

Competing Frameworks for Assessing
Contemporary Holocaust-Era Claims

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Abstract

Suppression and erasure have played a significant role in the context of the Holocaust. The massive number of deaths yielded a terrible weight of silence, and the erasure of memory occurred in a multiplicity of ways, including: (1) viciously and cynically on the part of many who sought to hide all traces of their crimes; (2) protectively on the part of some who sought to save the lives of the prosecuted; and (3) inevitably as the result of the disappearance of a world and culture destroyed beyond any possibility of resuscitation by the few individuals who survived in displacement and dispersal.

COMPETING FRAMEWORKS FOR ASSESSING CONTEMPORARY HOLOCAUST- ERA CLAIMS

*Vivian Grosswald Curran**

INTRODUCTION

There are many angles from which to perceive the contemporary holocaust-era claims. In 1997, *Time* magazine quoted Elie Wiesel as saying that

[i]f all the money in all the Swiss banks were turned over, it would not bring back the life of one Jewish child. But the money is a symbol. It is part of the story. If you suppress any part of the story, it comes back later, with force and violence.¹

Wiesel touches on two perspectives: first, what has been described as “litigating the holocaust,” with all that that implies about the law’s questionable capacity to adjudicate issues containing vast extra-legal components; and secondly, the problematic of suppression and erasure that has pervaded the holocaust at many different levels. Suppression and erasure are recurrent and very complicated phenomena of history and historiography in general, whether perpetrated wilfully or unwittingly.

They have played a particularly significant role in the context of the holocaust. The massive number of deaths yielded a terrible weight of silence, and the erasure of memory occurred in a multiplicity of ways, including: (1) viciously and cynically on the part of many who sought to hide all traces of their crimes; (2) protectively on the part of some who sought to save the lives of the persecuted;² and (3) inevitably as the result of the disap-

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1. Lance Morrow, *The Justice of the Calculator*, *TIME*, Feb. 24, 1997, at 45.

2. One thinks, for instance, of the mayor of the town in southern France in which Gertrude Stein and Alice B. Toklas lived, who deleted their names from the town records in order to hide their presence from the Germans. Countless Jews or “non-Aryans” erased their identifying names and backgrounds in false papers in order to escape persecution. See SUSAN ZUCCOTTI, *THE HOLOCAUST, THE FRENCH AND THE JEWS* 47 (1993). For an excellent account and analysis of law in Vichy France, see RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996).

pearance of a world and culture destroyed beyond any possibility of resuscitation by the few individuals who survived in displacement and dispersal.

I. SMOTHERED PALIMPSESTS

The post-war world indulged in numerous conscious erasures, such as the physical destruction or transfer of documents and files to obscure and unexpected archives. These acts aimed to prevent the story of officially sanctioned horrors from being revealed,³ or, as alleged in some of the holocaust litigation claims, they were part of concerted attempts by banking and insurance officials to minimize the possibilities for the robbed to reclaim or even identify their assets, thus precluding the assertion of the victims' legal right to property.

Official initiatives of erasure also resulted from acts that were not linked to past culpability, such as the efforts of de Gaulle in France to represent the French as having been unified throughout the war and Occupation in the face of a German oppressor. He declared that Vichy, France's collaborationist war-time government, never existed as a French phenomenon. De Gaulle proclaimed that France could be France only when it was a Republic; hence, Vichy never was France.⁴ Consistently with this approach, de Gaulle's position was that *he* had embodied the legal government of France from 1940 to 1944, a government in exile, a government of a people trapped in military defeat, but allegedly resisting at every opportunity the enemy occupier and the enemy's mere handful of French-born henchmen. This myth essentially erased Vichy from the slate of official French history for many years, just as post-war *ordonnances* en-

3. I think here of the Nazi and Vichy census files of Paris Jews, the notorious "*fichier des juifs*," and other documentation hastily sent from police precincts in France to obscure locations where they would be difficult to find, and where they would be subject to refusals on the part of their guardians to release the documents. For further discussion, see Vivian Grosswald Curran, *The Legalization of Racism in a Constitutional State: Democracy's Suicide in Vichy France*, 50 HASTINGS L.J. 1, 53 n.172, 64 n.217 (1998); Eric Conan, *Vichy: le rapport qui lève l'énigme sur le "fichier juif,"* L'EXPRESS, July 10, 1996; *Le "Fichier juif" au Mémorial*, 162 REVUE D'HISTOIRE DE LA SHOAH: LE MONDE JUIF 203, 206-09 (1998).

4. See Curran, *The Legalization of Racism*, *supra* note 3, at 60-61. De Gaulle's position was reflected in the August, 1944 *ordonnance*, stating that "the form of France's government is and remains a republic . . . in law, [and therefore the Republic] never ceased to exist." Quoted in the original French in Dominique Rousseau, *Vichy a-t-il existé?*, in JUGER SOUS VICHY 97, 103 (Maurice Olender ed., 1994).

acted under de Gaulle wiped Vichy laws from the legislative slate of France.

It should be noted that, although a myth, de Gaulle's rendition was not just the preferred view of those who had reason to avoid confronting France's role in the holocaust. Although it *enabled* such avoidance, it also was the position of most anti-Vichy French people in the immediate aftermath of the war, including the Nobel laureate and eminent legal scholar René Cassin, who had left France in 1940 to join de Gaulle in London.⁵ The view of Vichy's *ab initio* illegality in practice also proved essential to the success of the hasty post-Liberation trials of intellectuals for their collaboration in order to defeat their defense of having behaved patriotically by collaborating with Vichy.⁶

De Gaulle's version of Vichy profoundly appealed to Resisters inasmuch as it relegated Vichy to complete ignominy, as an essentially Nazi German phenomenon, thereby validating the concept of another France, which in their eyes was the France for which they had fought and risked their lives: a beacon of civilization. From 1940 on, one saw frequent references to the concept of "*la vraie France*," "the true France." Both pro-Pétain collaborationists and anti-Pétain resisters used it, although at complete cross-purposes. To the Resistance, it was the idea of a true France that embodied the best of human ideals flowing from the Revolution of 1789, and that Vichy was disguising temporarily in a fraudulent and illegitimate personification.⁷

5. See Curran, *The Legalization of Racism*, *supra* note 3, at 24-30, and sources cited therein.

6. See PHILIP WATTS, ALLEGORIES OF THE PURGE: HOW LITERATURE RESPONDED TO THE POSTWAR TRIALS OF WRITERS AND INTELLECTUALS IN FRANCE 18-19 (1998). Those post-Liberation trials also contributed to erasure in terms of holocaust history, as collaborators were judged for treason and national indignity, but rarely did antisemitism figure in the judicial proceedings. It took half a century for France to discuss Vichy in terms of its anti-Jewish measures. See, e.g., Watts' analysis of the trial of Céline. *Id.* at 25-26. Similarly, in a eulogy for the poet Max Jacob, who died in the Drancy internment camp in 1944, his colleagues described him as having been tortured and murdered as a French poet whose poetry symbolized good. See *id.* at 34. Max Jacob died at Drancy for a reason that had nothing to do with his poetry: because he was a Jew, and, as such, was outside the scope of legal rights or protections in Vichy France.

7. Among the many who espoused this fervent faith was my grandfather, whose letters to his family from the French internment camps of les Milles and Gurs make recurrent references to "*la vraie France*," whose return he awaited, leading him to postpone emigration for a perilously long time. See Curran, *The Legalization of Racism*, *supra* note 3, at 5-6.

The 1946 French Constitution of the Fourth Republic,⁸ one of the most beautiful and moving of documents in terms of tolerance and humanity,⁹ attempts to articulate this vision of a nation and a national identity cherished fervently by many. The Preamble to the 1946 Constitution reads like a transmutation of the Declaration of the Rights of Man of 1789 onto the terrain of French anti-fascist Resistance. De Gaulle's own articulation of the true France was both grandly imprecise and exquisitely simple: "*Toute ma vie, je me suis fait une certaine idée de la France*" ("All my life, I have had a certain idea of France"), as he subtly and subtextually invited his readers to invest their own ideals in his words.¹⁰

Even as time suggested that denying Vichy as a French phenomenon increasingly was becoming synonymous with an official French denial of responsibility for its predecessor's crimes, many former Resistance members continued to adhere to the denial, in memory of how important a point of honor it had been for them during the years of the Occupation.¹¹ Consequently, a highly distorted text of the past was written, superimposed on the original events, and obfuscating much that had transpired. As Wiesel observed however, suppressed texts eventually rear their heads.¹²

Like a palimpsest, the past never had been erased completely; it remained beneath the surface, seeping through occasionally, until finally, albeit much later, it burst forward in the midst of a national insistence by a new generation to know what Vichy France really had been.¹³ And so, like layers of superimposed parchment cracking with age and peeling away, slowly the past that had not ceased to haunt the nation re-emerged, provoking legal and political crises half a century after the events had transpired.

8. LA CONSTITUTION DU 27 OCTOBRE 1946, reprinted in LES CONSTITUTIONS DE LA FRANCE DEPUIS 1789, at 389 (Jacques Godechot ed., 1995) (1979).

9. See *id.* pmb.

10. CHARLES DE GAULLE, MÉMOIRES DE GUERRE: L'APPEL: 1940-1942, at 1 (1954).

11. See CURTAN, *The Legalization of Racism*, *supra* note 3, at 64.

12. See MOITOW, *supra* note 1, at 45; Cf. JEAN-MARIE AROUET DE VOLTAIRE, 82 THE COMPLETE WORKS OF VOLTAIRE 452 (1968) ("*Un historien est un babillard qui fait des tracasseries aux morts*" ["historians are babblers who harass the dead"]).

13. Cf. BORIS CYRULNIK, LES VILAINS PETITS CANARDS 26 (2001) ("*le palimpseste qui réveille les traces du passé fait resurgir les événements que l'on croyait enfouis*" ["the palimpsest that awakens the traces of the past causes events one thought buried to resurface"]).

II. JUDICIAL RE-COLLECTIONS

To the extent that the crisis has played itself out in the courts, law's interaction with the holocaust has involved not only adjudications half a century after the end of the events at issue, but also adjudications of issues that stray far from the traditionally legal: namely, adjudications concerning ethics, the reconstruction of history and even the formulation of national identity. These tasks were thrust on the courts of France before the recent litigation which is our subject—namely, in the criminal trials of the German, Klaus Barbie, commonly known in France as the butcher of Lyon, and of the French defendants Paul Touvier and Maurice Papon. Despite protests to the contrary by some of the legal actors, those trials were viewed by the nation as the trial of Vichy France, the State, and not, or at least not merely, the trial of the individual defendants.

As a consequence of involving history, both these trials and the later reparations claims also implicate memory. Memory is an area deeply relevant to court proceedings. In recent years, Paul Ricœur has written insightful books, elucidating the complex links of memory and history.¹⁴ Ernst Cassirer also has made a brilliant contribution to this issue. In one of the few texts he wrote in English originally, he discusses the intertwining of history with memory as a process of "*re-collection*," a new collection, a new assembling of traits from the past, always creative and always novel invention, both through reconfiguration and through selection, and always impregnated with the symbolic.¹⁵ The great novel of Marcel Proust, *A la Recherche du temps perdu*, although indirectly, also sheds light on the problematic of memory's relation to the past: paradoxically, a relation of simultaneous subjugation and empowerment.¹⁶

Memory's re-collections are situated in the context of the

14. See, e.g., PAUL RICOEUR, *LA MÉMOIRE, L'HISTOIRE, ET L' OUBLI* (2000).

15. See ERNST CASSIRER, *AN ESSAY ON MAN: AN INTRODUCTION TO A PHILOSOPHY OF HUMAN CULTURE* 51 (1944).

16. See MARCEL PROUST, *A LA RECHERCHE DU TEMPS PERDU* (1954). Proust's work, like Cassirer's, elucidates the primacy of the symbolic. In the context of France in particular, Pierre Nora's *Les Lieux de mémoire* also is a significant contribution. See PIERRE NORA, *LES LIEUX DE MÉMOIRE* (Pierre Nora ed., quart. ed. 1997). Boris Cyrulnik, the French-Jewish psychoanalyst who escaped alone at the age of six from an internment camp, where he hid in the recesses of a toilet as the other prisoners in the camp were being deported from France to Nazi concentration camps, has written an extraordinary book on memory as history *of* and *in* the individual, both hindering and enabling resili-

language by means of which one remembers, a crucial component of ideation and cognition. The human condition is a condition that frequently accords primacy to representations of events over the actual events in life. This result is effected by means of the symbolic representations that language constitutes.

The contemporary French intellectuals Boris Cyrulnik and Edgar Morin have described the dominant position of the symbolic in human thought and action in terms of its tragic potential to relegate events in life to a secondary or even irrelevant position. They signal the terrible danger of human inability to distinguish the representation from the represented (*i.e.*, from the real). The failure to distinguish between the two signifies a loss of feedback from reality in the formation of one's representation of reality, and consequently, of one's understanding of reality. This in turn can cause one to believe and act upon unwarranted representations:

[F]rom the instant when one becomes able to inhabit the world of virtuality—which one invents with one's narratives—one easily can hate each other and logically wish to kill each other based on the idea one forms of the other, rather than on the knowledge one has of the other. At that moment, one escapes the regulating mechanisms of nature and becomes completely subjected to the world one creates. And it then becomes both quintessentially moral and logical to construct and constitute genocides.¹⁷

[I]deas— . . . the necessary means for communicating with reality—also will disguise reality and will cause us to mistake the idea for the reality. This barbarous relationship to ideas is one of the greatest atrocities to have befallen humanity . . .

[T]he principal organ of vision is thought. We see with our

ence from trauma in intricate interplay with the variables of each person's genetic and cultural circumstances. See CYRULNIK, *supra* note 13.

17. BORIS CYRULNIK & EDGAR MORIN, *DIALOGUE SUR LA NATURE HUMAINE* 27 (2000) (“*dès l’instant où l’on devient capable d’habiter le monde virtuel—qu’on invente avec nos récits—on peut très bien se haïr et désirer logiquement se tuer, pour l’idée qu’on se fait de l’autre et non pas pour la connaissance que l’on en a. À cet instant, on échappe aux mécanismes régulateurs de la nature et l’on devient complètement soumis au monde qu’on crée. Et c’est alors le plus moralement et le plus logiquement du monde, qu’on fabrique et constitue des génocides*”). Cf. ISAAH BERLIN, *EN TOUTES LIBERTÉS: ENTRETIENS AVEC RAMIN JAHANBEGLOO* (trans. Gérard Lorimy, 1990) (“*L’imagination peut nourrir le fanatisme, mais la pénétration par l’imagination dans des situations très différentes des vôtres doit en fin de compte l’affaiblir.*” [“The imagination can feed fanaticism, but penetration by the imagination in situations very different from one’s own ultimately must weaken it.”]).

ideas . . . Our eyes often obey our thought more than our thought obeys our eyes.¹⁸

One of the results of trials relating to holocaust events, whether criminal or civil, is that they become vehicles for memorializing the holocaust. They fashion narratives of reality influenced by judicially recognized issues, concepts, and categories. Inevitably, they involve gaps between the events of life that they purport to adjudicate and their own creation of a judicially wrought account thereof.

The inefficiency of the judicial proceeding as a vehicle of memory was signalled after the war by the French National Committee of Writers, a group which had been anti-collaborationist throughout the war. The Committee wrote of France's collaborationist writers that there were some "whom even death cannot save, those who have paid only in the eyes of justice, *but not in the least [in the eyes] of human conscience.*" ("*[d]es écrivains que la mort même n'en peut sauver, ceux qui ne peuvent avoir payé qu'aux yeux de la justice, mais non point de la conscience humaine*").¹⁹

Part of the tension and uneasiness generated by all litigation concerning the holocaust, including Hannah Arendt's sense that the Eichmann trial imposed metaphysical symbolism on nothing more than a petty civil servant,²⁰ involves, to echo the thought of the French writers' group, a reluctance even to seem to suggest that, by virtue of resorting to the judicial arena, the court verdict, defined as justice, also *is* the verdict of human conscience.

Along similar lines, one of the great French poets of the Resistance, Paul Éluard, wrote "*Et que comprendre juge . . .*"²¹ ("And may understanding judge . . ."). He was not trying to exonerate the guilty by pleading for understanding; on the contrary, like Sartre and de Beauvoir, he believed that collaborators

18. CYRULNIK & MORIN, *supra* note 17, at 29 ("*les idées – qui sont désormais nos intermédiaires nécessaires pour communiquer avec la réalité—vont aussi masquer la réalité et nous faire prendre l'idée pour le réel. Ce rapport barbare avec les idées et l'une des plus atroces choses qui soient arrivées à l'humanité. . . le principal organe de la vision, c'est la pensée. On voit avec nos idées . . . Les yeux obéissent souvent à nos esprits plus que nos esprits à nos yeux*").

19. *Comité national des écrivains*, in LES LETTRES FRANÇAISES, Nov. 22, 1946, quoted in Watts, *supra* note 6, at 20 (emphasis added).

20. See generally, HANNAH ARENDT, EICHMANN IN JERUSALEM (1963) and Michel Dobkine, *Permanence et banalité du crime contre l'humanité*, LE RECUEIL DALLOZ 42/7002E, Nov. 30, 2000, at III (quoting a letter Arendt wrote to Jaspers discussing this issue).

21. PAUL ÉLUARD, *La Poésie ininterrompue*, in II ŒUVRES COMPLÈTES 39 (Lucien Scheler & Marcelle Dumas eds., 1968).

should be held accountable for their actions.²² His equating understanding with judging signals, rather, the commonplace principle that understanding is a pre-condition for judging, what in the law we call a condition precedent. Therein lies another profound source of discomfort with court judgments connected to the holocaust, for the holocaust ultimately eludes and defies understanding.²³

This problem takes on particular acuity within the United States' common-law judicial system because of the paradox that, while the holocaust was unprecedented, common-law legal conclusions derive from, and depend on, precedent.²⁴ The courts of the United States essentially cannot function without precedents as their point of departure for reasoning. That which has no precedent is meaningless to the common law, and this is true even where the courts themselves proclaim that they are adjudicating a situation without precedent.²⁵

Such situations, known as cases of first impression, would seem to contradict my statement that the courts require precedents. A close look at how United States courts handle cases of first impression, however, reveals that they continue to reason by

22. See *id.* at 49. Éluard revealed his exacting attitude to collaborators in his poetry as well as his actions: “*Je veux qu'on . . . rende justice / Une justice sans pitié / Et que l'on frappe en plein visage les bourreaux / Les maîtres sans racines parmi nous*” (“I want justice to be rendered . . . / A justice without pity / And may the tormentors be struck in their faces / The masters without roots among us”), and in a poem titled “*La justice n'est pas faiblesse*” (“Justice is not weakness”). *Id.* at 268.

23. As a corollary of this idea, Jean Clair posits that even memory is impossible: “*Les camps de concentration introduisirent cette rupture fondamentale qui marque la modernité: ils rendirent la mémoire impossible*” (“The concentration camps introduced the fundamental rupture that characterizes modernity: they made memory impossible”). JEAN CLAIR, *LA BARBARIE ORDINAIRE: MUSIC À DACHAU* 80 (2001). See also *id.* at 92-93. For the contrary argument that the holocaust does not defy understanding, see YEHUDA BAUER, *RETHINKING THE HOLOCAUST* (2001). But see JORGE SEMPRUN, *LE MORT QU'IL FAUT* 143 (2001) (remarking about a comrade whose dying he watched in Buchenwald, that “[o]ne has but to look at the photographs that bear witness to the deaths, even today, . . . to realize to what extent the absolute, frantic question about that death [*i.e.*, that of his comrade] has remained without answer” [“*Il suffit de regarder, aujourd'hui encore, . . . les photographies qui en témoignent, pour constater à quel point l'interrogation absolue, frénétique de cette mort, est restée sans réponse*”]).

24. I discuss this phenomenon at length in Vivian Grosswald Curran, *Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union*, 7 *COL. J. EUR. L.* 63 (2001).

25. See *id.* at 82-85. For my discussion of a civilian view of this issue, see *id.* at 83; and Vivian Grosswald Curran, *Rethinking Hermann Kantorowicz: Free Law, American Legal Realism and the Legacy of Anti-Formalism*, in *RETHINKING THE MASTERS OF COMPARATIVE LAW* 66-91 (Annelise Riles ed., 2001).

way of analogy to precedents even in cases of first impression; *i.e.*, even where they themselves proclaim that no precedents exist. In such cases, the courts tend to extend the horizon encompassing persuasive authority to foreign case law, whether of other states or even other countries, precisely because their *modus operandi* is to reason by analogy to, and distinction from, prior adjudicated cases, and because they are not adept at engaging in the process of resolving a pending case's issues in any other manner.²⁶

Given how many frameworks the holocaust reparations claims asserted in the United States courts implicate, it is not surprising that they have elicited considerable criticism. Criticism has focused on litigation as a conceptually inappropriate remedy for the injustice of the past, tainting and demeaning the memory of the holocaust by reducing it to purely material concerns. As one respondent to an article on the subject of holocaust reparation claims that appeared in *Commentary* put it, "justice is unattainable. Better not to use its name in vain."²⁷ The most heated criticism concerns perceived abuse of the tragic past by lawyers and others who would derive personal profit at the expense of the survivor claimants and, still more grievously, at the expense of demeaning the significance of past suffering. One survivor, a former slave laborer and concentration camp inmate, including, among others, at Auschwitz-Birkenau, has written that

[we] survivors . . . never were properly [re]presented in the [holocaust reparation] negotiations . . . Survivors were not united. Some spoke of "blood money." Others made impossible demands as to the amounts they envisioned. In this emotionally charged debate, [many] of us tended to forget that human life has no price, that there is no such thing as "compensation" . . . The organizations, on their part, were fighting for a big slice of the pudding. *They were negotiating—not us, the survivors. I never empowered anybody to speak for me. I never had an opportunity to do so. I never appointed the Claims*

26. See Curran, *Romantic Common Law*, *supra* note 24, at 82-85. I also have discussed the issue of the judiciary where the holocaust is concerned more generally and at greater length in Curran, *The Legalization of Racism*, *supra* note 3, at 87-94.

27. Yacov Lozowick letter, in *Holocaust Reparations: Gabriel Schoenfeld & Critics*, COMMENTARY, at 16 (Jan. 2001), available at <http://www.commentarymagazine.com/0101/schoenfeld.htm>.

*Conference to represent me . . . I haven't been asked.*²⁸

This sentiment was echoed more formally in the Newsletter of the *National Association of Jewish Child Holocaust Survivors* ("NAHOS"):

[O]ur large standing grievances [are] that all the settlements so ostentatiously flaunted by the self-appointed negotiators, amounted to very little benefits to the majority of survivors; that the actual demands by the grass-roots survivor population had been repeatedly ignored; that funds obtained in the name of Nazi-victims had been and are being spent on all kinds of esoteric projects of no direct benefit to survivors and that there is a pressing need for a home-care/health-care system, so that the survivors may be able to live out their remaining lives in dignity and without fear of financial ruin.²⁹

One senses in these comments the fear that, in the end, the survivors once again might be erased, or at least ignored in some measure. One wound that reverberates from the writing of virtually all survivors who have written memoirs is the sense camp inmates had during the Nazi years that they did not exist for the world as individuals. In the words of Jean Clair, "[t]he triumph of Nazism was to have made man lose his face." ("*Le triomphe du nazisme, c'est d'avoir fait perdre la face à l'homme*").³⁰ And indeed, the very concept of justice and of "the opposite of totalitarianism"³¹ in our times has been defined as "maximum *differentiation* as against maximum coordination."³²

III. NAZISM'S ERASURE OF THE HUMAN FACE: GENOCIDAL LEGAL THEORY

The Nazis' total de-individualization of Jews extended beyond the realm of physical acts, even beyond the act of murder: it was also a matter of legal theory advocated by the scholars of

28. E-mail from Fred Klein reproduced in e-mail response thereto of Gabor Hirsch (Nov. 30, 2000), Internet discussion group "H-Holocaust" at listserv@H-net.msu.edu (on file with author) (emphasis added). See also NEWSL. NAT'L ASS'N OF JEWISH CHILD HOLOCAUST SURVIVORS [hereinafter NAHOS], Nov. 1, 2001 (noting failure of claims process in vindicating rights of survivors).

29. NAHOS, *supra* note 28, at 2.

30. CLAIR, *supra* note 23, at 28.

31. MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 316 (1983).

32. *Id.* (emphasis added). Walzer elaborates an intricate idea to support his thesis, whose rendition above is in too summary a form to do it justice.

Nazi Germany. One professor of law after another, from Schmitt to Huber to Larenz to Maunz to Höhn, emphasized the need for Germans to expel the alien, the different, the foe, and to nullify his individual existence as legal subject or actor.³³

Germans were urged at many levels, including at the level of legal theory, to be strong enough to destroy even those whose Judaism lay in remote ancestry, and even if they as individuals had espoused the most nationalistic of Germanic goals.³⁴ According to Nazi legal theory, the inevitably alien spirit of Jews, even those Jews who tried to further German nationalism, would thwart, undermine, and eventually destroy the spirit of Germany.³⁵

Individual decency was of no relevance whatsoever to the new German legal theory, because individual attributes of *any kind* were irrelevant. Only the people, the community with whom the law categorized the individual, counted, and the Nazi rendition of biology was deemed determinative of human value.³⁶ The allegedly ever- and overly-sensitive, even gullible, Germans were to be reminded of this in order to fulfill what was billed as a *duty* of mercilessness towards the one defined as

33. See Vivian Grosswald Curran, *Fear of Formalism: Indications from the Fascist Period in France and Germany of Judicial Methodology's Impact on Substantive Law*, CORNELL INT. L.J. (forthcoming 2001) (discussing the views of these Nazi legal theorists). Yehuda Bauer has signalled the importance of the German intelligentsia in general: "[W]ithout the enthusiastic support of [Germany's] intelligentsia, neither war nor Holocaust would have ensued." BAUER, *supra* note 23, at 33.

34. See Geoffrey Hartman, *Is an Aesthetic Ethos Possible? Night Thoughts After Auschwitz*, 6 CARDOZO STUDIES L. & LIT. 135, 146, 147 (1994). This attitude was articulated explicitly by Hitler's higher education minister, Rust, in a speech in which he specified that it might be painful to expel Jews who individually could wish to take part in German society, but that their expulsion was indispensable because their blood and blood instincts prevented them from being German, regardless of what personal characteristics any individual among them might possess. The text of Rust's speech is reproduced in significant part in ANNA MARIA, GRÄFIN VON LÖSCH, *DER NACKTE GEIST: DIE JURISTISCHE FAKULTÄT DER BERLINER UNIVERSITÄT IM UMBRUCH VON 1933*, at 168-70 (Beiträge zur Rechtsgeschichte des 20. Jahrhunderts No. 26, Knut Wolfgang Nöel al. eds., 1999).

35. Von Lösch relates the intended applicability of this message to German law professors of Jewish descent, who for the most part were members of the Protestant or Catholic church, and whose political views tended to be conservative and often nationalistic. See *id.* (recounting in detail the situation of each law professor deemed "non-Aryan" at Berlin University during the Nazi period).

36. See, e.g., BERND RÜTHERS, *DIE UNBEGRENZTE AUSLEGUNG: ZUM WANDEL DER PRIVATRECHTSORDNUNG IM NATIONALSOZIALISMUS* 323-36 (3d ed. 1988); MICHEL STOLLEIS, *THE LAW UNDER THE SWASTIKA* 81 (Thomas Dunlap trans., 1998) (1994).

standing outside of the legal community; namely, the “non-Aryan.”³⁷

Thus it was that the legal scholars of Nazi Germany provided the courts with a theory that enabled judges to deprive Jews progressively of all legal rights, and not merely pursuant to Nazi-enacted laws, but even when the courts were applying unrepealed laws of the pre-Nazi era. The courts developed a doctrine of analogizing the Jewish person to a dead person, based on legal theory that openly and explicitly advocated the expulsion of Jews from the German community, the German *Volksgemeinschaft*. A contemporary German legal scholar has called this doctrine the judicial “concept of the ‘civil death’ of Jews.”³⁸ Since the German Civil Code had not been repealed, and granted legal capacity (“*Rechtsfähigkeit*”) to all individuals by virtue of birth, such a doctrine was essential if Jews were to be deprived of all legal rights in a manner bearing a semblance to law.³⁹

In a remarkable feat, Raphael Lemkin, a Polish-Jewish lawyer who drafted the U.N. Convention on Genocide, and who is credited with having coined the term “genocide,” understood the Nazi genocidal phenomenon *before* he learned the terrible facts that later substantiated his theory. At a time when others who, unlike Lemkin, *were* privy to the relevant facts, could not bring themselves to believe the import of what was happening (people such as Isaiah Berlin, Nahum Golman, and Chaim Weizmann), Lemkin understood, and, according to a recent article, the reason he understood the Nazi genocide was by a process of deductive reasoning from his study of Nazi jurisprudence.⁴⁰

37. See Hartman, *supra* note 34; VON LÖSCH *supra* note 34, at 168-70. See also RÜTHERS, *supra* note 36, at 330 (citing GRUNDFRAGEN DER NEUEN RECHTSWISSENSCHAFT 241 (Larenz ed., 1935)) (declaring that anyone who is not a member of the *Volk* stands outside the law).

38. INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 116 (Deborah Lucas Schneider trans., 1991) (emphasis added). For further discussion of this judicial doctrine of analogy between the Jew and deceased persons, see RÜTHERS, *supra* note 36, at 332.

39. See Curran, *Fear of Formalism*, *supra* note 33 (discussing the legal concept of *Rechtsfähigkeit* in German law during the Nazi period).

40. See Michael Ignatieff, *The Danger of a World Without Enemies: Lemkin's Word*, *NEW REPUBLIC*, Feb. 26, 2001, at 25-28. It should be noted that in a passing reference to Lemkin, Yehuda Bauer appears to suggest in his latest book that Lemkin *was* working from knowledge of the facts of genocide, in apparent contradiction to Ignatieff's account. See BAUER, *supra* note 23, at 9. I wrote to Professor Bauer to bring Ignatieff's

The erasure of the human face by Nazism is a principal theme in the painting of Music, whose post-war work has been haunted by images of the cadavres that surrounded him in Dachau. In his book on Music's art, museum curator Jean Clair notes the declaration by Stangl, Commandant of the Treblinka camp, to the effect that he did not perceive his prisoners to be individuals.⁴¹ And of Music's paintings of the dead and dying in Dachau, Clair observes the following:

[T]hose bodies, deprived of distinctive features and returned to formless mass, dissolve as the mountains north of Venice . . . under the acid rain, and as in Carso the earth of the hills dissolves under the furrowing of waters. . . . [And] then it is the individual who melts away, forgetting [himself that] he had a face . . . a personality, a look.⁴²

IV. CLASS ACTION CHALLENGES

If there is a point of extreme sensitivity to holocaust survivors, it lies in their individuality; and if there is a duty holocaust survivors consider sacred, it is to the memory of the dead. Class action suits by their nature challenge both of those sentiments, each for different reasons. The class action suit is that legal proceeding in which all plaintiffs are lumped together based on the allegedly identical and undifferentiated nature of their claims and situations. The voices of many are channelled into a univocal articulation.

Secondly, being legal proceedings, class action suits like all other suits, lead to a court record that cannot hope to be historically complete in reconstructing the past. Indeed, United States law in particular, due to its unique rules of evidence, which in turn in large part are due to the unique use of juries in civil cases in the United States, intentionally tends to prioritize the exclu-

rendition to his attention, and to ask if his own view is indeed irreconcilable with Ignatieff's. Professor Bauer responded that Ignatieff's account was accurate and that his own was not intended to suggest otherwise. Letter from Yehuda Bauer to Vivian Curran (May 20, 2001) (on file with author).

41. CLAIR, *supra* note 23, at 63.

42. *Id.* ("Et ces corps, privés de traits distinctifs et rendus à la masse informe, se dissolvent donc comme se dissout dans les montagnes au nord de Venise . . . sous la pluie acide, comme se dissout, dans le Carso, la terre des collines sous le ravinement des eaux . . . Mais c'est alors l'individu qui se fond, qui perd conscience d'avoir eu un visage, une personnalité, un regard") (In the words "rendus à la masse informe" is the connotation not just of having been "returned," but also of having been "rendered" or "represented" as formless).

sion from the court record or proceedings of numerous facts from life whenever the law deems such facts to be capable of engendering jury prejudice, or in other ways to be capable of misleading the jury as to their proper probative weight.⁴³

On the other hand, are those who were robbed really not entitled to what was stolen from them? Does this quite simple, straightforward and virtually universally acknowledged basic legal right that civilized societies accord their citizens not apply to them, and does it not exist quite apart from the more esoteric realm of the symbolic paradigms mentioned above? Or, in the words of *The Newsletter of the National Association of Jewish Child Holocaust Survivors*, “[a]re Holocaust survivors being singled out (again) as less deserving of justice and basic legal rights?”⁴⁴ Moreover, as Irwin Cotler put it, “we are talking about thefticide—the greatest mass theft on the occasion of the greatest mass murder in history.”⁴⁵

Motions to dismiss the United States claims asserted against European banks and insurers include certain generally shared defenses, including the defense of statutes of limitations. United States law of course applies the discovery rule to limitations periods, such that the relevant statutory period is tolled where the plaintiff was not reasonably able to assert the claim within the prescribed time frame. In France, the late Vladimir Jankélévitch, one of France’s foremost philosophers and a Resistance hero, took up his pen when the statutory period for crimes against humanity was about to expire in France. His impassioned argument was titled *L’Imprescriptible*. “*Imprescriptible*” in French connotes both that which is not contained within the purview of a statute of limitations, and also that which is not forgettable.⁴⁶ In 1964, France’s legislature agreed with

43. I have discussed this issue in the context of the Papon trial in Curran, *The Legalization of Racism*, *supra* note 3, at 73-94. See also CYRULNIK, *supra* note 13, at 151-56 (language is representation that alters the event from life; in the case of traumatic events, language’s alterations allow the traumatized to master the traumas of their past in order to resume living, but, by the same token, the inevitable refashioning of traumatic events by means of linguistic representation never remains faithful to the original experiences).

44. See NAHOS, *supra* note 28.

45. Irwin Cotler, *The Holocaust, Thefticide and Restitution: A Legal Perspective*, 20 CARDOZO L. REV. 601, 602 (1998).

46. See VLADIMIR JANKÉLÉVITCH, *L’IMPRESCRIPTIBLE: PARDONNER? DANS L’HONNEUR ET LA DIGNITÉ* (1986). The French writers’ committee, writing in 1946, already had made this point: “*Les sanctions morales prises par le CNE . . . ne sont limitées comme le sont les*

Jankélévitch, and decided that crimes against humanity were legally unforgettable and not subject to any statutory period of limitations. However, this did not affect the continued applicability of statutes of limitations to crimes of lesser magnitude than the crime against humanity. Thus, financial claims still would be subject to those limitations.⁴⁷ The conduct of Swiss banks has received considerable press coverage. Less well known are the actions of the French banking system. In the holocaust litigation in which I have been involved, France's banks asserted not just the defense of the statute of limitations, but also the substantive defense that everything they had done had been legal at all relevant times, and in fact had been mandated either by the Vichy French government or by Nazi Germany.

V. FRANCE'S BANKS

Little known research published in 1997 by Professor Lacroix-Riz suggests that the banks were not acting out of coercion, and, indeed, that they often acted contrary to Vichy's wishes. The research to which I refer is, incidentally, "little known" because of yet another instance of suppression and attempted erasure. Perhaps as telling as the substance of her historical findings is the difficulty Professor Lacroix-Riz encountered when she sought to publish them. She originally had a contract for the publication of her research findings with *Étude et*

sanctions juridiques à temps . . . ["The moral sanctions taken by the CNE . . . are not limited by time as are legal sanctions . . ."]. LES LETTRES FRANÇAISES, *supra* note 19, at 22.

47. For the often bizarre judicial contortions of the definition of the crime against humanity in recent French court decisions, see Curran, *The Legalization of Racism*, *supra* note 3, at 73-94. The problem of the passage of time has been a severe hindrance to France's trials from several vantage points. Witnesses' memories have faded and documents have vanished. See *id.*; see also *infra* notes 77-82 and accompanying text. Klaus Barbie finally was convicted of the deaths of a tiny fraction of the people whose deaths he almost certainly caused, as the passage of time made it impossible to connect him with more. See Curran, *The Legalization of Racism*, *supra* note 3. The same was true with the *milicien* Paul Touvier. See *id.* Finally, in March, 2001, a French court convicted the infamous Alois Brunner *in absentia* ("*par contumace*"), once again unable to connect him in a legally cognizable fashion to more than the deaths of a handful of children, although he was responsible for the deportations of hundreds of thousands of Jews to their deaths. French TV-5 broadcast, Mar. 2, 2001. See Curran, *The Legalization of Racism*, *supra* note 3. A television broadcast reported that Brunner is either dead or still in Damascus, Syria, where he found refuge after the war. French TV-5, *supra*. One can view this predicament caused by the passage of time as a kind of banalization or trivialization of the past.

documents, a journal operating under the auspices of France's Ministry of the Economy and Finances ("*ministère de l'économie et des finances*").⁴⁸ When it saw Professor Lacroix-Riz's findings, however, the government-sponsored journal refused to publish the article.⁴⁹ The article eventually found its way into print only when the Paris Center for Contemporary Jewish Documentation ("*le Centre de documentation juive contemporaine et mémorial du martyr juif inconnu*") published it.⁵⁰

In terms of erasure and suppression, this was a most fitting place for publication, for the Center for Contemporary Jewish Documentation was founded in the 1940's under Nazi occupation when France's Jewish community began to understand that all of its members were targeted for death. In the expectation that no one might survive, France's Jewish community began the task for posterity and history of documenting the process of its own destruction. Unlike some similar attempts in the ghettos of Poland, the French undertaking was successful, and today the Center's extraordinarily rich archive is a treasure trove of documentation about Vichy France and the Nazi Occupation of France. Among the institution's many activities is the publication of the journal in which Professor Lacroix-Riz was able to publish her findings.

Professor Lacroix-Riz uncovered bank industry complicity with the Nazis motivated by personal profit.⁵¹ Her account is in direct and irreconcilable conflict with the banks' defense in holocaust survivor litigation to the effect that their conduct at all relevant times not only was legal, but was the result of dual pressure by both Vichy and Nazi Germany.⁵² Apparently the banks kept their distance from Vichy, seeking to do business with the

48. See Annie Lacroix-Riz, *Les Élités françaises et la collaboration économique: la banque, l'industrie, Vichy et France*, 159 REVUE D'HISTOIRE DE LA SHOAH: LE MONDE JUIF 7 (1997).

49. This was not an isolated event. Rita Thalmann has reported the pattern in France that until very recently prevented scholarly research dealing with Vichy France. Rita Thalmann, *Le Silence des historiens?*, 160 REVUE D'HISTOIRE DE LA SHOAH: LE MONDE JUIF 154 (1997). Professors as eminent as the historian Braudel refused to be advisors to graduate students interested in writing their doctoral dissertations in the area of Vichy. See *id.* at 158. Since professorships are government positions in France, the government could prevent Vichy scholars from access to university teaching. See *id.*

50. See Lacroix-Riz, *Les Élités françaises*, *supra* note 48, at 6.

51. See *id.*; *Les Grandes banques françaises de la collaboration à l'épuration*, 141 REVUE D'HISTOIRE 2E GUERRE (1986).

52. See Lacroix-Riz, *Les Élités françaises*, *supra* note 48, at 38.

Germans to maximal profit, whether or not the result would further Vichy's aims.

In a book written over a decade ago, the noted historian André Kaspi pointed out that, in the area of "aryanization," Vichy itself *atypically* did not collaborate with the Nazis with its customary enthusiasm for collaboration.⁵³ Professor Lacroix-Riz concurs with this view.⁵⁴ During the years of Occupation, the French Vichy government was the most eager collaborator with Germany of any western nation. As Professor Kaspi has shown, it was, however, at its least cooperative with the Nazis when it came to coordinating the "aryanization" of Jewish property.⁵⁵ In this matter, Vichy heatedly asserted and defended its right to operate independently of Germany for the simple reason that it wanted the looted property to remain in France.⁵⁶ In other words, while Vichy collaborated with alacrity in handing Jewish persons over to the Germans, it resisted handing over Jewish assets to the Germans.

Post-war opinion has not been unanimous as to whether Vichy legislation and subsequent conduct sought to protect the French industrial and banking sectors from the Nazi occupier, or if, on the contrary, they sought to collaborate with the Germans. In the best-known study of France's banking and industrial sectors during the Occupation, *La Banque sous l'Occupation: Paradoxes de l'histoire d'une profession 1936-1946*, Professor Claire Andrieu provides an overview of existing research through 1990.⁵⁷ She also depicts the penury of archival materials, impeding historical analysis and conclusions.⁵⁸ Professor Andrieu herself seems on the whole to agree with Professors Kaspi and Lacroix-Riz in finding persuasive evidence that Vichy made efforts to protect the French economic sectors from German exploitation.⁵⁹

Similarly to Professors Kaspi and Lacroix-Riz, Professor Andrieu notes that resistance on the part of otherwise eager collab-

53. See ANDRÉ KASPI, *LES JUIFS PENDANT L'OCCUPATION* (1991).

54. See LACROIX-RIZ, *Les Élités françaises*, *supra* note 48.

55. See KASPI, *supra* note 53.

56. See *id.*

57. See CLAIRE ANDRIEU, *LA BANQUE SOUS L'OCCUPATION: PARADOXES DE L'HISTOIRE D'UNE PROFESSION 1936-1946*, at 119-40 (1990).

58. See *id.*

59. See *id.* at 131.

orators was a consequence of economic self-interest militating against compliance with German economic demands.⁶⁰ Professor Andrieu describes the French banking sector as undergoing panic in the wake of the German invasion, a panic which provoked an initial response of patriotism, a sudden acceptance of national regulation of, by and for France, and against the enemy.⁶¹ This initial wave of patriotism, however, gave way to a collaborationist zeal born of economic interest. In the words of Professor Andrieu, “[t]he original reaction, both financial and patriotic in nature, was forgotten, giving way to subsequent rational motives emanating from economic doctrine.”⁶²

That tension and conflict existed between France’s banks and the Vichy régime seems indisputable from Professor Andrieu’s research. In addition, Professor Lacroix-Riz argues that France’s banks went so far as to prioritize their own agenda, independently of and occasionally contrary to, the Vichy régime’s objective of allegedly representing the entire French nation’s financial interests by trying to keep Jewish property for French consumption. According to Professor Lacroix-Riz, the banks had no scruples about acting solely to magnify their own profits. She also concludes that, as a consequence of the French banking sector’s eagerness to do business with the Nazis, not only did the banks make great sums of money, but Germany also profited far more from its dealings with French banks than it did from dealings with banks in other occupied countries.⁶³

Professor Andrieu’s better-known study of France’s banks during the Occupation supports these findings inasmuch as it depicts France’s banks as seeking independence from State control. While Professor Andrieu does not engage in a discussion of the banks’ specific substantive actions during the Occupation, she recounts the struggle in which France’s banking sector had been engaged well before the Second World War to remain independent of State control and resist increasing legislative and

60. *See id.* at 133 (“*le simple intérêt pourrait conduire certains collaborateurs sur la voie de la résistance*” [“simple self-interest could lead certain collaborators down the path of resistance”]).

61. *See id.* at 153-54.

62. *Id.* at 54 (“*La réaction d’origine, à la fois patrimoniale et patriotique, fut oubliée au profit des motivations rationnelles secondes puisées aux sources de la doctrine économique*”).

63. *See* Lacroix-Riz, *Les Élités françaises*, *supra* note 48, at 58 (contrasting Nazi Germany’s larger profit from its dealings with the banks of France than with the banks of the Netherlands).

public regulatory pressures.⁶⁴

The second part of Professor Lacroix-Riz's findings concerns France's major banks' post-war falsification of their activities from 1940 to 1944, in order to disguise their past conduct as having consisted of forced compliance to Vichy and Nazi law. The banks apparently destroyed evidence in order to exculpate themselves.⁶⁵ Professor Lacroix-Riz discovered records of depositions and other evidence that show a pattern of intentional falsification of past events by the banks.⁶⁶ According to Professor Lacroix-Riz, surviving documents of the post-war "cleansing" or "*l'épuration*" in France (very roughly, the equivalent of "de-Nazification" in Germany) contain numerous declarations by bank officials as to their having dutifully *informed* Vichy of specific projects they were undertaking with the Nazis, a far cry from having operated *under orders* from Vichy, as they claimed in the reparations claims litigation.⁶⁷ Professor Lacroix-Riz in fact recounts how numerous the French banking and industrial projects with Nazis were which those sectors conducted entirely behind the back of Vichy: *i.e.*, without even informing Vichy of them. The banking and industrial sectors' omissions in communicating

64. ANDRIEU, *supra* note 57. See especially in *id.*: *L'anti-étatisme de principe de la profession bancaire*, *id.* at 49-55; *Le refus par les banques de la réglementation*, *id.* at 55-60; *Les banques résistent au gouvernement*, *id.* at 79-110.

65. See Lacroix-Riz, *Les Élités françaises*, *supra* note 48, at 38-122.

66. See *id.* So much has been said about Swiss banks that I would just make one point in this context. By the time Swiss banks agreed to disclose the identity of holocaust-era bank account holders, the Swiss system of anonymity had become endowed with a sacrosanct quality in the Swiss national psychology as a defining feature of their way of doing business. See, e.g., Alan Cowell, *Swiss Offer to Start Fund for Victims of Holocaust*, N.Y. TIMES, Jan. 8, 1997, at A6. See also Gabriel Schoenfeld, *Holocaust Reparations—A Growing Scandal*, COMMENTARY (Sept. 2, 2000), at <http://www.commentarymagazine.com/0009/schoenfeld.html>. Swiss banks "closed accounts in such a way as to complicate or rule out any future tracing of ownership." *Id.* While to holocaust survivors and their heirs, the past half century of stalling seemed unbearable and inexcusable, to Swiss banks the loss of anonymity marked a profound change in their profession. See Curran, *The Legalization of Racism*, *supra* note 3, at 72-73 n.249. Until recently, the belief was widespread that the bank-holder anonymity rules had been promulgated in order to assist German Jews in hiding their assets from the Nazi régime. See *id.* Recent research seems to indicate that the original goal was to buttress Switzerland's general policy of protecting capital that tax authorities from either Switzerland or abroad might attempt to locate. See *id.* The irony remains, although less dramatically, that the very anonymity which held out the promise to Jews during the period of Nazi persecution of disguising their ownership of property, ultimately also was the instrument that undermined and nullified their hope of preserving assets for their future or the future of their descendants.

67. See Lacroix-Riz, *Les Élités françaises*, *supra* note 48, at 43.

their activities to Vichy resulted in the transfer of significant French assets and natural resources to Germany, which Vichy would have wanted to retain in France and for France.⁶⁸

Professor Lacroix-Riz's work has been controversial, and its validity is impossible to assess on the basis of Professor Andrieu's study. Andrieu is familiar with Lacroix-Riz, and refers to her findings, but with the sole evaluative comment that historians have reached contradictory conclusions.⁶⁹ The focus of Professor Andrieu's own interest is not in the interaction between France's banks and the Vichy government with respect to joint or conflicting responses to Nazi Germany, but, rather, in the larger significance to France of the French bank regulations instituted by Vichy, and in the continuities and ruptures in the banking sector from before 1940 and extending beyond 1944. I have noted above the extent to which Professors Andrieu and Lacroix-Riz's findings overlap and agree.

Among the reviewers whose opinion has been unfavorable to Lacroix-Riz, Patrick Friedenson reproaches her for not making sufficient use of archival documents, while simultaneously conceding that some of that material remains closed and unavailable.⁷⁰ On the other hand, the negative response of one of the committee members of the government related journal which initially commissioned and then rejected Professor Lacroix-Riz's article, was not substantive: he declared it undesirable to publish her results because publishing them would be risky.⁷¹ Robert Paxton, perhaps the most eminent historian of the Vichy period, criticizes Lacroix-Riz in a book review which appeared in the *Times Literary Supplement*.⁷² Professor Paxton assesses Lacroix-Riz as being "reductionist in limiting entrepreneurial motives to short-term profit,"⁷³ and concludes that her vast research and documentation amount to a great deal of

68. *See id.*

69. *See* ANDRIEU, *supra* note 57, at 260 n.1.

70. *See* Nicolas Weill, *Des entreprises françaises au service de l'Allemagne nazie*, LE MONDE, Oct. 11, 1996, at 1.

71. *See* Ben Macintyre, *French Chemical Firm is Linked to Holocaust Gas*, THE TIMES, Oct. 9, 1996.

72. *See* Robert O. Paxton, *Occupations of the Occupation*, TIMES LITERARY SUPPLEMENT, May 19, 2000, at 12 (reviewing ANNIE LACROIX-RIZ, *INDUSTRIELS ET BANQUIERS FRANÇAISES SOUS L'OCCUPATION: LA COLLABORATION ÉCONOMIQUE AVEC LE REICH ET VICHY*).

73. *Id.*

“archival energy within [a] cramped . . . intellectual framework.”⁷⁴ Paxton confirms, however, that Professor Lacroix-Riz correctly portrays the unreliability of post-war testimony, as well as the French banking and industrial sectors’ enthusiasm to engage in business with the Germans, and that she has done extensive research.⁷⁵ Given that André Kaspi has amply substantiated Professor Lacroix-Riz’s assessment of the Vichy régime’s differences with Germany where it came to trying to keep French wealth in France,⁷⁶ and that her critics do not appear to dispute her claim that the banks eagerly sought to do business with the Germans, my sense is that the thesis for which I cite her in these pages is likely to be fairly close to historical truth.

VI. TIME LAPSE

While the post-war retaliatory measures against collaborators in France were harsh to the extent of lawlessness, they also were swift and notoriously incomplete. Much of the French population had been involved in collaboration with Vichy in one way or another, and the impetus to resist punitive measures against collaborators not only was a potent force after the war, but one that reached into the farthest and most powerful recesses of French government in both the ensuing Fourth and Fifth Republics, protecting the banks as it did the highest-ranking police and militia (“*milice*”) collaborators from prosecution for some five decades.⁷⁷

The governmental plan was to delay and delay until all of the guilty had died natural deaths, which would render prosecution moot and leave hidden forever the vast extent of French

74. *Id.* After completing the initial draft of this Essay, I received a communication from a French doctoral candidate to the effect that his own review of the documents on which Professor Lacroix-Riz based her conclusions invalidates those conclusions, and that he will establish this in his forthcoming doctoral dissertation, currently unpublished, and which I have not had the opportunity to read. E-mail from Jean-Marc Dreyfus to Vivian Curran (Mar. 28, 2001) (on file with author).

75. See Paxton, *supra* note 72.

76. See KASPI, *supra* note 53.

77. Those who were tried in the immediate aftermath of the Liberation often were put to death. Thus, in 1944, while the worst political collaborators were in exile in a still undefeated Germany, it was French collaborator writers and intellectuals who were tried and executed. See WATTS, *supra* note 6, at 22. When the politicians’ turn came, time had passed, lessening passions and often leading to far milder sentences (as well as to the framing of milder criminal charges).

collaboration.⁷⁸ The executive branch's traditional control over the French justice department enabled foot-dragging of monumental proportions in the prosecution of collaborators. It almost worked, and it *was* successful in some ways, including that almost all major criminals obligingly died natural deaths in time to avoid prosecution. The lapse of time also created such difficulties with proof that those few who were prosecuted could be judged for only a tiny fraction of the crimes they had committed, the vast bulk of their crimes no longer attributable to them in a legally cognizable fashion.⁷⁹

This was true for both the German and French defendants of recent years, including Klaus Barbie, Paul Touvier, and Maurice Papon.⁸⁰ Finally, in March 2001, Aloïs Brunner was convicted *in absentia* ("*par contumace*"). He had been guilty of deporting hundreds of thousands of Jews to their deaths, but the court convicted him only of the deportations of a handful of Jewish orphans from France, none of whom returned.⁸¹ On the other hand, the government's delay tactics may be said to have failed inasmuch as some French defendants were prosecuted when their unexpected longevity coincided with a veritable outcry in the country to conduct criminal trials and to search the nation's soul.⁸²

VII. THE LAW AS A CLUMSY INSTRUMENT

The law's propriety in dealing with the claims of half a century ago raises one set of issues: notably, as we saw earlier, problems of historical recollection, and of defining the past through judgments often ill-suited to such a task.⁸³ But the law has proved clumsy in the context of holocaust-generated claims

78. See Curran, *The Legalization of Racism*, *supra* note 3 (discussing Mitterrand and others' protection of collaborators). It also is possible that the astonishing attempt of Maurice Papon to flee France in November 1999, after his conviction for crimes against humanity, but while his appeal was still pending, emanated from a belief that he still had enough friends and protectors in high places that he would be allowed to escape. The public outcry was too potent, however, and prominent politicians including Prime Minister Lionel Jospin and Minister of Justice Elisabeth Guigou declared publicly that they shared the widespread sentiment of outrage at Papon's behavior, and pledged a national commitment to tracking him down. French TV-5 broadcast, Oct. 23, 1999.

79. See Curran, *The Legalization of Racism*, *supra* note 3, at 73-94.

80. See *id.*

81. French TV-5 broadcast, Mar. 2-4, 2001.

82. See Curran *The Legalization of Racism*, *supra* note 3, at 73-94.

83. See *id.*

even where it addressed highly practical issues that arose in the direct aftermath of the Nazi régime. For example, in the 1950s the Federal Republic of Germany granted pensions to Jewish civil servants who had been stripped of their citizenship status by the Nazis. Citizenship had been lost by all German Jews in 1935.⁸⁴ Pursuant to a decree that was passed in 1941, the eleventh decree ensuing from the 1935 Nuremberg Reich Citizenship Law, German nationality was withdrawn from all German Jews residing outside of Germany, thus rendering them stateless.⁸⁵

One such previously denationalized and stateless refugee to whom a German pension was restored was a Mr. Oppenheimer, who before emigration had been a civil servant in Germany as a teacher in a Jewish orphanage. His case arose in England, where he had resided since 1939, and where in 1948 he had acquired British citizenship.⁸⁶ If Mr. Oppenheimer, who had been born German, was deemed to have German as well as British citizenship, he would be exempt from British taxation on the pension Germany had restored to him. If the British court adjudicating his case held that he had not been German, however, he would be liable to double taxation. While it was undisputed that Mr. Oppenheimer lost his German citizenship in 1948 when he became British, it was less clear if he should be considered to have been German for the years 1941-1948, for purposes of the taxation of his back-paid pension for those years.

The British court decided that he *was* subject to double taxation, reasoning that he could not have been German once Germany had stripped him of citizenship in 1941.⁸⁷ Although the Hitler decree of 1941 had been rendered null and void by the allied powers in 1944,⁸⁸ the effect of the nullification of Nazi law was not *retroactive*, with the net result that Mr. Oppenheimer was deemed not to have had German nationality from the time of

84. Technically, all German Jews lost their "citizenship" in 1935. For the 1935 Reich citizenship law, see *Reichsbürgergesetz*, in REICHSGESETZBLATT ("RGBL") I, at 1146.

85. For the November 25, 1941 decree depriving Jews residing outside of Germany of their German "nationality" (not "citizenship," since all Jews had been degraded from German "citizens" to the lesser stature of "nationals" ["*Staatsangehörige*"] pursuant to the 1935 Nuremberg law) see RGBL I, at 722, the "*elfte Verordnung zum Reichsbürgergesetz*."

86. See F. A. Mann, *The Present Validity of Nazi Nationality Laws*, 89 L.Q. REV. 194 (1973) (discussing *Oppenheimer v. Cattermole* (Inspector of Taxes) 3 W.L.R. 815 (1972)).

87. See *id.* at 200.

88. See *id.* at 198 (Military Government Law No. 1, 1944).

Hitler's decree of 1941, until the time of his acquisition of English citizenship, consequently entailing taxation of the German pension by both Germany and England.⁸⁹

Unfair as the outcome of the Oppenheimer case may seem, post-war courts were to reach worse results in other cases. For example, after the Second World War, France enacted legislation intended to repair some of the damage the German occupier had caused.⁹⁰ One such statutory enactment involved the restoration of residences to people who had lost their homes due to the Nazis.⁹¹ There was a severe housing shortage in France at the time, and people returning to the formerly occupied areas of France from the formerly unoccupied zone, or from abroad, often Resistance members or Jews, discovered their apartments now occupied by strangers, often former collaborators who had had no need to flee the German Occupation. Here too it might be noted that the post-war legislation addressed the problem of alleged *Nazi-German* injustice, but left unarticulated that many, and probably most, of the actual cases involved *French* collaborators who had garnered better living arrangements by moving into residences abandoned by those who had fled the Germans.⁹²

In a case that was litigated to the Court of Cassation, the French supreme court for private law, the plaintiff was a German Jewish refugee who had managed to get to France in 1939, and who subsequently lost his official ties to Germany pursuant to the 1941 decree that had affected Mr. Oppenheimer in England

89. See *id.* at 194. The British press seems to have reacted angrily to this decision, with the comment that "[i]f the law supposes that, the law *ist ein Esel.*" *Id.*

90. See H. Lauterpacht, *The Nationality of Denationalized Persons*, 1948 JEWISH YEARBOOK INT'L L. 164 (1949).

91. See *id.* John Dawson wrote a fascinating study of cases arising under this legislation, although his principal focus is on the French phenomenon (still extant, although today with dramatic modifications) of *astreintes*. See John P. Dawson, *Specific Performance in France and Germany*, 57 MICH. L. REV. 495, 514-32 (1959).

92. See JOAN LITTLEWOOD, BARON PHILIPPE: THE VERY CANDID AUTOBIOGRAPHY OF PHILIPPE DE ROTHSCHILD 259-60 (1984) (giving one a good sense of how difficult it turned out to be to recover one's home after the war. Being French, the baron de Rothschild had every legal right to repossess his Paris house. The resident usurper nevertheless was not easily displaced, however, going so far as to argue that his possession was *prima facie* legal, since, in his words, "[t]his property was confiscated . . ." until the baron resorted to threatening the usurper with his gun. When he finally left, it was with most of de Rothschild's furnishings.) Dawson's article on *astreintes* also conveys a measure of the practical obstacles to recovering one's home pursuant to the legislation in question. See Dawson, *supra* note 91.

in the same manner, by stripping all Jews residing outside of Germany of German nationality.⁹³ The French high court held that the plaintiff, Mr. Kurzmann, was not entitled to be reinstated in his apartment because he was considered under French law to be German, pursuant to the Allied post-war legislation that had nullified the Nazi citizenship- and nationality-stripping laws.

The French court held that, as a German, Mr. Kurzmann was ineligible for redress statutorily limited to the victims of Germans, regardless of the fact that he had been forced to flee his apartment in France due to the Germans, and that Germany had stripped him of his German citizenship, then nationality, and had rendered him stateless.⁹⁴ The net result once again was to impose a dual penalty on a plaintiff who had suffered as a Jew, such that he now suffered as a German, and the latter regardless of whether he had sought to avail himself of his post-war right to reacquire German citizenship, or whether he personally had decided not to opt to be a German citizen again.

Mr. Kurzmann figured among many who, although victims of Nazi Germany, were deemed after the war to be German enemy aliens in their countries of refuge. As such, in the words of Professor Lauterpacht, they were "subject to the discriminatory, confiscatory, and repressive measures to which German nationals and their property [were] subjected" outside of Germany in numerous countries after the war.⁹⁵

While France and Germany tended to resort to courts, the approach of the judicial arena as the appropriate forum that dominated in Germany and France more recently was rejected by South Africa. The Truth and Reconciliation hearings provide an alternative model for analyzing the pros and cons of litigating the holocaust.⁹⁶ A foundational idea of the Truth and Reconciliation Hearings was to give a voice to the formerly dispossessed

93. LAUTERPACHT, *supra* note 90, at 166 (describing at length the French case, *Kurzmann v. O'Hea*, Nov. 26, 1946).

94. *See id.*

95. LAUTERPACHT, *supra* note 90, at 166-67. Among the legal issues this case raised were whether nationality or citizenship may be imposed on individuals regardless of their volition; and whether legal measures, such as the 1944 Allied Military Law that had repealed the Nazi denationalization measure, could be applied retroactively. *See id.* at 169.

96. For an excellent book on the truth and reconciliation model by an author of South African origin who also has written widely about holocaust-related issues, see

and voiceless, with the express intention of recording events of the past for posterity in a context free of many of the drawbacks associated with the court system.⁹⁷ The Truth and Reconciliation Hearings also, however, represent a decision to privilege reparations of a symbolic order over those of a concrete order, since the Hearings seek to record a narrative for posterity rather than to concentrate on redress for specific, legally cognizable wrongs.⁹⁸

CONCLUSION

The law's clumsiness and inadequacy in the area of remedies for holocaust-era losses are apparent. In large measure, like every other societal institution, law is unequipped to handle damages of the order of magnitude that occurred during the holocaust. The danger of using an instrument such as law to remedy the wrongs that were done to survivors is the danger of distorting and of demeaning the past. The danger of *failing* to do so, however, is to say that one should not even try to remedy damages which may be compensable because of the existence of others which are not compensable. For all of its imperfections and drawbacks, law also has some advantages: a signal advantage is that it can shift problems from, in the words of Max Radin, "the sphere of the impossible to . . . the range of the practicable."⁹⁹ And maybe that is all one can ask of law.

DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998).

97. *See id.*; *see also* CUITAN, *The Legalization of Racism*, *supra* note 3, at 73-94 (noting some of the drawbacks of the French use of trials).

98. *See id.*

99. Max Radin, *The Permanent Problems of the Law*, in *JURISPRUDENCE IN ACTION* 413, 428 (The Ass'n of the Bar of the City of N.Y. Comm. on Post-Admission Legal Educ., 1953).