# FROM *KIOBEL* BACK TO STRUCTURAL REFORM: THE HIDDEN LEGACY OF HOLOCAUST RESTITUTION LITIGATION

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ABSTRACT

*This Article offers a new approach to the issue of transnational corporate liability for human rights violations and more generally an inquiry into the place of domestic legal experiences in theorizing about transnational law. Grounded in a study of the Holocaust restitution litigation of the 1990s, the authors explain corporate liability as a type of bureaucratic liability and explore in depth the relationship between the Holocaust litigation and the theory of structural reform litigation developed in the U.S. to address the bureaucratic structure of rights violations. They read the restitution litigation in light of pluralist reformulations of structural reform, in which norms are not enunciated in a hierarchical manner by the judge but are produced contextually through dialogue between court and parties. The authors use this analysis to challenge contemporary theoretical treatments of transnational corporate responsibility for human rights violations and suggest more promising directions for theorization.*



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## INTRODUCTION

Does transnational law require developing a new legal theory? Many scholars have pointed to the mismatch between our political institutions, which remain primarily state-based, and the new transnational legal order (or chaos).[1] Peer Zumbansen, among others, has noted that "legal fragmentation" in transnational law raises serious questions about how to promote democratic participation in "global governance institutions" while protecting core human rights values.[2] However, Zumbansen does not subscribe to the widely held view that globalization creates a crisis for law, since law in domestic contexts has for decades faced similar challenges to its democratic legitimacy. Instead of thinking in terms of a new transnational legal theory, he suggests viewing "the alleged crisis of law and legal regulation, whether depicted as a loss of state sovereignty or as a problem of lacking (democratic, political) accountability and legitimacy in the global context, . . . as a particular amplification of a problem

1. For a review of this scholarship, see generally Peer Zumbansen, *Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 305 (2012).

2. *Id*. at 305-06.

with law that has long been coming."[3] Awareness of continuity in the deconstruction of the state-centered, hierarchical model of law can help us relativize the novelty presented by transnational law and suggests that we find inspiration in scholarship developed in the domestic context.

This article adopts this continuity-based approach with respect to the question of corporate liability for human rights violations. It does so by analyzing what we see as a paradigmatic case of transnational corporate liability: the lawsuits brought in the 1990s in U.S. courts against Swiss banks on behalf of Holocaust survivors for the restitution of monies held in bank accounts since World War II, as well as the claims for compensation for slave and forced labor brought against German and other private corporations ("Transnational Holocaust Litigation" or "THL").[4] We propose to read the debates surrounding THL in light of the earlier debates surrounding the structural reform lawsuit for civil rights violations. That debate was ignited by the U.S. Supreme Court's decision in *Brown v. Board of Education* and focused on the then-new political role taken on by U.S. federal courts and the reliance on the class action as a vehicle for social reform. The theory of structural reform was elaborated subsequently by professor Owen Fiss in 1979, when this type of litigation was under attack by the Burger Court. Today, civil litigation as a vehicle for promoting human rights in the transnational context faces a similar crisis following *Kiobel v. Royal Dutch Petroleum Co.*, in which the Supreme Court held that the Alien Tort Statute ("ATS") should generally be presumed not to apply to violations of international law that occur outside U.S. territory.[5]

By connecting THL to the earlier jurisprudential debates regarding structural reform, we aim to steer the discussion of corporate liability away from formalist considerations and develop a more robust theory of transnational corporate liability for human rights violations, situating that issue in the ongoing debate about the role of courts in sociolegal reform. Specifically, we argue for a pluralist, contextualized theory of transnational corporate liability for human rights violations that is neither dependent on the ATS nor on finding a clear precedent for corporate liability in international law.[6] However, in order to

3. *Id.* at 322 (citation omitted).

4. *See generally* Leora Bilsky, *Transnational Holocaust Litigation*, 23 EUR. J. INT'L L. 349 (2012) (analyzing THL in light of jurisprudential models).

5. 133 S. Ct. 1659 (2013). *Kiobel* was decided against the backdrop of increasing judicial hostility towards class actions. For a discussion of "how federal courts in recent years have cut back on the availability of class action lawsuits," see Robert H. Klonoff, Essay, *Reflections on the Future of Class Actions*, 44 LOY. U. CHI. L.J. 533, 533 (2012). *See also id.* at n.1 (providing citation to author's full-length article detailing how "courts have tightened the requirements for almost every element of class certification").

6. Because ATS claims must be grounded in norms of international law, one important strand of the debate surrounding *Kiobel* was whether the Nuremberg industrialist trials pro-

adapt structural reform to the context of transnational corporate liability, a critical reevaluation of some of the theory's fundamental premises, mainly its rejection of the damages remedy, is required. Thus, our article will attempt a double move: first, it will describe the continuity between structural reform and THL and second, it will offer a critical reevaluation of the main elements of the structural reform model.

While the briefing in *Kiobel* explored the relevance of the Nuremberg trials as possible historic precedent for imposing corporate liability for participation in human rights violations, it does not seem to have considered the possibility of THL as relevant precedent. Perhaps this was due to the prevalent perception that THL presented an unusual political case[7] concerned with historic wrongs.[8] Perhaps it was also because the restitution litigation was resolved through settlement, without an authoritative judicial decision that provided clear legal precedent.[9] Nonetheless, while acknowledging the special political and histori-

vided a precedent for corporate liability under international law. By "Nuremberg industrialist trials," we are referring to the trials of individual German industrialists and bankers that followed the trial of the highest-ranking Nazis by the International Military Tribunal at Nuremberg. *See generally* Doreen Lustig, *The Nature of the Nazi State and the Question of International Criminal Responsibility of Corporate Officials at Nuremberg: Revisiting Franz Neumann's Concept of Behemoth at the Industrialist Trials,* 43 N.Y.U. J. INT'L L. & POL. 965 (2011). These trials appear to be the closest attempt in international law to hold corporations—or at least corporate officers—liable for violations of international law. Thus, amici briefs filed by historians and legal scholars in *Kiobel* debated whether Nuremberg provides a precedent for corporate liability. *See* Brief Amici Curiae of Nuremberg Historians and International Lawyers in Support of Neither Party, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (No. 10-1491), 2011 U.S. S. Ct. Briefs LEXIS 2815; Brief Amici Curiae Nuremberg Scholars Omer Bartov et al. in Support of Petitioners, Kiobel v. Royal Dutch Petroleum Co., 133 S. Ct. 1659 (2013) (Nos. 10-1491; 11-88), 2011 U.S. S. Ct. Briefs LEXIS 2814.

7. *See, e.g.*, Michael Thad Allen, *The Limits of Lex Americana: The Holocaust Restitution Litigation as a Cul-de-Sac of International Human Rights Law*, 17 WIDENER L. REV. 1 (2011) (arguing that the large settlement was reached primarily for political and not legal reasons).

8. *See, e.g.*, Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 773 n.4; *see also id.* at 810 n.192 ("World War II cases arise out of wartime acts committed over sixty years ago; moreover, the U.S. government entered into peace agreements that are often interpreted as governing claims for compensation.").

9. Morris Ratner & Caryn Becker, *The Legacy of Holocaust Class Action Suits: Have They Broken Ground for Other Cases of Historical Wrongs?*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 345 (Michael J. Bazyler & Roger P. Alford eds., 2006); *see also* Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152, 1154 (2004) (reviewing MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003) and STUART E. EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003)) (arguing that the Holocaust restitution lawsuits' potential to serve as a model of reparation for collective injustice is very limited).

cal context within which THL took place, we point out that the litigation succeeded in making Swiss and German corporations pay prodigious sums after decades of their refusing to acknowledge responsibility. We further argue that the obstacles faced by survivors of the Holocaust in their quest for restitution and compensation from Swiss and German corporations—lack of evidence, state protection of business, structural inability to threaten large organizations—were not unique to World War II-era victims and characterize the contemporary struggles of many victims of human rights violations against multinational corporations. Thus, THL shared many features with ATS litigation: the reliance on the universal jurisdiction of U.S. courts in tort litigation,[10] the leading role of private lawyers as opposed to public officials, and the attempt to end the de facto immunity enjoyed by private corporate actors under international law.[11]

We believe, however, that THL's potential to contribute to a jurisprudence of corporate liability lies in another feature of that litigation: its reliance on the class action.[12] Once we understand the central part played by the class action mechanism in the success of these lawsuits, as well as its central role in the critique voiced against THL, it becomes apparent that the jurisprudential debate that began in the 1960s about the role of courts in social reform is the relevant "precedent." Indeed, we argue that the comparison between THL and structural reform illuminates the contemporary debate about transnational corporate liability.

Our theoretical argument is grounded in the concrete case of THL, which helps us see the parallels between domestic structural reform and transnational corporate liability. As in domestic structural reform, THL addressed an important public issue through civil litigation—namely, the responsibility of business for participation in state-sponsored atrocity—in light of the failure of al-

10. THL claims were crafted in various forms in order to assert the jurisdiction of U.S. courts over the claims. *See infra* notes 34-39 and accompanying text.

11. Bilsky, *supra* note 4, at 352, 363-65.

12. On the emergence of hybrid human rights mass tort litigation that merges international law with American class action procedure, see Kathryn L. Boyd, *Collective Rights Adjudication in US Courts: Enforcing Human Rights at the Corporate Level,* 1999 BYU L. REV. 1139, 1141 (1999) (discussing "new wave" of class action litigation involving public international norms); Margaret G. Perl, Note, *Not Just Another Mass Tort: Using Class Actions to Redress International Human Rights Violations*, 88 GEO. L.J. 773, 774 (2000) (arguing that "[r]esisting the application of a stringent mass tort model in the international human rights context is consistent with the policy goals and purpose of Rule 23"); Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 280 (2003) (suggesting that "the class action device – notwithstanding its potential for abuse and the challenges to its application – may provide an appropriate litigation device for human rights litigants in certain circumstances"). *Kiobel* itself was filed as a putative class action. Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111, 124 (2d Cir. 2010).

ternate deliberative public spaces to do so. Indeed, until THL, business corporations and their managers were rarely held liable for their involvement in the Holocaust.[13] For decades, the national governments of Germany and Switzerland had submitted to pressure from business in their respective countries that sought protection from legal liability[14] and the group of victims was so geographically dispersed that it lacked the political power to change the law.[15] In the absence of international institutions to correct these failures of domestic democracies, the civil lawsuit in the United States provided a unique deliberative public space for groups of victims to call corporations to account for their actions.[16]

Moreover, just as structural reform arose from human rights violations perpetrated by state bureaucratic organizations, the human rights violations that gave rise to THL (and, in recent years, to claims in ATS litigation) were also committed by large bureaucratic organizations—business corporations. In order to address the structural problem posed by the bureaucratic nature of the wrongdoing, the courts in both structural reform cases and THL enabled collective modes of litigation, abandoning the classic role of the judge as umpire in favor of an involved and managerial judicial role. Having done so, the courts faced serious problems of legitimacy in both the structural reform and THL context due to the apparent political role they had taken upon themselves.

In light of these parallels between structural reform and THL, we invite our readers to return with us to the earlier manifestation of the class action as a vehicle to tackle systematic civil rights violations, known as the structural reform

13. Even when these defendants were criminally prosecuted, courts were reluctant to convict in the absence of unquestionable criminal intent. For example, in the postwar trials in Germany of the members of the board of I. G. Farben, most defendants were acquitted of charges relating to the use of slave labor due to lack of clear evidence of knowledge and direct engagement of the defendants. For further discussion, see Alberto L. Zuppi, *Slave Labor in Nuremberg's I.G. Farben Case: The Lonely Voice of Paul M. Hebert*, 66 LA. L. REV. 495 (2006); BENJAMIN B. FERENCZ, LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION 34-67 (1979). Similarly, the Nuremberg military trial of the head of the Dresdner Bank shows the difficulty criminal law has addressing secondary participation in atrocity for "profit" reasons. KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 288 (2011).

14. *See infra* Part I.

15. In Germany, for example, courts regularly dismissed individual lawsuits by former slave and forced laborers by holding that existing compensation legislation precluded such lawsuits, even where plaintiffs failed to meet the eligibility criteria of the compensation laws. Libby Adler & Peer Zumbansen, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. ON LEGIS. 1, 33-34 (2002); *see infra* Part I.

16. For elaboration on THL as a democratic forum, see generally Leora Bilsky and Natalie R. Davidson, *A Process-Oriented Approach to Corporate Liability for Human Rights Violations*, 4 TRANSNAT'L LEGAL THEORY 1 (2013).

lawsuit. This is not to imply that the contemporary debate about transnational corporate liability is a simple repetition of the earlier discussion. Unlike its American predecessor, THL operated outside the boundaries of the nation-state. In addition, while domestic structural reform litigation focused on state institutions, THL solely targeted private corporations. Whereas previous structural reform sought a legal judgment declaring rights and aimed, as its name suggests, at reforming the institution, THL was structured as a settlement class action. Finally, notwithstanding the challenge to the courts' legitimacy in the domestic context, U.S. courts could rely on the Constitution, while THL was based mainly in private law and could not refer to a clear international law norm. Taking on the differences between structural reform and THL one by one, however, we show that the previous debate about structural reform is a fruitful source for theorization about transnational corporate responsibility.

Part I describes THL and its underpinning legal theories. Part II points to the parallels between THL and structural reform, as well as to the differences with the model of structural reform as traditionally understood, notably the monetary settlement. In order to address these differences, we present the theoretical criticism of structural reform elaborated by Susan Sturm and others and suggest viewing their intervention as a pluralist reformulation of structural reform.[17] In this pluralist reformulation, norms are not enunciated in a hierarchical manner by the judge, but are instead produced contextually through dialogue between the court and the parties. We claim that this reformulation can point to a strong continuity between the dilemmas facing the managerial judge in the domestic context and those confronting the judge in THL. This continuity sheds a different light on the procedures adopted in THL, and, in particular, the preference in THL for a settlement rather than a judicial decree. Indeed, we argue that THL's success resulted from departures from the classic structural reform case that went beyond even Sturm's pluralist reformulation and suggest further revisions to the theory of structural reform litigation in order to adapt it to the transnational context.

In Part III, we build on the continuity in the debates surrounding structural reform and THL in order to describe the insufficiencies of current theorizing about transnational corporate liability. THL should be understood in the broader context of the development since the 1980s of transnational public law litigation. The theory of transnational public law litigation ("TPL"), however, does not address the collective nature of the procedure, which involves organizational liability and class actions. TPL also operates, like the original formulation of

17. By "pluralist" we refer to an approach to law that rejects the boundaries between public and private, relativizes the power of state law, and points to the normative effect of non-binding "soft law" rules. S*ee generally* Zumbansen, *supra* note 1.

structural reform, in a universe of clear norms: the morally laden norms of international human rights law. Through the case of THL, we argue that it is time for a pluralist reformulation of the theory of TPL against corporations that would echo the reformulation of the structural reform model.

## I. THL AND THE HOLOCAUST RESTITUTION CAMPAIGN[18]

### *A. The Swiss Banks Litigation*

There were substantial obstacles to restitution of monies held by Swiss banks and deposited by European Jews before and during the war. After the war, banking secrecy was used against the survivors and their descendants to justify withholding information about accounts. Swiss banks coordinated their legal response in order to deflect inquiries about "dormant accounts" against the growing pressures of descendants of Holocaust victims, now dispersed around the world.[19] The banks also urged the Swiss government to refrain from enacting laws that would have forced them to reveal the accounts.[20] Additional aspects of Swiss law, such as the absence of an escheat law requiring unclaimed accounts to be transferred to the state, combined with regulations that authorized the destruction of account records after 10 years, provided economic incentives for Swiss banks to hide the existence of accounts.

Accounts of the Holocaust restitution campaign against the Swiss banks generally agree on the chronology of events culminating in the $1.25 billion USD settlement, but differ on whether it was international politics or lawsuits that produced the settlement.[21] The two were related, of course, with the plaintiffs' lawyers taking advantage of the opportunities created by the political in-

18. We do not discuss other restitution campaigns from this era. For a discussion of the restitution claims arising out of France, Austria and against various insurance companies based upon their misconduct during the Nazi era, see generally MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS (2003); STUART EIZENSTAT, IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II (2003); JOHN AUTHERS & RICHARD WOLFFE, THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST (2002).

19. INDEP. INT'L COMM'N OF EXPERTS SWITZ.—SECOND WORLD WAR, SWITZERLAND, NATIONAL SOCIALISM AND THE SECOND WORLD WAR: FINAL REPORT 446 (2002) [hereinafter BERGIER REPORT].

20. BAZYLER, *supra* note 18, at 47.

21. For the view that politics, not law, played a decisive role in this litigation, see Allen, *supra* note 7. Regula Ludi offers another explanation, according to which law follows broader social trends: she sees THL as an expression of the emergence of neo-liberal discourses regarding property in Europe following the end of the Cold War. Regula Ludi, Historic Inst., Univ. of Bern, The Triumph of Neo-liberalism and Second Wave Holocaust Era Restitution in the 1990s, presentation at the Tel Aviv University Faculty of Law conference: Corporate Liability for Human Rights Violations (Dec. 17, 2012) (on file with authors).

quiries into the conduct of the Swiss banks, while the diplomats simultaneously invoked the uncertainties attendant to the pending legal claims to encourage settlement.[22] Edgar Bronfman, president of the World Jewish Congress, felt that the issue was not taken seriously at a meeting with the Swiss Bankers Association in Switzerland in October 1995[23] or in subsequent dealings intended to address the dormant bank accounts of Holocaust victims. He therefore enlisted prominent United States politicians, including Republican Senator Alfonse D'Amato and First Lady Hillary Rodham Clinton, in his efforts to assist survivors and relatives seeking access to the accounts.[24] Political and economic pressures built on the banks to respond to the victims' claims.[25] Against this political background, four class action lawsuits filed against the Swiss banks in October 1996[26] and were consolidated before Judge Korman of the United States District Court for the Eastern District of New York.[27] Although the core of the plaintiffs' case involved dormant accounts, the plaintiffs also asserted claims based upon the defendants' misconduct with respect to looted assets,

22. *See also* Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 796-97 (2002) (describing class-action litigation, diplomacy, and "community insistence on dealing with long-delayed issues arising from the Holocaust" as "crucial to the success of the enterprise").

23. AUTHERS & WOLFFE, *supra* note 18, at 5-10. According to Michael Thad Allen, *supra* note 7, "[n]o one played a larger role in piercing [the Swiss banks'] bureaucratic recalcitrance than Edgar Bronfman, heir to the Seagram fortune and President of the World Jewish Congress (WJC) since the 1970s." Allen, *supra* note 7, at 39.

24. AUTHERS & WOLFFE, *supra* note 18, at 14-24 (Senator D'Amato), 16 (Hillary Clinton); *see also* EIZENSTAT, *supra* note 18, at 63-69 (discussing Senate Banking Committee hearings), at 66 (Hillary Clinton).

25. The banks were excoriated at hearings convened by Senator D'Amato in April 1996. As the issue of Switzerland's conduct during World War II continued to percolate, the claims against the banks expanded from dormant bank accounts to looted assets. Union Bank of Switzerland (UBS) and Swiss Bank Corporation (SBC), two of Switzerland's largest banks that did business in the United States, sought to merge. This required the approval of the New York State Banking Department, which held up the merger while investigating the matter of the dormant accounts. New York City's Comptroller, the financial officer responsible for borrowing money on the City's behalf, enlisted in the efforts to pressure the Swiss Banks. Negotiations occurred between the Swiss banks and various organizations, including the WJC. *See* AUTHERS & WOLFFE, *supra* note 18, at 74-106. Stuart Eizenstat, a prominent executive branch official, attempted vigorously to broker a settlement. At the time, Eizenstat was the United States Ambassador to the European Union. He then became Special Representative of the President and the Secretary of State on Holocaust Issues. *See Stuart Eizenstat*, COVINGTON & BURLING, LLP, http://www.cov.com/seizenstat/ (last visited Nov. 19, 2013) (providing professional biography); *see also* EIZENSTAT, *supra* note 18 (recounting his diplomatic efforts in connection with Holocaust restitution campaign).

26. *See, e.g.*, BAZYLER, *supra* note 18, at 11; *see also* Dubinsky, *supra* note 9, at 1156-57.

27. *See In re* Holocaust Victim Assets Litig., 105 F. Supp. 2d 139, 141 (E.D.N.Y. 2000).

slave labor, and denial of entry to refugees seeking entry to Switzerland.[28] The plaintiffs did not sue the Swiss government—only private defendants.

The claims had two principal categories of grounds. Where the named plaintiff was an alien, the plaintiffs asserted claims grounded in customary international law under the ATS, alleging that the Swiss banks had aided and abetted genocide and crimes against humanity by providing ordinary banking services to the Nazis.[29] However, in the absence of clear precedents for the imposition of customary international law on private corporations, the plaintiffs' lawyers felt it was important to ground the claims in other areas of law as well.[30] Thus, the plaintiffs asserted familiar civil law tort and contract claims: specifically, for breach of fiduciary and other duties, breach of contract, conversion, unjust enrichment, negligence, violating Swiss banking law and the Swiss commercial code of obligations, fraud, and conspiracy. The plaintiffs also claimed that the Swiss banks "concealed relevant facts from [the plaintiffs] in an effort to frustrate [their] ability to pursue their claims."[31] The primary relief sought by the plaintiffs was monetary damages—through disgorgement and awards of compensatory and punitive damages.[32] The plaintiffs primarily asserted claims arising under state law but the federal court in Brooklyn nevertheless had subject matter jurisdiction over the lawsuits on the basis of diversity jurisdiction. (Under the Constitution and federal law, federal courts are authorized to hear cases where the parties have different citizenship.[33]) Claims under the ATS arose under federal law and provided an independent basis for federal subject matter jurisdiction[34]

28. *Id*. at 143-44.

29. *Memorandum of Law Submitted by Plaintiffs in Response to Expert Submissions Filed by Legal Academic Retained by Defendants*, SWISS BANKS SETTLEMENT: IN RE HOLOCAUST VICTIM ASSETS LITIGATION (February 6, 2013), http://swissbankclaims.com/Documents/6-16-97.pdf.

30. "No one had yet imposed customary international law on a corporation . . . And, I was worried about the extraterritorial reach of the [ATS]. So, I concentrated on developing an additional claim that didn't rest on emerging ideas of international law." Burt Neuborne, Transnational Holocaust-Related Litigation in United States Courts: The Swiss Bank and German Slave Labor Cases (April 10, 2013) (unpublished manuscript at 41) (on file with authors).

31. *In Re Holocaust*, 105 F. Supp. 2d at 141.

32. The plaintiffs also sought an accounting and declaratory relief. *Id*.

33. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a)(3) (2011) (authorizing a federal court to hear a lawsuit in which the amount in controversy is in excess of $75,000 and is between "citizens of different States and in which citizens or subjects of a foreign state are additional parties").

34. There was federal subject matter jurisdiction for these claims because the ATS is a federal statute (28 U.S.C. § 1350 (2011)), and because the alien named-plaintiffs asserted that their claims arose under the ATS. *See* Neuborne, *supra* note 30, at 42; *see also id*. at 42-46 (discussing viability of ATS claim in Swiss bank litigation).

The defendants filed several motions to dismiss, and the court "heard lengthy argument" on those motions.[35] However, Judge Korman never ruled on the defendants' motions, keeping the pressure on both parties to engage in settlement discussions—initially with Undersecretary of State Stuart Eizenstat,[36] and then conclusively before the court.[37] On May 30, 1999, a settlement for 1.25 billion USD was preliminarily approved.[38] Subsequently, the court gave its final approval to the $1.25 billion USD settlement.[39] All of the funds for the settlement came from private corporations; the Swiss government did not contribute to the fund.

Because the plaintiffs' cases were brought as class actions under Rule 23, Judge Korman was substantially involved in the litigation even though he never ruled on the defendants' motions to dismiss. He preliminarily approved the settlement and certified five settlement classes under Rules 23(a) and 23(b), reviewed and directed the plan for providing notice to class members,[40] conducted two fairness hearings, including a fairness hearing in Israel via "electronic hookup," appointed a special master, and oversaw the claims tribunal that was established to distribute the settlement of bank-related claims.[41] In the words of Professor Judith Resnik, he was the quintessential "managerial judge."[42]

35. The dispositive motions sought dismissal for failure to state a claim under Swiss law and international law, failure to join indispensable parties, lack of personal and subject matter jurisdiction, and lack of standing. *In re Holocaust,* 105 F. Supp. 2d at 142. The defendants also moved, in the alternative, to stay the lawsuit. *Id*.

36. *See In re Holocaust*, 105 F. Supp. 2d at 141.

37. *See, e.g.*, AUTHERS & WOLFFE, *supra* note 18, at 50 ("By refusing to rule either way, [Judge Korman] kept the pressure on both sides to settle amicably and out of court.").

38. *In re Holocaust,* 105 F. Supp. 2d at 142-43.

39. *Id*. at 167.

40. "Notice of the proposed settlement of the lawsuit [was] provided worldwide in twenty-seven different languages." Symposium, *Holocaust Restitution: Reconciling Moral Imperatives With Legal Initiatives and Diplomacy*, 25 FORDHAM INT'L L.J. (SYMPOSIUM ISSUE) S-287, S-293 app. (2001). Ultimately approximately 580,000 Initial Questionnaires were submitted from around the world. *Id*. One of the attorneys involved in the litigation has described Judge Korman efforts to provide notice as "a uniquely ambitious and creative plan of notification" that was required to—and did—implement worldwide notice in order to satisfy the requirements of due process codified in Rule 23. *See* Elizabeth Cabraser, *Human Rights Violations as Mass Torts*, 57 VAND. L. REV. 2211, 2229 (2004).

41. *In re Holocaust*, 105 F. Supp. 2d at 143-46, 150-54; *see also Holocaust Restitution: Reconciling Moral Imperatives With Legal Initiatives and Diplomacy*, *supra* note 40, at 287.

42. *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376-77 (1982); *see also* Arthur Oder, Note, *What's Fair is Fair?: A Comparative Look at Judicial Discretion in Fairness Review of Holocaust Era Class Action Settlement in the United States and Canada*, 17 CARDOZO J. INT'L & COMP. L. 545, 555 (2009) (describing Swiss banks settlement, and observing that "Judge Korman closely monitored all aspects" of the settlement, "including the negotiations"); Morris Ratner, *The Settlement of Nazi-Era Litigation Through the Execu-*

In concluding that the settlement was substantively fair, the court evaluated the settlement award against the practical alternative to settlement—"prolonged, difficult, and complex litigation"—and noted that two other federal courts had dismissed claims asserted by victims of Holocaust crimes.[43] Given the uncertainty of the plaintiffs ultimately prevailing, Judge Korman endorsed the certainty attendant to the $1.25 billion USD settlement. The court specifically noted that "strong moral claims are not easily converted into successful legal causes of actions."[44] At the same time, Judge Korman recognized the value of closure for the Swiss defendants.[45] It should also be noted that after the settlement, the court was involved in overseeing administration of the settlement fund, which required it to issue numerous decisions.[46]

Although the practice of settlement generally indicates the private resolution of a dispute between the parties, the settlement of the Swiss banks claims involved a public process. This was due not only to the procedural requirements of Rule 23, which required notice and hearings as described above, but also to Judge Korman's engaged supervision. Moreover, this public process had significant public value. As one of plaintiffs' attorneys has written:

The litigation also bore witness and paid tribute to the sufferings of the victims, attesting that they were not forgotten. The settlement approval process itself enabled class members to tell their stories in court, in formally reported proceedings, with permanent transcripts. Their personal stories became matters of permanent public record, accorded the dignity and weight of court testimony. This, in itself, was of tremendous value to many Holocaust survivors and their family members. It was not the primary purpose of the litigation, but it

*tive and Judicial Branches*, 20 BERKELEY J. INT'L L. 212, 214, 230-32 (2002) (arguing that resolution of Swiss banks claims through settlement of class action cases was more fair and provided more protection to victims than resolution of slave and forced labor claims through German agreement discussed *infra*).

43. The court also was required to evaluate the substantive fairness of the settlement pursuant to the factors set out in City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). *See In re Holocaust*, 105 F. Supp. 2d at 146-49; *see also id*. at 147-48 ("Former United States Senator Alfonse D'Amato, who participated in the settlement negotiations as an advocate for Holocaust victims, also has concluded that the settlement is eminently fair and brings closure to the questions raised about the role of Switzerland during World War II."); *id*. at 148 (noting similar views of New York City Comptroller Alan Hevesi).

44. *In re Holocaust*, 105 F. Supp. 2d at 149.

45. *Id*. at 147-49.

46. *See* SWISS BANKS SETTLEMENT: IN RE HOLOCAUST VICTIMS ASSETS LITIGATION (Feb. 6, 2013), http://www.swissbankclaims.com/Overview.aspx; *see also Holocaust Restitution: Reconciling Moral Imperatives With Legal Initiatives and Diplomacy*, *supra* note 40, at 287; Katrina Miriam Wyman, *Is there a Moral Justification for Redressing Historical Injustices?*, 61 VAND. L. REV. 127, 175-76 (2008) ("Unlike many other class action settlements, the plaintiff and defendant attorneys did not attempt to negotiate the allocation of the settlement of the claims against the Swiss banks.") .

became a memorable and valuable benefit of the lawsuits.[47]

*B. German Forced and Slave Labor Claims*

The bulk of the $1.25 billion USD Swiss bank settlement was to compensate for misconduct with respect to dormant bank accounts.[48] Additionally, between $200 and $300 million USD in funds from that settlement were allocated for payments to slave laborers.[49] The rest of the funds to be paid out to forced and slave laborers—approximately $4 billion—came from a comprehensive settlement with German government and industry. As with the Swiss bank campaign, the labor settlement was the culmination of a prolonged political and legal campaign.[50] In the political campaign, many of the players—including the World Jewish Congress, Undersecretary Eizenstat, and Senator D'Amato—and tactics—publicity campaigns, congressional hearings, and the prospect of economic sanctions—were familiar.

And, as in the Swiss bank litigation, there were substantial legal and political obstacles to restitution. Due to pressure from German business, the 1953 London Debt Agreement had frozen individual claims for compensation against private German defendants until a peace treaty with Germany formally ending World War II was signed.[51] Furthermore, courts in Germany regularly dismissed individual lawsuits by former slave and forced laborers, holding that existing compensation legislation precluded such lawsuits even where the plaintiffs failed to meet the eligibility criteria of the compensation laws.[52] In the 1950s, Germany established a broad reparations program, including the restitu-

47. Cabraser, *supra* note 40, at 2232-33. In this sense, by enabling victims' stories to emerge, the litigation fulfilled important didactic functions of trials of atrocity. *See* LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 107-09 (2001).

48. Neuborne, *supra* note 22, at 801.

49. *Id*., at 800. Professor Neuborne explained the difference between slave laborers and forced laborers: "The terminology reflected a Nazi view that slave laborers, usually racially defined as subhuman, were wasting assets not even worth keeping alive; forced laborers, mostly non-Jewish Slavs, were treated as depreciable assets, valuable enough to keep alive, albeit under dreadful conditions." *Id*. at 799. For exact distribution statistics of the Swiss banks settlement as of March 31, 2013, see *Swiss Banks Settlement Funds Distribution Statistics as of March 31 2013*, UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, http://www.swissbankclaims.com/Documents/2013/Distribution%20Statistics%20as%20of%20March%2031%202013.pdf.

50. For an analysis of the very different ways the Swiss and German cases combined law and diplomacy, see Bilsky & Davidson, *supra* note 16, at 13-24.

51. Gerald D. Feldman, *Holocaust Assets and German Business History: Beginning or End?*, 25 GERMAN STUD. REV. 23, 25 (2002).

52. Adler & Zumbansen, *supra* note 15, at 33-34.

tion of looted property and grants of compensation to victims of Nazis. However, as Professor Neuborne has described, this scheme had significant gaps: First, the plan was unable to provide any relief for property in East Germany. Second, it ignored victims residing in communist Eastern Europe. Third, it made no provision for compensation to victims harmed by German companies, as opposed to the Nazi government. Until the fall of communism, nothing much could be done about property and victims in East Germany, Eastern Europe, and the former Soviet Union.[53]

In the U.S. courts, the initial labor lawsuit was filed in March 1998, while the Swiss bank case was still pending before Judge Korman. The plaintiff, Elsa Iwanowa, brought a class action against Ford Motor Co. and its German subsidiary, Ford Werke A.G., in the United States District Court for the District of New Jersey.[54] Iwanowa claimed that she had been abducted from Russia during World War II and taken to Germany, where she was sold to Ford Werke A.G. and required to work from 1942 through 1945. On her own behalf and on behalf of the class she represented, Iwanowa alleged that Ford Werke A.G.'s "use of unpaid, forced labor" enabled to the company to realize "substantial profit[s]"[55] and asserted claims for unjust enrichment and breach of contract as well as for violations of customary international law. Subsequently, more than fifty lawsuits were filed against German and Austrian companies for their use of slave and forced labor during World War II. Only two of the lawsuits, however, resulted in judicial decisions: *Iwanowa v. Ford Motor Co.* and *Burger-Fischer v. Degussa*, another lawsuit filed in federal court in New Jersey.[56] The

53. Neuborne, *supra* note 30, at 53. *See generally* Iris Nachum, *Reconstructing Life after the Holocaust: The Lastenausgleichsgesetz and the Jewish Struggle for Compensation*, 58 LEO BAECK INST. YEARBOOK 53 (2013), *available at* http://leobaeck.oxfordjournals.org/content/58/1/53.

54. *See* Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424 (D.N.J. 1999). According to Professor Neuborne, the plaintiff's lawsuit (and other lawsuits against German industry) asserting forced (and slave) labor claims was enabled by a "decision of the German Federal Constitutional Court in Krakauer v. Federal Republic of Germany (Federal Constitutional Court, BvL 33/93 (March 13, 1996)), abrogating the temporary immunity from suit for claims arising out of World War II." Neuborne, *Preliminary Reflections, supra* note 22, at 813; *see also* BAZYLER, *supra* note 18, at 63-66.

55. BAZYLER, *supra* note 18, at 63 (quoting the complaint in *Iwanowa*).

56. Burger-Fischer v. Degussa, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa*, 67 F. Supp. 2d at 424. Alice Burger-Fischer was a United States citizen who brought a class action against a German firm known as Degussa, which was alleged to have received and refined gold taken from murdered Jews and also to have manufactured Zyklon B, the poison used in the chambers at a number of concentration camps. *Burger-Fischer*, 65 F. Supp. 2d at 250. Fischer's lawsuit was consolidated with two other class action lawsuits against Siemens, an electrical manufacturing firm that had operated plants at a number of concentration camps, including Auschwitz. In *Burger-Fischer*, plaintiffs asserted claims sounding in tort—specifically, claims for civil assault, battery, conversion, unjust enrichment, conspiracy

German corporate defendants in those cases sought dismissal on a number of grounds, including justiciability and statute of limitations.

In September 1999, the district courts granted the motions to dismiss in *Iwanowa* and *Burger-Fischer*. In the latter case, the court emphasized justiciability, essentially concluding that plaintiffs' war-related claims could be asserted only by their government and that all war-related claims were extinguished by postwar peace treaties.[57] Furthermore, the court concluded that the questions presented by the lawsuit were to be resolved directly (and politically) by the nations involved and not by the judiciary.[58] In *Iwanowa*, the court also noted that the statute of limitations barred the plaintiffs' claims.[59] The plaintiffs in both cases appealed the district courts' adverse decisions, but the appeals were never litigated. Although the corporate defendants prevailed in the *Burger-Fischer* and *Iwanowa* cases, they nevertheless agreed to settle all of the slave labor suits shortly after the district courts issued their decisions in those cases.[60] Unlike the Swiss case, however, where the negotiations and settlement distribution remained under court supervision, the parties in the German case removed the settlement negotiation and distribution process out of court altogether.[61]

In order to negotiate, the giants of German industry organized a group of twelve corporations (which grew to seventeen) called the German Economy Foundation Initiative (GEFI). Undersecretary of State Eizenstat organized the negotiations in Washington D.C., which included eight interested countries (Germany, the U.S., Israel, Poland, Russia, the Ukraine, the Czech Republic, and Belarus), two NGOs, GEFI, and the main American lawyers in the class action.[62] The German corporations and German state insisted on a political solution in order to avoid U.S. class action procedure.[63] Furthermore, they de-

with the Nazi regime, and violations of human rights and customary international law. In their prayer for relief, plaintiffs sought, in addition to compensatory and punitive damages, an accounting, imposition of a constructive trust, restitution of property and the value of slave labor and forced labor, and disgorgement of illicit profits. *Id*. at 252-53.

57. *Burger-Fischer*, 65 F. Supp. 2d at 274. *But cf*. Bodner v. Banque Paribas, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (denying motion to dismiss in French bank case).

58. Citing the various treaties and agreements agreed to after World War II, the district court stated that an attempt to restructure the reparations would "express the ultimate lack of respect for the executive branch which conducted negotiations on behalf of the US and for the Senate which ratified the treaties." *Burger-Fischer* 65 F. Supp. 2d at 284; *see also id*. at 282-85.

59. *Iwanowa*, 67 F. Supp. 2d at 461-89. *But see Bodner*, 114 F. Supp. 2d 117, 134-135 (denying motion to dismiss on statute of limitations grounds in French bank case).

60. For accounts of the settlement negotiations, see EIZENSTAT, *supra* note 18, at 165-86; BAZYLER, *supra* note 18, at 59-109; AUTHERS & WOLFFE, *supra* note 18, at 336-77.

61. *See* Bilsky & Davidson, *supra* note 16.

62. Neuborne, *supra* note 22, at 819-20.

63. EIZENSTAT, *supra* note 18, at 210-17. Gentz, the CFO of Daimler/Chrysler and

manded "legal peace" and the German administration of the settlement.[64] However, avoiding U.S. court supervision of the settlement would have also deprived German corporations of the benefit of preclusion of future claims.[65] In order to reach legal closure without litigating in U.S. courts, the parties devised a creative solution whereby an Executive Agreement between Germany and the United States was to commit the United States to file a Statement of Interest seeking dismissal in any future Holocaust-related litigation against German industry.[66]

In July 2000, the Berlin Accords were signed by representatives of German industry, the plaintiffs, and the eight interested nations, providing for an end to the class action litigation in return for a commitment by German industry and the German government to place 10 billion in Deutsche Marks into a German Foundation under the name "Remembrance, Responsibility and the Future" that was created by the Bundestag and governed by a Board of Trustees representing the victims, interested governments, and the German companies and which would distribute the funds to victims under a prenegotiated formula.[67] Eighty percent of the Foundation's assets were set aside to compensate laborers.[68] The remaining twenty percent went to property claimants, to fund a separate program compensating insurance claims, and to create the Future Fund, an ongo-

chief negotiator of the GEFI, hired Witten, who had represented the banks in the Swiss settlement. Gentz approached Eizenstat and offered a political deal—the creation of a German charitable foundation funded by German corporate contributions that would pay compensation to World War II slave and forced laborers, in return for Congressional legislation or a Presidential Executive Order terminating the burgeoning litigation. Eizenstat, who was working with the lawyers in seeking to mediate the Swiss cases, responded with an offer to organize negotiations.

64. Otto Graff Lambsdorff, the representative of German government in the negotiations, explains that "a class action settlement, was . . . excluded for a number of reasons: (1) the example of the Swiss bank settlement, where money began to flow only three years after the agreement, had been hardly edifying; (2) such a settlement presupposed at least the possibility of an existing legal claim, a notion excluded by Germany for a number of reasons under international and national law—the statute of limitations being one of them; (3) a class action settlement would have put the whole Foundation, largely financed by German taxpayers' money, under the supervision of an American judge—a notion incompatible with any idea of German sovereignty." Otto Graf Lambsdorff, *The Negotiations on Compensation for Nazi Forced Laborers*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 176-77 (Michael J. Bazyler & Roger P. Alford eds., 2006).

65. In class actions, finality for the defendants is provided through the doctrine of preclusion, which prevents class members from filing claims covered by the settlement. Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 765 (2005).

66. MARRUS, *supra* note 71, at 10-25.

67. Neuborne, *supra* note 22, at 822.

68. *Id*.

ing charitable foundation in memory of deceased victims.[69] The labor funds were divided between slave laborers, a category which represented those who worked under atrocious conditions (mostly Jewish, but also homosexual and Sinti-Roma, victims) and forced laborers, who worked under slightly less brutal conditions for no or extremely low wages (mostly Slav victims).[70] Thus, while the federal court in Brooklyn devised elaborate rules and procedures for the distribution of the Swiss banks settlement and supervised the individual claims and award process, in the German case the entire distribution process was administered by German civil servants in a foundation set up by German legislation for this purpose.

### *C. The Creation of Transnational Class Actions*

A few noted historians of the Nazi era criticized the historical representation of the Holocaust in THL, as well as the absence of legal judgment attempting to clarify the historical picture.[71] Lawyers also criticized the negotiation process and the settlement. Observers unaccustomed to American class action practice criticized the negotiation process and the monetary settlements that followed as undermining the rule of law.[72] Furthermore, the active involvement of

69. Neuborne, *supra* note 22, at 822.

70. Jewish victims comprised most slave laborers, while the forced laborer category was composed mostly of Slavs. Slave laborers received twice the amount of compensation as forced laborers, but represent only twenty-five percent of the labor funds because of the higher mortality rate of slave labor. The Slav labor funds were themselves subdivided among the citizens of five participating Eastern European countries (Belarus, Russia, the Ukraine, Poland, and the Czech Republic). Adler & Zumbansen, *supra* note 15, at 2, 14.

71. Holocaust historians Michael Marrus and Peter Hayes argue that the concept of unjust enrichment, one of the lawsuits' principal legal grounds, is inadequate because many corporations were not actually enriched as a result of their activities during the war. *See* MICHAEL R. MARRUS, SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990S 101-03 (2009); Peter Hayes, *Corporate Profits and the Holocaust: A Dissent from the Monetary Argument*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 197, 203 (Michael J. Bazyler & Roger P. Alford eds., 2006). More fundamentally, Marrus argues that the focus of the lawsuits on monetary gains shifts attention away from the gravest crime committed during WWII—mass murder—to the lesser offense of theft. Furthermore, by highlighting the role of a few private corporations with deep pockets, the lawsuits diminish the role of the state as well as the public and agricultural sectors, which had also used forced and slave labor. Thus, according to the critics, THL distanced us from the insights of historical research, distorted our understanding of the involvement of private corporations in the Holocaust, and finally, was settled without a legal judgment attempting to clarify the historical picture. Leora Bilsky addresses these critiques in Leora Bilsky, *The Judge and the Historian: Transnational Holocaust Litigation as a New Model,* 24 HIST. & MEMORY 117 (2012).

72. MARRUS, *supra* note 71, at 28-29; Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust Era Cases*, 80 WASH. U. L.Q. 835, 841 (2002); Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW.

politicians and diplomats in the negotiation process has led some commentators to present THL as a political, rather than legal, phenomenon.[73] Even some of the legal practitioners involved in THL, who commend its accomplishments, see it as a unique campaign that probably cannot serve as precedent in future litigation because of the weak legal standing of the THL plaintiffs' claims.[74]

Though THL ended in settlement, in our view it has important normative significance because it forced powerful corporations to acknowledge their Nazi past and respond materially—not just symbolically—to victims' claims for the first time.[75] While historical, political, and economic factors were doubtless important,[76] it was a combination of legal features unique to the American legal system that allowed the victims' claims to be credible and threatening.[77] Only in U.S. courts could the victims rely on the powerful device developed since the 1960s to deal with violations of human rights by large bureaucratic organizations—the class action. Class actions allow courts to aggregate the claims of large groups of persons and resolve their common disputes in a single proceeding, thereby leveling the playing field between plaintiffs and defendants.[78] Innovations in the Federal Rules of Civil Procedure not particular to class actions—notice pleading, liberal joinder of parties and claims, and broad (even intrusive) discovery—further created a favorable environment for THL. These innovations both enabled and were brought about by the emergence of the structural reform model.[79]

As discussed above, the plaintiffs' principal claims were grounded in pri-

J. INT'L L. & BUS. 301, 316 (2007).

73. *See* Allen, *supra* note 7.

74. Ratner & Becker, *supra* note 9; *see also* Dubinsky, *supra* note 9 (arguing that the Holocaust restitution lawsuits' potential to serve as a model of reparation for collective injustice is very limited).

75. For the view that corporations settled precisely in order to avoid liability, see Adler & Zumbansen, *supra* note 15, at 5-6.

76. These factors include the end of the Cold War, the opening of archives in East and West, and economic and financial globalization that led to the opening of the American market to European companies. *See* MARRUS, *supra* note 71, at 75-84; ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 90-91 (2000).

77. This argument is developed in Bilsky, *Transnational Holocaust Litigation*, *supra* note 4, at 364-65.

78. The modern class action resulted from the amendments to Rule 23 in 1966. As has been noted, although the Advisory Committee expressly focused on revising Rule 23 to facilitate civil rights lawsuits in the revisions to Federal Rule of Civil Procedure 23(b)(2), the more lasting effect of the 1966 amendments was to allow more and larger damages in class actions through the revision of Rule 23(b)(3). *See, e.g.*, Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the Class Action Problem*, 92 HARV. L. REV. 664, 669-76 (1979) (describing the conventional narrative but also questioning it).

79. *See generally* Judith Resnik, *From Cases to Litigation*, 54 LAW & CONTEMP. PROBS. 5 (1991).

vate law, not the ATS. It is nonetheless probable that the renewed use of the ATS at the time played some background role in enhancing the courts' receptivity to claims based on grave human rights violations that occured outside their territorial jurisdiction,[80] in addition to the courts' jurisdiction based on diversity jurisdiction.[81] The combination of the legacy of human rights class actions with the model of transnational litigation created a hybrid process with novel features, including a worldwide class of victims, the combination of legal and diplomatic negotiations toward settlement, and, in the German case, significant contributions to the settlement fund by non-defendant corporations and the state.

## II. THL AND STRUCTURAL REFORM

Contrary to the view that THL was a unique, Holocaust-related case that succeeded primarily due to political pressures at a specific historical juncture, we see THL's success as the product of both political and legal factors, as is the case for many social struggles brought before courts.[82] This Article therefore attempts to encourage a discussion of THL that accounts for the distinctive political and historical conditions that enabled the settlement of Holocaust-related cases while addressing the important jurisprudential insights to be drawn from the case. In particular, we point to the central role played by the class action litigation in creating a space for deliberation about European corporations' involvement in the Nazi crimes. The theory of structural reform litigation pointed precisely to this function of class actions—addressing systematic breaches of human rights violations by bureaucratic entities, thereby correcting failures of the democratic system. What, then, can we learn from the earlier debates about structural reform when analyzing THL? In this section we point to the strong continuity between the challenges facing the courts in structural reform litigation and in THL, and argue that certain departures in THL from the classic theory of structural reform correspond to what we have termed the pluralist reformulation of structural reform. Moreover, in some ways the differences between THL and traditional structural reform go beyond the pluralist reformulation and suggest further developments in structural reform theory.

80. Ratner & Becker, *supra* note 9, at 347.

81. *See* U.S. CONST. art. III, § 2; 28 U.S.C. § 1332(a)(3) (authorizing a federal court to hear a lawsuit in which the amount in controversy is in excess of $75,000 and is between "citizens of different States and in which citizens or subjects of a foreign state are additional parties").

82. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 30-31 (Benjamin A. Page ed., 2d ed. 2008) (arguing that broad public and political support is a condition for courts to effect social change).

### *A. The Classic Structural Reform Model*

#### *1. A New Paradigm of Litigation*

In his 1979 *Harvard Law Review Foreword*, Professor Fiss provides a comprehensive account of the structural reform lawsuit.[83] The article celebrated the Warren Court—which embraced structural reform, starting with the school desegregation litigation initiated by *Brown v. Board of Education*[84]—in the "midst" of the "counterrevolution" brought by the Burger Court against structural reform.[85] We return to Fiss's early formulation of structural reform as it captures the gist of THL: the need to develop legal tools to make bureaucratic organizations accountable. According to Fiss:

83. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

84. 347 U.S. 483 (1954).

85. The Burger Court erected procedural obstacles—most prominently the "equitable standing doctrine"—to structural reform cases. Owen M. Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977) [hereinafter Fiss, *Dombrowski*]. According to Professor Gilles, "[u]nder the equitable standing doctrine, a private plaintiff has standing to seek injunctive relief against unconstitutional practices only if he can show to a 'virtual certainty' that he will suffer similar injury in the future." Myriam Gilles, *An Autopsy of the Structural Reform Injunction: Oops...It's Still Moving*, 58 U. MIAMI L. REV. 143, 163 (2003). As she argues, "the equitable standing doctrine will doom many efforts to seek the type of forward-looking, reformative injunctive relief that had been the hallmark of the structural reform revolution." *Id.* at 168. *See also* Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEX. L. REV. 1097, 1113 (2007) (noting that "institutional reform litigation limped on, hampered by the decisions of the Court, statutory reforms, and a change in the national zeitgeist" during the tenure of Chief Justice Rehnquist). Another procedural obstacle noted by Professor Fiss was the Supreme Court's decision in *Martin v. Wilks*, 490 U.S. 755 (1989), in which the Court invoked due process principles to expand the opportunities for aggrieved parties to continue challenging structural reform decreed. *See* Owen M. Fiss, *The Allure of Individualism*, 78 IOWA L. REV. 965 (1993) [hereinafter Fiss, *Individualism*]. And most recently, in the *Seattle School District* case, the Supreme Court signaled its retreat from *Brown v. Board*—the archetypal structural reform case. Parents Involved in Cnty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). The Court held that students could not be assigned to public schools solely to promote racial integration and that racial balance was not a compelling state interest. In a sharp dissent, Justice Stevens criticized the Court for not being faithful to *Brown*. Seattle Sch. Dist., 551 U.S. at 798 (Stevens, J., dissenting); *see also* Gilles, *supra*, at 144 n.10 (citing plaintiffs' decision to voluntarily end twenty-six-year-old case involving desegregation of Kansas City public schools that included litigation before the Supreme Court, *see* Missouri v. Jenkins, 515 U.S. 70 (1995), as "evidence of the end" of the structural reform era), 156 n.59 (noting that many school districts have sought to have court-supervised desegregation orders set aside). *But see* Brown v. Plata, 131 S. Ct. 1910 (2011) (upholding the district court's cap on the California prison population imposed by a three-judge court appointed to hear the case). In dissent, Justice Scalia criticized the majority for affirming "perhaps the most radical injunction issued by a court in our nation's history." *Plata*, 131 S. Ct. at 1950 (Scalia, J., dissenting); *see also The Supreme Court 2010: Leading Cases*, 125 HARV. L. REV. 172, 261 (2011) (discussing *Plata*).

Structural reform is premised on the notion that the quality of our social life is affected in important ways by the operation of large-scale organizations, not just by individuals acting either beyond or within these organizations. It is also premised on the belief that our constitutional values cannot be fully secured without effectuating basic changes in the structures of these organizations.[86]

Fiss defines the "structural suit" as "one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements."[87] The judge's instrument for this task is the injunction, which provides "the means by which these reconstructive directives are transmitted."[88]

A compelling feature of Fiss's analysis is his ability to identify the public aspect of civil litigation. Fiss contrasts structural reform with the "dispute-resolution model,"[89] which involves "a conflict between two individuals, one called plaintiff and the other defendant, with a third standing between the two parties, as a passive umpire, to observe and decide who is right . . . and to declare that right be done."[90] The typical structural reform case, he writes, is "breathtakingly different."[91] The case is not between two private individuals over a past incident involving private property (such as a contract), but is instead a lawsuit by a group of individuals against state actors because of the state's failure to adhere to the Constitution; the judge is not limited to the damages remedy but may legitimately exercise injunctive power to bring about the state agency's compliance with the Constitution.[92] As Fiss explains, the "con-

86. Fiss, *supra* note 83, at 2; *see also id*. at 18 ("[T]he focus of structural reform is not upon particular incidents or transactions, but rather upon the conditions of social life and the role that large-scale organizations play in determining those conditions.").

87. *Id*. at 2.

88. *Id*.

89. *Id*. at 17.

90. Fiss, *supra* note 83, at 17; *see also id*. at 21 ("In the dispute resolution model, where the victim is an individual, . . . the typical party structure is bipolar: a single plaintiff vied against a single defendant."); *id*. at 29 ("Most accounts of the judicial function begin with the same story: two people in the state of nature are squabbling over a piece of property, they come to an impasse, and, rather than resorting to force, turn to a third party, a stranger for a decision. Courts are but an institutionalization of the stranger.").

91. *Id*. at 17.

92. *See id*. at 18 (providing an example from the dispute-resolution model as "the farmer . . . not honor[ing] his promise to sell the cow"); *see also id*. at 3 ("Desegregation required a revision of familiar conceptions about party structure, new norms governing judicial behavior, and new ways of looking at the relationship between rights and remedies."). *See generally* OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION (1978) (examining injunctive relief in light of experience with civil rights litigation and arguing for abolition of remedial hierar-

cept of wrongdoer" in the dispute-resolution model is "highly individualistic" and "presupposes personal qualities: the capacity to have an intention and to choose."[93] With structural reform, although there may be individual wrongdoers, the focus is "on a social condition" and the "bureaucratic dynamics that produce that condition."[94] The absence of the notion of wrongdoing connects to the injunctive remedy sought in the structural reform lawsuit.

As noted earlier, the dispute-resolution model views the judge as an umpire. In a structural reform lawsuit, the judge assumes a more active role. In particular, Fiss writes, "[t]he judge must assume some affirmative responsibility to assure adequate representation" in the lawsuit between a plaintiff group—represented by a named plaintiff—and a bureaucratic defendant.[95] Furthermore, the remedial phase of the structural reform case "involves a long, continuous relationship between the judge and the institution."[96] That is because the judge's task is to eradicate the conditions of "an ongoing institution" that violate the Constitution.[97] As Fiss acknowledges, there is "almost no end" to judicial oversight of the defendant institutions in the structural reform case.[98]

chy that limits the availability of injunctions); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (describing comprehensive, forward-looking judicial orders to reform institutions).

93. Fiss, *supra* note 83, at 22.

94. *Id*. ("Paradigmatically, a wrongdoer is one who intentionally inflicts harm in violation of an established norm."); *see also id*. at 23 n.48 (citing cases from Arkansas prison reform litigation in which the court recognized that case was "an attack on the System itself" and the defendant prison warden "personally" was not "evil, brutal, or cruel").

95. *Id*. at 24-27. Fiss identifies a number of procedural devices—providing notice "to many of those who are purportedly represented in the litigation," inviting participation from amici or additional parties, and using a special master (*see* FED. R. CIV. P. 53)—that may be used to promote adequate representation in the structural reform lawsuit. *Id*., at 26-27. The adequacy of representation requirement derives from the due process clause and is codified in Rule 23. FED. R. CIV. P. 23(a)(4). The Supreme Court's decisions in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), address adequacy of representation in the context of class actions under Rule 23.

96. Fiss, *supra* note 83, at 27.

97. *Id*. at 27-28.

98. *Id*. at 27. Hence the extensive citations to the ongoing cases that Fiss refers to in the *Foreword*. He starts with *Brown* and notes the ensuing school desegregation cases brought in different courts around the United States. *See, e.g*., *id*., *supra* note 83, at 2-3 (*Brown*), 4-5 (other school desegregation cases), 17 n.35 (Coney Island school desegregation case), 21 n.44 (same, along with Norwalk Core school litigation), 25 n.55 (Coney Island case), 47 n.95 (other school desegregation cases), 55 n.10 (New Orleans school desegregation case). Then, as Fiss notes, "the lessons of school desegregation were transferred to other contexts" in cases brought alleging systemic violations by police departments, prisons, mental hospitals, and welfare administrators. *Id*. at 3-4. See, for example, *id*., at 12 n.28, which provides the complete case history—about a dozen reported decisions—of the Arkansas prison reform litigation from 1965 through the Supreme Court's decision in *Hutto v. Finney*, 437 U.S. 678 (1978).

*2. Structural Reform, the Constitution, and Settlement*

As Fiss acknowledges, this ongoing judicial supervision of the defendant agencies generated substantial controversy and criticism. Two of the most prominent legal criticisms invoke the principles of separation of powers and federalism. The arguments overlap but are not the same. With respect to the former, critics contend that ongoing judicial review of the defendant agencies intrudes on the authority of the political branches, specifically the executive branch and the legislature.[99] With respect to the latter, critics argue that judicial oversight of a state agency—such as a public school district—violates principles of state sovereignty by requiring local officials to relinquish management to a federal judge.[100]

Neither criticism is persuasive to Fiss because of the authority invested by the Constitution generally in the judiciary and, specifically, in the structural reform judge. The Constitution and established case law authorize judicial review generally, and specifically authorize structural reform due to the need to "adapt[] the traditional form of the lawsuit to the changing social reality—the dominance of our social life by bureaucratic organizations."[101] The structural reform judge has a coordinate and co-extensive role with the executive branch and the legislature in guaranteeing constitutional rights and implementing the Constitution. Fiss defines the role of the judge accordingly: "The task of the judge is to give meaning to constitutional values, and he does that by working with the constitutional text, history, and social ideals. He searches for what is true, right, or just. He does not become a participant in interest group politics."[102] In performing this role, the judge performs the crucial function of giv-

99. The separation of powers objection to structural reform is set out in, among other articles, John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, 84 CALIF. L. REV. 1121, 1123-24 (1996); Alfred M. Mamlet, *Reconsideration of Separation of Powers and the Bargaining Game: Limiting the Policy Discretion of Judges and Plaintiffs in Institutional Suits*, 35 EMORY L.J. 685 (1984); *see also* Gilles, *supra* note 85, at 161 (arguing that "the structural reform injunction has disappeared from the contemporary socio-legal landscape because of the essentially political fear of judicial activism").

100. The federalism objection to structural reform is set out in, among other articles, Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978); *see also* Mamlet, *supra* note 99.

101. Fiss, *supra* note 83, at 1-2, 6-17 (discussing United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938), as "the great and modern charter for ordering the relation between judges and other agencies of government"), 44; *see also* Fiss, *Dombrowski*, *supra* note 85, at 1159-60 (discussing federalism objection).

102. *Id*. at 3, 12-13 (discussing judicial independence and "obligation to participate in dialogue"); *see also id*. at 11 (describing judge's task and function when defining open-ended constitutional phrases involving "equal protection" and "due process of law").

ing "proper meaning to our public values."[103]

As this summary suggests, Fiss's structural reform model codifies the Warren Court's civil rights jurisprudence—its archetypal decision is *Brown v. Board of Education*.[104] The structural reform paradigm emerged from *Brown* and other school desegregation lawsuits—lawsuits made necessary by the fact that the political branches did not and could not lead the efforts to dismantle separate but equal schools. Indeed, the state defendants in the school desegregation cases vigorously resisted the courts' efforts to desegregate. The disputes were intensely local and led to contested litigation over very specific details in the course of implementing the courts' remedial decrees.[105] That courts needed to lead the endeavor to restructure and to continuously oversee local schools contributed to the defining features of structural reform. Quite simply, the courts could not issue injunctions against local state officials unless the Constitution authorized them to do so; moreover, that authority could be exercised only through judgments that contained specific instructions on how the defendant school districts could come into compliance with the Constitution.

Thus, for Fiss, structural reform is a legal answer to a systemic failure of the public sphere and an attempt to make good on constitutional norms of racial equality. One important implication for Fiss is the inadequacy of settlement in this context. Because settlement represents the opposite of public deliberation, norm articulation, and reasoned judgment, it undermines the very rationale of the litigation. We can venture to suggest that if structural reform requires that we reimagine the roles of the parties, judge, and remedy in civil litigation, Fiss adds another essential component to his model in his article *Against Settlement*—the rejection of settlement as essential to fulfilling the promise of structural reform.[106]

103. *Id.* at 30.

104. 347 U.S. 483 (1954). *See also* Fiss, *Individualism, supra* note 85. *See also Foreword*, *supra* note 83, at 16-17, 58 (lamenting the vulnerability of the values—notably equality—associated with the 1960s, the era of the Warren Court).

105. Fiss, *supra* note 83, at 2 ("The courts had to overcome the most intense resistance and, even more problematically, they had to penetrate and restructure large-scale organizations, [and] public school systems."); *see also* Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 588 (1983) ("It was the relentless refusal of citizens and public officials to accept the meaning of *Brown*—their persistent failure to accept change and act in good faith to implement the law—that required the courts to intrude with such coercion, with such detail, with stubborn patience and courage, and with strategic and managerial preoccupations that strained the boundaries the traditional judicial function.").

106. Owen M. Fiss, *Against Settlement,* 93 YALE L.J. 1073, 1085 (1984) [hereinafter Fiss, *Against Settlement*]. Though he elaborated his critique of settlement in an article not devoted to structural reform, his understanding of structural reform makes his critiques particularly relevant.

*B. The Pluralist Reformulation*

Fiss addresses a number of criticisms of structural reform in the *Foreword*.[107] The most significant, and most relevant in connection with this discussion of THL, is the instrumental critique, which asserts that the judge lacks the capacity or ability to bring about reform.[108] Fiss concedes that "the judge has no special claim of competency on instrumental judgments" but nevertheless argues that the judge, having declared the right, should continue to be involved in crafting and administering the remedy.[109] However, the instrumental critique relates to what Fiss recognizes as "the core dilemma" in the structural reform model: the tension inherent in the judge's dual role as adjudicator and remedial "architect[]."[110] Fiss acknowledges that because of the court's continued oversight of the state agency, the judge inevitably becomes involved in matters of bureaucratic management, thus compromising the judge's ideal role as the articulator of public values.[111] Confronted with difficulties of and re-

107. Fiss, *supra* note 83, at 31-43, 53-58. For example, Fiss addresses the "historical critique," which asserts that structural reform is novel and an unwarranted departure from the dispute resolution model. *Id*. at 35-39 (discussing, among other things, points made by Chayes, *supra* note 91. Another critique, attributed to Professor Lon Fuller, argues against structural reform in favor of the "dispute resolution" model "on the basis of moral axioms." *Id*. at 39. According to Fiss: "At the core . . . of Fuller's conception on the limits of adjudication and his objection to having courts resolve polycentric problems is the individual's right to participate in a proceeding that might adversely affect him." *Id*. at 40. Fiss contends that this conception, if accepted, "would be but a formal triumph of individualism . . . [that] would leave the individual at the mercy of large aggregations of power." *Id*. at 43.

108. The literature on the instrumental critique is extensive. *See*, *e.g*., DONALD HOROWITZ, COURTS AND SOCIAL POLICY (1977) (discussed by Fiss, *supra* note 83, at 31); PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS (1983); *see also* Gewirtz, *supra* note 105, at 596 n.24 (collecting academic works "examining the practical problems that courts face seeking to change the operation of large government institutions").

109. Fiss, *supra* note 83, at 51-52.

110. *Id*. at 53; *see also* Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 790-91 (1990) (distinguishing between "right-declaring phase of adjudication" and "remedial phase of lawsuit"). As an adjudicator in the liability phase, the judge is an impartial authority whose legitimacy derives not only from the Constitution but also from the judge's detachment from the political realm. As the "architect" of the remedial phase, the judge is "deeply involved in the reconstruction" of the defendant agency and therefore "is likely to lose much of his distance from the organization." Fiss, *supra* note 83, at 53.

111. Even academics who support structural reform emphasize this conflict inherent in the model. *See*, *e.g*., Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 52 (2003) (noting "the undeniable gap between [Fiss's] idealized version of abstract legal principles and judicial loftiness on the one hand, and the concrete norms and judicially decentered processes needed to effectively address the problems underlying the constitutional violations on the other"); *see also* Gewirtz, *supra* note 105, at 674 (arguing that "remedies must take account of resistance from the world they hope to transform" and that "in some cases courts may properly make compromises and limit remedies because of this re-

sistance to bureaucratic reform, the judge "is likely to accept the reality of those limits and compromise his original objective in order to obtain as much relief as possible." Indeed, according to Fiss, the judge "will bargain against the people's preferences."[112] This dilemma strikes at the heart of the structural reform paradigm. By also becoming a bureaucratic manager, inevitably drawn into remedial bargaining, the judge compromises his role as the governmental authority uniquely qualified to articulate public values.[113]

A number of authors have tried to grapple with this contradiction by reformulating the structural reform model.[114] Susan Sturm explains that Fiss's theory relies on a false dichotomy between right and remedy: "Fiss's formalistic schema of legitimate judicial decision-making predisposes him to assume that right and remedy are distinct in both content and methodology, and that remedial formulation is derivative and secondary to elaborating entitlements. He underappreciates the blurriness of the line between liability and remedial decision-making."[115]

According to Sturm, the source of Fiss's error lies in his attempt to elaborate a unitary constitutional principle by connecting the social problem of African Americans in the United States with a new vision of the judicial role. To some extent, this problem is generational. *Brown* and its progeny sought to dismantle de jure segregation by the state. It is likely that the clarity of the equality principle in this context, combined with the need for the judiciary to

sistance").

112. Fiss, *supra* note 83, at 54-55.

113. It is not controversial to suggest that the contemporary political frenzy in the United States over judicial activism is partly due to decades-long judicial supervision of state agencies found to have violated the Constitution and required to restructure in accordance with detailed judicial decrees. This argument is not against the legitimacy of structural reform; it is merely an observation on the consequences attendant to this inherent tension in the classic formulation of the model. Fiss concludes the *Foreword* with the suggestion that the best we can do is live with this tension inherent in the structural reform model. *Id*. at 58 ("The judge might be seen as forever straddling two worlds, the world of the ideal and the world of the practical."). Subsequently, he has emphasized the norm declaration associated with the liability phase over the "technocratic" aspects of the remedial phase. Fiss, *Splendor*, *supra* note 110, at 790-91.

114. *See generally* Sturm, *supra* note 111; Charles F. Sabel & William H. Simon, *Destabilizing Rights: How Public Litigation Law Succeeds*, 117 HARV. L. REV. 1016 (2004) (describing a move away from command and control injunctive remedies toward "experimentalist intervention"); Brian Ray, *Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases*, 2009 UTAH L. REV. 797 (2009) (offering a hybrid model of constitutional litigation combining ADR processes with formal court adjudication).

115. Sturm, *supra* note 111, at 62; *see also id*. at 64 (arguing that "there is a more dynamic relationship between right and remedy than the formalistic paradigm acknowledges" and that "[t]here is a basic, inseparable, and iterative, means-ends relationship that results from problem-solving in context").

articulate a clear legal principle for the political branches and the public, led Fiss to prioritize the normative role of the court in the liability phase. Sturm acknowledges this historical state of affairs—in which segregation was sanctioned by state law—but proposes revising the structural reform model in order to address the more subtle and complicated forms of racial discrimination in the post-*Brown* era.[116] Her solution is a contextual approach to—rather than a formalistic theory of—structural reform. This approach suggests that:

> In areas of normative and remedial uncertainty and complexity, the function of judicially articulated legal norms is not to establish precise definitions boundaries [sic] of acceptable conduct which, if violated, warrant sanction. Instead, the judicial function is to prompt—and create occasions for—normatively motivated inquiry and remediation by non-legal actors in response to signals of problematic conditions of practice.[117]

In order to do justice to the "messy" reality of structural reform litigation, Sturm suggests replacing Fiss's "imperial" judge with a "catalyst" judge. In a sense, it seems that although Fiss was bold enough to articulate an entirely new grammar for civil litigation, he fell short of giving up the traditional conception of the imperial judge, which sits better with the traditional model of dispute resolution. Sturm offers a more flexible model in which the judge's relationship to the dispute does not require detachment and hierarchy, but rather requires continuing dialogue—and, where possible, cooperation—among the judge and parties. The judge is to be understood as a facilitator, providing incentives for the parties not only to investigate human rights violations by the organization but also to offer interpretations of the value of equality in the specific organizational context in which the violation occurred. Scholars have identified a similar shift of structural reform from command-and-control injunctive regulation to "experimentalist" intervention, and some have praised the reduced risks to the court's legitimacy.[118]

If we accept this revised conception of the structural reform judge, we also can revise our understanding of the legitimacy of settlement in structural reform. Instead of obstructing the promotion of rule-of-law values and, more generally, the normative role of adjudication, settlement is a mechanism that can enhance norm articulation through dialogue between the judge and the parties in both the process of factual inquiry and in devising ways to reform the

116. Sturm, *supra* note 111, at 78-80 (examining strategies for formulating injunctive relief in the context of contemporary employment discrimination cases).

117. *Id*. at 67.

118. Sabel & Simon, *supra* note 114 (arguing that structural reform is a species of "destabilizing rights"—namely, claims to unsettle and open up failing public institutions normally insulated from the processes of political accountability).

defendant institution.[119] The new possibilities offered by this approach are apparent if one examines THL closely.[120]

### *C. From Structural Reform to THL: A Continuous Search for Bureaucratic Accountability*

THL contains many important elements of structural reform that Fiss articulated: THL relied on the class action mechanism and pursued bureaucratic defendants (large banks, insurance companies, and business firms) that plaintiffs claimed were responsible for human rights violations. It focused on systematic violations of rights without searching for an individual wrongdoer in the defendant organizations.[121] And, finally, like structural reform, the Swiss case in THL was administered by a managerial, proactive court. However, THL differs in a number of ways from the paradigmatic structural reform case. The defendants were private corporations, not public agencies. The plaintiffs' claims did not arise under the U.S. Constitution, but were instead based on common law principles of tort and property, as well as international law. The principal remedy sought was damages to compensate for injuries resulting from past legal wrongs rather than an injunction to remedy ongoing constitutional violations, and the cases ultimately were resolved through settlement rather than through adjudication.

These differences can of course be attributed to the time factor, as injunctions would not have made much sense five decades after the violations. More significantly, the departures from structural reform model were also due to the

119. On the importance of a dialogic relation between courts and other state actors in judicial review of administrative action, see generally MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008) (arguing that social welfare rights can be better protected if judicial enforcement is not binding on the legislative and executive); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391 (2007) (developing a theory of "constitutional dialogue" between courts and legislatures in the enforcement of socio-economic rights).

120. Sturm herself has applied these insights in the European setting. Joanne Scott & Susan Sturm, *Courts as Catalysts: Re-thinking the Judicial Role in New Governance* 13 COLUM. J. EUR. L. 565 (2007) (arguing that in addition to traditional role of rule elaboration and enforcement, courts have a limited but crucial role as catalysts in new governance, which, in the context of the European Union, includes prompting institutions to provide full and fair participation and fostering transparency and accountability).

121. The lack of focus on individual liability derives from the facts that the defendants were legal entities and not individuals and that plaintiffs' civil claims involved issues of property law. For example, quantum meruit (restitution of unpaid wages), one of the German lawsuits' principal claims, does not require proof of wrongful intent on the part of any individual within the defendant organizations. See Allen, *supra* note 7, 23-27

transnational character of the litigation.[122] Indeed, the claim structure of transnational litigation tends to blend arguments drawn from public and private law, as well as international and domestic law, in order to fulfill public functions.[123] Foreign injunctions are also notoriously difficult to enforce, leading to a preference for damage remedies and some sort of political settlement. THL can thus be understood as the transnational "translation" of structural reform, with the differences between THL and structural reform resulting from pragmatic considerations. Below, we further explore the differences between THL and classic structural reform and argue that these departures also correspond to the pluralist reformulation of structural reform developed in the domestic context.

*1. Private Corporations, Not State Agencies*

Scholarship about structural reform has focused on state agencies and actors, not private corporations. However this difference with THL is not, in our view, significant. The focus of the domestic scholarship on public agencies reflects the history of the structural reform lawsuit, which began with the desegregation lawsuits filed against public school officials and agencies in the 1950s and then expanded to state prisons and mental hospitals in the 1960s.[124] It also reflects the limits of the state action doctrine in the United States.[125] Because

122. Harold Koh has written that "transnational public law litigation" is defined by five characteristics: "(1) a *transnational party structure*, in which states and non-state entities equally participate; (2) a *transnational claim structure*, in which violations of domestic and international private and public law are all alleged in a single action; (3) a *prospective focus*, fixed as much upon obtaining judicial declaration of transnational norms as upon resolving past disputes; (4) the litigants' strategic awareness of the *transportability of those norms* to other domestic and international fora for use in judicial interpretation or political bargaining; and (5) a subsequent process of *institutional dialogue* among various domestic and international, judicial and political fora to achieve ultimate settlement." Harold Hongju Koh, *Transnational Public Law Litigation,* 100 YALE L.J. 2347, 2371 (1991) (citation omitted). THL has at least four of these qualities, with only the third—a prospective focus—arguably in question. On this point, the plaintiffs' claims were historical in nature but also sought to reform the culture and practices of the defendant corporations that were sued. *See infra* notes 166-180.

123. Koh illustrates this notion of blending realms: "By filing the Bhopal case in American court, India was no more seeking a traditional tort judgment than Linda Brown was seeking just to walk fewer blocks to a school bus in Topeka, Kansas. Both were seeking judicial declarations of systemic wrongfulness, declarations that they could then use to convert principle into political power." Koh, *Transnational Public Litigation, supra* note 122, at 2396.

124. *See*, *e.g.*, Fiss, *supra* note 83, at 3-4.

125. *See*, *e.g.*, Emily Chiang, *No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond*, 60 BUFF. L. REV. 615, 642-43 (2012) (noting that the state action doctrine at its most essential holds that the Constitution constrains only government behavior, not private behavior (citing the civil rights case United States v. Stanley, 109 U.S. 3, 11 (1882))).

the plaintiffs in structural reform lawsuits claimed violations of their constitutional rights and because the U.S. Constitution constrains only state actors, the structural reform lawsuit was tailored to target state actors.

The mirror image of this process is apparent in THL's suing private corporations. Under current interpretations of international law, sovereign states enjoy immunity from civil litigation for the commission of atrocities.[126] Hence, state actors were immune from suit in THL, and the plaintiffs targeted private corporations only. Thus, in both THL and structural reform, the focus only on one type of actor is not linked to the nature of the human rights violations, but is the result of pragmatic considerations. It is therefore important to note that in Fiss's analysis, what is distinctive about the new type of social wrong is the bureaucratic structure of the defendants, not its classification as public or private. The fact that THL targeted private corporations may have obscured the connection between THL and structural reform but it is not a significant difference between the two phenomena.

*2. Judicial Role: From Norm Articulator to Narrative Catalyst*

If the judge in the structural reform lawsuit was criticized for entering the field of politics, in Fiss's account this development had at least the saving grace of producing a normative judgment. In contrast, in the Swiss banks case, Judge Korman was a paradigmatic managerial judge, actively involving himself in the negotiations, but without producing a judgment on liability.[127] The harshest criticism of monetary settlement in THL is that it precluded the elaboration of a much-needed normative framework regarding the responsibility of the business corporation for participation in atrocity. International criminal law after World War II developed a system of norms dealing with the personal responsibility of state officials while overcoming the obstacles posed by national sovereignty and compliance with superior orders. However, this achievement left unaddressed the responsibility of indirect participants in the crimes—corporations that operated for profit, often within a system of pressure and coercion using forced labor and slavery, and banks that funded the Nazi's criminal apparatus through bank loans. It therefore may appear as if the monetary settlement in THL prevented a normative clarification of corporate responsibility.[128]

126. BETH STEPHENS ET AL., INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 89-94 (2d ed. 2008).

127. As summarized earlier, Judge Korman's decision approving the settlement did discuss moral values and the attendant difficulty of converting the defendants' violation of those values decades ago into viable legal claims. Yet, Judge Korman's decision approving a settlement was not adjudication, the paramount judicial task for Fiss.

128. Not only has THL not been invoked as precedent in subsequent ATS claims against corporations, but Judge Korman himself, in a dissenting opinion regarding a class

As we have seen, however, Sturm offers an alternative view of the path to norm development whereby, in areas of "normative uncertainty and complexity,"[129] the search for unequivocal, comprehensive, and clear norms for the courts to enunciate is an unrealistic and undesirable objective. Instead of the "imperialist," top-down imposition of norms, Sturm suggests that we should aim for the contextualized fashioning of norms through cooperation and continuous dialogue between the parties and the judge.[130] This understanding of normativity is particularly appropriate in transnational disputes, where there are few shared assumptions as to how best to resolve the issues. As Nancy Fraser has noted, in the absence of global democratic institutions through which to debate and determine the ground rules of justice-seeking, transnational disputes often involve "meta-disputes over the very grammar of justice"—what forms a legitimate subject of claim, whose interest deserves consideration, and what institution should resolve the dispute—and those disputes often overtake disputes over first-order questions such as the degree of a wrongdoer's liability.[131] This was clearly the case in THL, which was conducted in the absence of either clear norms of corporate liability or transnationally agreed procedures for resolving that type of claim. Against this background, the procedures adopted in THL exemplify the pluralist reformulation of structural reform. The courts gave the parties the tools to fashion a contextualized solution to the dispute, prompting the disclosure of important information about corporate participation in the Nazi crimes, integrating this information into the settlement, and enabling the parties to participate in the design of the settlement.

In THL, U.S. procedure was adapted to the transnational context of the case. In the litigation against Swiss banks, the principal obstacle to the plaintiffs' claims was the defendants' invocation and reliance on the principle of bank secrecy.[132] For the plaintiffs, United States courts offered broad and liberal rules of discovery that afforded the best opportunity for overcoming that

action filed under the ATS against corporations for having done business with the Apartheid regime in South Africa, opined that doing business with a criminal regime, by providing loans to it for example, does not constitute a violation of customary international law. Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 292-93 (2d Cir. 2007).

129. Sturm, *supra* note 111 and accompanying text.

130. *See supra* notes 114-117 and accompanying text.

131. "No sooner do first-order disputes arise than they become overlain with meta-disputes over constitutive assumptions, concerning who counts and what is at stake. Not only substantive questions, but also the grammar of justice itself is up for grabs." NANCY FRASER, SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD 50 (2009).

132. Bergier Report, *supra* note 19, at 446; LEONARD ORLAND, A FINAL ACCOUNTING: HOLOCAUST SURVIVORS AND SWISS BANKS 21 (2010).

obstacle.[133] Judge Korman refused to formally order discovery to allow the plaintiffs' accounting experts to inspect the banks' records, fearing that such an order would force Swiss banks to commit a criminal act in their country. However, he pressured the defendants to reveal some information by chastising the banks for failing to publish their lists of dormant accounts and by refusing to approve the settlement until access to information for a fair claims procedure was provided.[134] Furthermore, Judge Korman pressured the Swiss banks to agree to an independent group headed by Paul Volcker, former Chairman of the Federal Reserve, that would carry out a Swiss-government-approved audit of the Swiss banks in the search for unpaid Holocaust-era accounts.[135] Thus, although U.S. discovery rules were not formally applied in the Swiss case because of the transnational character if the litigation, the court's exercise of its authority to supervise settlement negotiations and approve the settlement agreement enabled it to pressure the banks into overriding their policy of secrecy and revealing some valuable information. Similarly, in the German case, the settlement negotiation and distribution process were removed from United States courts so as not to offend German sovereignty.

These creative devices led to the production of important information. In addition to the pressure exerted by Korman on the Swiss banks to disclose information, the distribution stage provided new incentives for Swiss corporations to self-identify as having used slave labor during World War II. The settlement agreement had created a class of claims for persons who performed slave labor for Swiss entities (Slave Labor Class II).[136] Because of a lack of information, the court asked that companies seeking release from claims identify themselves and provide information. Several companies, including Nestlé, provided lists of thousands of individuals who had worked for them during the

133. The process of pretrial discovery, unique to U.S. law, allows parties to obtain from each other a broad range of written and oral information relevant to the case after the initial claim has been filed. *See* ROBERT M. COVER, OWEN M. FISS, & JUDITH RESNIK, PROCEDURE 826-30 (2d ed. 1988); Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 277, 292-96 (2002).

134. BAZYLER, *supra* note 18, at 39.

135. The Volcker Committee, though independent, was subject to much pressure from the Swiss banks. For a description of the compromises it had to make in order to produce findings that were susceptible to being complied with, see *In re Holocaust Victim Assets Litig*., 319 F. Supp. 2d 301, 323-26 (E.D.N.Y 2004) (amended memorandum and order). However, it avoided a long process of discovery that could have taken years and it transferred the cost of this very expensive audit to the banks.

136. Slave Labor Class II consisted "of those persons, whether or note 'Victims or Targets of Nazi Persecution,' who performed slave labor" for entities covered by the court's distribution plan. *In re Holocaust Victim Assets Litig*., Nos. CV 96-4849 ERK MDG, CV 96-5161, CV 97-461, 2000 WL 33281701 at *4 (E.D.N.Y Dec. 8, 2000).

war and may have performed slave labor.[137] The court's role in distributing the global settlement amount also produced many valuable victim narratives. Questionnaires were sent to approximately one million survivors and their families, seeking to allow potential class members to express support or opposition to the settlement as well as to gather information to assist the court in designing a fair scheme of allocation of the settlement funds.[138]

The court in the Swiss banks case thus served as a catalyst for both the disclosure and production of significant information—information that had never been produced or published before—and integrated that information into its administration of the settlement. Furthermore, because the case was a class action, the court received objections and comments directly from potential claimants and community representatives when designing the settlement. In addition to the questionnaires, the "fairness hearings" allowed victims and others to express their opinion.[139] Some of the objections raised at those hearings led to substantial amendments to the settlement agreement.[140]

137. The list of companies that identified themselves and the information they provided can be found at Exhibit 1: Companies Which Seek a Release Under the Settlement Agreement By Identifying Themselves to the Special Master, (Sept. 11, 2000), http://www.swissbankclaims.com/Documents_New/697505.pdf.

138. In the view of Professor Neuborne, one of the plaintiffs' counsel, a central reason for bringing the cases was "to speak to history—to build a historical record that could never be denied." Neuborne, *supra* note 22, at 830.

139. *Archives: Proposals on Allocation of Residual Funds,* HOLOCAUST VICTIM ASSETS LITIGATION (SWISS BANKS), http://www.swissbankclaims.com/Archives.aspx (last visited Nov. 12, 2013).

140. The four main objections were: 1) that the settlement amount was too low; 2) that as drafted, the settlement agreement might have inadvertently blocked future efforts to track artwork to Swiss hiding places; 3) that no provision existed in the settlement for unpaid Swiss insurance claims; and 4) that it would be difficult if not impossible to resolve bank account claims when bank secrecy forbade public identification of the account. While the first objection was not considered realistic, the three other objections led to renegotiations and amendments. Thus, under pressure from Korman not to approve the settlement, both sides agreed on an amendment exempting from preclusion efforts to recover specific works of art, an insurance provision governing unpaid World-War-II-era Swiss life insurance policies, as well as an information access mechanism, including the internet publication of 21,000 (eventually increased to 24,000) "high probability" accounts, the creation of a database reflecting the records of the 36,000 accounts identified as probable or possible Holocaust accounts by the Volcker auditors, access to the 36,000 account database by the CRT in Switzerland, and a promise of good faith assistance in providing additional information needed to resolve particular claims. Neuborne, *supra* note 30, at 62-65. In addition, it seems that the insistence of some victims that the money be returned to their owners and not used for charity convinced Korman that a corrective, individualized approach to justice must be adhered to as far as possible. Transcript of Civil Cause for Fairness Hearing Before the Honorable Edward R. Korman United States District Judge at 148, *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (2000), No. CV-96-4849, *available at* http://www.swissbankclaims.com/Documents/DOC_14_fairnesshearingtranscript.pdf.

Because in the German case the settlement was finalized and distributed without court supervision, it did not provide similar avenues for individual victim participation. However, there too the litigation brought together various constituencies—plaintiffs' lawyers, corporations, diplomats, and representatives of victim organizations—into dialogue to design a settlement arrangement.

When we read THL in light of the pluralist reformulation of structural reform, settlement ceases to be second best and reveals itself to have enabled the judge to serve as the catalyst for dialogue among the various constituencies to the litigation, thereby fulfilling a new conception of the judge. One could say that instead of a settlement in the shadow of the law, THL offers an example of law produced by settlement.[141] Yet in our view, THL took the pluralist theory of structural reform a step further. It created a new division of tasks between judge and parties, *incentivizing the parties themselves to produce new narratives with important normative value*.[142] One can see this concretely in the new historical narratives formed as a result of settlement.

Courts in criminal trials of atrocity, both international and domestic, have been sharply criticized for adopting the didactic objectives of writing history and shaping collective memory.[143] The "catalyst"[144] court in THL avoided the pitfalls of didactic judging by clearly separating the judicial and historical functions of the litigation, allocating the latter to the parties outside the courts. In the German case, the litigation prompted the creation of historical commissions composed of prestigious academic historians hired by German companies to investigate a company's specific relationship with the Third Reich and publish their findings. Although some companies had begun investigating their Nazi past prior to the 1990s, many more were prompted to investigate their history as a result of THL.[145] By ensuring that corporate archives would not be used

141. We thank Owen Fiss for pointing this out in a personal conversation with one of the authors.

142. Leora Bilsky & Tali Fischer, *Rethinking Settlement Theoretical Inquiries in Law*, 15 THEORETICAL INQUIRIES IN L. (forthcoming, 2013).

143. For a review of these critiques, see RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS 1-24 (2011). For a critique of domestic criminal trials and in particular their use of historian expert-witnesses, see HENRY ROUSSO, THE HAUNTING PAST: HISTORY, MEMORY, AND JUSTICE IN CONTEMPORARY FRANCE 48-83 (Ralph Schoolcraft trans. 2002).

144. See *supra* notes 116-117 and accompanying text.

145. As historian Gerald Feldman—who was commissioned by Allianz to investigate its Nazi past—explains: "It was inconceivable that German corporations prior to the 1990s would have gone around looking for, let alone publicly announcing the kinds of documents I mentioned in connection with the Deutsche Bank, let alone ask people like myself . . . what other awful things we could find." Feldman, *supra* note 51, at 26. His investigation resulted in his study, ALLIANZ AND THE GERMAN INSURANCE BUSINESS, 1933-1945. GERALD D.

against the defendants in litigation, and by precluding future litigation, the settlement incentivized hundreds of German companies to research their Nazi past and make the findings publicly available.

Similarly, in response to the restitution lawsuits, Switzerland commissioned historians to research its relationship with the Third Reich.[146] The Bergier Commission (named after the historian who led it) reported a concerted wartime policy on the part of Swiss banks to comply with German requests for transfers from Jewish accounts, even when those transfers were contrary to their customers' interest and to the law. It also confirmed the plaintiffs' claims that after the war, the Swiss banks had deliberately failed to return assets deposited with them by victims of the Holocaust. The findings of the Bergier Commission and Volcker audit were, in turn, used by the court in the Swiss case to design the settlement distribution mechanism.[147]

It is instructive to compare the courts in THL with the structural reform courts celebrated by Fiss. As discussed, the courts in THL served as narrative catalysts that enabled and relied on historians outside of the litigation to write the fullest accounts ever produced of corporate involvement in the crimes of the Holocaust. Compared to the structural reform court, Judge Korman not only

FELDMAN, ALLIANZ AND THE GERMAN INSURANCE BUSINESS, 1933-1945 (2001); *see also* HAROLD JAMES, THE DEUTSCHE BANK AND THE NAZI ECONOMIC WAR AGAINST THE JEWS 4 (2001). For discussion of the new relationship between judge and historian in THL see generally Bilsky, *New Model, supra* note 70.

146. The Commission was composed of nine distinguished historians from various countries (Switzerland, U.S., Israel, and Poland) and appointed by the Swiss parliament, which granted the commission unprecedented powers and resources. It had unimpeded access to the archives held by Swiss private companies, including banks and insurance companies; the companies were prohibited from destroying any files relating to the period being examined by the commission; and the initial budget of 5 million Swiss francs was increased to a total of 22 million. BERGIER REPORT, *supra* note 19, at 498-99.

147. For instance, the Bergier Commission's findings of improper behavior by the Swiss banks formed the basis of legal presumptions adopted in the rules for distribution of the settlement, such as the presumption that the account owner or heirs did not receive the proceeds of the account since "the Account Owners, the Beneficial Owners, and/or their heirs would not have been able to obtain information about the Account after the Second World War from the Swiss bank due to the Swiss banks' practice of [destroying records or] withholding or misstating account information in their responses to inquiries by Account Owners and heirs because of the banks' concerns regarding double liability." *Rules Governing the Claims Resolution Process (As Amended),* 17 (2000) http://www.crt-ii.org/_pdf/governing_rules_en.pdf [hereinafter *CRT Rules*]; *see In re* Holocaust Victim Assets Litig., 319 F. Supp. 2d 301, 302 (E.D.N.Y. 2004) (amended memorandum and order). Moreover, because the Swiss banks had destroyed many relevant transactional records, the Special Master in the Swiss banks litigation drafted rebuttable presumptions governing the size and payment status of categories of matched accounts with no surviving transactional records, relying on statistical averages developed by the Volcker auditors. Neuborne, *supra* note 30, at 61.

was less authoritarian, he did not have as many roles to play. This enabled him to avoid the compromises inevitably made by the structural reform judge in the prolonged remedial phase of reform litigation.

*3. Monetary Remedy: The Public Value of Settlement*

THL did not culminate in an adjudicated judgment. For Fiss, the absence of such a judgment is unacceptable. While we acknowledge that THL did not produce legal precedent, we argue that THL in its entirety—not just the reported judicial decisions—should be understood to have substantial public value.[148] It is a familiar claim that globalization is characterized by a growing democratic deficit.[149] As two of us have elaborated elsewhere,[150] we see the procedures used in THL as an attempt to remedy that deficit in the context of the Swiss and German cases[151] by promoting the democratic values of participation, transparency, and deliberation.[152] In the Swiss banks case, the fairness hearings and other procedures employed to design the settlement granted individual victims and community organizations a voice in the proceedings. The mechanism to distribute the bank-account-related portion of the Swiss settlement also operat-

148. Our argument is akin to Bruce Ackerman's case for recognizing The New Deal as a constitutional "moment" that effectively amended the U.S. Constitution. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 34-57 (1991).

149. To the familiar limitations of domestic democratic processes, such as the muting of minority voices and the capture by special interest groups, is now added the fact that policy-making at the global level erodes national sovereignty without offering significant venues for participation by civil society. Moreover, the growing dependence on foreign capital has significantly increased the domestic political leverage enjoyed by private foreign corporations, which are not, in counterpart, accountable to the citizenry. Eyal Benvenisti, *Sovereigns as Trustees of Humanity*, 107 AM. J. INT'L L. (forthcoming 2013). In this context, "partitioning political space along territorial lines" insulates "extra- and non-territorial powers" such as MNCs, financial markets, investment regimes, and the global media from justice. FRASER, *supra* note 132, at 23.

150. Bilsky & Davidson, *supra* note 16, at 19-21.

151. See, in particular, *supra* notes 138-140 and accompanying text.

152. A number of scholars have argued that in the absence of elections, we should consider due process guarantees in litigation as substitutes for those values. Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Conception, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 88 (2012) (arguing that in procedural matters the democratic values of equality, dignity and sovereignty over one's fate are embodied in principles of due process such as adequate representation, public proceedings, and fair procedures); Armin von Bogdandy, *The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations*, 23 EUR. J. OF INT'L L. 315, 321 (2012) (arguing that a close reading of Articles 9-12 of the European Union Treaty reveals an attempt to develop democracy in the European Union, by abandoning the concept of holistic democracy, based on group and elections, and developing a concept of individualistic democracy, based on equal citizenship, transparency, participation and deliberation).

ed according to detailed rules promoting transparency and accountability.[153] In the absence of international institutions able to remedy the failings of Swiss and German law,[154] THL created a forum bringing together corporations, victims, lawyers, diplomats and community organizations to engage in the dialogue and exchanges of information described above.

However, it is not just the participatory process in THL that had value: the histories produced in the shadow of the settlement have value in themselves. The involvement of European corporations in the Nazi crimes was researched extensively, making public the extent of their corporate responsibility. The veil of the organization itself was pierced in the organizational histories produced as a result of the litigation. Historians explored the internal dynamics of the corporations, focusing on individual managers and their responsibility for the corporation's acts.[155] Significantly, it was the very lack of legal decision and the promise of finality that enabled the production of these new historical narratives. Though the settlement agreements did not contain any formal undertaking on the part of the defendants to give researchers access to their archives, the lack of formal determination of liability and the immunity from future lawsuits encouraged the defendants, as well as numerous non-defendant corporations, to open their archives to prestigious historians and to fund their research.[156] In this way, the responsibility of corporations for participation in the Nazi crimes was examined in a detailed, case-by-case manner, echoing the contextualized fashioning of norms praised by Sturm.

Furthermore, the monetary settlement actually provided creative ways of fashioning a mode of accountability, which reflected the complexity of corporate involvement in atrocity. First, settlement was appropriate to address the responsibility of bureaucratic organizations. This argument was raised by Sturm and others[157] in relation to structural reform of prisons and other public

153. *CRT Rules*, *supra* note 147.

154. *See supra* notes 19-20, 51-53, and accompanying text.

155. *See, e.g.*, JONATHAN STEINBERG, THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR 67-68 (1999) (discussing the personal responsibility of directors of the bank).

156. *See, e.g.*, PETER HAYES, FROM COOPERATION TO COMPLICITY: DEGUSSA IN THE THIRD REICH xv (2004). Of course, the corporations' attitude can be explained as mere economic calculation, as it is less costly to research one's history after settlement has been reached. Yet the "moral" responsibility embraced by the German corporations is much broader than legal liability, and led to extensive self-investigation, which from a historical and normative perspective represents a substantial advance.

157. Sabel & Simon, *supra* note 114, at 1073-81. Sturm's articles on prison reform are collected in Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 1996 n.13 (1999) (reviewing MALCOM FEELEY & EDWARD RUBIN, JUDICIAL POLICYMAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (2000)).

agencies. THL illustrates how this argument is strengthened in relation to private corporations such as banks and industrial firms. The imposition of monetary sanctions is a fitting way to make corporations internalize responsibility by "speaking the language" that the firms understand.

Second, settlement enabled THL to address the sharing of responsibility and moral complexity of corporate involvement in atrocity. THL was criticized for singling out a few corporations chosen on the basis of financial standing and international activity rather than their actual responsibility.[158] Yet here again, through a claim for damages, the litigation served as a catalyst to broaden the circle of responsibility. Indeed, the imposition of a monetary, liquid sanction allowed the defendants to share the burden of liability. Thus, in Germany, the German government contributed over half of the German companies' monetary settlement. Furthermore, the German government encouraged German companies that were not defendants, as well as the general public, to contribute to the settlement in light of the fact that more than 20,000 companies had used slave labor during the war.[159] Over 6,500 German companies contributed.[160] This sharing of liability reduced the arbitrariness in the choice of defendants for which the THL claims were criticized. The inter-bureaucracy cooperation and spreading of the financial burden of legal liability reflects the collaboration and sharing of responsibility among states and large sectors of the economy in committing atrocities. This collaboration was made possible by the monetary character of the remedy and by the fact that there was no judgment expressly assigning legal responsibility to the specific defendants in the litigation. Settlement thus provided the conditions for an appropriate response to bureaucratic wrongdoing, echoing Carrie Menkel-Meadow's claim that settlement can provide more substantive justice than adjudication because it frees the court from the need to fit complex situations (here, the widespread use of slave labor in the German economy in cooperation with the State) into narrow legal categories (here, the dozen formal defendants to the lawsuits).[161]

158. Going after the 'deep pocket' was considered, in this respect, an arbitrary choice. MARRUS, *supra* note 71, at 90.

159. BAZYLER, *supra* note 18, at 88-89. When it became apparent that German companies were reluctant to contribute, the German state made contributing more attractive by giving tax deductions. According to Bazyler, companies were finally shamed by public opinion into contributing, following a media campaign organized by the government and the defendant companies. As there were still fewer contributors than originally expected, the contribution rate was raised (originally 0.1 percent of the 1998 turnover, then raised to 0.15, and the founding members increased their contribution to 0.2 percent). *Id*. at 353-54 n.104.

160. EVZ: STIFTUNG ERINNERUNG VERATWORUNG ZUKUNFT (2012), http://www.stiftung-evz.de/eng/the-foundation/facts-and-figures.html.

161. Carrie Menkel-Meadow, *Whose Dispute is it Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases),* 83 GEO. L.J. 2663, 2679 (1995).

Finally, the lawsuits did bring about reform in the defendants' corporate culture. It should be emphasized that German corporations, like the Swiss banks, consistently denied having any legal—as opposed to moral—responsibility.[162] Yet, as described earlier, the German defendants—as well as many corporations that were not defendants—were willing to open their archives for investigation when the parties reached a monetary settlement. Similarly, the Swiss banks agreed to extensive audits under judicial pressure. Some claims against European banks also involved accusations of modern-day cover-up of wartime robberies. These claims, the high amounts demanded and paid, and the public relations damage led defendants to realize that history has to be dealt with, and that the operation of corporations can no longer be guided by profits alone.[163] Furthermore, in the German case, settlement provided a way for the responsibility of the state and private corporations to be internalized through the legislation of the Foundation Law, a sovereign act of the German state. Though this internalization of responsibility was far from adequate, this case illustrates how settlement, because it is not limited to the legal categories of the claim and the measures available to courts, enabled participants to design procedures that could be tailored to the dispute and were viewed as legitimate

162. Roger M. Witten, *How Swiss Banks and German Companies Came to Terms with the Wrenching Legacies of the Holocaust and World War II: A Defense Perspective*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY 90 (Michael J. Bazyler & Roger P. Alford eds., 2006).

163. The new historical narratives triggered by the litigation in turn provoked transformations in patterns of national collective memory of states such as Switzerland, Austria, and Germany. In Switzerland, the myth of neutrality fell apart with the banks' scandal, and today its cooperation with the Third Reich is the subject of public discourse. Michael Berenbaum, *Confronting History: Restitution and the Historians*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* note 162 at 43, 45. For an in-depth analysis of the transformation of Swiss collective memory following THL, see Regula Ludi, *Legacies of the Holocaust and the Nazi Era*, 10 JEWISH SOC. STUD. 116 (2004). In Austria, where the image of the country as a victim of Nazi Germany had prevailed, the lawsuits led to the recognition of partial responsibility and to a public discussion of the participation of ordinary Austrians in the Nazi crimes. Berenbaum, *Confronting History: Restitution and the Historians, supra* at 46-47. According to plaintiffs' lawyer Deborah Sturman, in Germany "[t]he cases precipitated a nationwide discussion about the widespread use of slave labor during World War II (virtually every business and most farms had used slave labor), the practice of 'Aryanization,' and, most profoundly, that 'ordinary' Germans both participated in the development and execution of those policies and derived their benefits. That debate helped shatter the widely accepted myth that only a small number of senior Nazis bore responsibility for the crimes of the Third Reich." Deborah Sturman, *Germany's Reexamination of Its Past through the Lens of the Holocaust Litigation*, *in* HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY, *supra* at 216. *But see* GÖTZ ALY, HITLER'S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE 1-4 (Jefferson Chase, trans. 2007), and MARRUS, *supra* note 71, at 87-88, for the view that the German litigation shifted the blame from ordinary Germans to a few giant corporations, producing yet another distortion of history.

by the participants because of their involvement in crafting the settlement.

Until now, we have drawn parallels between structural reform and THL. We have shown that notwithstanding the differences between them, both reflect an attempt to address rights violations by powerful bureaucracies, and both employed the class action mechanism as a way to overcome failures of the political arena. This continuity, we suggested in the introduction, can help us develop a more robust theory of transnational corporate liability for human rights violations. In the next Part, we turn to one of the dominant theories of transnational human rights litigation and suggest how our approach can contribute to theorizing about corporate accountability.

## III. TOWARD A PLURALIST THEORY OF TRANSNATIONAL CORPORATE ACCOUNTABILITY

As noted in Part II,[164] THL relied on the theory of transnational public law litigation (TPL) as well as the legacy of structural reform. TPL was elaborated by Harold Koh to make sense of the international human rights litigation—often brought under the Alien Tort Statute—in United States courts after the Second Circuit's decision in *Filartiga* in 1980.[165] In articulating the framework for transnational public law litigation, Koh saw parallels between that litigation and structural reform. As with domestic public law litigation, transnational public law litigation is intended "to vindicate public rights and values through judicial remedies . . . , often with the goal of provoking institutional reform."[166] Central to TPL is the blurring of boundaries between domestic and international law—a functional approach that emphasizes process and dialogue and takes into account actual outcomes.[167]

TPL is the most sophisticated theoretical model of transnational corporate

164. *Supra* note 81 and accompanying text.

165. The term "transnational law" was coined in the International Court of Justice by Judge Philip Jessup in 1956 to refer to "all law which regulates actions or events that transcend national frontiers." HAROLD HONGJU KOH, TRANSNATIONAL LITIGATION IN UNITED STATES COURTS 2 (2008).

166. *Id*. at 23-24. Indeed, Koh sees TPL as a legacy of structural reform. His explanation for the rise of ATS litigation in 1980 relies on two developments in the 1970s: the rise of domestic public law litigation and the explosion of transnational commercial litigation in U.S. courts (which led to the question, if contracts, why not torture?). Koh, *supra* note 122, at 2364-66. Furthermore, Koh has described *Filartiga v. Pena-Irala*, 577 F. Supp. 860 (E.D.N.Y. 1984), as the *Brown* of transnational public law litigation because *Filartiga* prompted a wave of academic scholarship and human rights litigation, reminiscent of the way in which *Brown* inaugurated the era of with civil rights cases. Koh, *supra* note 122, at 2366.

167. *Infra* note 179 and accompanying text.

liability elaborated to date.[168] However, TPL does not adequately describe or account for THL for two reasons. First, TPL does not take into consideration the group structure of the litigation; that is, Koh does not specifically account for the role of the class action in enabling human rights litigation such as THL. Second, TPL draws legitimacy from—and seeks to further—the elaboration of clear norms, in particular the universal norms of international (human rights) law. THL, at the intersection of structural reform and TPL, suggests the need for a pluralist reformulation of TPL. As with the earlier discussion of structural reform and THL in Part II, we begin by noting the parallels between TPL and THL. We then argue that, insomuch as THL differs from transnational public law litigation, those differences suggest a pluralist reformulation of TPL. In doing so, we move from a hierarchical model to a dialogical model and from a model of hard to soft law in order to address human rights violations by bureaucratic organizations.

### *A. The Classic Theory of Transnational Public Law Litigation*

As in domestic private law litigation, transnational public law litigation seeks to impose liability retrospectively on wrongdoers in order to compensate victims of that wrongdoing. Simultaneously, as in traditional international law litigation between states, TPL has the prospective aim of "provok[ing] judicial articulation of a norm of transnational law, with an eye toward using that declaration *to promote a political settlement in which both governmental and non-governmental entities will participate*."[169] This strategic goal is often served by a declaratory or default judgment declaring that a norm of international law has been violated.[170] The model is therefore a hybrid, blurring the boundaries between international and domestic law on the one hand, and public and private law on the other.[171] According to Koh, this blurring of boundaries is explained

168. According to Koh, "history and precedent make clear [that] corporations can be held liable" under the TPL framework. KOH, UNITED STATES COURTS, *supra note* 165, at 46; *see also id*. at 46-50. While other theories of corporate responsibility have been developed, those theories elaborate the substantive duties of corporations to respect human rights. *See, e.g*., Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 545 (2001); ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006). In contrast, Koh's theory of TPL emphasizes the transnational process through which liability is imposed and therefore is better suited to our pluralist approach.

169. KOH, *supra* note 165, at 25 (emphasis added).

170. In this model, norm enunciation is not merely symbolic, but constitutive — that is, "'not simply to change behavior, but to change minds.'" *See id*. at 41 (quoting Melissa A. Waters, *Normativity in the "New" Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455, 463, 470 (2007)).

171. *Id*. at 1-9.

by the ultimate purpose of this type of litigation, which is for domestic legal systems to internalize international legal norms.[172]

TPL's blurring of legal boundaries is related to its dialogical quality—what Koh describes as "'dialectical legal interactions' among . . . law declaring fora."[173] The model endorses the legal pluralism of the New Haven School of International Law, accepting domestic courts—and not only international institutions—as legitimate sources for the interpretation and development of international law.[174] Development of international law by multiple communities implies interaction and dialogue, including with domestic courts.[175] Furthermore, with respect to a particular dispute, it may be difficult to enforce a judgment from a domestic court in another country. Accordingly, ultimate resolution of the litigation often requires a political solution that must be negotiated by and between the various parties and nations involved. Though the legal decision is crucial in that it establishes norms, it is only one step in a broader political process in which the dispute will be settled and the declared norms thereby internalized.[176] (This, again, echoes the shift identified by Fiss from the judge as umpire, issuing a liability decision, to the judge as manager, involved in the long-term effort to bring about compliance with the liability determination.)

As we have discussed, THL was part of a broader political campaign that sought to hold private firms accountable for their wrongdoing during the Nazi era. Indeed, a significant criticism of THL is that the litigation was nothing more than an attempt to coerce a settlement at an opportune political moment.[177] In our view, this criticism is unwarranted in light of the importance of

172. According to Koh, transnational public law litigation is only the "judicial face" of "Transnational Legal Process," "the transubstantive process whereby states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into substantive domestic law . . . [t]hrough repeated cycles of 'interaction-interpretation-internalization,' interpretations of applicable global norms are eventually internalized into states' domestic legal systems." *Id*. at 8 (citation omitted).

173. *Id*. at 6 (quoting Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 307, 311 (2007)).

174. *Id*. at 5-6 (citing Berman, *supra* note 173, at 307).

175. *Id*. at 6 (describing law "downloaded" from international law to domestic law, law "that is uploaded [from a domestic legal system], then downloaded [by becoming part of international law,] and . . . law that is borrowed . . . from one national system to another").

176. "[D]omestic decisions no longer represent final stops, only way stations, in a transnational legal process of "complex enforcement," triggered here by transnational public-law litigation. Even resisting nations cannot insulate themselves forever from complying with international law if they regularly participate, as all nations must, in transnational legal interactions." Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 199 (1996) (citation omitted).

177. *Supra* notes 73-74.

dialogue between political actors under TPL. That is, the theory of transnational public law litigation explains the "political" aspects of THL as reflecting the dialogic character of TPL[178] and the enforcement problems associated with domestic judgments in international civil litigation. Though Koh does not address settlement in his discussion of norm-enunciation (whether through declaratory or default judgments) under TPL, the dialogic character of the model nevertheless provides additional justification for settlement in the context of THL. "In the end, like all litigation, transnational public law litigation is a development whose success should be measured not by favorable judgments, but by practical results: the norms declared, the political pressure generated, the illegal government practices abated, and the innocent lives saved."[179]

From this perspective, one can favorably contrast THL with the ATS class action against former Filipino ruler Ferdinand Marcos.[180] In that case, liability was clearly established by the court in a landmark decision hailed for elaborating norms of international law.[181] Yet the class has spent decades litigating enforcement, showing the difficulty of obtaining a judgment without the involvement or support of the political process.[182] Though this enforcement problem is specific to transnational litigation, it is similar to the problem of enforcement encountered in classic structural reform. As we discussed in Part II and as Sturm argued, making the defendants active participants in the process increases their willingness to internalize the result.

However, if adjudication is not central to the TPL model, explicit norm elaboration is.[183] The ultimate objective of the process is for states to form and internalize norms of international law. Yet THL, though it has fulfilled important public functions, lacks the explicit elaboration of a clear and precise norm of corporate liability for involvement in human rights violations. This suggests the insufficiencies of current theorization about transnational litigation against corporations.

178. The theory emphasizes the role of interaction among states (whatever their political character, liberal or otherwise) and nonstate actors as the crucial trigger to a process leading to norm internalization. KOH, *supra* note 165.

179. *Id*. at 26.

180. *See generally* Joan Fitzpatrick, *The Future of the Alien Tort Claims Act of 1789: Lessons from* In re Human Rights Marcos Litigation, 67 ST. JOHN'S L. REV. 491 (1993).

181. *See, e.g*., Ralph G. Steinhardt, *Fulfilling the Promise of* Filartiga*: Litigating Human Rights Claims Against the Estate of Ferdinand Marcos*, 30 YALE J. INT'L L. 65, 68-69 (1995).

182. *See, e.g*., STEPHENS ET AL., *supra* note 126, at 242 (describing ongoing efforts to settle human rights litigation).

183. Even in the absence of adjudication, norm elaboration could conceivably be achieved by treaty, opinions, or even a settlement agreement.

*B. Toward a Pluralist Theory of Transnational Litigation*

Norm elaboration is integral to Koh's vision of TPL. Such elaboration involves—indeed, requires—the articulation of clear values upon which there is consensus (for example, "the international human rights norm against disappearance").[184] Universal norms are required under TPL in part to grant domestic courts legitimacy in deciding cases with a strong element of extraterritoriality. This reliance upon and articulation of clear norms situates courts in TPL in a similar position as Fiss's structural reform judge. That is, the court's legitimacy is preserved or protected in both structural reform and in TPL by the fact that the court's authority derives from fundamental (or foundational) legal principles. Thus, if the judge in the domestic structural reform lawsuit can counter the critique that she is infringing on the separation of powers by appealing to constitutional norms, U.S. courts involved in transnational litigation can deny that they are imposing *Lex Americana* on foreigners by appealing to universal human rights norms. Indeed, it is precisely because the court is adjudicating in what initially seems to be a novel context—whether structural reform litigation such as school desegregation or TPL such as *Filartiga*—that the court anchors its actions in clear norms.

THL sought to impose liability on private firms in the absence of clear, consensual norm on what misconduct warrants civil liability for corporate involvement in human rights violations. Furthermore, because THL was resolved through settlement, it did not expressly elaborate any norm for such misconduct. Thus, in terms of the theory of transnational public law litigation, we are faced with a conundrum: while the lawsuits in THL were paradigmatically transnational, they cannot draw legitimacy from the universality of international norms on which the model relies.[185]

Before we address that dilemma, we must first note another parallel that follows from the importance of clear norms in structural reform and TPL. Just as Fiss's focus on constitutional values led him to sharply distinguish between the liability and remedial phases, Koh's focus on international norms obscures the distinctive normative significance of procedure in TPL, at least as it relates to our account of THL. Koh has famously developed the concept of "transnational legal process" and insists that inquiries into legal process have a long

184. KOH, *supra* note 165, at 6.

185. Though the theory of transnational public law litigation envisions domestic courts developing international law norms, in order to avoid problems of legitimacy the norms must enjoy a certain amount of consensus before domestic courts become involved. In *Transnational Public Law Litigation*, Koh writes that the political question doctrine should be rarely invoked in transnational public lawsuits "except in those cases where there is so little consensus about the international rules at issue that there is literally no law for the court to apply." Koh, *supra* note 122, at 2387.

pedigree in international legal scholarship.[186] However, the concepts of transnational legal process and transnational public law litigation remain oriented towards the elaboration and internalization of norms of international law. Thus, Koh treats the question of the nature of the defendant as one of mere procedure, distinct from and auxiliary to the norm of international law prohibiting human rights violations.[187] Similarly, class actions are treated as a mere variation on the party structure of the litigation.

Our account of THL elaborates on Koh's approach. We suggest moving beyond a "hard" model of law in domestic and transnational contexts and propose a pluralist approach. Reading THL in light of the pluralist reformulation of American structural reform strongly suggests that there is no clear distinction between norms and process. As we discussed in Part II, THL encompasses more than the transfer of billions of dollars through the settlements; it also entails the legal procedures and devices that enabled them. This includes the encounter and negotiations among corporations, victims, lawyers, diplomats, and community organization; the administrative procedure that grew out of the slave and forced labor class actions; as well as the distribution process that prompted and in turn relied on victim questionnaires and historical research produced out of court in the Swiss banks case. Koh's focus on norms obscures the normativity and democratic value of these creative devices.

THL also suggests that the search for consensual norms of corporate responsibility is elusive. How were corporate entities to act when their employees were conscripted into the army and the remaining civilian labor market was composed largely of slave and forced laborers? What should insurance companies and banks have done when numerous business opportunities presented themselves as a result of the persecution of Jewish citizens by the state? And what was the responsibility of corporations that just "did business" with a criminal regime? We would be hard pressed to find consensual norms on the complex issue of the responsibility of economic "enablers," especially when the responsibility for the firms' actions is intertwined with political actions of a corrupt state.[188] To the extent that TPL sanctions litigation only where the predicate of a clear, consensual norm is involved, it would direct victims of corporate misconduct to the political branches that already have failed those victims.

186. *See* Koh, *supra* note 176; KOH, *supra* note 165, at 24.

187. KOH, *supra* note 165, at 46.

188. Even Koh notes that "[t]o constitute a 'complicity offense,' the corporate conduct must meet a very high standard." KOH, *supra* note 165, at 486. As of 2008, when Koh wrote TRANSNATIONAL LITIGATION IN UNITED STATES COURTS, no suit against a private corporation for "direct human rights violations or for acts in complicity with state human rights violations" had "been fully adjudicated in the plaintiffs' favor." *Id*.

If THL relies on the legacies of structural reform and transnational public law litigation, yet lacks these models' authoritative norms—constitutional principles and international norms, respectively—from where does this process draw its legitimacy? Following our pluralist understanding of law, we suggest that THL's justification lies in the participatory and contextualized nature of the process described in Parts II.C.2 and II.C.3. We do not claim that THL constitutes a model that can simply be reproduced in future legal struggles for corporate liability for human rights abuses. Rather, our analysis of THL suggests that a robust theory of transnational corporate liability should seek to harness domestic court procedures that reflect the bureaucratic nature of the wrongdoing, such as class action procedure. Such a theory should emphasize meaningful participation by a wide range of stakeholders, and the need to contextualize the process so that it can be adapted to the special issues raised by each case (such as in the Swiss case, the problem of access to information, and in the German case, concerns for German sovereignty). Following the catalyst conception of courts, THL suggests that settlement can provide the flexibility needed to allow the parties themselves to participate in designing the procedure, incentivize defendants to contribute information and help them internalize its results.

## CONCLUSION

At the time of publication of this article, the impact of the U.S. Supreme Court's decision in *Kiobel* on transnational human rights litigation against corporations remains unclear. While some see *Kiobel* as the end of an era,[189] others predict that another avenue for such litigation will be found—for example, in state courts.[190] We do not adopt a position on this question. Instead, we have tried to steer the discussion of transnational human rights litigation against corporations away from formalist considerations and toward a more pluralist understanding of law. THL's success can be explained not in relation to the ATS and the elaboration of international law norms of corporate liability—though the extraterritorial interpretation of the ATS prevalent in the 1990s probably made it easier for the courts to accept jurisdiction in the first place—

189. Julian Ku & John Yoo, *The Supreme Court Unanimously Rejects Universal Jurisdiction*, FORBES.COM (April 21, 2013), http://www.forbes.com/sites/realspin/2013/04/21/the-supreme-court-unanimously-rejects-universal-jurisdiction.

190. *See generally* Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709 (2012); Roger Alford, Kiobel *Insta-Symposium: The Death of the ATS and the Rise of Transnational Tort Litigation*, OPINIO JURIS (Apr. 17, 2013), http://opiniojuris.org/2013/04/17/kiobel-instthe-death-of-the-ats-and-the-rise-of-transnational-tort-litigation.

but as a result of the appropriateness of the class action procedure, including the possibilities for participation and contextualization offered by settlement to addressing bureaucratic liability. International law has come to be seen by many as a form of global administrative law.[191] Ultimately, this article suggests taking the "administrative" metaphor further in order to address the structure and responsibility not only of regulatory bodies,[192] but also of the business corporation itself.

191. *See generally* Benedict Kingsbury, Nico Krisch, & Richard B. Stewart, *The Emergence of Global Administrative Law,* 68 LAW & CONTEMP. PROBS. 15 (2004) (mapping what they see as the emerging field of Global Administrative Law).

192. According to Kingsbury, Krisch and Steward, global administrative law comprises "the mechanisms, principles, practices, and supporting social understandings that promote or otherwise affect the accountability of global administrative bodies," themselves defined to include "formal intergovernmental regulatory bodies, informal intergovernmental regulatory networks and coordination arrangements, national regulatory bodies operating with reference to an international intergovernmental regime, hybrid public-private regulatory bodies, and some private regulatory bodies exercising transnational governance functions of particular public significance." *Id*. at 17.