The Strategies Used to Achieve Non-Monetary Goals

Transcripts∗

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Abstract

Record of remarks from a panel titled, “The Strategies used to Achieve Non-monetary Goals.” Panelists included law professors, Director of the Office of Special Investigations, United States Department of Justice, and a Holocaust survivor and Treasurer of the American Gathering of Jewish Holocaust Survivors.
THE STRATEGIES USED TO ACHIEVE NON-MONETARY GOALS

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MODERATOR: Professor Russell Pearce, Co-Director, Louis Stein Center for Law & Ethics, Fordham University School of Law*

PANELISTS: Professor Michael J. Bazyler, Whittier Law School**
Professor Burt Neuborne, John Norton Pomeroy Professor of Law, New York University School of Law***
Eli Rosenbaum, Director, Office of Special Investigations, United States Department of Justice†
Max K. Liebmann, Holocaust survivor and Treasurer of the American Gathering of Jewish Holocaust Survivors††

* Professor Russell Pearce has taught at Fordham Law School since 1990. He is a co-Associate Director of the Louis Stein Center for Law and Ethics and founded the Center's Institute for Religion and Lawyer's Work. Professor Pearce teaches Professional Responsibility, Ethics in Public Interest Law, and the Housing Rights Clinic.

** Michael J. Bazyler is a professor of international law at Whittier Law School and a Research Associate at the Holocaust Educational Trust, London, UK. He has written extensively in the area of international human rights law, including a 250-page legal study of the Holocaust restitution efforts in the United States.

*** Burt Neuborne is the John Norton Pomeroy Professor of Law at New York University School of Law, where he teaches civil rights and civil liberties, and serves as Legal Director of the Brennan Center for Justice at NYU. Professor Neuborne is a former National Legal Director of the American Civil Liberties Union and a member of the New York City Human Rights Commission. He is the court-appointed Lead Settlement Counsel in the U.S.$1.25 billion Swiss bank litigation and was a principal lawyer in the cases against German industry that culminated in the establishment of the 10 billion DM German Foundation "Remembrance, Responsibility and the Future." He is also a member of the Board of Trustees of the German Foundation.

† Eli M. Rosenbaum is the Director of the Office of Special Investigations ("OSI"), the United States Department of Justice's special task force for the investigation and prosecution of Nazi war criminals. Mr. Rosenbaum, who began his tenure with OSI as a trial attorney, later Deputy Director, and now Director of OSI, is the longest-serving prosecutor and investigator of Nazi criminals in world history. Mr. Rosenbaum has also served as General Counsel of the World Jewish Congress, where he directed the investigation that resulted in the worldwide exposure of the Nazi past of former United Nations Secretary General and Austrian President Kurt Waldheim.

†† Mr. Liebmann was born in Mannheim, Germany in 1921. He is a Holocaust survivor, having been deported to France in 1940 and spending almost two years in the
PROFESSOR ROSENBAUM: At this moment I would like to introduce Professor Russell Pearce, who is the Co-Director of the Louis Stein Center for Law & Ethics here at Fordham Law School, a good friend, a fine human being, and a wise moderator, who will be moderating Panel II.

PROFESSOR PEARCE: Good morning, everyone.

On this panel, we are going to continue a conversation that was begun, in part, by the first panel this morning: What is the relationship between moral objectives and legal and diplomatic strategies? What have been the strengths and weaknesses of these strategies in serving goals, such as seeking justice, assigning responsibility, promoting truth, promoting reconciliation, and allowing survivors to tell their stories?

We are going to begin the conversation with Professor Neuborne.

PROFESSOR NEUBORNE: Thank you, Russ.

Being on a panel like this is wonderful. It enables you to really be an enfant terrible.

Let me challenge the very basis of the panel, that there is a distinction between the non-monetary and the monetary goals.

As far as I am concerned, all goals in this process are non-monetary. I think Ben Meed put it best, that is: the only question is whether the money helps or hurts those non-monetary goals. The goals are essentially goals of truth, making sure that the story and history of the agony and the suffering is projected forward in time in a way that no denier can ever cast doubt on again, and to create an historical record that is absolutely irrefutable and that will stand for all time. That is one of the extraordinarily important goals.

The second goal is, if it is possible—and I don’t know if it is possible—to foster some sense of reconciliation between the survivors and the community of which the survivors are part and the community that committed the awful events. Is it possible to find ceremonies of reconciliation, if not closure, that will enable

French concentration camp, Gurs. When the round-up of Jews in France began in 1942, many Jews were sent to Auschwitz, but Mr. Liebmann was able to escape to a small French village called Le Chambon s/Lignon. Soon thereafter, he escaped to Switzerland. He emigrated to the USA in March 1948 with his wife and two-year old daughter. In the United States, Mr. Liebmann worked as an executive in several organizations. Most recently, Mr. Liebmann volunteers for the American Gathering of Jewish Holocaust Survivors where he has been treasurer for many years.
us to focus our eyes forward instead of constantly focusing them back, without ever forgetting, but recognizing that the future is where we will live, and hoping to deal with that as some form of reconciliation?

And finally, the notions of re-establishing or fostering a sense of justice, a sense of rightness, about what human beings can do in the wake of evil as dramatic and unimaginable as the Holocaust.

I always view those as the three goals: truth, reconciliation, and the re-establishment of a sense of justice. Monetary aspects were certainly a piece of that, and always in my mind a relatively small piece.

I will tell you that my thinking on the monetary aspects of it has changed a little bit over time. When I began working on these cases five years ago—many of you know that I have been deeply involved in the litigation and the negotiation of the German Foundation, and the Swiss Banks case as well—I saw the monetary aspects of this as essentially punitive. I saw this as a disgorgement process and said that no sense of justice could ever exist, no sense of reconciliation could ever exist, and there would be a constant repetition of the lies, if private individuals were permitted to have profited dramatically by the agony of the victims and to simply keep their ill-gotten gains, I said: “I don’t care who gets it, I just know that that company shouldn’t keep it.”

That is the way I approached it originally. My sense was: “I don’t care who gets the Swiss money; I know it shouldn’t stay in the Swiss Banks. I don’t care who gets the slave labor profits; I know that the German companies shouldn’t make a profit, the insurance companies shouldn’t make a profit, and that disgorgement is necessary for that unjust enrichment.”

Over the years, I have become increasingly concerned about the fairness of the allocation.

But let me just, in a minute or so, advert to how we consciously dealt with the non-monetary aspects, because I believe the monetary aspects are part of a larger package, but there are non-monetary aspects.

My participation in the German Foundation negotiations, was one of the most extraordinary experiences I have ever had,
in part—and I am sorry that Count Lambsdorff is not here to hear this. Oh, he is still in the room, good.

We went through a long set of negotiations before he joined the German Foundation negotiations, and they were bogged down in rhetoric and deliberate posturing. It was only when he began to lead the German team that a voice of candor came through. More than once he ended the negotiation sessions when we would be frustrated and intensely divided with what became a mantra for the negotiations, and that is: We are doomed to succeed in these negotiations. And in large part, we succeeded because his was a wise and candid voice.

The negotiators’ “voices” spoke in four different tones, and this is what made it such a unique experience for me. They spoke in the voice of charity. At the beginning, the German side consistently stressed that they were engaged in essentially giving something away out of the goodness of their hearts, a kind of charitable operation, which grated on a lot of the participants, but it was one of the voices that existed.

We also talked in the voice of morality. A number of people tried to place the negotiations in a context of moral statements, saying what would be the moral stance be. We very quickly drifted, as Count Lambsdorff observed this morning, into the voice of self-interest, because the German participants understood that both morality and self-interest coincided in an effort to reach a result. And then, the lawyers, because it is the only voice they know, continually spoke in the voice of rights and justice.

And so you had in the same negotiating forum a combination of people speaking in those four different voices: charity, morality, self-interest, and rights. It was out of that that came the effort to achieve both monetary and non-monetary justice.

My sense is—and I will end on this note—that it is the combination of the moving apology by President Rau, the combination of the significant financial gesture made by the Swiss companies of putting U.S.$1.25 million into the Swiss settlement fund, the significant financial gesture made by the German Government in contributing DM 5 million, the significant financial gesture made by German industry in contributing DM 5 billion, and the gestures that can also be made by France and hopefully other countries of Europe. That is what they are: they are monetary and non-monetary gestures.
I ask you all to measure them, to measure their effectiveness against those three goals: Do those gestures help in projecting the truth? Do those gestures help in projecting some sense of reconciliation that allows us to focus on the future and not be fixated on the past? And do those gestures help in establishing a sense of community and a sense of fairness? If so, we have done something worthwhile. If not, the process is brittle and history will judge it harshly.

PROFESSOR PEARCE: Thank you. Mr. Liebmann, to put you on the spot a bit, do you have answers to those questions or other thoughts about the topic?

MR. LIEBMANN: I have some thoughts. But let me tell you that I am somewhat at a disadvantage because until last night at 9:00 o'clock I didn't know I would be here this morning at 11:00 to speak to anybody.

Let me talk about reconciliation. I do not think that reconciliation between Jews and the perpetrators is possible as long as we, the survivors, live. I am in daily contact with lots of survivors who call the organization for which I work as a volunteer, and it seems to me that most survivors feel the same way I do. Reconciliation with the survivors will not be possible. The wounds are too deep. In fact, I only personally achieved a sense of closure about the murder of my parents when ashes were buried in the Holocaust Museum in Washington. That was ten years ago.

But we do have to recognize that all of these negotiations prompted many countries, which absolutely did not want to deal with their guilt, which finally came around and started to slowly discuss the fact that they also have guilt and should be involved in some moral justice.

PROFESSOR PEARCE: Thank you.

Professor Bazyler, how would you respond to Professor Neuborne's questions and to Mr. Liebmann's observation about reconciliation?

PROFESSOR BAZYLER: I am very honored to be on a panel with Professor Neuborne. It is very easy for me, as a professor in the Ivory Tower, to look at all the individuals who have worked so hard over the last five years in order to bring this issue to the forefront.

In looking at this—and my conclusions are very similar to what Professor Neuborne has said—there are basically three dif-
ferent questions that have to be asked, which are part of what Professor Neuborne was saying and the discussion this morning. Each time that someone spoke about a particular issue, I could fit it into one of these three categories.

The first one is: Should the money be sought? Should we seek money, regardless of whether you call it restitution or reparations or anything else? Second, if you are going to seek the money, how should it be collected; what is the method? The two really come together. Sometimes you can say that the “how” may lead you to the conclusion that it’s too messy, that it shouldn’t be done. The third question is the one that Professor Neuborne said he is focusing on right now, which is the allocation. Once the money is collected, how should it be distributed?

There are many reasons, looking at number one and number two, to say that we should not, that the morality calls for us not to seek the money, and that the process itself is just too high a price to pay, as a number of people have pointed out. You could say that no matter how much money you get, the Swiss banks did not pay enough, you have not fully disgorged the amount of money which they earned. The Austrian banks did not pay enough, the French banks did not pay enough, the German companies themselves did not pay enough for the amount of profits and the earnings from the slave labor.

Anti-Semitism increased as a result of the movement. Sometimes accusations are made of countries in which historical truth is stretched. The people who profited from this are really the lawyers, the Jewish groups, and the politicians, and that it means the memory of the Holocaust.

It also can make the perpetrators feel, “Well, we’ve gone ahead and discharged our debt fully. Go away, Jews. Why do we need to deal with you? Don’t bring up this any more. We went ahead and paid it.”

There is also talk of the fact that if you are concerned about the security of the State of Israel, that in fact that is too high of a price to pay.

When you look at the distribution, you say: “Well, look at the payouts”—as Professor Curran mentioned, pennies per day for what the survivors went through. The lawyers’ fees compared to the amount of money that the individuals get, so that in the slave labor distribution, the amount of money that the lawyers
And then, needy survivors are being left out. The whole controversy about whether you distribute to the double victims in the former Soviet Union and Eastern Europe, and then the needy survivors in the United States are left out. And then, other individuals making more than the survivors, whether it is travel agents, accountants, owners of hotels, or consultants. All of that may lead to the conclusion that this fight was not worth it, that no matter what, we should not have it.

The writings that I have done in this area—again looking from the Ivory Tower point of view—explain that I disagree with that. With all the costs that there are, I think it is a worthy fight, I think it is something that should have been done, and it is something that justice did require.

My concern also is the same as Professor Neuborne's, that when this first began—and I look at it again, not being on the front lines, but from the Ivory Tower—the issue was that this money has to be disgorged. There are profits that were made, moneys that were made by these corporations, and they have to be given back.

There was a debate—you might have seen this—that went on in the form of an article in the magazine Commentary by Gabriel Schoenfeld, called "Holocaust Reparations: A Growing Scandal," which I very much disagreed with. But what I thought was useful about that was that in the January issue of Commentary there was a much more interesting and much more useful responses by various individuals that set out various issues.

One of those responses came from Stuart Eizenstat. I just want to quote a portion. To me, I could not say it better than the way he said it:

Law, justice, and logic all come down strongly in favor of what has been done. In every developed nation on earth, the accepted method of compensating the victim when a civil wrong has been committed, a contract breached, or labor extracted under duress is through the award of money. Only those on the fringe, those who deny the Holocaust and other wrongs ever occurred, would disagree that its victims, Jews and non-Jews alike, were grievously injured both by the Nazi Government and by the German private industry. The same can be said when it comes to Austrian industry and Swiss
banks. Insurance policies were not honored, dormant bank accounts went unpaid, brutal labor conditions went uncompensated, Aryanized property was never returned. If these injuries occurred, why should their victims not have the same right to sue for justice as victims or other and lesser catastrophes?

PROFESSOR PEARCE: Mr. Rosenbaum, I am going to try to get us to look at Professor Neuborne’s question. Let me ask whether, as someone who is a prosecutor, whether you have a different sense of whether the diplomatic and legal initiatives here best satisfy the goal of seeing justice?

MR. ROSENBAUM: I think we are probably too close to these recent events for history to have anything approaching a final judgment yet. I will say that I do not believe that it is possible to achieve anything but, in the final analysis, symbolic justice when one is talking about a crime—and now just to speak about the murder of the Jews—a crime in which, for four straight years, an average of more than 4,000 men, women, children, and babies were shot, gassed, beaten, or starved to death every single day.

But I do share the view, of course, that it is important to try to pursue both the monetary and the non-monetary goals. I think there are at least three kinds of key non-monetary goals, all subsumed under the heading of the word that you used, “justice”—provision of prosecutorial or law enforcement justice against the perpetrators, provision of ethical and moral justice, and provision of historical justice. The score on all three of those I think is, at best, one of partial success, though, frankly, I tend to view the world as having failed largely in all of them, just as it has failed in the area of monetary justice.

I want especially to thank Professor Bazyler for speaking some unpleasant truths about that process. I want, if I may be permitted, also to state that, although I am with the Department of Justice, I am with the Criminal Division, and the Criminal Division was not involved in any of the negotiations that took place with Switzerland, Germany, Austria, et cetera. My small office was intimately involved with that which preceded those negotiations, the pursuit of historical justice, particularly in connection with the wartime activities of Swiss institutions.

If one looks at prosecutorial justice, if I may stick with my three goals, we have learned that only governments can success-
fully pursue justice. It seems that the world has, for whatever reason, turned to private Nazi hunters, and they perform a central role more as gadflies than as investigators. It is Nazi hunters, Jewish organizations, other groups, the media, that have embarrassed European governments in particular, but also our own, into pursuing some measure of prosecutorial justice.

But, let's face it, that effort has failed. The overwhelming majority of the perpetrators of the Holocaust have escaped. Within a few years after the Nuremburg trials, the Cold War gave most of the countries of the world, East and West, a ready excuse to cease pursuing Nazi criminals.

It is scandalous that my tiny office of thirty-five people at the Department of Justice has more Nazi cases in litigation than all of the other countries of the world put together. I would like to say that that is a tribute to the people I am privileged to work with, but it is really more a condemnation of European governments in particular, nearly all of which have to be pushed by Nazi hunters, by Jewish organizations, by the U.S. Government, to do the right thing. Our own government took thirty-five years to finally get serious about pursuing Nazi and Japanese criminals.

I do want to correct one thing that Count Graf Lambsdorff said about the statute of limitations in Germany. The statute of limitations was allowed to run on all Nazi crimes years ago, with the sole exception of what German jurisprudence refers to as "base motive murder." So today, my friends, if you prove in a German courtroom that the defendant manned a machine gun and calmly mowed down 1,500 Jewish schoolgirls, he will be acquitted unless you can prove that the did it because of what they call "racial hatred." It is not enough to prove murder. And so hardly any cases are prosecuted in Germany. Hardly any have been prosecuted in the last ten or fifteen years.

In terms of the provision of ethical and moral justice, I have in mind acknowledgment of national responsibility—not collective guilt, but national responsibility. In that regard, Germany has been a leader, and other countries, especially Austria and Switzerland, have been very slow, as has France, in catching up.

I have in mind provision of a formal apology. Again, Germany has led the way in that, and other countries are still trying to get around to doing it. In the Baltic countries, for example,
anything that smacks of an official apology is extremely contro-
versial.

Finally, I have in mind efforts to prevent the repetition of such crimes. I think anyone who looks at the way Roma and Sinti peoples are still treated in Europe knows that Europe has not fully learned the lessons of the Shoah.

In terms of historical justice, historians of the world have done an excellent job in studying and writing about the history of the period, but only incomplete justice has been done there as well, for a number of reasons, among them the fact that documents the world over are still inaccessible in many cases. In countries of the former Soviet Union, many documents are still classified. In Great Britain, they have an Official Secrets Act that still bars access to documents in many cases.

In our own country, there are hundreds of thousands, if not millions, of classified documents relating to the period of the Second World War that are still unavailable to the public more than half a century after the crimes took place. We are in the middle of a process, pursuant to legislation that President Clinton signed in 1998, to seek out, declassify, and make public all of those documents.

One sees history in recent years being written by govern-
ment commissions, including ones in the United States, in Swit-
zerland, and in many of the countries of Europe. That is a pro-
cess that has great advantages, but is also fraught with danger. I think, in general, governments should not be writing our histo-
ries. One gets into all kinds of problems when that happens.

For example, the Presidential Advisory Commission on Hol-
ocaust Assets in the United States made the mistake of releasing a draft report on the so-called “Hungarian gold train.” They gave it to the media before it was vetted by qualified historians, and so it is suffused with errors. But that account has never been cor-
corrected as far as The New York Times was concerned. They ran it on the front page, replete with a picture of a U.S. Army official who happened to have the same name as someone who was men-
tioned in the so-called “Gold Train Report,” but was completely uninvolved in those events. We have a long way to go.

I want to close by expressing my admiration for Mr. Lieb-
mann and Ben Meed and all the other survivors, and especially their leaders, who have kept at the forefront of public conscious-
ness the crimes that were committed and the importance, above all else, of an acknowledgment of national responsibility and the provision of an apology, which is worth more than any money.

Thank you.

PROFESSOR PEARCE: I would like to follow up on a few of the themes that have been mentioned. The first is Mr. Liebmann’s suggestion that reconciliation is not possible. How do you respond to that, Professor Neuborne, in light of your sense that fostering some sense of reconciliation should be or was one of the major goals?

PROFESSOR NEUBORNE: First, I want to make a very important distinction. It is impossible, it is immoral, it is outrageous, for anyone to attempt to speak for a survivor. I can’t, I won’t, I would never try.

My intuition is that Mr. Liebmann is right. I think it is probably impossible for people who actually suffered the persecution and the horror to become reconciled to their oppressors. It would be wrong to ask them to do so. This is not something that can ever, ever be rectified.

And so, the reconciliation I am talking about is not a reconciliation of the victim to the oppressor. I do not believe in asking victims to forgive the people who oppressed them. The reconciliation I am talking about is a more structural reconciliation between the cultures, between German culture, between the culture in the United States.

I confess to you that when I went to Berlin, and to Bonn initially, to engage in these negotiations, I found myself feeling extremely uncomfortable, extremely out of place. I was hostile, I was angry (and I suffered no personal loss through the Holocaust). But I was a representative of my culture, a culture that I love and revere, and I was reacting as strongly and negatively as I possibly could.

The reconciliation that will allow a lessening of that emotional anger is the reconciliation I am talking about, allowing the two communities to be able to speak to each other, over time, in ways that are not constantly dominated by a retrospective anger, so that we can acknowledge the fact that we have to live together in the world, we have to find ways of getting into the future.

That doesn’t mean forgiving, it doesn’t mean asking the victims to forgive, but it does mean trying to find ways that the two
communities can deal with each other on a reasoned basis, and to try to find ways that we can work together in the future.

And, perhaps on a totally romantic note, but it is one that I hope that we can do so, to try to see not just that we look backwards, but that we look forwards and try to minimize the possibility that anything like this can ever happen, not only between and among our communities, but to try to minimize the chance that this happens elsewhere in the world as well. It is that kind of reconciliation I am striving for.

MR. LIEBMANN: What I would like to add to my remarks is of course the following. I have no problem dealing with the next generation of Germans. As Count Lambsdorff said, his children bear no responsibility for what happened between 1933 and 1945. I have in the past had dealings with the next generation of Germans and I had no problems with that. But we have to recognize that the wounds of the survivors are too deep to effect any reconciliation with our generation.

PROFESSOR PEARCE: Professor Bazyler, on this topic do you have thoughts, or Mr. Rosenbaum, that you would like to add?

PROFESSOR BAZYLER: The question is—again I am going to focus back on the money—what do the payouts do? Does that help the process of reconciliation? Does it somehow diminish the process of reconciliation?

In the brief remarks I made, I pointed out there are some negatives in the payouts and, as Professor Neuborne pointed out, there are some positives in bringing a reconciliation. So there are factors affecting it both ways.

MR. ROSENBAUM: I think it would be interesting for someone to do some opinion sampling to find out whether as a result of the events of the last five years, particularly the litigation and the payments, survivors in general are more or less angry than they were before the process began. I will leave it to others to suggest what the survey is likely to reveal.

PROFESSOR PEARCE: Let me move to the theme that Professor Neuborne suggested, which we talked about a little already.

PROFESSOR NEUBORNE: Russ, if you don’t mind, I just want to respond very briefly.

I hope if you do take that poll that you poll survivors in
Byelorussia, the Ukraine, Russia, Poland, people whose lives were extraordinarily disrupted and who are poor beyond our imagination, and not simply ask—I mean, we sometimes forget what a blessed land we live in, in terms of the fact that people who live here—there is a safety net below which many of us simply do not fall—not that the government necessarily gives it to us, but that the community will give it to us—and below that safety net many people do not fall.

PARTICIPANT: That is not true.

PROFESSOR PEARCE: Excuse me.

PROFESSOR NEUBORNE: I have spent a lifetime arguing that our safety net is too porous and that we fail. But if you think that this is a country that can be compared with Byelorussia in terms of the way people live, then I suggest that you visit Byelorussia.

The fact is that if you are going to poll the survivor community, please don’t poll the Americans survivor community and think that what you have done is given us an answer.

PROFESSOR PEARCE: Let me ask the panel to go back to this question of reconciliation and what Professor Neuborne has suggested with regard to it. Professor Bazyler, I think, would like to add some comments.

PROFESSOR BAZYLER: About the money, I was born in the Soviet Union, I lived in Poland, and I have relatives in both countries, and I still send funds to an aunt in Odessa. That U.S.$7,500 will make an incredible difference to that woman. And as Count Lambsdorff did say, it’s a fortune for her. That can make a difference.

MR. ROSENBAUM: I, too, think Professor Neuborne made an important point about the impact that these funds may have on survivors in Eastern Europe. But if one looks at the concept of disgorgement, and also entitlement to compensation just for labor, it is hard to understand, for instance, when four American companies that manufacture cigarettes have settled with the state governments for U.S.$240 billion, why anyone should be dancing around the room celebrating the fact that U.S.$5 billion was given up by all of German industry put together. The lawyers fought as hard as they could, and I am certainly not blaming them, but let us not delude ourselves into thinking that what has been done is anything more than symbolic.
PROFESSOR PEARCE: That, I think, segues us to another question. Mr. Liebmann, I will give you the heads up and put you on the spot on this. This goes to Professor Neuborne’s question about a sense of justice for survivors. What is your perspective with regard to a sense of justice about the litigation and diplomatic efforts?

MR. LIEBMANN: I think it is a matter of morality that there was some money given. I do not know if you can call it justice, because it is still only a minor token as to what was paid. And let’s not forget one thing: The U.S.$5 billion total of the initiative goes seventy percent, I believe, to the so-called forced laborers—in other words, to the non-Jewish side—and only about twenty-five or thirty percent goes to the Jewish side. I think that is a point, which has been studiously avoided by Germany to be published.

PROFESSOR PEARCE: Professor Bazyler?

PROFESSOR BAZYLER: That is correct.

PROFESSOR PEARCE: But any thoughts? What is your view with regard to that? I’m not checking the accuracy of his statement. What I would like to know is what about with regard to those facts and the question that Professor Neuborne raised about the re-establishment of a sense of justice? We heard a little bit of Mr. Rosenbaum’s response; I think it is fair to say. I want to go to Mr. Liebmann and now to you. What do you think the bottom line on the establishment of a sense of justice, given Mr. Liebmann’s comments?

PROFESSOR BAZYLER: Five billion dollars is not enough. Ten is not enough. Yes, the Jewish survivors should have gotten more, and yes, the forced laborers should have gotten more. I think in part of his testimony—I think it was before the House—Count Lambsdorff said, “$10 billion is what we got and that $10 billion is what we’re giving. I wish I could have gotten more.” I wish he had gotten more too.

I also suspect, but for the messy negotiations that went on, we would not have gotten to the U.S.$10 billion. You know, it is interesting. When Count Lambsdorff spoke about this not being a class action settlement, that this is money that is being paid out—but it was paid out because of the hard-fought negotiations. It was paid out because of the greedy class action lawyers
sitting there and grinding the other side to get the greatest possible number.

You know the ads that were placed—I brought those with me—that I show to my class in the newspapers, *The New York Times*, talking about the offer, the measly offer that the German companies were making. It was all part of the process. It was the number that was received. We wish there was more, but that is the reality of the situation.

**PROFESSOR PEARCE:** So your answer to the question that Mr. Rosenbaum raised earlier, about whether the sense of justice—I know you cannot answer it from the perspective of the survivor community—but your answer from your view as to whether there is more of a sense of justice now than before appears to be yes. I think everybody agrees there is no complete justice that is possible. But in terms of sense of justice, you would take the position that there is more now?

**PROFESSOR BAZYLER:** There is some, absolutely. This is a positive development. It is a positive development in the human rights field, it is a positive development in international law, and it is a positive development in the memory of history.

**PROFESSOR NEUBORNE:** Russ, can I explain why I think it is a positive development, not just for the Holocaust cases, because the Holocaust cases were obviously the thing that drove the passion with which we work on it. But when I teach about this, when I speak about this, I think about the wonderful work that the prosecutors have done on this. I say that there has been a substantial growth in the notion of law as a way of dealing with these cataclysmic outpourings of evil that cannot possibly be dealt with by any single nation State. They are international violations in the truest sense of the word.

Beginning with the Nuremberg Trials and the evolution toward the struggle to create a World Court in Rome that will actually have jurisdiction over violations like this, the legal community has made significant strides since the Second World War on the criminal side.

On the civil side, we have not moved an inch. Think about this as a metaphor. We figured out a way to deal with the guy who runs the concentration camp. The guy who runs the concentration camp is an international criminal, and we are, slowly but surely, moving toward a world in which there would be an
international criminal court before which someone like that can be brought to create some sense of justice.

The guy who sells the barbed wire to build the concentration camp, knowing what it is being used for, and knowing that he or she is making a huge profit from the transaction, we have no international mechanism for taking that profit back, for taking the profit out of being the civil conspirators with the criminal evil that creates these horrors.

One of the reasons I worked on these cases was not just the Holocaust, although it consumed my life for the past five years with a passion that I did not dream would occur, but I worked on it as well because I wanted to try—we all did—the lawyers wanted to try to kick-start a process by which there would be a legal vocabulary to describe the requirement that there not be a profit motive in cooperating with genocide, and that if you cooperate with genocide, someday, somewhere, some time, someone is going to come and take the profit back.

That is why I thought disgorgement was such an important role here, and that is why I agree entirely that this is all symbolic. We did not come close to getting a disgorgement that is accurate, but sixty years after the fact, in the historical imperative in which we live, it was the best we could do, and it is a gesture, no more than that, and the beginning, no more than that.

PROFESSOR PEARCE: Professor Bazyler, then Mr. Rosenbaum and Mr. Liebmann.

PROFESSOR BAZYLER: The “somewhere” answer is the United States. That is the only place.

PROFESSOR NEUBORNE: Now. Now it is the only place.

PROFESSOR BAZYLER: Now, it is here. I mean, as part of the settlement, what the Germans wanted—you know, this is the term that was used—was legal peace. What does that mean, legal peace? It is not a fear of being sued in German courts; it's not a fear of being sued in courts in any other country in the world. It’s a fear of being sued in the United States. It is the same thing with the Swiss banks and the same thing with the other defendants.

What it has led to—and I have said this in some of the other writings that I’ve talked about—is what I hope is a new view of other perpetrators, even from World War II, and also of other
historical wrongs, being sued in U.S. courts and having the same kind of recognition.

A couple of months ago, there was a conference commemorating the 1951 treaty between the Allied powers and Japan. Imagine the audience, consisting of American POWs who worked as slave laborers for Japanese companies, who suffered like the Holocaust survivors suffered. The door has been closed on them. They have not been able to get compensation. They would be extremely happy to be in the shoes of those individuals who are receiving the compensation from the DM 10 billion settlement. They want that. They have been denied that. How are they going about it? They are filing lawsuits in the U.S. courts.

There is a settlement with New York Life Insurance Company stemming from the Armenian genocide, where New York Life came in and sold policies in the Ottoman Empire. How did that lawsuit come about? As a result of the Holocaust litigation that occurred here.

There is talk right now of the African-American reparations movement that is going on. I get weekly runs on those cases in newspaper articles. How do I get those? By plugging in the word “Holocaust.” Everyone of those takes its cue from the Holocaust litigation cases.

So, hopefully, this will be a new way of going against companies and saying: “If you do the same things as these companies did fifty years ago, you also will be sued, except this time we won’t have to wait fifty years.”

PROFESSOR PEARCE: Mr. Rosenbaum?

MR. ROSENBAUM: If the historical question is: Will history judge this particular settlement as “a dignified sum”—which is what the White House called it during the celebration surrounding the signing of the agreement last year—my hunch is that history will not agree.

There are so many numbers one can look at. If a person of color in this country is not seated at a Denny’s restaurant, he or she will get a lot more than U.S.$7,500. If we are paying people just for their slave labor, not for their anguish and their pain and suffering, and if they each worked on average certainly more than a year in slavery and we are paying them in today’s dollars, I doubt there is anyone—I know there is no one in this room—who will work at a job in which what you say most of the time is
“Would you like fries with that burger?” for U.S.$7,500 a year. But let us hope that that is not the standard for measuring what was done.

As Professor Neuborne and Professor Bazyler indicated, let us hope that the key question is: Will the landmark precedent of last year’s agreement, the result of some very, very difficult negotiating and some very tough fighting by the lawyers and others, be a precedent that ensures that in many cases in the future, unlike this one, the full profits of inhumanity really will be disgorged? If they are, then what happened last year was actually a success, and we have to pray that it was.

PROFESSOR PEARCE: Mr. Liebmann?

MR. LIEBMANN: There is one thing, which has not been mentioned here at all. I think one of the reasons why this agreement came about altogether is thanks to the American regulators, the insurance regulators and the banking regulators, who put an enormous amount of pressure on the German side to come to some kind of an agreement because it was in their economic interest. With all the lawyers and all the negotiations, I think the overriding reason why Germany came to the table and finally came to the settlement was the regulators.

PROFESSOR NEUBORNE: I think we have to acknowledge that. I worked on this so hard as a lawyer, but I always describe this now to myself—and now this is the first time I will try describing it publicly—I always think of this process as a three-legged stool, that it is one of those milking stools with three legs.

First, the work of the U.S. Government—I mean, the work of the regulators, the work of the state insurance regulators, of the banking regulators, the Senate, and various officials. Some of the unsung heroes are the people who were the comptrollers, the treasurers at the local level of various cities across the United States, who made it very clear that they would not do business with banks that would not find a way to end this process. That pressure was absolutely crucial. All the lawyering in the world does not get us to first base without that pressure.

And then, secondly, the lawyers. The lawyers essentially provided a legal vocabulary, a matrix, within which the discussion could go on, and a theory which created a little more self-interest in settlements. The lawyers I think participated constructively, but could not possibly have done it alone.
But the thing that put it over the top, frankly, although you are too modest to say it, was the organized activity of the Jewish community that put this on the agenda back in the early-1990s, that would not let it go away, and that insisted that there be a resolution. The politicians and the lawyers helped craft the resolution, but the pressure for the resolution came from the community.

It couldn’t have been done without the cooperation of all three entities.

PROFESSOR PEARCE: Professor Bazyler and then Mr. Rosenbaum.

PROFESSOR BAZYLER: You know, there is a Chinese proverb that says “failure is an orphan and success has many parents.” What I have seen in all these settlements, because it is seen as a success, is so many people and so many organizations coming forward and saying, “We are the one.” It is not. Again, I have to agree with Professor Neuborne. All these people have come together.

I do think that the Swiss settlement, in particular, which I call the “mother of all Holocaust restitution settlements,” would not have occurred without the pressure from the regulators, and specifically Alan Hevesi and the Executive Monitoring Committee on those banks. Once that happened, that became a very powerful force.

And I do think that the threat of sanctions was very important. It was something that was opposed by the U.S. Government. There were ads against it—you know, “trade war against Switzerland.” But it worked. Without it, who knows? None of this would have occurred.

PROFESSOR PEARCE: Mr. Rosenbaum?

MR. ROSENBAUM: I agree. I think the work that the Jewish organizations did to make sure that through the media this issue was never allowed to walk off center stage was essential. I see my friend Menachem Rosensaft here, who was intimately involved in that, who wrote some terrific Op Ed pieces, in particular. The World Jewish Congress led the way initially in this, later joined by the Wiesenthal Center and others.

I well remember a very powerful full-page ad that ran in newspapers around the country, and perhaps around the world, placed by the American Jewish Committee, which pointed out
that even while Germany was refusing to pay pensions to former slave laborers, it was handsomely rewarding its SS veterans. Alas, SS veteran pensions still greatly exceed these amounts that are being paid to the victims, but that deal is done.

I, too, want to pay tribute to the work of the regulators. As long as we are doing that, I think this would be an appropriate time to mention the extraordinary contribution of Neil Levin, who perished in the World Trade Center attack.

PROFESSOR PEARCE: Let me change the direction of the conversation just a little bit and ask about non-monetary remedies that were left out. Some of the remedies that I have heard mentioned have included a forum, which would have enabled survivors to tell their stories. A different type of remedy I have heard discussed is the notion of attempting to rebuild communities.

What I would like to ask—and maybe I will start by laying out the question for Professor Neuborne and then raise it for others: Professor Neuborne, if you had a wish list, were there some kinds of remedies that had to be dropped in the negotiation? For all the panelists, I would like to hear your thoughts about these remedies in general, and also about the question of whether class action or diplomatic strategies made it more difficult perhaps to achieve these remedies. It is a big question.

PROFESSOR NEUBORNE: That is a tall order.

I will say personally the non-monetary remedy we did not get is what I feel most troubled about and what I consider a genuine failure is that we were unable to require that private archives be opened—in other words, the company records, the bank records, the insurance records. I think that our inability to force the public disclosure of all records relating to this era as a matter of course, just as a matter of ordinary human decency, is a great failure.

If there is an anchor that is hooked to this process that could sink it in the future, it is the failure to get adequate public disclosure, because I think that is just going to encourage deniers to go back and start telling stories again. As long as this information is in the gray area, in archives that people cannot get at, and as long as information can be manipulated because it is not in the public sector, that is a bad thing.

In terms of the psychology, the apology, I was at the Ger-
man President's residence, at President Rau's residence, when he made that apology. It was one of the most moving experiences I have ever seen. There was not a dry eye in the audience. There were many survivors in the audience who spoke and said that this was a very important day for them.

To the extent that that apology was a central aspect of the negotiation, I think it was the most important non-monetary event that took place, the formal apology by the President of Germany.

On the class action, for an academic like me, this is a perfect kind of experiment, because the Swiss Banks case proceeded as a classic Rule 23 class action. You will hear this afternoon from perhaps one of the most important figures in the Swiss Banks case, Judah Gribetz, the Special Master, given the very difficult responsibility of helping us work out a plan of allocation and distribution. That is a classic Rule 23 case.

The German cases went into this mixed legal/diplomatic bag, which I think is unprecedented. Interestingly enough, I think, just as a bottom line, we got more money out of the class action. The Swiss Banks case, the U.S.$1.25 billion, was a better economic return than the German settlement, which was the best we could do and symbolically an important amount, but if it had gone through the traditional class action process, my sense is more money would have been generated.

On the other hand, the Swiss distribution is much slower than the German distribution. So there are tradeoffs that get made.

PARTICIPANT: Why is it slower?

PROFESSOR NEUBORNE: Because it has to go through a series of formalities. It is the formalities in the class action mechanism—constant notice, constant mailings, and constant legal formalities—which are important to assure formal legal fairness, but which take time. The German system, because it operates outside of a court, can operate more flexibly, but with the risk that there is not a judge looking over the shoulder to make sure that everything is done perfectly. So there are going to be risks in both situations.

PROFESSOR PEARCE: Mr. Liebmann, are there remedies that were left out that you would have liked to see?

MR. LIEBMANN: I think what we did not mention at all is
that there is a vast store of histories recorded by both the Spielberg Foundation and the United States Holocaust Memorial Museum. I do not know if this is the case overseas in Europe. I think it is very important that these histories be preserved in order to make sure that the deniers have nowhere to go. Besides, the German records are so complete that I think eventually the deniers will end up at a dead end.

PROFESSOR PEARCE: Is there anything, though, in particular that you would have also liked to see in terms of a remedy? I take it what you are saying is in terms of the issue of giving people an opportunity to tell their stories, you did not necessarily see this process as the place for that. Are there other kinds of remedies that you would have liked to have seen come out of the process?

MR. LIEBMANN: The only thing I can say is that there are still too many countries who have not yet admitted to what they did or to their guilt. I think it is important that these countries come to grips with their past.

MR. ROSENBAUM: I do not know if it can be forced under the heading of remedy but the one thing I would have liked to have seen, beyond, obviously, greater compensation, would have been additional transparency in the negotiating process. It was very difficult to follow what was going on, what was being said to whom.

I am not saying that the negotiations had to be conducted at Yankee Stadium. But there were questions raised after the fact, most notably about the side agreement that was, as far as I know, kept secret for quite some time. It was signed by the United States, Germany, and the representative of German industry, which guaranteed a certain sum, between U.S.$50 and U.S.$75 million, to the trial lawyers. For some reason, that was not published at the same time as the other agreements. I think the survivors had a right to know about those kinds of things, and they did not.\footnote{After this Symposium, Eli Rosenbaum sent a copy of a letter addressed to "the plaintiffs' attorneys participating in the negotiations" from Mr. Stuart Eizenstat, Count Otto Graf Lambsdorff, and Mr. Manfred Gertz. This letter states the following: This is to confirm our understanding of the resolution of the issue of attorneys' fees. An allocation from the administrative budget of the Foundation consisting of not less than 100,000,000 DM and not more than 125,000,000 DM will be set aside for the payment of attorneys' fees, expenses,}
PROFESSOR NEUBORNE: Just for historical accuracy, the agreement you are talking about was an arbitration agreement that was negotiated in June. It was never secret. It was as public as anything else. And the amounts you are talking about are just completely wrong. The total amount of all attorneys' fees paid to every attorney, including 278 survivors who received special compensation for having been the spearhead to do this, and every penny of costs, the total amount in all of that is U.S.$52 million.

Now, that is a lot of money, but there were fifty-one lawyers who worked for five years. I am not going to argue about the morality of the way we compensate our lawyers, we compensate our baseball players, or we compensate our movie stars. This

and related payments. Two arbitrators will decide on the allocation of this fund, and must unanimously decide on a figure within that range. One arbitrator will be selected by the plaintiffs, and will be Ken Fineberg. The second arbitrator will be selected by the German side, with the approval of the plaintiffs' attorneys. By July 24, 2000, the German side will present the plaintiffs with a nominee, and the second arbitrator will be determined by August 23, 2000. This fund will be limited to the lawyers in the United States legal actions, including Michael Witti. Payments to lawyers will be made when the Foundation begins making payments to victims, either directly or through partner organizations.

We confirm to you here that we will jointly present this resolution to the Foundation Board with the support of the U.S. Government, German Government, and German companies, so that the Foundation Board may officially implement it in accordance with the Foundation legislation.

Letter from Stuart E. Eizenstat, Otto Graf Lambsdorff, and Manfred Gertz to the Plaintiffs' Attorneys (Slave Labor cases) (submitted by and on file with Eli Rosenbaum). In the same correspondence, Mr. Rosenbaum also noted that

[A]s of the July 17, 2000 signing date, the minimum payment to attorneys under the assurance of that date was set at DM 100 million, the equivalent of nearly U.S.$50 million, specifically U.S.$47.8 million. . . . [T]he upper limit set by the accord was approximately U.S.$63.9 million (i.e., the dollar equivalent of DM 125 million), not U.S.$75 million as [I] estimated in [my] remarks.

Email from Eli Rosenbaum, Jan. 18, 2002 (on file with Fordham Int'l L.J.).

2. Professor Neuborne responded to Mr. Rosenbaum with the following comment:

If it would help clear up any misunderstanding, the actual distribution to lawyers and 278 named plaintiffs was 124 million DM. The sum was used to make modest payments to each of the 278 named plaintiffs for their courage in agreeing to serve as named-plaintiffs, to reimburse 51 law firms for the enormous out-of-pocket costs (like printing, telephone and travel) associated with five years of litigation, and to provide a fee based on the arbitrators' judgment about the relative quality of each lawyer's work. No other fees have been paid to lawyers.

Email from Burt Neuborne, January 18, 2002 (on file with Fordham Int'l L.J.).
culture needs to talk a lot about the way we allocate our reimbursement formulas.

Within the culture, within the way we do it, this was a relatively modest compensation. That is all I can say.

PROFESSOR PEARCE: I want to go back to the non-monetary remedies. Mr. Rosenbaum, are there remedies that you would have liked to have seen, and are there ways in which you think that either the class action or diplomatic efforts shaped consideration of which remedies were appropriate?

MR. ROSENBAUM: I think, in general, everyone of good will would like to see the countries of Europe in which these crimes took place do more in the way of Holocaust education, more in the way of funding scholarship.

Interestingly, Germany has, long before the advent of this process of litigation, done more of that than any other government of Europe, I am sure. Much of the best research on the Holocaust comes out of the Institute for Contemporary History in Munich. What I would have liked to see, and would still like to see, is that example emulated by other governments of Europe.

PROFESSOR PEARCE: Professor Bazyler?

PROFESSOR BAZYLER: One of the things that did occur as a result of this movement and the litigation was the setting up of these various historical commissions. I mean, the Berger Commission in Switzerland, the Mattéoli Commission in France—none of that, I do not think, would have occurred without the litigation starting here and the pressure being felt. So I think that a lot of the historical facts have come out. And yes, there are some more that need to come out.

Some companies have hired independent private historians to come in and to review their records, and those have issued reports, and those reviews by the historians are independent in the sense that they do not take cues from the company and they bring out the information which they find. So I think that is a positive. Should more companies have done that? Absolutely.

One of the sets of companies that I think that has not come forward as much is the American companies. We point the finger at other countries, we point the finger at foreign companies, but U.S. companies have not been able to do so. General Motors was accused in a series of articles that resurrected some of
the facts of its involvement of its German subsidiary during World War II, and they first denied wanting to do that, then they hired Professor Henry Turner of Yale to do a report. I think more companies should do that.

You might have seen last year the book on IBM and the Holocaust, and that IBM was unwilling to go ahead and to have an independent historical review of its records. So if we are going to point the finger at other countries, we should also do it to ourselves.

PROFESSOR PEARCE: I want to go back to this issue of giving people an opportunity to tell their stories. In my days in practice before academia, I would often have clients who would say, “You know, what I really want is to go before the judge and have my story heard.” I might say, “That is not going to be the most effective way to proceed. I can just talk to the lawyer and talk to the judge and I think that is going to be the easiest way to go.” Sometimes they would say, “No, that’s the reason I’m here in court. I want to tell my story to the judge.”

So let me raise the question of what the panelists think of the notion that going to a trial might have provided a type of remedy itself and whether that would have been a useful remedy under these circumstances.

Professor Bazyler, I see you shaking your head.

PROFESSOR BAZYLER: These cases would never have gone to trial. I was naive enough to believe that, and then I remember speaking to one of the lawyers involved, and she reminded me of a very important fact, that—and the French Bank cases showed that—as soon as you are able to beat the motion to dismiss, defendants will end up settling with you. That is what happened in these cases. There is no way that these companies wanted Holocaust survivors paraded on the witness stand telling their stories.

And I think the survivors’ stories have been told. Mr. Liebmann referred to the Shoa Visual History Foundation that the Speilbergs put forth in my hometown of Los Angeles. They have gone all over the world and taken video narratives. Now they are in the second phase, where they are actually going to be—if you pick a particular word, you will be able to go and through that technology find all the survivors who have mentioned that particular word or that particular place.
The survivors' stories are being told. I do not think that was part of what this was about.

PROFESSOR PEARCE: Mr. Liebmann, you have taken one crack at this. Do you have anything you would like to add in response to this?

MR. LIEBMANN: No.

PROFESSOR PEARCE: Mr. Rosenbaum and then Professor Neuborne.

MR. ROSENBAUM: As someone who has presented survivor testimony in courts of law in our prosecutions now for fifteen years, I am partial to that. I believe in the importance of presenting those remembrances in a court of law, subject to cross-examination, which is the ultimate test of its reliability.

The great privilege of my professional career has been to be associated with so many survivors who have been willing to reopen these wounds that have never really closed and to brave American courtrooms and withstand some pretty nasty tactics on the part of defense lawyers.

But I, too, agree that these cases would never have actually gone to trial and that, fortunately, survivor testimonies have been recorded by the Shoah Foundation, by Yale, by the Holocaust Museum, by the Wiesenthal Center, by others, and have been presented in courts of law both here and abroad.

PROFESSOR PEARCE: Professor Neuborne?

PROFESSOR NEUBORNE: I would dearly love to have tried these cases. I wanted very much to try them. There were three reasons why we ultimately did not.

One, a trial and an appeal would have taken at least six years. Our estimate was at least six years for the case to wind its way through the system, assuming we won every stage of every motion. At that point, our estimate was the entire survivor generation would have passed into eternity; virtually the entire survivor generation would have been gone. We felt that there was significant time pressure to do something while at least some of them were able to recognize what was being done.

Secondly, although I am proud of the legal theories, the legal theories were not ironclad legal theories. We were reaching to the very edge of a lot of jurisdictional arguments, a lot of arguments on the merits. It is not at all clear that if we had pushed the envelope to the end that we would have won. That is why
people settle. They settle because there is a mutual sense of anx-
xiety about how it will finally come out. We shared that mutual
sense of anxiety.

And finally, we did do at least—it is not the same as testi-
mony—but in the Swiss Banks case, we polled the survivors. We
sent out well over 1.5 million questionnaires to the surviving gen-
eration using every informational source we could to identify
where they could be reached. We received 580,000 answers,
580,000 questionnaires detailing experiences of the survivor gen-
eration.

When the case was over, we lodged those questionnaires
with an appropriate historical archive. I am pleased to tell you
that currently there is a nationwide project in which American
law students are reading every single questionnaire so that they
will be in some sense in touch with this generation in a personal
way. The questionnaires are being read and worked through to
make sure that no Swiss bank claim goes unexplored.

That is the best that we were able to do with actually letting
them speak.

PROFESSOR PEARCE: I am going to ask each of the panel-
ists if you have any thoughts that we have not been able to get to.
We have about a minute apiece. In case you do not have any-
thing in particular to add—I will ask you to speak about one of
the remedies that we did not address: the question of rebuilding
communities. Do you think that notion had any value or
whether it was unrealistic and/or inappropriate?

I am going to go in reverse order from how we started to
give Professor Neuborne a chance on this one. So let me start
with Mr. Rosenbaum.

MR. ROSENBAUM: I do not know that I am qualified to
address the concept of rebuilding communities, so let me con-
serve some time for others by just thanking Fordham for spon-
soring this wonderful conference. I want especially to thank
Thane Rosenbaum, who I am sure will want me to acknowledge
that we are not related in any way, for inviting me.

PROFESSOR PEARCE: Professor Bazyler?

PROFESSOR BAZYLER: I lived in post-war Lodz—you do
not want to rebuild the Jewish community in post-war Lodz.
That is not where the money should go. If even one dollar is
being used to build a monument or to do something, that dollar
should go to a needy survivor. The money should go to a needy survivor.

PROFESSOR PEARCE: Mr. Liebmann?

MR. LIEBMANN: I think I would agree with Professor Bazyler that money should first go to the survivors before it goes anywhere else.

PROFESSOR PEARCE: Professor Neuborne?

PROFESSOR NEUBORNE: (Smiling) I can read this crowd. I have not survived this long by taking unpopular positions.

In fact, the theory of the distribution in both the Swiss and the German cases is exactly that. The theory of the distribution in the Swiss case is that we are exhausting every possibility and, I assure you, spending a significant amount of resources—it makes me nervous sometimes at how expensive it is to attempt to find survivors to give them a chance to put claims in. So we share the notion that as much as possible of the Swiss settlement fund should be distributed to survivors in an effort to provide actual compensation for actual harms to actual people.

To the extent that proves impossible—and I am hoping that it does not; I am hoping that we spend every single penny in that aspect of the process. But if at the end of a very, very intense effort to return the money to individuals, that turns out not to be possible, what we plan to do is have a secondary distribution procedure at which people will suggest proposals for the use of whatever funds are left over.

I do not think rebuilding Jewish communities is going to have a particularly high priority, but there will be important possible ways of benefiting the survivor community and the various victim communities. The judge, aided by Judah Gribetz, will ultimately make that decision, but I am hopeful that is going to be a very small chunk of the money.

In the German fund, as you may know, DM 700 million have been set aside as a future fund to try to both benefit in some small sense the heirs of survivors, but also in a larger sense to try to fund programs of toleration throughout Europe, to try to prevent anything like this from ever happening again. So a little over eighty percent of the German fund is being distributed directly to survivors, as it should be.