian*, it is clear that Turkey wishes to keep the words “Armenian Genocide” out of the American and world vocabulary, the most the Executive has done to date is to lobby Congress not to use the term and not to pass any resolution highlighting the atrocity or blaming Turkey.<sup>386</sup> Although this is not insignificant, it hardly constitutes much of an exercise of the foreign affairs “power” of the United States and falls far short of the active dispute resolution efforts in which the Executive engaged in connection with Holocaust-related coverage.

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<sup>385</sup> 539 U.S. at 405-406. See also *EIZENSTAT*, *supra* note 275.

<sup>386</sup> See *Movsesian I*, 578 F.3d at 1057-60 (describing indicia of national government foreign policy discouraging use of term “Armenian Genocide” but noting no instances of affirmative national government efforts to mediate, prosecute, or resolve insurance claims related to the historical episode and noting not concrete government action or policy forbidding civil litigation over insurance claims of Genocide victim descendants or assignees). See also *id.* at 1063 (Pregerson, J., dissenting) (“Nowhere, however, does the majority point to any evidence of an express federal policy barring states [from extending statute of limitations to facilitate prosecution of Armenian insurance claims].”).

To be sure, we disagree with the *Garamendi* decision, as did four members of the Supreme Court. Justice Ginsburg's eloquent *Garamendi* dissent, which exposes the weakness of the majority analysis well, notes, "no [federal] executive agreement or other formal expression of foreign policy disapproves state disclosure laws like the HVIRA. Absent a clear statement aimed at the disclosure requirements [of the HVIRA] by the 'one voice' to which courts properly defer in matters of foreign affairs" the dissenters found no reason to disturb the California law.<sup>387</sup> But agree or disagree with *Garamendi*, it involves U.S. government involvement in Holocaust-related insurance claims that far exceeds any tangible government policy regarding the Armenian Genocide, although concededly the U.S. Executive seeks to humor Turkey in discouraging the use of the term.

Similarly, while there is ample case law in which American courts have blocked domestic litigation thought to be adverse to the Executive's foreign affairs power, these cases tend to involve more obvious interference with presidential prerogatives. In *Dames & Moore v. Regan*,<sup>388</sup> the Supreme Court upheld restrictions on U.S. business claims against the Islamic Republic of Iran related to Iran's seizure of their assets.<sup>389</sup> In *United States v. Pink*,<sup>390</sup> a national executive compact with the Soviet Union was held valid in the face of state objections prompted because the compact extinguished those claim.<sup>391</sup> In *United States v. Belmont*,<sup>392</sup> the Court upheld the same compact.<sup>393</sup> All of these cases involved clear U.S. policy expressed by the Executive Branch in something more than mere admonitions not to offend foreign governments by using words they disliked. The cases all stemmed from fairly tangible positive law such as a statute or treaty.

As the *Movsesian I* Court noted, it was not until *Garamendi* that the Supreme Court for the first time ruled that something more amorphous like "presidential foreign policy" could itself "carry the same preemptive force as a federal statute or treaty."<sup>394</sup> But presidential foreign policy nonetheless normally involves something more tangible than simply urging Congress to avoid saying anything that might offend the sensitivities of ally. Although national government efforts to resolve Holocaust-related insurance and

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<sup>387</sup> See *Garamendi*, 539 U.S. at 430.

<sup>388</sup> See *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

<sup>389</sup> See *id.* at 674-75, 686-88.

<sup>390</sup> 315 U.S. 203 (1941).

<sup>391</sup> See *id.* at 234.

<sup>392</sup> 301 U.S. 324 (1937).

<sup>393</sup> See *id.* at 330-32.

<sup>394</sup> *Movsesian I*, 578 F.3d 1052, 1056 (9th Cir. 2009) (citing *Garamendi*, 539 U.S. at 421-23).



bank disputes were not accompanied by formal treaties or executive orders, there was without doubt substantial federal government involvement in the shaping of the resolution. In effect, the federal government inserted itself into the Holocaust litigation to bring about the resolution it preferred and then sought to protect its achievement by doing what it could to provide the settling defendants with “global peace” and the assurance that there would not be straggling, recurrent claims of a similar nature in the future.

By contrast, the federal government has done nothing of similar magnitude regarding claims related to the Armenian Genocide.<sup>395</sup> The Executive’s supposedly vigorous opposition to upsetting Turkey has yet to take the form of Executive Order, veto, or even mention in the State of the Union Address where a President’s complicity toward Turkish denial could face even modest public scrutiny. Although the national government purports to have been steadily working toward improvement in Turkish-Armenian relations, this appears to have focused on formal diplomatic arrangements between the governments of Turkey and that of Armenia, a former Soviet Socialist Republic that gained independence after the collapse of the Soviet Union. Although a thaw in Turkish-Armenian relations may perhaps someday include recognition, reconciliation, or reparations, to date there has been no breakthrough or brokering of a deal in a manner similar to Secretary Eizenstat’s work related to the Holocaust.<sup>396</sup>

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<sup>395</sup> In that sense, Professor Ramsey’s excellent critique of *Movsesian I*, that it would permit the Executive Branch to legislate by presidential decree, is a bit understated in that the Executive Branch brought the Judicial Branch to heel with far less than a formal decree. See Ramsey, *supra* note 266, at 39. The Clinton, George W. Bush, and Obama Administrations all made clear that they did not want Congress or others to disturb Turkish sensibilities with the use of the words “Armenian Genocide.” But, as reflected in the descriptions of the Executive’s conduct in the *Movsesian* decisions themselves, the U.S. Executive has been averse to asking Turkey to accept responsibility for the Genocide. Further, it remains difficult to see why Turkey has any legitimate interest in thwarting efforts of U.S. citizens to collect life insurance benefits from German insurers. Although Turkey is of course upset about having its role in past atrocities highlighted by the language of a California law, the functional effect of *Movsesian III* is to permit foreign insurers and a foreign government to negate a state law because of its rhetoric. In effect, the federal courts assist foreign entities in suppressing the speech of the largest U.S. state. See *supra* text accompanying note 281 (discussing “informal presidential communications.”).

<sup>396</sup> A recent effort in normalizing relations was comprised of Turkey-Armenia Protocols, (officially known as the “Protocol on the Establishment of Diplomatic Relations Between Republic of Armenia and Republic of Turkey”) that were signed by the Turkish and Armenian foreign ministers in October 2009. Although the lan-

Reduced to its essence, U.S. foreign policy on the matter is one of “see no evil,” “speak no evil,” “hear no evil” in that it seeks to avoid use of the term “Armenian Genocide” by American lawmakers. In effect, the Executive Branch’s policy on Armenian Genocide-related private law claims is a non-policy that has essentially ignored the situation (relative to its extensive efforts regarding Holocaust-related claims) and focused primarily on the inflammatory nature of the term rather than analyzing the insurance, contract, banking, and fiduciary issues presented by litigation claims. Despite the national government’s clear preference that the loaded word “genocide” not be used, the Executive Branch appears never to actually have contended that there should be civil immunity for insurance companies and banks that breached their obligations to policyholders and depositors.

Further, in *Garamendi*, the statute under attack was one of significantly greater regulatory scope and state involvement than that at issue in *Movsesian*. In *Garamendi*, California, as a state government acting in its sovereign capacity, insisted that insurers provide information. In *Movsesian*, California merely provided a longer statute of limitations to a group of litigants that it felt legitimately deserved more time to file claims due to the extenuating circumstances of historical displacement. It was as if the state had legislatively overruled a judicial decision with which it disagreed because it took an unduly strict approach to applying a limitations period. Although the extended statute of limitations of course had potential for significant impact (but only potential; it was not an imposition of liability), it did not significantly involve the state as a state in the dispute. By contrast, in *Garamendi*, the state was actively interacting directly with insurers in imposing and enforcing regulatory obligations.

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guage of the document would seem fairly innocuous to an uninformed reader, the subtext of the guidelines for normalization indicate a set of preconditions to further dialogue. Among these preconditions was the establishment of a commission to examine “historical records and archives to define existing problems,” and repeated affirmations of recognizing territorial integrity. These preconditions are veiled efforts to call into question and deny that the Armenian Genocide took place, and further foreclose the possibility of territorial claims arising out of the Genocide. Although the Turkey-Armenia Protocols were signed and have not been repudiated, the document was not ratified by the either country’s parliament due, in part, to concerns about these preconditions. Nevertheless, it seems apparent that the Turkey-Armenia Protocols are not the equivalent of any formal understanding or resolution between the descendants of the perpetrators and victims of the Genocide. See Protocol on the Establishment of Diplomatic Relations Between Republic of Armenia and Republic of Turkey, Oct. 10, 2009. See also Armenia Suspends Ratification of Turkey Deal, RFE-RL, Apr. 22, 2010, available at <http://rferl.org>.

In addition, there was a non-trivial risk that disclosure by insurers could spur further investigation and litigation, which would have undermined the U.S. government's quest for final resolution of the Holocaust cases and global peace for the European insurers and governments that had paid 10 billion deutsche marks to settle the claims. The defendants paid these substantial sums and the U.S. became so involved in negotiations because they wanted the certainty and presumed political benefits of a sufficiently fair resolution that was final. Although one may question whether Secretary Eizenstat achieved a good deal, it was nonetheless the U.S. national government's official, approved resolution of the matter.

Supporters of the *Garamendi* holding could argue that permitting the reporting requirements of HVIRA to stand, if it led to further claims, would be the equivalent of state prosecution of former president Richard Nixon in the aftermath of the pardon issued by his successor Gerald Ford. That analogy may be a stretch, but no comparable assertions can be made about allowing the *Movsesian* plaintiffs to sue because they caught a break from the California legislature. Continuation of the *Movsesian* litigation does not risk undermining any federally sponsored mass resolution of Armenian insurance claims and does not subject Munich Re to repetitive litigation.

To be clear: we agree with Justice Ginsburg's dissent in *Garamendi* and believe that the HVIRA regulatory scheme requiring reporting by insurers was not a sufficient conflict with the Eizenstat-brokered resolution of claims. But it presented dramatically more federal-state tension than the extended statute of limitations in *Movsesian*. Even if one finds Justice Souter's majority opinion in *Garamendi* persuasive, there appears to us considerable distance between the direct state regulation and extensive federal settlement efforts in that case as opposed to the relatively nonintrusive extension of a limitations period regarding contract law claims on which the national government has never taken a position.

In short, *Garamendi*, like the Holocaust statute of limitations cases and the slave labor cases, seems clearly distinguishable from *Movsesian*. Although in our view all these cases are wrongly decided, *Movsesian* stands out as the worst of the lot. One would hope that it represents the apogee (or nadir) of judicial suppression of state law that displeases the U.S. Executive Branch. The zeal of the *Movsesian I* and *Movsesian III* courts for extending *Garamendi*, a 5-4 decision, is particularly disheartening. While 5-4 decisions are of course still binding law, the closeness of the *Garamendi* outcome and the strength of the Ginsburg dissent (joined by the unusual ideological coalition of Justices Stevens, Scalia, and Thomas) bespeaks caution in the application of *Garamendi*, and logically suggests that it not be aggressively extended to situations of less extensive federal and state in-

volvement and conflict. *Movsesian I*'s expansion of the foreign affairs power doctrine to strike down a standard fare state procedural law is the equivalent of trumpeting *Bush v. Gore*<sup>397</sup> as the leading and controlling equal protection precedent.<sup>398</sup>

Under *Movsesian I* and *Movsesian III*, the test for applying the foreign affairs doctrine becomes one of whether the Executive Branch is upset with the nomenclature used by state legislatures or is otherwise displeased with state law. The fact that Turkey abhors the term "Armenian Genocide" and that the President does not want to upset Turkey was enough to overturn an official act of a sovereign state legislature. Although tensions in the Middle East and Turkey's strategic location require some concern over the

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<sup>397</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>398</sup> *Bush v. Gore* is consistently criticized by commentators for adopting a novel theory of equal protection (i.e., that continuing a recount of disputed ballots in Florida would improperly discriminate against voters whose ballots were not subject to recount) and then stating that this novel (arguably strange and wrongheaded) perspective could not be used as future precedent. *Bush v. Gore* is also routinely criticized as both a poorly reasoned case and one that is result-driven and built on political expediency and favoritism. See, e.g., ALAN DERSHOWITZ, *SUPREME INJUSTICE: HOW THE SUPREME COURT HIJACKED ELECTION 2000* (2001); SAMUEL ISACHAROFF ET AL., *WHEN ELECTIONS GO BAD: THE LAW OF DEMOCRACY AND THE PRESIDENTIAL ELECTION OF 2000* (rev. ed. 2001); Erwin Chemerinsky, *Bush v. Gore Was Not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001); Christopher Bryant, *Haste Makes Waste*, 9 NEV. LAW. 18, 18-20 (May 2001); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, in *THE VOTE: BUSH, GORE, AND THE SUPREME COURT 184-204* (Cass R. Sunstein & Richard A. Epstein eds., 2001); Peter M. Shane, *Disappearing Democracy: How Bush v. Gore Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001); Robert G. Kaiser, *Slim Majority Raises Fear of Court Partisanship*, WASH. POST, Dec. 10, 2000, at A32 (quoting University of Texas Law School Professor Sanford Levinson: "This looks like a group of five, hard-line, right-wing Republicans who are willing to do anything to put their guy in office."). But see John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §14.31 and *id.* at 1096 (8th ed. 2010) ("While reasonable (or unreasonable, for that matter) persons may debate the wisdom and, indeed, legitimacy of the Court's ruling in *Bush v. Gore*, the legal issues addressed by the Court in that case were fairly straightforward ones.") (footnote omitted); RICHARD A. POSNER, *BREAKING THE DEADLOCK* (2001) (taking fairly charitable view of decision). See also ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 10.8.4 at 897 (3d ed. 2006) (listing "issues to consider concerning" case that suggest error in decision); JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION* (2002) (presenting an evenhanded account that nonetheless leaves the reader with the impression that the Court erred and rushed to judgment).

sensibilities of the Turks, giving this sensitivity and commitment to denial of history an effective veto power over the actions of American states is a frightening precedent that almost begs for *Saturday Night Live* parody.

“What’s next?” one might reasonably ask. A state law providing relocation assistance to Afghan refugees is struck down because the preamble criticizes President Hamid Karzai? Funding for a Russian-American museum is invalidated because it will include an exhibit on the arguably totalitarian and allegedly criminal activities of former Prime Minister and enduring power broker Vladimir Putin? Or because it contains an exhibit on the Russia-Chechnya conflict? Perhaps state funded gifts or exchanges with the Republic of Georgia would be in peril if the current federal government policy toward Georgia were critical.

What about tort action arising out of alleged food poisoning at an Afghan restaurant in the U.S. owned by a relative of Hamid Karzai?<sup>399</sup> If a Turkish national sued an American for defamation related to the American’s suggestion that the Turk’s ancestors were involved in the Genocide, would the American defendant be precluded from raising a defense of truth because to do so would offend the Turkish government’s denial that any such atrocity occurred? Surely, the sensitivity of U.S. -Turkey relations would not support this sort of interference with the American legal system. But the *Movsesian I* and *Movsesian III* decisions are essentially indistinguishable from these seemingly ridiculous hypotheticals.

Viewed only through the lens of private law and the American commitment to enforcing contract rights, the rationale of *Movsesian III* is dangerous because it arguably establishes a regime in which one’s contract rights—and perhaps other legal rights as well—vary according to the entities with which one has contracted or by which one has been victimized. Seen in this light, *Movsesian I* and *Movsesian III* create something of an

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<sup>399</sup> Not so far-fetched a hypothetical: one of President Karzai’s brothers reputedly owns a popular restaurant in the Baltimore-D.C. area serving Afghan-style food. Although the restaurant is reportedly excellent, it of course could become the subject of tort liability due to food problems, slip-and-fall lawsuits, wage-and-hour disputes, discrimination or the like. The ability to sue this type of entity should not hinge on whether the owner’s brother or brother’s government objects to the litigation. But decisions like *Movsesian I* and *Movsesian III* support such absurd results by interfering with traditional state legal prerogatives because they pose the risk of offending an ally and hampering U.S. foreign policy. *See, e.g., Movsesian I*, 578 F.3d at 1052, 1060 (9th Cir. 2009) (“by using the phrase ‘Armenian Genocide,’ California has defied the President’s foreign policy preferences.”) This quotation from *Movsesian I* might be expected in a totalitarian society where Kangaroo courts are controlled by dictators but seems oddly Orwellian coming from a U.S. court.

equal protection or due process problem. If your ancestors bought insurance from a British insurer and died from a mugging in France, you have rights under the policy. If they instead purchased insurance in Turkey from German insurers, the beneficiaries are out of luck when the deaths as part of a mass murder merely because of the historical accident of Turkey's purported importance to U.S. foreign policy.<sup>400</sup>

*C. Improving American Law by Giving Breathing Space to Private Law Litigation Responses to Human Rights Violations*

1. The Increasing Problem of Excessive Judicial Deference to the National Executive

Although *Movsesian I* and *Movsesian III* are great jurisprudential disappointments, there is substantial case law taking a broad view of the foreign affairs power that has resulted in the disapproval of several state laws that simply touch upon matters of sensitivity to the U.S. Executive Branch and the foreign nations with which it deals. *Movsesian* might therefore serve as not only an example of problematic reasoning and application of precedent but also as an example of larger doctrinal problems in the constitutional law of federalism and separation of powers. *Movsesian*, like the Armenian Genocide insurance litigation overall, also illustrates the limitations of law when component parts of the system are in tension.

In discussing a legal system, most focus is on courts. But whether a legal system works well or poorly, all branches of government are usually implicated. In the saga of the attempts to enforce the insurance policies impacted by the Armenian Genocide, only the legislative branch appears to have acquitted itself very well (although federalism has done better than separation of powers in this doctrinal struggle in that the states have performed better than the national government on this issue). The U.S. Congress, although deferring to presidential requests to refrain from annoying Turkey, has at least been willing to bring out into the open issues that have

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<sup>400</sup> One can, of course, argue that the Armenian insurance plaintiffs had themselves enjoyed special advantage because of the California legislation extending the statute of limitations. But this was thought necessary by the legislators only because the defendant insurers and others had created a situation hindering and arguably preventing the plaintiffs from making a timely exercise of their contract rights. From this perspective, the California legislation is better seen not as a special favor for Armenians but rather as a state's efforts to level the playing field so that a gravely disadvantaged group of litigants is provided the opportunity to enforce insurance policy rights typically enjoyed by policyholders and their beneficiaries and estates.

long been swept under the rug by Turkey and its enablers.<sup>401</sup> State legislatures have been willing to enact corrective or remedial legislation to assist in allowing private law claims related to atrocities to have an airing in the courts. Although California has been the clear leader, it is not alone.<sup>402</sup>

By contrast, the Executive Branch has to a degree been the anti-justice arm of the government in that it has rather consistently lined up on the side of foreign governments that have violated international human rights and foreign banks and insurers that appear to have breached their fiduciary and contractual duties to depositors. Ironically, the U.S. government has done much to help these foreign commercial entities but comparatively little on behalf of domestic insurers such as New York Life, almost as if the national government is discriminating in favor of aliens relative to its own commercial citizens. To be fair, where the Executive Branch has gotten heavily involved, as in the Holocaust negotiations, it has sought and achieved at least some recompense, justice, and sense of closure, albeit arguably at the cost of preventing the American judicial system from running its course, perhaps resulting in greater compensation to policyholders and depositors. By contrast to the Holocaust litigation, the U.S. government's involvement regarding Armenian insurance has been almost exclusively negative—opposing even acknowledgment of the Genocide while offering no affirmative efforts to achieve corrective justice for policyholders and depositors.

The judiciary has a mixed record in this drama. Although cases like *Movsesian* and *Garamendi* are troubling, neither decision was unanimous and trial courts have divided on the issues. The decisions taking an excessively broad view of the foreign affairs doctrine could be overturned with the shift of even a few votes. For example, Judge Nelson's switch replaced *Movsesian I* with *Movsesian II* (only to have this undone by the Court en banc in *Movsesian III*). Justice David Souter, the author of *Garamendi*, has been replaced by Justice Sonia Sotomayor. Justice Sandra Day O'Connor and Chief Justice Rehnquist, members of the *Garamendi* majority, have been replaced by Justice Samuel Alito and Chief Justice John Roberts, respectively. Justice Stevens, a member of the *Garamendi* majority, has been replaced by Justice Elena Kagan, who may or may not share the views of

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<sup>401</sup> See *Movsesian I*, 578 F.3d 1052, 1057-60 (9th Cir. 2009) (describing congressional consideration of resolution recognizing and condemning Armenian Genocide).

<sup>402</sup> See *Assicurazioni Generali S. P. A. Holocaust Ins. Litig.*, 340 F. Supp. 2d 494, 501-508 (S.D.N.Y. 2004) (striking down on pre-emption grounds Florida, New York, Wisconsin, and California statutes permitting Holocaust-related insurance claims).

the White House.<sup>403</sup> Notwithstanding *stare decisis*, there is some ground for optimism that the Supreme Court of 2012 could take a less expansive view of the Executive Branch's power to thwart state law than did the 2003 *Garamendi* Court. Further, the Court's 2008 *Medellin* decision appears to have adopted a restrained reading of *Garamendi*.<sup>404</sup>

But whatever the ideological or political composition of the High Court, serious consideration should be given to whether constitutional law doctrine—like American politics generally—has excessively empowered the Executive. Observers have noted a steady increase in executive power during the past fifty years, one that appears to have gained significant momentum during the George W. Bush Administration, both because of Administration efforts and the receptive social, political, and legal climate created by the September 11 terror attacks.<sup>405</sup> Constitutional doctrine ceding substantial authority to the President of course predates this era in that legal constructs such as the act of state doctrine, the foreign affairs power, and various abstention doctrines reflect self-imposed judicial limits on adjudicative power.<sup>406</sup> But in recent decades, world events and greater executive

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<sup>403</sup> See Paul Kane & Robert Barnes, *Senate Confirms Kagan as Justice; 4th Woman Joins Court in 63-67 Vote; She is Unlikely to Shift the Ideology of the Bench*, WASH. POST., Aug. 6, 2010, at A1; Robert Barnes, *Senators Working to Piece Together Portrait of Kagan: No Long 'Paper Trail' Supreme Court Pick's Old Writings Dissected*, WASH. POST., May 26, 2010, at A3; Peter Baker & Jeff Zeleny, *Obama Said to Pick Solicitor General for Court*, N.Y. TIMES, May 10, 2010, at A1; Sheryl Gay Stolbert & Charlie Savage, *Justice Stevens Retiring, Giving Obama a 2nd Pick*, N.Y. TIMES, Apr. 10, 2010, at A1.

<sup>404</sup> See Ramsey, *supra* note 266, at 33-37 (discussing *Medellin v. Texas*, 552 U.S. 491 (2008) in comparison to *Garamendi*).

<sup>405</sup> See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY (2007) (describing aggressive Bush administration efforts spearheaded by Vice-President Dick Cheney to expand federal executive power in controversial and arguably inappropriate, excessive ways).

<sup>406</sup> See NOWAK & ROTUNDA, *supra* note 383, at ch. 6; SEAN D. MURPHY, PRINCIPLES OF INTERNATIONAL LAW 199-235 (2006); CHEMERINSKY, *supra* note 383, at §§ 2.8, 4.6.; JANIS, *supra* note 305, at 109-12; CHESTER J. ANTEAU & WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW §§ 47.33-47. 56 (2d ed. 1997); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996); AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987); JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 181-95 (7th ed. 2009) (describing the Supreme Court as more deferential in "the foreign arena" and stating that "While the Court generally has reacted negatively to assertion of inherent domestic govern-



exercise of power appear to have pushed the boundaries of these doctrines, with courts tending to yield substantial ground.

For example, as previously noted, in *Garamendi*, the Supreme Court for the first time granted deference to the executive and invalidated a state law merely because the Executive was involved in the subject matter area rather than because of treaties, compacts, executive orders, or documented international agreements.<sup>407</sup> With *Movsesian*, it is possible that these doctrines have reached the point where any state or congressional action that upsets the Executive regarding foreign policy matters is vulnerable to invalidation by the courts. And, as the Armenian Genocide debates demonstrate, the U.S. Executive could be seen by some courts as adopting a "foreign policy position" merely by stating that it opposes certain legislative action and merely because another nation or entity<sup>408</sup> of sufficient strategic import finds particular words offensive.

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mental powers, the claim of extra-constitutional national powers in external relations has received a far more sympathetic judicial response."). *See, e.g.*, *New York v. United States*, 505 U.S. 144 (1992) (refusing to decide if a representative of foreign nation was proper party with whom President could negotiate treaty); *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding validity of executive orders nullifying contract judgments against Islamic Republic of Iran that were part of negotiated agreement for release of hostages seized during 1979 takeover of U.S. Embassy in Teheran); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1965) (leading "act of state" doctrine case in which Court supports Cuba in litigation challenging Castro government's expropriation of property and recognizing federal common law of foreign relations binding on states); *United States v. Pink*, 315 U.S. 203, 229 (1942) (finding a national executive compact with Soviet Union valid and that conflicting state claims were extinguished by the compact); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937) (upholding the same compact as in *United States v. Pink*); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (upholding a congressional delegation of power to the President to ban arms sales to foreign governments). *See also* ANTEAU & RICH, *supra* 392, at 653 ("[c]ontroversies involving presidential and congressional handling of foreign affairs have repeated been deemed 'political questions' not proper for judicial review.").

<sup>407</sup> *See supra* text accompanying notes 370-72, 381-82 (describing and criticizing the *Garamendi* decision).

<sup>408</sup> The reach of decisions like *Movsesian III* and *Garamendi* seem to admit of no reasonable stopping point. At least as we read the majority opinions in those cases, the basis for Executive Branch opposition to legislation need not be concerned with its impact on another nation but need only involve a person, group, or entity that the Executive wishes to placate. For example, if a particular political party or important corporation or individual (e.g., arms makers, energy producers) disliked state legislation, for any reason, the Executive could conclude that national foreign

Relatedly, the nation's courts have faced cases presenting the issue of the degree to which the Executive Branch can seize and hold terrorism suspects and establish separate incarceration and legal systems for them outside the mainstream. Although courts have to a degree resisted broad assertions of executive power, they have nonetheless provided substantial deference.<sup>409</sup> One particularly egregious example is *Arar v. Ashcroft*.<sup>410</sup> Plaintiff, a Canadian citizen, was on a vacation in Tunisia when called back to work by his employer in Canada. Flying home, he sought to change planes at Kennedy Airport in New York, only to be seized for questioning because of alleged ties to terrorist organizations, a charge he denied.<sup>411</sup> He was questioned for two days by representatives of the FBI and the INS without an attorney present before finally being given a cold McDonald's meal to eat. He was told he could voluntarily go to Syria, his country of

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policy militated against the legislation. And, under *Movsesian III*, the Executive need not formally seek invalidation of the law. The mere Executive dislike for the law or its terminology would be enough to invalidate the act of the states as sovereigns. In the Armenian Genocide litigation itself, it appears that *Movsesian III* would have been decided the same way even if the basis of Executive Branch concern was not the Turkish government's views but the views of banks, insurers, or political activists who were thought important to the stability of Turkey and its continued alliance with the United States. This is a very slippery slope that seemingly has no end, save perhaps for the exercise of common sense on a case-by-case basis. But in our view this type of ad hoc jurisprudence should have upheld the extended statute of limitations which in and of itself had only the most modest and indirect impact on U.S. foreign policy and did nothing tangible against the Turkish government.

<sup>409</sup> See CHEMERINSKY, *supra* note 383, at § 4.6 (reviewing the development of doctrine generally and examining in particular judicial treatment of “[p]residential power and the war on terrorism” (§ 4.6.4) with particular focus on *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (5-4 decision holding that national executive may hold American citizen apprehended in foreign country as enemy combatant, with congressional authorization a key factor in upholding such action: government must accord due process to person so held with notice of charges, “meaningful factual hearing,” right to respond, and right to counsel), *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (5-4 decision holding that federal court in New York lacked jurisdiction to hear habeas corpus challenge to detention of American citizen seized in Chicago on suspicion of planning terrorist act after being transferred to military prison in South Carolina by way of New York), and *Rasul v. Bush*, 542 U.S. 466 (2004) (6-3 decision holding that federal court may hear habeas petition by persons held at Guantanamo, and cases concerning authority of military tribunals).

<sup>410</sup> *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009).

<sup>411</sup> *Id.* at 565 (Arar did admit to knowing at least one individual with suspected terrorist ties but “continued to deny terrorist affiliations.”).

birth (he had emigrated to Canada years before). He refused, citing fear of torture, and asked to go home to Canada or to be sent to Switzerland if the U.S. would not let him return home.

The INS initiated removal proceedings. Arar was finally permitted a phone call and through his mother obtained a lawyer, who was given limited access to Arar with the U.S. giving “false information about Arar’s whereabouts.”<sup>412</sup> After a week of being held in this Kafkaesque<sup>413</sup> limbo, Arar was

taken to New Jersey, whence he flew in a small jet to Washington, D.C., and then to Amman, Jordan. When he arrived in Amman on Oct. 9 [nearly two weeks after he was first detained at Kennedy Airport] he was handed over to Jordanian authorities who treated him roughly and then delivered him to the custody of Syrian officials, who detained him at a Syrian Military Intelligence facility. Arar was in Syria for a year, the first ten months in an underground cell six feet by three, and seven feet high. He was interrogated for twelve days on his arrival in Syria, and in that period

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<sup>412</sup> *Id.* at 565-66.

<sup>413</sup> We realize the term Kafkaesque is used so frequently that it risks cliché status. As of January 24, 2011, “Kafkaesque” or “Kafka-esque” was found in 606 U.S. law review and journal articles in the LexisNexis database while there were 1,350 articles with references to Kafka. The term and most of the references, at least in legal literature, pay homage to FRANZ KAFKA, *THE TRIAL* (1925), in which the protagonist is arrested and processed without ever being informed of the charges against him, nor having a fair opportunity to air the issues, defend himself, and resolve the matter on the basis of evidence. As a result, a proceeding that mocks values of truth, the rule of law, justice, and due process is often termed Kafkaesque.

The facts of *Arar*, as reflected in the Second Circuit opinion, clearly qualify as Kafkaesque. And throughout all of his legal travails, Mr. Arar has largely simply been trying to achieve a day in court on the substantive merits of his claim that U.S. officials illegally sent him abroad to be tortured in violation of his rights. All of this is complicated, of course, by recent U.S. Supreme Court jurisprudence over the sufficiency of pleading. In *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court gave judges significantly more authority to dismiss claims pursuant to FED. R. CIV. P. 12(b)(6) where the court found allegations of conspiracy or other legality insufficiently “plausible.” The decisions have been widely criticized in the academic community and there have been some congressional efforts to overturn them. See, Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L. J. (2010); A. Benjamin Spencer, *Plausible Pleadings*, 49 B.C.L. REV. 431 (2008).

was beaten on his palms, hips, and lower back with a two-inch-thick electric cable and with bare hands. Arar alleges that United States officials conspired to send him to Syria for the purpose of interrogation under torture, and directed the interrogations from abroad by providing Syria with Arar's dossier, dictating questions for the Syrians to ask him, and receiving intelligence learned from the interviews.<sup>414</sup>

Eventually, Arar was released and returned to Canada,<sup>415</sup> and in 2004 filed suit seeking damages from U.S. officials for injuries suffered as

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<sup>414</sup> 585 F.3d at 566. *See id.* at 582 (Sack, J., dissenting) (providing more extensive recitation of facts illustrating considerable indignity and injury inflicted on Arar).

<sup>415</sup> In another ugly aspect of American foreign policy in the wake of 9/11, the U.S. appears to have routinely lied to, and refused to cooperate with, its ally, Canada, regarding its treatment of a Canadian citizen:

On October 20, 2002 [24 days after Arar's initial detention], Canadian Embassy officials inquired of Syria as to Arar's whereabouts. The next day, Syria confirmed to Canada that Arar was in its custody; that same day, interrogation ceased. Arar remained in Syria, however, receiving visits from Canadian consular officials. On August 14, 2003, Arar defied his captors by telling the Canadians that he had been tortured and was confined to a small underground cell. Five days later, after signing a confession that he had trained as a terrorist in Afghanistan, Arar was moved to various locations. On October 5, 2003, Arar was released to the custody of a Canadian embassy official in Damascus, and was flown to Ottawa the next day.

*Id.* at 566-67.

Lest some readers conclude that Arar was a terrorist who got what he deserved, we hasten to add that the "confession" signed by Arar was almost certainly false and executed only as an expedient means of obtaining release. In view of Arar's regular contact with Canada as a citizen-resident with a responsible "day job" as a computer software engineer in good standing and earning a good income, it appears logistically impossible that he ever could have snuck off to Afghanistan long enough to receive even minimal terrorist training. *See* 585 F.3d at 587 (Sack, J., dissenting) ("To lessen his exposure to the torture, Arar falsely confessed, among other things, to having trained with terrorists in Afghanistan, even though he had never been to Afghanistan and had never been involved in terrorist activity."); COMM'N OF INQUIRY INTO THE ACTIONS OF CANADIAN OFFICIALS IN RELATION TO MAHER ARAR, REPORT OF THE EVENTS RELATING TO MAHER ARAR: ANALYSIS AND RECOMMENDATIONS 190 (2006) (concluding that Arar's confession was the result of torture). *See also* DAVID COLE & JULES LOBEL, LESS SAFE, LESS

a result of his detention and interrogation in the U.S. and Syria, invoking the Torture Victim Protection Act ["TVPA"]<sup>416</sup> and the Fifth Amendment (via a *Bivens* action),<sup>417</sup> as well as a declaratory judgment that this rights were violated. The defendants sought dismissal on personal jurisdiction grounds (an argument rejected by the court), and based on the argument that Arar's allegations of conspiracy were insufficiently compelling to make out a claim under TVPA or the Constitution.

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FREE: WHY AMERICA IS LOSING THE WAR ON TERROR 23-25 (2007) (describing Arar's ordeal); David Cole, *He Was Tortured, But He Can't Sue*, NEW YORK REVIEW OF BOOKS BLOG, June 15, 2010, <http://www.nybooks.com/blogs/nyrblog/2010/jun/15/he-was-tortured-but-cant-sue/> (discussing U.S. Supreme Court's decision not to hear Arar's appeal).

The situation is perhaps made more sympathetic to the U.S. defendants because it can be argued that all of this was Canada's fault. At least that seems to be part of the majority's reasoning. "[I]t was, after all, Canadian authorities who identified Arar as a terrorist (or did something that led their government to apologize publicly to Arar and pay him \$10 million)." 585 F.3d at 580. Perhaps. But this hardly required the U.S. to treat Arar like a bag of potatoes, notwithstanding that that Second Circuit majority, *id.* at 580-81, raises a number of supposedly intractable dilemmas faced by the U.S. government officials, suggesting that if Arar was not renditioned to Jordan/Syria, the U.S. might be forced to put a potentially dangerous man on an airplane of innocents bound for Canada. We find the majority's view a little preposterous. If there was good authority to arrest Arar, he should have been arrested. If the situation was uncertain, its exigencies may have supported holding Arar without charges longer than would ordinarily be permissible. But we see no justification for holding Arar incommunicado, without counsel, without communication, and without a chance to substantively address the issue of whether he was or was not a terrorist.

More important, even if Arar was a terrorist, he was in our view entitled to a basic quantum of due process and decency during the arrest and interrogation process. He should have never been arrested absent probable cause, been given notice of the basic nature of charges against him, had access to an attorney and the outside world, an opportunity to defend himself in front of a neutral magistrate on both procedural and substantive matters related to his case. And, to state what we wish were an uncontroversial position, he should never have been tortured.

<sup>416</sup> 28 U.S.C. §1350 et seq. (creating cause of action for damages by torture victims against any "individual who, under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture.").

<sup>417</sup> See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S.388 (1971) (permitting implied private right of action under Constitution against federal officers alleged to have violated a citizen's constitutional rights in case involving unlawful warrantless search resulting in arrest; Fourth Amendment provides basis for violation).

Although the court never formally invoked the foreign affairs doctrine in the manner of *Movsesian* or *Garmendi*, the same type of undue deference to federal officials and executive-driven policy decisions (regardless of their correspondence with prevailing legal norms) animates the *Arar* decision.

Cases in the context of extraordinary rendition are very likely to present serious questions relating to private diplomatic assurances from foreign countries received by federal officials, and this feature of such claims opens the door to graymail . . .

Should we decide to extend *Bivens* into the extraordinary rendition context, resolution of these actions will require us to determine whether any such assurances were received from the country of rendition and whether the relevant defendants relied upon them in good faith in removing the alien at issue.

Any analysis of these questions would necessarily involve us in an inquiry into the work of foreign governments and several federal agencies, the nature of certain classified information, and the extent of secret diplomatic relationships. An investigation into the existence and content of such assurances would potentially *embarrass our government* through inadvertent or deliberate disclosure of information harmful to our own and other states.<sup>418</sup>

Bypassing completely the issue of whether it is permissible for the U.S. to kidnap a foreign national passing through the U.S. and send him to an unwanted destination, the majority worries that providing victims of such conduct with a right to litigate a cause of action for damages will unduly “embarrass” the U.S. and foreign governments. Our view is that

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<sup>418</sup> 585 F.3d at 578 (footnote omitted) (emphasis added). As noted above, *Arar* is doctrinally different than *Movsesian* in that *Arar* did not address alleged state law conflict with the federal executive’s power over foreign affairs but instead focused on the availability of a *Bivens* action “in the context of extraordinary rendition,” finding that Mr. Arar had no standing and that there could be no such claim for “detention and torture” in Syria in the absence of congressional authorization as this would constitute too great a judicial impingement on federal executive authority. *See id.* at 563-65. Notwithstanding these doctrinal distinctions, we find *Arar* of a piece with the unfortunate *Movsesian I* and *Movsesian III* decisions in that both exhibit undue deference to the federal executive merely because an otherwise seemingly justiciable case involves matter arguably touching on foreign policy.

simply reading about the *Arar* episode embarrasses the U.S. (and Jordan and Syria) in profound ways unlikely to be expanded very much by litigation. On the contrary, providing a full airing of Arar's claim and damages if violations are proven would do much to rehabilitate the U.S., notwithstanding that the government continues to fight hard to prevent Arar and others from having the full adjudication promised by the American judicial construct.

*Arar* is marked not only by the undue deference of the majority (Judge Denis Jacobs joined by Judges Joseph McLaughlin, Jose Cabranes, Reena Raggi, Richard Wesley, Peter Hall and Debra Livingston) but also by strong dissents by Judges Robert Sack, Rosemary Pooler, Barrington Parker and Guido Calabresi.<sup>419</sup> The dissents are marked by being highly cognizant of executive prerogatives and the realities of foreign policy and terrorism. The dissenters are hardly seeking a radical change in doctrine respecting executive authority and cannot credibly be viewed as undermining the national executive or the war on terror.<sup>420</sup> But neither are the dissenters willing to abdicate or unduly constrict the judicial function in hearing civil claims

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<sup>419</sup> The en banc *Arar* decision was unusual in that it included the participation of four judges on senior status even though senior judges normally do not participate in en banc decisions. Judge McLaughlin, as a member of the three-judge panel that first heard the case, was eligible to participate in the en banc hearing. Judges Calabresi, Parker, and Sack all assumed senior status during the course of the en banc proceedings and were therefore eligible. See 28 U.S.C. §§ 46(c)(2) & 46(c)(2). Judge Sonia Sotomayor became Justice Sonia Sotomayor on August 8, 2009 and therefore was no longer part of the Second Circuit at the time of the November 2, 2009 *Arar* opinion. Judge Robert Katzman did not participate. See 585 F.3d at 562.

The personnel aspects of assembling the Second Circuit en banc also suggest that decisions like *Arar* are perhaps even more likely in the future. Of the non-senior judges ordinarily available for en banc review, only Judge Pooler dissented, with six non-senior judges in the majority and Judge Katzman's views unknown. Although *Arar* may be an aberration, it holds the prospect that the demographic trend of the federal bench is one with younger/newer judges showing more deference to the Executive Branch than did their predecessors. In any event, plaintiffs similar to Mr. Arar are likely to get even less support from this court in future cases.

<sup>420</sup> See 585 F.3d at 582, 605-10 (Sack, J., dissenting) (noting that national government interest may be protected by state secrets privilege where government can demonstrate applicability of privilege later in litigation); *id.* at 610, 612 (Parker, J., dissenting) ("active management of foreign policy and national security is entrusted to the executive and legislative branches"); *id.* at 626-27 (Pooler, J., dissenting) (acknowledging precedent granting more leeway to executive branch in matters of war and foreign policy); *id.* at 630, 634-39 (Calabresi, J., dissenting) (suggesting

for wrongdoing and injury.<sup>421</sup> Putting the larger issue well, Judge Calabresi viewed the majority decision as a jurisprudential disaster.

[B]ecause I believe that when the history of this distinguished court is written, today's majority decision will be viewed with dismay, I add a few words of my own ' . . . more in sorrow than in anger.' Hamlet, act 1, sc. 2.

[The other dissenters] have already provided ample reason to regret the path the majority has chosen. In its utter subservience to the executive branch, its distortion of *Bivens* doctrine, its unrealistic pleading standards, its misunderstanding of the TVPA and of § 1983, as well as in its persistent choice of broad dicta where narrow analysis would have sufficed, the majority opinion goes seriously astray. It does so, moreover, with the result that a person – whom we must assume (a) was to totally innocent and (b) was made to suffer excruciatingly (c) through the misguided deeds of individuals acting under color of federal law – is effectively left without a U.S. remedy. . . .

All this, as the other dissenters have powerfully demonstrated, is surely bad enough. I write to discuss one last failing, an unsoundness that, although it may not be the most significant to Maher Arar himself, is of signal impor-

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that legitimate government concerns in case can be addressed by invocation of state secrets privilege during course of further proceedings).

<sup>421</sup> See *id.* at 582-83 (Sack, J., dissenting) (majority reaches conclusion that Arar has no *Bivens* claim “by artificially dividing the complaint into a domestic claim that does not involve torture and a foreign claim that does.”) and *id.* at 591-92 (criticizing majority for requiring Arar to name individual perpetrators, pointing out that in *Bivens* itself, the defendants were “Six Unknown Named Agents of Fed. Bureau of Narcotics”); *id.* at 610, 612 (Parker, J., dissenting) (enhanced presidential role in foreign affairs “does not mean that executive and legislative officials are left to adhere to constitutional boundaries of their own accord, without external restraint. That is the job of the courts.”) and at 613 (“The Supreme Court has repeatedly made clear that the separation of powers does not prevent the judiciary from ruling on matters affecting national security, and that the courts are competent to undertake this task.”); *id.* at 623, 625 (Pooler, J., dissenting) (“Were the majority’s dicta the rule, there would be no explanation for the Supreme Court’s decision in *Bivens* in the first place.”); *id.* at 630, 633 (Calabresi, J., dissenting) (“The national security concerns that the majority relies upon in its special factors analysis are precisely those that the Supreme Court said must be avoided [in *Christopher v. Harbury*, 536 U.S. 402 (2002)].”).



tance to us as federal judges: the majority's unwavering willfulness. It has engaged in what properly can be described as extraordinary judicial activism. It has violated long-standing canons of restraint that properly must guide courts when they face complex and searing questions that involve potentially fundamental constitutional rights. It has reached out to decide an issue that should not have been resolved at this stage of Arar's case. Moreover, in doing this, the court has justified its holding with side comments (as to other fields of law such as torts) that are both sweeping and wrong. That the majority—made up of colleagues I greatly respect—has done all this with the best of intentions, and in the belief that its holding is necessary in a time of crisis, I do not doubt. But this does not alter my conviction that in calmer times, wise people will ask themselves: how could such able and worthy judges have done that?<sup>422</sup>

## 2. The Essential Role of Courts in Adjudicating Without Regard to Political Pressure

Cases like *Movsesian* and *Garamendi* lack the immediate emotional punch of *Arar*. The atrocities of the Holocaust, and particularly the Armenian Genocide, have faded considerably from historical remedy.<sup>423</sup> The cruelty inflicted upon Mr. Arar is closer in time, raw, and has been largely memorialized, albeit with fictional license, in cinema.<sup>424</sup> But these decisions and others of their type are united by a disturbing judicial tendency to be so

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<sup>422</sup> 585 F.3d at 630 (footnote omitted). Judge Calabresi defined “judicial activism” in “its literal sense, to mean the unnecessary reaching out to decide issues that need not be resolved, the violation of what Chief Justice Roberts called ‘the cardinal principle of judicial restraint – if it is not necessary to decide more, it is necessary not to decide more.’” *PDK Labs., Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).” *See id.* at 630, n.1. Whether Chief Justice Roberts continues to practice what he preached as Judge Roberts remains subject to reasonable debate. *See* Peter Baker, *Obama v. Roberts*, N.Y. TIMES, Apr. 18, 2010, Week in Review p. 1 (discussing view that as Chief Justice Roberts has spearheaded judicial activism in favor of politically conservative policy preferences).

<sup>423</sup> In addition, *Garamendi* is sanitized to a degree by its focus on regulation and disclosure, while *Movsesian* is about contract rights rather than a direct attack on the perpetrators of the Armenian Genocide. *See supra* text accompanying notes 209, 256 (describing case).

<sup>424</sup> The film *RENDITION* (New Line Cinema 2007) largely presents the *Arar* situation but makes the victim an American citizen aided by his wife fruitlessly seeking

skittish of interfering with the executive or doing anything that might embarrass the national government or its allies (no matter how stained their human rights records) that it will not perform the core function of courts—the adjudication of tort, contract, and statutory claims.<sup>425</sup>

To be sure, trials may have a political component and the evidence adduced at a trial may lead to judgments with significant social impact or may spur changes in the larger body politic. But this is not a reason to avoid trials. Rather, it is a compelling brief for having judges do their duty and adjudicate even uncomfortable and difficult cases. To cite an obvious example, cases involving slaves hastened the abolition of the practice in both England<sup>426</sup> and America.<sup>427</sup> This was not because of a judicial activism of

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help from elected officials and introduces a fictitious (so far as we know) government official who out of pangs of conscience assists the victim in escaping.

<sup>425</sup> See 585 F.3d at 638 (Calabresi, J., dissenting) (if extraordinary renditions permissible, it must be acknowledged that mistakes will be made in application. “[A] civilized polity, when it errs, admits it and seeks to give redress. In some countries, this occurs through a royal commission. In the United States, for better or worse, courts are, almost universally, involved.”).

[Arar’s] complaint offers an exceptionally compelling basis for relief, one that the majority repeatedly sidesteps: The charge that government officials actively obstructed Arar’s access to the courts, violating core procedural due process rights. Any court should be deeply disturbed by such allegations, especially those backed by the factual detail presented here.

*Id.* at 622 (Parker, J., dissenting).

<sup>426</sup> See ADAM HOCHSCHILD, *BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE’S SLAVES* 79-82 (2005) (describing the *Zong* case that led to public furor over harshness of slavery and provided major support to abolitionist movement in England). Like *Arar*, the situation in the *Zong* case made it to the cinema. The film *AMAZING GRACE* (Bristol Bay Productions 2006) about British MP William Wilberforce, touches on the case as part of the mix of factors leading to Wilberforce’s successful political crusade against slavery. For a detailed examination of the *Zong* case, see James Walvin, *THE ZONG: A MASSACRE, THE LAW & THE END OF SLAVERY* (2011); Geoffrey Clark, *The Slave’s Appeal: Insurance and the Rise of Commercial Property* in *THE APPEAL OF INSURANCE* 52 (2010) (Geoffrey Clark, Gregory Anderson, Christian Thomann & J. Matthias Graf von der Schulenburg, eds.); IAN BAUCOM, *SPECTERS OF THE ATLANTIC: FINANCE CAPITAL, SLAVERY, AND THE PHILOSOPHY OF HISTORY* (2005).

<sup>427</sup> See *United States v. The Amistad*, 40 U.S. (15 Pet.) 518 (1841) (providing that escaped slaves arriving in U.S. need not be repatriated to slave masters or prospective owners), celebrated in the Steven Spielberg film *AMISTAD* (DreamWorks SKG 1997), provided substantial ammunition for American abolitionists.

expanding the law or deciding more than necessary to resolve a dispute. Courts in these cases were instead addressing the disputes before them on the merits without undue regard for the consequences that might ensure. This approach fits admirably within the legal profession's classic view of its role.<sup>428</sup>

When courts are too skittish about addressing such matters, the judicial function itself is seriously undermined and society itself is injured, to say nothing of the individual litigants. Although judges have more obvious responsibilities to the system than do advocates in an adversarial model of litigation, the systemic premise in both instances is that members of the legal profession will perform their tasks without the paralysis of undue second-guessing as to the consequences,<sup>429</sup> particularly whether actions will be unpopular or might impede career advancement.<sup>430</sup>

Faced with this evolving expansion of executive power and constriction of adjudicatory power, courts (either alone or in collaboration with

<sup>428</sup> For example, an oft-cited example of lawyer courage is Lord Henry Brougham's statement, while defending Queen Caroline on charges of adultery, that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. [In serving the client, the lawyer] must not regard the alarm, the torments, the destruction which he may bring upon others [H]e must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion." See TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821); STEPHEN GILLERS, REGULATION OF LAWYERS 23-24 (8th ed. 2009) (reproducing quote). The express suggestion is that lawyers (and by implication, judges) should not pull punches in the discharge of their duties out of personal or political concerns. Implicitly, the Brougham dictum is a little tarnished in that it is now widely viewed as "graymail" of a sort designed to back the Crown off the prosecution for fear that some unflattering information about the King's personal habits might surface. See GILLERS, *supra*, at 24 (suggesting strategy worked). See also JANE ROBBINS, THE TRIAL OF QUEEN CAROLINE (2006).

<sup>429</sup> To be sure, courts deciding cases must give some consideration to the likely operation of their precedents in practice. A court should legitimately consider whether a doctrine is confusing, leads to excessive caution or recklessness, is costly to apply, over-deters, and the like. But this consideration is quite different from worrying about whether another branch of government will like the decision.

<sup>430</sup> At the risk of being unduly cynical, the proposition cannot be discounted. Many federal trial judges aspire to become appellate judges and many appellate judges aspire (however unrealistically) to the Supreme Court. Any such promotions require the support of the Executive Branch. What begins as concern over unduly intruding on the function of another branch can become a self-serving desire to make friends or avoid making enemies in that branch in order to increase the odds of promotion.

the other federal branches and the states) may need to rethink this entire area of constitutional law. Two key concerns arise: federalism and separation of powers. Federalism is the shorthand term for the traditional American view that power is largely reserved to the states for governing most of society's affairs absent specific constitutional authorization for national government activity. Separation of powers refers to the concept that none of the three branches of the national government (executive, legislative, and judicial) may usurp power outside its sphere and that there are imbedded in the Constitution checks and balances that impede the ability of any one branch to gain undue dominance.<sup>431</sup> If judge-made doctrines of deference to the executive in foreign affairs, war, terrorism, or other matters become too broadly and aggressively applied, both federalism and separation of powers (and perhaps other constitutional provisions)<sup>432</sup> are violated.

*Movsesian I* and *Movsesian III*, like *Garamendi*, were setbacks for the states in the ongoing federalism jousting that pervades much constitutional law. And to an extent, it is surprising in that to a large degree, state autonomy has enjoyed relatively wide support in the U.S. Supreme Court during the past half-century.<sup>433</sup> But so, too, has executive power, in the con-

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<sup>431</sup> See NOWAK & ROTUNDA, *supra* note 381, chs. 3-5, 8-9 (overview of federal power in relation to states), ch. 7 (overview of separation of powers concept and presidential and congressional relations); BARRON & DIENES, *supra* note 390, ch. 3 (discussing federalism); ch. 4 (discussing separation of powers); CHEMERSINSKY, *supra* note 381, 233-39, 312-26 (outlining federalism and separation of powers concepts). As a practical matter, of course, the national government has great power, particularly since the post-New Deal expansion of the scope of the Commerce, Due Process, and Equal Protection Clauses (which increased the ability of courts to curtail state action violative of those provisions). The national government's greater revenue raising abilities also enable it to achieve state cooperation with economic incentives even where it may not directly regulate.

<sup>432</sup> For example, the Executive Branch policy of treating the words "Armenian Genocide" as if it were a timid Harry Potter character mentioning "Voldemort" (see J. K. ROWLING, *supra* note 293) could violate the First Amendment if it rose to the level of a prohibition. For example, if the President issued an executive order barring use of the term, this would almost certainly violate the First Amendment's guarantee of free expression. But in *Movsesian I*, the California legislature's actions extending the statute of limitations was invalidated because it contained the term. See *Movsesian I*, 578 F.3d 1052, 1057-59 (9th Cir. 2009). In effect, the California legislature, the Governor (who signed the legislation), and the state itself were punished for exercising their presumed rights to describe matters as they saw them.

<sup>433</sup> See NOWAK & ROTUNDA, *supra* note 418, § 2.11 (Supreme Court decisions invoking Eleventh Amendment provide significant immunity from suit in federal

texts of both federalism and separation of powers.<sup>434</sup> One explanation of *Garamendi* is that in a heavyweight battle between states rights and executive power, the executive prevailed. Of course, defenders of *Garamendi*, *Movsesian I*, *Movsesian III*, and like cases argue that they represent not broad deference to the executive in all matters but only regarding issues affecting foreign policy. But under *Garamendi*, *Movsesian*, and their precedential allies, the concept of foreign policy has greatly expanded to include traditional core state matters such as regulating insurance,<sup>435</sup> private contracts, litigation, and dispute resolution.

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court; § 2.14 (abstention doctrines used to avoid federal court adjudication of state law or interference with state proceedings. *See, e.g.*, *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) (Congress may not employ Commerce Clause to create private rights of action and abrogate state immunity conferred by Eleventh Amendment, regardless of whether relief is monetary or injunctive); *Fla. Prepaid Post-secondary Ed. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999) (striking down congressional Patent Remedy Act that would permit infringement suit against states as violative of Eleventh Amendment immunity); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (Eleventh Amendment bars enforcement of federal disability rights statutes against state agency in federal court)).

<sup>434</sup> *See* NOWAK & ROTUNDA, *supra* note 383, ch. 7 (discussing broad power generally enjoyed by President); CHEMERINSKY, *supra* note 383, ch. 4 (same). *See, e.g.*, *Cheney v. U.S. Dist. Ct. for the Dist. of Columbia*, 542 U.S. 367, 391-92 (2004) (taking a broad, sympathetic view of executive privilege and overturning and remanding decision that would have required Vice-President to disclose interaction with energy industry in policymaking); *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982) (finding the President's "unique position in the constitutional scheme" and separation of powers doctrine create substantial immunity protections for President); *Schick v. Reed*, 419 U.S. 256 (1974) (broadly construing presidential pardon power). *But see* *Clinton v. Jones*, 520 U.S. 681 (1997) (finding the President subject to deposition requirement in pending civil damages litigation); *United States v. Nixon*, 418 U.S. 683 (1974) (recognizing the existence of executive privilege for the President but requiring that it yield to demonstrated needs of valid adjudication by the judicial branch).

<sup>435</sup> The McCarran-Ferguson Act, 15 U.S.C. § 1011, provides that "the continued regulation and taxation by the several States of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." The Act was passed in response to *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), which overturned well-established precedent removing insurance from the reach of federal commerce power. By enacting McCarran-Ferguson, Congress restored this status quo in which insurance was to be primarily state regulated, including a general exemption from federal antitrust law absent boycott, coercion or intimidation by insurers acting jointly in restraint of

These cases also arguably run afoul of separation of powers concepts in that they excessively privilege the executive over the legislature in matters that go beyond the common understanding of foreign policy and certainly are far afield from the war power and protective mandate of the executive that spurred creation of doctrines deferring to the President in matters of this type. Again, *Garamendi* is problematic while *Movsesian I* and *Movsesian III* are appalling. Recall that in *Movsesian I*, a large part of the “evidence” of the national government position opposing any legislation recognizing the Armenian Genocide was based on presidential opposition to proposed congressional resolutions that would use the term and criticize Turkey.<sup>436</sup> Congress was never considering imposing any concrete or tangible action against Turkey.

In the face of presidential concern over formal recognition of the Armenian Genocide, Congress backed down. But it remains clear that there was (and presumably still is) substantial support in Congress for addressing the Genocide and seeking recognition and rectification to the extent possible. Although these congressional sentiments never became positive law, neither did the executive’s misgivings. Under these circumstances, a reasonable observer employing a sports metaphor might deem this a “no harm; no foul” situation in which no blood was drawn. Unless the matter at issue is one clearly sounding in direct diplomacy, war making, or protection of the national population, the wiser judicial course would appear to be one that gave little weight to the executive’s opinions—or at least no more than those of Congress, particularly where the opinions were “informal,” such as expressed in letters rather than executive orders or agreements with foreign entities. By treating presidential and cabinet officer correspondence as the equivalent of national “law” regarding the Armenian Genocide and related matters, *Movsesian I*, *Movsesian III*, and the Judicial Branch too greatly elevates the Executive Branch over the Legislative Branch.<sup>437</sup>

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trade. See *United States Dept. of Treas. v. Fabe*, 598 U.S. 491 (1993); JERRY & RICHMOND, *supra* note 346, at § 21; STEMPEL ON INSURANCE CONTRACTS, *supra* note 195, § 2.03[b].

<sup>436</sup> See *Movsesian I*, 578 F.3d 1052, 1057-58 (9th Cir. 2009). See also *supra* text accompanying notes 234, 238-44, 246-59 (discussing *Movsesian I*).

<sup>437</sup> Even if the President had issued a formal executive order or proclamation attempting to bar a congressional resolution on the Armenian Genocide, it should not have the force of law. See Ramsey, *supra* note 266, at 39 (noting that even Alexander Hamilton, the founding father most supportive of a strong presidency, “did not propose . . . giving the executive the power to change law by decree.”).

3. Determining the Degree of Deference Due

Despite its age, Justice Robert Jackson's famous concurrence in *Youngstown Sheet & Tube v. Sawyer*,<sup>438</sup> remains instructive in this area. The Court in *Youngstown* invalidated President Harry Truman's takeover of steel mills during the Korean War, ruling that despite the exigencies of war, that this affirmative action (taken by formal executive order, not cajoling or disapproving correspondence), exceeded the President's power.<sup>439</sup> Attempting to establish a matrix for assessing the dispute and others like it, Justice Jackson wrote

When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate<sup>440</sup>

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.<sup>441</sup>

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from

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<sup>438</sup> *Youngstown*, 343 U.S. 579, 634-60 (1952).

<sup>439</sup> See NOWAK & ROTUNDA, *supra* note 383, at § 6. 11(b)-(c) (describing *Youngstown* decision and opinions in the case); CHEMERINSKY, *supra* note 383, at 38-42 (describing *Youngstown*).

<sup>440</sup> *Youngstown*, 343 U.S. at 634, 635-36 (Jackson, J. concurring) ("In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If this act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.").

<sup>441</sup> *Id.* at 635, 635-37 (Jackson, J., concurring) (footnote omitted).

acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>442</sup>

Applying a similar approach to the application of the foreign affairs doctrine to state laws alleged to run afoul of national foreign policy interests, courts should consider the degree of legislative-executive harmony as well as the clarity, formalism, and tangibility of legislative and executive conduct when assessing what constitutes the “national” position on an issue. For example, regarding the Armenian Genocide, the Executive clearly would prefer to accommodate the sensitivities of the Turkish government—but Congress apparently would prefer to call out Turkey for its role in the atrocity, but cannot summon the will to openly battle the President on this issue. But neither is the President taking a strong or high profile position adverse to Congress.

At the very least, the Executive acts without congressional support, albeit with some arguable acquiescence, when it attempts to undermine state law merely because it uses words disliked by a purported national ally. But in view of continued congressional consideration of Armenian Genocide resolutions and continued criticism of the White House position of acknowledging no evil on the issue, one could argue that the Executive is acting against the implied will of Congress and that its power should be limited to the constitutional minimum even where foreign affairs issues are concerned. Applying Justice Jackson’s template, the most likely classification is that on the issue of litigation related to the Armenian Genocide, the Executive at best acts in the “twilight” area where the “imperatives of events” and the practical problems of U.S. foreign policy must be weighed in relation to traditional state prerogatives regarding civil litigation, contract rights, and the like.

Beyond pandering to Turkish aversion to the word genocide, it is not completely clear what the U.S. position is on the issue, and there exists little in the way of formal or tangible declarations about the Genocide or related issues. Certainly, neither the President nor Congress has stated it is opposed to honoring insurance policies, bank accounts, or other financial instruments under which the Genocide victims or their heirs and assigns may hold rights. Neither has Congress or the President ever approved the Genocide or suggested that merely letting bygones be bygones is a fair resolution of an episode that continues to torment victims and oppressors alike. Against this backdrop, the errors of *Movsesian I* and *Movsesian III* are

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<sup>442</sup> *Id.* at 637-38 (Jackson, J., concurring) (footnote omitted).



clear, while *Garamendi* is defensible, at least in terms of the degree of concrete involvement by the national executive.

Weighed against these factors of clarity, tangibility, unity, and firmness of national position should be the rights of the states and the degree of conflict actually presented by the state law or action in question. The Jackson concurrence in *Youngstown* dealt with separation of powers. California's extension of the statute of limitations for Armenian insurance claims adds federalism to the mix—and in doing so weakens the case for deference to the federal executive when the national executive opposes a duly enacted law of the nation's largest state. Further, as discussed above, in *Movsesian* the actual federal-state conflict was minimal and largely based simply on the notion of Turkish offense should an American state use the dreaded G-word when referring to Turkey's past actions against Armenians. Although the state regulation struck down in *Garamendi* was more intrusive and more in tension with national actions, it still was not much of a conflict, a factor vindicating the Ginsburg dissent.

Further, in both cases, the state action in question was not some frolic or detour into the diplomatic arena but instead was simple regulation of private law litigation (*Movsesian*) and management of the historically state-based regulation of a highly regulated industry (*Garamendi*). If California had refused to respect diplomatic immunity for the Turkish ambassador or consulate or had levied a genocide tax on Turkish visitors to the state, the situation would of course be different. But in both *Garamendi* and even more so in *Movsesian*, California chose a path that attempted to, and in our view did, honor the reasonable parameters of the foreign affairs doctrine. To the extent that the foreign affairs doctrine and other judicially created attempts to accommodate the national executive prohibit such actions, they raise severe federalism concerns.

#### 4. Questioning the Need for Judicial Deference to the National Executive

Although it is well beyond the scope of this article, the courts may also wish to rethink entirely the conceptual underpinnings of the doctrines of deference to the executive. One underpinning is the view that the nation must speak with one voice. *Garamendi* and *Movsesian* arguably achieve this—but at the high cost of giving insufficient attention to separation of powers, federalism, contract rights, fiduciary duty, and citizen access to the courts. A second underpinning is the view that in matters of foreign policy the executive is best positioned to consistently make better decisions (at least better than Congress or the states) regarding national welfare in the world arena. But the evidence of the past forty years provides little empirical support for this proposition.

The Vietnam War was largely unsuccessful, consuming tens of thousands of lives, billions of dollars, and ultimately failing to prevent South Vietnam from being absorbed into a communist North Vietnam.<sup>443</sup> The Afghanistan invasion succeeded in rooting out al Qaeda elements using that country as a base, but the subsequent decade of occupation has been costly in dollars and lives and appears primarily to have succeeded in propping up a corrupt government widely viewed as an ineffectual U.S. puppet.<sup>444</sup> The Iraq invasion of 2003 proved totally erroneous and unnecessary according to the rationale advanced by its proponents<sup>445</sup> as well as raising

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<sup>443</sup> See GEORGE C. HERRING, *AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975* 346-48 (4th ed. 2002) (1979); ROBERT S. MCNAMARA ET AL., *ARGUMENT WITHOUT END: IN SEARCH OF ANSWERS TO THE VIETNAM TRAGEDY I* (1999); STANLEY KARNOW, *VIETNAM: A HISTORY* 9-11 (2d ed. 1997) (1984). The Vietnam War was a sufficiently scarring experience for America that it continues to be a substantial source of literature, almost all of it unflattering in the manner of portrayal of U.S. involvement the experience of soldiers and society generally. See, e.g., Sebastian Junger & Danielle Trussoni, *The Vietnam Wars*, N.Y. TIMES BOOK REVIEW (Apr. 4, 2010) (reviewing, respectively, KARL MARLANTES, *MATTERHORN: A NOVEL OF THE VIETNAM WAR* (2010) and TAJANA SOLI, *THE LOTUS EATERS* (2010)).

<sup>444</sup> See AHMED RASHID, *DESCENT INTO CHAOS: THE UNITED STATES AND THE FAILURE OF NATION BUILDING IN PAKISTAN, AFGHANISTAN, AND CENTRAL ASIA* xxxviii, 156 (2008); Laura King, *Crucial Year: Beginning for Afghanistan*, L.A. TIMES, Jan. 1, 2011, at A1 (describing continuing difficulties in the Afghanistan war); Robert D. Blackwill, *Plan B in Afghanistan*, 90 FOREIGN AFFAIRS 42 (2011) ("Current U.S. policy toward Afghanistan involves spending scores of billions of dollars and suffering several hundred allied deaths annually to prevent the Afghan Taliban from controlling the Afghan Pashtun homeland — with little end in sight."); U.S. Department of Defense, *Casualty Status*, [www.defense.gov/news/casualty.pdf](http://www.defense.gov/news/casualty.pdf) (1,445 casualties in and around Afghanistan as of Jan. 10, 2011, 10 a. m. EST).

<sup>445</sup> See, e.g., RUSS HOYLE, *GOING TO WAR: HOW MISINFORMATION, DISINFORMATION, AND ARROGANCE LED AMERICA INTO IRAQ* (2008); FRANK RICH, *THE GREATEST STORY EVER SOLD* (2005); James P. Pfiffner, *Did President Bush Mislead the Country in His Arguments for War with Iraq?*, in *INTELLIGENCE AND NATIONAL SECURITY POLICYMAKING IN IRAQ: BRITISH AND AMERICAN PERSPECTIVES* 59-84 (James P. Pfiffner & Mark Phythian eds., 2008) (assessing misleading and exaggerated claims of the Bush Administration regarding weapons of mass destruction and links between Saddam Hussein, al Qaeda, and the September 11 attacks); Mark Phythian, *Locating Failure: U.S. Pre-War Intelligence on Iraq's Weapons of Mass Destruction*, in *AMERICA'S "WAR ON TERRORISM: NEW DIMENSIONS IN U.S. GOVERNMENT AND NATIONAL SECURITY* (John E. Owens & John W. Dumbrell eds., 2008) (stating "no WMD were found in Iraq, the threat was illusory rather than

severe questions as to whether the United States was behaving properly as matter of national morality.<sup>446</sup> With this track record, it is hard to imagine

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imminent, and the United States has continued to pay a heavy price in blood, treasure, and diplomatic stature for a course of action now widely regarded as unnecessary and counter-productive.”); Dana Priest & Walter Pincus, *U.S. ‘Almost All Wrong’ on Weapons: Report on Iraq Contradicts Bush Administration Claims*, WASH. POST, Oct. 7, 2004, at A1 (describing chief U.S. weapons inspector’s report “that contradicts nearly every prewar assertion made by top administration officials about Iraq”); S. REP. NO. 108-301 (2004) (“Most of the major key judgments in the Intelligence Community’s October 2002 National Intelligence Estimate (NIE), *Iraq’s Continuing Programs for Weapons of Mass Destruction*, either overstated, or were not supported by, the underlying intelligence reporting. A series of failures, particularly in analytic trade craft, led to the mischaracterization of the intelligence.”).

<sup>446</sup> The prevailing norm in the U.S. is one eschewing attacks on others but rallying strongly in the event of an attack. The U.S. response to the Dec. 7, 1941 Pearl Harbor attack being perhaps the classic example. One of us is old enough to have been fortunate to have taken classes from noted political science scholar Hal Chase, a long-time member of the Princeton and University of Minnesota faculties. *See, e.g.*, Harold W. Chase, *Federal Judges: The Appointing Process* (1972). Professor Chase, a former Marine (holding the rank of Brigadier General in the Reserve at the time of his death in 1982), could never credibly be accused of advocating a “wobbly” foreign policy insufficiently realistic about the world or determined to protect American interests. But he emphasized the practical limits on military and executive authority imposed by forms of government and drew confidence that the American system would prevent undue aggression or adventurism in foreign policy or military operations. “Democracies don’t start wars,” he frequently intoned with approval, although he supported democracies ending wars (by vanquishing aggressors) as necessary to support their national interests. As far as we have been able to determine, Professor Chase’s aphorism was, although of course subject to debate, substantially correct until 2003 when the U.S. invaded Iraq, a country with which it was not currently at war and which did not by any objective standard provoke the invasion and occupation.

To be sure, Saddam Hussein behaved badly in his conduct toward U.N. weapons inspectors—but most observers have concluded this was a ruse to create concern over his possible nuclear capability in order to discourage Iran from adventurism in Iraq. With the great deference shown to President George W. Bush in the wake of the September 11 attacks (for which it is clear that Saddam and Iraq were in no way responsible), America appears to have finally and conclusively falsified Professor Chase’s axiom. *See generally* Glenn Kessler, *Hussein Pointed to Iranian Threat*, WASH. POST, JULY 2, 2009, at A1 (describing Saddam Hussein’s concerns about Iran and denials of dealings with al-Qaeda); Pfiffner, *supra* note 430, at 59-62 (describing lack of evidence linking Saddam Hussein, al Qaeda, and the September 11 attacks); S. REP. NO. 109-331, at 110, 126 (2006) (finding lack of evi-

that Congress or the states could do much worse if they were permitted to conduct parallel foreign policy at odds with the preferences of the Executive Branch.

The *Movsesian I* panel majority was so focused on a formalistic but broad application of the foreign affairs doctrine that it seemed not to appreciate the almost comical irony of its data points used to demonstrate national policy forbidding states from even uttering the words “Armenian Genocide.” In opposing a proposed congressional resolution on the issues, Secretary of Defense Robert Gates and former Secretary of State Condoleezza Rice warned that if Congress passed the resolution, Turkey could become so upset that it would refuse cooperation in the war effort in Iraq that “could harm American troops in the field [and] constrain [ ] our ability to supply our troops in Iraq and Afghanistan. . . .”<sup>447</sup> In 2003, less overt but apparent arguments were made to the effect that angering Turkey could impede American effectiveness in Iraq, the Middle East, and Asia.<sup>448</sup>

After a decade of two costly military ventures that many regard as ineffective and unnecessary (particularly the unprovoked Iraq invasion of 2003), cynics might be forgiven for wishing Congress had called Turkey’s bluff and that the Turkish response would have prevented the Iraq invasion or forced withdrawal from Iraq and Afghanistan. While no one in the American legal mainstream wants courts second-guessing the policy decisions of the President (and no American anywhere wants to endanger U.S. troops), neither does it seem wise for courts to expand judicial deference to the often erroneous, incompetent, and perhaps deceptive conduct of the Executive Branch so far above that accorded to Congress and the states. Hindsight is, of course, usually 20-20 (except for blind ideologues)<sup>449</sup> but the miscues of

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dence that Iraq was involved in the September 11 attacks and noting Saddam Hussein’s primary goal to “bluff Iran about Iraq’s WMD capabilities.”)

<sup>447</sup> See *Movsesian I*, 578 F.3d 1052, 1058 (9th Cir. 2009).

<sup>448</sup> See *id.*

<sup>449</sup> Of which there appears to be no shortage. In spite of the clear lunacy of America’s military adventure in Iraq, architects and proponents of the 2003 invasion and war continue to be largely unapologetic about their role in the deaths of both Americans and Iraqis, the destruction of much of Iraq, and the empowerment of Iran, an avowed enemy of most of these supporters of the Iraq War. See, e.g., GEORGE W. BUSH, *DECISION POINTS* 267-70 (2010) (“As I record these thoughts more than seven years after American troops liberated Iraq, I strongly believe that removing Saddam from power was the right decision.”); KARL ROVE, *COURAGE AND CONSEQUENCE: MY LIFE AS A CONSERVATIVE IN THE FIGHT* 332-43 (2010) (refuting claims that the war in Iraq was unjustified in chapter entitled “Bush Was Right on Iraq”); BOB WOODWARD, *STATE OF DENIAL* 488-90 (2006) (describing an interview with President Bush reflecting his “habit of denial,” particularly when

the U.S. executive in the region in which Turkey is purportedly such an important ally should give courts greater caution in giving the executive *carte blanche* not only to make such military and diplomatic blunders, but also to invalidate state law. In a nation that prides itself on federalism, democracy, and separation of powers, the strong form of the foreign affairs doctrine advanced in cases like *Movsesian I* and *Movsesian III* is sufficiently discomfoting to merit retirement.

#### CONCLUSION

Despite the disappointments of *Movsesian I* and *Movsesian III*, the path of the New York Life and Munich Re claims reveal both accomplishment and frustration due to the practical and political limits of both litigation and legislation for vindicating the rights of policyholders and beneficiaries. More broadly, of course, the insurance litigation reflects both the potential of the law for corrective justice and law's ability to fall short of that potential. Just as the insurance litigation had only limited success in accomplishing its objectives, law has had only limited success in vindicating human rights in the face of sufficiently ruthless regimes and the strictures of Realpolitik.

It would be comforting to believe that an enlightened Turkey will someday acknowledge both the Genocide's occurrence and confess error, perhaps even providing reparations. Similarly, one hopes that either because of a change in Turkey's position or a retooled U.S. foreign policy less driven by oil, terrorism, and geopolitical concerns enhancing Turkey's power vis-à-vis America that the Executive Branch would cease pandering to Turkey's worst human rights impulses regarding its "shameful act."<sup>450</sup> Although the modern trend has generally supported human rights and greater frankness in national assessments of past problematic behavior, progress is hardly a given. For some regimes and societies, national consciousness appears to mean never admitting, never apologizing, and never rectifying. If perpetrators of human rights crimes are sufficiently ruthless

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questioned about Iraq and weapons of mass destruction): BOB WOODWARD, PLAN OF ATTACK 419-43 (2004) (reporting conversations with President Bush and members of his administration concerning the failure to find weapons of mass destruction and their continuing support for the decision to invade Iraq); John F. Burns & Alan Cowell, *At Iraq Inquiry, Blair Offers Regrets for Loss of Life*, N.Y. TIMES, Jan. 22, 2011, at A6 (describing former Prime Minister Tony Blair's expressions of regret for lives lost in Iraq while remaining steadfast in his support for decision to go to war).

<sup>450</sup> See AKCAM, *supra* note 4.

and unyielding, they may ultimately triumph over a body politic unwilling to make hard decisions in the face of political and economic expediency.

American law, of course, has always aspired to something better. American courts cannot right all wrongs of the world. They can, however, use their greater isolation from the instant pressures of expediency to faithfully apply the U.S. legal system's own internal rules and norms to matters clearly within their jurisdiction, such as breach of contract claims involving contracts made by American companies (and foreign companies doing business and earning money in the U.S.). When U.S. courts shirk this part of their job description, they begin uncomfortably to resemble the puppet-like judiciaries of totalitarian regimes. Deference to the U.S. Executive Branch so great that courts refuse to apply state law because it contains terminology disliked by the Executive may not descend to the depths displayed by Nazi judges,<sup>451</sup> Soviet tribunals, or the kangaroo courts of Third World dictatorships—but it clearly slouches in that direction. And what begins with a slouch can become eventual prostration.

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<sup>451</sup> See INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1991) (noting the degree to which the German bench was complicit in the rise of Nazism and suppression of political enemies). See also Richard A. Posner, *Courting Evil*, *NEW REPUBLIC*, June 17, 1991, at 36 (reviewing INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Deborah Lucas Schneider trans., 1991)).

