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Litigating The Holocaust: A Consistent Theory in Tort For The Private Enforcement of Human Rights Violations

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I. INTRODUCTION

Survivors of the Holocaust have repeatedly attempted, with little apparent success, to recover the assets their families deposited in Swiss banks prior to World War II.[1] Considering the claimants' subsequent–yet understandable lack of documentation,[2] until now these survivors have had to rely solely on the banks' promises to expedite the return of these "dormant accounts" to their rightful owners.[3] Reliance on such promises, however, quickly evaporated with the public disclosure of one man's experience: Christoph Meili.[4]

A security guard for the Union Bank of Switzerland (UBS), Meili became an international figure early in 1997.[5] While in UBS's document shredding room, two large boxes overflowing with old books caught his attention.[6] Upon closer examination, he discovered that these books contained records of banking transactions which had occurred during the 1930s and 1940s.[7] Meili promptly turned the documents over to the police, sparking a media frenzy in which he found himself the center of attention.[8] The considerable public attention which followed was accompanied with voluminous hate mail, death threats, and even the distancing of the Jewish community.[9] As a result of these mounting pressures, Meili has since

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1. *See* Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325, 352-65 (1998).

2. Because Hitler neglected to issue death certificates to victims of the Holocaust, this posed a significant barrier to the recovery of funds deposited prior to the war. The surviving children were usually not given the money deposited by their parents without proof of their parents' death. See *infra* note 55.

3. Jodi Berlin Ganz, *Heirs Without Assets and Assets Without Heirs: Recovering and Reclaiming Dormant Swiss Bank Accounts*, 20 FORDHAM INT'L L.J. 1306, 1352-55 (1997).

4. *See* Barry James, *Swiss Facing Suit on Holocaust Gold*, INT. HERALD TRIB., July 11, 1997, at 5.

5. *See* Christoph Meili, *Christoph Meili Tells His Story*, 20 WHITTIER L. REV. 43, 43-45 (1999).

6. *See id.* at 43.

7. *See id.*

8. *See id.*

9. *See id.* at 44-45.

become the first Swiss citizen to seek and acquire political asylum in the United States.[10]

Meili's story was undoubtedly a catalyst in the recent $1.25 billion settlement between Holocaust victims and the three largest Swiss banks.[11] This settlement was the end result of a class action lawsuit demanding the return of billions of dollars of these "unclaimed" bank accounts.[12] This historic settlement, the final details of which were announced on January 22, 1999,[13] is the largest recorded settlement of a human rights case in United States history.[14]

For Holocaust-related litigation in the United States, this massive recovery is likely to be merely the tip of the iceberg, encouraging others to proceed with similar suits.[15] As of this writing, lawsuits are likewise pending against several European insurance companies for nonpayment of policies,[16] numerous automobile manufacturers for profits made from Nazi slave labor,[17] and numerous German banking institutions for their role as a depository of looted Nazi assets.[18]

In August 1998, Holocaust heirs filed a pivotal suit against the German company Degussa AG for their alleged role in manufacturing the Zyklon-B cyanide used in Nazi gas chambers.[19] More recently, on December 23, 1998, Chase Manhattan Corp. and J.P. Morgan & Co. became the first U.S. banks to be named

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10. *See id.* at 45. In his own words, Christoph Meili described his experience as follows:
> On one occasion, I entered the shredding room and observed two boxes overfilled with old books. This concerned me, since it was something I had never seen before, and I could not comprehend why UBS would want to destroy these old books. I took a quick glance at the books and discovered they related to old bank records . . . . Upon further investigation, I discovered that these books documented bank business from 1875 to 1917 . . . . [M]y concern was heightened when I discovered the documents also contained records from the 1930s and 1940s. At the time, I was aware that efforts were being made, by and on behalf of Jews, to research the existence of assets belonging to Holocaust survivors . . . so I decided to save them . . . . [Turning them over to the police] sparked a media circus in which I felt I was under a microscope . . . . Both the bank and I knew of the importance of these documents.

Id. at 43-44.

11. *See* Prof. Michael J. Bazyler, *A Measure of Justice for Holocaust Survivors*, ORANGE CO. REG., Aug. 23, 1998. The defendants in this settlement were Credit Suisse and Union Bank of Switzerland (which earlier merged with another defendant, Swiss Bank Corporation). *See id.*

12. *See id.*

13. *See* Henry Weinstein, *Holocaust Survivors, Swiss Banks OK Settlement*, L.A. TIMES, Jan. 23, 1999, at A13.

14. *See* Bayzler, *supra* note 11.

15. *See id.*

16. *See* Deborah Senn, *American Government Officials Speak*, 20 WHITTIER L. REV. 23, 27-28 (1999) (discussing the jurisdictional issues of suits against three European Insurance companies whose records are under scrutiny); *see also Survivors of Holocaust Victims Denied Insurance Benefits are Offered $100 Million to Settle Claims*, 2 NO. 24 MEALEY'S INS. L. WKLY. 1, Aug. 24, 1998, at 1.

17. *See Slave Laborers in WWII Volkswagen Plant Sue*, WASH. POST, Sept. 1, 1998, at A8.

18. *See* Watman v. Deutsche Bank, No. 98-3938 (S.D.N.Y. filed June 3, 1998).

19. *See Degussa: Holocaust Claims*, CHEM. BUS. NEWSBASE, Sept. 21, 1998.

as defendants in a Holocaust-related lawsuit.[20]

A series of global events has occurred during the 1990s to force the painful issues of the Holocaust once again into the public limelight.[21] These events include the fall of communism, the reunification of Germany and Europe, and the aging of the Holocaust victims.[22] Several watershed cases have also been recently decided, contributing to a legal landscape which now appears to tolerate–or even encourage–the private enforcement of human rights violations.[23] Finally, archives have been opened worldwide which have shed further light on the events surrounding the tragedy of the Holocaust.[24]

Not all survivors of the Holocaust, however, praise the recent surge of litigation.[25] Many survivors–in 2000 the average age of which is 82 years old–would prefer to leave alone these painful issues.[26] Discussing the horrors of the Holocaust in monetary terms is seen by many survivors as a profit-motivated desecration of the memory of those who perished.[27] This viewpoint is forcefully expressed by Abraham Foxman, director of the Anti-Defamation League and a survivor of the Holocaust.[28] Additionally, many attorneys cringe at the thought of private lawyers spearheading these remuneratory efforts, which they likewise

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20. *See* Paul Beckett, *U.S. Banks Named in Suit On Holocaust*, WALL ST. J. EUR., Dec. 24, 1998, at 11; *see also The Search for Nazi Assets: A Historical Perspective*, 20 WHITTIER L. REV. 7, 17 (1999). This volume of the Whittier Law Review contains the edited text of remarks presented at the Fifteenth Annual Whittier International Law Symposium on March 1, 1998. *See id.*

21. *See* Victor D. Comras, *American Government Officials Speak*, 20 WHITTIER L. REV. 23, 30 (1999).

22. *See id.; see also* Verena Dobnik, *Octogenarian Holocaust Survivors Race Time to Claim Settlement*, DAILY REC. (Baltimore, Md.), Aug. 20, 1998, at 5B (estimating that in 1999 the average Holocaust survivor was 81 years old).

23. *See* discussion *infra*, Section II (f), of *Filartiga v. Irala-Peña.*

24. *See* Comras, *supra* note 21, at 30.

25. *See* Wendy R. Leibowitz, *"Getting the Gnomes of Zurich to Cough Up," Lawyers Pursuing Holocaust Wealth Face Huge Evidentiary Obstacles, But They're Unfazed*, NAT'L L.J., Jan. 27, 1997, at A12.

26. *See Swiss Gold Controversy Touches South Florida: Holocaust Survivors Try to Reclaim Assets*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Jan. 26, 1997, at 1A, *available in* 1997 WL 3082203. Marcel Rosenberg is one of the 35,000 Florida residents who are survivors of the Holocaust. *See id.* Currently in his 80s and in frail health, Rosenberg made the following statement when informed about the possibility of recovering assets hidden in Swiss banks: "I am old; I am very sick; I cannot hear too well. . . . It will take years to settle this thing, and by then I will not be around. So I don't want to be bothered. I don't want to make a big deal of it." *Id.*

27. *See 60 Minutes* (CBS television broadcast, June 27, 1999), *available in* 1999 WL 16209069.

28. *See id.* Mr. Foxman's statement to Lesley Stahl, co-host of *60 Minutes*, reads as follows:

> If, by putting a dollar amount on slave labor, we close the books and they're no longer guilty, I'm not sure it's worth it . . . . [T]alking about the material loss would diminish the grotesque, the horrendous human loss, the human tragedy. And now, all we're talking about is material loss.

interpret as a belated attempt by plaintiffs' lawyers to profit from an historical atrocity.[29]

The recent avalanche of Holocaust related litigation may be generally divided into three phases, or categories.[30] The first category ("Category I") constitutes attempts by plaintiffs to remedy unjust enrichment by forcing the return of both converted property and its profits to the rightful owners.[31] The second category ("Category II") constitutes endeavors to force the return of profits earned by German corporations that used Jewish slave laborers, as well as efforts to force back payment of the laborers' wages.[32] The third wave of Holocaust related litigation ("Category III") commenced in August 1998.[33] This category includes multitudinous lawsuits filed against any company which profited from its commercial intercourse with the Third Reich.[34]

Section II of this Comment will lay a foundational backdrop by reviewing the most noteworthy historical events which have acted as precursors for these legal phenomena.[35] Section III will cover the recent litigative responses aimed at remunerating those impacted by the horrors of the Holocaust.[36] Section IV will review the attempts by several countries to rectify, through non-litigative fora, the damages which category I and category II litigation have attempted to remedy.[37] Finally, Section V will analyze category III litigation in light of other similar pending tort litigation. It will then discuss the inherent pitfalls of this wave of litigation and suggest the tort of "private human rights reparations" which would both award damages to injured parties and simultaneously prevent an abuse of the legal system.[38]

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29. *See* Leibowitz, *supra* note 25.

30. While these three categories of lawsuits have been chosen deliberately, their occurrence is both progressive and simultaneous. Litigative success in the first category catalyzes the occurrence of lawsuits in the second and third categories, which may also take place concurrently with those in the first.

31. The lawsuits filed against the Swiss banks and European insurance companies are examples of Category I lawsuits. *See* Ramasastry, *supra* note 1, at 374.

32. Category II lawsuits include those filed against corporations which utilized Nazi slave labor, such as Ford, BMW, Daimler-Benz, and Volkswagen. *See Slave Laborers in WWII Volkswagen Plant Sue, supra* note 17.

33. Burger-Fischer v. Degussa, a lawsuit against Degussa for manufacturing the Zyklon-B cyanide used in gas chambers, is an example of this third category of lawsuits. *See Germany Says Degussa Compensation Demands "Unrealistic,"* AGENCE FRANCE-PRESSE, Aug. 27, 1998, *available in* 1998 WL 16586546.

34. *See infra* notes 209–15 and accompanying text.

35. *See infra* notes 39–105 and accompanying text.

36. *See infra* notes 106–215 and accompanying text.

37. *See infra* notes 216–60 and accompanying text.

38. *See infra* notes 264–365 and accompanying text.

II. HISTORICAL PRECURSORS IN PRIVATE HUMAN RIGHTS LITIGATION

The global effects of Hitler's attempted genocide have reverberated for more than half a century.[39] History bristles with accounts of courageous survivors of Nazi brutality such as Alicia Appelman-Jurman.[40] Alicia, though buried alive by German soldiers, was fortunate enough to be rescued prior to asphyxiating.[41] Throughout the decades that followed, each attempt to recover the money her parents had left in Swiss bank accounts proved unsuccessful, as the bank repeatedly insisted such accounts did not exist.[42]

Historically speaking, genocide is a very lucrative business.[43] While it often requires a hefty initial capital investment, it may provide an enormous return on investment when executed properly.[44] Hitler's genocidal plan was effectively financed through four general enterprises: 1) the European banking industry, 2) the European insurance industry, 3) looted Nazi assets, and 4) Nazi slave labor camps.[45] These four areas will be examined in detail, with particular emphasis placed on those factors instigating current lawsuits.[46] They will be followed by an explanation of post-World War II attempts to recover various types of Jewish property,[47] as well as a recapitulation of recent human rights litigation which has set the stage for the subsequent critical mass of litigation which began in 1998.[48]

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39. *See* Catherine Crocker, *Holocaust Survivor Reveals Story of Lost Family, a Missing Fortune*, HOUST. CHRON., May 18, 1997, at 34 (relating the story of Leslie Gabor, a wealthy World War II survivor who lost everything in the war).

40. *See*, eg., Alicia Appleman-Jurman, *The Claimants Speak: Insurance Claims of Holocaust Victims and their Heirs*, 20 WHITTIER L. REV. 61 (1998).

41. *See id.*

42. *See id.*

43. *See generally* Burt Neuborne, *The Search For Nazi Assets: A Historical Perspective*, 20 WHITTIER L. REV. 7 (1999). Professor Neuborne is the John Norton Pomeroy Professor of Law at New York University Law School; he is also co-counsel for the Swiss banking cases in New York.

44. *See id.*

45. *See id.*

46. *See infra* notes 49-84 and accompanying text.

47. *See infra* notes 86-94 and accompanying text.

48. *See infra* notes 95-107 and accompanying text.

A. *Financing an Empire*

1. The European Banking Industry

Prior to implementing a plan to systematically exterminate the Jews, the Nazi Regime first adopted its anti-Semitic agenda in 1933.[49] A primary objective of this agenda was to separate the German and Austrian Jews from their property.[50] The following year, the Swiss banking community, in timely fashion enacted, Article 47 of the Swiss Bank Law, establishing a duty of secrecy owed by Swiss banks to their clients.[51] While the motive for this Act has been subject to impassioned debate, it nevertheless provided the means for Jews--contrary to Nazi orders--to inconspicuously channel their assets out of Germany.[52]

A myriad of Jews availed themselves of the opportunity to indiscretely deposit their money in a neutral safe haven where their actions could not be tracked by the Nazis.[53] Unfortunately, the later withdrawal of that money was not as simple as its

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49. *See generally U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II*, Report by U.S. Dept. of State, May 7, 1997 (the Eizenstat Report). Stuart E. Eizenstat is the Under Secretary of Commerce for International Trade and Special Envoy of the Department of State on Property Restitution in Central and Eastern Europe.

50. *See id.*

51. *See* Kathryn H. Lamont, Comment, *Banking Secrecy Lifted: The Swiss Act to Counter Attacks Launched as a Result of Their Banks Actions During World War II and Thereafter*, 16 DICK. J. INT'L L. 227, 229-33 (1997). Regarding the Swiss banking secrecy laws, it was recently stated that:

> Swiss banking secrecy is defined in the Swiss civil code as part of each individual's right to privacy, and in each contract between the bank and the bank customer. Enacted in 1934, SBA article 47 prohibits the disclosure of customer transactions, and of bank communications with its customers and others regarding those transactions. Sanctions are applicable to those individuals who infringe upon these secrecy rights directly, or induce or try to induce others to break the confidence, and to those who violate the act through negligence.

Harvey M. Silets & Susan W. Brenner, *"Compelled Consent": An Oxymoron with Sinister Consequences for Citizens who Patronize Foreign Banking Institutions*, 20 CASE W. RES. J. INT'L L. 435, 443 (1998).

52. Three theories have been promulgated to explain the creation of the Swiss banking secrecy laws. One is that, motivated by humanitarian impulses, the Swiss created these laws to provide a financial safehaven for German Jews who sought to hide their assets. Another is that the Swiss were motivated by economic opportunism, seeking to make the banks more attractive to Jews. A final theory is that the system of numbered bank accounts is completely unrelated to the Nazi influence and the Swiss movement to assist Jews. *See* Lamont, *supra* note 51, at 230.

53. *See* Detlev F. Vagts, Editorial Comment, *Switzerland, International Law and World War II*, 91 AM. J. INT'L L. 466, 468 (1997). Germany permitted three European countries to remain neutral: Switzerland, Sweden, and Spain. *See id.* This was done, however, not as a function of Germany's power, but out of necessity. *See id.* The Nazis "needed Sweden's shipping industry, Switzerland's material supplies and banking institutions, and Spain's information capabilities." *See* Neuborne, *supra* note 43, at 19.

earlier deposit.[54] With no account numbers, death certificates, or documents verifying personal identification, both victims and their representatives were repeatedly rebuffed in their attempts to recover their money.[55] This constitutes the great irony of the Swiss banking secrecy laws: the law created ostensibly to help Jews protect their money was the very tool which was used to wrest it from them.[56] Persistent efforts to recover this money came to a bittersweet end in January 1999, with announcement of the final details of a $1.25 billion settlement between Holocaust survivors and the three largest Swiss banks.[57]

2. The European Insurance Industry

During the 1930s and 1940s, the purchasing of insurance policies was a popular form of financial investment among middle and working class Europeans.[58] Because retirement instruments were not widely available, many individuals instead purchased life insurance policies, as well as both education and dowry policies.[59] On the eve of World War II, many Jews purchased these insurance policies for the same reason they channeled money into Swiss banks: to secure their wealth in the event they survived what was surely an ominous forecast.[60]

During the last fifty years, these same policyholders have been denied any benefits from their policies.[61] Many of these insurance companies even continue to transact business–selling policies and collecting premiums–under the same corporate name used in the 1930s.[62] The reasons proffered by these companies for their nonpayment lamentably parallel those employed by Swiss banks for their

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54. *See* Neuborne, *supra* note 43 at 19.

55. *See id.* The banks not only demanded account numbers, but proof of identification, such as death certificates. *See id.* Because Hitler had neglected to the issue death certificates to relatives of the victims, this became a means by which the banks avoided returning money to its rightful owners. *See id.*

56. *See id.*

57. *See* Bayzler, *supra* note 11; *see also* Weinstein, *supra* note 13.

58. *See* William Palmer, *What Happens Next*, 20 WHITTIER L. REV 91 (1999).

59. *See id.* While life insurance policies were paid to the survivor upon the death of the purchaser, dowry and education policies were different, yet very popular, investment instruments. *See id.* A dowry policy was purchased when a daughter was born, and paid when she married. *See id.* When a son was born, an education policy was purchased which was paid at the time he commenced higher education. *See id.*

60. *See id.*

61. *See* $100 Million Offered to Settle Holocaust Claims, 9 MEALEY'S LITIG. REP.: BAD FAITH 8, Sept. 1, 1998; *see also* Palmer, *supra* note 58, at 126.

62. *See id.*

similar nonpayment of funds.[63]

Estimated to be worth billions of dollars, the persistent attempts to collect these insurance policies experienced a sizeable breakthrough on August 20, 1998.[64] European insurer Assicurazioni Generali announced that it would settle the Holocaust victims' allegations of claim withholding for $100 million.[65] This auspicious settlement evaporated within a few weeks when Generali realized that such a settlement would not place a legal cap on the potential legal payout to European policyholders.[66]

3. Looted Nazi Assets

Besides being one of the greatest tragedies in history, the Holocaust was also arguably the greatest theft in history.[67] As discussed previously, part of the institutional dehumanization of the Jews consisted in first separating them from their property.[68] Myriad are the stories of men and women from whom wedding rings were forcibly taken and golden teeth physically extracted.[69] These "precious" metals were then smelted and used to help finance Hitler's regime.[70] In addition to the near-total loss of the Jews' private property, extensive Jewish communal property was taken as well.[71] The Nazis also looted valuables from banks and businesses, as well as a sizeable amount of the world's most valuable art collections.[72] In total, it is estimated that the gold plundered by the Nazis from European central banks, from individual Jews and Gypsies,[73] and from other

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63. *See* Palmer, *supra* note 58, at 126. Five reasons given by insurance companies for nonpayment are as follows: 1) absence of death certificate by the claimant, 2) the proceeds were already paid to the Nazis as policyholders, 3) the reparations by governments covered insurance proceeds, 4) because these companies were taken over by communist governments, no funds exist to pay the claims, and 5) there are no existent records verifying the claimant as a policyholder. *See id.*

64. *See id.* at 127; *see also $100 Million Offered to Settle Holocaust Claims*, *supra* note 61.

65. *See $100 Million Offered to Settle Holocaust Claims*, *supra* note 61.

66. *See NAIC Wants More; Generali Deal Fails*, INS. REG. 1, Sept. 28, 1998, (*available at* 1998 WL 5049992).

67. *See Unclaimed Property from the Holocaust:* Testimony before the House International Relations Committee Property Restitution in Central and Eastern Europe, (1998) (Statement of Stuart Eizenstat, Under Secretary of State), *available in* 1998 WL 12763035.

68. *See id.*

69. *See Chemistry and Industry: Degussa: Holocaust Claims*, CHEMICAL BUS. NEWSBASE, Sept. 21, 1998, *available in* 1998 WL 14757474; *see also* Watman, No. 98-3938 at 12-16.

70. *See* Lori Silberman Brauner, *Holocaust Survivors Sue German Firm and its New Jersey Subsidiary*, N.J. JEWISH NEWS, Aug. 27, 1998, *available in* 1998 WL 11396211. On August 21, 1998, a class-action lawsuit was filed against Degussa, a German manufacturer of precious metals, chemicals, and pharmaceuticals, alleging that they allowed gold and other metals stolen from the plaintiffs to be used to finance "the Nazi war machine." *See id.*

71. *See* Eizenstat, *supra* note 49 and accompanying text.

72. *See* Owen Pell, *Nazi-Stolen Art*, 20 WHITTIER L. REV. 67, 67-68 (1998).

73. For a detailed historical analysis of the parallel extermination of the approximately one-half million people of Roma, or "Gypsies," see Palmer, *supra* note 58.

victims is worth approximately $4 billion.[74]

4. Nazi Slave Labor Camps

"By December 1941, Nazi Germany had achieved domination over territories with an aggregate population of 350,000,000 people."[75] By this time, the drain on German manpower and concomitant need for armaments reached an apogee.[76] Hitler thus attempted to bolster his fatigued war machine through the compulsory enslavement of laborers from his conquered territories.[77] German corporations were forced to utilize these slave laborers in order to meet Hitler's recently-elevated production output requirements.

Elly Gross is a plaintiff in a class-action suit filed on August 31, 1998, against Volkswagen, Inc.[78] As a teenager, she was awaiting her turn to die at Auschwitz when she was sent to work for the German automaker Volkswagen.[79] Virtually barefoot, she was transported to the Volkswagen plant where her hair was shorn, her name was replaced with the number A-3725, and she was forced to work in subterranean caverns applying a highly corrosive coating to munition parts.[80] As a result of the inhumane conditions in which she lived and worked, she contracted chronic whooping cough which permanently damaged her lungs, as well as a gum disease which caused the loss of all her teeth.[81]

Historians estimate that approximately 7 million people were forced to work in Nazi slave labor camps.[82] Among those forced to labor by the Nazis were French prisoners of war, Jews, Russians, Ukrainians, Italians, and Belgians.[83] Until recently, no attempts to recover either wages or profits earned by these corporations during this time have experienced even the slightest measure of success.[84]

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74. *See id.*

75. Gross v. Volkswagen, (D.N.J. filed August 31, 1998) at 5.

76. *See id.*

77. *See* Memorandum of Law Submitted by Plaintiffs' Counsel, No. CV-96-4849 (consolidated with CV-96-5161 and CV-97-461) at 6-7 (E.D.N.Y June 17, 1997).

78. *See* Gross v. Volkswagen, *supra* note 75, at 8–9.

79. *See* Chelsea Carter, *Holocaust Survivors Take On Volkswagon* [sic], TORONTO STAR, Aug. 31, 1998 (*reprinted in* <http://www.straightedge.com/pages/anti-ingorance/rwnazi-html> (visited Sept. 28, 1998)).

80. *See* Gross v. Volkswagen, *supra* note 75, at 8.

81. *See id.* While Gross was fortunate to have escaped death at Auschwitz, her mother and five-year-old brother were not as fortunate. *See* Carter, *supra* note 79.

82. *See* Carter, supra note 79.

83. *See* Gross v. Volkswagen, *supra* note 75, at 10.

84. *See generally* Neuborne, Memorandum of Law Submitted by Plaintiffs, *supra* note 43.

B. Post-World War II Recovery Attempts

Following the war, the Swiss demonstrated an obdurate reluctance to cooperate with Allied efforts to retrieve and redistribute the looted Nazi gold.[85] After difficult and contentious bargaining, the Swiss finally acknowledged that retention of gold looted by the Nazis from conquered governments would violate customary international law. The 1946 Washington Accord was the result of dramatic negotiations between the Swiss and the Allies.[86]

Under this Accord, the Swiss would return $58 million to the Allies--a figure far less than the $185-$289 million range the U.S. Treasury and State Departments had estimated were in Swiss accounts.[87] Additionally, the Swiss would provide the Allies with fifty percent of the liquidated value of the German assets located in Switzerland after the War.[88] The Tripartite Gold Commission was later established to disburse the gold which would be received by the Allies under this settlement.[89] The Swiss never fully complied with their promise under the 1946 Washington Accord to return deposited assets to the Holocaust survivors.[90]

In 1962, the Swiss government passed a resolution focusing on these heirless assets.[91] This resolution spawned 4.5 million Swiss Francs from 961 separate accounts being turned over to claimants, and two million Swiss Francs being given to both Swiss Jewish communities and a Swiss refugee organization.[92]

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85. Testimony of Stuart E. Eizenstat before the Senate Committee on Banking, House, and Urban Affairs, May 15, 1997 (hereinafter "Testimony of Stuart Eizenstat"). Mr. Eizenstat further testified:

> In postwar negotiations, Switzerland used legalistic positions to defend their interest, regardless of the moral issues also at stake. They first contended they had purchased Nazi gold in good faith, and only later did they admit to having obtained looted Belgian gold. After long, difficult and contentious bargaining, agreement was reached in the form of the 1946 Washington Accord . . . .

Id.

86. *See id.*

87. *See id.*

88. *See id.* Six years after the 1946 Washington Accord, the Allies accepted a token payment of $28 million from Switzerland, a sharp contrast to earlier Allied estimates that Switzerland held between $250 and $500 million in German assets. *See id.*

89. *See* Lamont, *supra* note 51, at 235. The Tripartite Gold Commission was created to redistribute looted gold to the governments from whom it was originally stolen during the War. *See* Testimony of Stuart Eizenstat, *supra* note 85.

90. *See* Neuborne, *supra* note 43.

91. *See* Ramasastry, *supra* note 1, at 358-59. Similar to the 1946 Washington Accord, the promises made in 1962 were never completely fulfilled, resulting in what Professor Neuborne has deemed the "single most egregious example of unjust enrichment in banking history." *See id.*

92. *See id.* at 361.

C. Private U.S. Human Rights Litigation

As recently as two decades ago, rare was the university whose curriculum included a course in human rights studies.[93] However, the past two decades have seen a plethora of private human-rights lawsuits which have laid a firm foundation for the recent jurisdictional advent of private Holocaust-related litigation.[94] Congress originally provided for federal jurisdiction over such suits filed by aliens involving international law in the Judiciary Act of 1789, commonly referred to as the Alien Tort Claims Act ("ATCA").[95]

The seminal case which expounded the Alien Tort Claims Act was *Filartiga v. Peña-Irala*.[96] The plaintiffs in *Filartiga*, citizens of Paraguay, brought an action in a United States Federal Court against another citizen of Paraguay who was in the United States on a visitor's visa.[97] Their lawsuit was a civil wrongful death action on behalf of their son, who died after being tortured by the defendant.[98] The court held that federal subject matter jurisdiction existed over this claim because deliberate torture violated the well-established and universally recognized norms of customary international law.[99] Since *Filartiga*, courts have held that the ATCA provides a private civil cause of action–as well as a federal forum–for aliens who

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93. *See* HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT, preface (Oxford Press, 1996).

94. *See generally id.* at 779-810; *see also* Thomas Buergenthal, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL 1-19 (1995).

95. *See* Stephanie A. Bilenker, *In Re Holocaust Victims' Assets Litigation: Do the U.S. Courts Have Jurisdiction Over the Lawsuits Filed by Holocaust Survivors Against the Swiss Banks?* 21 MD. J. INT'L L. & TRADE 251 (1997). The Alien Tort Claims Act, codified at 28 U.S.C. § 1350, reads in full: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

96. 630 F.2d 876 (2d Cir. 1980).

97. *See id.* at 878.

98. *See id.*

99. *See id.* at 889-90. The defendant, Peña, argued that the customary law of nations, as reflected in treaties and declarations that are not self-executing, should not have been applied in this case. *See id.* National treaties, while afforded the respect of a statute, are generally either self-executing or non-self-executing. A self-executing treaty is one that can be implemented without further enabling legislation. A non-self-executing treaty is one requiring further enabling legislation. A judge may apply the provisions of a treaty that is self-executing, while one that is non-self-executing cannot be applied judicially without further legislation. For this reason Pena argued that the U.N. declaration was non-self-executing. However, the Second Circuit ruled that government-sanctioned torture is a violation of international human rights and thus a viable tort under the Alien Tort Claims Act. *See id.* at 890. For a comprehensive review of the nature of both self-executing and non self-executing treaties, see Bilkener, *supra* note 95.

seek remedies for international human rights violations related to torture, genocide, or other war crimes.[100]

With *Filartiga* as a backdrop, an American jury held Ferdinand Marcos liable in 1994 for human rights violations that occurred in the Philippines during his Presidency, and then awarded the plaintiffs $1.2 billion in damages.[101] Further expounding on this *Filartiga* rationale, in 1995 the Second Circuit held that the leader of Bosnian-Serb forces could also be held liable under the Alien Tort Claims Act for acts of genocide, war crimes, and crimes against humanity.[102] Whether the soldier acted under color of law or as a private individual was held to be immaterial.[103]

These private human rights cases have been a preparatory force structuring a legal scaffolding upon which Holocaust-related litigation has recently proceeded.[104] At a minimum, they demonstrate that the Nuremberg principles of criminal responsibility have left a stinging civil legacy.[105]

III. CURRENT HOLOCAUST-RELATED LITIGATION

The recent Holocaust-related litigation has proceeded primarily in the form of class action lawsuits.[106] While class action suits are perhaps one of the most complex forms of federal civil litigation, they are uniquely suited to resolving

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100. *See* Bilkener, *supra* note 95.

101. *See* Ralph G. Steinhardt, *Fulfilling the Promise of Filartiga: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos,* 20 YALE J. INT'L L. 65, 65-68 (1995). Five cases were filed against Marcos soon after his departure from the Philippines and his arrival in Hawaii. In 1989, the Judicial Panel on Multidistrict Litigation consolidated the cases for trial and assigned them to Judge Manuel Real. *See id.* (citing MDL No. 840, Order of September 5, 1990). The Ninth Circuit sustained a preliminary injunction against "transferring, secreting, or dissipating" the assets in the Marcos estate pendente lite. *See* In re Estate of Ferdinand Marcos, Human Rights Litig., 25 F.3d 1467, 1480 (9th Cir. 1994). For an overview of the legal issues prior to the Ninth Circuit's decision in 1994 *see generally* Joan Fitzpatrick, *The Future of the Alien Tort Claims Act: Lessons from In re Marcos Human Rights Litigation,* 67 ST. JOHN'S L. REV. 491 (1993).

102. *See* Kadic v. Karadzic, 70 F.3d 232, 241-42 (2nd Cir. 1995).

103. *See id.* at 242.

104. *See id.*

105. *See* Steinhardt, *supra* note 101, at 67-68.

106. In submitting his Memorandum of Law for the Swiss banking cases, Burt Neuborne stated that he is "a legal resource for the more than 80,000 persons who have contacted counsel in connection with the recovery of assets allegedly deposited in a Swiss bank on the eve of the Holocaust." *See In re: Holocaust Vicitms' Assets,* No. CV 96-4849 (E.D.N.Y. Jan. 19, 1997). Additionally, Edward Fagan stated the following at the Fifteenth Annual Whittier International Law Symposium on March 1, 1998:

> On October 2, 1996, I filed one of the first class action lawsuits on behalf of Holocaust survivors against the Swiss banks. In March 1997, I was among the first to file a class action lawsuit against European insurance companies. I represent over 31,000 clients, approximately five of whom die every week.

Ralph Steinhardt et al., *The Lawyers Speak: Actions Against Swiss Banks and European Insurance Companies in United States Courts,* 20 WHITTIER L. REV. 47, 58 (1999).

human rights conflicts.[107] Litigants have utilized them in federal cases involving Bendectin,[108] Agent Orange,[109] asbestos,[110] gypsum,[111] breast implants,[112] DES,[113] and, most recently, human rights.[114] In spite of the multiple claimants, varied damage awards, complex evidentiary concerns, and cumbersome stipulations of Rule 23,[115] justice is often better served in mass tort cases through "collective, rather than by disaggregative, processes."[116] The legal factors discussed in Section II have created a deluge of private legal cases attempting to remedy human rights violations, frequently against non-citizen defendants.[117] This section will analyze the current cases of this nature, with particular mention made of those cases with a punitive, rather than restorative, intent.[118]

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107. *See* Manuel L. Real, *What Evil Have We Wrought: Class Action, Mass Tort, and Settlement*, 31 LOY. L.A. L. REV. 437, 437-38 (1998). Judge Real presided over the case of *In re Estate of Ferdinand Marcos Human Rights Litigation* in the late 1980s which involved 23 individual plaintiffs and a class of 9,539 human rights victims. *See id.* at 443.

108. *See, e.g.*, Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

109. *See, e.g.*, In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 216 (2d Cir. 1987).

110. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986).

111. *See, e.g.*, In re Gypsum Antitrust Cases, 565 F.2d 1123 (9th Cir. 1977).

112. *See, e.g.*, In re Dow Corning Corp., 211 B.R. 545 (Bankr. E.D. Mich. 1997).

113. *See, e.g.*, Payton v. Abbott Labs, 83 F.R.D. 382 (D. Mass. 1979), *vacated*, 100 F.R.D. 336 (1983).

114. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232 (2nd Cir. 1995); In re Estate of Ferdinand Marcos Human Rights Litig., 94 F.3d 539 (9th Cir. 1996); Sampson v. Federal Republic of Germany, 975 F. Supp. 1108 (N.D. Ill. 1997); Filartiga v. Peña-Irala, 630 F.2d 876 (2nd Cir. 1980); Princz v. Federal Republic of Germany, 813 F. Supp. 22 (D.D.C. 1992); Hirsh v. State of Israel, 962 F. Supp. 377 (S.D.N.Y. 1997).

115. Rule 23(a) of the Federal Rules of Civil Procedure reads as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

FED. R. CIV. P. 23(a) (1999).

116. *See* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 567-68 (1987).

117. *See generally supra*, note 114 (listing human rights cases).

118. *See infra* notes 119 to 215 and accompanying text.

A. *Swiss Banking Cases*

The creation of the Volcker Commission,[119] the discovery of documents by Christoph Meili, and the recent precedential private human rights cases have all helped create a geopolitical ambiance demanding a public response from the three primary Swiss Banks: Credit Suisse, Union Bank of Switzerland, and the Swiss Bank Corporation.[120] The banks' collective response has included, among other things, the establishment of a private sector humanitarian fund to "alleviate the plight of Holocaust victims and their heirs."[121] Notwithstanding their attempts to establish good will, three class action lawsuits were filed in United States Federal Courts against the Swiss banks between October 1996 and January 1997.[122]

1. *Weisshaus v. Union Bank of Switzerland*[123]

On October 3, 1996, Gisella Weisshaus, a Holocaust survivor, filed a twenty billion dollar class action lawsuit in the federal district court of the Eastern District of New York.[124] The defendants listed were Union Bank of Switzerland (UBS) and Swiss Bank Corporation (SBC).[125] The suit charged that the banks participated in a common scheme "(1) to conceal and convert assets deposited in accounts with the defendant banks prior to 1946; and (2) to be a depository of and profit from the looting of personal property by the Nazi Regime and its allies between 1933 and 1945."[126] Weisshaus stated six causes of action in the complaint: breach of contract, accounting, breach of fiduciary duty, conversion, conspiracy, and unjust enrichment.[127]

2. *Friedman v. Union Bank of Switzerland*

Jacob Friedman, a Holocaust survivor, along with four children of other Holocaust victims, filed a class action suit on October 21, 1996, against UBS, SBC,

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119. *See infra* notes 226 to 228 and accompanying text.
120. *See generally* Bazyler, *supra* note 11.
121. Nicholas Burns, *Swiss Banks to Create Fund,* Feb. 5, 1997 (press statement from the Office of the Spokesman, U.S. Dep't of State) *available at* <http://secretary.state.gov/www/briefings/statements/970205b.htm>.
122. *See* Ganz, *supra* note 3, at 1356-1362.
123. No. CV-96-4849 (E.D.N.Y. 1996) (Am. Compl. Jan. 24, 1997)
124. Weisshaus v. Union Bank of Switz., No. CV 96-4849 (E.D.N.Y. 1996) (Am. Compl. Jan. 24, 1997).
125. *See* Ramasatry, *supra* note 1, at 373.
126. *See id.* at 374.
127. *See id.*

and Credit Suisse (CS).[128] The suit alleged that the banks prevented victims of the Holocaust from "accessing money deposited by their deceased relations," and that the banks laundered money stolen by the Nazis from Jews.[129] The plaintiffs sought to certify three separate classes.[130] Class A included the "Rightful Owners of Nazi Regime Looted Assets and/or Their Heirs"; class B included "Slave Laborers and/or Their Heirs"; class C included "certain Swiss Bank Depositors and/or Their Heirs."[131] The remedy sought was the disgorgement of all looted assets, profits from utilizing slave labor, and all dormant bank accounts.[132]

3. *World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switzerland*

The third lawsuit, filed on behalf of the World Council of Orthodox Jewish Communities ("World Council"), was initiated in January 1997 by the Philadelphia firm of Berger & Montague.[133] The plaintiffs sought to certify the same classes as the Friedman case, with one addition class: "Rightful Owners of Nazi Regime-Looted Communal Assets and/or Their Heirs."[134]

4. Swiss Banking Settlement

On March 7, 1997, these three lawsuits were consolidated for pretrial purposes by Brooklyn Federal District Court Judge Edward Korman.[135] In response to this class action lawsuit, the banks proposed a $600 million settlement.[136] However, Jewish groups, who unsurprisingly had estimated the Swiss-held assets to be worth between six and seven billion dollars, rejected the offer and demanded $1.5 billion.[137]

In an effort designed to pressure the Swiss banks to overcome the impasse, twenty U.S. states and thirty individual municipalities[138] formally threatened to

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128. *See id.* at 374-75 (citing Friedman v. Union Bank of Switz., No. CV 96-6161 (E.D.N.Y. 1996) (Am. Compl. 1997)).
129. *See* Ramasastry, *supra* note 1, at 374-75.
130. *See* Ganz, *supra* note 3, at 1359.
131. *Id.*
132. *See id.* at 1360.
133. *See* Ramasastry, *supra* note 1, at 375 (citing World Council of Orthodox Jewish Communities, Inc. v. Union Bank of Switzerland, No. CV 97-0461 (E.D.N.Y. 1997) (Am. Comp. July 1997))
134. Ganz, *supra* note 3, at 1361.
135. *See* Ramasastry, *supra* note 1, at 376.
136. *See* James Bone, *Swiss Pay $1.25bn to End Feud with Holocaust Jews*, TIMES LONDON, Aug. 14, 1998, at 13.
137. *See id.*
138. *See id.*

impose sanctions on the banks "for not resolving the suit and meeting their moral and legal obligations."[139] Further browbeating occurred when plaintiffs' lawyers filed separate class action suits against the respective banks in California and Washington D.C.[140]

On August 12, 1998, attorneys announced a preliminary settlement of $1.25 billion dollars, the largest of its kind in U.S. History.[141] The final details of the settlement were agreed upon on January 22, 1999.[142] The principal conundrum impeding the conclusion of the settlement was the definition of the class of persons eligible for compensation.[143] The phrase agreed upon was "targets and victims of Nazi persecution."[144] In the drafting of the settlement, plaintiffs' attorneys walked a delicate tightrope between two extremes: allocating recovery to everyone harmed by the Nazis, which includes almost everyone in Europe, and allowing recovery by the Jews only.[145] One extreme would have diluted the recovery to the point of rendering the suit meaningless, while the other would have made it unfairly parochial.[146]

While such an historic settlement may be viewed as a victory for Holocaust survivors, the most daunting task yet remains: distribution of the settlement.[147] New York lawyer Judah Gribetz, appointed by Judge Korman, will be a special master over disbursement of the funds.[148] Public fora will be held in Israel, the United States, Europe, South America, and Australia to solicit suggestions on the distribution, which is estimated to take approximately four years.[149] Rather than put to rest this Holocaust-related litigation, this victory has served as a catalyst for the filing of similar lawsuits against other industries, especially the European insurance

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139. *See* Bayzler, *supra* note 11.

140. *See id.*

141. *See id.* The settlement consists of $1.25 billion to be paid over three years in four installments consisting of: one payment of $250 million in 90 days after the settlement was approved, "and further installments of $333 million on the first, second, and third anniversary of [the] approval." *See* Bone, *supra* note 136.

142. *See* Weinstein, *supra* note 13, at A13.

143. *See id.*

144. *Id.* This phrase will be interpreted to include "Jews, homosexuals, physically and mentally disabled people, people commonly known as Gypsies, as well as individuals among those groups who sought refuge in Switzerland and were deported. In addition, individuals who were slave laborers for Swiss firms will be eligible for compensation under this settlement." *Id.*

145. *See id.*

146. *See id.*

147. *See* Marilyn Henry, *Jewish Groups Trying to Decide on Swiss Fund Distribution, Public Forums Set Across Globe to Solicit Comments,* JERUSALEM POST, Sept. 4, 1998, at 9.

148. *See* Weinstein, *supra* note 13. Judah Gribetz has served as counsel for former New York Governor Hugh Carey and as an advisor to Senator Daniel Patrick Moynihan on federal judicial appointments. *See id.* While Gribetz has done considerable work in the Jewish community, he is not commonly considered to be aligned with any Jewish organization which stands to profit from disbursement of the settlement. *See id.*

149. *See* Henry, *supra* note 147, at 5.

industry.[150]

B. European Insurance Cases

As far as pre and post-World War II behavior is concerned, the parallels between the Swiss banking industry and the European insurance industry abound.[151] Prior to the war, Jewish families purchased insurance policies worth an estimated $2 billion to $2.5 billion, with current worth estimated at ten times higher than pre-war value.[152] Many of those insurance policies, including those covering property destroyed during *Kristallnacht*,[153] have not been paid.[154]

In states with large numbers of Holocaust victims,[155] state insurance commissioners have actively spearheaded a campaign to ensure the compensation of policyholders.[156] After gathering information, these commissioners have proceeded in their effort on three different levels: federal, state, and administrative.[157]

1. Federal Action

A federal class action lawsuit was filed by insurance commissioners against eighty insurer-defendants in June 1997.[158] These defendants can be linked to approximately fifteen insurer groups, each of which has filed a motion to

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150. *See Making Amends*, LIFE INS. INT'L, Oct. 1, 1998, at 7.

151. *See generally*, Palmer, *supra* note 58 (discussing the present day obstacles to resolving Holocaust insurance claims).

152. *See Making Amends*, *supra* note 150, at 7.

153. The *Kristallnacht*, or "Crystal Night," occurred on November 9-10, 1938. During this night, the terror against the Jewish people increased, as the windows to Jewish shops and businesses were smashed. The following morning, the glass was swept into the sweet, where it resembled crystal. *See* Palmer, *supra* note 58, at 127 n.198.

154. *See supra* note 63 for a listing of five bases upon which the insurance companies have relied when refusing to pay benefits to policyholders.

155. Approximately eighty percent of the estimated population of Holocaust survivors reside in California, Florida, Illinois, Maryland, New Jersey, New York, Ohio, and Pennsylvania. New York has the most survivors with approximately 14,800 to 44,500. California is second with 6,300 to 19,000. Florida has approximately 5,000 to 15,400, and New Jersey has between 4400 and 13,400. An exact number is difficult to ascertain because many survivors do not want to be included in the proceedings. *See* Palmer, *supra* note 58, at 128 n.199.

156. Agreements have taken place between the insurance companies and the National Association of Insurance Commissioners (NAIC). *See $100 Million Offered to Settle Holocaust Claims*, *supra* note 61, at 8.

157. *See* Palmer, *supra* note 58, at 131-34.

158. *See* Connell v. Generali, No. 97-2262 (S.D.N.Y. filed June 1997).

dismiss.[159] As of January 1999, these motions were still pending and parties were involved in motions to compel discovery. Previously, while riding the coattails of his publicity and success in the Swiss banking cases, attorney Edward Fagan filed a comparable suit against similar European defendants.[160]

2. State Action

In various states, these same insurance companies are being sued by individuals to whom the insurance commissioners have pledged their support.[161] The commissioners' support is vital because if the federal actions are dismissed, the commissioners will proceed in state courts using their regulatory powers to influence decision makers.[162]

3. Administrative Action

Enormous latitude exists in the powers and influence of a state insurance commissioner; she may influence whether a company is forced to surrender its license or whether a foreign company may transact business in the United States.[163] Her subpoena powers may allow her to force company officers to answer questions about corporate practices and to examine both a company's files and records.[164] As threats of banking sanctions were instrumental in reaching a settlement with the Swiss banking industry, insurance commissioners anticipate similar threats of administrative sanctions will likewise be instrumental in a speedy settlement with the insurance industry.[165]

A major negotiations breakthrough occurred on August 20, 1998, with the announcement of the Assicurazioni Generali agreement to pay $100 million to settle the claims.[166] The settlement was abandoned just a few weeks later, after the

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159. These insurance conglomerates are: Allianz, Assicurazioni Generali, Basler, Der Anker Allegmeine, Deutcher Ring, Gerling Konzern, Mannheimer, Nordstern, Riunioni Adriatica, UAP (now known as AXA), Vereinte, Victoria, Weiner Allianz, Winterthur, and Zurich. *See* Palmer, *supra* note 58, at n.208.

160. The pending suits against the insurance companies allege that the insurers refused to honor claims on policies purchased by the plaintiffs. *See* Palmer, *supra* note 58.

161. On February 4, 1998, one such family, the Stern family of California, publicly announced the filing of their lawsuit against Generali Assicurazioni. *See id.* at 132-33.

162. *See id.* at 133.

163. *See id.*

164. *See id.* Commissioner Quackenbush of California, a state with many Holocaust victims, has been very active in the attempt to force payment by these insurance companies. *See id.* Hearings were held by Commissioner Quackenbush in November 1997 and January 1998, in Los Angeles and San Francisco, which solicited more information to assist in the lawsuits. *See id.*

165. *See* Gernsten, *supra* note 150.

166. Under the terms of the settlement, Generali would have paid $10 million up front, and $90 million upon court approval. The total settlement, $100 million, is only a fraction of the $1 billion the Plaintiffs in the class-action suit originally demanded. *See $100 Million Offered to Settle Holocaust Claims*, *supra* note 61, at 8.

National Association of Insurance Commissioners ("NAIC") informed Generali that this settlement would not place a monetary cap on their potential damage payout.[167] As of this writing, while more insurance companies have signed the NAIC's Memorandum of Understanding ("MOU"), actual recovery for policyholders remains distant.[168] Notwithstanding, it is anticipated that a settlement will be reached in a time and form comparable to that of the Swiss banking cases.[169]

C. Nazi Slave Labor Camps

Oskar Schindler, the real-life hero of Steven Spielberg's epic *Schindler's List*, saved Jewish concentration camp victims from extermination by employing them as forced labor in his factory.[170] He ran his business into the ground in protest against Hitler's slave labor enterprise, which provided the Third Reich cheap labor to finance Hitler's regime.[171] However, had Schindler gone on to build a successful post-war business like Volkswagen, Siemens, BMW, and Leica, he likely would now be facing another difficult quandary: a lawsuit forcing him to pay the profits he earned from using those same slave laborers whose lives he saved.[172]

Perhaps Ford Motor Company, which operated a subsidiary in Germany and also employed Nazi slave labor during the 1940s, saw the proverbial writing on the wall.[173] On February 23, 1997, Ford sponsored a televised, commercial-free

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167. *See* NAIC Wants More; Generali Deal Fails, 9 INS. REGULATOR 37, Sept. 28, 1998, at 1.

168. By signing the Memorandum of Understanding (MOU), the insurance companies agree to contribute to the establishment of a humanitarian fund and to help pay for the investigation and audits by insurance commissioners to locate policies. As of September, 1998, six insurance companies had signed the MOU: Zurich Insurance Co. of Switzerland (the first to do so in Mid-August), Assicurazioni Generali (after negating the $100 million settlement), Allianz AG Holding of Germany, the Paris-based AXA Group, and Switzerland's Basler Leben and Wintherthur Insurance Companies. *See NAIC Reviews Holocaust Pact*, BEST'S INS. NEWS, Sept. 15, 1998, *available at* 1998 WL 19369511.

169. *See* Deborah Senn, *American Government Officials Speak*, 20 WHITTIER L. REV. 22, 23 (1999). Ms. Senn is the State Insurance Commissioner of Washington, the first woman elected to that office, and heads a nationwide task force created to investigate Holocaust-related insurance claims. *See id.* at 23 n.aa1.

170. Jonathan Braude, *Volkswagen Yields to War-time Slaves*, S. CHINA MORNING POST, Sept. 17, 1998, at 13.

171. *See id.*

172. *See* Edmund L. Andrews, *53 Years Later, Lawsuit is Filed on Behalf of Hitler's Slave Labor*, N.Y. TIMES, Sept. 1, 1998, at A1; *see also* Braude, *supra* note 170.

173. With the advent of lawsuits against European banks and insurance companies who profited from Hitler's reign, it was undoubtedly only a matter of time before similar lawsuits were filed against all other companies perceived as profiting from the Holocaust. Henry Ford's support of Hitler's regime had a profitable consequence: "the Ford factories in Germany were never nationalized and instead placed under the administrative custodianship of the 'Reichs Commission Office' for the handling of

screening of *Schindler's List*.[174] Many Jewish viewers were caught between being deeply offended and highly amused at the stark irony: Ford Motor Company was founded by one of America's premier anti-Semites, Henry Ford.[175] Ford himself helped popularize anti-Jewish sentiment in the United States with his 1927 anti-Semitic publication, "The International Jews."[176] Following Ford's display of public goodwill, other corporations which likewise profited from slave labor during WWII, such as Volkswagen, began establishing funds to recompense Nazi slave laborers.[177]

Such demonstration of good will was irrelevant to plaintiffs who later filed two lawsuits in August 1998, listing Volkswagen as a defendant.[178] The first lawsuit was filed in New York on August 30, 1998, by the same attorneys responsible for the Swiss banking and European insurance cases previously discussed in this Comment.[179] This lawsuit named numerous defendants, among whom were Daimler-Benz, Volkswagen, BMW, and Siemens.[180] The second lawsuit was filed against Volkswagen just one day later in Newark, New Jersey.[181] Both lawsuits

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alien property." Hermann Goring, head of this office, was of the view that after the war, assets taken from these companies would be returned to their legal owners. *See* Herbert R. Reginbogin, *American-German Industrial Relations During World War II*, 3-4 (unpublished manuscript on file with the author).

174. *See generally* Ben Kamin, *Was Ford Right Sponsor for "Schindler's List"?*, JEWISH NEWS (Cleveland, OH), Feb. 28, 1997, at 7. For an assessment of the situations surrounding the showing of *Schindler's List*, Nielsen ratings, and its impact *see* Kyle Pope, *Sunday TV Fare May Get Serious After "Schindler,"* WALL ST. J., Feb. 25, 1997, at B1.

175. *See* Joshua Botkin, *Ford and "List" - Making Up for the Past?*, NEWSDAY, Feb. 25, 1997, at A43.

176. Reginbogin, *supra* note 173, at 3.

177. During June 1998, Volkswagen publicly stated that the Nazi regime was responsible for the slave labor and any reparations should be directed to the government's successor, the current German government. However, on July 7, 1998, the automaker demonstrated a surprising change of heart regarding this issue, announcing that it would open a private fund to pay the slave laborers who worked for them during 1944-45. It was done, Volkswagen said, "in recognition of its historical and moral responsibilities arising from the use of forced labor during World War II." *See Volkswagen Plans Fund for WWII Slaves, Turnaround Avoids Potential Lawsuit*, SEATTLE POST-INTELLIGENCER, July 8, 1998, at A2.

178. *See* Slave Laborers in WWII Volkswagen Plants Sue, WASH. POST, Sept. 1, 1998, at A8; Petitioner's Brief, Pollack v. Siemens AG, No. CV 98-5499 (E.D. N.Y. filed Aug. 30, 1998); *see also* Petitioner's Brief, Gross v. Volkswagen (Fed. N.J. filed Aug. 31, 1998).

179. *See* Andrews, *supra* note 172, at A2. Attorneys for the plaintiffs said "they will demand at least $75,000 for each of the surviving victims." *Id.* The attorneys for the plaintiffs are Edward D. Fagan and Carey D'Avino of Fagan & Associates; Robert A. Swift and Martin J. D'Urso of Kohn, Swift & Graf, PC; William Marks of the Marks Law Firm; Robert L. Leiff, Morris A. Ratner, and Karen J. Mandel of Leiff, Cabraser, Heimann & Berstein; Irwin Levin and Richard Shevitz of Cohen & Malad, PC; and Michael Witti of Munich, Germany. *See* Petitioner's Brief at 31, *Pollack* (No. 98-5499).

180. *See* Andrews, *supra* note 172. The complete list of named defendants is as follows: Siemens AG, Fried Krupp AG Hoesch-Krupp, Henkel KGaA, Eicon Technology, Diehl GmbH & Co. oHG, Bayeriche Motoren Werke, Daimler-Benz AG, Volkswagen AG, Audi AG, Leica Camera AG, Wurtembergische Metallwarenfabrik AG, and MAN AG. *See* Petitioner's Brief at 13-16, *Pollack* (No. 98-5499).

181. *See Slave Laborers*, *supra* note 17, at A8.

accused the German companies of profiting from slave labor, and asked for disgorgement of the profits made from the slave work force.[182]

The slave labor cases relied on legal theories that are markedly different from the theories utilized in the Swiss banking and European insurance cases.[183] In the latter cases, attorneys utilized contractual theories and demanded the return of the plaintiffs' property and interest to remedy unjust enrichment.[184] Such actions are typical of category I litigation discussed previously.[185] In the slave labor cases, however, the plaintiffs alleged violations of international law, civil assault and battery, conversion, unjust enrichment, and conspiracy.[186] In *Pollack v. Siemens AG*, for example, the plaintiffs sought restitution of the value of the slave labor, disgorgement of illicit profits, compensatory damages, and interest.[187] Claims such as these are typical of category II litigation also discussed above.[188] As of this writing, there is no indication of a forthcoming settlement between the former slave laborers and the corporations.[189]

D. French Banking Lawsuits

A multitude of lawsuits has recently been filed against French banks, no doubt spurred by the auspicious beginnings of the Holocaust cases.[190] On December 17, 1997, "a lawsuit filed in Brooklyn federal court accused nine French banks of blocking access to Jewish accounts under the Vichy regime, [as well as] failing to account for seized assets after World War II."[191] This suit, which follows the pattern of cases discussed above, was, *a fortiori*, the ostensible product of the pitiful results prior reparations have yielded.[192] During December 1998, one of

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182. *See id.; see also* Andrews, *supra* note 172.

183. *See* In re: Holocaust Victim Assets, (E.D. N.Y.) Master Docket No. CV-96-4849, at 12-28.

184. *See id.* at 7-9.

185. *See* Section I and accompanying discussion of the three categories of Holocaust-related litigation.

186. *See* Petitioner's Brief at 25-30, *Pollack* (No. 98-5499).

187. *See id.* at 30.

188. *See supra* Section I and accompanying discussion of the three categories of Holocaust-related litigation.

189. The time frame of the Swiss banks cases may likely be an accurate harbinger of the future of slave labor cases. The initial suits were filed early in 1997, and a final settlement was announced almost two years later. If the past is a prologue, the slave labor cases--the most visible of which were filed during August 1998--are not likely to be resolved anytime before the end of 2000.

190. *See* Tim Whitmire, *French Banks Sued over Confiscated World War II Assets*, ASSOC. PRESS, Dec. 17, 1997, *available in* 1997 WL 4897208.

191. *Id.*

192. *See id.*

these banks, Barclays, had agreed to a $3.6 million settlement with descendants of French Jews, an action which six other major French banks publicly criticized.[193]

E. Nazi-Stolen Art

While disputes regarding looted Nazi assets are generally regarded as the last chapter of the Holocaust, "[t]he final portion of [that] chapter will likely be the story of looted art."[194] Within the first few months after the Nazis' arrival in France, they looted over 200 art collections, "which at that time constituted approximately one-third of the world's privately-owned art."[195] These works were used, not surprisingly, along with the personal and communal property looted from the Jews, to finance Hitler's regime.[196]

Although the era of Holocaust-related litigation is still in its infancy, attempts to locate looted art have recently commenced.[197] Federal legislation is assisting in this search,[198] and more lawsuits appear to be on the horizon.[199] While an enduring principle of American property law states that a thief cannot pass good title to anyone, the advent of the Discovery Rule in *O'Keefe v. Snyder*[200] is certain to complicate what would otherwise be simple conversion cases.[201] In that sense, it is possible we have yet to see even the first page of the chapter on Nazi-looted art.[202]

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193. *See* AFX News; Source: World Reporter, Dec. 17, 1998, *available in* 1998 WL 20327970. The six banks issued that a joint statement criticizing Barclays for the settlement are Credit Lyonnais, Banque Paribas, Banque Indosuez, Credit Agricole, Natexis/BFCE and Societe Generale.

194. Pell, *supra* note 72, at 72.

195. *See id.* at 68.

196. *See id.*

197. *See France Publishes Catalogue of Looted Nazi Art*, CNN (Nov. 10, 1998) <http://cnn.com/WORLD/europe/9811/10/nazi.art/index.htm>.

198. Representative James A. Leach, chairman of the House Banking and Financial Services Committee, introduced a bill on October 1, 1997, which declared that "all governments take appropriate action to ensure that artworks confiscated by the Nazis or in the aftermath of World War II by the Soviets be returned to their original owners of their heirs." David Runkel, *Leach Introduces Bill to Aid Holocaust Victims*, Government Press Release, October 1, 1997, *available in* 1997 WL 12103218.

199. At the behest of the Art Institute of Chicago, philanthropist Daniel Searle purchased a Degas pastel entitled "Landscape with Smokestacks" for $850,000. Ten years later, Searle faces a major lawsuit filed by Holocaust victims who claim the painting was stolen from their relatives by Nazis. The two sides are holding talks that, if not successful, may result in an upcoming trial. *See* Pell, *supra* note 72, at 67.

200. 416 A.2d 862 (N.J. 1980).

201. For an excellent historical overview and analysis of the current problems facing the acquisition of art looted by the Nazis during World War II, see Pell, *supra* note 72, at 74-90.

202. For a discussion of some of the potential private lawsuits that are certain to make headlines, as well as the myriad legal conundrums which face those in the judiciary who will attempt to reconcile the problems of a thief passing title, see Pell, *supra* note 72, at 74-90.

F. Burger-Fischer v. Degussa AG

In January 1998, the Degussa Corporation announced that it would make payments to former slave laborers as a humanitarian gesture.[203] Such a gesture, however, did not stave off legal battles which were looming on the horizon.[204] One week after the $1.25 billion Swiss bank settlement, a lawsuit was filed against Degussa, in part for smelting gold looted by the Nazis, but most notably for manufacturing the infamous Zyklon-B cyanide used in gas chambers.[205] This suit was also filed by Edward Fagan, an attorney whose notoriety stems from his involvement in the Swiss banking and European insurance lawsuits. Mr. Fagan is quickly becoming a very controversial legal figure.[206] There is a growing unease in the Jewish community that his persistent legal "bickering" is reducing the Holocaust merely to a battle over money.[207] Nonetheless, the stock market certainly viewed Fagan's suit as more than mere bickering–the Monday after filing the suit against Degussa, its stock dropped 4.2%.[208]

This lawsuit marks what is perhaps the first pure category III lawsuit, as discussed previously.[209] In category III litigation, the prayer for relief is not merely return of the plaintiffs' property, or even restitution of unjust enrichment earned by the plaintiff's slave labor.[210] The objective of Category III litigation is punitive; the action seeks to punish a corporation for an act it did not directly commit, but one committed by someone with whom it associated or transacted business.[211] Degussa AG is being sued as punishment for acts which were committed by the Nazis, with whom they unquestionably had an abiding and profitable commercial

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203. *See Degussa to Make Payments to Former Nazi Slave Workers*, NAT'L POST, Jan. 29, 1998, at 26, *available in* 1998 WL 7190273.

204. *See, e.g.*, Burger-Fischer v. Degussa AG, No. 98-3958 (D.N.J. Filed Aug. 21, 1998).

205. *See id; see also* Brauner, *supra* note 70, at 8.

206. *See* Steve Chambers, *Holocaust Lawyer Inspires Range of Emotions*, STAR LEDGER (Newark, N.J.) Dec. 20, 1998, at 27, *available at* 1998 WL 16983366. Melvyn Weiss referred to Mr. Fagan as an "ambulance-chaser" and "a relatively small-time lawyer who thought himself bigger than he is." *See id.*

207. *See id.* Fagan recently stated the following regarding the pending lawsuit against Degussa: "Basically I want to see them bankrupt." *See* Frederic Bichon, *Holocaust Survivors Seek Assets from German Firm Degussa*, AGENCE FRANCE-PRESSE, Aug. 22, 1998, *available in* 1998 WL 16583419.

208. *See* Christopher Rhoads, *Degussa Shares Drop 4.2% on Filing of Holocaust Suit*, WALL ST. J. EUR., Aug. 25, 1998, at 3, *available at* 1998 WL-WSJE 12730045.

209. *See* discussion *supra* Section I.

210. *See* Bichon, *supra* note 207.

211. *See generally* Burger-Fischer v. Degussa, (U.S.N.J. Filed Aug. 21, 1998).

relationship.[212]

Such cases of jurisprudential "guilt by association," proceeding on shaky legal ground, have already been impugned as "an unseemly fight over blood money."[213] The legal theory upon which these cases are predicated, as well as the consequences of a potentially successful suit against Degussa, will be discussed *infra*.[214] One thing, however, can be said with certainty about category III lawsuits: there will surely be many more to come.[215]

IV. GOVERNMENTAL RESPONSES

Class action suits against corporations are being viewed by many as a panacea for the righting of historical misdeeds.[216] However, many countries involved in the effort to compensate Holocaust victims have made worthwhile--and effective--efforts to do so through non-legal fora.[217] While many countries have reexamined their own WWII involvement, and have taken steps towards rectifying the injustices of the past, those of the United States and Switzerland will now be discussed.[218]

A. Responses by Switzerland

The Swiss employ a German word to describe the agonizing process of examining their country's World War II role: *Vergangenheitsbewaeltigung*.[219] Translated, it means "coming to terms with the past."[220] No country has arguably undertaken more comprehensive research on the history of its relationship with Nazi Germany than the Swiss Government.[221] What follows are some of the steps Switzerland has taken to come to terms with its past.[222]

1. Bergier Commission

In December 1996, the Swiss Parliament created the Independent Commission

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212. *See* Jeffrey Gold, *Holocaust Victims Sue German Firm*, ASSOCIATED PRESS, Aug. 21, 1998, at *1, *available in* 1998 WL 7611618.

213. Charles Krauthammer, *The Holocaust Scandal*, WASH. POST., Dec. 4, 1998.

214. *See infra* Section V and accompanying discussion.

215. *See* John Authers, *Holocaust Lawsuit Brought Against Degussa in US*, FIN. TIMES, Aug. 24, 1998, at 3, *available in* 1998 WL 12260719.

216. *See generally* Brauner, *supra* note 70; Bichon, *supra* note 207; Gold, *supra* note 212.

217. *See* discussion *infra* notes 244–60 and accompanying text.

218. *See* discussion *infra* Section IV.

219. *See* Tom Tugend, *Coming to Terms With the Past*, JEWISH JOURNAL, Apr. 17, 1998, at 22.

220. *Id.*

221. *See* Stuart Eizenstat, Testimony Before the House International Relations Committee on Property Restituion in Central and Eastern Europe, Aug. 6, 1998, at 9.

222. *See* discussion *infra* notes 223 to 243.

of Experts, led by Professor J. F. Bergier (the Bergier Commission).[223] It consists of nine members: eight historians and one legal expert.[224] They are currently conducting a painful, yet thorough, examination of stolen Nazi goods, gold transactions with the Reichsbank, and the Swiss refugee policy during the Nazi era.[225]

2. Volcker Commission

On May 2, 1996, an agreement between the World Jewish Restitution Organization and the Swiss Bankers Association (SBA) declared that independent auditors should be allowed "unfettered access to all relevant files in banking institutions regarding dormant accounts and other assets and financial instruments deposited before, during and immediately after the Second World War."[226] This committee is officially called the "Independent Committee of Eminent Persons" (ICEP) or simply the "Volcker Commission."[227] Its objective is to discover all unclaimed assets which were deposited in Swiss banks by Nazi victims.[228]

3. Humanitarian Funds

In February 1997, the Swiss Federal Council established a fund for needy Holocaust victims by soliciting financial contributions from the private sector at large, with these contributions coming primarily from the three Swiss banks.[229] The fund currently contains over 165 million Swiss Francs.[230] In March 1997, the Swiss government proposed the Solidarity Foundation, with an endowment of $4.7 billion that would generate $200 million to assist genocide victims, victims of human disasters, and Holocaust survivors.[231]

Finally, the SBA has recently published a list of names of holders of dormant accounts opened before 1945, while the Swiss government has also established an

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223. *See* Comras, *supra* note 21, at 34.

224. *See* Steps Taken by Switzerland in Connection with the Problem of Unclaimed Assets and Nazi Looted Assets, Swiss Federal Department of Foreign Affairs, Status Statement, August 1, 1998.

225. *See id.*

226. Lamont, *supra* note 51 at 240-42.

227. *See id.* This commission is known as the Volcker Commission because it is chaired by Paul Volcker, former Federal Reserve Board Chairman.

228. *Steps Taken by Switzerland in Connection with the Problem of Unclaimed Assets and Nazi Looted Assets*, *supra* note 224, at 3.

229. *See id.* at 3-4.

230. *See id.*

231. *See* Comras, *supra* note 21, at 34-5.

independent agency to rule on claims by foreigners.[232]

4. Swiss Public Resentment

Having sustained a drumfire of accusations by both American politicians and Jewish organizations, the Swiss are becoming increasingly resentful and are considering economic retaliations of their own.[233] Such a feeling is certainly understandable when Edgar Bronfman, president of the World Jewish Conference, recently declared "total war" on Switzerland.[234] Fewer incidents, however, have aroused greater Swiss indignation than a report issued by the Simon Weisenthal Center accusing the Swiss of keeping Jewish war refugees in brutal working and living conditions.[235] Though the Weisenthal Center has since backpedaled on the report's conclusions,[236] this has not stopped the Swiss Ambassador from lambasting what he called "a new polemic of half-truths."[237]

The Swiss have taken several approaches to counter what they call American "extortion maneuvers" by a country hopelessly biased against their own.[238] Two Los Angeles attorneys have formed the Switzerland Alliance, a group whose intent is to emphasize the uniquely Swiss contributions to progress in human rights and international policy.[239] The Swiss Consulate General and Federal Department of Foreign Affairs have made recent efforts to emphasize those actions the Swiss have undertaken to assist Holocaust victims in the past.[240] Finally, the Swiss Consulate General in Los Angeles recently had a public exhibit detailing the life of Carl Lutz, a Swiss citizen who saved the lives of 69,000 Jews by issuing them "Schutzbriefe" (protective papers).[241]

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232. *See* Steps Taken by Switzerland in Connection with the Problem of Unclaimed Assets and Nazi Looted Assets, *supra* note 228, at 1.

233. *See* Tugend, *supra* note 219, n.22.

234. *See id.*

235. *See id.*

236. When questioned about the report, Simon Weisenthal stated "I didn't like his [Schom's] first report on Swiss refugee camps and distanced myself from it. I have said in the past that Mr. Schom is a historian by hobby only, and I am convinced this is the last time the center will use him as a historian." Thomas G. Borer, *Distortion, Guilt by Association*, L.A. TIMES, June 17, 1998, *reprinted in Dialogue*, Newsletter from the Switzerland Task Force, June 1998, at 5.

237. *See id.* Ambassador Borer, on November 15, 1998, spoke at the Whittier Law School symposium entitled "Assets of the Holocaust: The Swiss Perspective." He stated that Switzerland welcomed 230,000 refugees during the war, 30,000 of which were Jewish. That, he claims is much more per capita than America welcomed in. Had America welcomed, per capita, the amount Switzerland did, it would equal well over one million Jews. *See id.*

238. *See* Tugend, *supra* note 219, at 23.

239. *See* Arthur A. Jones and Robin Wiseman, *Shaping the Future*, The Switzerland Alliance, November 3, 1998 (unpublished document on file with author).

240. *See generally, Steps Taken by Switzerland in Connection with the Unclaimed Assets and Nazi Looted Assets, supra* note 224.

241. Doris Ritzi, *"Visas of Life" The Work of Charles "Carl" Lutz*, SWISS AM. REV., June 15, 1998, at 14.

Swiss President Flavio Cotti recently admitted that "[w]ithout a doubt, Switzerland made mistakes" during the war.[242] However, he also strongly cautioned against the American tendency to view any altercation as a battle between good and evil by reminding that "headlines can also kill."[243]

B. America's Governmental Responses

While the United States is internationally renowned for its trigger-happy posse of plaintiff's lawyers, ever willing to employ legal pleadings in the fight against injustice, the U.S. government itself has done much more to assist the Holocaust victims' remuneration than simply facilitate the exchange of legal pleadings.[244]

1. The Eizenstat Report and the Executive Branch

Under the leadership of Stuart Eizenstat,[245] the Executive branch of the U.S. government has sought to obtain redress for Holocaust victims, particularly those who are "double victims:" victims both of Nazism and later Communism.[246] Mr. Eizenstat was appointed by the President as the Special Envoy of Property Restitution.[247] In this position he visited eleven countries to see what could be done to assist in the process of returning property both to individuals and to communities.[248] Further, he was charged with coordinating a historical examination into issues of looted assets and post-war efforts to compensate those individuals from whom property was stolen.[249]

His seminal study, the results of which were revealed at the London Gold Conference,[250] showed that an insufficient effort was made to recover the looted

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242. Speech by President Flavio Cotti at the National Congress of the "Education for Tolerance" Foundation, Zurich, May 14, 1998, *reprinted in Dialogue*, Newsletter from the Switzerland Task Force, June 1998.

243. *See id.*

244. *See* discussion *infra* notes 244 to 260.

245. Mr. Eizenstat is the United States Under Secretary of State for Economic, Business, and Agricultural Affairs.

246. Double victims are those whose property was stolen twice, first by the Nazis and then by the Communist regimes that eventually presided over Central and Eastern Europe.

247. *See* Comras, *supra* note 21, at 31-2.

248. *See* Testimony by Stuart Eizenstat before the House International Relations Committee on Property Restitution in Central and Eastern Europe, Aug. 6. 1998.

249. *See* Comras, *supra* note 21, at 31.

250. The London Gold Conference occurred in December 1997, during which time the location and distribution of post-WWII gold were discussed. A follow-up conference was held in Washington D.C. in December 1998. *See id.* at 31.

gold.[251] Further, Mr. Eisenstat's study reported that not nearly enough was done to use these assets to benefit those that survived the Holocaust.[252] Following his report, a dozen countries formed historical commissions to study their respective government's relationship with Nazi Germany.[253] The report, however, was clear in enunciating that a moral obligation exists to complete the unfinished business of the Second World War.[254] Cabinet members such as Madeleine Albright have also demonstrated the executive branch's commitment to emphasizing what the Swiss have accomplished, rather than further antagonizing them with a barrage of legal pleadings.[255]

2. The Legislative Branch

The legislative branch has also been working on other Holocaust-related issues.[256] On October 1, 1997, Representative James A. Leach introduced a bill which would authorize up to $25 million in donations to organizations serving survivors of the Holocaust in the United States.[257] It would also fund archival research by the U.S. Holocaust Museum to assist in the restitution of assets looted or extorted from Holocaust victims.[258] Senator Alfonse D'Amato, while head of the Senate Banking Committee, held hearings related to confiscated assets and was also instrumental in facilitating the recent settlement with the Swiss banks.[259] Hence, some of the most visible and poignant successes have come not from the filing of class action lawsuits, but from not-too-subtle governmental arm-twisting.[260]

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251. *See id.* at 32. Some of the countries in attendance were Argentina, Belgium, Brazil, Norway, Portugal, Spain, Switzerland, Sweden, and Turkey. *See id.*

252. *See id.* at 31.

253. *See id.*

254. *See id.* at 32.

255. *See* Madeleine K. Albright, Remarks Before Members of the Swiss Parliament, Bern, Switzerland (Nov. 15, 1997), at 1-2, *available at* <http://secretary.state.gov/www/statements/971115a.htm>.

256. *See* Runkel, *supra* note 198.

257. *See id.*

258. *See id.*

259. *See* Clifford J. Levy, *D'Amato's Next Job: Mediating Holocaust Lawsuit Against Banks*, N.Y. TIMES, Dec. 17, 1998, at B2. Having recently lost his bid for re-election to the United States Senate, Senator D'Amato has accepted a job mediating a federal lawsuit against German and Austrian banks brought by Holocaust survivors. *See id.*

260. *See id.*

V. CATEGORY III LITIGATION AND THE TORT OF "PRIVATE HUMAN RIGHTS REPARATIONS"

A. Summary of the Three Categories

As previously mentioned, Holocaust-related litigation has occurred in three general phases, or categories.[261] Category I litigation consists of those cases in which the objective is merely to recover property previously belonging to the plaintiffs.[262] The most notable examples of these cases are the lawsuits against the Swiss Banks for deposits made but not recovered, as well as unpaid insurance policies.[263] Category II litigation comprises attempts to recover the unjust enrichment of companies who profited from the plaintiffs' forced labor, yet did not pay them for their "services."[264] The current lawsuits against Volkswagen, Ford, and BMW are examples of this category of litigation.[265]

Category III litigation ventures progressively further into the blurry realm of duties which plaintiffs owe defendants.[266] These cases constitute attempts to punish defendants for actions which, while thoroughly revolting to a more modern conception of human rights, were technically legal at the time they were committed.[267] This legal theory asserts guilt by association--association, that is, with the Third Reich.[268] Further, these cases tend to have an intervening cause between the actions of the plaintiff and the agent which directly caused the tort.[269]

Category III litigation, as well as other current tort actions using similar legal theories--dram shop acts, tobacco litigation, and firearms litigation--will be discussed in this section.[270] Because human rights cases are essentially tort actions, Category III cases constitute some of the first attempts to resolve human rights cases through private means. This Comment will suggest the use of a new tort, the

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261. *See supra* note 30-34 and accompanying text.
262. *See* discussion *supra* Section II A-B.
263. *See* discussion *supra* Section IIA(1), (2); *see also* Section III A-B.
264. *See* discussion *supra* Section IIA(4); *see also* Section IIIC.
265. *See supra* Section III (discussing current legal imbroglios involving Ford, BMW, Daimler-Benz, and other automotive manufacturers who profited from forced slave labor during WWII).
266. *See infra* note 33 (discussing Category III litigation, and the pending lawsuit against Degussa).
267. *See id.*
268. *See generally infra* Section V (overviewing cases in which guilt is the result merely of association).
269. *See id.*
270. *See infra* notes 295–336 and accompanying text.

tort of "private human rights reparations."[271] This tort would strike a middle jurisprudential ground by providing reparations for victims of human rights violations, while simultaneously preventing the impending dilemma of infinite liability.[272]

B. Degussa: A Tip of the Iceberg

The suit most conspicuously of a Category III nature was recently filed by victims of the Holocaust against Degussa AG.[273] Degussa is the largest precious metals refiner in Germany and is an international corporation with an annual sales of over $9 billion.[274] In the complaint, Degussa is alleged to have smelted golden teeth taken directly from the mouths of Jewish prisoners, as well as manufactured the Zyklon-B cyanide capsules which were used in Nazi gas chambers.[275] This class-action lawsuit, filed on the coattails of the Swiss banking settlement,[276] seeks 1) profits earned, 2) compensatory damages, and 3) punitive damages.[277] Though unlikely to see the inside of a courtroom before the year 2001, this lawsuit is likely to be the catalyst for a deluge of other similar category III lawsuits.[278]

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271. *See infra* Section V (discussing the tort of private human rights reparations).

272. *See id.*

273. *See* Burger-Fischer v. Degussa, No. 98-3958 (D.N.J. filed Aug. 21, 1998); *see also Chemistry and Industry-Degussa-Holocaust Claims*, CHEMICAL BUS. NEWSBASE, Sept. 21, 1998, *available in* 1998 WL 14757474. Degussa, a global corporation with sales of over $9 billion, was "the largest precious metals refiner in Europe in the 1930s and 40s," and was ostensibly the reason the Nazis decided to forcibly take teeth from both living and murdered victims. *See* Gold, *supra* note 212. Degussa informed "the Nazis that it could refine gold dental fixtures into marketable gold," thus aiding the Nazis to finance the war. *See id.* The Zyklon-B cyanide tablets, which were used to exterminate hundreds of thousands of concentration camp inmates, were produced by Degesch, a company owned by Degussa. *See id.* Degussa had previously opened its archives to clarify the issue of smelting gold and silver from Jews. *See id.* "The lawsuit was filed in Newark, because [Degussa's] U.S. subsidiary, Degussa Corp., is based in Ridgefield Park, [New Jersey]." *See id.* Degussa Corp.'s legal counsel, Dennis J. Taylor, "said that Degussa Corp. was formed in 1973 and has no connection to whatever may have occurred in Europe in the '30s and '40s." *Id.*

274. *See 125 Years of Degussa AG - History*, (visited Aug. 13, 1998) *available at* <http://www.degussa.de>. (corporate profile of Degussa); *see also* Gold, *supra* note 212 for statement regarding Degussa's global sales of $9 billion.

275. *See* Burger-Fischer v. Degussa, No. 98-3958 (D.N.J. filed Aug. 21, 1998). Note that while Degussa is being sued for processing the gold taken from the mouths of Jews and manufacturing the gas used to kill them, Degussa is not being sued for actually taking part in the extraction of the teeth or actually taking part in the extermination of Jews. *See generally id.*

276. The lawsuit against Degussa was filed in New Jersey one week after the $1.25 billion settlement between Holocaust victims and the Swiss banks. *See* Gold, *supra* note 212.

277. *See* Burger-Fischer v. Degussa, *supra* note 275. In addition to judicial problems, "a New Jersey state legislator has called for a boycott of the company's products in the state as well as a divestiture of the company's stock." *See* Rhoads, *supra* note 208.

278. *See* Authers, *supra* note 215. Edward Fagan recently remarked that Degussa played a "unique role" by manufacturing the cyanide capsules used in gas chambers. *See Chemistry and Industry-Degussa-Holocaust Claims*, CHEMICAL BUS. NEWSBASE, Sept. 21, 1998, *available in* 1999

A litigative battle of this sort certainly evokes our natural sympathies on behalf of the victims of such a nightmarish ordeal.[279] However, such a lawsuit is also saturated with potential legal complications. The most obvious is the agency problem: was Degussa a forced agent of the German government, or could they have informed Hitler that they were unwilling to cooperate because of their disapproval with his unsavory methods of operation?[280]

Dennis J. Taylor, counsel for Degussa Corporation, remarked that "it wasn't like Degussa determined what they wanted to refine. Everyone in Germany did what the government wanted."[281] Degussa's defense of duress is surely bolstered by the fact that they were the only company in Nazi Germany with the capacity to refine precious metal dental alloys into market grade purity.[282] While such a defense is certain to be wholly unfulfilling to those at the opposite end of the spectrum, it is certain to be a defense employed by the vast majority of defendants in similar Category III cases.[283]

Further, Degussa's business activities of refining precious metals were technically legal under World War II German law.[284] Nonetheless, Degussa was not ignorant of the source of the precious metals which it was refining.[285] Thus, a key issue is whether, as a recent historical report charges, Degussa was "an active accomplice in perpetrating the financial crimes and human rights violations of the Nazi regime."[286]

The ramifications of a successful lawsuit against Degussa would be far

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WL 14757474. Further, Fagan asserted that the Holocaust "victims 'bought the company with their blood and their teeth,' and that he wants Degussa to turn over all its assets to the plaintiffs." *Id.*

279. *See generally* Alicia Appleman-Jurman, *supra* note 40.

280. *See* Gold, *supra* note 212.

281. *Id.*

282. This is a point conceded by the plaintiffs in their complaint against Degussa. *See* Burger-Fischer v. Degussa, No. 98-3958 (D.N.J. filed Aug. 21, 1998). Reason warrants the conclusion that if Degussa were the only German company with the capacity to process dental gold, their corporate autonomy during Hitler's reign was likely *de minimis*. *See id.*

283. *See id.*

284. Kenneth R. Timmerman provides an interesting insight into the inner-working of Degussa in THE DEATH LOBBY: HOW THE WEST ARMED IRAQ 70 (Houghton Mifflin Co. 1991). He remarks:

> Degussa had also played a key role in the Nazi effort to build an atom bomb, stopped only when its Oranienburg works near Berlin were flattened by U.S. bombers in 1945. That same year, as the Third Reich was going up in flames, Degussa's chairman, Hermann Schlosser, donated 45,000 reichsmarks to Hitler's SS. Thirty-five years later Schlosser was still on the Degussa board, and in 1987 he was awarded the German Federal Merit Cross for his services to industry.

Id.

285. *See* Burger-Fischer v. Degussa, No. 98-3958 (D.N.J. filed Aug. 21, 1998).

286. *See* Authers, *supra* note 215. The historical report which makes these charges was, ironically, commissioned by Deutsche Bank. *See id.*

reaching.[287] If it is found that Degussa "willingly helped"[288] the Nazis, which may subject Degussa to liability a half century later for the Nazi's actions, the pressing question will be: who is next?[289] May liability be imposed on the manufacturers of the ovens that killed the Jews, the guns that soldiers used to kill Jews, or even the railroads that carried the Jews to Dachau, Treblinka, or Auschwitz?[290] Such a result would appear to impose an unreasonable duty of care on the defendants.[291] The analysis would likely change if the defendant--a manufacturer of ovens, for example--tailored the ovens specifically for the purpose of war crimes.[292] Assume further that Degussa manufactured the Zyklon-B specifically for use in concentration camp gas chambers.[293] Would such an action then impose an unreasonable duty of care upon the defendants?[294]

While such Category III lawsuits may, at first blush, appear to impose unreasonable burdens upon defendants, such scenarios would not be unusual considering the cacophonous state of modern tort law.[295] Three areas of litigation which parallel these scenarios are 1) dram shop laws, 2) tobacco-related litigation,

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287. Worthy of mention is the fact that Degussa Corp., based in Ridgefield Park, New Jersey, was formed in 1973 and thus has arguably no connection to what occurred in Europe in the '30s and '40s. *See* Gold, *supra* note 212.

288. Such a phrase as "willingly helped" seems somewhat oxymoronic in light of the actions taken by Hitler against those who disagreed with him. This phrase was used by Peter Jeffrey in describing this watershed case against Degussa. Peter Jeffrey, *World Watch*, WALL ST. J., Aug. 24, 1998, *available in* 1998 WL-WSJ 3506502.

289. *See* discussion *infra* Section V(E) regarding potential lawsuits against manufacturers of screwdrivers, knives, etc., in the context of firearms litigation.

290. Justice Andrews, in his famous dissent in Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (Andrews, J. dissenting), stated his theory of liability as follows:

> Every one owes to the world at large the duty of refraining from those acts that may unreasonably threaten the safety of others. Such an act occurs. Not only is he wronged to whom harm might reasonably be expected to result, but he also who is in fact injured, even if he be outside what would generally be thought the danger zone.

Id.

291. The Restatement (Second) of Torts § 402A(1) states:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Id.

292. Such a manufacturing for profit, assuming the corporation did so freely and without duress from the German government, would likely qualify as an accomplice in war crimes, or crimes against humanity. *See generally* Buergenthal, *supra* note 94.

293. If such a question were answered in the affirmative, this fact would undoubtedly comprise a prominent place in the pleading in Burger-Fischer v. Degussa. Nonetheless, the pleading omits to mention anything relating to his fact. *See generally* Burger-Fischer v. Degussa,.No. 98-3958 (D.N.J., filed Aug. 21, 1998).

294. This question is considered *infra* in section V(F) when discussing the tort of private human rights reparations.

295. *See* Jean-Marie Simon, *The Alien Tort Claims Act: Justice or Show Trials?*, 11 B.U. INT'L L.J. 1, 2-5 (1993).

and 3) lawsuits against manufacturers of firearms.[296] In each of these cases, courts place liability not only upon the tortfeasor, but additionally upon entities higher up the chain of commerce.[297] Hence, courts essentially hold the individual who transacted business with the tortfeasor liable primarily for the existence of a commercial relationship.[298] These three areas will be discussed briefly, followed by the suggestion of a tort of "private human rights reparations" which would weave a consistent thread in the tapestry of tort jurisprudence.[299]

C. Dram Shop Laws

At common law, vendors of alcohol were not held liable for injuries sustained by third parties due to the negligence of intoxicated patrons.[300] After all, it was axiomatic that the the proximate cause of the injury was the consumption, not the furnishing, of the alcohol.[301] The intoxicated patron was therefore deemed contributorily negligent, which barred any recovery from the bartender personally.[302]

During the last 40 years, however, both courts and legislatures have gradually imposed liability on vendors of alcohol to both provide a greater remedy for injured parties, and to serve as a policy effort to deter drunk driving.[303] Such laws are commonly referred to as "dram shop" statutes.[304] Presently, a majority of states have some version of a dram shop statute.[305]

The heart of tort law essentially comprises striking a "sensitive balance between two opposing goals: compensating a plaintiff for injuries inflicted by

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296. *See* discussion *infra* regarding dram shop laws, tobacco litigation, and lawsuits against manufacturers of firearms in Section V(C-E).

297. *See id.*

298. *See id.*

299. *See infra*, Section V(E-G) and accompanying notes.

300. *See* Pamela A. Moore, *Lee v. Kiku Restaurant: Allocation of Fault Between An Alcohol Vendor and a Patron–What Could Happen After Providing "One More for the Road,"* 17 AM. J. TRIAL ADVOC. 269, 269-70 (1993).

301. *See id.* at 270.

302. *See id.*

303. *See* William Hurst, *The Dram Shop: Closing Pandora's Box*, 22 IND. L. REV. 487, 487-89 (1989).

304. *See id.* at 488-90.

305. Thirty-six jurisdictions presently have enacted some version of a dram shop statute. *See*, e.g., ARIZ. REV. STAT. ANN § 4-301 to 302, CAL. BUS. & PROF. CODE §§ 25602, 25602.1 (West 1985 & Supp. 1993), CONN. GE. STAT. ANN. § 30-102 (West 1990); COLO. REV. STAT. ANN. §§ 13-21-103 (West 1989); IDAHO CODE § 23-808 (Supp. 1993); MICH. COMP. LAWS ANN. § 436.22 (West Supp. 1993); N.M. STAT. ANN. § 41-11-1 (Michie 1978).

another, and limiting a tortfeasor's liability to something less than the infinite consequences of his tortious act."[306] A statute placing liability on a defendant for the acts of another, as is the case with dram shop statutes, seems to extend liability further towards the "infinite consequences" than traditional legal theory would allow.[307]

An increasing awareness exists that alcohol is related to more than half of all automobile-related fatalities.[308] For entirely understandable policy reasons, courts have allowed such an extension of the sphere of liability in the face of this evidence to deter not only potentially intoxicated drivers, but also as a deterrent for bartenders who continue to serve a patron beyond the point of legal, "visible" capacity.[309]

Hence, placing liability on a company like Degussa for actions taken with their product is analogous to tort liability being imposed upon a bartender for the actions of its patrons.[310] Such liability implications may appear to extend the reach of tort liability far beyond that with which either Justice Cardozo or Justice Andrews would have felt comfortable in the famous case of *Palsgraf v. Long Island R.R. Co.*[311] Nonetheless, as appropriate public policy may justify this extension of liability, similar policy considerations may likewise justify an imposition of liability on companies, like Degussa, when deaths result from their commercial intercourse.[312]

D. Tobacco Litigation

During President Clinton's 1999 State of the Union Speech, he unveiled a rather surprising decision: the Department of Justice would pursue legal action against the tobacco industry.[313] This decision was particularly surprising

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306. Robert M. Howard, *The Negligent Commercial Transaction Tort: Imposing Common Law Liability on Merchants for Sales and Leases to "Defective" Customers*, 1988 DUKE L.J. 755, 755 (1988).

307. *See id.*

308. *See* Daphne D. Sipes, *The Emergence of Civil Liability for Dispensing Alcohol: A Comparative Study*, 82 NW. U. L. REV. 403 (1988) (citing National Highway Traffic Safety Admin., *Alcohol and Highway Safety 1984: A Review of the State of the Knowledge*, 13).

309. *See* Gary Spencer, *Murder Conviction Upset for Delay, Speedy Trial Rights Found Not Waived*, N.Y.L.J. (col. 3), Nov. 19, 1998.

310. Michael E. Bronfin has forcefully advocated the theory that purveyors of illegal drugs should be held civilly liable for the costs of their illegal activities. For an analysis of the costs and benefits of such a tort theory, *see generally* Michael E. Bronfin, *"Gram Shop" Liability: Holding Drug Dealers Civilly Liable for Injuries to Third Parties and Underage Purchasers*, 1994 U. CHI. LEGAL F. 345 (1994).

311. *See* Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (1928) (C.J. Cardozo) (Andrews, J., dissenting).

312. *See* Brauner, *supra* note 70.

313. *See* William J. Clinton, *State of the Union Speech*, Jan. 19, 1999, *available at* <http://www.whitehouse.gov>.

considering the historic settlement between the states and the tobacco industry just months before, reported to be hundreds of billions of dollars.[314]

At this writing, not one dollar has actually been paid by the tobacco industry to any plaintiff, but the debate is likely to be transferred to the U.S. Congress where the details of the agreement will be worked out.[315]

The intent of this section is not to trace the multi-faceted theories and complex history of tobacco litigation, but merely to draw a parallel.[316] For many decades, tobacco-related litigation was doomed to certain failure because of a theory juries understandably adopted: assumption of risk.[317] While many cases initially failed because the plaintiffs could not prove that smoking in fact caused cancer, most have failed recently because juries felt that tobacco consumers both knew of the risks and yet proceeded to smoke voluntarily.[318] The theory which toppled the tobacco industry's seemingly-impermeable legal shield was that "states should be able to sue in order to recover the costs of treating disease and illness caused by cigarette smoking."[319]

Because this settlement was effectuated on a state level, the tobacco settlement is arguably a less-than-perfect parallel to current Category III litigation.[320] Such litigation, however, may provide a helpful analytical perspective on why punitive Holocaust-related lawsuits should be realized through public rather than private means.[321] Nonetheless, tobacco companies are being sued for actions which are perfectly legal–selling tobacco–and for harm caused by foreseeable actions taken by third-party consumers of these products.[322]

Similarly, a lawsuit against Degussa or any similarly-situated corporation would aim to compensate for damage caused by third-party acts; in such a case, the third party would be the Third Reich.[323] The startling legal ramifications of such a case are immediately apparent because the Third Reich was a third-party to an

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314. *See* Frank J. Vandall, *The Legal Theory and the Visionaries That Led to the Proposed $368.5 Billion Tobacco Settlement*, 27 SW. U. L. REV. 473, 483-85 (1998).

315. *See id.* The tobacco industry is understandably willing to allow the settlement debate to transfer to a forum over which it has more control: the U.S. Congress. The death-grip the tobacco industry has on Congress, due to the massive campaign funding which it gives to both parties, was evidenced by the $50 billion tax credit for the tobacco manufacturers carefully placed in a recent bill. *See* Editorial, *Another Gasp By Tobacco*, N.Y. TIMES, Aug. 19, 1997, at A22.

316. *See* generally Daniel Givelber, *Cigarette Law*, 73 IND. L. J. 867 (1998).

317. *See* Vandall, *supra* note 314, at 477.

318. *See id.*

319. *Id.* at 478.

320. *See id.*

321. *See* Runkel, *supra* note 198 (expressing one government attorney's dismay over the fact that restitution is being sought through private, and not public means.)

322. *See* Givelber, *supra* note 316, at 895.

323. *See Degussa to Make Payments to Former Nazi Slave Workers*, FIN. POST, Jan. 29, 1998, at 26.

immeasurable amount of tortious suffering.[324]

E. Gun Manufacturers

Spurred on by the recent success in tobacco litigation, the next high-profile, prominent target of tort litigators appears to be firearm manufacturers.[325] In November 1998, Chicago Mayor Richard Daley announced a sweeping lawsuit naming numerous gun stores, distributors, and manufacturers as defendants in a lawsuit based on a "public nuisance" theory.[326]

Several other large cities followed Mayor Daley's lead, announcing similar suits modeled upon the tobacco-related litigation discussed previously.[327] Philadelphia Mayor Edward G. Rendell has proposed a simultaneous filing by as many as one hundred cities on the same day in 1999.[328] These suits accuse the gun manufacturers of making an inherently unsafe product and putting a dangerous product on the market knowing it will fall into the hands of violent criminals.[329] Both the legal theories and the objectives of these suits are similar to those in the tobacco litigation.[330]

This lawsuit is the most closely analogous to that filed against Degussa, and similar to Degussa, it is likely only one end of a massive amount of litigation.[331] Which end, however, is wholly dependant upon the outcome of this pivotal series

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324. *See generally* Dan Glaister, *Shadow of Shame*, GUARDIAN (London), Dec. 22, 1998, *available in* 1998 WL 24896170.

325. *See* Yvonne Zipp, *Who Pays Cost of Gun Violence?*, CHRISTIAN SCI. MONITOR, Nov. 23, 1998, at 1, *available in* 1998 WL 2372131.

326. *See* Paul M. Barrett, *Chicago Sues Gun Makers in Battle's Second Shot*, WALL ST. J., Nov. 13, 1998, at A3, *available in* 1998 WL-WSJ 18991930.

327. New Orleans Mayor Marc Morial was among the first to file a lawsuit against gun manufacturers, followed by Mayor Daley and Boston Mayor Thomas Menine. *See Seattle Gun Lawsuit is Bound to Misfire*, SEATTLE TIMES, Dec. 28, 1998, at B4. New York Mayor Rudolph Giuliani, as well as the mayor of San Francisco, Bridgeport, and Miami have also announced their intent to file similar lawsuits. *See* Roberto Suro, *Cities Plan Legal Assault on Makers of Handguns; Tobacco Lawsuits Viewed as Model*, WASH. POST, Dec. 23, 1998, at A1, *available in* 1998 WL 22542661.

328. *See* Suro, *supra* note 327.

329. *See Questionable Aim in Lawsuits*, STATE J. REG. (Springfield, Ill.), Dec. 21, 1998, at 6, *available in* 1998 WL 213336667.

330. *See id.* "The mayors are following the lead of 46 state attorneys general, who recently reached a $206 billion settlement with the lawsuit-beleaguered tobacco industry. While gun manufacturers haven't nearly the deep pockets of cigarette companies, the gun industry nonetheless presents a ripe-enough target for the mayors." *Id.* Wendell Gauthier, a member of the national consortium of law firms that pursued class-action litigation against the tobacco industry, boasted, "We're going to do to this what we did to tobacco." *Id.*

331. *See Degrussa to make Payments to Former Nazi Slave Workers, supra* note 323. The parallels between the two cases are legion: both are filed against a defendant for providing a product to criminals, both are holding the defendants liable for the actions of the criminals, and both are attempting to demonstrate that the actions of the criminals constitute non-intervening acts.

of lawsuits.[332] A newspaper editorial recently surmised that, in the interest of legal consistency, lawsuits also should be filed against manufacturers of "knives, screwdrivers, hammers, saws (especially chain saws), [and] ice picks . . . ."[333] While such a statement drips with sarcasm, it also pinpoints the crucial legal question with regards not only to gun cases, but all Holocaust-related cases: how far should the specter of liability run?[334] As far as Category III litigation is currently concerned, that crucial question remains to be decided, if not through legislation, then through litigation.[335] One possibility is through tort theories and a tort of "private human rights reparations."[336]

G. The Tort of Private Human Rights Reparations

All Category III litigation, such as *Burger-Fischer v. Degussa*,[337] is essentially tortious in nature.[338] Tort law seeks to impose duties on persons to act in a manner that will not injure other persons,[339] and one who breaches a tort duty "may be liable in a lawsuit brought by a person injured because of that tort."[340] While the Alien Tort Claims Act[341] has a vast array of jurisdictional and substantive legal problems, tort jurisprudence is better suited to deal with the private reparations of human rights abuses.[342] For this reason, this Comment suggests the usage of a tort

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332. The slippery slope which this suit could occasion is readily apparent. As a recent editorial queried, "Is it time for all of us to file a class action suit against the manufacturers of any sort of instrument or material that could be used to inflict bodily harm to another? How about knives, screwdrivers, hammers, saws (especially chain saws), ice picks?" *Suing Gun Makers*, SACRAMENTO BEE, Dec. 30, 1998, at B6.

333. *See id.* at A3.

334. *See* James B. Irwin, attorney for firearms manufacturer Colt, recently queried, "Will Abita Beer be called upon to pay for the crimes of drunken drivers and Popeye's Fried Chicken for the cost of heart surgeries?" James B. Irwin, *Outrageous Lawsuit Against Gun Manufacturers*, NEW ORLEANS TIMES, Dec. 18, 1998, at B6, *available in* 1998 WL 16082334.

335. Part of the rationale behind the suit filed by the city of Chicago is that Chicago "has some of the country's most restrictive gun laws, including a ban on handgun sales and private ownership of handguns unless registered before March 30, 1982." Barrett, *supra* note 326, at A3.

336. *See* discussion *infra* Section V(G).

337. *See Degussa*, No. 98-3958(D.N.J., filed Aug. 21, 1998).

338. *See* John W. Wade et. al., PROSSER, WADE, AND SCHWARTZ'S CASES AND MATERIALS ON TORTS (9th ed. 1994).

339. *See id.* at 1.

340. *Id.*

341. 28 U.S.C. § 1350 (1998) [hereinafter "Alien Tort Statute"].

342. *See* Simon, *supra* note 295, at 1-8 (reviewing the problems with the Alien Tort Statute and why its use has represented primarily symbolic justice for victims of human rights abuses and their attorneys).

of "private human rights reparations."[343] This tort is a derivative of the "prima facie tort" suggested by Prosser: a generic tort with application to future situations.[344] The elements of private human rights reparations are: 1) an affirmative act, 2) a mental element, 3) cause in fact, and 4) damages.[345]

1. Affirmative Act

This first element of this new tort would require the defendant to take an action which plays a role in eventually causing injury to the plaintiff.[346] A potential issue with this element–a scenario not seen as of this writing–is where numerous defendants exist and the plaintiff is not certain which defendant's affirmative act actually caused the injury.[347] The market share liability concept developed in California by *Sindell v. Abbott Laboratories*[348] may provide a workable solution to this scenario. Under this theory, "[e]ach defendant [is] held liable for the proportion of the judgment represented by its share of that market [at that time period], unless it demonstrates that it could not have made the product which caused injuries."[349] Another theory worthy of consideration in this situation is enterprise liability.[350]

2. Scienter

Perhaps the most formidable issue in dealing with the production of a good is that of scienter: did the defendant make the product specifically for the purpose for which it was used, or did the defendant at a minimum have a knowledge of the purpose for which the product may eventually be used.[351] If the defendant's

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343. The phrase "private human rights reparations" is meant to include violations of human rights which have previously fallen under the Alien Tort Statute, but which are of a private nature. Given the jurisdictional approval of cases such as *Degussa*, such as tort would deal effectively with the reparations of private human rights violations.

344. *See* W. Page Keeton et. al., PROSSER & KEETON ON THE LAW OF TORTS § 129, at 983 (5th ed. 1984).

345. *See* discussion *infra* Part V(G)(1-4).

346. A tort is "a private or civil wrong or injury resulting from a breach of a legal duty that exists by virtue of society's expectations regarding interpersonal conduct, rather than by contract or other private relationship." Barrons, LAW DICTIONARY, 516 (1996).

347. Such an issue is highly likely to appear in the future, and would be the case if, for example, there were several companies which smelted dental gold, or if Nazi slave laborers were unable to identify the company for which they worked.

348. 607 P.2d 924 (Cal. 1980).

349. *Id.* at 937. For an overview of market share liability *see* Andrew B. Nace, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395 (1991).

350. Enterprise liability is the theory that an entire industry's wrongdoing is viewed as a single enterprise. For a review of various collective liability theories, *see* Robert F. Daley, *A Suggested Proposal To Apportion Liability In Lead Pigment Cases*, 36 DUQ. L. REV. 79 (1997).

351. *See generally* Burger-Fischer v. Degussa. No. 98-3958 (D.N.J., filed Aug. 21, 1998). While the plaintiffs in Degussa would argue that satisfying either test would be a prima facie indication of guilt, such judicial liberality would allow for potentially unlimited liability in most Category III cases.

product, Zyklon-B cyanide, was made specifically for use in concentration camps, then the defendant would be a co-conspirator and the mental element would appear to be satisfied.[352] In the firearms cases previously discussed, opponents accuse manufacturers not only of tailoring their manufacturing but also marketing their products to target the city's criminal element.[353]

If the defendant had only that knowledge, then the appropriate analysis would be that of *Watson v. Kentucky & Indiana Bridge & R.R. Co.*[354] *Watson* concluded that while a plaintiff must anticipate subsequent negligent behavior, she is not required to anticipate subsequent criminal behavior.[355]

Deciphering whether a defendant meets the mental test is complicated by one additional agency-related factor in a World War II setting: whether the corporation engaged in commercial interaction on its own volition, or whether it was under duress by the German government.[356] Degussa's corporate profile claims that "the National Socialist economic system determined the company's business policy" during World War II.[357] If such duress existed, this element would not be satisfied; nonetheless, this question is an appropriate one for a jury.[358]

3. Cause in Fact

Because the "but for" test is not well-suited for Category III lawsuits, a more appropriate test would be the "substantial factor" test of *Perkins v. Texas and New*

See id. at 2, 4.

352. The complaint in *Degussa* never mentions Degussa cyanide as being tailor made for use in concentration camps, but only that it was made. *See Germany says Degussa Compensation Demands "Unrealistic," supra* note 33.

353. *See Questionable Aim In Gun Lawsuits, supra* note 329. The firearms cases actually involve an analysis of both mental element points: manufacturers certainly know what the products will be used for, and while not manufacturing them specifically for that use, they are accused of using marketing specifically to target a group of criminal consumers. *See id.*

354. 126 S.W. 146 (Ky. 1910). In *Watson*, a railroad car full of gasoline was derailed, causing gasoline to run into the street. *See id.* at 147. An individual named Duerr struck a match, igniting the gasoline and causing an explosion. *See id.* The analysis rested upon whether Duerr struck the match simply to light his cigar, or with malicious intent. *See id.*

355. *See id.* at 151. The court concluded:

> The mere fact that the concurrent cause or intervening act was unforeseen will not relieve the defendant guilty of the primary negligence from liability, but if the intervening agency is something so unexpected or extraordinary as that he could not or ought not to have anticipated it, he will not be liable, and certainly he is not bound to anticipate the criminal acts of others by which damage is inflicted and hence is not liable therefor.

Id.

356. *See* Gold, *supra* note 212 for statement by Dennis J. Taylor, general counsel of Degussa Corp.

357. *See 125 Years of Degussa AG–History, supra* note 274.

358. *See* list of allegations against Degussa in the pleading, *supra* note 293, at 9-12.

Orleans Ry. Co.[359] In the event of a tort where the plaintiff is unable to determine where liability rests, the solution employed in *Summers v. Tice*[360] would likely be the best model for resolution.[361] In *Summers*, the defendants were left to work out between themselves any apportionment.[362] Based upon the historical complexities of Category III litigation, the individual corporations are in the best position to argue their historical involvement.[363]

4. Damages

Potential tort suits to remedy damages which Holocaust survivors could bring include 1) emotional distress, 2) physical harm, 3) wrongful death, or 4) a survival action.[364] While the tort of private human rights reparations would balance the right to reparations against infinite liability, the theory behind this tort would also be well-suited to other situations, most notably, tobacco and firearms litigation.[365]

VI. CONCLUSION

A. Historical Misdeeds

Degussa, a case which courts would have cavalierly dismissed just a decade ago, now appears–in the face of current dram shop laws, tobacco litigation, and firearms litigation–to have serious litigative potential.[366] Many worry that such litigation is setting a dangerous precedent.[367] Larry Schonbrun, a Jewish lawyer skilled in battling large class-action cases, expressed angst at the precedential value of allowing private attorneys to redefine history.[368] He proffered that the rationale

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359. 147 So.2d 646, 648 (La. 1962).

360. 199 P.2d 1, 5 (Cal. 1948).

361. *See id.* (holding that co-defendants should be responsible for apportioning damages).

362. *Id.* at 3-4.

363. Degussa secured the services of Professor Peter Hayes for a thorough investigation of its chemicals and pharmaceuticals business in what it calls the "National Socialist" period. Other companies, such as Ford, discussed *supra*, have undertaken a detailed study of their role with the German government, and thus they are in the best position to make any apportionment arguments. *See 125 Years of Degussa AG–History*, *supra* note 274.

364. *See generally* Keeton, *supra* note 344.

365. An analysis of tobacco and firearms litigation would be particularly suited with an application of the four elements of the private human rights reparations tort, discussed *supra*.

366. *See generally* Bichon, *supra* note 207.

367. *See* infra note 365 and accompanying text.

368. *See* Carolyn Lochhead, *Can the Lawyers Right the Wrongs of History?*, S.F. CHRON., Dec. 6, 1998, at 9, *available in* 1998 WL 3929593. Larry Schonbrun further emphasized the politics of lawsuits thusly: "The people who are capable of turning O.J. Simpson into Martin Luther King and Mark Fuhrman into Hitler are not the kind of people I want making historical judgments, and that's what's happening now." *Id.*

employed to win cases against foreign companies could possibly be "used against any country, including our own, for different historical misdeeds."[369]

As far as "historical misdeeds" are concerned, the United States certainly is not without its share.[370] Even a superficial historical excavation yields myriad candidates.[371] While the inhumanity of slavery, for example, is perhaps the most well-publicized miscarriage of American justice, a lesser-known example will now be discussed for illustrative purposes.[372]

B. The Extermination Order

During the winter of 1833, the government physically forced thousands of Mormon settlers in Western Missouri off their lands,[373] stripping them of thousands of acres of land, and hundreds of thousands of dollars of personal property.[374] These same people also have the notoriety of being the only group of U.S. citizens against whom their own government issued an executive order authorizing their extermination, personally signed by the governor of Missouri.[375]

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369. *See id.* Schonbrun further queried, "I wonder whether we're going to start suing the Belgians over King Leopold's actions in the Congo or the Turks over their atrocities against the Armenians." *Id.*

370. Madeleine Albright reminded members of the Swiss Parliament that America "locked away thousands of our countrymen who were of Japanese origin in interment camps. It was not until the nineteen nineties that Congress appropriated funds to compensate the victims of that cruel policy and achieved a measure of closure and healing." Secretary of State Madeleine K. Albright, *Remarks Before Members of the Swiss Parliament* (Nov. 15 1997) *available at* <http://secretary.state.gov/www/statenet/971115a/html>.

371. Such a cursory examination would yield a scathing indictment of America's treatment of, among other groups, American Indians, African Americans, Mormons, Homosexuals, Irish, Catholics, Japanese during WWII, and women.

372. *See infra* Part V(B).

373. *See* Ivan J. Barrett, JOSEPH SMITH AND THE RESTORATION, 265-66 (Young House 1973). As the homes and crops were demolished by a mob, the mob threatened, "We will rid Jackson County [Missouri] of the 'Mormons,' peaceably if we can, forcibly if we must. If they will not go without, we will whip and kill the men; we will destroy their children, and ravish their women." *See id.* at 255; *see also* "Church History," *The Encyclopedia of Mormonism*, (Daniel R. Ludlow ed., MacMillan 1994) (a chronological account of the various Mormon expulsions from Ohio, Missouri, and Illinois between the years 1832-1847).

374. The damage done to the property of the Mormons by a Missouri mob in 1833 was estimated to be worth, at that time, approximately $195,000. *See* Barrett, *supra* note 373.

375. Missouri Governor Lilburn Boggs issued the following executive order: "The Mormons must be treated as enemies and *must be exterminated* or driven from the state, if necessary for the public good." *See id.* The order was issued in response to false charges that the Mormons had burned the cities of Gallatin and Millport, Missouri. *See id.* It was not until the 1980s that the Missouri State Legislature officially repealed the what has since become known as "the extermination order." *See id.*

While there were numerous unsuccessful attempts to obtain redress, the most famous occurred in October 1839, when the Mormon leader Joseph Smith traveled to Washington D.C. and met with President Martin Van Buren.[376] After relating the tragic loss of human life, liberty, and personal property, President Van Buren remarked, "Gentlemen, your cause is just, but I can do nothing for you . . . . If I take up for you I shall lose the vote of Missouri."[377]

Based upon all the current trends in United States tort law, and contemporary attempts to right historical wrongs, descendants of the Mormon pioneers who were deprived of their land would have a valid class action suit for, among other things, the value of their stolen property.[378] Such a tragic example demonstrates 1) the abundance of potential lawsuits which could be filed to vindicate any historical misdeed, and 2) the necessity of the courts to confront this pressing issue of private human rights reparations quickly. Unless these issues are addressed, every historical misdeed in our past—and in the past of other countries—runs the risk of being vindicated through litigation.[379]

C. Degussa and Beyond

A victory for plaintiffs in a Category III case like *Degussa* is certain to spawn a deluge of litigation.[380] While the attempt to redress the wrongs which occurred over a half-century ago is a noble, and indeed necessary, endeavor, the U.S. court system is about to be faced with the colossal undertaking of defining precisely the limits of recovery to those who were wronged in the near or distant past.[381] By utilizing the tort of private human rights reparations, which would prevent unlimited liability while redressing wrongs of the past, the courts undertake the

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For an excellent historical analysis on the political climate at the time of the extermination order, see Leonard J. Arrington, THE MORMON EXPERIENCE: A HISTORY OF THE LATTER-DAY SAINTS, 51 (Vintage Books 1979).

376. Barrett, *supra* note 373, at 448-49.

377. *See id.*

378. While such a lawsuit has neither been filed nor contemplated by the Church of Jesus Christ of Latter-day Saints (or "Mormon Church"), a victory for plaintiffs in *Degussa* could spawn a host of lawsuits with like scenarios. This raises a further issue: whether a plaintiff would be have been able to obtain redress at the time in which redress was petitioned. The Mormons were unable to obtain redress in the 1840s and likely would have been similarly unsuccessful during the tragic "polygamy raids" of the 1880s, in which the U.S. government sought to imprison every male who had more than one wife. Such an action did more to disturb the public welfare of wives and children than did the practice of polygamy itself, which was—ironically–denounced for its negative impact on the public welfare in the seminal case Reynolds v. United States, 98 U.S. 145 (1878). In similar fashion, the Jews would not have been likely to receive an appropriate measure of justice in the 1940s, but may perhaps in the new millennium. Such an historical account should play a role in any similar category III lawsuit. *See generally* Arrington, *supra* note 375.

379. *See* Bichon, *supra* note 207.

380. *See* Authers, *supra* note 215.

381. *See supra* notes 273 to 299.

most noble endeavor of all: preventing such historical misdeeds from ever being repeated.[382]

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382. *See supra* Part V(G).