

Rethinking Settlement

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*In his canonical articles *Against Settlement and The Forms of Justice*, Owen Fiss argues that the erosion of civil litigation harms the deliberative process and the elucidation of public values in society. By revealing the hidden public dimension underlying not only public law litigation, but also the adjudication of private law disputes, Fiss's argument can be conceptualized as posing a challenge to the public/private distinction. At the same time, Fiss's critique reinforces the public/private divide by placing settlement and civil litigation on either side of the borderline.*

In this Article, we set out to dispel the prevalent depiction of settlement as inherently private, and to challenge the binary logic of the private/public distinction as it is understood to apply to settlement. We show how settlements have the capacity to fulfill each and every one of the public functions attributed to the civil trial, including the elaboration of norms, the discovery of facts, the facilitation of democratic participation, and the creation of public narratives. The functional, process-oriented approach we offer depicts settlement as a device that does not stand in opposition to the promotion of rule of law values — but rather as an institution that enhances the articulation of public norms. Our discussion progresses against the background of three settlement arenas: settlement in the classic civil suit context, structural reform suits, and transnational Holocaust litigation.

INTRODUCTION

During the last few decades the institution of settlement has expanded significantly, mainly through the evolution of the alternative dispute resolution (ADR) movement and the growth of transitional justice processes, as well as the formation of truth commissions and other forms of extralegal dispute resolution bodies.¹ In addition, we are witness to the development of various

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forms of “soft law” manifested in the ethical codes of multinational corporations (MNCs) as well as in the resolution of transnational claims for human rights violations.

The expansion of the social role played by settlements provoked opposition to this institution, with law professor Owen Fiss’s renowned *Against Settlement* at the forefront of the debate.² *Against Settlement* is part of a set of articles in which Fiss draws a distinction between two competing conceptions of civil litigation: *the Dispute Resolution Model* and *the Public Norm Elaboration Model*.³ The Dispute Resolution Model presupposes a civil litigation landscape in which similarly situated parties with roughly equal capacities are involved in (mainly) monetary compensation disputes, and turn to the court to serve as a neutral umpire of their disputes. Such a depiction of the civil litigation landscape, argues Fiss, motivated the drive toward settlement,⁴ which — as an institution — is aimed at the pursuit of peace rather than justice.⁵ Fiss contests such a depiction of the world of civil trials: the Public Norm Elaboration Model of adjudication views the civil litigation process as a central component of political life, similar to the legislative process and to free elections,⁶ and stresses the political role of the grinding of the mills of justice in civil trials.⁷ This understanding of civil trials points to the intrinsic value of litigation.⁸ Fiss argues that the attrition of the adjudicatory arena, by way of institutionalizing settlement, harms the deliberative process and the elucidation of public values in society.⁹

Fiss’s critique can be conceptualized as posing a challenge to the public/private distinction — for Fiss exposes the implicit public dimension underlying not only public law litigation, but also the adjudication of private law disputes.¹⁰ However, Fiss’s challenge stops at the civil suit gate: while he acknowledges

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1 For example, South Africa’s Truth and Reconciliation Commission.

2 Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984).

3 See David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619, 2629 (1995).

4 *Id.*

5 See Fiss, *supra* note 2, at 1085.

6 See Luban, *supra* note 3, at 2637.

7 Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 *FORDHAM L. REV.* 1177 (2009).

8 See Luban, *supra* note 3, at 2637.

9 See Fiss, *supra* note 2.

10 For a similar articulation of Fiss’s argument, see Luban, *supra* note 3, at 2637.

the public dimension of the civil suit, he views the settlement process as exclusively private. Fiss's depiction of settlement as an inherently private institution is shared even by those who disagree with him on policy grounds: both critics and advocates of the ADR movement and of the institution of settlement in the civil suit realm often share the assumption that settlements cannot fulfill important public functions — the most notable of which refers to their normative capacities and to the failure to act as potential sources of law. The aim of this Article is to challenge the private/public distinction as it is understood to apply to settlement, and to point to the public dimensions underlying settlement, including the elaboration of norms, the discovery of facts, democratic participation, and the creation of public narratives. Fiss's rejection of settlement, we argue, is connected to a formalist mode of reasoning that separates norm and remedy. Yet, following Samuel Issacharoff and Robert Klonoff in the civil suit and class action context, and Susan Sturm in the structural reform context, we claim that norm and remedy cannot be neatly distinguished, and a process-oriented approach is therefore called for. By replacing the formalist divide with a functional approach, we demonstrate that adjudication and settlement are not posed on either side of the private/public dichotomy.

Our discussion progresses against the background of three settlement arenas: settlement in the classic civil suit context, in structural reform suits, and in transnational Holocaust lawsuits. One reason for highlighting these arenas is the fact that they represent three chronological stages of the institution of settlement, resulting in reactive upsurges of critiques against settlement from legal academia and the bench. Our emphasis on these arenas, however, is not only rooted in our attempt to follow the chronological evolution of the institution of settlement or the footsteps of the literature criticizing this process. Rather, we believe that these arenas jointly highlight something fundamental about the public role of settlement and the interaction between settlement, democratic deliberation, and public adjudication: these three arenas represent increasingly difficult cases to make for the public value of settlement. The structural reform lawsuit has a more salient public dimension than general civil lawsuits, as its objective is to elaborate public norms, in particular the promotion of equality. Settlement's legitimacy in these lawsuits therefore appears to be reduced, as settlement obstructs courts' task of enunciating norms. Yet, even in the contexts in which civil suits serve as a means of elaborating public norms, we argue, settlement can serve public functions, occasionally better than adjudication itself.

The case study of the transnational Holocaust restitution lawsuits of the 1990s (transnational Holocaust litigation, or THL) brought in U.S. federal courts against European corporations, for participation in the crimes of the

Third Reich, poses an even greater challenge for the public value of settlement. We propose to view it as a type of structural reform litigation that was adjusted to transnational litigation.¹¹ Grounded in private law, in particular the law of restitution, and reflecting many aspects of the structural reform model, these suits were ultimately settled for unprecedented amounts, without the defendants formally assuming any legal responsibility. Holocaust-related claims have extremely strong moral-public dimensions calling for normative regulation, such that the difficulties of justifying monetary settlement are made more acute. However, as will be shown, even in the THL context settlements facilitated the formation of a deliberative public sphere, resulting in the creation and clarification of norms.

The Article proceeds as follows: Part I presents the arguments put forward by scholars for the public dimension of adjudication. Part II argues that despite conventional wisdom, many of the public functions of adjudication can actually be realized through settlement of civil lawsuits. Part III then refines the argument by developing it in the more specific context of structural reform lawsuits. Part IV develops the central argument put forth in the Article, using the case study of the transnational Holocaust restitution class action brought before U.S. federal courts in the 1990s against Swiss banks for the restitution to Holocaust victims of accounts held since World War II, and against German corporations for compensation for forced and slave labor during the war.

I. THE PUBLIC DIMENSION OF CIVIL SUITS

The arguments positing civil lawsuits and the institution of settlement on either side of the private/public divide stem from the public dimension attributed to the former (and supposedly absent from the latter). As claimed by David Luban, these arguments can be roughly divided into two archetypes.¹² The first set of arguments is instrumental in nature — viewing adjudication as a means of achieving certain public values and ends. The second set of arguments views adjudication as an intrinsic good in and of itself.¹³ Challenging the prevalent classification of settlements as an exclusively private phenomenon thereby requires addressing each of these arguments separately. We will begin by briefly surveying the instrumental approach and then move on to address the intrinsic value approach to the “publicness” of adjudication. After making the instrumental and intrinsic cases for the public nature of adjudication (and

11 See *infra* notes 110-115 and accompanying text.

12 Luban, *supra* note 3, at 2621.

13 *Id.*

the inherent private qualities of settlement), we will turn to challenging the adjudication/settlement divide by revealing how settlements accommodate the social goals and public value attributed to civil suit litigation.

A. Instrumental Value of Public Adjudication

Adjudicating civil disputes bears prominent private features, in that the resolution of a dispute generates private utility for both parties to the proceeding.¹⁴ But alongside this private utility are also public utilities to adjudication of the dispute: the very constitution of a system for peacefully resolving disputes in society¹⁵ and the very appeal to that system have the characteristics of public goods.¹⁶

1. Deterrence

The dispute-determination function promotes social peace not only in ending the enmity between the two parties to the actual dispute but also, in a broader fashion, by creating a general deterrence effect.¹⁷ Bringing rights-violators to justice deters potential injurers from acting similarly, the outcome being a general prevention of harms and disputes.

2. Legal Norms

The public goods inherent to adjudication refer not only to public *peace*, but also to public *justice*: another central public good supplied by the judicial process is the legal precedent.¹⁸ Legal precedents are vital for guiding social

14 See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979).

15 See Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1813 (1986).

16 Anthony de Jasay, *Self-Contradictory Contractarianism*, in FOR AND AGAINST THE STATE 150 (John T. Sanders & Jan Narveson eds., 1996); Luban, *supra* note 3, at 2622-26; Lawrence B. Solum, *Alternative Court Structures in the Future of the California Judiciary: 2020 Vision*, 66 S. CAL. L. REV. 2172 (1993).

17 For an extensive discussion of the enforcement counterpart to this phenomenon, see RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 5 (1985); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

18 See KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 23 (1974); JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY* 108 (1975); RODNEY H. MABRY ET AL., *NAT'L INST. L. ENFORCEMENT & CRIM. JUST., AN ECONOMIC INVESTIGATION OF STATE AND LOCAL JUDICIARY SERVICES* 78 (1977); Jules Coleman & Charles Silver, *Justice*

behavior.¹⁹ They assist in the ex-ante prevention of disputes and in their ex-post resolution. Salient examples of public courts' contribution to lawmaking and social norm-setting are the sexual harassment precedents and the development of the prohibitions in the realm of domestic violence.²⁰

Legal precedents feature the defining public good characteristic of non-rivalry: from the moment a body of precedents is formed, an unlimited number of individuals can make use of this legal corpus and derive from it the entire diversity of attendant utilities. The marginal cost of supplying the legal precedent to an additional consumer is nearly zero.²¹ The fact that one agent shapes her behavior in accordance with a legal precedent does not detract, in itself, from the ability of others to act similarly.²² In addition to the defining feature of non-rivalry, the public good quality of in-excludability is also present in the legal precedent framework: it is not possible to grant copyright in a legal precedent or to preclude someone without such property rights to act in accordance with its prescriptions.²³ Moreover, in-excludability manifests in the legal precedent in both its aspects: not only is there no practical way of withholding the fruits of the precedent from someone who did not participate in supplying it, but the economic feasibility of so doing is doubtful.²⁴ The power of the legal precedent is anchored in its collective application. Any attempt to limit the consumption of the legal precedent solely to those who have participated in its supply process would be directly at odds with the very

in Settlements, 4 SOC. PHIL. & POL'Y 102 (1986); Landes & Posner, *supra* note 14.

- 19 JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* 355 (1994).
- 20 Judith Resnik, *Secrecy in Litigation: Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 536 (2006).
- 21 John R. Haring & Kathleen B. Levitz, *The Law and Economics of Federalism in Telecommunications*, 41 FED. COMM. L.J. 261, 285 n.43 (1989).
- 22 Solum, *supra* note 16, at 2176.
- 23 *But cf.* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249 (1976) (examining the extent of optimal investment in "production" of legal precedents and the desirable pace of investment in them, as a function of the capital invested, the rate of depreciation, and the relevance of the interaction between these factors. In the margins of this model, the authors related to a certain allocation of "copyright" in the legal precedent, but the proposal that they put forth in this context is problematic and leaves many irresolvable vacuums.).
- 24 MABRY ET AL., *supra* note 18, at 80.

essence of the legal precedent as a tool for minimizing transaction costs and guiding social behavior.²⁵

In light of its public good nature, the legal precedent will be undersupplied outside the public adjudication arena — in the market realm of private adjudication and settlement. Neither the parties to the dispute nor private arbitrators in the market arenas of private adjudication (ADR) and settlement are expected to internalize the social gains of the precedent in their utility functions, and they may therefore refrain from investing the socially optimal level of resources for the development of the law.²⁶ Instead of contributing the public good of legal norm generation, disputing parties and private arbitrators will be incentivized to free-ride on the lawmaking efforts of others, i.e., they are incentivized to use legal norms made in other cases but to refrain from investing the resources involved in contributing legal norms of their own.²⁷ Optimal development of the law will be possible, consequently, only by way

25 JAMES M. BUCHANAN, *THE BASES FOR COLLECTIVE ACTION 2* (1971).

26 William M. Landes and Richard A. Posner claim that adjudication has public good characteristics, and that its optimal level will therefore not be supplied in a free market. Their discussion focuses on one particular market arena — private courts and arbitrators. They emphasize the limitations of private courts in norm creation. Landes and Posner maintain that in a competitive market for adjudication, the exposure of the rules at the foundation of the judicial verdict is likely to guide potential litigators with regard to the line the particular arbitrator (private judge) will take in similar cases in the future, thereby deterring (at least one of the sides) from litigating before that arbitrator. Due to the need to attract future customers, arbitrators in the private sector are likely, therefore, to refrain from judicial lawmaking and to instead wrap a cloak of ambiguity around the normative considerations that guide them in their decisions. *See* Landes & Posner, *supra* note 14, at 239-40. While Landes and Posner's canonical article focuses on the market institution of private courts and on the motivations of private arbitrators, their conclusion regarding the undersupply of legal precedents outside the public adjudication arena is in fact much broader: it may be applied also to the institution of settlement and to the motivations of the parties to the disputes. Like private arbitrators, the parties to disputes are also not expected to internalize the public utility associated with norm-generation in their utility functions, leading to a lower than optimal level of normative resolution of disputes in society (or a higher than optimal level of settlement) and to a derivative undersupply of legal norms. Like private arbitrators, private parties to the disputes may also attempt to free-ride on the norm-generating efforts of others, rather than to optimally contribute to the public good.

27 Clayton P. Gillette, *Rules, Standards, and Precautions in Payment Systems*, 82 VA. L. REV. 181, 217 (1996). The problematic nature of initiatives in the framework of a competitive market for legislation also arises in the federal context:

of public supply of legal norms, and based on non-market motivations and incentives, which exist in the framework of the public adjudication system.²⁸

The delegalization and undersupply of legal norms in the market realms of private adjudication and settlement is a widespread assumption shared by both critics and advocates of the ADR movement and of the institution of settlement in the civil suit realm.²⁹ According to this prevalent view, settlements fail to act as a potential source of law for they simply mimic the expected trial outcomes.³⁰ This shared understanding is portrayed by Carrie Menkel-Meadow:

Those who critique the lack of rules and principles and the “mushiness” of nondefinitive rulings also lament what they perceive to be the absence of precedent in settlement processes [T]oo many settlements will reduce the making of law or provide an insufficient “sample” of cases from which the courts will draw to fashion rules to govern human behavior.³¹

3. Fact Finding

Even in cases in which the legal issues at stake are negligible, and where the trial essentially revolves around ascertaining the factual claims, adjudication

Essentially, the risks of innovative laws are borne asymmetrically: the benefits of successful legal innovations are shared with non-innovating, free-riding states, whereas the consequences of failed innovation (sunk research and development costs, migration of constituents out of the jurisdiction, and diminished reputation and goodwill) are shouldered by the innovating state alone.

Ronald J. Daniels, *Should Provinces Compete? The Case of Competitive Corporate Law Market*, 36 MCGILL L.J. 130, 149 (1991). Of course, this quotation refers to the legislative arena, and not the litigation process — but there are substantial similarities between the legislative process and the norm-generating function of litigation as far as the effects of privatization are concerned.

28 Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 436 (1999).

29 Stephen Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

30 Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 962 (2010); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

31 Carrie Menkel-Meadow, *Whose Dispute Is It Anyways?*, 83 GEO. L.J. 2663, 2679 (1995).

plays a central public role.³² For, similar to the case of the legal precedent, judicial fact finding is also a public good, and plays a role in succeeding litigation.³³ The trial serves as a public epistemological sphere — as a means of conveying messages to political actors, prospective litigants and the public at large.³⁴ For example, returning to the sexual harassment example, the judicial finding of liability can caution the public against the particular defendant.

Unlike the litigation process, settlements tend to restrict access to public knowledge, including information regarding public safety and health hazards. The ability to conceal matters underlying the factual basis for liability in nondisclosure agreements tends to be a significant part of the mutual gains that settlement offers, the result being harm to the deterrence potential of law and dispute resolution.³⁵

4. *Legitimacy*

Beyond providing mere access to information, norms of openness in courts serve as a means of facilitating a proper phenomenology of law and the process of lawmaking.³⁶ In addition, open adjudication serves as a mechanism for the licensing of the exercise of state power. Secrecy undermines the ability of the state to command the social meaning of conflicts and their resolutions.³⁷ Moreover, the adjudicatory process may also further the public good of legitimizing court authority. In the words of Luban: “Whenever disputants rely on the final and public judgment of a court to resolve their controversy, they enhance the courts’ claim as an authoritative resolver of controversies.”³⁸ Since confidentiality is the norm — rather than the exception — in the settlement arena, settlements cannot fulfill these public functions underlying the administration of civil justice.³⁹

5. *Interim Summary*

To conclude, the abovementioned social utilities underlying adjudication may be undersupplied in the settlement arena: disputing parties will fail to internalize this range of social utilities in their utility functions. Due to free-

32 Luban, *supra* note 3, at 2639.

33 *Id.*

34 See Samuel Bray, *Not Proven: Introducing a Third Verdict*, 73 U. CHI. L. REV. 1299, 1308 (2005).

35 Depoorter, *supra* note 30, at 983.

36 Resnik, *supra* note 20.

37 *Id.*

38 Luban, *supra* note 3, at 2625.

39 Resnik, *supra* note 20.

riding tendencies, each individual in the market will rely on others to supply deterrence, legal rules, information, and judicial legitimacy — and will not be willing to bear the costs of supplying these public components of the judicial process. The outcome will be a suboptimal supply of these public goods.⁴⁰

Alongside the non-internalization of the *positive* externalities, depicted hereto, a parallel problem relating to the institution of settlement is the imposition of *negative* externalities, namely, the potential for shifting undesirable behavior to third parties not represented around the bargaining table. The settlement between *A* and *B* over environmental pollution, for example, may include a component of diverting the pollution to the external parties *C* and *D*.⁴¹ The adjudicatory process constrains the parties' ability to minimize their mutual losses by shifting the burden to third parties, due to the legal basis underlying the court resolution, as well as the open nature of the outcome.⁴²

The preceding set of arguments emphasized the instrumental role fulfilled by the adjudicatory process in the furthering of public goals. It focused upon the necessity of legal precedents for fostering a system of rules, and for providing the normative infrastructure essential for prospective transactions. This abovementioned set of arguments perceives law as “facilitative,” and the infusion of “value” into the law as solely transactional. It has been characterized by Luban as Hobbesian in nature: focusing on state monopoly in dispute resolution as a prerequisite for social coordination and peace.⁴³

B. Intrinsic Value of Public Adjudication

1. Democratic Deliberation

Another strand of the debate — to which we will now turn — views adjudication as an intrinsic end, in and of itself, and as an inherent component of the political and democratic processes. In other words, it construes the adjudicatory process and derivative legal precedents not only as institutions delineating the lives of individuals together, but also as a locus of democratic deliberation and

40 Susan Rose-Ackerman & Mark Geistfeld, *The Divergence Between Social and Private Incentives to Sue: A Comment on Shavell, Menell and Kaplow*, 16 J. LEGAL STUD. 483, 483 (1987).

41 Cf. Alon Harel, *Efficiency and Fairness in Criminal Law*, 22 MISHPATIM [HEBREW U. L. REV.] 499, 517 (1992) (Isr.) (discussing a similar example in the context of the privatization of protection against crime and the attendant externalities).

42 Luban, *supra* note 3, at 2626.

43 *Id.* at 2634.

moral judgment, embodying the “objective spirit”⁴⁴ and the “communal life”⁴⁵ of the political community.

The *sine qua non* of law, under this view, is the fact that it expresses the political community’s constitutive morality.⁴⁶ In addition to consolidating and reflecting the political community’s shared value scale, law also plays a central role in constituting human cognition and serves as a filter through which human beings, subject to the rule of law, understand and experience the world around them.⁴⁷ And since adjudication “provides occasions for law”⁴⁸ and for the politics that law codifies, adjudication forms an essential part of the political process.⁴⁹

Following Hannah Arendt’s depiction of freedom as rooted in the political arena,⁵⁰ Fiss,⁵¹ Luban,⁵² Judith Resnik,⁵³ and Stephen Yeazell⁵⁴ emphasize the role of adjudication in defining the public space: trials allocate political entitlements and set the baseline for political debate, by elucidating the social values that motivate specific legal rules and stances.⁵⁵ The constitutive role of law and adjudication in the development of political entities — they claim — is manifested in the fact that adjudication conceptually and historically precedes the rise of democratic political regimes.⁵⁶ Adjudication is thereby viewed as a central forum of reasoned deliberation, and as a sphere for the communal elucidation of conflicting visions of the good life.⁵⁷

In light of the relationship between vindication of rights and democratic deliberation, settlements — claim the critics — do not perform a political role. Rather, they are premised upon socioeconomic and other extrajudicial contingencies. In the settlement arena it is the more affluent or those who hold

44 G.W.F. HEGEL, HEGEL’S PHILOSOPHY OF MIND 268 (William Wallace trans., 1971), cited in Luban, *supra* note 3, at 2626.

45 Ronald Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479, 492 (1989).

46 ROBERT NOZICK, THE EXAMINED LIFE: PHILOSOPHICAL MEDITATIONS 286 (1989).

47 Anna-Maria Marshall, *Communities and Culture: Enriching Legal Consciousness and Legal Culture*, 31 LAW & SOC. INQUIRY 229, 237 (2006).

48 Luban, *supra* note 3, at 2637.

49 *Id.*

50 HANNAH ARENDT, THE HUMAN CONDITION 22-78 (1958), cited in Luban, *supra* note 3, at 2633.

51 Fiss, *supra* note 2.

52 Luban, *supra* note 3.

53 Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987).

54 Yeazell, *supra* note 29, at 675-76.

55 Menkel-Meadow, *supra* note 31, at 2667.

56 Resnik, *supra* note 20, at 521.

57 NOZICK, *supra* note 46.

greater social capital who may prevail, rather than those with the meritorious claims.⁵⁸ Settlements embody a coincidental meeting-point between converging choices that are singular and individual by nature. They are a product of preference and a realm for the expression of subjective particularistic visions of the good life, however idiosyncratic. Each party is guided by his own preferences, ends, or subjective morality.⁵⁹ Settlements are not considered a sphere for the collective elucidation of conflicting notions of justice nor do they seek to promote collective conceptions of the good life. They are, therefore, not vital to the political and democratic processes.

2. *Public Stories*

Even in cases in which the legal issues at stake are negligible, adjudication bears intrinsic value and political virtue due to its expressive capacities.⁶⁰ Public trials are arenas for construing stated narratives, and for conveying messages of moral condemnation.⁶¹ The trial organizes the complexity of diverse, sporadic and conflicting narratives, integrating them into a coherent voice and endowing them with meaning.⁶² Liability conveys a message of moral opprobrium of the defendant's action and value scale.⁶³

According to critics, settlement fails in this regard. In the words of Fiss, settlements "deprive a court of the occasion, and perhaps even the ability, to render an interpretation."⁶⁴ The terms of agreement do not communicate information regarding the underlying narrative, normative values, or the defendant's legal and moral culpability.⁶⁵ The information that settlement offers, unlike the outcomes of trial, cannot serve as a basis for further public

58 Menkel-Meadow, *supra* note 31, at 2667.

59 For a similar description with regard to liberalism, see Mark V. Tushnet, *Following the Rules Laid Down*, 96 HARV. L. REV. 781, 783 (1983).

60 Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 71 (1991); Marc Galanter & Mia Cahill, "*Most Cases Settle*": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1382 (1994).

61 Resnik, *supra* note 20, at 536.

62 Thus enabling those subject to it both to communicate with others and to distinguish themselves from others (law as identity).

63 Erik Lillquist, *Recasting Reasonable Doubt: Decision Theory and the Virtues of Variability*, 36 U.C. DAVIS L. REV. 85, 136 (2002) ("Behavior is criminalized, in part, in an effort to express society's moral condemnation of the behavior, as well as the values that the behavior symbolizes").

64 Fiss, *supra* note 2.

65 Issacharoff & Klonoff, *supra* note 7, at 1195.

deliberation.⁶⁶ Under this view, expansion of the institution of settlement would lead to an impoverished political dialogue and public realm.

II. THE PUBLIC DIMENSION OF SETTLEMENTS: THE TEST CASE OF THE CLASSIC CIVIL SUIT

Our discussion hereto was dedicated to articulating the prevailing lines of criticism against the institution of settlement, based upon the “public nature” of trial and the “private nature” of settlement. These common standpoints, however, fail to notice the vital (if implicit) public dimension underlying the institution of settlement. Moreover, many of the critics who object to settlement suffer from a basic bias in favor of adjudication: they conduct an asymmetric comparison between a utopian model of adjudication and a realistic model of settlements. Demsetz termed this approach “the Nirvana Approach.”⁶⁷ In what follows we set out to unveil the public facet of settlement.⁶⁸

Settlements fulfill the public values — instrumental and intrinsic — attributed to civil litigation. Some, such as the creation of a general deterrence effect by way of ex-post facto compensation, are rather self-evident, and do not warrant much discussion.⁶⁹ Other public functions, such as norm elaboration or fact-finding, are fulfilled in more subtle ways.

One obvious way in which settlements in the civil suit arena affect the normative landscape is by taking certain suits out of the general pool of cases brought before the court. Evidently this passive way of influencing the path of the law cannot serve as an incidence of the norm-elaboration model, as it exemplifies norm-setting by way of power rather than by way of reasoned deliberation. Thus, as argued in Marc Galanter’s seminal article *Why the*

66 Luban, *supra* note 3, at 2639.

67 Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1, 1 (1969). In Menkel-Meadow’s terms, these critics suffer from “litigation romanticism.” See Menkel-Meadow, *supra* note 31, at 2669. Furthermore, their depiction of the trial arena is empirically unfounded. Since the late 1930s, with the promulgation of the Federal Rules of Civil Procedure, and the development of pretrial proceedings, judges are becoming increasingly involved in settlement facilitation — both in the pretrial phase and during the course of trial. See Depoorter, *supra* note 30, at 975.

68 The general theoretical discussion provided in this Part, which is dedicated to the public nature of settlement in the context of the civil suit, will be refined in Part III, when we deal with the public nature of settlements in structural reform suits, and further demonstrated in Part IV in the THL arena.

69 Issacharoff & Klonoff, *supra* note 7, at 1196.

“*Haves*” *Come Out Ahead*, repeat players (litigants involved in similar litigation over time) settle disputes when they face an unfavorable precedent. Their tendency to litigate only when they can obtain a favorable precedent tilts the path of the law toward their interests.⁷⁰

Nonetheless, settlements influence the path of the law in more direct ways, casting their shadow over both the trial and future settlement arenas. One reason for the growing power of settlements as a source of normativity is rooted in the changing social and judicial stances toward in-court settlements in the civil trial arena. Thus, over the past few decades the role of judges in civil suit trials has undergone significant transformations. The classical perception of the judicial role — viewing judges as detached and uninvolved umpires, who decide the cases brought before them solely on the basis of their legal merits — has made way for managerial judging, whereby judges are perceived as assuming an active role, and engage in facilitation of settlement between the parties.⁷¹ As claimed by Judith Resnik, in the twenty-first century courts effectively function as institutions of settlement, and the work of trial judges is shifting “from courtrooms to chambers.”⁷² In this era of managerial judging, adjudication and settlements are no longer mutually exclusive and distinct categories. The growing role of judges in facilitating in-court settlements not only alters the “publicness” of the act of judging, but may also change the attitude toward and social role of the institution of settlement.⁷³ In the words of Ben Depoorter, the expanding involvement of judges in settlement “expands the potential shadow of prior settlements over future disputes.”⁷⁴

Moreover, as claimed by Depoorter, judges often view settlements as normative benchmarks precisely because of their voluntary nature.⁷⁵ Due to their consensual basis, settlements may be perceived as capturing the normative

70 Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *LAW & SOC’Y REV.* 97 (1974).

71 Judith Resnik, *Managerial Judges*, 96 *HARV. L. REV.* 374 (1982).

72 See Resnik, *supra* note 20, at 535 (citing Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 *J. EMPIRICAL LEGAL STUD.* 783, 800 (2004)).

73 Depoorter, *supra* note 30, at 974.

74 *Id.*

75 There is room to contest the voluntary nature of settlement in light of the socioeconomic contingencies and other external factors underlying it and mentioned in the text above. See *supra* note 58 and accompanying text. On the other hand, since settlements are struck in the shadow of trial, the discrepancies may often be depicted as simply mimicking the advantages of repeat players — and of the “haves” more generally — in the trial setting. Moreover, as will be shown in the context of THL, sometimes the settlement arena minimizes power disparities

outlook on the reasonableness and appropriateness of subsequent claims. Judges may interpret settlement precedents as expressive statements regarding the appropriateness of compensation. Thus, prior settlements between similarly situated parties and in cases of a similar nature may update and impact the expectations of judges (as well as lawyers and other repeat players in the judicial system).

Settlements affect not only the trial arena, but also the out-of-court arena. Despite the expansive resort to nondisclosure agreements, theoretical and empirical studies prove that information on civil settlements is distributed successfully among the legal community and potential litigants. Courts mandate the release of confidential settlements when such exposure is imperative for effectual discovery.⁷⁶ In addition, there are statutory limitations to the confidentiality of agreements when significant public interests are at stake — for instance, when health hazard issues arise.⁷⁷ Additional channels of communication include the oral culture of lawyers, specialized reporters and media coverage.⁷⁸ Due to their circulation via the professional networks of lawyers and repeat disputants, precedential settlements serve as points of reference for lawyers, and apply “peer pressure” on the settling parties in subsequent negotiations.⁷⁹

Finally, as claimed by Menkel-Meadow and other ADR advocates, settlements do not deprive the parties and the public at large of normative resolutions of disputes. In a deep sense they can facilitate solutions which are more just, in that they are free of the need to reduce the complex underlying moral considerations to legally cognizable categories. Unlike normative resolutions, settlements do not dictate the translation of the dispute and its resolution into the rigid and restricted categorization offered under the law, thereby facilitating the intrinsic public value of adjudication.⁸⁰

and allows for a more voluntary resolution of the dispute as compared to the trial arena. *See infra* Sub-Sections IV.B.1-2.

76 Depoorter, *supra* note 30, at 966.

77 *Id.*

78 *Id.* While the cases dealt with by the press may not be reflective of the great mass of settlements, and while the reports relating to them may not include the type of legal reasoning which would facilitate public deliberation — they do impact perceptions inside and outside of court. *See* Menkel-Meadow, *supra* note 31, at 2681.

79 Depoorter, *supra* note 30, at 977.

80 *See* Menkel-Meadow, *supra* note 31, at 2674.

III. THE PUBLIC NATURE OF SETTLEMENT: THE STRUCTURAL REFORM LITIGATION TEST CASE

We now turn our attention to the structural reform lawsuit. Fiss defines the “structural lawsuit” 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.”⁸¹ The judge is asked by the plaintiffs to declare the violation by the bureaucratic defendant of a constitutional value, and to issue an injunction in order to remove that violation. As the public dimensions of this mode of civil litigation are more pronounced than in ordinary civil suit trials, structural reform litigation provides a “hard case” in which to legitimize settlement. We propose to evaluate the arguments against settlement and see whether and to what extent settlement can be reconciled with the public rationale for these suits.

A. The Structural Reform Model of Litigation and Settlement

In his canonical article *The Forms of Justice*,⁸² Fiss turns the attention of the legal academy to civil rights class actions — structural reform suits — brought before U.S. courts during the 1960s and 1970s. Fiss wrote the article in 1979, when structural reform was under growing criticism from the bench and academia. He attempted to clarify the constitutional principles that can justify group litigation, and the changing role of the judiciary it entails. According to Fiss, the criticism stems from a misconception — a reading of this litigation according to the traditional model of “private dispute resolution” instead of understanding it as amounting to a new conception of adjudication, which he calls the structural reform model. This mode of adjudication is based on an understanding of civil litigation as concerned with promoting “rule of law” values. We elaborated on the public dimension of civil adjudication in Part I, explaining why litigation can be viewed as part of the public sphere of public deliberation about norms. This role of adjudication is particularly acute at times when other channels of public deliberation are closed, or biased in such a way that some groups are systemically excluded. Such was the case with African-Americans during the decades preceding *Brown v. Board of Education* and other desegregation cases. Fiss’s vision of the role of structural reform is shaped by these cases. Here we briefly introduce the changes that

81 Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

82 *Id.*

structural reform adjudication entails in relation to party constitution, the role of the judge, and the nature of the remedy sought in court. We then turn our attention to the issue of settlement.

According to Fiss,

[s]tructural 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.⁸³

The structural reform lawsuit transforms our conventional understanding of civil litigation, as the case is no longer between two private individuals over a past incident involving private property, but instead between a group of individuals and state actors involving the state's failure to adhere to the Constitution. Accordingly, 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.⁸⁴

As noted above, 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.⁸⁵ Furthermore, the remedial phase of the structural reform case "involves a long, continuous relationship between the judge and the institution."⁸⁶ That is because the judge's task is to eradicate the conditions of "an ongoing institution" that violate the Constitution.⁸⁷ As Fiss acknowledges, there is "almost no end" to judicial oversight of the defendant institutions in the structural reform case.⁸⁸

83 *Id.* 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").

84 *Id.* at 18.

85 *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, such as FED. R. CIV. P. 53 — that may be used to promote adequate representation in the structural reform lawsuit. Fiss, *supra* note 81, at 26-27.

86 *Id.* at 27.

87 *Id.* at 27-28.

88 *Id.* at 27.

The public dimensions of civil litigation are apparent in structural reform, as the judge undertakes to ameliorate a systemic failure of the two other branches of government, legislative and executive. The dramatic change that structural reform brought about in the role of the judiciary was a source of criticism.⁸⁹ However, for Fiss, it was this very public role of the litigation that justifies the radical changes in the role of the judge who thus fulfills the role assigned to him by the Constitution to make good on the constitutional value of equality.

Against this background we can better understand Fiss's critique of settlement. Structural reform should be understood as a legal answer to a systemic failure of the public sphere. Since settlement represents for Fiss the opposite of public deliberation, norm articulation and reasoned judgment, it undermines the very rationale of the litigation. We may venture to suggest that if structural reform requires that we reimagine the roles of the parties, judge, and remedy of civil litigation, in *Against Settlement* Fiss adds another essential component to his model — the rejection of settlement as essential to the fulfillment of the promise of structural reform litigation.

Various writers have argued that Fiss's opposition to settlement is connected mainly to class actions and other aggregated cases that raise deeper and more intractable problems, because "parties are not individuals but rather organizations or groups without designated spokespersons."⁹⁰ However, we suggest that Fiss may have been too hasty in his conclusion that settlement is necessarily inconsistent with the values of the structural reform lawsuit due to its classification as "private."

B. The Catalyst Judge and Settlement

A closer reading of Fiss's argument reveals that the cracks in the theory appear even before he turned his attention to settlement, and are connected to an internal tension, if not outright contradiction, between the new managerial role assigned to the judge and the constitutional justification for the litigation. Indeed, Fiss recognizes that "the core dilemma" in the structural reform model stems from a tension inherent in the judge's dual role as adjudicator

89 See John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of Federal Courts*, 84 CALIF. L. REV. 1121, 1123-24 (1996); Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949 (1978).

90 Issacharoff & Klonoff, *supra* note 7, at 1178 (citing Fiss, *supra* note 2, at 1078); see also Luban, *supra* note 3, at 2629-31.

and remedial “architect[.]”⁹¹ In the former role, 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. In the latter role, 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.”⁹² 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 articulator of public values. Confronted with the difficulties of and resistance 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.”⁹³

This dilemma strikes at the heart of the structural reform paradigm. On the one hand, structural reform is located in the context of bureaucratic organizations, and requires changing the role of the judge from being passive and detached to being involved and managerial. On the other hand, the need to justify the new role of the judge leads Fiss to emphasize his institutional role of norm elaboration, a role that is dependent on the detachment of the judge from the parties — a detachment that allows him to give meaning to constitutional values held in common.

This tension or contradiction was identified by Susan Sturm who suggested a way out of it.⁹⁴ Sturm explains that Fiss’s theory relies on a false dichotomy between right and remedy, which in turn relies on the public/private divide: “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.”⁹⁵

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. A way out of this contradiction would be to adopt a contextual approach (rather than

91 Fiss, *supra* note 81, at 53; *see also* Owen M. Fiss, *Reason in All Its Splendor*, 56 BROOK. L. REV. 789, 790-91 (1991) (distinguishing between the “right-declaring phase of adjudication” and the “remedial phase of lawsuit”).

92 Fiss, *supra* note 81, at 53.

93 *Id.* at 54-55.

94 Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51 (2004).

95 *Id.* at 62.

a formalistic theory) to the various types of structural reform litigation. Such exploration reveals that

[i]n areas of normative and remedial uncertainty and complexity, the function of judicially articulated legal norms is not to establish precise definitions and boundaries 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.⁹⁶

In order to do justice to the “messy” reality of structural reform litigation, Sturm suggests replacing Fiss’s model of an “imperial” and “detached” judge with a “catalyst” conception of the judge. In a sense it seems that although Fiss was bold enough to articulate a whole new grammar for civil litigation, he fell short of giving up the traditional conception of the imperial judge, which sits better with the traditional mode 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 continuing dialogue and 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.

This model offers a way to avoid the internal tension in Fiss’s model, and to better respond to the new role of the judiciary in structural reform litigation. If we accept this correction, we can understand differently 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 the collaboration of judge and parties, in both the process of factual inquiry and devising ways to reform the defendant institution. Furthermore, settlement can facilitate the creation of public spaces of deliberation and new channels of communication, thus promoting the intrinsic values of litigation described in the previous sections. We examine the new possibilities that such an approach opens through a case study of THL, which we propose to view as a type of structural reform litigation that was adjusted to transnational litigation.

96 *Id.* at 67.

IV. THE PUBLIC NATURE OF SETTLEMENT: THE THL TEST CASE AND SETTLEMENT IN A TRANSNATIONAL WORLD

The debate on settlement revived in the 1990s around THL. In previous articles, one of the authors argued that THL should be understood as a variant of the structural reform lawsuit, despite the fact that the relief sought was not an injunction but financial compensation.⁹⁷ In this Part we present THL and its legal and political background. We explain why THL should be seen as a transnational form of structural reform lawsuit directed against business entities. These lawsuits arose in the context of an ongoing failure to end the era of immunity for MNCs and, in the absence of any transnational democratic space able to create a body of agreed-upon norms, provide a remedy enforced by effective judicial and law-enforcement institutions. We argue that THL adapted the American structural reform lawsuit to the new reality of multinational corporate defendants and victims who form an amorphous group without a clear territorial center or representative institutions. Yet at the heart of the lawsuit stood huge financial settlements. THL therefore offers a fruitful and concrete case in which to examine the claim that settlement has public dimensions.

A. THL: A New Transnational Structural Reform Lawsuit

The wave of Holocaust restitution litigation began in 1996 in U.S. courts with class actions filed against Swiss banks on behalf of Holocaust survivors, some living in the United States but most of them abroad, for the restitution of monies held in bank accounts since the war, and soon expanded to include claims against banks in other countries, as well as claims for life insurance plans. In 1998, Swiss banks were the first to settle, for an unprecedented \$1,250,000,000.⁹⁸ Shortly thereafter, a series of claims against German corporations for the use of slave and forced labor during the war led to the establishment of a \$5,000,000,000 fund to which the German government and

97 Leora Bilsky, *Transnational Holocaust Litigation*, 23 EUR. J. INT'L L. 349 (2012); Leora Bilsky, Rodger Citron & Natalie Davidson, *From Kiobel Back to Structural Reform: The Hidden Legacy of Holocaust Restitution Litigation*, 1 STAN. J. COMPLEX LITIG. (forthcoming 2013).

98 See MICHAEL R. MARRUS, *SOME MEASURE OF JUSTICE: THE HOLOCAUST ERA RESTITUTION CAMPAIGN OF THE 1990s*, at 10-25 (2009). For a detailed exposition of the settlement mechanism, see Madeline Doms, *Compensation for Survivors of Slave and Forced Labor: The Swiss Bank Settlement and the German Foundation Provide Options for Recovery for Holocaust Victims*, 14 TRANSNAT'L L. 171, 175-92 (2001).

corporations contributed in equal shares, and to the signing of an Executive Agreement between the governments of Germany and the United States whereby in exchange for Germany's agreement to compensate victims, the United States undertook to make efforts to have any future litigation against the defendants dismissed.⁹⁹

THL was criticized by jurists and historians alike for its political aspects, for commodifying the Holocaust by reducing it to monetary claims, and in particular for culminating in settlement without a court judgment establishing the responsibility of the corporations. European observers unaccustomed to American class-action practice criticized the negotiation process prodded by the courts and the monetary settlements that followed as undermining the rule of law.¹⁰⁰ Furthermore, the active involvement of politicians and diplomats in the negotiation process has led commentators to present THL as a political rather than legal phenomenon.¹⁰¹ A few noted historians of the Nazi era criticized the historical representation of the Holocaust in these lawsuits, as well as the absence of legal judgment attempting to clarify the historical picture of the involvement of private business in the crimes of the Third Reich.¹⁰² Even legal practitioners involved in THL and praiseful of 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 plaintiffs' claims.¹⁰³

99 Under-Secretary of State Stuart Eizenstat played a pivotal role in the shaping of this agreement. See Doms, *supra* note 98. For an overview of the litigation campaign until 2006, see HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY (Michael J. Bazylar & Roger P. Alford eds., 2006).

100 MARRUS, *supra* note 98, at 28-29; Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 316 (2007); Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust Era Cases*, 80 WASH. U. L.Q. 835, 841 (2002); see also Constantin Goschler, *German Compensation to Jewish Nazi Victims After 1945*, in LESSONS AND LEGACIES VI: NEW CURRENTS IN HOLOCAUST RESEARCH 401 (P. Hayes & J.M. Diefendorf eds., 2004). Even proponents of reparations mechanisms were found to distance themselves from the aggressive litigation style of the lawyers involved.

101 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).

102 See MARRUS, *supra* note 98, at 85-114; Leora Bilsky, *The Judge and the Historian: Transnational Holocaust Litigation as a New Model*, 24 HIST. & MEMORY 117 (2012).

103 See Burt Neuborne, *A Tale of Two Cities: Adminstrating the Holocaust Settlements in Brooklyn and Berlin*, in HOLOCAUST RESTITUTION, *supra* note 99, at 60, 74; Morris Ratner & Caryn Becker, *The Legacy of Holocaust Class Action Suits:*

Though THL ended in settlement, in our view it has important normative significance, as it forced powerful corporations to acknowledge their Nazi past for the first time and respond materially (and not just symbolically) to victims' claims.¹⁰⁴ Until the 1990s, private corporations and their managers were rarely held liable for their involvement in the Holocaust. Even when they were criminally prosecuted, courts have been reluctant to convict defendants in the absence of unquestionable criminal intent.¹⁰⁵ Civil litigation in Europe did not provide a better solution. For decades, victims' demands for the return of bank accounts and compensation for forced and slave labor had been denied by the corporations.¹⁰⁶ The national governments of Germany and Switzerland had submitted to pressure from business in their respective countries to protect them from legal liability,¹⁰⁷ and the group of victims was so geographically dispersed as to be lacking the political power to change the

Have They Broken Ground for Other Cases of Historical Wrongs?, in HOLOCAUST RESTITUTION, *supra* note 99, at 345; see also Paul R. Dubinsky, *Justice for the Collective: The Limits of the Human Rights Class Action*, 102 MICH. L. REV. 1152 (2004).

- 104 For the view that corporations settled precisely in order to avoid liability, see Libby Adler & Peer Zambunson, *The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich*, 39 HARV. J. LEGIS. 1 (2002).
- 105 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 BENJAMIN FERENCZ, *LESS THAN SLAVES: JEWISH FORCED LABOR AND THE QUEST FOR COMPENSATION* 34-67 (Ind. Univ. Press 2002) (1979); 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).
- 106 FERENCZ, *supra* note 105 (describing how German compensation legislation failed to address inmates' labor for private firms, and showing that the few private lawsuits brought against the largest industrial firms resulted in paltry settlements). Likewise, requests by Holocaust survivors and their heirs for access to prewar bank accounts were often denied for failure to meet the banks' documentary requirements, in particular the requirement to produce death certificates. See STUART M. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 79 (2003); MARRUS, *supra* note 98, at 11.
- 107 See *infra* notes 120-122 for a discussion of the Swiss legislation favorable to Swiss banks. The 1953 London Debt Agreement froze individual claims for compensation against private German defendants until a peace treaty with Germany formally ending World War II be signed, and this in part following pressure from German business. Gerald D. Feldman, *Holocaust Assets and*

law. In Germany, courts regularly dismissed individual lawsuits by former slave and forced laborers, holding that existing compensation legislation precluded such lawsuits, even where plaintiffs failed to meet the eligibility criteria of the compensation laws in the past and where thus left with no compensation at all.¹⁰⁸ Moreover, the reliance on the ordinary mode of civil litigation was generally futile due to the structural limitations of the dispute resolution model. According to this model, individual Holocaust survivors claiming relatively small amounts of money had to face off with giant corporations benefiting from excellent legal representation and other advantages of size.

As we have shown in Part III, the turn to the class action for human rights violations in the United States was tied to failures of participatory public spaces.¹⁰⁹ This problem concerning the absence of a deliberative political arena is intensified in transnational struggles for justice, where MNCs operate in weak states, or exploit lacunae of international law and the absence of effective international judicial institutions. Thus, THL's public significance lies not only in its substantive outcome — the abrogation of the de facto immunity of corporations for involvement in the Nazi crimes — but also in the fact that in terms of process it created a forum, bringing together lawyers, giant corporations, victims, nongovernmental organizations and politicians to negotiate and design a dispute-resolution mechanism.

These achievements were made possible by a number of geopolitical and economic factors, including the end of the Cold War, the opening of archives in East and West, and economic and financial globalization which led to

German Business History: Beginning or End?, 25 GERMAN STUD. REV. 23, 25 (2002).

108 Adler & Zambunson, *supra* note 104, at 33-34. In the 1950s, Germany established a reparations program and signed treaties with Israel and other Western nations to provide compensation for victims of Nazis living in those countries. However, the reparations scheme had many important lacunae. Bundesentschädigungsgesetz [Federal Compensation Law], June 6, 1956, BGBL. I at 559 (Ger.), though it had the declared purpose of compensating for injustices under Nazi rule, imposed severe territorial restrictions on eligibility; in particular it did not provide for claimants residing in Eastern Europe. Furthermore, slave and forced labor were not recognized as grounds for compensation. Since most forced laborers came from Eastern Europe and returned there after the war, most former laborers had no claim under the law. Yet “[c]ourts regularly dismissed individual lawsuits by referring to existing compensation legislation,” even where plaintiffs failed to meet the eligibility criteria of the compensation laws. Adler & Zambunson, *supra* note 104.

109 *Supra* notes 83-84, 91 and accompanying text.

the opening of the American market to European companies.¹¹⁰ While these factors are doubtless important, in our view the use of the powerful device of the American class action was key. 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. By focusing on patterns of practice rather than the specific harm caused to each individual victim, class actions enable the law to deal with the liability of corporations as organizations instead of pinpointing individual decision-makers within the organization as guilty. Yet as we show below, it was not class action procedure alone that enabled THL to abrogate corporate immunity and serve as a deliberative forum, but the use of the class action combined with settlement.

Indeed, THL contains many important elements of the structural reform lawsuit as understood by Fiss. Like former structural reform suits, THL relied on the class action. It pursued bureaucratic defendants (large banks, insurance companies, and business firms) allegedly responsible for human rights violations,¹¹¹ without focusing on individual responsibility.¹¹² And it was administered by managerial, proactive courts.¹¹³ Although it targeted private businesses while former structural reform suits focused on state agencies and actors it did not diverge from the principal rationale for structural reform

110 See ELAZAR BARKAN, *THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* 90-91 (2000); MARRUS, *supra* note 98, at 75-84.

111 The three large Swiss banks sued were *Crédit Suisse*, the Union Bank of Switzerland (UBS), and the Swiss Bank Corporation, MARRUS, *supra* note 98, at 12. The defendants in the slave and forced labor suits included such large companies as Siemens, Daimler Benz, Volkswagen, Degussa, Hugo Boss, Bayer, Hoechs, as well as Ford and its German subsidiary, *id.* at 20. Finally, the insurance claims were brought against giant insurers such as Allianz and Generali, *id.* at 22.

112 The lack of focus on individual liability derives from the fact that the defendants were legal entities (as opposed to individuals), coupled with the primary focus of the claims on issues of property law (unjust enrichment, one of the lawsuits' principal claims, does not require proof of wrongful intent on the part of any individual within the defendant organizations).

113 The court's managerial activism is exemplified in particular by Judge Korman of the Brooklyn Federal Court in the Swiss banks litigation, who, among other things, initiated the consolidation of the three initial claims, urged the plaintiffs to appoint Burt Neuborne as special counsel to the plaintiffs, and is credited with being the architect of the settlement and with overseeing the process of distribution. MICHAEL J. BAZYLER, *HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA'S COURTS* 11, 27, 38-44 (2003). As can be appreciated from the above list, these judicial actions are more administrative than adjudicative.

suits. It is noteworthy 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.¹¹⁴

However, THL differed in one crucial aspect from former structural reform suits — its reliance on monetary settlement. This was made possible by the fact that THL took the form of a lawsuit for damages, grounded in the Alien Tort Statute (ATS), a track that would subsequently be followed by many lawsuits against MNCs.¹¹⁵ THL transformed the domestic structural reform suit into a transnational class action against European corporations by relying on the ATS, which until recently had been interpreted to create a form of universal civil jurisdiction for American courts. Thus, THL offered 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.

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 — are not unique to World War II-era victims, and characterize the struggles of many victims of human rights violations against multinational corporations

114 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 then expanded to state prisons and mental hospitals in the 1960s. It also reflects the limits of the state action doctrine in the United States. *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) (arguing that the state action doctrine at its most essential holds that the Constitution constrains only government behavior, not private behavior) (citing the Civil Rights Cases, 109 U.S. 3, 11 (1883)). Because 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.

115 Alien Tort Statute, 28 U.S.C. § 1350 (2006) (granting federal courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”). This provision was redeemed from near oblivion in 1980 in the landmark case of *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). However, in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), the Supreme Court held that the ATS should be construed not to apply to violations of international law that occur outside United States territory.

(MNCs). In contrast with most ATS litigation against MNCs, which has had very limited success, THL succeeded in making corporations pay prodigious sums after decades of refusing to acknowledge responsibility. Yet the importance of this success was overshadowed by the prevalent perception of THL in the legal academia as an unusual political case concerned with historic wrongs, lacking precedential value. This view, we contend, is largely due to a misconception of the role played by settlement in this litigation.

B. THL and the Public Value of Settlement

As mentioned, THL differed in one fundamental way from the structural reform model — the remedy sought was not an injunction aimed at reforming the corporations, but rather monetary compensation. The main expectation from the courts in THL was to facilitate monetary settlements. In fact, the multiparty negotiations supported by the relevant governments have been interpreted as constituting the “real” process.¹¹⁶ The emphasis on settlement paradigmatic of the dispute-resolution function of adjudication appears to send us back to the more limited objective of private litigation and thereby to undermine the public rationale of THL such as ending the era of immunity for businesses that benefited from the crimes of the Third Reich. However, in what follows we show that, to the contrary, settlement enabled THL to fulfill important public functions.

Even lawyers who participated in THL and have defended it against the critics present settlement as a “second best” solution, a necessary compromise given the difficulties of reaching a normative judgment, decades after the events, in the courts of a third party.¹¹⁷ Indeed, the questionable legitimacy of the American courts in judging the Holocaust makes it preferable to avoid substantive law decisions emanating from those courts. Furthermore, it seems obvious that so many years after the acts, and in a completely different political regime, there would be no sense in reforming the structure of the defendant corporations. Indeed, given the formidable legal obstacles standing in the way of the restitution claims, it seems that the settlements allowed a more substantive justice to be achieved.¹¹⁸

116 EIZENSTAT, *supra* note 106, at 340.

117 Burt Neuborne, *Transnational Holocaust-Related Litigation in United States Courts: The Swiss Bank and German Slave Labor Cases 110* (June 22, 2012) (unpublished manuscript) (on file with authors).

118 Key legal problems involved the applicable statutes of limitations, foreign affairs preclusion, civil procedure issues, and potential problems of proof. For further

Beyond these pragmatic considerations, can settlement be viewed as the preferred mechanism to resolve such a morally charged dispute as THL? In what follows we apply to THL the theoretical prism developed in Parts II and III to demonstrate how settlement can serve public functions. We show that because the courts in THL relinquished their imperial role for the dialogic, catalyst model described by Sturm, settlement of THL contributed, arguably better than would have been possible through adjudication, to the discovery of facts, the provision of an arena for public deliberation, the creation of public narratives, and the elaboration of norms.

1. Fact Finding

For six decades the involvement of private business in the crimes of the Third Reich has been shielded from legal investigation as well as from historical inquiry.¹¹⁹ THL helped uncover important information about corporate participation in the Nazi crimes in two ways: first, the judge's managerial powers, including the power to order discovery, triggered the uncovering of a large volume of historical data. Second, the lawsuits provoked the creation of historical commissions by both defendant corporations and European governments. Settlement was crucial to both of these developments.

In the restitution litigation against Swiss banks, the main obstacle before the plaintiffs was banking secrecy.¹²⁰ The banks urged the Swiss government to refrain from enacting laws that would have forced them to reveal the accounts.¹²¹ Without such disclosure laws, "the claims of surviving Holocaust victims were usually rejected under the pretext of banking secrecy."¹²² Thus, the existence in American courts of broad and liberal rules of discovery was

discussion, see Detlev Vagts & Peter Murray, *Litigating the Nazi Labor Claims: The Path Not Taken*, 43 HARV. INT'L L.J. 503, 514-22 (2002).

119 See *supra* notes 105-108 and accompanying text.

120 INDEPENDENT COMM'N OF EXPERTS SWITZERLAND — SECOND WORLD WAR, SWITZERLAND, NATIONAL SOCIALISM AND THE SECOND WORLD WAR: FINAL REPORT 255-61, 446 (2002) [hereinafter BERGIER REPORT]; LEONARD ORLAND, A FINAL ACCOUNTING: HOLOCAUST SURVIVORS AND SWISS BANKS 21 (2010).

121 BAZYLER, *supra* note 113, at 47.

122 BERGIER REPORT, *supra* note 120, at 455. Additional aspects of Swiss law, such as the unusual absence of an escheat law requiring unclaimed accounts to be transferred to the state, combined with regulations authorizing the destruction of account records after ten years, provided economic incentives for Swiss banks to hide the existence of accounts. In addition, the Swiss banks were keen to avoid any close examination of the large transfers of money made from Jewish accounts to the Reichsbank, as access to such information would surely have led to liability. See Amended Memorandum and Order, *In re Holocaust Victim*

a main source of attraction for plaintiffs.¹²³ Judge Edward R. Korman, who was in charge of the Swiss banks case, refused to formally order discovery to allow the plaintiffs' accounting experts to inspect the banks' records, fearing that such an order would have forced Swiss banks to commit a criminal act in their country. Instead, 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 validate the settlement as fair according to the law until access to information required for a fair claims procedure was secured.¹²⁴ In other words, since the transnational aspects of the case obstructed the reliance on formal rules of discovery, settlement allowed the parties to reach a type of discovery that was much broader than the one entailed by Swiss law, but restricted in American terms. Under court pressure, the Swiss banks agreed to form an independent group headed by Paul Volcker, to carry out a Swiss government-approved audit of the Swiss banks in the search for unpaid Holocaust-era accounts.¹²⁵ In a conservative estimate, the Volcker Committee discovered 35,000 relevant accounts.¹²⁶ Thus, the judge's far-reaching procedural powers to supervise settlement negotiations and condition the approval of the settlement agreement enabled him to pressure the banks into overriding their secrecy policy and revealing at least some valuable information. In this sense, settlement gave the courts tools to incentivize the defendants to reveal information notwithstanding legal limitations on discovery in a transnational setting.

In order to distribute the global settlement amount, the court in the Swiss case also encouraged the production of data. 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

Assets Litigation, 319 F. Supp. 2d 301 (E.D.N.Y. 2004) [hereinafter Amended Memorandum].

123 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 (1988); Oscar G. Chase, *American "Exceptionalism" and Comparative Procedure*, 50 AM. J. COMP. L. 292 (2002).

124 BAZYLER, *supra* note 113, at 39.

125 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 of being complied with, see Amended Memorandum, *supra* note 122, at 323-26. 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.

126 *Id.* at 324.

well as to gather information to assist the court in designing a fair scheme of allocation of the settlement funds.¹²⁷ On the basis of the information gathered, the Special Master appointed by the court in the Swiss banks litigation prepared a distribution plan that relied on, and in turn contributed to, the historical record.¹²⁸ The settlement, and in particular the possibility of obtaining a legal release from future claims, provided new incentives for Swiss corporations to self-identify as having used slave labor during World War II and contribute historical information.¹²⁹ By relying on settlement, which offered the promise of finality in the form of a release from future litigation, litigators managed to provide sufficient incentives for the banks and the Swiss government to begin a serious audit and release some information.¹³⁰

Finally, the settlement distribution stage also added to public information by creating a record of short personal histories through the elaborate individualized claims programs established for the claims related to bank accounts. The

127 In the view of Professor Burt Neuborne, one of the counsels for the plaintiffs, a central reason for bringing the cases was “to speak to history — to build a historical record that could never be denied.” Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 830 (2002). Neuborne writes that “approximately 580,000 questionnaires were returned, demonstrating overwhelming support for the settlement. Only 300 persons elected to opt out of the class,” *id.* at 827-28 n.117.

128 On September 11, 2000, the Special Master filed the Proposed Plan of Allocation and Distribution of Settlement Proceeds, a two-volume document of approximately 900 pages, which recommends how to allocate the settlement funds among the five classes of claims created by the settlement agreement, *see Chronology: In re Holocaust Victim Assets Litigation*, HOLOCAUST: VICTIMS ASSETS LEGISLATION (SWISS BANKS), <http://www.swissbankclaims.com/Chronology.aspx> (last visited Mar. 26, 2012). The main text of the plan presents the historical context, including summaries of the Volcker, Bergier and Eizenstat reports.

129 The settlement agreement created a class of claims for persons who performed slave labor for Swiss entities (Slave Labor Class II). Because of a lack of information, the court asked that companies seeking release from claims identify themselves and provide information, such as the names of slave laborers used by them. Several companies, including Nestlé, provided lists of thousands of individuals who had worked for them during the war and may have performed slave labor. The list of companies that identified themselves and the information they provided can be found at COMPANIES WHICH SEEK A RELEASE UNDER THE SETTLEMENT AGREEMENT BY IDENTIFYING THEMSELVES TO THE SPECIAL MASTER (2000), *available at* http://www.swissbankclaims.com/Documents_New/697505.pdf.

130 For a discussion of the settlement’s objective of extinguishing “all World War II-related claims against Switzerland and its industries through this settlement,” *see* BAZYLER, *supra* note 113, at 36.

Claims Resolution Tribunal set up in Zurich,¹³¹ under the direct supervision of the Brooklyn court, to adjudicate claims to the settlement funds related to bank accounts, resolved more than 100,000 claims, while memorializing every award in a written opinion, now publicly available on a website.¹³² Each award contains information provided by the claimant, including the name of the account owners, a personal story consisting of information regarding the owners followed by a brief explanation of family ties, and in some cases a description of the family's whereabouts during the war. According to Burt Neuborne, "[t]he thousands of CRT opinions . . . constitute a priceless addition to the historical record."¹³³

2. Historical Narratives

One of the most interesting results of the legal pressure produced by THL and the promise of finality offered by settlement was the creation of a new model of historical research: historical commissions consisting of distinguished historians from various countries, with the mandate to investigate the accusations and produce a written report. These commissions were created in the course of the litigation and some continued their work after settlement had been reached.

Two types of commissions emerged, national and private. In response to the restitution campaign, twenty-four European governments commissioned historians to research property spoliation in their countries during World War II.¹³⁴ The best-known government-appointed commission was the Bergier Commission formed in Switzerland in direct response to the lawsuits.¹³⁵ The

131 Roger P. Alford, *The Claims Resolution Tribunal and Holocaust Claims Against Swiss Banks*, 20 BERKELEY J. INT'L L. 250 (2002).

132 See *Certified Awards Rendered by the CRT*, HOLOCAUST: VICTIMS ASSETS LEGISLATION (SWISS BANKS), http://www.crt-ii.org/_awards/index.phtm (last visited Mar. 26, 2012).

133 Neuborne, *supra* note 117, at 62.

134 Helen B. Junz, *Confronting Holocaust History: The Bergier Commission's Research on Switzerland's Past*, JERUSALEM CTR. FOR PUBLIC AFFAIRS (May 1, 2003), www.jcpa.org/phas/phas-8.htm. For a list of research commissions relating to Holocaust-era assets and slave labor established by national governments, see *International List of Current Activities Regarding Holocaust-Era Assets, Including Historical Commissions, and Forced and Slave Labor*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/assets/> (last visited Mar. 26, 2012).

135 The commission was composed of nine distinguished historians from various countries (Switzerland, United States, Israel, and Poland), and appointed by the Swiss parliament, which gave 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

commission reported a concerted wartime policy on the part of Swiss banks to comply with German requests for transfers from Jewish accounts, even when this was 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 second type of commission consisted of one or more historians hired by German companies to investigate the company's relationship with the Third Reich. While some companies had begun investigating their Nazi past prior to the 1990s, THL is seen by many historians as the main engine leading German and European businesses to investigate their own history.¹³⁶ One effect of the move from judgment to settlement was the privatization of history writing. While this new model raises the specter of corporations gaining increasing power over the writing of history, the quality of the research produced is undeniable.¹³⁷ The assurance that corporate archives would not be used against the defendants in litigation and the preclusion of future litigation offered by settlement incentivized hundreds of German companies to hire historians to research their Nazi past in an objective manner and make the findings publicly available.

Not only did THL trigger the discovery of historical facts; it also provoked transformations in patterns of national collective memory of states. In Switzerland, the myth of neutrality fell apart with the banks' scandal, and

destroying any files relating to the period being examined by the commission; and the initial budget of five million Swiss Francs was increased to a total of twenty-two million. BERGIER REPORT, *supra* note 120, at 498-99.

136 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 107, at 26. His investigation resulted in his study, GERALD D. 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 a discussion of the new relationship between judge and historian in THL, see Bilsky, *supra* note 102.

137 For example, the Deutsche Bank's Nazi past was investigated by a number of prestigious historians working separately, but who read each other's drafts, in a process reminiscent of academic research. Furthermore, the bank's archives were left open for other researchers to evaluate the work of the commissioned historians. *See* JONATHAN STEINBERG, *THE DEUTSCHE BANK AND ITS GOLD TRANSACTIONS DURING THE SECOND WORLD WAR* 9-12 (1999).

today its cooperation with the Third Reich is the subject of public discourse.¹³⁸ In Germany, the sphere of responsibility was widened to include industrialists and civil society, contributing to the more general process of recognizing the responsibility of indirect participants — including ordinary Germans — for the Nazi crimes.¹³⁹ According to plaintiff 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.¹⁴⁰

Transformations in collective memory require a painful process of shattering national myths or overcoming social taboos. These transformations were made possible by the transnational aspect of the litigation, which allowed third-party (United States) courts to trigger a discussion in European nations. Furthermore, the use of private law, which is less morally laden than criminal law, and the targeting of indirect perpetrators allowed the law to address the “gray zone” of complicity with the Third Reich. Crucially, settlement served as a catalyst for the production of critical collective memories, by providing the incentives for corporations and national governments to go beyond their legal duty and investigate their own past.¹⁴¹

138 Michael Berenbaum, *Confronting History: Restitution and the Historians*, in HOLOCAUST RESTITUTION, *supra* note 99, at 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).

139 Berenbaum, *supra* note 138, at 46-47.

140 Deborah Sturman, *Germany's Reexamination of Its Past Through the Lens of the Holocaust Litigation*, in HOLOCAUST RESTITUTION, *supra* note 99, at 216, 217-19 (noting that alongside the new recognition of the important role of indirect participants in the operation of the Third Reich, there have been increasing demands that German suffering during and after the war be acknowledged). But see GÖTZ ALY, *HITLER'S BENEFICIARIES: PLUNDER, RACIAL WAR, AND THE NAZI WELFARE STATE* (Jefferson Chase trans., 2007); and MARRUS, *supra* note 98, 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.

141 *Supra* notes 134-137 and accompanying text.

3. *Democratic Deliberation*

In transnational struggles for justice, the challenges of democratic participation are exacerbated, as the dispute often exceeds the boundaries of the nation-state, and there is no transnational arena providing the means of democratic deliberation to those who are most affected by an issue. This was abundantly clear with respect to victims of the Holocaust, who were unable to affect the national legislation in Germany and Switzerland that was shielding corporations from accountability for Nazi-era wrongdoing.¹⁴² This is also the case as regards victims of MNCs' operations in developing countries today; these victims find themselves in a situation of conflicting interest with their own governments, which wish to encourage the entry of MNCs into their territory. International law has failed to create a forum for democratic participation of individuals and corporations in the design of norms that would apply to MNCs in developing nations, and thus one of the only avenues of deliberation open to victims is civil litigation in the courts of a third party.

The Swiss and German cases in THL provide two different models of democratic deliberation through settlement. The Swiss case was filed as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure¹⁴³ and therefore both negotiations and settlement distribution were supervised by the court. In contrast, the German negotiations were removed from the courts and managed by diplomats in a relatively informal process.¹⁴⁴

142 *Supra* notes 107-108 and accompanying text.

143 FED. R. CIV. P. 23(b)(3).

144 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), headed by the CEO of Daimler/Chrysler as chief negotiator. Under-Secretary of State Stuart Eizenstat organized the negotiations in Washington, D.C., which included eight interested countries (Germany, United States, Israel, Poland, Russia, the Ukraine, Czech Republic, and Belarus), two NGOs, GEFI and the main American lawyers in the class action. In the meantime, the judges in two cases filed in Newark Federal Court ruled that the claims were time-barred, as six years had passed between the signing of the 1991 treaty which had lifted the ban on individual claims (Treaty on the Final Settlement with Respect to Germany, Sept. 12, 1990, 1696 U.N.T.S. 124) and the filing of the lawsuits, while the statute of limitations under German law was two years. They further ruled that the 1991 treaty had extinguished international law claims by not providing explicitly for reparations. Neuborne, *supra* note 117. For an in-depth analysis and comparison of the Swiss and German cases in terms of deliberation and participation, see Leora Bilsky & Natalie R. Davidson, *A Process-Oriented Approach to Corporate Liability for Human Rights Violations*, 4 *TRANSNAT'L LEGAL THEORY* 1 (2013).

From the outset, the German corporations and German state insisted on a political solution, to avoid an American court procedure.¹⁴⁵ Furthermore, they demanded “legal peace” and that the administration of the settlement be undertaken by the Germans.¹⁴⁶ In the absence of settlement approved by a U.S. court,¹⁴⁷ legal closure was to be obtained by an executive agreement between Germany and the United States committing the United States to file a Statement of Interest seeking dismissal in any future Holocaust-related litigation against German industry.¹⁴⁸ In July 2000, the Berlin Accords were signed by representatives of German industry, the plaintiffs, and the eight interested nations.¹⁴⁹ It provided for an end to the class action litigation in return for a commitment by German industry and the German government to place ten billion Deutsche Marks for distribution to victims. For its distribution a German foundation, named “Remembrance, Responsibility and the Future” was created by the Bundestag and governed by a Board of Trustees representing the victims, interested governments, and the German companies. 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.¹⁵⁰ The distribution process conducted by the foundation was similar to the one in the Swiss case in that for each victim an individual claim was followed by a decision-making procedure according to predefined rules. However, a crucial difference is that in the German case

145 Otto Graf Lambsdorff, *The Negotiations on Compensation for Nazi Forced Laborers*, in HOLOCAUST RESTITUTION, *supra* note 99, at 170.

146 *Id.*

147 With respect to class action settlements certified by the court, finality for the defendants is provided through the doctrine of preclusion, which prevents class members from filing claims covered by the settlement. See Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 765 (2005).

148 MARRUS, *supra* note 98, at 21.

149 Agreement Concerning the Foundation “Remembrance, Responsibility and Future,” U.S.-Ger., July 17, 2000, 39 I.L.M. 1298.

150 Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung, Zukunft” [Law on the Creation of the Foundation “Remembrance, Responsibility and Future”], Aug. 2, 2000, BGBL. I at 1263 (Ger.), available at <http://www.stiftung-evz.de/eng/the-foundation/law.html>.

there was no third party, either a court or other body, to supervise the process and hear appeals in relation to distribution.¹⁵¹

Shifting the discussion from the question of “whether or not to settle?” to “what kind of settlement?” and comparing the judicial track created in the Swiss case with the diplomatic-bureaucratic track created in the German case reveals important differences in the democratic character of the deliberation process in the two cases. The comparison suggests that settlements closely supervised by courts and following formal procedures, as was the case with the Swiss litigation, can provide meaningful avenues for participation. Rule 23(b)(3) grants putative class members the right to opt out of the class, leaving them free to pursue their individual claims separately. As a result, the victims in the Swiss case benefited from the procedural safeguards accorded such class actions. A massive worldwide outreach program was designed to notify Holocaust victims and their heirs of the settlement’s terms and of their possibility to opt out.¹⁵² Over a million questionnaires were sent to potential claimants. 573,000 questionnaires were returned, demonstrating a high level of support for the settlement.

Furthermore, the formal court proceedings in the Swiss case actually gave individual victims and members of the public a direct, active voice — though not a right of veto — in certain key decisions. First, Special Master Judah Gribetz, who had been appointed by the court to design a plan for the distribution of the settlement, invited the public to submit suggestions for the allocation of settlement, and received many suggestions from individual survivors, as well as from Jewish and victim organizations.¹⁵³ Second, the “fairness hearing” created a formal process through which victims and others could express their opinion.¹⁵⁴ Some objections were raised by individual survivors and led to

151 The processing of claims and actual distribution was contracted out to a number of third parties — international organizations such as the International Organization for Migration (IOM). However, these organizations were not in a position to supervise the Foundation, and to the contrary were subordinate to it. Adler & Zambunson, *supra* note 104, at 26-28.

152 *Supra* note 127 and accompanying text. The notices informed potential class members of the settlement’s terms, explained how to deliver written comments to Judge Korman, encouraged interested persons to submit written comments on the settlement, and invited class members to a hearing in Judge Korman’s courtroom to discuss the settlement’s fairness and adequacy.

153 These can be read at *Archives*, HOLOCAUST: VICTIMS ASSETS LEGISLATION (SWISS BANKS), <http://www.swissbankclaims.com/Archives.aspx> (last updated May 9, 2013).

154 Two fairness hearings were held, one in the Brooklyn federal court, and another in Jerusalem, with Judge Korman participating by telephone. At the fairness hearing

substantial amendments to the settlement agreement.¹⁵⁵ In addition, it seems that the insistence of some victims that the money be returned to its owners and not used for charity convinced the judge that a corrective, individualized approach to justice must be adhered to as far as possible.¹⁵⁶

In contrast, the German case, working outside Rule 23, did not provide any similar opening for individuals to directly participate.¹⁵⁷ In that case, two large nongovernmental organizations (NGOs) sat at the negotiations table. In this

in Brooklyn, many individuals as well as organizations spoke, either directly or through lawyers. The transcript of the fairness hearing held in Brooklyn reveals a formal proceeding that provides room for dialogue. In addition to participation in the hearings, many class members wrote their views to the court by mail and email. Transcript of Civil Cause for Fairness Hearing Before the Honorable Edward R. Korman United States District Judge, (Nov. 29, 1999), *In re Holocaust Victim Assets Litigation*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), available at http://www.swissbankclaims.com/Documents/DOC_14_fairnesshearingtranscript.pdf.

155 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 Judge Korman not to approve the settlement, both sides agreed on an amendment exempting from preclusion efforts to recover specific works of art, and an insurance provision governing unpaid World War II-era Swiss life insurance policies. Moreover, the parties undertook to establish 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 117, at 62-68.

156 ORLAND, *supra* note 120, at 50. This is not to imply that there were no recriminations over the settlement. MARRUS, *supra* note 98, at 3-4. Advocates for the disabled, gay and Sinti-Roma complained that very few impoverished survivors in those categories were qualifying for assistance from the \$205,000,000 looted assets class funds. Neuborne, *supra* note 117, at 69-70.

157 Of course, the universe of potential claimants in that case was much wider, with over a million potential claimants, so that conducting participatory procedures such as hearings on the fairness of the settlement would perhaps have proved prohibitively time-consuming and costly.

manner, the process gave voice to the interests of the community of Jewish victims, which may be better represented by Jewish organizations established for the long term than by individual victims and their legal representatives.¹⁵⁸ Yet there was very little room in the German case for the voice of the victims themselves. In fact, the wishes of Jewish organizations were often at odds with those expressed by individual victims.¹⁵⁹ Furthermore, non-Jewish voices were ill-represented at the negotiations, and when they were present they complained of their unequal bargaining power.¹⁶⁰ The lack of adequate representation is even more troubling in light of the fact that potential class members did not have the opportunity to opt out of the arrangement as in the Swiss case,¹⁶¹ and the Foundation Law enacted by the German Bundestag in fulfillment of the settlement agreement purports to bar recovery pursued in any other forum.¹⁶²

158 For a discussion of Jewish organizations' representation of Jewish interests with respect to German reparations, see RONALD W. ZWEIG, *GERMAN REPARATIONS AND THE JEWISH WORLD: A HISTORY OF THE CLAIMS CONFERENCE* (1987).

159 In particular, the commemorative and educational projects funded by the German settlement were criticized by many who thought the settlement money should only go to Holocaust survivors. BAZYLER, *supra* note 113, at 275-85.

160 For example, no representatives of gay workers and disabled workers were present at the negotiations. An American lawyer joined the discussions in the middle to speak to the interests of the Roma, but no one signed the agreement on their behalf. Representatives from five central and eastern European countries present at the negotiations complained that the United States pressured them to accept the terms of the settlement agreement despite their sense that the compensation amounts were too low. Adler & Zambansen, *supra* note 104, at 22.

161 Libby Adler and Peer Zumbansen surmise that following U.S. Supreme Court precedent, which has limited the possibility of certifying a mandatory class under Rule 23(b)(1)(B) (that is, a class without the possibility of opting out), it is difficult to imagine that a court would have certified the class action against German corporations as mandatory. Thus, as in the Swiss case, there would probably have been an opt-out option had the German case remained managed by the courts. *Id.*

162 Gesetz zur Errichtung einer Stiftung "Erinnerung, Verantwortung, Zukunft" [Law on the Creation of the Foundation "Remembrance, Responsibility and Future"], Aug. 2, 2000, BGBl. I at 1263 (Ger.), available at <http://www.stiftung-evz.de/eng/the-foundation/law.html> [hereinafter Foundation Law]; Adler & Zumbansen, *supra* note 104, at 26. Adler and Zumbansen emphasize that the preclusion of alternate fora reproduces the previous scheme in German law, whereby courts consistently held that the Federal Compensation law of 1956 blocked avenues for individual compensation, even where individual claims were not covered by the law. In addition, Adler and Zumbansen claim that individuals who performed

Finally, the two models were different in terms of transparency. The settlement distribution mechanism devised in the Swiss case created a relatively accountable decision-making organ, with award decisions subject to appeal.¹⁶³ In contrast, the German settlement funds were distributed by seven partner organizations outside Germany. These organizations processed the claims and distributed the funds according to the eligibility standards set by the Foundation Law, which provides little guidance and has no standards to govern appeals.¹⁶⁴ Not only did the informality of the distribution process in the German case fail to create a democratic process through transparency, deliberation, and appeals. The absence of a third party supervising the formulation of the distribution rules, such as the court had done in the Swiss case, granted Germany exclusive power over important distribution decisions, to the exclusion of other voices.

In sum, the comparison reveals that it was not settlement as such that prevented the democratic participation of victims in deliberations about compensation in the German case, but rather the terms of the German settlement, and in particular the lack of third-party supervision of the settlement distribution process and of sufficiently formal procedures.

4. Norm Creation

The harshest criticism of settlement in the context of THL is that it precluded the elaboration of a much-needed normative framework regarding the responsibility of a business corporation for participation in atrocity.¹⁶⁵ International criminal law after World War II managed to develop 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 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 funding the Nazi's criminal apparatus through bank loans. It therefore appears as if normative clarification of corporate responsibility has been once again eluded, this time by a settlement that remained silent on the legal liability of the business corporations.

forced labor in ecclesiastical institutions, private households or the agricultural sector have no claim under the law, but the law purports to preclude their lawsuits. Adler & Zumbansen, *supra* note 104, at 26.

163 RULES GOVERNING THE CLAIMS RESOLUTION PROCESS (AS AMENDED) art. 30, http://www.crt-ii.org/_pdf/governing_rules_en.pdf (last visited Dec. 15, 2013).

164 Other than that it states that “[t]he partner organizations are to create appeals organs that are independent and subject to no outside instruction.” Foundation Law art. 19.

165 MARRUS, *supra* note 98.

Following Galanter, this result is to be expected, as corporate defendants often choose to settle and thereby prevent the development of substantive norms.¹⁶⁶ However, as we have seen, Sturm offers an alternative view of the path to norm development, whereby the search for unequivocal, comprehensive and clear norms to be enunciated by the courts is an unrealistic and undesirable objective. Instead of the “imperialist,” top-down imposition of norms, she suggests we should aim for the contextualized fashioning of norms through cooperation and continuous dialogue between the parties and the judge.¹⁶⁷ This understanding of normativity is particularly appropriate not only in structural reform suits, but also in transnational disputes. As explained by Nancy Fraser, such litigation often involves meta-disputes over the who, how and what of justice, with the parties sharing few assumptions as to how to resolve these disputes.¹⁶⁸ Therefore, in discussing the norm creation effected through settlement of THL, we do not purport to point to a clearly and precisely defined norm of corporate accountability. Yet we claim that settlement provided creative ways of fashioning a mode of corporate accountability that reflects the complexity of corporate involvement in atrocity.

First, we would like to point to the appropriateness of settlement to addressing the responsibility of bureaucratic organizations. This argument was raised by Sturm in relation to the structural reform of prisons and other public agencies.¹⁶⁹ The case of THL illustrates how this argument is strengthened in relation to private entities such as business or financial corporations. The imposition of monetary sanctions is a fitting way to make corporations internalize responsibility, by “speaking the language” that firms understand. More importantly, the imposition of a monetary liquid sanction allows for the sharing of the burden of liability. For example, in Germany, the state contributed over fifty percent of the German companies’ monetary settlement. Furthermore, the German government encouraged German companies which were not defendants as well as the general public to contribute, in light of the fact that more than 20,000 companies had used slave labor during the

166 Galanter, *supra* note 70.

167 See *supra* notes 94-96 and accompanying text.

168 NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* 50 (2009) (“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.”).

169 Susan Sturm, *Resolving the Remedial Dilemma*, 138 U. PA L. REV. 805 (1990).

war.¹⁷⁰ Over 6,500 German companies contributed.¹⁷¹ Likewise, in 1997 Switzerland's central bank, together with the defendant banks and a pool of Swiss companies contributed to the Humanitarian Fund for the Victims of the Holocaust, a fund separate from the fund that ultimately was established by settlement.¹⁷²

This sharing of liability among bureaucracies reduces the arbitrariness in the choice of defendants for which the claims were criticized. The inter-bureaucracy cooperation and spreading of the financial burden of legal liability reflects the collaboration and sharing of responsibility among the state and large sectors of the economy in committing atrocities. This collaboration was made possible by the monetary character of the remedy, but also by the fact that there was no judgment expressly assigning legal responsibility to the specific defendants in the litigation. Thus, settlement provided the conditions of an appropriate response to bureaucratic wrongdoing, echoing Menkel-Meadow's claim that settlement can provide a more substantive justice than adjudication as it is free from the need to fit complex situations into narrow legal categories.¹⁷³

While the unprecedented sums paid in settlement made particularly salient the goal of reparation, the lawsuits also brought about a certain reform of the corporate culture of the defendants. It should be emphasized that German corporations as well as Swiss banks constantly denied having any legal — as opposed to moral — responsibility.¹⁷⁴ Yet as described above, upon reaching a monetary settlement, the German defendants — as well as many corporations that were not defendants — were willing to open their archives for investigation, to hire historians, and to publish the results of these historical

170 BAZYLER, *supra* note 113, at 88-89. When it became apparent that German companies were reluctant to contribute, the German state made contributing more attractive by granting tax deductions. According to Bazylar, 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 less contributors than was originally thought, the contribution rate was raised (originally 0.1% of the 1998 turnover, then raised to 0.15%, and the founding members increased their contribution to 0.2%). *Id.* at 353-54 n.104.

171 INFORMATION ON THE PAYMENTS TO FORCED LABOURERS, http://www.stiftung-evz.de/fileadmin/user_upload/EVZ_Uploads/Stiftung/Zahlen_und_Fakten/infos-auszahlungen-en.pdf (last visited Feb. 20, 2013).

172 EIZENSTAT, *supra* note 106, at 98-99.

173 *Supra* note 80 and accompanying text.

174 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, *supra* note 99, at 90.

inquiries. Similarly, Swiss banks agreed under judicial pressure to extensive audits. These activities are certainly focused on the past (the discovery of facts), but they represent a significant shift in the European understanding of the stance of the corporation in the face of human rights abuses.

Moreover, 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 made led defendants realize that history has to be dealt with and that the operation of corporations can no longer be guided by profits alone. Furthermore, in the German case, settlement provided a way for the state's and corporations' responsibility to be internalized through the legislation of the Foundation Law — a sovereign act of the German state.¹⁷⁵ Though this internalization of responsibility was far from adequate, as our discussion above of the Foundation Law's limitations suggests,¹⁷⁶ this case illustrates how settlement, because it is not limited to the legal categories of the claim and the measures available to courts, enables participants to design creative procedures, which can be tailored to the dispute and appropriated by the participants as their own.

And yet, despite the accountability achieved through settlement, do we not play into the bureaucratic “trap” by using monetary settlements that abstract and almost eradicate personal fault and blame? Were these proceedings successful in piercing the veil of the organizations, or did they address the organizations as such, asserting their abstract overall responsibility, without offering us a theory that penetrates the organizational charts of these companies? The law's difficulty in addressing corporate liability is twofold. First, what is the allocation of responsibility between corporations and the state? To what extent does coercion reduce a corporation's liability? Second, how is responsibility allocated within corporations? What is the human story behind the abstract bureaucratic liability?

Formally speaking, THL did not provide a satisfactory answer to either of these questions. The German state's contribution to the slave labor settlement fund does not reflect a precise understanding of the complex relationship between state and corporations under the Third Reich. Furthermore, though it contributed to the Humanitarian Fund, the Swiss government adamantly refused to contribute to the settlement and insisted that it was not a party in

175 Gesetz zur Errichtung einer Stiftung “Erinnerung, Verantwortung, Zukunft” [Law on the Creation of the Foundation “Remembrance, Responsibility and Future”], Aug. 2, 2000, BGBL. I at 1263 (Ger.), *available at* <http://www.stiftung-evz.de/eng/the-foundation/law.html>.

176 *See supra* notes 157-162 and accompanying text.

any way to the THL.¹⁷⁷ If THL provided only a rough answer to the question of the relationship between state and corporations, it appears to have completely failed to pierce the bureaucratic veil, in the sense of illuminating the dynamic of liability inside a corporation.

However, a closer look reveals that this view that THL did not manage to pierce the organizations' veil is misleading, and may be a result of relying on the model of judge as umpire, i.e., expecting the judge to authoritatively determine the issue of responsibility in a formal judgment. In contrast, when we adopt the catalyst conception of the judiciary presented in Part III, a very different understanding of settlement and its connection to norm articulation is revealed. The veil of the organization was pierced by THL outside the legal process, in the organizational history that was produced as a result of the litigation. Historians commissioned by the defendants as a result of the litigation explored the internal dynamics of corporations, focusing on individual managers and their responsibility for a corporation's acts.¹⁷⁸ It was the very lack of legal decision and the promise of finality that laid the ground for the production of these new historical narratives. Though the settlement agreements did not contain any formal undertaking of the defendants to give researchers access to their archives, the lack of formal determination of liability and the immunity from future lawsuits encouraged them to open their archives to prestigious historians and fund their research.¹⁷⁹ Of course, the corporations' attitude can be explained as cold 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 was much broader than legal liability, and led to extensive self-investigation, which from a historical and normative perspective represents a substantial advance.

Our discussion of the normative value of THL must address a final and pressing question: did THL provide a precedent for transnational corporate accountability or, to the contrary, did it prevent the creation of such a precedent? According to Galanter's analysis, the defendant corporations, as repeat players, prevented normative enunciation through settlement. And indeed, we have indicated that THL did not provide a precise norm of corporate responsibility that could serve as precedent. Yet our discussion of the normative aspects of THL suggests that THL has contributed to the elaboration of a vague yet significant norm of corporate responsibility for profiting from atrocity and

177 BAZYLER, *supra* note 113, at 49-51.

178 *See, e.g.*, STEINBERG, *supra* note 137 (discussing the personal responsibility of directors of the bank).

179 *See, e.g.*, PETER HAYES, FROM COOPERATION TO COMPLICITY: DEGUSSA IN THE THIRD REICH, at xv (2004).

collaborating with the state. Here we suggest that this norm carries precedential value.

First, as we saw in Part II, settlements carry precedential value in settlements relating to similar claims. Such dynamics were observed in THL, where the settlement reached with the Swiss banks encouraged the filing of claims against German corporations and the settlement of the German case.¹⁸⁰ Second, settlements managed by courts or other official organs such as the foundation created by German legislation take on an official aspect. As such, the rulings and statements made by official bodies in the course of finalizing or distributing the settlement could be invoked in the future as precedents. An example from the Swiss banks case is illuminating in this respect. In order to adjudicate the post-settlement individual claims to Swiss bank accounts, the court had designed legal presumptions based on the findings of the Bergier Commission¹⁸¹ that the banks had systematically destroyed documents relating to Jewish Nazi-era accounts. One such presumption was 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.¹⁸²

The banks vehemently objected to these presumptions, insisting that they had never engaged in any substantial misconduct. This objection was raised even though these presumptions did not affect the banks' overall financial liability, which had been set by the settlement agreement. Visibly exasperated by what he deemed "a series of frivolous and offensive objections to the distribution process," Judge Korman upheld the distribution rules, after an extensive discussion and analysis of the Bergier Report's findings.¹⁸³ The judge expressly noted:

The critical fact, and the one that the defendants appear to miss, is that the Swiss banks did not comport with basic notions of equity. For over half a century they destroyed evidence they knew to be relevant to legitimate claims that were being made and that, if substantiated through documentation, would expose the banks to liability. The fact

180 ORLAND, *supra* note 120, at 89-92.

181 *See supra* note 135.

182 RULES GOVERNING CLAIMS RESOLUTION, *supra* note 163, art. 28(h).

183 Amended Memorandum, *supra* note 122, at 302.

that the destruction may not have violated Swiss law — which was not amended to accommodate the claims of heirs of account holders who the Swiss knew were slaughtered in the Holocaust and who could not make a successful claim if records were destroyed — is nothing more than a sad commentary on the manner in which the banks were permitted to operate.¹⁸⁴

In doing so, the judge sought to set the historical record straight, and in addition assigned moral responsibility to the defendants for historic wrongdoing during the Nazi era and after the war, as well as for the present-day denial of responsibility.¹⁸⁵

For our purposes, the banks' challenge to the presumptions despite their complete financial irrelevance suggests that settlement can have normative value, as even legal presumptions designed to distribute settlement can be reflective of normative evaluations. Moreover, this example suggests that courts and other bodies administering the settlement will inevitably issue statements reflecting normative judgments, even as they concentrate on so-called "administrative" or "remedial" tasks. One should therefore bear in mind the possibility that in the future even monetary settlement may be given precedential value in interpretations of corporate liability under international law.¹⁸⁶

CONCLUSION

It is fascinating to examine THL in light of the debate that recently played out in the American legal community over the decision of the U.S. Supreme Court in *Kiobel v. Royal Dutch Petroleum*.¹⁸⁷ Though the case was decided on the issue of jurisdiction, the majority holding that the ATS should not be interpreted to apply to conduct occurring outside United States territory, the litigation and scholarly commentary initially centered on the question whether

184 *Id.* at 320-21.

185 *Id.*

186 Another example of normative interpretation of a non-adjudicatory legal measure is the postwar dissolution of German companies that had assisted in the Nazi war effort. This dissolution has recently been invoked as a precedent for the proposition that corporations are subject to customary international law. *See* *Flomo v. Firestone Nat'l Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); Brief of Amici Curiae Nuremberg Scholars to the Supreme Court in Support of Petitioners, *Kiobel v. Royal Dutch Petroleum Co.*, 210 U.S. App. (2d Cir. 2010) (No. 10-1491).

187 *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

corporations could be held liable under the ATS for violations of international law. The parties, as well as international lawyers and historians submitting *amici curie* briefs, therefore returned to the Nuremberg trials in order to discuss whether international law provides a precedent for corporate liability. Despite the profound disagreements between the two sides, all participants to the *Kiobel* debate shared the assumption that besides Nuremberg, international law has little or no precedent to offer on the question of corporate accountability. Thus, THL was almost completely disregarded, even though it represents the unprecedented success of a transnational class action against corporations.¹⁸⁸

What can explain this silence? We believe that the answer lies in the prevailing conception of settlement as belonging to the private side of the public/private dichotomy, a conception we have tried to challenge in this Article. The adoption of the functionalist approach presented in this Article liberates settlement from this dichotomy. This move allows us to explore unorthodox modes of litigation and of holding accountable such as the ones experimented with in THL, and to recognize THL's normative and precedential value in contributing to the development of a regime of transnational legal liability of corporations for participation in mass crimes.

Once we have recognized this contribution, we can move from the question of “whether or not settlement?” to “what kind of settlement?” and address pressing questions of accountability and participation. For example, the normative implications of settlement suggest that it is important to leave the supervision of settlement in the hands of a court or other independent and accountable body. While the Swiss banks' litigation remained under court supervision, one of the settlement terms important to the German state and corporations was that the German litigation be removed in its entirety from the courts and administered by a German foundation. As discussed above, this foundation operates subject to very little accountability.¹⁸⁹ Yet the public/private frame conventionally applied to settlement obscures comparisons such as the one attempted here.

Obviously, there are remaining questions to be answered, concerning the representativeness of the THL arena *vis-à-vis* the general class of civil suits. Further theorization is also required in order to define the underlying conditions against which the public function of settlements becomes more or

188 For further discussion, see Leora Bilsky, *Hannah Arendt's Judgment of Bureaucracy*, in HANNAH ARENDT AND THE LAW 271 (Marco Goldoni & Christopher McCorkindale eds., 2012).

189 As a result, settlement granted the defendants — the German state and corporations — the power to make normative decisions based on one-sided historical interpretations of their own past.

less pronounced. Acknowledging the public role that settlements serve also illuminates potential normative ramifications, regarding their regulation and supervision. All these issues we leave for future discussion. Our contention here is more limited in scope: we argue that it is high time we abandon the public/private all-or-nothing approach to settlement, and direct our attention to designing mechanisms that are fair, participative, and apt to fulfill the important public functions described throughout this Article.

