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Two Observations on Holocaust Claims

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I have two observations to make about Holocaust and related claims litigation and its relation to the subject of corporate social responsibility. My perspective is that of a corporate law teacher.

First point: large firms are making reparations because they do business on a global basis; despite this, many of the generating forces and events have operated at local levels in a manner inimical to globalist principles.

Second point: these corporations can be required to make these reparations because their status as legal entities, which ordinarily serves to deflect responsibility, facilitates inherited culpability in a way that does not obtain to human beings.

With these two points, this reparations movement reverses our usual expectations about multinational corporations and their global operations.

I. First Point

As to the first point, billions are being paid to Holocaust claims boards and plaintiffs without a single one of the well-publicized cluster of U.S. lawsuits having been litigated to final judgment for the plaintiffs.

Why have all of these corporate defendants settled? Should we infer that this is a spontaneous order result achieved in the global venue—a triumph of international private ordering? Did the firms' rational interest in reputation preservation, or, alternatively or concomitantly, an imposition of shame on them by normative entrepreneurs in this country and elsewhere, bring them to the settlement table? Certainly, moral pressure, applied by private groups and government actors, and heightened by the international

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media, matters here.

But this is not just public shaming and private ordering. Law and legal entrepreneurs wielding sticks also show up in the sequence of events. And, significantly, they have done so for the most part at the state and local level in the United States.

Consider the lawsuits filed in New York and California against the Swiss banks. These were defended in part on the ground that the Swiss government's claims settlement process was the more appropriate forum. Yet the banks settled here for $1.25 billion in August 1998. Why? Threats of sanctions, I daresay of dubious legality, made by elected officials in the state of New York brought the banks to the table, as did threats in the Senate banking committee, then run by another New York politician, Alfonse D'Amato.

Not dissimilarly, the insurance claims moved from U.S. courts to the international settlement framework by way of an agreement among insurance commissioners from New York, California and Florida and six European insurers, one of which later withdrew upon ceasing to do business in the United States. The German process for the compensation of slave laborers was initiated in 1999 with mention of proliferating litigation here and with the final settlement originally being contingent on dismissal of the U.S. lawsuits. In contrast, actual judicial rulings implicating international law, which began coming down after 1998, have gone the defendants' way.

This all suggests a standard public choice account of the claims movement. The critical impetus came from pressure groups and local politicians anxious to assist them in New York, Florida, and California. These actors worked in tandem, if not in partnership, with actors from the plaintiff's bar, targeting foreign firms lacking in local influence. In state-level legal and political arenas, the interests of fluid commerce in the global venue can count for little. In short, we have had a classic hold-up in the stream of cross-border commerce, with locals imposing themselves on foreign firms that are made to bear the cost of the hold-up in order to access the value held out by doing business in the locality. In particular, the need for access to New York as a world financial center seems to have figured centrally in the firms' vulnerability.

Not that moral imperative has not operated also. In its absence, New York's interest in presenting itself as a hospitable venue for international capital might have reasserted itself so as to change the incentives of local politicians. And, absent a moral imperative with negative and uncontrollable reputational implications, a firm would be less quick to settle.

But I wonder what the outcome would have been had the moral imperative operated alone, with no assist from lawyers and politicians wielding legal sticks at a barricade blocking a crossroad of global finance. I also wonder how much money would be on the table had all outcomes depended exclusively on transnational and international law interpreted by judges or actors from the international law community.

Expanding, here local and global interests have conflicted, with no Commerce Clause to force an outcome on the global side. Here the multinational firm goes abroad and gets slammed with liability, where in the usual globalization story the multinational goes abroad to operate free of domestic regulatory constraints. That freedom implies irresponsibility, whether we are talking about Nike contracting to have sneakers manufactured by minors in Indonesia, an American industrial producing in Maquiladoras free of domestic wage levels and labor standards, or an American firm setting a transfer price with an Irish subsidiary so as to lighten its domestic corporate tax burden.

II. Second Point

Note that, given the peculiarities of the corporate form, such dubious corporate conduct tends to proceed without accountability on the part of any of the human actors who make the firm's decisions. After all, they do what they do to enhance shareholder value, referring us to their fidelity to the shareholder interest when we complain of negative social consequences. But, of course, they make that reference knowing well that we will be unable to fix responsibility on their shareholder beneficiaries because the juridical corporation intervenes to shield the shareholders with limited liability. More than that, with dispersed shareholding there never emerges a human face to which moral responsibility meaningfully might be assigned. It diffuses in the collectivity.

It follows that to fix a collective responsibility we must take the firm as it comes—as a firm. This can be less than satisfactory. When the firm commits a crime, for example, we cannot incarcerate its corporate personality, constructively but meaningfully criminal though it may be. We can only fine it (and we may or may not find a culpable human agent for incarceration). Thus does corporate entity status usually deflect responsibility.

My second point is that entity status has the opposite effect with Holocaust claims. Recall that fifteen and twenty years ago, the American legal system sought corrective justice for the Holocaust by searching out and sending home direct participants who had come here after the war. By now such actors have passed from the scene, as have the culpable actors who ran Swiss banks, continental insurers, and German industrials during and after the War. Now our legal system seeks to compensate surviving victims (and in the case of many awards made in the Swiss bank claims process, the descendants and collaterals of deceased victims) while there is still time. A case for reparations certainly could remain powerful after the surviving victims too are gone—as we see with arguments for reparations respecting American slavery. But it would be a case unsuited to the context of private litigation and dispute resolution.

Meanwhile, unlike the responsible human beings, there is no danger that the corporate defendants will disappear. The basic attributes of corporateness—fictive legal personality, unlimited life, and successorship in the event of merger or acquisition—keep corporate perpetrators present and accountable.

Not that questions could not have been raised if some of the claims had gone to full litigation. The gravamen of many of the complaints has been unjust enrichment. Given this, one legitimately can ask whether a corporate defendant's endurance as a legal entity by itself imports responsibility, or whether a finding of present responsibility requires a showing of institutional and ownership continuity. To show unjust enrichment today, one would arguably have to show some tie between today's economic entity and the War-era entity that took value from the victims.

This manifestly appears to be the case with Swiss banks and Holocaust victim deposits. If, as seems likely, the institutional world of the Swiss bank is highly stable, today's banks rest on a capital base as to which the victims' deposits are as much a part as any capital contributed prior to 1950. As between survivors or relatives of victims and the banks' equity-holders, the former ought to have the benefit of that capital.

The case is harder with the claim that the banks benefited from doing business with the Third Reich, acting as conduits for gold exchanged for capital which supported the war effort and otherwise acting as intermediaries in trade between the Reich and the outside world. Here there may or may not be an attributable unit of capital depending on the financial particulars of those long-ago transactions.

Institutional continuity also has been disputed in the case of the insurers, who raised postwar nationalizations in the East as defenses. Just what those nationalizations meant in financial terms is not immediately clear. Here the benefit conferred is the prewar flow of premiums. Such returns as originated in Eastern Europe may or may not have flowed upward to the home office of a company like Generali. If they did, and Generali otherwise has been a stable corporate institution, then a plausible case can be made out.

Compare a hypothetical case—one entirely a figment of my imagination constructed for the sake of argument. Suppose the policies in question were written by a Czech company wholly-owned by an Italian parent. It was operated as a separate entity and its policy proceeds were invested in a portfolio sited in Prague. After the War, what remained of the portfolio was subsumed into the nationalized Czech economy. What is the benefit conferred on today's Italian parent? The best one can do is look to intercorporate dividend flows prior to nationalization and draw inferences.

Assume we find such a benefit flowing from Prague to Italy and spin the hypothetical out another step. Now assume that the Italian insurer was closely held by a family and that the family cashed out in 1948 by selling 100 percent of their stock to another Italian insurer. The insurer becomes the purchasing company's wholly-owned subsidiary. But whither the benefit of the antecedent premium flows? The surviving firm can argue that, despite the corporate continuity, the benefit redounded to the selling human equity-holders in 1948. The same point obtains if its equity is publicly traded. Dispersed stockholdings turn over as the years pass. Once they do so completely, the ownership tie to the tortfeasor firm arguably disappears. There is institutional continuity, but when the question is benefit conferred, an economic institution whose ownership does not turn over, like a university or a state, makes a more attractive defendant a half century later.

So which is it—the nominal entity or the economic substance? If I were deciding matters of law in a Holocaust claims case respecting slave labor or insurance policies (the Swiss bank deposits would be easy), I would be inclined to discredit arguments along the foregoing lines and let liability follow from entity continuity. The theory is simple: Corporations and corporate actors, having taken the advantage of entity status and legal personality across the entire period, should now also be held to take the detriments of entity status and reified, perpetual personality. I do admit that there might be an extreme case where I would make an exception—where through reorganizations, mergers, asset strips or whatever, the surviving firm really only had a nominal connection with the culpable institution. But my presumption of liability would be quite hard to rebut.