

HEINONLINE

Citation:

Katrina Miriam Wyman, Is There a Moral Justification
for Redressing Historical Injustices, 61 Vand. L. Rev.
127, 198 (2008)

Provided by:

Aix Marseille Universite

Content downloaded/printed from [HeinOnline](http://heinonline.org)

Mon Sep 4 15:07:09 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to
your smartphone or tablet device

Is There A Moral Justification For Redressing Historical Injustices?

*Katrina Miriam Wyman**

INTRODUCTION	128
I. BACKGROUND ON U.S.-BASED CLAIMS FOR REDRESS.....	132
A. <i>What is a Historical Injustice?</i>	133
B. <i>How Are Claims for Redress Advanced?</i>	134
C. <i>Why Are Claims Brought and What Remedies Are Requested?</i>	136
II. TWO LESS PROMISING MORAL ARGUMENTS FOR REDRESS	140
A. <i>Redress Deters</i>	140
B. <i>Redress Promotes Distributive Justice</i>	143
III. CORRECTIVE JUSTICE JUSTIFICATIONS	147
A. <i>Aristotelian Corrective Justice</i>	149
1. Existence.....	150
2. Violation of Protected Interest	156
3. Remediable Violation	158
B. <i>Nozickian Corrective Justice</i>	160
1. Violation of Protected Interest	161
2. Remediable Violation	162
3. Proviso	164
IV. CASE STUDY: REDRESSING CLAIMS AGAINST THE SWISS BANKS.....	170
A. <i>Background</i>	171

* Associate Professor, NYU School of Law. This Article benefited from suggestions from many colleagues, including Paulette Caldwell, Jules Coleman, Kevin Davis, Peggy Davis, David Garland, Mark Geistfeld, Les Green, Sam Issacharoff, Jim Jacobs, Doug Kysar, Daryl Levinson, Eric Muller, Liam Murphy, Burt Neuborne, Stephen Perry, John Torpey, and Jeremy Waldron, and presentations at Cornell Law School, NYC Torts Theory Group, NYU School of Law, and the Journal of Tort Law's September 2006 conference on Tort Law and the Modern State at Columbia Law School. I also am grateful to the organizers of that conference for selecting an earlier version of the article as one of the two winners of the competition for papers from junior scholars. Lesley Coben, Benjamin Geffen, and Derek Kershaw provided excellent research assistance. I especially thank those who helped me with this article even though they disagree with its arguments. All errors are mine. The Filomen D'Agostino and Max E. Greenberg Research Fund at New York University School of Law provided generous financial assistance.

1.	Historical Wrongs.....	171
2.	Process of Obtaining Redress.....	172
3.	Implementation of Redress	175
B.	<i>Moral Justifiability of Redress</i>	179
1.	Deterrence	179
2.	Distributive Justice	181
3.	Corrective Justice.....	184
a.	<i>Aristotelian Corrective Justice</i>	185
i.	Conversion of Bank Accounts	185
ii.	Other Wrongs	188
b.	<i>Nozickian Corrective Justice</i>	191
i.	Conversion of Bank Accounts	191
ii.	Other Wrongs	192
	CONCLUSION.....	194

INTRODUCTION

In recent years, there have been lively popular and academic debates in the United States and elsewhere about whether injustices committed decades or even centuries ago should be redressed through official apologies, commissions of inquiry, reparations, and restitution.¹ In the American context, the historical injustices for which redress has been pursued, and in some cases granted, include the internment of Japanese Americans during World War II, the Holocaust, and the mistreatment of Native Americans.² Recently, the most prominent debate in the United States has been about whether federal and state governments and corporations should pay reparations to African Americans for slavery and subsequent

1. See, e.g., JOHN TORPEY, MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS 1-5 (2006) (surveying claims for redress).

I use “redress,” “restitution,” and “reparations” interchangeably unless otherwise specified.

2. See, e.g., ELAZAR BARKAN, THE GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES 30-45, 169-215 (2000) (discussing redress for Japanese Americans and Native Americans); ALFRED L. BROPHY, REPARATIONS: PRO & CON xv (2006) (referring to redress received by Japanese Americans, Holocaust victims, and Native Americans).

The Holocaust is included on this list even though it was not perpetrated by (or in) the United States because in the 1990s a movement for redress for Holocaust-related injustices was initiated and litigated partly in the United States. See, e.g., MICHAEL J. BAZYLER, HOLOCAUST JUSTICE: THE BATTLE FOR RESTITUTION IN AMERICA’S COURTS xi (2003) (chronicling Holocaust restitution claims from the 1990s and the role of U.S. courts in addressing them).

discrimination.³ Indeed, in the past few years, several major books have been published advocating reparations for African Americans, numerous law reviews have held symposia on the idea, and many stories have appeared on the subject in print and television media.⁴

This Article examines whether there is a moral justification for redressing historical injustices, focusing on debates in the American context. Perhaps because the legal case for redressing historical injustices is often weak, many supporters of redress advance moral arguments. For example, proponents argue that redressing historical injustices is necessary to deter future wrongdoing or to promote a more just distribution of societal resources.⁵ More frequently, they emphasize the injustice of the original wrong⁶ and argue that there is a continuing obligation to correct it.⁷

I argue that notwithstanding the prominent role that moral arguments play in these claims, it is difficult to justify redress for historical injustices in moral terms. This does not mean that redress never is morally warranted. But the difficulty of making a strong moral argument for redressing historical injustices is instructive. In particular, it helps to explain why redress has not been implemented in many instances notwithstanding extensive public debate and why, when redress has been implemented, it often has been on a relatively limited scale.⁸ In addition, the moral complexity of claims for

3. See, e.g., BROPHY, *supra* note 2, at 3 (noting that “discussion of reparations” for slavery and Jim Crow “has grown explosively”).

4. Sources surveying recent efforts to address historical injustices in the United States and elsewhere include BARKAN, *supra* note 2; THE HANDBOOK OF REPARATIONS (Pablo De Greiff ed., 2006); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS (1998); POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES (John Torpey ed., 2003); RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY (John Elster ed., 2006); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); TORPEY, *supra* note 1; BRIAN A. WEINER, SINS OF THE PARENTS: THE POLITICS OF NATIONAL APOLOGIES IN THE UNITED STATES (2005); Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003).

Recent books advocating reparations for African Americans include ROY L. BROOKS, ATONEMENT AND FORGIVENESS: A NEW MODEL FOR BLACK REPARATIONS (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 292 (2004); RANDALL ROBINSON, THE DEBT: WHAT AMERICA OWES TO BLACKS 244-46 (2000). Symposia on reparations for African Americans include *Reparations Symposium*, 20 HARV. BLACKLETTER L.J. 17 (2004); Symposium, *A Dream Deferred: Comparative and Practical Considerations for the Black Reparations Movement*, 58 N.Y.U. ANN. SURV. AM. L. 447 (2003); Symposium, *The Jurisprudence of Slavery Reparations*, 84 B.U. L. REV. 1135 (2004).

5. See *infra* Part II (addressing the forward-looking moral arguments for redress).

6. I use the terms “wrong” and “injustice” interchangeably.

7. See *infra* Part III (addressing the backward-looking corrective justice arguments for redress).

8. Of course, interest group politics also have had a significant influence on whether and what redress has been granted. See, e.g., LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1993) (analyzing the factors

redressing historical injustices raises a fundamental question about the value of the time and resources that have been devoted to debating the redress of historical wrongs.

This Article proceeds as follows. Part I provides some background for analyzing the moral justifiability of redressing historical injustices. It attempts to define what a historical injustice is by specifying the characteristics shared by many of the events to which the term is applied in the United States. In addition, it discusses how claims for redressing historical injustices are advanced and the range of motivations for bringing claims and remedies requested.

Part II turns to the issue of the moral justifiability of redressing historical injustices. It identifies and underscores the difficulties with two of the less promising moral arguments that have been offered in the United States for repairing historical injustices. These are the forward-looking arguments that redress will deter the commission of wrongs and promote distributive justice.

Part III focuses on the most promising—and the most commonly made—moral argument for redressing historical injustices: the backward-looking argument that there is a duty to correct injustices in general, including ones that occurred long ago. Typically, the corrective justice argument is made at an intuitive level, without invoking any particular concept of corrective justice.⁹ I specify two potential corrective justice arguments for redress: one rooted in the Aristotelian conception of corrective justice and the other rooted in Nozick's principle of rectification. Then, I emphasize the limited extent to which both of these arguments justify redress for historical injustices.

To illustrate my argument that redressing historical injustices is difficult to justify in moral terms, Part IV offers a case study of one recent claim for redress for wrongs committed several decades ago. That is the claim against Swiss banks that was brought and settled in the 1990s for profiting from the Holocaust by financing the Third Reich and withholding the bank accounts of Holocaust victims after the war. Allegations that Swiss banks had behaved improperly during and after the war persisted for decades, but they only drew

that led to the passage of the redress legislation); TORPEY, *supra* note 1, at 85-86 (explaining Japanese American success in gaining redress for internment); Saul Levmore, *Changes, Anticipations, and Reparations*, 99 COLUM. L. REV. 1657, 1688, 1698 (1999) (analyzing interest group politics surrounding reparations).

9. See, e.g., Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 CAL. L. REV. 683, 707 (2004) (arguing for redress for slavery and subsequent discrimination using the "quite basic" concept of corrective justice).

widespread public attention in the 1990s, after the end of the Cold War. Fascinating in their own right, the bringing and the resolution of the claims are also historically significant because the claims were a major impetus for the emergence of additional claims for redress stemming from the Holocaust and other injustices, such as slavery.¹⁰ Ten years after the claims against the banks settled, the settlement fund that two of the banks paid still is being distributed. I examine the program implemented to redress the claims against the Swiss banks to exemplify the moral complexity of redressing historical injustices. I conclude by suggesting that the difficulty of justifying redress is an argument for generally focusing more on recent injustices than on historical ones.

To a large extent, recent U.S. legal scholarship about redress for historical injustices has focused narrowly on traditional legal concerns. For example, a number of scholars have suggested litigation strategies to keep reparations cases alive in the courts.¹¹ Others have weighed the virtues of different legal strategies for obtaining reparations.¹² Still others have analyzed the different options for implementing reparations.¹³ This Article underscores the fundamental

10. BAZYLER, *supra* note 2, at 307-44. Another major impetus was the passage of the Civil Liberties Act of 1988, 50 App. U.S.C.A. § 1989b to b-9 (2000), which authorized reparations for the internment of Japanese Americans and the relocation of Aleuts during World War II. BROPHY, *supra* note 2; TORPEY, *supra* note 1, at 4.

11. See, e.g., Yanessa L. Barnard, Note, *Better Late Than Never: A Takings Clause Solution to Reparations*, 12 WASH. & LEE J. C.R. & SOC. JUST. 109 (2005) (delineating flaws in the litigation of reparations claims and proposing the takings clause as a more successful route); Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 86-92 (2005) (describing various legal arguments available to avoid statute of limitations issues in reparations litigation); Kaimipono David Wenger, *Causation and Attenuation in the Slavery Reparations Debate*, 40 U.S.F. L. REV. 279 (2006) (discussing the problems of causation and attenuation that arise in the context of reparations); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003) (viewing slavery as a violation of the takings clause and discussing the legal ramifications).

12. See, e.g., Keith N. Hylton, *Slavery and Tort Law*, 84 B.U. L. REV. 1209 (2004) (discussing the problems inherent in bringing reparations claims under a derivative tort scheme); Anthony J. Sebok, *Two Concepts of Injustice in Restitution for Slavery*, 84 B.U. L. REV. 1405 (2004) (advocating against the use of restitution law and language for compensating the injuries inflicted by slavery); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443 (2004) (arguing that restitution is not an appropriate basis for reparations for historical injustices).

13. See, e.g., Saul Levmore, *Privatizing Reparations*, 84 B.U. L. REV. 1291 (2004) (setting forth a scheme of privatized, or elective, payment of reparations); Posner & Vermeule, *supra* note 4 (comparing various reparations schemes for historical injustices); Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003) (proposing a system of corporate reparations); Carlton Waterhouse, *Avoiding Another Step in a Series of Unfortunate Legal Events: A Consideration of Black Life Under American Law from 1619 to 1972 and a Challenge to Prevailing Notions of Legally Based Reparations*, 26 B.C. THIRD

moral issues raised by claims made in the United States for redressing historical injustices.¹⁴

I. BACKGROUND ON U.S.-BASED CLAIMS FOR REDRESS

The idea that societies should redress injustices committed long ago has spread since the end of World War II. An important impetus has been the extensive set of programs of reparations, property restitution, and commemoration that West Germany started in the immediate aftermath of the Holocaust, due to a combination of domestic forces and foreign pressure.¹⁵ Building on the post-Holocaust experience, the proponents of redress in the United States and elsewhere seek similar remedies for other injustices. In doing so, the proponents often refer back to the activities undertaken in the wake of the Holocaust.¹⁶ However, unlike the reparations, restitution, and commemorative activities that began soon after the Holocaust, these remedies would be instituted many years after the initial injustice. This squarely raises the issue of whether obligations and entitlements to repair injustices persist with the passage of time.

This Part provides some background for considering the moral justifiability of redressing historical injustices in Parts II-IV. In particular, it addresses three topics: the characteristics of the wrongs discussed as historical injustices in the United States, the ways that

WORLD L.J. 207 (2006) (presenting an alternative to reparations that focuses on developing black political, economic, and educational institutions).

14. In doing so, the article draws on other scholarship debating in philosophical terms the merits of redressing historical injustices that occurred in the United States and elsewhere such as JUSTICE IN TIME: RESPONDING TO HISTORICAL INJUSTICE (Lukas H. Meyer ed., 2004); JANNA THOMPSON, TAKING RESPONSIBILITY FOR THE PAST: REPARATION AND HISTORICAL JUSTICE (2002); WEINER, *supra* note 4; Christopher Kutz, *Justice in Reparations: The Cost of Memory and the Value of Talk*, 32 PHIL. & PUB. AFF. 277 (2004); David Lyons, *The New Indian Land Claims and Original Rights to Land*, in READING NOZICK: ESSAYS ON ANARCHY, STATE AND UTOPIA 355 (Jeffrey Paul ed., 1981); Posner & Vermeule, *supra* note 4, at 698-711; Amy J. Sepinwall, *Responsibility for Historical Injustices: Reconceiving the Case for Reparations*, 22 J.L. & POL. 183 (2006); A. John Simmons, *Historical Rights and Fair Shares*, 14 LAW & PHIL. 149 (1995); Jeremy Waldron, *Settlement, Return, and the Supersession Thesis*, 5 THEORETICAL INQUIRIES L. 237 (2004); Jeremy Waldron, *Redressing Historic Injustice*, 52 U. TORONTO L.J. 135 (2002); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4 (1992); Piibe Jõgi, *The Past That Can't Be Fixed: Property Restitution in the Post-Socialist World* (April 2006) (unpublished J.S.D. dissertation, New York University School of Law).

15. On the historical significance of the West German efforts, see, for example, BARKAN, *supra* note 2, at xxiii-xxiv, and TORPEY, *supra* note 1, at 4, 9, 37-41, both of which discuss the treatment of Holocaust claims as a model for claims for other historical injustices.

16. See, e.g., BORIS I. BITTKER, REPARATIONS: THE CASE FOR BLACK REPARATIONS 6 (1973) (referring to West German reparations in advocating reparations for African Americans); ROBINSON, *supra* note 4, at 222 (same).

redress typically is sought for these injustices, and the wide range of the motivations for seeking redress and the remedies requested.

A. What is a Historical Injustice?

There is no accepted definition of what constitutes a “historical injustice.”¹⁷ However, it is possible to derive something approaching a definition of the term by analyzing the events to which it is applied.

In practice, academics and others discussing historical injustices in the United States apply the term to wrongs that are similar in a number of ways. Collective agents such as governments¹⁸ and private corporations¹⁹ committed or authorized many of the wrongs discussed as historical injustices. For instance, the U.S. government interned Japanese Americans, and slavery was institutionalized under the auspices of governments that sometimes also used slaves. In addition, as the adjective “historical” implies, historical injustices are wrongs that took place in the past, sometimes decades or even centuries ago.²⁰ Importantly, many of the wrongs discussed as historical injustices involve a large scale violation of fundamental human rights. In particular, many wrongs referred to as historical injustices in the United States involved invidious discrimination against many individuals based on race, religion, or ethnicity. Thus, paradigmatic examples of historical injustices include the colonization of Native Americans, slavery, Jim Crow, the internment of Japanese Americans during World War II, the removal of Aleuts in Alaska during the same war, and the Holocaust.²¹

17. Eric L. Muller, *Fixing A Hole: How the Criminal Law Can Bolster Reparations Theory*, 47 B.C. L. REV. 659, 664-69 (2006). The idea may be difficult to analyze conceptually because of the large number of different wrongs that are labeled “historical injustices” in the United States and elsewhere, and the potential for each of these wrongs to be considered unjust for several reasons. For instance, slavery was wrong because most slaves were black in the United States. In addition, slavery was wrong because it fundamentally violated human dignity.

18. Kyle D. Logue, *Reparations as Redistribution*, 84 B.U. L. REV. 1319, 1336 (2004) (referring to the Holocaust under the Nazi regime and Japanese American internment by the U.S. government).

19. See, e.g., BAZYLER, *supra* note 2, at xii (describing claims relating to the Holocaust against European banks, European insurers, and German companies); *id.* at 307 (chronicling claims against Japanese companies for using slave labor); *id.* at 317-20 (chronicling claims against insurers relating to Armenian genocide); *id.* at 320-28 (chronicling claims against companies relating to African American slavery).

20. Muller, *supra* note 17, at 667.

21. TORPEY, *supra* note 1, at 47; see Roy L. Brooks, *Getting Reparations for Slavery Right: A Response to Posner and Vermeule*, 80 NOTRE DAME L. REV. 251, 255 (2004) (listing as historical injustices such things as “gross violations of fundamental international rights, such as slavery, genocide, and Apartheid”).

We can conclude that in the United States, then, the term “historical injustice” generally refers to wrongs that share four characteristics: (a) they were committed or sanctioned at least a generation ago; (b) they were committed or authorized by one or more collective agents, such as a government or corporation; (c) they harmed many individuals; and (d) they involved violations of fundamental human rights, often discrimination based on race, religion, or ethnicity. This Article generally follows the prevailing use of “historical injustice” and is concerned with wrongs with these characteristics when discussing the moral justifiability of redressing historical injustices.²²

B. How Are Claims for Redress Advanced?

I now turn to the ways that claims for redress for historical injustices have been advanced in the United States. Reflecting the role of governments and corporations in historical injustices, claims for redressing them typically have involved collective action directed at the legislative and executive branches of government and/or private corporations.²³ Redress movements also often bring litigation. This litigation is viewed best as impact litigation attempting to bolster what are fundamentally political movements for redress. Indeed, to my knowledge, redress is rarely provided in the United States as a result of a judicial decision finding an actor liable for a historical wrong.²⁴ Instead, when it is provided, redress typically flows from a

On why I include the Holocaust on this list even though it was not committed by the United States and did not take place here, see *supra* note 2.

22. It is important to recognize that the term “historical injustice” often is used to refer to wrongs that took place outside the United States that do not have these four characteristics. For example, the systematic torture of political dissidents in Latin America and Communist takings of property in Central and Eastern Europe unmotivated by racial animus are discussed as historical injustices. See *supra* note 4 (identifying scholarship on historical injustices, both in the United States and elsewhere).

23. See generally BAZYLER, *supra* note 2 (chronicling the movement for restitution for victims of the Holocaust and other restitution movements of the 1990s).

24. BROOKS, *supra* note 4, at 99 (identifying “an unmistakable judicial indisposition toward lawsuits that seek redress for past injustices”); see also *In re Nazi Era Cases Against German Defendants Litig.*, 196 F. App’x 93 (3rd Cir. 2006) (affirming dismissal of claims brought by Holocaust survivor against two German corporations for cooperating in Nazi-era medical experiments on him); *In re African-American Slave Descendants Litig.*, 471 F.3d 754 (7th Cir. 2006), *affg in part* 375 F. Supp. 2d 721 (N.D. Ill. 2005) (affirming dismissal of claims brought by descendants of African American slaves for reparations from private companies based on lack of standing and statutes of limitations); *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57 (2nd Cir. 2005) (dismissing claims against Austria for Nazi-era property deprivations); *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2nd Cir. 2005) (reversing judgment for tribal plaintiffs that had awarded them damages for dispossession of land); *Alexander v. Oklahoma*,

political compromise negotiated or legislated by governments. Even when redress is the product of one or more private firms agreeing to pay compensation, that agreement typically follows a negotiation process with substantial government involvement.²⁵ As a result, many redress programs either are government programs or resemble government programs in relying on administrative criteria and structures.²⁶

Generalizations about who seeks redress for historical injustices are difficult to make given the different social movements for redress for various injustices. But a notable feature of a number of prominent U.S. movements for redress is that at least some of the leading participants are not themselves victims of the original injustice. In particular, prominent participants often include the children of the victims of the injustices or persons from the same

382 F.3d 1206 (10th Cir. 2004) (affirming dismissal of claims brought by survivors and descendants of survivors of a 1921 race riot in Greenwood, Oklahoma); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227 (11th Cir. 2004) (affirming dismissal of claims against two German banks for profiting from Nazi program of Aryanization of Jewish-owned property); *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003) (affirming dismissals of claims against German and Japanese corporations for using slave labor during World War II); *Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995) (affirming dismissal of claims against the U.S. government for damages and other remedies for African American slavery and subsequent discrimination against African Americans); *Hohri v. United States*, 847 F.2d 779 (Fed. Cir. 1988), *aff'g* 586 F. Supp. 769 (D.D.C. 1984) (dismissing the claims of Japanese Americans seeking damages and declaratory relief for injuries resulting from internment during World War II); *Iwanova v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999) (dismissing claims against Ford for compensation and damages for forced labor during World War II); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248 (D.N.J. 1999) (dismissing class actions brought against German corporations for compensation for forced labor and damages); *Shinnecock Indian Nation v. New York*, No. 05-CV-2887, 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006) (dismissing the claims of the Shinnecock Indian Nation for wrongs dating back over 140 years). *But see* *Alperin v. Vatican Bank*, 410 F.3d 532 (9th Cir. 2005) (dismissing human rights claims against the Vatican Bank stemming from actions taken during World War II under the political question doctrine, but holding that the doctrine does not bar property claims against the bank); *Oneida Nation v. New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007) (dismissing the possessory land claims of three Oneida tribal groups because of the burdensome disruption that granting such claims would cause, but allowing non-possessory claims for compensation to proceed); *Rosner v. United States*, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (denying, in part, the U.S. government's motion to dismiss claims brought by Hungarian Jews for the army's seizure of property on the "Hungarian Gold Train"); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (denying French banks' motions to dismiss Jewish customers' descendants' claims arising from World War II-era plunder of assets); *BARKAN*, *supra* note 2, at 181-87 (referring to cases brought by Native Americans); ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM: CASES AND MATERIALS* 1049-64 (4th ed. 2003) (discussing Nonintercourse Act cases).

25. *See, e.g.*, Part IV.A.2 (chronicling the process by which two Swiss banks agreed to pay \$1.25 billion for actions during and after World War II).

26. *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 766 ("[F]or the past 60 years, when the issue of reparations has arisen in regard to other minority groups, Congress has dealt with the issue."); Posner & Vermeule, *supra* note 4, at 692 (analogizing reparations to "large-scale governmental transfer programs").

generation as children of victims—what might be called the next generation down.²⁷ Indeed, histories of the movement for Japanese American redress suggest that many older surviving internees sought redress reluctantly at first.²⁸ The ongoing campaign for reparations for African Americans for slavery and Jim Crow exhibits a similar, although not identical, pattern. Obviously none of the leaders is a former slave, and the persons now leading the movement for redress are several generations removed from the last generation of slaves.²⁹ If, however, the injustice is defined as Jim Crow rather than slavery, then a number of the leaders are the first to grow up since the end of de jure segregation, after *Brown v. Board of Education*.³⁰

C. Why Are Claims Brought and What Remedies Are Requested?

Notwithstanding the similarities in the claims for historical-injustice redress in the United States, the claims also differ in important ways. In particular, there are significant differences in the

27. For example, the movement for reparations for Japanese Americans was led not only by former internees, but also by the children of internees born after internment. See, e.g., HATAMIYA, *supra* note 8, at 142, 164 (describing the active role of the Sansei, third generation Japanese Americans, in the movement for reparations); TORPEY, *supra* note 1, at 85 (attributing much of the success of the Japanese American redress movement to the emergence of the Sansei as a political force); Roger Daniels, *Japanese Relocation and Redress in North America: A Comparative View*, 26 PAC. HISTORIAN 2 (1982), reprinted in THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS 376, 386 (Charles McClain ed., 1994) (pointing out that leadership in the redress movement shifted to the younger generation in the late 1970s).

28. See, e.g., BARKAN, *supra* note 2, at 36-37 (referring to “the early reluctance among those of the older generation, the majority of internees,” to seek redress for internment); HATAMIYA, *supra* note 8, at 45-46 (noting that taking no action was the preferred course of action for many Japanese Americans at the beginning of the redress movement).

29. However, the distance between living African Americans and slavery is not as great as many imagine. The relatively short lapse of time since the abolition of slavery was underscored recently by the discovery that Reverend Al Sharpton’s great-grandfather was a slave owned by a relative of the late segregationist Senator Strom Thurmond. Bob Herbert, *Slavery Is Not Dead. It’s Not Even Past*, N.Y. TIMES, Mar. 1, 2007, at A19. Sharpton spoke of reparations for slavery at the 2004 Democratic Party convention. Reverend Al Sharpton, Address at the 2004 Democratic National Convention (July 28, 2004), available at <http://www.washingtonpost.com/wp-dyn/articles/A21903-2004Jul28.html>.

30. 347 U.S. 483 (1954).

Consider, for example, the backgrounds of Randall Robinson and Charles Ogletree, two of the co-chairs of the Reparations Coordinating Committee. OGLETREE, *supra* note 4, at xiv, 284; ROBINSON, *supra* note 4, at 8; Amitabh Pal, *Randall Robinson*, THE PROGRESSIVE, Oct. 2005, at 37, 40-41.

On why the generation once removed from the injustice may take up the cause of redress, see, e.g., EVA HOFFMAN, AFTER SUCH KNOWLEDGE: MEMORY, HISTORY, AND THE LEGACY OF THE HOLOCAUST (2004), which explores the thoughts and experiences of the children of Holocaust survivors, and PETER NOVICK, THE HOLOCAUST IN AMERICAN LIFE (1999), which looks at the treatment of the Holocaust in the United States.

motivations for seeking redress and the remedies that have been sought.

Sociologist John Torpey has developed a helpful categorization of claims for redress for historical injustices based on what motivates the bringing of the claims and the remedies requested.³¹ Torpey argues that claims for redress can be mapped along two dimensions.

First, claims can be categorized by the extent to which they are motivated by a desire to obtain monetary compensation or the return of economically valuable resources, such as land.³² At the poles of this dimension sit two kinds of claims: (1) purely symbolic claims in which money or economically valuable resources either are not sought or are sought mainly to affirm symbolically the making of redress and (2) purely economic claims in which the objective is to obtain money or economically valuable resources for their own sake. The claims for reparations for Japanese Americans might be considered more symbolic and the claims for reparations for African Americans more economic. Japanese American proponents of redress seemed to be seeking recognition of the wrongful nature of internment more than financial compensation for the losses caused by internment. Many Japanese Americans regarded the payment of monetary reparations as necessary to underscore the significance of the U.S. government's apology for internment rather than as a form of compensation.³³ In contrast, many of the contemporary proponents of redress for slavery and subsequent discrimination against African Americans seem to advocate it, in part, as a way of directing additional resources to disadvantaged African Americans.³⁴ Notably, the revival of claims for reparations for African Americans comes at a time when many African Americans remain socioeconomically disadvantaged relative to non-Hispanic whites, notwithstanding the improvement in the socioeconomic standing of many African Americans since the 1960s.³⁵

The second dimension along which we can map claims is "the extent to which claimants regard past injustices as having contributed to *the destruction of 'a culture,'* and the role" of redress "in repairing the damages . . . inflicted on a culture."³⁶ At the poles of this

31. TORPEY, *supra* note 1.

32. *Id.* at 42-51.

33. See, e.g., HATAMIYA, *supra* note 8, at 81-82 (emphasizing the "conscience-clearing" aspects of redress). But see *id.* at 97 (specifying the wishes of some Japanese Americans that they be compensated for loss of property, wages, and education, among other things).

34. See *infra* note 55 (noting that recent proponents of reparations for African Americans see them as a way to address socio-economic gaps between blacks and whites).

35. *Id.*

36. TORPEY, *supra* note 1, at 58.

dimension sit two types of claims: (1) claims stemming from an injustice that destroyed a way of life and seeking redress to recapture an aspect of the bygone way of life and (2) claims with little cultural significance that are motivated by the loss of an item to which the claimant claims legal title. Torpey refers to this second type as “mundane” claims.³⁷ Consider, for instance, Native American claims for the return to tribes and individuals of human remains and cultural artefacts stored in museums that led to the passage of the Native American Graves Protection and Repatriation Act in 1990.³⁸ The artefacts and human remains were remnants of traditional ways of life that, in many instances, were destroyed by colonization but retained spiritual or familial significance to Native Americans.³⁹ At the other end of the spectrum, we might put some of the post-1989 claims for the return of properties expropriated after World War II by Communist governments in Central and Eastern Europe. Some of these claims were for the return of real property with sentimental value, such as old family homes, and cultural property like artwork. But these claims also were for commercially valuable properties that were sold or rented quickly by those who received them in restitution programs.⁴⁰

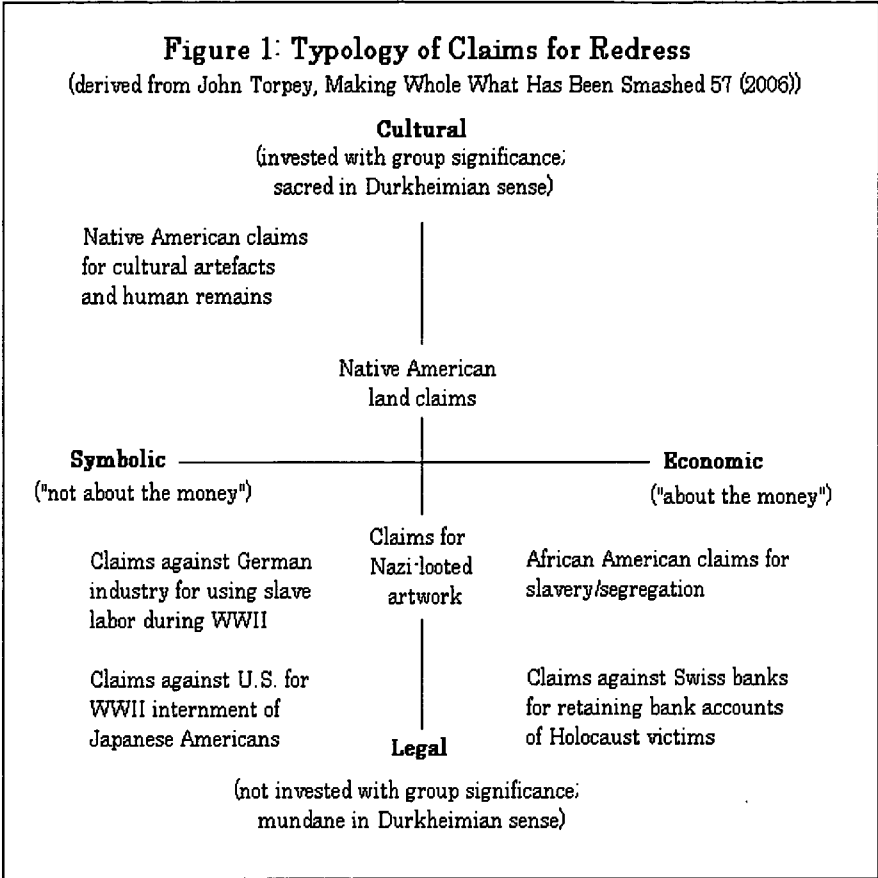
Below, I reproduce a modified version of Torpey’s visual representation of his attempt to map claims for redress to which I have added and subtracted examples.

37. *Id.* (quoting Emile Durkheim).

38. 25 U.S.C. §§ 3001-3013 (2000).

39. See also William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1, 64 (2005) (“[M]ost Indians desire above all not to be made whole financially but rather to exercise their rights to self-determine and to express their unique cultures and religions upon their sacred ancestral lands.”).

40. See, e.g., Mark Blacksell & Karl Martin Born, *Private Property Restitution: The Geographical Consequences of Official Government Policies in Central and Eastern Europe*, 168 GEOGRAPHIC J. 178, 184 (2002) (describing consequences of restitution in East Germany).



Adapted and reprinted by permission of the publishers from *MAKING WHOLE WHAT HAS BEEN SMASHED: ON REPARATIONS POLITICS* by John Torpey, p. 57, Cambridge, Mass.: Harvard University Press, Copyright © 2006 by the President and Fellows of Harvard College

With this background in mind, I now turn to the moral justifications for addressing the claims for historical injustices that recently have been advanced in the United States. Most of these claims are for injustices that occurred in the United States, such as the wartime internment of Japanese Americans, the mistreatment of Native Americans, and slavery and discrimination against African Americans. But some of the claims are for redressing injustices that took place elsewhere, such as the Holocaust. While many of the same moral arguments are made for redressing different historical injustices, there are some arguments that are particular to specific

injustices. I indicate below when arguments are closely identified with one or more movements for redress. My primary focus is the justifiability of claims for redress that would involve commitments of significant resources, such as large-scale reparations or property restitution. I focus on claims that implicate sizeable amounts of resources because these claims tend to be much more contentious than claims for more symbolic measures like official apologies, memorials, or commissions of inquiry, except when these measures are regarded as preludes to reallocations of sizeable amounts of resources.

II. TWO LESS PROMISING MORAL ARGUMENTS FOR REDRESS

I start by considering two of the less promising, forward-looking moral arguments that have been advanced in the United States for redressing historical injustices: the argument that redress will deter wrongdoing and the argument that it will promote distributive justice.

A. Redress Deters

Some proponents of redressing historical injustices argue for redress in utilitarian terms, on the basis that it will deter human rights violations, such as invidious discrimination based on race, religion, or ethnicity. For example, Robert Westley, a prominent advocate of reparations for African Americans, has written that "[m]emorializing injustices committed in the past is . . . an obviously important way of preventing those same injustices from occurring in the future."⁴¹ Consider also an argument that some American attorneys made in the 1990s when suing German corporations for using slave and forced labor during World War II, and the Swiss banks for helping to finance the German war effort and retaining the bank accounts of Holocaust victims.⁴² These attorneys suggested that

41. Robert Westley, *Many Billions Gone: Is It Time to Reconsider the Case for Black Reparations?*, in *SHOULD AMERICA PAY? SLAVERY AND THE RAGING DEBATE OVER REPARATIONS* 109, 118 (Raymond A. Winbush ed., 2003); see also Bradford, *supra* note 39, at 81-83 (suggesting that redressing injustices done to Native Americans would deter wrongdoing); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 383-85 (1987) (asserting that reparations will deter wrongdoing because "[t]he discovery and acknowledgment of past wrongs will educate us, and help us to avoid repeating the same errors"); Eric K. Yamamoto, *Friend or Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT'L L. & POL'Y 223, 233 (1992) ("[R]eparations claims, and the rights discourse they engender . . . can and should be appreciated as intensely powerful and calculated political acts that challenge racial assumptions . . .").

42. Slave laborers were "confined in concentration camps and ghettos" and "worked to death." Just over "half . . . were Jewish, the rest mostly Poles and Russians." "Forced laborers,

the lawsuits would help to establish that private corporations that profit from moral wrongs are as liable as the public officials who authorize the wrongs. For these attorneys, suing European firms for profiting from the Holocaust was part of a broad effort by human rights advocates and others to institutionalize notions of corporate social responsibility.⁴³

There are important reasons for doubting that redressing historical injustices will deter future wrongdoing.⁴⁴ For analytical clarity, I separately consider whether redressing historical injustices can be justified as individual and general deterrence.⁴⁵

The individual deterrence argument is that forcing an actor to redress injustices that it committed in the past will deter that actor from committing the same injustices in the future.⁴⁶ As mentioned above, in most instances in which redress has been sought in the United States, the original wrongs involved human rights violations—principally discrimination based on race, religion, or ethnicity—authorized and often committed by governments and private

almost exclusively non-Jewish workers from Eastern Europe,” had “harsh but better” “living conditions” and “were often paid minimal salaries.” STUART E. EIZENSTAT, *IMPERFECT JUSTICE: LOOTED ASSETS, SLAVE LABOR, AND THE UNFINISHED BUSINESS OF WORLD WAR II* 206-07 (2003).

43. See Memorandum of Law Submitted by Plaintiffs in Response to Expert Submissions Filed by Legal Academics Retained by Defendants at 28-39, *In re Holocaust Victim Assets Litig.*, No. CV-96-4849 (on file with Vanderbilt Law Review) [hereinafter Memorandum]; see also Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-Era Litigation in American Courts*, 80 WASH. U. L.Q. 795, 829 (2002) (describing Holocaust litigation as an outgrowth of the movement to establish “transnational law that holds actors responsible for violations of norms of human decency, regardless of local law”); Robert A. Swift, *Holocaust Litigation and Human Rights Jurisprudence*, in *HOLOCAUST RESTITUTION: PERSPECTIVES ON THE LITIGATION AND ITS LEGACY* 50, 51-52 (Michael J. Bazyler & Roger P. Alford eds., 2006) (situating Holocaust litigation in the context of a growing movement for redress from corporations for profiting from human rights violations); see also Robinson, *supra* note 13, at 323-38 (linking arguments for reparations for African Americans and corporate social responsibility).

44. See Levmore, *supra* note 8, at 1687-88 (rejecting the idea that reparations deter); Logue, *supra* note 18, at 1335-36 n.52 (same).

Another utilitarian justification sometimes offered is that redress—particularly in the form of property restitution—may promote economic development. See, for example, Kutz, *supra* note 14, at 291, who refers to the instrumental uses of restitution in post-1989 Central and Eastern Europe. Conventionally, though, economists are wary of property restitution because it may create instability, disincentivizing investment. See, e.g., WORLD BANK, *WORLD DEVELOPMENT REPORT 1996: FROM PLAN TO MARKET* 59 box 3.7 (1996) (noting the economic uncertainties produced after formerly communist states enacted restitution programs).

45. Individual deterrence is defined as:

[T]he tendency of a person who has been penalized for committing an illegal act to be more deterred in the future from committing that act than he had been beforehand by the prospect of sanctions [G]eneral deterrence . . . [is] the tendency of people who have not yet been sanctioned to be deterred by the prospect of sanctions for committing an illegal act.

STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 515 (2004) (emphasis omitted).

46. *Id.*

corporations. Concretely, then, redress would aim to deter governments and corporations—more specifically, their officers and employees—from violating human rights.

First, consider governments. It is difficult to imagine them being deterred from human rights violations by having to pay for an injustice committed in the distant past.⁴⁷ In general, governments do not respond to monetary costs in a straightforward manner because the monetary costs of government actions are externalized to taxpayers.⁴⁸ Instead, governments respond to political costs, which may or may not arise from the imposition of monetary costs.⁴⁹ Moreover, governments would seem even more likely to discount future costs, such as reparations, given the possibility that these costs might never be incurred or might come due long after the current decisionmakers have left office.

It is also difficult to envision that the threat of redress will deter corporations from committing injustices comparable to ones that they have committed in the past. Corporations are more sensitive to the monetary costs of redress because they are less able to externalize costs, assuming that firms operate in competitive markets.⁵⁰ But corporations also may discount the possibility of having to pay reparations in the future, given the chance that the obligation to pay may never arise.

Redress is more plausible as a strategy of general deterrence. As suggested above, redress often is advocated as a way of conveying a message about the importance of respecting human dignity in order to deter governments and corporations from actions undermining that dignity. In particular, the advocates of redress often hope that it will change common understandings of what is morally acceptable and thereby reduce the likelihood of human rights violations.⁵¹

However, it is not self-evident that redressing instances of long ago human rights violations will change public attitudes. Redress

47. Of course, the situation might be different if the payment was made for a relatively recent injustice, and some of the perpetrators of the injustice remained in office. In particular, individual deterrence might be feasible in countries transitioning to democracy in which past wrongdoers still held power, for example in the military. See, e.g., Laurel Fletcher, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, 19 BERKELEY J. INT'L L. 428, 432 (2001) (reviewing MINOW, *supra* note 4).

48. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 401 (2003).

49. *Id.* at 400-02.

50. See, e.g., *id.* at 377 (suggesting that sanctions are more likely to deter entities that have less ability to externalize the costs of sanctions).

51. See, e.g., J. Angelo Corlett, *Wrongdoing, Reparations and Native Americans*, in INJUSTICE AND RECTIFICATION 147, 148-49 (Rodney C. Roberts ed., 2002) (discussing the expressive function of reparations).

undoubtedly educates decisionmakers and the public about past injustices when it involves an official apology, a commission of inquiry, or the construction of a monument or a museum memorializing an injustice.⁵² However, the decision to implement redress by these or other means is probably more often an indication that attitudes already have changed.⁵³ Moreover, present-day human rights violations such as discrimination might be overcome more effectively by prohibiting such violations now and in the future and by drawing attention to current, rather than past, violations. Notably, there is little empirical evidence that redressing historical wrongs, whether through reparations or through other forms of redress such as memorialization, actually has changed public attitudes about human rights.⁵⁴

B. Redress Promotes Distributive Justice

A number of advocates for redress for African Americans and Native Americans propose it as a way of promoting distributive justice.⁵⁵ Of course, there are many conceptions of distributive justice,

52. See, e.g., HATAMIYA, *supra* note 8, at 84-98 (analyzing the impact of the 1982 report of the Commission on Wartime Relocation and Internment of Civilians); Karen Lee Ziner, *Brown Focuses on Ills of Slavery*, PROVIDENCE J. BULL., Feb. 25, 2007, at A-01 (reporting public reaction to the Brown University Steering Committee on Slavery and Justice).

53. Jeremy Waldron, *Redressing Historic Injustice*, in JUSTICE IN TIME, *supra* note 14, at 55, 74 (arguing that we would not condemn past events as violating "moral standards" "[u]nless we had those standards already").

54. Indeed, a number of scholars have speculated that prominent instances of redress such as reparations for Japanese Americans have had little effect on American attitudes. See, e.g., NOVICK, *supra* note 30, at 247 (1999) (doubting "claim that the Holocaust 'sensitizes' us, makes us more alert and responsive to other, lesser atrocities"); TORPEY, *supra* note 1, at 105 ("[T]he impact of the violation of Japanese-Americans' constitutional rights on . . . [American] society remains relatively vague, . . . [although] the history of the Japanese-American internment has had some effect on recent discussions of the treatment of Arab-Americans."); Yamamoto, *supra* note 41, at 233-36 ("[R]eparations for WWII Japanese American internees has not necessarily entailed a fundamental restructuring of governmental relations with Asian Americans particularly, and minorities generally.").

55. See, e.g., BROOKS, *supra* note 4, at 36-97 (emphasizing "human capital deficiencies" faced by blacks, such as lower educational attainment than whites, in arguing for reparations); BROPHY, *supra* note 2, at xi ("Faced with differences between blacks and whites in wealth, poverty rates, educational achievement, and health care, scholars and activists in post-Civil Rights America have increasingly turned to 'reparations talk.'"); ROBINSON, *supra* note 4, at 226-28 (advocating reparations partly to close the "wealth gap" between African Americans and whites due to slavery and subsequent discrimination); TORPEY, *supra* note 1, at 65 ("[T]he case of reparations for black Americans is virtually the paradigm case of anti-systemic reparations, where the central problem is the alleviation of economic inequalities said to be rooted in a past system of domination."); Alfred L. Brophy, *The Cultural War Over Reparations For Slavery*, 53 DEPAUL L. REV. 1181, 1193 (2004) (describing reparations as a tool to combat poverty); Forde-Mazrui, *supra* note 9, at 710 ("[A]ddressing the social and economic disadvantages experienced

and they often differ about what must "be distributed, to whom . . . on what basis," and whether the distribution must be in place all the time or over a lifetime.⁵⁶ Historically, distributive justice was associated with a distribution of holdings based on merit or desert.⁵⁷ More recently, distributive justice has been associated with a distribution of holdings based on economic need, equality, or another concept combining these and other considerations.⁵⁸

The proponents of African American and Native American redress often argue loosely that holdings should be distributed more equally between whites and African Americans or Native Americans, or that not enough has been done to address the needs of economically disadvantaged African Americans or Native Americans.⁵⁹ They then suggest that redress would lead to a more just distribution of holdings between whites and African Americans or Native Americans. For example, prominent proponents recently have portrayed reparations for African Americans as a means of addressing the wealth gap between whites and African Americans by re-distributing resources to poorer African Americans, especially those living in urban ghettos.

The idea that redressing an injustice committed long ago could promote distributive justice brings to mind the theoretical debate about the relationship between distributive and corrective justice. The dominant view among corrective justice theorists is that distributive and corrective justice are two distinct concepts.⁶⁰ As discussed further

by blacks may be warranted as a matter of distributive justice."); Logue, *supra* note 18, at 1322 (arguing that reparations for African Americans "can be defended on fairly intuitive and straightforward distributive justice grounds"); Robinson, *supra* note 13, at 376 (arguing that reparations should be motivated by a distributive desire to close the wealth gap); Westley, *supra* note 41, at 126-27 (discussing distributive justice implications of paying reparations to African Americans); see also Lindsay Glauner, Comment, *The Need for Accountability and Reparation: 1830-1976: The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 954 (2002) (referring to poverty levels among Native Americans in arguing for redress). But see Bradford, *supra* note 39, at 73 (referring to material and other disadvantages Native Americans face in arguing for redress, but emphasizing that Native American claims are not "pleas for distributional justice").

56. Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, in OXFORD ESSAYS IN JURISPRUDENCE 237, 241 (Jeremy Horder ed., 2000) (listing requirements James Gordley suggests are necessary in order to do distributive justice); see also *id.* at 245-46 (discussing static and dynamic conceptions of distributive justice).

57. SAMUEL FLEISCHACKER, A SHORT HISTORY OF DISTRIBUTIVE JUSTICE 2 (2004).

58. *Id.* at 4.

59. See *supra* sources cited in note 55 discussing distributive justice rationales for reparations for African Americans and Native Americans.

60. This discussion associates corrective justice with what Part III refers to as Aristotelian corrective justice, and assumes that redress for historical injustices instantiates Aristotelian corrective justice.

in Part III, corrective justice usually is assumed to generate an obligation on specific individuals to repair losses that they caused to other identifiable individuals.⁶¹ In contrast, distributive justice is assumed to ground more general obligations on society to assist individuals based on one or more criteria, such as need.⁶² Emphasizing this distinction, most corrective justice theorists argue that corrective justice is not a means of achieving distributive justice.⁶³ One intuitive reason for this is that corrective justice applies only to actors who have related to each other in a certain way.

Consider a situation where corrective justice usually is assumed to apply: an accident in which a car driver negligently crashes into a pedestrian. Here, the car driver owes a duty of repair to the pedestrian in corrective justice. Because corrective justice only applies in limited contexts, it cannot be counted on as a way of achieving or preserving a distribution based on need or any other criterion. A transfer of resources mandated by corrective justice to repair a wrong, such as negligent driving, could upset an existing just distribution or exacerbate any existing distributional imbalances. Any ability that exists to maintain or further distributive justice by transferring resources from one individual to the other in a relationship governed by corrective justice is fortuitous.⁶⁴ Imagine that, in the hypothetical, I was the pedestrian and Bill Gates was the driver. Any payment that he made would promote distributive justice, but only because of the coincidence of my economic position compared to his. If I was the driver and Bill Gates was the pedestrian, corrective justice would mandate a transfer from a poorer to a wealthier person,

61. See generally Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (emphasizing specificity of corrective justice theories).

62. See, e.g., JULES L. COLEMAN, RISKS AND WRONGS 312-13 (1992) (distinguishing an individual responsibility basis of corrective justice from a collective responsibility basis of distributive justice); Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 351-52 (2002) (same).

63. See COLEMAN, *supra* note 62, at 357 (“[C]orrective justice does not sustain distributive justice”); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 80 (1995) (emphasizing that corrective justice is “autonomous” from distributive justice); Perry, *supra* note 56, at 237 (“[C]orrective justice is a general moral principle that is concerned, not with maintaining a just distribution, but rather with repairing harm.”). But see James Gordley, *Tort Law in the Aristotelian Tradition*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 131, 132-37 (David G. Owen ed., 1995) (arguing that, unlike Weinrib and other modern tort theorists, many writers in the Aristotelian tradition suggest that corrective and distributive justice are related).

64. Perry, *supra* note 56, at 244 (“[C]orrective justice rectifies loss on a local scale, between two persons. As a general matter, the local mechanism cannot respond satisfactorily to the global problem.”).

which is inconsistent with most contemporary notions of distributive justice.⁶⁵

While advocates of reparations for African Americans often suggest that reparations would promote distributive justice, reparation proposals reflect some of the problems corrective justice theorists identify with attempting to achieve distributive justice through corrective justice. Consider, for example, Roy Brooks's atonement model of reparations for African Americans.⁶⁶ In making the case for reparations, Brooks emphasizes the unequal distribution of resources and opportunities between African Americans and whites in the United States and presents reparations as a way of remedying this maldistribution.⁶⁷ Under Brooks's proposal, the U.S. government would apologize for slavery and Jim Crow and build a museum about slavery.⁶⁸ In addition, to address the current unequal distribution of resources, Brooks would have the U.S. government endow trust funds for "newborn black American child[ren] born within a certain period of time—five, ten, or more years."⁶⁹ The trust funds could be used to finance education, business start-ups, or investments.⁷⁰

Notwithstanding Brooks' egalitarian instincts, the trust fund proposal is an over- and under-inclusive way of promoting a more equitable distribution of resources. It is over-inclusive because wealthier as well as poorer African Americans have the same claim for reparations based on a shared family history of slavery. Recognizing this problem, Brooks arbitrarily (from a corrective justice standpoint of addressing slavery) excludes children born into "wealthy black families . . . from the [trust fund] program."⁷¹ His proposal is under-inclusive (from a distributive justice standpoint) because equally economically disadvantaged children with no family history of African American slavery would not be eligible for the trust funds. Perhaps sensing the arbitrariness of this exclusion (from an egalitarian perspective), Brooks defends excluding these children on the basis that they have no connection to slavery.⁷² But from the perspective of

65. The example is inspired by one developed in COLEMAN, *supra* note 62, at 304, and adapted by Kutz, *supra* note 14, at 299, to refer to Bill Gates.

66. BROOKS, *supra* note 4, at 141-79.

67. *Id.* at 36-97.

68. *Id.* at 157-59.

69. *Id.* at 159.

70. *Id.* at 161-62.

71. *Id.* at 162. Brooks envisions that trust administrators would establish income cut-offs to account for income and wealth disparities across regions. *Id.*

72. *Id.* at 160-61, 197 (defending exclusion of children of foreign-born blacks, and children of other racial minorities, from eligibility for the trust funds).

distributive justice, the result remains unsatisfactory because equally disadvantaged children are treated differently for no reason relevant to their current resources or need. The under- and over-inclusion bear out the difficulty of achieving distributive justice through corrective justice.

The limited opportunity that redressing historical injustices offers for promoting a more egalitarian distribution of resources is one reason that a number of proponents of distributive justice are reluctant to embrace redress for historical injustices. Egalitarian critics of redressing historical injustices argue that it is more important “to focus upon present and prospective costs.”⁷³ Contrary to reparationists, the egalitarian critics maintain that forward-looking distributive justice should trump historically minded redress for past wrongs.⁷⁴

III. CORRECTIVE JUSTICE JUSTIFICATIONS

The most frequently made argument for redressing historical injustices is a backward-looking one rooted in a concept of moral rights. According to this argument, there is an obligation to correct injustices, and a corresponding right to have them redressed, even if they happened long ago.⁷⁵ One version of the corrective justice argument was used by the claimants in the Swiss banks case. In particular, they invoked Aristotle’s concept of corrective justice in support of their claims against the banks for profiting from the

73. Waldron, *Superseding Historical Injustice*, *supra* note 14, at 26 (arguing that behind his assertion that claims rooted in the past may be superseded is “a determination to focus upon present and prospective costs”); *see also* Kutz, *supra* note 14, at 278, 296 (arguing against property restitution in post-Communist Eastern Europe because paying reparations diminishes the societal resources available to meet current needs); Lyons, *supra* note 14, at 375-76 (arguing that Native Americans have compelling claims based on their current needs, not the dispossession of their ancestors).

74. *See* sources cited *supra* note 73.

75. *See* Logue, *supra* note 18, at 1323 (“[M]ost reparations scholars and activists view reparations as an issue of corrective justice, of rectifying a historic wrong.” (citing Eric J. Miller, *Healing the Wounds of Slavery: Can Present Legal Remedies Cure Past Wrongs?*, 24 B.C. THIRD WORLD L.J. 45, 47 n.5 (2004))); *see also* Posner & Vermeule, *supra* note 4, at 691 (offering a four-part definition of reparations that suggests that reparations “typically refer to schemes . . . in which the payment is justified on backward-looking grounds of corrective justice”); Adrian Vermeule, *Reparations as Rough Justice* 7 (Sept. 2005) (unpublished manuscript, on file with Vanderbilt Law Review), available at <https://www.law.uchicago.edu/law-pdf/public-law/105.pdf> (characterizing reparations for historical injustices as “very rough corrective justice”). *But see* BROPHY, *supra* note 2, at xiii (arguing that proposals for reparations for African Americans “are about both ‘corrective justice’ . . . and ‘distributive justice’”).

Holocaust.⁷⁶ Another version of the corrective justice argument invokes Nozick's entitlement theory of justice. Advocates of reparations for African Americans and Native Americans have drawn on the principle of rectification that is part of this theory.⁷⁷

This Part analyzes the Aristotelian and Nozickian conceptions of corrective justice and argues that each conception yields a different backward-looking argument for repair. I also underscore the conditions that must be satisfied to justify repairing a historical injustice under Aristotelian and Nozickian corrective justice.

This Part discusses corrective justice arguments for redress in considerably more depth than Part II discussed deterrence and distributive justice arguments for two reasons. First, many of the arguments for redressing historical injustices invoke the idea of corrective justice.⁷⁸ Second, corrective justice often is invoked very imprecisely in arguments for redress.⁷⁹ Few proponents of redress have grounded their arguments in any sophisticated conception of corrective justice.⁸⁰ This Part addresses that failure by explaining how the Aristotelian and Nozickian conceptions of corrective justice, often invoked loosely by redress proponents, might ground claims for repairing historical injustices. In doing so, this Part illustrates that these conceptions of corrective justice offer highly contingent justifications for redressing historical injustices. Importantly, then, the following analysis underscores the limited extent to which

76. For a discussion of the use of Aristotelian themes in Holocaust litigation, see, for example, Neuborne *supra* note 43. Neuborne represented plaintiffs in numerous Holocaust reparations claims. *Id.* at 795 n.1.

77. See, e.g., Bradford, *supra* note 39, at 57 n.298 (implying that Nozick offers a model of redress for Native Americans, but rejecting that model); Corlett, *supra* note 51, at 149 (offering "historical argument for reparations to Native Americans" similar to Nozick's); see also Tuneem E. Chisolm, Comment, *Sweep Around Your Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 713 (1999) (invoking Robert Nozick in advocating reparations for African Americans); Hylton, *supra* note 12, at 1255 n.186 (noting that Nozick's principle of rectification offers a "game plan" for reparations for African Americans); Lyons, *supra* note 14, at 357-58 (positing that arguments for and against aboriginal land claims "center on what we, following Robert Nozick, might call 'historical' considerations"); Simmons, *supra* note 14 (offering a version of historical theory of property rights similar to Nozick's in support of Native American claims); see also THOMPSON, *supra* note 14, at xiii (suggesting that "philosophical discussions" of duties to repair historical injustices often presume that duties are based on historical title theories similar to Nozick's).

78. See *supra* note 75 (emphasizing the prevalence of corrective justice-type arguments).

79. See *supra* note 9 and accompanying text, referring to imprecision of discourse about redress.

80. Janna Thompson arguably is an exception, although she does not describe her argument as being rooted in corrective justice. See THOMPSON, *supra* note 14, at xx (justifying reparations in a framework of "trans-generational relationships").

corrective justice theories invoked by redress proponents actually may justify redressing historical injustices.

A. Aristotelian Corrective Justice

In Book V of the *Nicomachean Ethics*, Aristotle lays out a concept of corrective justice that generates the obligation (and the corresponding entitlement) to repair, which, as mentioned above, was invoked by the claimants in the Swiss banks case.⁸¹ This Aristotelian concept has a number of modern expositors, including Jules Coleman and Ernest Weinrib, each of whom offers his own conception of corrective justice.⁸²

For Aristotle, Coleman, Weinrib, and other Aristotelians, corrective justice imposes an obligation on one party to another because they have interacted in a particular way.⁸³ Consider, for example, the main elements of Weinrib's version of corrective justice. It maintains that individuals who interact must remain in a position of equality with each other.⁸⁴ If one does something to upset their equality, then he must restore it.⁸⁵ For instance, if one neighbor steals from another, then the thief has upset their equality and is required to restore it by returning the object or compensating his neighbor for the robbery. For Aristotelians, corrective justice differs from distributive justice because distributive justice imposes a general obligation on society to allocate goods, resources, or opportunities based on one or more criteria, such as merit, need, or equality. Consequently,

81. See generally ARISTOTLE, *NICOMACHEAN ETHICS* 81-102 (Roger Crisp ed., Cambridge Univ. Press 2000) (discussing corrective justice); see also Neuborne *supra* note 43, at 829 (discussing Aristotelian themes invoked during Holocaust litigation).

82. For Ernest Weinrib's theory, see, for example, WEINRIB, *supra* note 63, at 56-83, and Weinrib, *supra* note 62, at 349-56. For Jules Coleman's mixed conception of corrective justice, see, for example, JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* 3-63 (2001), and COLEMAN, *supra* note 62, at 303-28. Coleman's earlier annulment theory is not Aristotelian because it does not impose a duty of repair on the wrongdoer in particular. See COLEMAN, *supra* note 62, at 309-11 (criticizing annulment thesis).

83. See ARISTOTLE, *supra* note 81, at 87 para. 1132a (describing corrective justice in terms of the interaction between two parties); COLEMAN, *supra* note 62, at 314-15 ("If one person has wronged another, then corrective justice imposes a duty on the wrongdoer to rectify his wrong."); Weinrib, *supra* note 62, at 351 ("Corrective justice links the doer and sufferer of an injustice in terms of their correlative positions.").

84. Weinrib, *supra* note 62, at 349. Weinrib states that "equality consists in persons' having what lawfully belongs to them." *Id.* Equality does not require "an initial equality in the parties' wealth." *Id.* at 354.

85. *Id.* at 349, 354.

Aristotelians regard corrective justice as agent-specific and distributive justice as agent-neutral.⁸⁶

There is no single version of Aristotelian corrective justice. It is possible, however, to identify at least three conditions that must apply for one actor to be said to owe another a duty of repair under Aristotelian corrective justice theories: the existence requirement, the violation-of-protected-interest requirement, and the remediable violation requirement.⁸⁷ Each requirement limits the extent to which corrective justice offers a moral justification for redressing a historical injustice.

1. Existence

Under Aristotelian corrective justice, a duty of repair applies only if the wrongdoer and the victim still exist. This existence requirement reflects the fact that Aristotelian corrective justice is agent-specific: as discussed above, it posits that a wrongdoer has an obligation toward his or her victim. Recall Weinrib's conception of corrective justice, according to which the purpose of corrective justice is to reinstate the equality of wrongdoer and victim that the wrongdoer violated.⁸⁸ It would be impossible to reinstate the equality of wrongdoer and victim if one or both no longer exists. According to Coleman, corrective justice imposes a duty on wrongdoers "to repair the wrongful losses for which they are responsible."⁸⁹ Again, it is hard to understand how a wrongdoer could fulfill this duty if he or his victim no longer exists.

Implicitly, the existence requirement imposes a time limit on invoking Aristotelian corrective justice to justify redressing historical wrongs: the duty of repair ends once the wrongdoer or the victim ceases to exist. I first consider the implications of the existence requirement for wrongdoers, and then for victims, in debates about redressing historical injustices.

The wrongdoers in the historical injustices that have become the focus of debate in the United States typically were collective

86. See, e.g., COLEMAN, *supra* note 62, at 319 ("[C]orrective justice creates agent-relative reasons for acting.").

87. To be clear, these conditions do not correspond with any particular corrective justice scholar's theory of when a duty of repair exists. They are prerequisites for invoking a duty of repair that are either explicit or implicit in various existing theories, principally Weinrib's and Coleman's mixed theory. For Coleman's and Weinrib's descriptions of their theories, see sources cited *supra* note 82.

88. See *supra* notes 84-85 and accompanying text summarizing Weinrib's theory of corrective justice.

89. COLEMAN, *supra* note 62, at 324.

agents, specifically governments and corporations.⁹⁰ This raises the question of when a collective agent ceases to exist. Aristotelians have not addressed this issue because their paradigmatic applications of corrective justice involve individual wrongdoers and victims.⁹¹

Notably, the law presumes that governments and corporations retain their identities over time, even when the individuals comprising them change.⁹² Thus, governments and firms are legally required to pay the debts that they incurred in the past, absent fundamental institutional changes, such as the dissolution of the state or the firm.⁹³ For example, as a matter of government succession law, today's U.S. government likely is responsible for debts incurred by the antebellum U.S. government despite the Civil War and constitutional amendments that occurred in the interim. The U.S. government's responsibilities persist because none of these events rises to the level of a fundamental change breaking continuity.⁹⁴

However, even though black letter law clearly holds governments and corporations responsible for the actions of earlier versions of themselves, it is not easy to justify doing so. Piercing the institutional veil that shrouds governments and firms and holding these collective agents responsible for acts undertaken or sanctioned by much earlier versions of themselves means forcing current citizens and shareholders to pay for actions that were done under the watch of their predecessors. The standard justifications for making citizens and shareholders pay for recent wrongs committed by governments and corporations cannot neatly justify forcing current citizens or

90. See *supra* notes 18-19 and accompanying text, discussing the fact that governments and private corporations were the wrongdoers in many prominent historical injustices.

91. See *supra* sources cited in note 82 (generally discussing corrective justice in terms of moral obligations and entitlements prevailing between individuals). I do not agree, but some regard Aristotelian corrective justice as too individualistic to allow for group claims or responsibility. See, e.g., Ellen Frankel Paul, *Set-Asides, Reparations, and Compensatory Justice*, in COMPENSATORY JUSTICE 97, 101-02, 115, 120-22 (John W. Chapman ed., 1991).

92. Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHI. J. INT'L L. 391, 404 (2005) ("The law of government (as distinct from state) succession is settled—revolutions notwithstanding, 'the nation remains with rights and obligations unimpaired.' " (quoting *Lehigh Valley R.R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927))).

93. See Gelpern, *supra* note 92, at 405 (discussing state succession). On successor liability for corporations in products liability cases, see AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY ch. 3 (1998). See also THOMPSON, *supra* note 14, at 74-75 (arguing normatively for continuity presumption, except in the case of "legal and institutional changes" or injustices "committed by a ruler who acted against [the] . . . interests of a nation's members).

94. Whether a court would enforce debt obligations that the U.S. government incurred before the Civil War is a separate question. Even if government succession law holds that the U.S. government remains the same, other legal obstacles such as statutes of limitation and sovereign immunity could keep courts from enforcing such obligations.

shareholders to pay for acts from many years ago. Consider, for instance, the conventional argument that the citizens of a country are morally responsible for repairing wrongs the government commits because citizens have the opportunity to influence the government through voting, protests, or direct participation.⁹⁵ This opportunity-to-influence argument justifies requiring American citizens to pay taxes to fund redress for wrongs recently committed or licensed by the U.S. government, such as the brutality at Abu Ghraib.⁹⁶ Most of the citizens who would be financing this redress had the opportunity to influence U.S. policy in Iraq, at least in theory. But the opportunity-to-influence argument does not justify holding current Americans responsible for wrongs that U.S. governments committed many decades ago. Current citizens did not have even the notional opportunity to influence governments that were in power before they were born.⁹⁷

Recognizing the limitations of existing arguments, two scholars recently have offered thought-provoking arguments for holding current members of organized groups responsible for injustices that the groups committed under the watch of earlier members. One scholar argues for transgenerational obligations of repair on the basis that organized groups such as nations are “intergenerational communities” whose members “acquire obligations to fulfil . . . the commitments and relationships of their predecessors” “by imposing obligations on their successors, or thinking they could.”⁹⁸ The other scholar argues that the current membership of an organized group, such as a state, is responsible for the consequences of the group’s earlier actions because the current membership has chosen to perpetuate the group.⁹⁹

For the sake of advancing the argument, assume that collective agents are still extant, as government and corporate law do, unless

95. For discussion of the opportunity to influence argument for collective responsibility, see, for example, LARRY MAY, *THE MORALITY OF GROUPS* 73-83 (1987). See also Levinson, *supra* note 48, at 425-27 (discussing theories of collective responsibility); Posner & Vermeule, *supra* note 4, at 703-11 (analyzing models of collective guilt).

96. The Pentagon has promised compensation for Iraqi victims. Christopher Marquis, *The Reach of War: Detainees: U.S. Preparing for Influx of Compensation Claims by Abused Iraqis*, N.Y. TIMES, May 22, 2004, at A9. But see Jon Tracy, *Sometimes in War, You Can Put a Price on Life*, N.Y. TIMES, May 16, 2007, at A19 (criticizing the U.S. military for not adequately compensating victims of atrocities committed by U.S. troops in Afghanistan and Iraq).

97. THOMPSON, *supra* note 14, at 9; Sepinwall, *supra* note 14, at 190, 200-02; see also *id.* at 190 n.43, 197-200 (arguing that other standard arguments for collective responsibility do not obligate current group members to address historical injustices).

98. THOMPSON, *supra* note 14, at xviii.

99. Sepinwall, *supra* note 14, at 191.

there has been a fundamental change. Furthermore, assume that there is a moral justification for holding current generations comprising collective agents responsible for the misconduct of the agents when they had different members. Then consider the implications of these assumptions for debates about redressing historical injustices. A particularly notable one is that as long as the collective agent that committed or sanctioned the injustice persists, there remains an actor who owes a duty of repair. Concretely, then, long-lasting governments and corporations may have duties of repair in corrective justice for injustices that they committed long ago. Still, some claims will not be justifiable under corrective justice. For instance, imagine there are victims of ancient Rome alive today. They could not claim a duty of repair because the Roman Empire no longer exists and there is no clear successor state to which its debts should be assigned.¹⁰⁰

I now turn to the implications on the victim side of the existence requirement for redress claims for historical injustices. Clearly, if an actor who suffered the injustice remains alive, then a victim who is entitled to claim repair in Aristotelian corrective justice still exists. I call such actors direct victims of the injustice because they experienced the injustice.

It is important to remember that direct victims entitled to repair could be individuals or collective agents, such as a Native American tribe claiming for the violation of a treaty right. In examining whether a collective agent is the same agent that was victimized by a historical injustice, we should use the same criteria that we use to determine whether a collective agent alleged to be responsible for a wrong is the same agent as the wrongdoer. Thus, a tribe would benefit from a presumption that it was the legitimate successor to the victimized tribe, absent fundamental changes in the tribe.¹⁰¹

Once the direct victims pass away, can their descendants still claim that they are owed repair under Aristotelian corrective justice? This is an important question because some of the most prominent claims for redress in the United States are claims by individual

100. THOMPSON, *supra* note 14, at 40, 72.

101. In discussing modern-day claims by indigenous nations, Jeremy Waldron suggests that it is necessary to consider whether nations claiming redress are the same as the collective agents that were victimized by the injustice. Waldron, *Redressing Historic Injustice*, *supra* note 14, at 148-50; Jeremy Waldron, *The Half-Life of Treaties: Waitangi*, *Rebus Sic Stantibus*, 11 OTAGO L. REV. 161, 175-76 (2006). *But see* THOMPSON, *supra* note 14, at 76-77 (discussing how there are "moral reason[s] for resurrecting [indigenous] nations and presuming that their members inherit the entitlements of their forebears").

descendants of individual direct victims. Consider, for instance, reparations claims by contemporary African Americans for the enslavement of earlier generations of African Americans.¹⁰²

A strict reading of the existence requirement suggests that the duty of repair ceases once the direct victims of an injustice die and that descendants have no entitlement to repair. But the duty of repair might persist for at least some time after the direct victims pass on if we generously interpret the concepts of existence or victimhood. Consider two categories of arguments for longer-lasting duties and entitlements to repair.

First, we might interpret expansively the concept of existence to define deceased direct victims as still existing because they have continuing interests after they die. Although the idea is contested,¹⁰³ philosophers including Aristotle have argued that the dead have interests and can be benefited and harmed.¹⁰⁴ Their arguments seek to rationalize common intuitions, such as the tendency to “‘feel sorry’ for a decedent if” a project that “he invested in fails after his death.”¹⁰⁵

Assume for the sake of argument that the dead do have interests and, on this basis, exist in some sense after they pass away.¹⁰⁶ It seems reasonable to assume that the interests of the dead might include the well-being of the remaining family members that they knew while they were alive. The dead, we might think, would benefit from knowing that their children and grandchildren had collected reparations that they had not been able to collect when they were alive. It is hard to believe that the interests of the dead would extend much beyond two generations, though. The dead are unlikely

102. I do not pursue this argument, but the entitlements of direct victims of historical injustices to repair also could be questioned on the basis that there is no identity between the victim and the claimant. Individual identity changes over time, and we might be regarded as distinct versions of ourselves at different points in our lives. As a result, an opponent of redress might argue that a direct victim of a forty-year-old injustice is not entitled to redress because the person's identity has changed in the intervening decades. THOMPSON, *supra* note 14, at 162 n.6.

103. *Id.* at 113. See generally Joan C. Callahan, *On Harming the Dead*, 97 ETHICS 341 (1987) (arguing that, despite scholarly assertions to the contrary, it is not possible to harm the dead).

104. Aristotle speculated that the well-being of the dead could be improved or diminished by “the fortunes of a person's descendants and all his friends,” although only marginally. ARISTOTLE, *supra* note 81, Book I, ch. 11; see also George Pitcher, *The Misfortunes of the Dead*, 21 AM. PHIL. Q. 183 (1984) (arguing that “the dead can be harmed”).

105. Callahan, *supra* note 103, at 341; see also Pitcher, *supra* note 104, at 183-84 (arguing that a dead person is harmed when the business that she built collapses after her death).

106. The following argument comes from Michael Ridge, *Giving the Dead Their Due*, 114 ETHICS 38, 42-45, 52 (2003), who offers it as an argument for reparations for African Americans. Another source suggesting that the continuing interests of the dead could ground claims is Tyler Cowen, *How Far Back Should We Go? Why Restitution Should Be Small*, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY, *supra* note 4, at 17, 29.

to have had any contact with descendants further down the line.¹⁰⁷ Thus, even if the dead have interests, those interests might justify redress only to their children and grandchildren. The duty of repair probably would cease after these generations passed away.

Second, we might extend the concept of victim to define descendants of direct victims as victims of the injustice. There are two main versions of the descendants-as-victims argument for allowing the duty of repair to persist even after direct victims have passed away.¹⁰⁸ Under one version, descendants are victims because the suffering of their forebears left the forebears less able to support their descendants materially and emotionally.¹⁰⁹ While probably more plausible to many people than the dead-still-exist argument, this descendants-as-victims argument is still problematic. The descendants may not have existed absent the injustice because their forebears might never have met or had children if they had not suffered the injustice.¹¹⁰ Furthermore, assuming the descendants are deprived in some way, the current plight of the descendants may not be attributable to the injustice that their forebears endured. If the injustice occurred many years ago, the descendants' plight may be due partially or wholly to other factors, including choices made by their forebears.¹¹¹ Like the dead-still-exist argument, then, this argument may not support claims by descendants more than roughly two generations removed from the direct victims, given the ways that circumstances tend to change and opportunities for individual choice multiply over time.

Under a second version of the descendants-as-victims argument, descendants could claim that they are victims because the injustice deprived them of their inheritance rights.¹¹² Difficulties also abound with this argument. First, the argument presumes the legitimacy of inheritance rights. Although inheritance rights are

107. Ridge, *supra* note 106, at 52, 55.

108. These two arguments and others for claims by descendants are critiqued in THOMPSON, *supra* note 14, at xix-xxi, 104-12; Ridge, *supra* note 106, at 38-42; Sepinwall, *supra* note 14, at 215-26. See also THOMPSON, *supra* note 14, at 130-47 (reconceptualizing descendants' harm); Sepinwall, *supra* note 14, at 226-28 (same).

109. THOMPSON, *supra* note 14, at 104.

110. *Id.*; Waldron, *Superseding Historic Injustice*, *supra* note 14, at 12. But see Sepinwall, *supra* note 14, at 222-24 (arguing that the child of slaves can claim reparations even if she would not have been born absent slavery).

111. THOMPSON, *supra* note 14, at 105-06; Waldron, *Superseding Historic Injustice*, *supra* note 14, at 7-14.

112. See, e.g., THOMPSON, *supra* note 14, at 107-12 (discussing inheritance-based claims); Ridge, *supra* note 106, at 38-42 (same); Sepinwall, *supra* note 14, at 218-22 (discussing inheritance-based claims to reparations for slavery).

widely established as a matter of positive law, they face many normative critiques.¹¹³ For example, allowing individuals to pass on wealth may perpetuate and exacerbate inequalities.¹¹⁴ Inheritance rights also may negatively affect societal welfare. While some individuals may labor to leave large inheritances and thereby increase social welfare, receiving an inheritance might discourage beneficiaries from working and thereby reduce social welfare. Second, this argument probably also provides support only for claims of generations once- or twice-removed from the direct victims. It is difficult to imagine people born more than two generations after a direct victim being able to establish that their generations would have received the inheritance that the direct victim could not bequeath to the first post-injustice generation. The direct victims are unlikely to have known members of the third or later generations born after them. Moreover, the direct victims and the intervening first and second generations might have made choices that deprived the later generations of the inheritance.¹¹⁵

In summary, the existence requirement central to Aristotelian corrective justice imposes a time limit on claims for redress for historical injustices. That time limit prevents claims from being brought against, and by, collective agents such as governments or corporations that have ceased to exist. Moreover, even under generous interpretations of the existence requirement, only direct individual victims and the generations of their children and grandchildren likely can claim that they are entitled to redress.

2. Violation of Protected Interest

A second condition for invoking the Aristotelian duty of repair is that the wrongdoer must have violated a protected interest of the victim. There is not a single list of protected interests that all corrective justice theorists agree on. Usually, though, bodily integrity and core property rights are among the interests that, when violated, trigger a duty of repair.¹¹⁶

113. See, e.g., THOMPSON, *supra* note 14, at 108-11; Kutz, *supra* note 14, at 294; Ridge, *supra* note 106, at 41; Sepinwall, *supra* note 14, at 220.

114. THOMPSON, *supra* note 14, at 110.

115. THOMPSON, *supra* note 14, at 111-12; Waldron, *Superseding Historic Injustice*, *supra* note 14, at 7-14; Sepinwall, *supra* note 14, at 219-20; see also THOMPSON, *supra* note 14, at 124, 128-29 (defending limited inheritance rights, in particular for children and grandchildren).

116. Perry, *supra* note 56, at 239; see Weinrib, *supra* note 62, at 354 (describing protected interests). Coleman's theory seems to condemn violations of bodily integrity through the concept of wrongdoing, and property rights violations through that concept and his concept of wrongs. COLEMAN, *supra* note 62, at 330, 332, 354.

Most of the historical injustices for which redress has been sought involve violations of core property rights (such as uncompensated takings of real property) and/or interference with bodily integrity (such as enslavement).¹¹⁷ As a result, the requirement for a violation of a protected interest would seem to pose little difficulty for grounding claims to redress historical injustices in an Aristotelian duty of repair.

Still, two aspects of this requirement bear emphasizing because they may pose obstacles to grounding a claim for repair in Aristotelian corrective justice in particular cases. First, the requirement is that the claimant has suffered a violation of one of his protected interests by the wrongdoer against whom he is claiming. A victim cannot transfer his entitlement to repair to someone who was not harmed by the wrongdoer. To some extent, this prohibition on transfer is enforced through the existence requirement, but it is also an aspect of the covered protected interests requirement that can have bite. A claimant is not entitled to corrective justice if the claimant cannot point to an interest of his that has been violated by the alleged wrongdoer.

A second aspect of the protected interest requirement worth underscoring concerns the significance of the prevailing positive law when the injustice took place. One argument sometimes made in opposition to redressing historical injustices such as African American slavery is that the injustice was legally authorized when it took place.¹¹⁸ However, the contemporaneous legality of the injustice is irrelevant in determining whether there is an Aristotelian duty of repair. Because corrective justice imposes moral, not legal, obligations, what matters is whether the interest is protected under the concept of protected interest undergirding the theory of corrective justice.¹¹⁹ If

117. See text accompanying note 21, referring to the colonization of Native Americans, slavery, Jim Crow, the internment of Japanese Americans during World War II, the removal of Aleuts in Alaska during the same war, and the Holocaust as paradigmatic examples of historical injustices.

118. Sepinwall, *supra* note 14, at 211 (“[S]ome opponents of Black reparations argue that precisely because slavery was legal, it was not wrong and hence ought not to be subject to demands for compensation.”).

Scholars also have argued that contemporaneous legal authorization should not be a legal bar to recovery now for slavery or other injustices. See, e.g., Hanoeh Dagan, *Restitution and Slavery: On Incomplete Commodification, Intergenerational Injustice, and Legal Transitions*, 84 B.U. L. Rev. 1139, 1164-74 (2004); see also Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 791-800 (2004) (discussing techniques used to apply laws retroactively in countries transitioning to democracy).

119. Forde-Mazrui, *supra* note 9, at 713 (arguing that “legal toleration of a practice” does not protect it “from moral condemnation”).

the prevailing law violated a protected interest, that law would be merely another example of the injustice.

3. Remediable Violation

A third condition for invoking an Aristotelian duty of repair is that it must be possible for the violation of the victim's protected interest to be remedied. Corrective justice does not just identify grounds of responsibility (i.e., violations of protected interests) and actors who can claim and be held responsible on those grounds (i.e., victims and wrongdoers). It also has an endpoint—remedying violations of protected interests. If those violations cannot be remedied, then logically there is no basis for claiming a duty of repair.

Different corrective justice theories define the remedies that corrective justice mandates differently. Hence, the theories suggest different tests for assessing whether the violation that the victim has suffered could be remedied consistently with corrective justice. Consider as examples Weinrib's and Coleman's conceptions of the remedy that corrective justice contemplates.

According to Weinrib, the remedy that corrective justice prescribes is a transfer from the wrongdoer to his victim that restores the victim-wrongdoer equality that the wrongdoer upset.¹²⁰ Hence, there is no duty of repair if equality cannot be restored. Weinrib assumes that the wrongdoer can restore the equality that the wrong destroyed by paying the victim monetary compensation. However, it is debatable whether cash compensation always can restore the equality between victim and wrongdoer. Imagine that the wrongdoer violated the victim's property rights by taking a painting from her and destroying it. Paying the victim cash compensation likely could restore the equality between the wrongdoer and victim. But what if the wrongdoer took part of the victim, such as her arm or leg, by beating her? Whether we would regard compensation as restoring the equality between victim and wrongdoer would depend on whether we consider the loss of a body part to be commensurable. Certainly the economic costs of losing a body part, such as lost wages, are commensurable. However, some argue that the intangible injuries to which the loss gives rise, such as pain and suffering, are not commensurable.¹²¹ If we

120. Weinrib states that the "equality consists in persons' having what lawfully belongs to them." Weinrib, *supra* note 62, at 349. Equality does not consist in "an initial equality in the parties' wealth." *Id.* at 354.

121. THOMPSON, *supra* note 14, at 48-49; see also Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 803-06 (1990) (arguing that intangible injuries such as pain and suffering cannot be monetized); Margaret Jane Radin, *Essay: Compensation and Commensurability*, 43

doubt the commensurability of these injuries, then we will have difficulty concluding that compensation is restoration and, therefore, that the wrong can be remedied.¹²²

According to Coleman, the remedy that corrective justice prescribes is the "repair" by the wrongdoer of the "wrongful losses" for which he is "responsible."¹²³ Coleman contemplates that repair will occur through the provision of compensation for these losses.¹²⁴ Like Weinrib, Coleman assumes that monetary compensation can remedy wrongs. However, there is still a theoretical question whether compensation actually can repair all losses.

Both Weinrib and Coleman presumably would consider historical injustices remediable through cash compensation if restitution of an object were not feasible or sufficient.¹²⁵ Historical injustices often involve violations of property rights and bodily integrity similar to those encountered in tort law, which these theorists argue instantiates corrective justice. If these theorists did not regard violations of bodily integrity or property rights to be remediable through compensation, then they could not argue that tort law embodies corrective justice.

Matters become more complicated if we depart from the assumption underlying Coleman's and Weinrib's theories that violations of bodily integrity or property rights are commensurable. If we doubt the commensurability of these violations, then we must doubt whether they are remediable. Doubts about the remediability of violations generate doubts about whether there is an Aristotelian justification for repairing historical injustices.

DUKE L.J. 56, 69-70 (1993) (describing the traditional position that bodily harm and emotional distress are non-commensurable); Bradford, *supra* note 39, at 64, 67, 83 (emphasizing that injustices Native Americans have suffered cannot be redressed through cash compensation, but rather require an elaborate program of land restitution, self-determination, and reconciliation).

122. See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 457-61 (1992) (arguing that Aristotle's obligation of restoration "does not seem to apply where the gainer's gain is not equal to the loser's loss"). But see Weinrib, *supra* note 62, at 354-55 (arguing that restoration is possible even when the gain and loss are not co-extensive because equality does not refer to wealth).

123. COLEMAN, *supra* note 62, at 329.

124. *Id.* at 371 ("Corrective justice imposes the duty on the wrongdoer to compensate his victims for the costs his wrongdoing imposes on them.").

125. If an object is taken, returning it might not be sufficient to restore the equality between wrongdoer and victim (or repair the victim) if the victim suffered harm while deprived of the object. In this situation, restoring equality or repairing the victim might require compensating the victim for the harm suffered while the object was out of her hands, or apologizing for the taking of the object, in addition to restitution of the object. Janna Thompson, *Collective Responsibility for Historical Injustices*, in JUSTICE IN TIME, *supra* note 14, at 101, 103.

To recap, then, the Aristotelian duty of repair is an agent-specific duty, according to which a wrongdoer is obligated to his victim. As discussed above, there are at least three conditions for invoking that duty: the wrongdoer and victim must exist, the wrongdoer must have violated a protected interest of the victim, and that violation must be remediable. These requirements constrain the extent to which the Aristotelian duty grounds claims for redress for historical injustices in potentially significant ways.

B. Nozickian Corrective Justice

While corrective justice usually is conceived of in agent-specific, Aristotelian terms, there are alternative conceptions of corrective justice that impose general duties on society to repair past injustices. Probably the most well-known agent-neutral theory of corrective justice is Nozick's principle of rectification.¹²⁶ As mentioned above, it has been invoked by proponents of redress for historical injustices in the United States.¹²⁷

Nozick's principle of rectification is a component of his historical entitlement theory of distributive justice. Presented as an alternative to John Rawls's conception of distributive justice,¹²⁸ the historical entitlement theory maintains that holdings are distributed justly if they were acquired and transferred according to the proper procedures. In particular, Nozick's procedural theory of distributive justice dictates that holdings must be acquired and transferred according to three principles. The first is the principle of justice in acquisition, which governs how individuals may come to acquire property in unowned things.¹²⁹ The second is the principle of justice in transfer, which governs the subsequent transfer of appropriated things.¹³⁰ The principle of rectification is the third principle. It dictates that holdings not acquired or transferred in accordance with the two first principles must be assigned to the persons that would have been

126. ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 152-53, 230-31 (1974). Another agent-neutral theory of corrective justice is Jules Coleman's annulment theory, which he has abandoned. COLEMAN, *supra* note 62, at 318.

Note that I am labeling Nozick's principle of rectification "corrective justice," but that he does not describe the principle as a theory of corrective justice. See also Perry, *supra* note 56, at 254 (describing "Nozick's entitlement theory" as "in effect, a theory of corrective justice to which the principle of justice in acquisition has been appended").

127. See *supra* note 77 and accompanying text.

128. NOZICK, *supra* note 126, at 198-204.

129. *Id.* at 150.

130. *Id.* at 150-51.

entitled to them if the first two principles had been followed.¹³¹ Under Nozick's entitlement theory, holdings are distributed justly if they are distributed consistently with the principles of acquisition, transfer, and rectification.¹³²

At first glance, Nozick's principle of rectification would seem to be a much more attractive basis for claiming redress for a historical injustice than the Aristotelian duty of repair because the principle is not agent specific. Unlike Aristotle, Nozick does not ascribe responsibility for rectification solely to the original wrongdoer. Instead, he suggests that the obligation to rectify the violation of the principle of justice in acquisition or transfer applies to society at large.¹³³ Also unlike Aristotle, Nozick does not limit the right to rectification to victims of the violation, implying instead that rectification is a freestanding right.¹³⁴ The principle of rectification, then, seems to ground claims for injustices that happened long ago, potentially many years after the direct victims and wrongdoers have passed away. Indeed, Nozick actually suggests that the principle of rectification could ground claims to redress historical injustices. He identifies slavery as an example of a violation of the principle of justice in transfer for which rectification may be owed.¹³⁵

However, there still are limits on the circumstances in which the principle of rectification can be invoked in support of claims for redress. I discuss three conditions for invoking it: the violation-of-a-protected-interest requirement, the remediable-violation requirement, and the consistency-with-the-proviso requirement.

1. Violation of Protected Interest

One condition for invoking the principle of rectification is that the wrong for which redress is sought must be a violation of an interest that rectification protects. Recall that the interests protected under Aristotelian conceptions of corrective justice include, at a

131. *Id.* at 152-53, 230-31.

132. *Id.* at 150-53.

133. *Id.* at 231 ("[A]n important question for each society will be the following: given its particular history, what operable rule of thumb best approximates the results of a detailed application in that society of the principle of rectification?"); see also THOMPSON, *supra* note 14, at 43 (suggesting that in Nozick's framework, "[t]he right of rectification ... [does] not depend on the presence of the agents responsible for the violation").

134. See, e.g., THOMPSON, *supra* note 14, at 102 (suggesting "descendants" or "successors" of a direct victim may reclaim title). But see THOMPSON, *supra* note 14, at 40 (suggesting that Nozick premises entitlement to rectification on a rights violation).

135. NOZICK, *supra* note 126, at 152.

minimum, bodily integrity and core property rights.¹³⁶ The principle of rectification also seems to protect at least these interests.

On its face, the principle of rectification protects against violations of the principles of justice in acquisition and transfer.¹³⁷ What do these two principles protect? Nozick is largely silent on the content of the principles of justice in acquisition and transfer, with one notable exception that I discuss below (the proviso).¹³⁸ However, Nozick does offer several examples of actions that violate the principle of justice in transfer for which he implies rectification is required. Specifically, in introducing the principle of rectification, he states:

Not all actual situations are generated in accordance with the two principles of justice in holdings: the principle of justice in acquisition and the principle of justice in transfer. Some people steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose, or forcibly exclude others from competing in exchanges. None of these are permissible modes of transition from one situation to another. And some persons acquire holdings by means not sanctioned by the principle of justice in acquisition. The existence of past injustice (previous violations of the first two principles of justice in holdings) raises the third major topic under justice in holdings: the rectification of injustice in holdings.¹³⁹

Based on the examples that Nozick offers, then, we can conclude that the interests protected by the principle of rectification include bodily integrity ("enslave them") and core property rights ("[s]ome people steal from others, or defraud them").

As mentioned above, most historical injustices for which redress has been sought can be framed as violations of bodily integrity and/or core property rights. As a result, the requirement that the injustice have violated an interest protected by the Nozickian principle of rectification would not seem to pose an obstacle for using the principle to ground many prominent claims for redress. Again, because the principle of rectification is a moral principle with its own internal logic, the fact that a violation may have been legal when it was committed would not affect whether rectification is due.

2. Remediable Violation

A second condition for claiming redress based on the principle of rectification is that the violation of the protected interest must be capable of being rectified. This requirement is implicit in Nozick's theory. After all, if the wrong cannot be rectified, there would be no point in imposing an obligation to rectify it.

136. *See supra* Part III.A.2.

137. NOZICK, *supra* note 126, at 152-53.

138. *Id.* at 150.

139. *Id.* at 152.

Nozick begins by suggesting that the objective of rectification is transferring an asset to the party that would have held it but for the historical violation of the principle(s) of justice in acquisition and/or transfer.¹⁴⁰ However, in a footnote to the suggestion, Nozick recognizes that this objective might be hard to achieve.¹⁴¹ For example, it may be difficult to determine counterfactually who might have held an object if there had been no injustice, given the passage of time.¹⁴² As a result, Nozick proposes that rectification might be approximated by implementing a legislated program distributing holdings in line with Rawls's difference principle or some other principle, such as equality.¹⁴³ While I do not pursue it, there is, of course, an irony in Nozick's proposal: having suggested that he is offering an alternative to a patterned conception of distributive justice such as Rawls's,¹⁴⁴ he offers a justification for a Rawlsian approach due to the difficulties of actually implementing his historical entitlement theory. In the end, then, his principle of rectification may not actually ground a claim to redress a historic injustice if the claimant is not currently among the most disadvantaged in society.¹⁴⁵

For present purposes, the key point to underscore is that Nozick suggests two alternative objectives for rectification and, therefore, two bases for assessing whether rectification is possible. The first-best objective is transferring an improperly acquired or transferred holding to the party that would have held it if there had been no violation of justice in its acquisition or transfer.¹⁴⁶ Under this understanding of rectification, invoking the principle requires showing that there remains a holding, that its rightful owner could be identified, and that the holding could be transferred to this owner. This is a stringent test that could make it difficult to use the principle of rectification as a basis for claims to redress historical injustices. The misappropriation of tangible objects or money potentially could be rectified under this understanding of rectification. Assume there is a holding (the object or money): it may be possible to identify who should have it now, and the object or money could then be transferred. But it is not clear that violations of bodily integrity could be rectified,

140. *Id.* at 152-53.

141. *Id.* at 153 n.*, 230-31.

142. See Waldron, *Superseding Historic Injustice*, *supra* note 14, at 7-14 (discussing difficulties with counterfactual thinking).

143. NOZICK, *supra* note 126, at 153 n.*, 230-31.

144. *Id.* at 156-57.

145. Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 *ETHICS* 114, 121 (2001).

146. See *supra* text accompanying note 140.

given the difficulty of identifying a holding, the proper owner of it, and effecting a transfer of that holding, if the proper owner could be found.

Under Nozick's second-best understanding of rectification, it is accomplished through a societal scheme of distributive justice. Nozick provides no definite guidance about the principles that should be used in formulating this scheme. While raising Rawls's difference principle and others as possibilities, he suggests that ultimately it is for "each society" to determine what "operable rule of thumb best approximates the results of a detailed application in that society of the principle of rectification," given the society's "particular history."¹⁴⁷ This second understanding of the principle of rectification gives considerably more scope than Nozick's first for thinking that rectification of an injustice might be possible. To say that an injustice is rectifiable under this second understanding, it seems necessary to offer only a principled distributive scheme that is responsive to the history of injustices in the relevant society. The difficulty of devising and implementing such a scheme should not be underestimated. But conceiving of rectification in terms of a principled distributive scheme at least avoids the minutiae of figuring out who would own what specific holdings now if the principles of justice in acquisition and transfer had not been violated in the past.

3. Proviso

At first glance, we might think that there is no time limit on the principle of rectification. After all, as discussed above, the time limit on the duty to repair in Aristotelian corrective justice is rooted in its agent specificity, which requires an existing wrongdoer and an existing victim.¹⁴⁸ The principle of rectification does not require continued existence because the principle contemplates a free-floating duty and right not limited to the wrongdoer and the victim.

There is, however, a kind of time limit embedded in the principle of rectification that comes from the principle of justice in acquisition. While remaining largely silent on the principle of justice in acquisition, Nozick underscores that the right to acquire unowned objects is limited by a proviso, similar to the famous Lockean proviso. According to the Nozickian proviso, accumulation of private holdings is allowed provided that appropriation does not "worsen[] the situation

147. NOZICK, *supra* note 126, at 230-31.

148. See *supra* Part III.A.

of others.”¹⁴⁹ Before turning to the content of this proviso, we must consider when it applies.

Clearly, the proviso applies at the point of initial appropriation. An individual is not allowed to appropriate an unowned thing from the wild if appropriation would worsen the situation of others.¹⁵⁰ Importantly, though, the proviso also continues to apply long after the initial appropriation because it functions like a permanent servitude on the holding. As Nozick explains:

Each owner's title to his holding includes the historical shadow of the Lockean proviso on appropriation. This excludes his transferring it into an agglomeration that does violate the Lockean proviso and excludes his using it in a way, in coordination with others or independently of them, so as to violate the proviso by making the situation of others worse than their baseline situation.¹⁵¹

While Nozick does not say so explicitly, the proviso also should be regarded as limiting transfers to rectify past injustices, given its broad applicability to subsequent transfers. If a rectificatory transfer would worsen anyone's situation, then the rectification presumably would not be justified under Nozick's entitlement theory. Indeed, Nozick seems to raise implicitly the possibility that the proviso applies to rectification when he asks rhetorically in discussing rectification, “How far back must one go in wiping clean the historical slate of injustices?”¹⁵²

As for the content of the proviso, the key issue always is whether the appropriation or transfer would worsen the situation of others. Nozick is elusive about what the baseline is for assessing whether an appropriation or transfer worsens the situation of others. But he seems to envision that the baseline is the situation in the state of nature where something akin to common ownership prevails.¹⁵³ As Nozick acknowledges, his baseline for comparison is “low.”¹⁵⁴ The appropriation must only not leave others worse off than they would be in the state of nature. Nozick, then, can easily justify private property, even if it generates massively unequal distributions of holdings. Compared with the state of nature, private property generates many benefits even for individuals who do not hold much property. For example, private property “increases the social product by putting means of production in the hands of those who can use them most

149. NOZICK, *supra* note 126, at 175. According to G.A. Cohen, the proviso “is Nozick's doctrine of appropriation.” G.A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* 76 (1995).

150. NOZICK, *supra* note 126, at 174-82.

151. *Id.* at 180.

152. *Id.* at 152.

153. COHEN, *supra* note 149, at 76-87.

154. NOZICK, *supra* note 126, at 181.

efficiently (profitably)" and "enables people to decide on the . . . risks they wish to bear."¹⁵⁵

When might a transfer, in particular a rectificatory transfer, worsen the situation of others? Again, the baseline for assessing the effects of rectification, like initial appropriation, seems to be the situation in the state of nature before private property. Thus, in determining whether a rectificatory transfer would be unjustifiable because it would violate the proviso, we must examine whether the transfer would leave others worse off than they would be under something like common ownership. It is likely that few rectificatory transfers will violate Nozick's proviso. Even the people required to finance reparations or restitution probably will not be left worse off than they would have been in the state of nature.

Still, though, the existence of the proviso means that Nozick's principle of rectification is subject to a kind of time limit that will block transfers to original owners in extreme situations. Consider the following scenario: Property initially was acquired without violating the proviso, maybe because there were no other claimants around. Subsequently, the property was transferred in violation of the principle of justice in transfer. When rectification comes on the agenda, however, circumstances may be drastically different. For example, the population has expanded or resources have been depleted to the point that returning the property to its original owner would create shortages of land or other resources that would leave many people thirstier or hungrier than they would be in the state of nature. Because the proviso would limit rectificatory transfers in extreme circumstances, the proviso imposes a time limit on rectification. But this time limitation is impossible to specify in advance because it is contingent on radical changes in circumstances.

Notably, in an influential series of articles, Jeremy Waldron has developed further the idea underlying the proviso that property rights are vulnerable to changes in circumstances.¹⁵⁶ Waldron's

155. *Id.* at 177.

156. Waldron's leading articles include Waldron, *Superseding Historical Injustice*, *supra* note 14, at 4-28, which develops his Supersession Thesis in analyzing aboriginal claims for redress; Waldron, *Redressing Historic Injustice*, *supra* note 14, at 135-60, which further elaborates the Supersession Thesis in the context of discussing aboriginal claims; and Waldron, *Settlement, Return, and the Supersession Thesis*, *supra* note 14, at 237-68, which applies the Supersession Thesis to the Israeli-Palestinian dispute.

The following comparison between Waldron's Supersession Thesis and the Nozickian proviso is mine. Waldron addresses the relationship between the Supersession Thesis and the Nozickian proviso only in passing. See Waldron, *Settlement, Return, and the Supersession Thesis*, *supra* note 14, at 245 n.13 (distinguishing the Supersession Thesis from Nozick); Jeremy Waldron,

Supersession Thesis, like Nozick's proviso, posits that changes in circumstances may weaken property rights to the point that rectification of unjust transfers is no longer justifiable. Importantly, though, Waldron departs from Nozick in making the status quo, not the state of nature, the baseline for assessing whether rectificatory transfers are permissible. Under the Supersession Thesis, property rights diminish, and may be eliminated, if changes in circumstances, such as population growth or resource depletion, mean that enforcing the rights would leave existing persons worse off than they are now. In light of the way that Waldron redefines the baseline, redressing historical injustices is much less likely to be justifiable under Waldron's Supersession Thesis than under the Nozickian proviso.¹⁵⁷

The implications of the Supersession Thesis are evident in Waldron's treatment of specific claims for redress. Waldron developed his Supersession Thesis in response to the demands of New Zealand Maori for the return of land and other resources that had been taken from them in violation of the 1840 Treaty of Waitangi.¹⁵⁸ Waldron argues that while Maori had property rights in these resources when the resources were wrongfully taken from Maori, those rights may not survive in their original form. Waldron suggests that as a result of changes in the interim, including substantial European settlement of New Zealand, many people likely would be left worse off than they are now if historical Maori rights were operable.¹⁵⁹ A similar argument has been made regarding demands by Native Americans for lands

Nozick and Locke: Filling the Space of Rights, 22 SOC. PHIL. AND POL'Y 81, 98 n. 61 (2005) (implying Supersession Thesis is related to Nozickian proviso).

157. See generally Waldron, *Settlement, Return, and the Supersession Thesis*, *supra* note 14, at 240-43, 248-68 (emphasizing that property rights can fade over time as circumstances change). While insisting that an unjust violation of property rights could be superseded by subsequent changes in circumstances, Waldron emphasizes that he does not advocate forgetting about the initial injustice, even if it is superseded. "Apologies and acknowledgments are properly demanded, and at least symbolic compensation may be due to descendants of those who were originally treated unjustly." *Id.* at 244. A remedy also might be due for the initial injustice. *Id.* at 242.

158. Waldron, *Settlement, Return, and the Supersession Thesis*, *supra* note 14, at 243-46. Recently, Waldron applied the Supersession Thesis to territories Israel has occupied since 1967. *Id.*

159. Waldron, *Superseding Historic Injustice*, *supra* note 14, at 26 (arguing that returning land to New Zealand Maori today "might mean many people going hungry who might otherwise be fed and many people living in poverty who might otherwise have an opportunity to make a decent life"); see Waldron, *Settlement, Return, and the Supersession Thesis*, *supra* note 14, at 244 (arguing that in light of the changes in New Zealand since European colonization, "it boggles belief to say that what justice requires in this territory now is anything like what justice required at the very beginning of European contact"); *id.* at 255 (explaining that in New Zealand, "the key change is the presence . . . of large numbers of people who had no practicable choice but to remain").

wrongfully taken from them. Without invoking the idea of supersession, David Lyons has suggested that it would not be just to return all of the tribes' lands to their descendants, even though the lands were taken wrongfully from their ancestors, given the changes that have occurred in the United States in the interim.¹⁶⁰

In summary, Nozick's principle of rectification does not provide an unconstrained justification for redressing historical injustices. The injustice must be a violation of a protected interest, and the violation must be remediable. Moreover the proviso potentially imposes a time limit on invoking the principle of rectification because it emphasizes that entitlements are affected by circumstances.

Despite the conditions that must be satisfied to invoke Nozick's principle of justification, I emphasize again that the Nozickian principle likely justifies redressing historical injustices in more circumstances than Aristotelian corrective justice. Consider the following hypothetical as an illustration of a situation where the Nozickian principle of rectification would support redress, while Aristotelian corrective justice might not. Imagine that a Communist government comes to power in a country. A month later, the government seizes the land of a farmer without paying him compensation because the farmer is from an ethnic minority. The farmer (the direct victim), his daughter (the first descendant generation, or G1), his grand-daughter (G2), and his great-grand-daughter (G3) live out their days in a small town near the old family farm, working first on collective farms and then in nearby factories that are built as the country gradually industrializes under Communism. After a century, a new government comes to power through an election, not a revolution. For sentimental reasons, the farmer's great-great-granddaughter (G4), who lives in a big city far from the old farm, now wants to reclaim it. The farmland still is owned by the state. The area surrounding the farm has not changed much in the intervening century, although the population has declined slightly because of the urbanization associated with the country's industrialization.

160. Lyons, *supra* note 14, at 363, 375.

Without invoking Lyons or Waldron, courts recently have identified changes in circumstances, including changes in demographics, as grounds for rejecting Native American land claims in New York State. See *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 277 (2d Cir. 2005) (holding that disruptive land claims are subject to equitable defenses); *Shinnecock Indian Nation v. New York*, No. 05-CV-2887, 2006 WL 3501099, at *4 (E.D.N.Y. Nov. 28, 2006) (discussing how a change in circumstances gives rise to equitable defenses). *But see Oneida Nation v. New York*, 500 F. Supp. 2d 128, 134-46 (N.D.N.Y. 2007) (dismissing the possessory land claims of three Oneida tribal groups because of the burdensome disruption that granting such claims would cause, but allowing non-possessory claims for compensation to proceed).

Nozick's principle of rectification is more likely to support restoring the land to G4 than Aristotelian corrective justice. The original taking violated an interest protected by both Nozickian and Aristotelian corrective justice because the failure to pay compensation breached a core property right. In addition, the violation is remediable under both Nozickian and Aristotelian corrective justice through the return of the land. The reason that the Nozickian principle supports the return of the land to G4 while Aristotelian corrective justice might not is Aristotelian corrective justice's agent specificity. The difficulty G4 faces in claiming the farm under Aristotelian corrective justice is that she is not the direct victim of the injustice or from the roughly two generations of descendants that, as I suggested above, might be able to claim repair under expansive interpretations of the existence requirement without excessively diluting the concept of agent specificity. Accordingly, the validity of G4's claim is doubtful under Aristotelian corrective justice because there is no victim who has a justifiable claim against the wrongdoer.¹⁶¹

In contrast, G4 has a justifiable claim under the Nozickian principle of rectification because it contemplates a freestanding right of repair. It does not require the continued existence of a victim or a wrongdoer. As discussed above, in extreme cases, the proviso might act as a time limit on repair similar to the Aristotelian existence requirement. The proviso, however, is not triggered in the hypothetical because there has been no change in circumstances since the taking (such as a massive population increase) that would leave people worse off if the land was returned than they would be in the state of nature.

As the hypothetical illustrates, the Nozickian principle of rectification potentially justifies redressing historical injustices many years after they occurred when Aristotelian corrective justice might not, provided there are no significant changes in circumstances that would trigger the proviso blocking rectificatory transfers. However, as the analysis of the hypothetical also illustrates, both Aristotelian and Nozickian corrective justice are complex theories whose support for redressing historical injustices is contingent on the circumstances of the claim. As emphasized above, proponents of redress often overlook this conditionality and its implications when they informally invoke corrective justice in defense of repairing historical injustices.

161. Note that there is an existing wrongdoer a century after the injustice. The country's government remains responsible for the actions of an earlier generation of officials because the country did not dissolve.

IV. CASE STUDY: REDRESSING CLAIMS AGAINST THE SWISS BANKS

Parts II and III had two main objectives: specifying the moral arguments often used loosely in the United States to argue for redressing historical injustices, and underscoring in largely theoretical terms the difficulties with using these arguments to justify redress claims. But it could be that in practice redress is an effective deterrent, a successful mechanism for achieving distributive justice, or defensible as corrective justice. This Part takes that possibility seriously by examining whether one particular program being implemented to redress historical injustices is justifiable as deterrence or distributive or corrective justice: the program for redressing the wrongs of the Swiss banks during and after World War II.

For decades, allegations persisted that the Swiss banks had been the Third Reich's bankers and withheld the accounts of Holocaust victims after the war.¹⁶² However, these allegations only drew widespread public attention in the 1990s.¹⁶³ Intriguing in their own right, the bringing and the resolution of the claims against the Swiss banks also are historically significant. The claims against the Swiss banks were the first major claims for Holocaust restitution pursued in the United States in the 1990s. After these claims were publicized, claims were brought against other European firms and governments for Holocaust restitution.¹⁶⁴ In addition, claims for redress for other injustices, including other World War II era injustices and African American slavery and Jim Crow, became more prominent.¹⁶⁵

I begin by analyzing the banks' wrongs, efforts to force the banks to redress them, and the implementation of the program of restitution that resulted from this campaign. Then I argue that it is possible to justify a significant portion of what has been done to redress the wrongs of the Swiss banks, but not everything. Thus, the Swiss banks case exemplifies the moral complexity of attempting to redress clear wrongs many years after they occurred.

162. See *infra* text accompanying note 177.

163. See *infra* text accompanying notes 179-180.

164. See generally BAZYLER, *supra* note 2, at 1-306 (chronicling the emergence of claims for Holocaust restitution in the 1990s).

165. *Id.* at 307-34 (chronicling emergence of claims for redressing other historical injustices in the 1990s).

A. Background

1. Historical Wrongs

The claims against the Swiss banks largely concerned their conduct during and after World War II. Throughout the war, Swiss banks acted as the Third Reich's main bankers.¹⁶⁶ While Switzerland officially remained neutral during World War II, its central bank and commercial banks, with government support, laundered some gold that the Nazi regime plundered from individual Holocaust victims and large amounts of gold looted by Nazi Germany from the central banks of the countries the Reich invaded.¹⁶⁷ The Third Reich used funds from these gold transactions to finance its war effort.¹⁶⁸ In addition, the banks transferred assets belonging to the banks' Jewish account holders to the Reich and its supporters.¹⁶⁹ In doing so, the banks violated agreements with their customers, who, in many cases, had entrusted assets to the banks for safekeeping in the lead-up to the war.¹⁷⁰ During the war, Swiss banks also served many of the public and private entities in Germany that used slave labor. As a result, the banks may have profited from the use of slave labor.¹⁷¹

After the war, the Swiss government and the Swiss banks largely covered up their wartime actions.¹⁷² Moreover, the private Swiss banks that had taken deposits from Jews and others seeking to

166. OFFICE OF THE HISTORIAN, DEP'T OF STATE, PUBL'N 10468, U.S. AND ALLIED EFFORTS TO RECOVER AND RESTORE GOLD AND OTHER ASSETS STOLEN OR HIDDEN BY GERMANY DURING WORLD WAR II: PRELIMINARY STUDY iii, xxi (1997) [hereinafter PRELIMINARY STUDY].

167. INDEP. COMM'N OF EXPERTS SWITZ.—SECOND WORLD WAR, SWITZERLAND: NATIONAL SOCIALISM AND THE SECOND WORLD WAR: FINAL REPORT 238-53, 265-72 (2002) [hereinafter SWITZERLAND: FINAL REPORT]; PRELIMINARY STUDY, *supra* note 166, at ix, xxxi-xxxii, 40, 65, 166, 168 n.4, 178; Special Master's Proposed Plan of Allocation and Distribution of Settlement Proceeds, at Annexes G-24 to -32, *In re Holocaust Victim Assets Litig.* (No. CV 96-4849) (Sept. 11, 2000), available at <http://www.swissbankclaims.com/DistributionPlan.htm> [hereinafter Plan of Allocation].

"During the first years of the war, most of the German gold was sold to Swiss commercial banks." SWITZERLAND: FINAL REPORT, *supra*, at 238. But later the Swiss requested that the Reichsbank "deal with the" Swiss central bank, the Swiss National Bank). "From then on the commercial banks only engaged in smaller-scale gold transactions abroad." *Id.* at 239.

168. SWITZERLAND: FINAL REPORT, *supra* note 167, at 247; PRELIMINARY STUDY, *supra* note 166.

169. SWITZERLAND: FINAL REPORT, *supra* note 167, at 275-77, 456; INDEP. COMM. OF EMINENT PERSONS, REPORT ON DORMANT ACCOUNTS OF VICTIMS OF NAZI PERSECUTION IN SWISS BANKS 86-87 (1999) [hereinafter ICEP].

170. SWITZERLAND: FINAL REPORT, *supra* note 167, at 257-58, 261, 274-75.

171. Plan of Allocation, *supra* note 167, at Annexes H-1 to -58, I-1 to -7; see also SWITZERLAND: FINAL REPORT, *supra* note 167, at 311-18 (discussing the use of forced labor in German subsidiaries of Swiss companies).

172. SWITZERLAND: FINAL REPORT, *supra* note 167, at 443, 445-46.

safeguard them before the Holocaust did little to help the depositors' descendants access the funds that the survivors badly needed.¹⁷³ In response to periodic pressures from the relatives of persons murdered in the Holocaust, the banks promised to search their records for accounts that might have belonged to Holocaust victims. However, the banks often employed narrow search criteria, producing little information about the extent of dormant accounts in the banks' possession.¹⁷⁴ Over the years, the banks also drained many dormant accounts through fees and destroyed records that might have helped identify the account holders and their descendants.¹⁷⁵ For the banks, the funds in these accounts represented free working capital because "unclaimed" bank accounts "do not escheat to the government" in Switzerland.¹⁷⁶

2. Process of Obtaining Redress

The wartime collaboration of the Swiss banks with the Third Reich and their postwar withholding of Holocaust victims' accounts were known immediately after the war. However, after the 1950s, the wartime and postwar conduct of the Swiss banks largely faded from view due to the western powers' focus on containing the Soviet Union.¹⁷⁷ With the end of the Cold War, a series of forces made it possible to revisit the injustices associated with the war.

The initial pressure on the Swiss banks to make redress came from within Switzerland, after the Swiss President apologized for the country's wartime mistreatment of Jewish refugees on the fiftieth anniversary of the end of World War II.¹⁷⁸ Then, in 1995, leaders of the Swiss Jewish community took a step that proved pivotal in bringing the claims against the Swiss banks to broader attention: they contacted Edgar Bronfman, chairman of the U.S.-based World Jewish

173. *Id.* at 277, 442-57.

174. *Id.* at 445-46, 451-57; ICEP, *supra* note 169, at 81, 87-97.

175. SWITZERLAND: FINAL REPORT, *supra* note 167, at 446-47, 455; ICEP, *supra* note 169, at 82, 84-86.

176. Memorandum, *supra* note 43, at 27 n.23.

Given that the banks continued to withhold accounts into the 1990s, the withholding could be characterized as a continuing, rather than a historical, wrong. Edward R. Korman, *Rewriting the Holocaust History of the Swiss Banks: A Growing Scandal*, in HOLOCAUST RESTITUTION, *supra* note 43, at 115-32.

177. PRELIMINARY STUDY, *supra* note 166, at ix.

178. EIZENSTAT, *supra* note 42, at 48; GREGG J. RICKMAN, SWISS BANKS AND JEWISH SOULS 42-43 (2d prtg. 1999).

Congress ("WJC"), and asked for his help in pursuing the banks.¹⁷⁹ Together with Rabbi Israel Singer, Bronfman had revitalized the WJC in the 1980s. Under their leadership, the WJC participated in the Cold War campaign to press the Soviet Union to allow Jews to emigrate and drew attention to Austrian Chancellor Kurt Waldheim's Nazi past. For the WJC, the misconduct of the Swiss banks represented another instance of wartime collaboration and callous postwar indifference to the plight of Holocaust victims by leading European institutions.¹⁸⁰ Resolving the claims against the banks also stood to help with a top priority of American Jewish social service agencies in the 1990s: sustaining the hundreds of thousands of destitute elderly Jews in the former Soviet Union who, in many cases, were double victims of Nazism and Communism.¹⁸¹ Forcing the Swiss banks to identify and disclose the Holocaust victims' accounts might uncover heirless assets that could be used to assist elderly Jews in the former Soviet Union.¹⁸² Notably, there was a precedent for using the heirless assets of Holocaust victims to assist living Holocaust victims. In the early 1950s, the state of Israel and the Conference on Jewish Material Claims Against Germany ("Claims Conference") negotiated reparations from West Germany partly on the bases that it would be unfair for heirless Jewish properties to accrue to West Germany and that there were many needy Jewish Holocaust survivors who could be helped to resettle using proceeds from these properties.¹⁸³

179. RICKMAN, *supra* note 178, at 43. *But see* BAZYLER, *supra* note 2, at 11-12 (attributing Bronfman's involvement to Rabbi Israel Singer's growing interest in the postwar activities of the Swiss banks, and not mentioning the role of Swiss Jewish community leaders in bringing the banks' conduct to Bronfman's attention).

180. JOHN AUTHERS & RICHARD WOLFFE, *THE VICTIM'S FORTUNE: INSIDE THE EPIC BATTLE OVER THE DEBTS OF THE HOLOCAUST* 5-13 (2002); BAZYLER, *supra* note 2, at 11-14; EIZENSTAT, *supra* note 42, at 52-74. In 2007, Bronfman dismissed Singer from the World Jewish Congress and Bronfman resigned as president of the organization. Stephanie Strom, *President of Jewish Congress Resigns After 3 Years' Turmoil*, N.Y. TIMES, May 8, 2007, at A16.

181. In 2003, the American Jewish Joint Distribution Committee ("JDC") described assisting Jews in the former Soviet Union as "the Jewish world's largest relief operation in half a century." AMERICAN JEWISH JOINT DISTRIBUTION COMMITTEE, 2003 ANNUAL REPORT 14 (2003) (on file with Vanderbilt Law Review) [hereinafter JDC ANNUAL REPORT]. *See generally* ANITA WEINER, *RENEWAL: RECONNECTING SOVIET JEWRY TO THE JEWISH PEOPLE: A DECADE OF AMERICAN JEWISH JOINT DISTRIBUTION COMMITTEE (AJJDC) ACTIVITIES IN THE FORMER SOVIET UNION 1988-1998*, at 157-271 (Jacob Neusner ed., 2003) (discussing JDC relief and welfare activities in the former Soviet Union).

182. When the banks, the WJC, and class action attorneys finally began negotiating seriously to resolve the claims in 1997, Singer pressed for allocating heirless bank accounts to Central and Eastern European and former Soviet Jewish communities. EIZENSTAT, *supra* note 42, at 119.

183. Plan of Allocation, *supra* note 167, at 116-17 n.344, Annexes E-125 to -133; RONALD W. ZWEIG, *GERMAN REPARATIONS AND THE JEWISH WORLD: A HISTORY OF THE CLAIMS CONFERENCE* 6-7 (1987).

Starting in 1995, Bronfman drew on his political connections in the United States to advance the claims against the banks.¹⁸⁴ In December of that year, Bronfman and Rabbi Singer met with Republican Senator Alfonse D'Amato of New York, then the Chairman of the Senate Banking Committee. From April 1996 until D'Amato lost his 1998 senatorial race, the Committee held a series of hearings on the Swiss banks' behavior during and after the war.¹⁸⁵ Bronfman also enlisted the support of the Clinton White House.¹⁸⁶ The Administration named Stuart Eizenstat as its designated point person on the renewed efforts to achieve redress for Holocaust victims and their descendants. In this capacity, Eizenstat supervised the production of two reports on the role of neutral countries, including Switzerland, in laundering gold looted by the Nazis and on American efforts to curtail and redress this laundering activity after the war.¹⁸⁷ Eizenstat also mediated negotiations between the Swiss banks and other European interests that later were accused of profiting from the Holocaust, representatives of Jewish communities around the world, and class action attorneys.

Litigation also was used to obtain redress from the banks. In particular, U.S. lawyers filed three federal class action suits between October 1996 and January 1997 against Swiss banks. The best-researched of these came from prominent class action attorneys Michael Hausfeld and Melvyn Weiss, who took the case against the Swiss banks pro bono.¹⁸⁸ Consolidated in the spring of 1997, the three lawsuits used a variety of legal theories, including restitution, to claim redress for the banks' wartime activities and the return of assets

184. BAZYLER, *supra* note 2, at 13.

185. When Bronfman approached him, D'Amato immediately perceived the banks' conduct as an issue that might help him with Jewish voters. *Id.* On the hearings, see, for example, RICKMAN, *supra* note 178, at 51, 78, 85, 128, 171, 225.

186. BAZYLER, *supra* note 2, at 14.

187. PRELIMINARY STUDY, *supra* note 166; OFFICE OF THE HISTORIAN, DEP'T OF STATE, PUBL'N 10557, U.S. AND ALLIED WARTIME AND POSTWAR RELATIONS AND NEGOTIATIONS WITH ARGENTINA, PORTUGAL, SPAIN, SWEDEN, AND TURKEY ON LOOTED GOLD AND GERMAN EXTERNAL ASSETS AND U.S. CONCERNS ABOUT THE FATE OF THE WARTIME USTASHA TREASURY (1998).

188. BAZYLER, *supra* note 2, at 6-11; JANE SCHAPIRO, INSIDE A CLASS ACTION: THE HOLOCAUST AND THE SWISS BANKS 35-42 (2003).

Attorneys' fees for the negotiation of the settlement accounted for a very low percentage of the settlement in the Swiss banks case, partly because some plaintiff lawyers served pro bono. However, some of the attorneys who worked pro bono in the Swiss banks case then went on to earn sizeable fees in cases brought against other European firms for profiting from the Holocaust. BAZYLER, *supra* note 2, at 45-46. Recently, controversy has erupted over the fees that attorney Burt Neuborne is seeking for work done at Judge Korman's request in administering the settlement since it was negotiated. See *In re Holocaust Victims Asset Litig.*, Nos. CV 06-0983(FB)(JO) et al., 2007 WL 4441189, at *8 (E.D.N.Y. Dec. 17, 2007) (accepting magistrate judge's recommendation of a \$3,095,325 fee award to Professor Neuborne).

deposited by Holocaust victims.¹⁸⁹ Filing these class actions gave the claimants additional leverage to force the banks to negotiate a resolution of their claims and defined a set of players who would negotiate the resolution—the class action attorneys, the WJC, and the Swiss banks. Negotiations finally intensified in December 1997.¹⁹⁰ Uncertain about whether the judge presiding over the class actions would allow the legal claims against the banks to proceed, the banks, the class action attorneys, and the WJC sat down to negotiate a settlement with the assistance of Stuart Eizenstat.¹⁹¹ As they did so, local and state public finance officials led by New York City Comptroller Alan Hevesi provided the claimants with economic leverage.¹⁹² The officials threatened to sanction the Swiss banks if they did not resolve the claims, using as a model the sanctions that many governments had applied against apartheid South Africa in the 1980s.¹⁹³

Ultimately, after more than seven months of negotiations, the WJC and the class action attorneys settled the claims against the banks just before local- and state-government-sponsored sanctions were to take effect in New York. The \$1.25 billion settlement was announced in August 1998 on the steps of the courthouse where Judge Edward Korman presides, reflecting his role in bringing the parties together.¹⁹⁴

3. Implementation of Redress

The centerpiece of redress in the Swiss banks case has been the distribution of the \$1.25 billion settlement paid by two private Swiss banks, Credit Suisse and UBS AG.¹⁹⁵ Unlike many other class action settlements, the plaintiff and defendant attorneys did not attempt to negotiate the allocation of the settlement of the claims against the Swiss banks.¹⁹⁶ Instead, the settlement agreement assigned the tasks

189. Memorandum, *supra* note 43, *passim*.

190. See, e.g., EIZENSTAT, *supra* note 42, at 114-76 (chronicling the negotiation of a settlement in the Swiss banks case).

191. *Id.*

192. BAZYLER, *supra* note 2, at 21-25.

193. RICKMAN, *supra* note 178, at 189-90, 199, 226.

194. *Id.* at 230; BAZYLER, *supra* note 2, at 27-29.

195. Joseph P. Fried, *Swiss Banks Reach Holocaust Accord*, N.Y. TIMES, Aug. 13, 1998, at A1; *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139, 151 (E.D.N.Y. 2000).

196. See Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 316-17 n.127 (2003) (noting that class and defense counsel usually bargain allocation).

Having agreed to pay \$1.25 billion, the banks had little interest in participating in what would surely be a contentious process. Similarly, there was little incentive for plaintiffs'

of allocating and distributing the \$1.25 billion to Judge Korman. He has been doing so with the assistance of Special Master Judah Gribetz, an attorney with considerable political experience and knowledge of the inner workings of the Jewish philanthropic world.¹⁹⁷

As of December 2007, well over half of the Swiss banks settlement fund had been disbursed. Judge Korman has indicated that he will distribute the remainder of the settlement fund once the process of identifying bank accounts belonging to depositors and their heirs is complete.¹⁹⁸ Table 1 identifies how the settlement funds have been allocated among the five settlement classes that Judge Korman certified, along with other uses.

As Table 1 illustrates, the bulk of the settlement funds have been distributed to four groups¹⁹⁹: the Deposited Assets Class (48% of settlement funds), former slave laborers (29%), the Looted Assets Class (21%), and the Refugee Class (1.2%). The Deposited Assets Class mainly comprises the heirs (or heirs of heirs) of Jewish Holocaust victims who deposited funds with Swiss banks before World War II. Former slave laborers are those individuals who provided slave labor to German or Swiss firms in Germany that may have used Swiss banks during World War II. The Looted Assets Class comprises the victims and targets of Nazi persecution whose property was looted by the Nazis and potentially laundered through the Swiss banks, as well as the heirs of these victims and targets.²⁰⁰ Instead of ordering small payments to the many class members, Judge Korman has distributed most of the funds set aside for the Looted Assets Class to a small

attorneys to negotiate the allocation since many had accepted strict limits on their fees. See *supra* note 188 (describing limits on attorneys' fees). Moreover, the plaintiffs' attorneys feared that if they attempted to allocate the funds, unseemly fights would erupt among different groups of Holocaust victims. *In re Holocaust Victim Assets Litig.*, No. CV-96-4849-ERK-MDG, 2000 WL 33241660, at *1 (E.D.N.Y. Nov. 22, 2000).

197. *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 150. All appeals of Judge Korman's decisions allocating the settlement fund have been dismissed. See *In re Holocaust Victim Assets Litig.*, 424 F.3d 169 (2d Cir. 2005); *In re Holocaust Victim Assets Litig.*, 424 F.3d 158 (2d Cir. 2005); *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005); *In re Holocaust Victim Assets Litig.*, 413 F.3d 183 (2d Cir. 2001).

198. Claims Resolution Tribunal, Holocaust Victim Assets Litigation (Swiss Banks), Introduction to the Claims Resolution Process, <http://www.crt-ii.org/introduction.phtml> (last visited Oct. 17, 2007).

199. For a description of the four groups, see *infra* text accompanying notes 207-214.

200. A Victim or Target of Nazi Persecution is defined in the settlement agreement as "any individual, corporation, partnership, sole proprietorship, unincorporated association, community, congregation, group, organization, or other entity persecuted or targeted for persecution by the Nazi Regime because they were or were believed to be Jewish, Romani, Jehovah's Witness, homosexual, or physically or mentally disabled or handicapped." Exhibit 1 to Plan of Allocation, Class Action Settlement Agreement § 1, http://www.swissbankclaims.com/PDFs_Eng/exhibit1toPlanofAllocation.pdf (last visited Jan. 16, 2008).

number of non-profit organizations to be used to assist the neediest Holocaust survivors.²⁰¹ In particular, a large share of Looted Asset Class funds has been distributed to two Jewish philanthropic organizations, the American Jewish Joint Distribution Committee ("JDC") and the Claims Conference, to assist needy elderly Jews in the former Soviet Union.²⁰² The Refugee Class is comprised of individuals denied entry into Switzerland as refugees during World War II and of those who entered Switzerland and were mistreated.²⁰³ Although the Swiss government, not the Swiss banks, was responsible for the country's wartime refugee policies, the Swiss banks sought and obtained a release of claims against the government through the settlement.²⁰⁴

As a result of Judge Korman's allocation decisions, approximately 51% of the settlement funds disbursed to date have been received by direct victims of World War II, while 48% have been received by heirs (or heirs of heirs) of Holocaust victims.²⁰⁵

201. *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, 95-107 (E.D.N.Y. 2004); Plan of Allocation, *supra* note 167, at 23.

202. See *infra* notes 212-213 and accompanying text (showing distribution of funds).

203. Plan of Allocation, *supra* note 167, at Annexes J-1 to -31 (describing Swiss wartime refugee policies).

204. Exhibit 1 to Plan of Allocation, *supra* note 200, at Class Action Settlement Agreement § 12; see Swift, *supra* note 43, at 54 ("The Swiss banks insisted on closure for themselves and all Swiss entities—an unprecedented nationwide release for any type of Holocaust-era claim.").

205. These estimates of the shares allocated to direct victims and heirs assume that (1) all funds paid to the slave labor, refugee and looted assets classes went to direct victims; and (2) all funds paid to the deposited assets class and insurance awards went to heirs (or heirs of heirs). They do not take into account administrative and other expenses.

Special Master Gribetz has recommended that once the search for bank accounts is complete, the money remaining in the settlement fund be distributed largely to the most economically needy survivors, just as funds allocated to the Looted Assets Class have been used for humanitarian assistance. Special Master's Recommendations for Allocation of Possible Unclaimed Residual Funds, at 11-12, *In re Holocaust Victim Assets Litig.*, No. CV 96-4849 (Apr. 16, 2004), available at <http://www.swissbankclaims.com/Overview.aspx> (go to "the Special Master's Recommendations for Allocation of Possible Unclaimed Residual Funds" link).

Table 1: Allocation of Swiss banks settlement fund as of December 2007²⁰⁶

Class	Amount Received	Recipients	Description of Disbursement
Deposited Assets Class	\$469,060,657	Mainly heirs (or heirs of heirs) of the original bank account depositors because most of the original depositors were murdered in the Holocaust ²⁰⁷	Individually calculated payments reflecting account values
Slave Labor I Class	\$287,162,350	Former slave laborers who worked for German organizations tied to Swiss entities ²⁰⁸	Each former slave laborer receives \$1,450 ²⁰⁹
Slave Labor II Class	\$826,500	Former slave laborers who worked for Swiss corporations ²¹⁰	Each former slave laborer receives \$1,450 ²¹¹
Looted Assets Class	\$205,000,000	JDC, Claims Conference, and International Organization for Migration ²¹²	Most funds have been used to distribute food packages, medical help, and other assistance to needy elderly Jewish Holocaust survivors in the former Soviet Union ²¹³
Refugee Class	\$11,600,000	Refugees denied entry to Switzerland or refugees who were admitted and mistreated	Individuals denied entry receive \$3,625. Individuals admitted and mistreated receive \$725 ²¹⁴

206. See Swiss Banks Settlement Fund Distribution Statistics as of December 31, 2007, http://www.swissbankclaims.com/Documents_New/Scanjob_20080109_155313.pdf [hereinafter Statistics] (last visited Jan. 10, 2008).

The overall size of the settlement fund available for distribution exceeds \$1.25 billion, partly because the banks paid compound interest. Lead Settlement Counsel's Brief Opposing the Holocaust Survivors Foundation USA, Inc.'s Opposition to the District Court's Allocation of the Settlement Fund, at 20-21, *Pink Triangle Coalition v. Union Bank of Switz.*, No. 04-1899(CON)-CV (2d Cir. Aug. 23, 2004) (on file with Vanderbilt Law Review).

207. Plan of Allocation, *supra* note 167, at 10-11.

208. *Id.* at Annexes H-1 to -2, H-52 to -58.

209. Statistics, *supra* note 206.

210. Plan of Allocation, *supra* note 167, at Annex I-1.

211. Statistics, *supra* note 206.

212. *Id.*

213. *Id.* at n.2; *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, 102-03 (E.D.N.Y. 2004).

214. Statistics, *supra* note 206.

Class	Amount Received	Recipients	Description of Disbursement
Victim List Project	\$10,000,000	Yad Vashem Holocaust Martyrs' and Heroes' Remembrance Authority in Israel, U.S. Holocaust Memorial Museum	Program is intended "to collect and make widely available the names of all victims or targets of Nazi persecution" ²¹⁵
Incentive Awards	\$575,000	"[S]even class members whom the Court determined provided 'efforts [which] materially aided the plaintiff class' " ²¹⁶	Transferred by court
Insurance Awards	\$1,024,480	Owners or heirs of insurance policies issued by selected Swiss insurance companies before and during World War II ²¹⁷	Transferred by court, but paid 50-50 by settlement fund and insurance company ²¹⁸
Total	\$985,248,987		

B. Moral Justifiability of Redress

I now consider whether the redress program implemented in the Swiss banks case can be justified using the moral arguments for redress identified in Parts II and III. I argue that it is difficult to justify the redress program as a deterrent or as distributive justice. However, I suggest that part of the program—the payments for withheld bank accounts—likely is justifiable as Aristotelian and Nozickian corrective justice. Other parts of the program, though, are difficult to justify as instantiating either form of corrective justice. As a result, the Swiss banks case illustrates the moral complexity of redress for historical injustices.²¹⁹

1. Deterrence

As mentioned above, one of the justifications given for suing the Swiss banks and other corporations that profited from the Holocaust in the 1990s was that it might deter the commission of

215. *Id.* at n.5.

216. *Id.* at n.4.

217. *Id.* at n.3.

218. Exhibit 1 to Plan of Allocation, *supra* note 200, at Amendment No. 2 to Settlement Agreement, at 9.

219. Nothing in this Article should be interpreted as questioning the legality of any aspect of the Swiss banks' redress program. It clearly is being administered lawfully by Judge Korman. Nor should I be interpreted as questioning the motives of the individuals who sought redress from the banks or the individuals who are implementing the redress program. I admire their work, and recognize that it often has been conducted in difficult circumstances.

similar wrongs in the future.²²⁰ Consistent with my earlier discussion of redress's potential to deter, I begin by considering whether the redress program is justified as a form of individual deterrence. The argument here would be that forcing the banks to pay redress will deter them from committing wrongs that are the same as the ones they redressed. To assess whether the settlement has deterred the banks from doing so, we might consider their conduct since the settlement. In particular, we might try to assess whether they have demonstrated a new aversion to participating in the commission of human rights violations. But this kind of assessment is difficult to make from the outside. While much has been written about the banks' wartime and postwar conduct and the lawsuits against them, relatively little has been written about how paying restitution has affected the banks going forward.

There is anecdotal evidence that the affair has had some impact on the Swiss banks. For example, as a result of the controversy, the Swiss Bankers Association developed new guidelines for managing dormant accounts that could help the banks avoid accumulating dormant accounts like those of Holocaust victims.²²¹ More relevant to our interest in the banks' post-settlement approach to human rights, one participant in the negotiation of the settlement, Stuart Eizenstat, has suggested that the controversy has made the banks more sensitive to human rights. Writing in the early 2000s, Eizenstat argued that "[t]o help repair the tainted reputation of their banks, the Swiss have now become active leaders in international anti-money-laundering efforts; they have been freezing accounts of dictators like Nigerian strongman Sani Abacha and cooperating with the Bush administration's efforts to block assets of terrorists."²²² However, when asked to comment on Eizenstat's observations, the Swiss Bankers Association denied that the banks' actions concerning Sani Abacha, money laundering, or terrorism were related to the controversy about the banks and the Holocaust.²²³

220. See *supra* notes 42-43 and accompanying text.

221. SWISS BANKERS ASS'N, GUIDELINES OF THE SWISS BANKERS ASSOCIATION ON THE TREATMENT OF DORMANT ACCOUNTS, CUSTODY ACCOUNTS AND SAFE DEPOSIT BOXES HELD IN SWISS BANKS (REPLACES THE GUIDELINES DRAFTED 8TH SEPTEMBER 1995) 1, 1-12 (2000), available at http://www.swissbanking.org/en/114_e.pdf; see also COMM'N FÉDÉRALE DES BANQUES, RAPPORT DE GESTION CFB 2005, at 33-35 (2005), available at <http://www.ebk.admin.ch/f/publik/bericht/pdf/jb05.pdf> (discussing a legislative proposal to regulate dormant accounts).

222. EIZENSTAT, *supra* note 42, at 185. His reference to "the Swiss" suggests Eizenstat is not commenting on the post-settlement conduct of the banks alone, but also of others in Switzerland.

223. E-mail from James Nason, Head of Int'l Commc'ns, Swiss Bankers Ass'n, to author (June 27, 2006) (on file with Vanderbilt Law Review).

Next, I consider whether the settlement has acted as a general deterrent. As mentioned above, some of those who sued the banks argued that holding them accountable might deter other private actors from profiting from human rights violations. Because the case against the banks was settled, it did not help to establish that private actors could be held legally responsible for profiting from human rights violations. Nonetheless, the settlement still might have deterred other private actors from profiting from human rights violations in the way that the Swiss banks did by acting as the Third Reich's bankers. Notably, the Swiss banks case, along with the other Holocaust-related litigation of the 1990s and early 2000s, generated settlements totaling more than \$7.5 billion, an "unprecedented" amount "in the human rights field."²²⁴ However, it is even harder to assess whether the settlement has been a general deterrent than whether it has increased the banks' sensitivity to human rights. The range of actors whose behavior would have to be tracked is daunting: private firms, large and small, in Switzerland and outside.

Without more information, then, it is difficult to justify the Swiss banks settlement as a deterrent. Even if it could be proven that the settlement had deterred the banks or other firms from profiting from human rights violations, we still would need to ask from a utilitarian perspective whether forcing the banks to make redress was an efficient way of achieving this result. One consideration that would have to be factored into that analysis is the unsavory anti-American and anti-Semitic backlash in Switzerland following the efforts to obtain redress. There the campaign against the banks was widely perceived as an unfair attack on Swiss institutions by powerful Jewish interests in the United States.²²⁵ While that perception may not be a reason not to have pursued the banks,²²⁶ it nonetheless would have to be considered in assessing the consequences of forcing the banks to make redress.

2. Distributive Justice

Unlike redress for African Americans and Native Americans, the campaign for redress from the Swiss banks was never promoted as a way of achieving a more equal or need-sensitive distribution of resources. However, as mentioned above, some of those who led the

224. Swift, *supra* note 43, at 58; see also EIZENSTAT, *supra* note 42, at 353-54 (describing the successes of the reparations movement).

225. EIZENSTAT, *supra* note 42, at 184-86, 340, 348-50.

226. See, e.g., Neuborne, *supra* note 43, at 828 n.118 (arguing that backlash is not a reason not to pursue the banks).

campaign for redress seem to have been motivated partly by a desire to help a particularly needy population of elderly Jews in the former Soviet Union. In fact, in distributing the settlement fund, Judge Korman has allocated a significant share of Looted Assets Class funds to assist needy elderly Jewish Holocaust survivors in the former Soviet Union.²²⁷ Nonetheless, for at least two reasons, it is difficult to justify the Swiss banks settlement as a whole, as promoting a more just distribution of resources, in the sense of a distribution that is more equal or favorable to the needy.

First, the overarching objective of the redress program has been to redress the wrongs of the Swiss banks that harmed Holocaust victims and their descendants. This focus on Holocaust victims and their descendants is reflected in who has received settlement funds to date. As mentioned above, 51% of funds allocated to date have gone to direct victims, and 48% have been distributed to the heirs of victims.²²⁸ This focus on Holocaust victims and heirs who, for the most part, have injuries traceable to the conduct of the banks is natural, given the impetus for the demands for redress. But the focus on Holocaust victims and their heirs also means that the redress program is not a general scheme for equalizing holdings or addressing the needs of the least well-off, irrespective of where they live and their individual historical experiences.

A second reason why the redress program cannot be justified as promoting distributive justice is that the \$1.25 billion settlement has not been distributed among Holocaust victims and heirs based on their relative levels of need or their unequal circumstances. Instead, the settlement fund has been distributed according to various criteria, of which relative need has been only one factor. Perhaps the most important decision that Judge Korman made in initially allocating the fund was giving the claims for the return of bank accounts priority over all other claims. To implement that decision, Judge Korman reserved \$800 million to pay the members of the Deposited Assets Class, based on a very rough estimate of the current value of victim assets that the banks might be found to hold.²²⁹ A major reason why a significant portion of the Swiss banks settlement fund remains

227. Approximately 14% of all settlement funds distributed to date have gone to social service agencies to assist needy elderly Jewish Holocaust survivors in the former Soviet Union (\$138,375,000/\$985,248,987). See *supra* note 213 and accompanying table.

228. See *supra* note 205 and accompanying text.

229. Plan of Allocation, *supra* note 167, at 15. The priority given to the Deposited Assets Class reflects Judge Korman's belief that the Class had the strongest legal claims against the Swiss banks. *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, 93 (E.D.N.Y. 2004). It also reflects the terms of the Settlement Agreement. Plan of Allocation, *supra* note 167, at 11-15.

unallocated is that Judge Korman has refused to distribute any portion of the \$800 million that has not yet been paid to the heirs of depositors, pending a final determination that it is not possible to match any more bank accounts to Holocaust victims. This matching process has been time consuming, partly because the Swiss banks destroyed many documents in the decades after the war.²³⁰

In addition to his decision to reserve a significant share of the settlement fund for the payment of bank account claims, Judge Korman has made other decisions that underscore the fundamentally backward-looking focus of the redress program. For instance, as Table 1 indicates, after the bank account claims, the second largest allocation has gone to former slave laborers who were forced to work for either Swiss-owned or German-owned companies that, in many cases, used the Swiss banks.

As Table 1 also indicates, the third largest allocation, \$205 million, has gone to the Looted Assets Class. In distributing this sum, Judge Korman has considered need. But even the distribution within the Looted Assets Class has not been based entirely on need. To start, Judge Korman divided the \$205 million allocated to this class between Jewish and non-Jewish Holocaust victims: 90% has been used to assist Jewish survivors (\$184.5 million) and 10% to assist needy Roma, Jehovah's Witness, disabled, and homosexual survivors (\$20.5 million).²³¹ Then Judge Korman used relative levels of current need to allocate the \$184.5 million reserved for needy Jewish Holocaust survivors. In allocating this sum, Judge Korman considered all needy Jewish Holocaust survivors around the world as a single group. He then allocated 75% of the \$184.5 million (\$138.375 million) to assist elderly Jewish Holocaust survivors in the former Soviet Union because they have the greatest need of any population of Jewish Holocaust survivors, due to the combined legacy of Nazism and Communism, the limited social safety net in the former Soviet Union, and the fact that West Germany never paid restitution or reparations to Jewish survivors in the area during the Cold War. The remaining 25% (\$46.125 million) was allocated to assist needy Jewish Holocaust survivors in other parts of the world, including the United States.²³²

230. *In re Holocaust Victim Assets Litig.*, 319 F. Supp. 2d 301, 314-21 (E.D.N.Y. 2004); EIZENSTAT, *supra* note 42, at 94-98; Korman, *supra* note 176, at 126-29.

231. The 90/10 allocation was based on precedents for allocating funds between Jewish and non-Jewish Holocaust survivors "dating back to 1945" and the fact that "Jewish victims now constitute the overwhelming proportion of surviving 'Victims or Targets of Nazi Persecution' as defined under the Settlement Agreement." Plan of Allocation, *supra* note 167, at 118-19.

232. *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141-42 (2d Cir. 2005); *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, 97-108 (E.D.N.Y. 2004).

Not surprisingly, the large share of the Looted Assets Class funds allocated to assist needy Jewish Holocaust survivors in the former Soviet Union attracted the ire of some American Holocaust survivors. They argued that Judge Korman's allocation shortchanged needy Holocaust survivors in the United States. While "[a]pproximately 4% of the funds from the Looted Assets Class has been allocated to needy survivors in the United States," 14%-19% of the worldwide population of Jewish survivors lives in the United States.²³³ By comparison, the Jewish survivors in the former Soviet Union who have received roughly 67.5% of Looted Assets funds constitute "approximately 19%-27%" of the worldwide population of Jewish survivors.²³⁴ Incensed, some American Holocaust survivors unsuccessfully appealed the allocation to the Second Circuit.²³⁵

Amid the dispute over how to allocate the funds assigned to the Looted Assets Class based on current need, it is important not to lose sight of the limited role that need has played in the overall distribution of the settlement fund. This is not surprising given the wrongs that provided the basis for the settlement. Indeed, it seems odd even to attempt to justify the distribution from the standpoint of distributive justice, given the mainly backward-looking impetus for the redress program.

3. Corrective Justice

I now consider whether the redress program is justified as Aristotelian or Nozickian corrective justice. In discussing these potential justifications, I divide the wrongs that the program has been addressing into two categories: conversion of the bank accounts and other wrongs (laundering by Swiss entities of looted assets, Swiss entities' profits from use of slave labor in Germany, and the Swiss government's wartime refugee policies). There is a strong argument that redress for the conversion of the bank accounts is justified as Aristotelian and Nozickian corrective justice. It is harder to justify the redress undertaken for the other wrongs as either form of corrective justice.

233. *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d at 97.

234. *Id.*

235. *In re Holocaust Victim Assets Litig.*, 424 F.3d 132. The Second Circuit's decision upholding Judge Korman's allocation of a large share of the Looted Assets Class funds to survivors in the former Soviet Union has not ended the criticism of the allocation. *See, e.g.*, Thane Rosenbaum, Op-Ed., *Losing Count*, N.Y. TIMES, June 14, 2007, at A31 (arguing that Judge Korman's allocation "diverted" assets that belonged to American survivors).

a. Aristotelian Corrective Justice

As discussed above, Aristotelian corrective justice imposes an obligation on wrongdoers to redress the victims of their wrongs.²³⁶ At least three conditions must be satisfied to justify redress as Aristotelian corrective justice: (1) the wrongdoer and the victim must exist because the wrongdoer must provide redress to his victim; (2) the wrong for which redress is being provided must have been a violation of a protected interest; and (3) it must be possible to view the redress provided as remedying that wrong.

i. Conversion of Bank Accounts

As mentioned above, the largest share of the settlement fund distributed to date (48%) has been paid to individuals claiming the proceeds of Swiss bank accounts. At least some of these payments would appear to be justifiable as an exercise in Aristotelian corrective justice.

To begin, many of the bank account payments can be understood as being made by wrongdoers to victims of their misconduct. The two banks that paid the \$1.25 billion, Credit Suisse and UBS, probably wrongfully withheld many of the accounts now being paid out of the settlement fund. Indeed, “87 percent of the accounts identified by the Volcker Committee as probably or possibly belonging to Jews were held” by Credit Suisse and UBS.²³⁷ In addition, “these two banks,” which were operating in the 1930s and 1940s, “through acquisitions and mergers now contain more than 40 percent of all bank accounts open or opened in Switzerland during the Nazi era.”²³⁸ Because Credit Suisse and UBS (or banks that they acquired and merged with) were the principal wrongdoers, it is consistent with the agent specificity of Aristotelian corrective justice for these two banks to be funding the payments for bank accounts.²³⁹

236. See *supra* Part III.A.

237. Korman, *supra* note 176, at 118. The Volcker Committee, formally the Independent Committee of Eminent Persons, was established in 1996 by the Swiss Bankers Association, the World Jewish Restitution Organization, and the World Jewish Congress to identify accounts of Holocaust victims in Swiss banks, and “to assess the treatment of the accounts of” Holocaust victims by the banks. ICEP, *supra* note 169, at 1-2. Former Federal Reserve Chairman Paul Volcker chaired the Committee.

238. Korman, *supra* note 176, at 118.

239. For some Aristotelians, the fact that victims of the banks’ withholding are not being paid by the actual banks that withheld the accounts, but rather by a settlement fund under the supervision of Judge Korman, may be inconsistent with the Aristotelian ideal whereby the wrongdoer repairs its own victims. But it is not clear that the administrative process through which bank account claims are being paid removes the claims from the realm of corrective

On the recipient side, most of the individuals who have received payments for bank account claims likely are heirs—or heirs of heirs—of the original depositors. The original depositors, while eligible to receive payments, mostly were murdered in the Holocaust.²⁴⁰

From a strict Aristotelian perspective, it is problematic that heirs (and heirs of heirs) are receiving payments from the dormant accounts. As discussed above, under a strict interpretation of the existence requirement central to Aristotelian corrective justice, only the direct victims of the injustice are entitled to repair. In the Swiss banks case, the original depositors, not their heirs, are the direct victims of the banks' misconduct. That is because the banks' refusal to pay out accounts after World War II violated understandings that the depositors had with the banks.

However, we can reconcile the intuition that many people probably have that the heirs are entitled to the bank account payments with Aristotelian corrective justice by interpreting the existence requirement generously. As a historical matter, many of the Holocaust victims who deposited funds in Swiss banks before World War II did so to provide for family members in the event of war or other danger.²⁴¹ As a result, in withholding the accounts after the war, the banks deprived heirs of funds that depositors had set aside for them. Against this historical backdrop, the payments to heirs seem consistent with the expansive interpretations of the existence requirement discussed in Part III.A.1. First, if the dead can be benefited, then the dead can be regarded as victims who are being benefited through the payments to family members for whom they deposited funds with Swiss banks. Alternatively, the payments to heirs are justifiable as payments to victims on the basis that the heirs themselves were victims of the banks' withholding of the accounts. By paying the heirs now, the settlement fund is providing the heirs with

justice, especially given that the two banks that paid the settlement fund likely were significantly responsible for the withholding of accounts. See COLEMAN, *supra* note 62, at 327 (arguing that while the wrongdoer has the duty of repair, it is consistent with corrective justice for a third party to make the repair for the wrongdoer voluntarily).

A second wrinkle in the Swiss banks case for Aristotelians is that, while only UBS and Credit Suisse paid the settlement, settlement funds are being used to pay out claims for bank accounts withheld by other banks. Swift, *supra* note 43, at 58 (indicating that claims against "over 125 banks" are covered by the settlement).

240. Plan of Allocation, *supra* note 167, at 11.

241. SWITZERLAND: FINAL REPORT, *supra* note 167, at 257-58, 261, 274-75.

funds that they would have received immediately after the war had the bank accounts not been wrongfully withheld.²⁴²

The bank account payments also satisfy the second requirement for Aristotelian corrective justice, which stipulates that the payments must be for a violation of a protected interest. The banks' withholding of the accounts after the war violated core property rights of the depositors and their heirs. By withholding the accounts, the banks improperly converted the accounts for their own use.²⁴³

Finally, the payments for the bank account claims satisfy the third requirement: that redress remedy the original wrong. The payments come as close as is possible more than sixty years after World War II to remedying the wrongful withholding of the accounts, whether redress is understood as the restoration of equality or the repair of wrongful losses. The Swiss banks program has devoted considerable time and resources to calculating payments individually in respect of bank account claims. The program's objective has been to pay successful claimants the value of their—or their forebears'—accounts, adjusted for inflation.²⁴⁴ This objective has been met only imperfectly, due to the banks' destruction of records in the decades after the war and uneven cooperation from the banks in administering the claims process.²⁴⁵ But even the presumptions that have been employed to compensate for the disappearance of documentary evidence have been calculated, and are being scrutinized, with care.²⁴⁶ Overall, then, there is a strong basis for justifying as Aristotelian corrective justice at least the bank account payments to the heirs of individuals murdered in the Holocaust.

242. As Janna Thompson states in a context unrelated to the Swiss banks case: "It would be mean-minded to question the claims of descendants of Nazi victims on the grounds that their parents or grandparents might have lost their possessions in some other way if the Nazis had not stolen them." THOMPSON, *supra* note 14, at 123.

Notably, in the 1990s, the advocates of redress often highlighted the experiences of the individuals who, I argue, had the strongest claims: individuals who were alive after World War II who tried to claim bank accounts immediately after the war that their parents, or other relatives, had set aside in the 1930s. See, e.g., RICKMAN, *supra* note 178, at 79 (describing the choice of witnesses for the October 1996 Senate Banking Committee hearing).

243. Conversion was among the plaintiffs' causes of action. Memorandum, *supra* note 43, at 14 n.12.

244. Holocaust Victim Assets Litigation (Swiss Banks), Deposited Assets Class, <http://www.swissbankclaims.com/DepositedAssets.aspx> (last visited Dec. 25, 2007) (describing the process for identifying bank account claimants, matching claimants to accounts, and calculating account values).

245. See *In re Holocaust Victim Assets Litig.*, 319 F. Supp. 2d 301, 314-21 (E.D.N.Y. 2004) (describing Swiss banks' destruction of documents).

246. *In re Holocaust Victim Assets Litig.*, 319 F. Supp. 2d at 316-21; Rules Governing the Claims Resolution Process (As Amended) at 17, available at http://www.crt-ii.org/_pdf/governing_rules_en.pdf (last visited Dec. 25, 2007).

ii. Other Wrongs

To date, 51% of the settlement fund has been allocated to individuals with no claims to Swiss bank accounts.²⁴⁷ The recipients of this 51% include slave laborers forced to work during World War II for Swiss- and German-owned firms that, in many cases, used Swiss banks; individuals who were denied entry to Switzerland as refugees, and individuals who were admitted but mistreated; and social service agencies assisting needy Holocaust survivors ("social service agencies"). These various payments are hard to justify by appealing to Aristotelian corrective justice.

To start, the payments to slave laborers, refugees, and social service agencies do not fit the Aristotelian ideal, according to which the wrongdoer is supposed to make a transfer to his victims. In defense of these payments, it should be emphasized that they are largely being made to victims of World War II, as an Aristotelian would insist. Former slave laborers and refugees are the primary recipients of payments for slave labor and the mistreatment of refugees. Heirs of slave laborers and refugees can receive payments only if the slave laborers and refugees died after the formalization of the settlement in 1999.²⁴⁸ Similarly, the social service agencies receiving funds set aside for the Looted Assets Class must spend these funds to assist only needy Holocaust survivors.²⁴⁹ One consequence is that Jewish social service agencies helping needy elderly Jews in the former Soviet Union with Looted Asset Class funds have a morally troubling two-tier assistance program. Elderly Jewish Holocaust survivors receive more assistance than equally needy elderly Jews who are not Holocaust survivors because only the survivors can receive help financed by the Swiss banks settlement fund.²⁵⁰

The principal difficulty with the payments to slave laborers, refugees, and social service agencies from the perspective of Aristotelian corrective justice is that it is difficult to regard the Swiss banks as being responsible for the wrongs inflicted on former slave laborers, refugees, and needy elderly Holocaust survivors benefiting as members of the Looted Assets Class. The banks' lack of responsibility is clearest in the case of the refugees. The refugees suffered because of

247. See *supra* note 205.

248. Plan of Allocation, *supra* note 167, at 18 (explaining eligibility requirements).

249. From an Aristotelian perspective it may seem troubling that social service agencies are the direct recipients of Looted Assets Class funds, not Holocaust victims. But since the agencies must spend the funds to assist victims, it still seems fair to regard victims, rather than agencies, as the ultimate recipients of the funds.

250. JDC ANNUAL REPORT, *supra* note 181, at 36.

the actions of the Swiss government, not the Swiss banks. Yet the payments for their harms are coming from a fund paid by two banks to which the Swiss government made no contribution. There are more plausible connections between the Swiss banks and the former slave laborers and the needy elderly Holocaust survivors who are being assisted by social service agencies. While Swiss banks did not employ slave labor, many of the organizations that used slave labor in Germany during World War II also used the Swiss banks. The banks, therefore, may have profited from slave labor.²⁵¹ Likewise, Swiss banks can be viewed as having profited at the expense of Holocaust victims in the Looted Assets Class because Swiss banks laundered assets looted by the Third Reich.²⁵² Still, the historical evidence linking the banks to the suffering of slave laborers and Holocaust victims in the Looted Assets Class generally is less developed than the evidence connecting the banks to the withholding of accounts.²⁵³ For example, under available evidence, few Holocaust survivors in the Looted Assets Class would be able to establish that the assets that the Nazis looted from them passed through Swiss banks.²⁵⁴ From a strict Aristotelian perspective, then, in funding a settlement being used to compensate slave laborers, refugees, and needy Holocaust survivors, Credit Suisse and UBS would appear to be paying for wrongs to which they are not clearly connected. Notably, though, the two banks are doing so at their own insistence, as they requested that the settlement release all Swiss entities from potential liability for Holocaust-related claims.²⁵⁵

Setting aside the difficulty of regarding the payments as being funded by actors who wronged the recipients, the payments are for violations of protected interests. The Holocaust survivors receiving aid

251. See Plan of Allocation, *supra* note 167, at Annexes G-33 to -36 (describing relationships between Swiss entities and German industries), Annexes H-52 to -59 (describing relationships between Swiss firms, including Swiss banks, and German entities that exploited slave labor).

252. *Id.* at Annexes G-25 to -32. Although commercial banks including, perhaps, Credit Suisse, were also involved, much of the laundering of gold appears to have been done by the Swiss National Bank, the central bank, which did not contribute to the settlement fund. *Id.* at Annexes G-25, G-28.

253. See *id.* at Annexes H-52 to -58 (referring to the lack of prior research about the ties between German firms that used slave labor and Swiss firms, but concluding that there were “pervasive interrelationships among German entities that exploited slave labor and the Swiss economy, particularly Swiss financial institutions”); *id.* at Annexes I-1 to -7 (discussing historical evidence of slave labor use by Swiss-owned firms); *id.* at Annexes G-1 to -58 (discussing the extent of Nazi plunder, Swiss involvement in laundering looted assets, and the difficulty of determining what happened to Nazi plunder decades after World War II).

254. *Id.* at Annex G-39.

255. Swift, *supra* note 43, at 54 (“Swiss banks insisted on closure for themselves and all Swiss entities.”).

as members of the Looted Assets Class almost certainly suffered violations of their property rights, as “[t]here is hardly a victim of the Nazi Regime who did not have his or her assets looted.”²⁵⁶ Slave laborers were denied control of their persons and forced to work for the profit of others.²⁵⁷ Refugees were denied entry to Switzerland, expelled, and forced to return to dangerous situations, or they were admitted but then mistreated—for example, by being interned.²⁵⁸ As mentioned above, though, it is not clear how much these violations should be attributed to Credit Suisse and UBS.

An additional problem with the payments to the slave laborers, refugees, and needy survivors in the Looted Assets class is that it is difficult to regard these payments as remedying the wrongs that these individuals suffered, regardless of whether remediation is defined as restoration or repair of wrongful losses. The redress program is not calculating individualized payments for slave laborers, refugees, or Holocaust victims whose assets may have been laundered through Swiss banks, partly because of the significant transaction costs that individualized payments would entail.²⁵⁹ Instead, slave laborers and refugees are receiving flat payments.²⁶⁰ Needy Holocaust survivors receiving social services financed by Looted Asset Class funds get assistance such as food packages, medical help, and emergency assistance.²⁶¹ The payments to slave laborers, refugees, and social service agencies for needy survivors are symbolic, rather than compensatory.²⁶² While entirely understandable on pragmatic grounds, the decision to make symbolic payments nonetheless makes it harder to regard the payments as satisfying the remedial requirements of corrective justice. To recap, the payments for bank account claims seem easier to justify as Aristotelian corrective justice than the payments to slave laborers, refugees, and social service

256. Plan of Allocation, *supra* note 167, at Annex G-2.

257. “Slave Labor means work for little or no remuneration actually or allegedly performed by individuals involuntarily at the insistence, direction, or under the auspices of the Nazi Regime.” Exhibit 1 to Plan of Allocation, *supra* note 200, at Class Action Settlement Agreement § 1.

258. Plan of Allocation, *supra* note 167, at Annexes J-1 to -37 (discussing Switzerland’s treatment of wartime refugees and the composition of the Refugee Class under Settlement Agreement).

259. *Id.* at 20, 23.

260. Slave laborers each received \$1,450. Refugees denied entry into Switzerland each received \$3,625. Refugees who were admitted to Switzerland each received \$725. Statistics, *supra* note 206.

261. *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, 102-03 (E.D.N.Y. 2004).

262. *See, e.g.*, Plan of Allocation, *supra* note 167, at Annex J-37 (describing recommended payments for refugees denied entry as “essentially symbolic” and payments for refugees who were admitted into Switzerland but mistreated as “largely symbolic”).

agencies to assist needy Holocaust survivors who are members of the Looted Assets Class.

b. Nozickian Corrective Justice

While the payments for bank account claims may be justified as Aristotelian corrective justice, these payments also seem to be defensible as Nozickian corrective justice. However, it is equally difficult to justify the payments to slave laborers, refugees, and social service agencies as Nozickian corrective justice.

As discussed above, Nozick's principle of rectification creates a freestanding duty and right to rectification.²⁶³ However, at least three conditions must be satisfied to justify redress under this principle of rectification: (1) the wrong for which redress is being provided must be a violation of a protected interest; (2) the redress must be rectifying this wrong; and (3) rectification cannot worsen the situation of others, consistent with the Nozickian proviso.

i. Conversion of Bank Accounts

The banks' withholding of bank accounts after the war clearly constitutes a violation of a protected interest for which rectification is due. By withholding the accounts, the banks improperly converted the funds for the banks' own use.²⁶⁴ Although Nozick does not define the principle of justice in transfer, the conversion of others' funds is similar to some of his examples of unjust transfers justifying rectification, such as theft or fraud.²⁶⁵

The payments for the bank account claims also come very close to Nozick's first-best conception of rectification. Under that conception, rectification involves transferring holdings to the persons who would have held them had there been no violation of the principles of justice in acquisition and/or transfer.²⁶⁶ As mentioned above, the payment of bank accounts follows a highly individualized process in which claimants are matched to bank accounts. In turn, successful claimants receive payments based on estimates of the value of the accounts they are claiming, adjusted for inflation. In other words, the claims resolution process strives to the greatest extent possible to pay out what the banks withheld. Still, a purist might object that even this individualized process does not satisfy the Nozickian ideal. For

263. See *supra* Part III.B.

264. See *supra* note 243.

265. See *supra* text accompanying note 139.

266. NOZICK, *supra* note 126, at 152-53.

example, payments likely are being made to individuals who would not have received the funds if the banks had not withheld them after the war, because relatives who already have died would have cashed out the accounts after the war and spent the proceeds on resettlement. In addition, the process only examines how much the Swiss banks withheld and does not go back further and correct any violations of the principles of justice in acquisition or transfer by the original depositors or their forebears.

Assuming, though, that the individualized process approximates Nozick's first-best conception of rectification, the only remaining issue to consider in attempting to justify the bank account payments is whether rectification is worsening the condition of others, contrary to the proviso. Credit Suisse and UBS likely would have preferred to retain the \$1.25 billion that they paid to settle the claims against them. As mentioned above, they settled only in the face of considerable political and legal pressure in the United States. However, the fact that the \$1.25 billion was extracted from Credit Suisse and UBS does not mean that they—or anyone else—are worse off in a relevant sense. Recall that under the Nozickian proviso, a transfer worsens a person's condition only if it leaves the actor worse off than it would be in the state of nature. There is no way that the banks, their shareholders, or their employees are worse off as a result of the settlement than they would be in the state of nature. Indeed, the banks probably would not exist in the state of nature.

ii. Other Wrongs

Although the bank account payments appear justifiable as Nozickian corrective justice, it is harder to justify the payments to slave laborers, refugees, and social service agencies to assist needy Holocaust survivors. In their favor, the payments are for violations of protected interests. This is most clear in the case of the payments to slave laborers and social service agencies for needy survivors. After all, slavery and theft are among the unjust transfers that Nozick gives as examples of violations of the principle of justice in transfer for which rectification is due.²⁶⁷ It is more difficult to characterize Switzerland's refusal to admit refugees, or its mistreatment of some of those that it admitted, as violating the principles of justice in acquisition and/or transfer and therefore violating a protected interest. But it may be possible. The refusal to admit and the mistreatment could be regarded in Nozick's terms as "forcibly

267. *Id.* at 152.

exclud[ing] others from competing in exchanges”²⁶⁸ because these actions kept refugees from coming to Switzerland and limited the terms under which those admitted could participate in Swiss society. Among the motivations for Switzerland’s restrictive wartime refugee policies was a concern that refugees would take jobs from unemployed Swiss.²⁶⁹ On this basis, one might argue that excluding refugees and limiting the freedom of movement of those who were admitted was a form of economic protectionism that “forcibly” forbade “others from competing in exchanges.”

It is also clear that the payments to slave laborers, refugees, and social service agencies for needy Holocaust survivors do not violate the Nozickian proviso. Again, the two Swiss banks that paid the settlement were left without \$1.25 billion that they otherwise would have had. However, the banks are better off than they would be in the state of nature where they probably would not exist.

The real obstacle to justifying these payments under the Nozickian principle of rectification is that it is difficult to view them as remedying the wrongs for which they are being made. As mentioned above, the payments to slave laborers and refugees are flat, non-individuated payments that bear no relationship to the hardships that the recipients suffered or to any benefits that accrued to the banks (or the Swiss government) from serving clients who used slave labor (or excluding or mistreating wartime refugees). The assistance that needy survivors receive from social service agencies also is unrelated to the harms that the survivors endured due to the banks’ laundering of looted assets or the banks’ profits from laundering. As a result, it is difficult to regard the payments to slave laborers, refugees, and social service agencies for needy survivors as embodying Nozick’s individualized process for determining how holdings would have been distributed.

Nor do the payments seem to embody the ambitious program of distributive justice that Nozick suggests might be an acceptable alternative, given the difficulty of achieving the ideal. A great deal of effort has gone into distributing the slave labor and refugee payments and the aid for needy Holocaust survivors, and these efforts have had tangible and intangible benefits for many. However, it is still difficult to regard the payments and aid as the product of a comprehensive program of distributive justice, which Nozick suggests legitimately could take the place of an individualized rectification process.

268. *Id.*

269. Plan of Allocation, *supra* note 167, at Annex J-13.

In summary, it is easier to justify the bank account payments than the payments to slave laborers, refugees, and social service agencies for needy survivors under both the Aristotelian duty of repair and Nozick's principle of rectification. It is difficult to characterize the latter payments as Aristotelian corrective justice because they are being made by a settlement fund paid by two banks whose connection to the use of slave labor, the mistreatment of refugees, and looted assets is hard to establish, and the payments are symbolic rather than compensatory. Under Nozickian corrective justice, it is the symbolic quality of the latter payments that is problematic because the principle of rectification is not agent specific.

From a broader perspective, it is notable for two reasons that the bank account payments are easier to justify as corrective justice than the payments to slave laborers, refugees, and social service agencies for needy Holocaust survivors. First, Judge Korman has indicated that, as a matter of law, the claims for the withholding of bank accounts were the strongest claims against the Swiss banks.²⁷⁰ Thus, his legal conclusion seems to align with corrective justice theory. Second, many people, if asked, likely would rank profiting from forced labor and the refusal to admit—and the mistreatment of—refugees as more heinous than withholding bank accounts. However, paradoxically, more than sixty years after the end of World War II, it seems that the payments for a wrong to property are easier to justify than the payments for wrongs to persons. This counter-intuitive result is an example of the moral complexity of claims for redress for historical injustices that raises questions about the merits of our current societal preoccupation with correcting past wrongs.

CONCLUSION

Since the end of World War II, survivors of the Holocaust and other injustices have published memoirs recounting their horrific experiences.²⁷¹ Some of the children of survivors of the Holocaust and other injustices also have written about the impact of these injustices on them and their parents. One poignant book by a child of Holocaust survivors is *After Such Knowledge*, a memoir published in 2004 by Eva Hoffman. Born shortly after World War II to two Polish Jewish Holocaust survivors, Hoffman emigrated to Canada in 1959 with her

270. *In re Holocaust Victim Assets Litig.*, 302 F. Supp. 2d 89, 93 (E.D.N.Y. 2004).

271. See Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675, 835-36 n.655 (2002) (listing memoirs by Holocaust survivors).

family.²⁷² Hoffman now lives in London, England and Cambridge, Massachusetts after having spent a great deal of her adult life in the United States. Movingly, Hoffman writes that “[t]he statute of limitations on the great cataclysms of the twentieth century is running out.”²⁷³ She emphasizes “that mourning must . . . come to its end.”²⁷⁴ “Sixty years later, . . . and after all that can be done has been done, it may also be time to turn away, gently, to let” go of the Holocaust.²⁷⁵ Hoffman by no means is urging that the Holocaust be forgotten. Nevertheless, she suggests that the moral right to demand redress for it is fading as time passes. According to Hoffman, the moral rights of individuals like her to make demands of Germany are not as strong as those of the direct victims of the Holocaust.²⁷⁶

By definition, advocates of redress for historical injustices resist the idea that the statute of limitations has run on the wrongs for which they seek redress.²⁷⁷ At the same time, they, like Hoffman, often would prefer to leave the past behind. But to do so, they argue, it is first necessary for society to undertake additional remedial measures to address the present effects of past wrongs. For example, in a well-known article advocating reparations as a progressive tool of legal change, Mari Matsuda argues that “[r]eparations claims are based on continuing stigma and economic harm. The wounds are fresh and the action timely given ongoing discrimination.”²⁷⁸ More recently, in arguing that there is a moral obligation to remedy slavery and past discrimination against African Americans, Kim Forde-Mazrui expresses a profound concern with the vast present-day disparities between African Americans and whites.²⁷⁹

But the argument for addressing current injustices by revisiting the past discounts the complex moral issues raised by attempts to redress past injustices many years later. The historical wrongs for which redress has been sought in the United States are grievous, and they deserve to be condemned loudly. Sometimes redress requiring a significant commitment of resources also may be justified, even many years after the event. But as I have argued, it may be difficult to justify redress measures as a deterrent strategy, as

272. HOFFMAN, *supra* note 30, at 82.

273. *Id.* at 243.

274. *Id.* at 279.

275. *Id.* at 233.

276. *Id.* at 126.

277. *E.g.*, Forde-Mazrui, *supra* note 9, at 738.

278. Matsuda, *supra* note 41, at 381-82.

279. See Forde-Mazrui, *supra* note 9, at 695-97 (cataloguing the social, economic, and health-related disparities between African Americans and whites).

consistent with distributive justice, or as a form of corrective justice. Moreover, even if redressing a particular injustice could be justified on one or more of these bases, to justify fully redressing that injustice, it also would be necessary to defend pursuing that basis. In this article, I have not broached the complex task of defending the pursuit of deterrence, distributive justice, or corrective justice.²⁸⁰

I conclude with a suggestion. In light of the difficulty of justifying the redress of historical injustices, maybe we should concentrate more on tackling present injustices, rather than focusing on the past and how it affects the present.²⁸¹ There is certainly no shortage of pressing current injustices in the United States and elsewhere to which we could devote our attention. Recall, for instance, the aftermaths of Hurricane Katrina and the Asian tsunami and the genocide in Darfur. While it is important to memorialize the past and honor its victims, it is also vital to remember our obligations to the present and the future.

280. For a recent article raising questions about the desirability of pursuing corrective justice specifically, see Ronen Avraham & Issa Kohler-Hausmann, *Accident Law For Egalitarians*, 12 *LEGAL THEORY* 181 (2006).

281. See *supra* note 73 (identifying other sources similarly supporting a focus on present needs).

The Individualization Fallacy in Forensic Science Evidence

Michael J. Saks

61 Vand. L. Rev. 199 (2008)

Jonathan J. Koehler

Forensic scientists across a broad array of sub-specialties have long maintained that they can link an unknown mark (e.g., a partial fingerprint or tireprint) to a unique source. Yet no scientific basis exists for this assertion, which is sustained largely by a faulty probabilistic intuition equating infrequency with uniqueness. This Essay traces the origins of the individualization claim and explicates the various failed lines of evidence and argument offered in its support. We conclude with suggestions for improving the scientific bases of the forensic identification sciences.
