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The Problem of the Past or How Historic Wrongs became Legal Problems

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The Problem of the Past or

How Historic Wrongs became Legal Problems

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The past has long been a problem. The problem however has been moral, political or historical in nature. It has not by and large been a problem of law. And so for most of the reign of the western legal system, the past has been the province of historians not lawyers. Historians examined the past, researched and pondered the events and the rights and wrongs that had occurred. Sometimes they even talked about responsibility. But the past ultimately belonged to them. This is not to say that law had nothing to do with the problems of the past—indeed the opposite is more often true. The law often played an important role in constituting the troubling features of the past. But while the law may have been central in providing the infrastructure for the iniquities of the past, it was not called upon to respond to those iniquities. That however has changed. This paper tells the story of the complex and dynamic relationship between the past and law and explores how historic wrongs once far beyond the reach of the law have now become law's most troubling cases.

It is not an accident that for most of its history law avoided dealing with the past. Given that so many of the structures of the past that enabled injustice were legal in nature, it is easy to see that law was awkwardly positioned in the struggle to dismantle or more profoundly rectify that injustice. The task of remedying the past was therefore the realm of politics. In the service of this idea, law was replete with doctrines and underlying principles that confined its operation in a very distinctive way: in the all-important realm of responsibility, it only addressed current discrete wrongs, thus ensuring that by and large, law left the past and its vast problems alone.

In the aftermath of WWII however, this began to change. Nuremberg was perhaps the most obvious turning point. Law (especially in the form of legal decrees) played an important role in giving effect to the horrors of the Nazi regime. But in the aftermath of that regime, after some debate a rather surprising decision was made-- the institutions of law not politics would determine the fate of some of that regime's worst perpetrators. Exploring the full meaning of those decisions at Nuremberg is obviously beyond the scope of this project. But whatever else they did, those trials established a new

paradigm for law: in beginning to look backward and to judge the sovereign in its most sovereign-like act of war, it was just starting to reach beyond the discrete current problems that were understood to be the province of the positive law of the day. It was, in short, beginning to reshape its conception of responsibility.

This emerging conception of responsibility began to unsettle the old idea that responding to the big difficult problems of the past was not the job of law. At the same time there was emerging the related, though distinct, impulse to bring positive law, especially but by no means only constitutional and supra-national law, into closer alignment with the underlying principles of human dignity that found such important expression at Nuremberg. The law has always contained within it a conception of justice but it was tightly confined: it was largely discrete and transactional. However, in Anglo-American legal orders, that conception began to broaden to encompass obligations that were not confined to individual transactions (especially duties of care in private law) and that linked more closely to substantive (as opposed to procedural) conceptions of justice and the rule of law.

These developments provided a source of 'critical leverage' on the tenets of positive law and gradual shifts began to occur in both doctrines and in our broader legal consciousness. The idea started to take hold that a traditional source of legal obligation (for example a statute or an agreement) could actually be affected in some way by fundamental values. And as domestic legal actors in stable constitutional regimes began to grapple with this shifting role another important dynamic was taking place. Around the world, unjust regimes began to fall and the field of transitional justice emerged into public consciousness. Transitional justice discussions brought more fully to the fore that which was just stirring in stable constitutional orders—the idea that law could be used to rectify the problems of the past, even though so many of those problems took a specifically legal form.

Building on the Nuremberg principles, the view emerged that legal mechanisms and not just political ones could be used to put right the problems of the past and perhaps more radically, that such mechanisms may respond to some of the problems that had a specific grounding in positive law. Some of these examples of transitional justice became quite well known and the subject of much discussion (South Africa, former East Germany), a conversation that became more engaged as technological innovation enabled a much more connected global (or at least trans-national) conversation. Thus is it hardly surprising that many of those concerned with past iniquities in stable or notionally 'non-transitional' orders began to raise questions of their own. They wondered why their countries should be immune from similar scrutiny and why victims of widespread historic injustices in stable regimes were, by contrast with those in transitional regimes, left without any form of redress. The past in other words was slowly becoming a legal problem.

In almost all of these cases and consistent with the traditional approach, the early efforts at rectification were political. Those who suffered under the Nazi regime sought redress. Populations in North America who were interned simply because of their race began to demand accountability; victims of involuntary sterilization asked for redress; aboriginal and other children forced into brutal institutions sought

recognition that they had been wronged; survivors of sexual violence looked for accountability. These groups did not generally begin their quests by filing court actions; they began by approaching the institutions that had wronged them and engaging them in a discussion about what happened to them and why. They asked for recognition, for the wrong to be acknowledged, and perhaps for commemoration to take place. To the extent that they lost property, they asked for restitution. Sometimes they also sought monetary redress. But with a few notable exceptions, prominently the Japanese Americans and Canadians interned during WWII, these campaigns for recognition and redress failed[1]. The groups subjected to widespread historic wrongs perhaps unsurprisingly still tended to be marginalized, often by race, sometimes by gender or disability. Typically they had little political capital. Their 'voice' was insufficient to make themselves heard in the corridors of power. In most instances, they pressed against these odds and waged political campaigns that lasted for decades. Indeed, many of the campaigns continue to this day (reparations for slavery, US residential schools, sex abuse victims, sterilization victims).

Given this political immobility, it is hardly surprising that advocates of responding to past injustices began to look to law as a solution. There were a number of reasons for this. In several Anglo-American legal regimes, a cultural shift was taking place. An important inspiration for this shift was found in the American civil rights movement and its thoughtful effective use of litigation to effect social change.[2] Inspired in part by the American civil rights movement and its use of law and constitutional law in particular, larger developments were also underway. Key among these was the pressure to develop justiciable constitutionalized rights in countries that did not have constitutionally entrenched bill of rights.[3] These movements, along with the development of human rights regimes that addressed the private sphere and administrative law mechanisms meant that courts and tribunals were gradually becoming accustomed to a new and different kind of role that frequently placed them in positions of judgment with regard to the law itself.

An important part of this cultural shift was also found in the growth of a new kind of globally connected and jurisdictionally mobile advocacy. Spurred on by technological changes that enabled among other things instant and detailed information sharing, the development of a different kind of legal advocacy was an important part of this change. Though the United States with its long history of civil rights and constitutional litigation provided a model and impetus for this, advocates in newly constitutionalized regimes soon began developing their own approaches and techniques[4]. And in the face of the general failure of political advocacy, these groups began to turn their focus to legal actions that sought redress for some of the most troubling problems of the past.

But redress for the wrongs of the past would require something much bigger—a shift in our very conception of responsibility. The past has always been insulated from legal scrutiny by an array of rules and doctrines. The most obvious of these are of course limitations periods, which overtly prevent any

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[1] **Insert references for Japanese American and Canadian Internment and successful redress efforts**

[2] **insert references for US civil rights advocacy and social change. Use of litigation to effect social change…Brown, etc.**

[3] **For example, Canada, Australia, the United Kingdom….insert references and include other examples.**

[4] South Africa Centre for Constitutional Rights International Law Website

legal consideration of the past. However, there were also other important--though much less obvious--ways that the past was immunized. The Nuremberg model suggested that law could only be drawn into the unfamiliar terrain of the past for a very good, indeed for an extraordinary, reason—judging the most egregious of wrongs. Given this reason for reaching back into the past, it is hardly surprising that the law initially reached for the criminal law model. And so as the idea emerged that law could be used to venture into unfamiliar terrain, it was the criminal law model of responsibility that served as the dominant understanding[5]. However—and perhaps this was part of its appeal—the theory of responsibility that underlies criminal law derives much of its power from its intense focus on an individual wrongdoer. The powerful conception of the guilty mind or *mens rea* that animates criminal law does not translate well to collectives of any kind, though many theorists have attempted the feat. This meant that law's initial foray into the past, inspired by Nuremberg, focused sharply on personal culpability. Any claim premised on the person will of course have an inherent kind of 'shelf life' associated with the human lifespan. Thus, for decades-post Nuremberg, the hold that the idea of personal criminal liability had on the legal imagination also created limits on the ability of law to reach into the past.

But then, in the 1980s, something began to happen. The story of exactly why it began to happen deserves more attention than I can give it here but allow me to at least suggest the outlines of an account. For a variety of reasons, at that time progressive advocates began to turn away from criminal law and towards civil justice. It is plausible to say that there was a kind of 'movement' towards civil justice as a supplement to the criminal model.[6] One group certainly at the forefront of this movement was a group of feminist advocates, disillusioned in part with how female victims of male violence fared in criminal law. They began to turn to tort law, along with other advocates who saw more promise in the civil justice model than in the traditional criminal or even constitutional arenas[7]. This shift towards civil justice was driven in the United States, where "mass torts" were also just starting to take hold as an idea, along with other uses of civil actions in cases that would formerly have be the exclusive province of criminal law[8] or perhaps more accurately where there would have been no legal responsibility at all.

The turn to civil justice occurred for a range of reasons. These included pragmatic reasons like the greater control that the complainant has in the civil domain, the more plaintiff-friendly burden of proof and the availability of a greater range of remedies including but not limited to damages. But while the

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[5] Indeed, as Bilsky nicely shows, it underlies much of the criticism of the Holocaust reparations movement. The same could be said of other similar turns to civil justice for widespread historic wrongdoing (reparations for slavery, redress for victims of other injustice—head tax, internment, involuntary sterilization etc: Tony Seebok eg).

[6] Discuss this in more detail…Owen Fiss was very important, Hart-Sacks, Look at the turn to civil remedies that happened in the 1980s to try to sort out at least a bit of why/how it happened.

[7] See for example Leslie Bender, "An Overview of Feminist Torts Scholarship" (1993), 78 Cornell L Rev 575; Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort, 38J. LEGAL EDUC. 3 (1988); ADRIAN HOWE, THE PROBLEM OF PRIVATIZED INJURIES: FEMINIST STRATEGIES FOR LITIGATION (Institute for Legal Studies Working Paper No. 4:1, 1989); see also MARTHA A. FINEMAN & NANCY S. THOMADSEN, AT THE BOUNDARIES OF LAw: FEMINISM AND LEGAL THEORY 148 (1991); Joyce McConnell, Incest As Conundrum: Judicial Discourse on Private Wrong and Public Harm, 1 TEx.J. WOMEN & L. 143 (1992)

[8] Civil actions for sexual violence was one especially important area of legal activity, particularly in the early days, actions by survivors in cases of incest: see note above, *KM* in Canada.

pragmatic reasons tend to be the ones highlighted in the literature on the turn to civil remedies, there are also deeper issues at work—issues that also play a role in expanding law's engagement with the past.

These deeper issues can be seen at work at two levels: first, in the idea of expanding institutional liability; second and related though much larger, in the broadening conception of what work legal responsibility itself can do (reparative justice). Each of these played a very significant role in equipping law to judge the past. The simplest illustration can be found in the increasing willingness of courts to hold institutions and not just individuals liable for various forms of wrongdoing. This shift from a focus on individual liability in the direction of liability that is shared with an institutional defendant was a vitally important factor in enabling law to judge the past. The reach of law into the past had historically been controlled not just by limitations periods but also by more profound unarticulated ideas. The most important of these was the post-Nuremberg criminal law inspired idea that if there was any legal responsibility for atrocity, it was primarily personal. However, as noted above, personalized liability has a kind of natural shelf life that restrains the reach of law—it restrains it both with respect to time and also with respect to the kinds of acts and actors it can attach to.

The move to the civil justice model that was underway did not of itself displace the idea that responsibility was primarily personal. But so long as responsibility for significant wrongs was understood within that criminal law inspired understanding of responsibility, the reach of law would be limited. That reach would not be extended unless, in addition to weakening the limitations defences that prevented the past from being subject to legal consideration, responsibility could go beyond the individual and attach to institutions. Without this change, even a shift to civil remedies would have been naturally limited by the life span of individuals and more profoundly by the highly individualized conception of wrongdoing. Thus, liability could only expand into the past if the rules that kept liability personal rather than institutional were also changed.

And this is exactly what began to happen. Thus, as I will discuss below, in addition to the changes to limitations periods, the very idea of liability began to shift. For our purposes, the most important dimension of this was the willingness of courts to countenance the idea that an institution could be liable for the personal even criminal wrongdoing of its members. This expansion in institutional exposure to liability through expanding vicarious liability rules was thus one more very important dimension of how law came to engage with the past. It also marked another move away from the attachment to the dominance of the criminal model of responsibility. Along with vicarious liability rules, that expanded institutional liability, the duty of care in tort law was also changing in ways that made it increasingly likely that an institution could be held liable for negligence.

There are many examples of the kinds of historic wrongs that slowly came to be legalized, at least to some degree. The most important example and the inspiration of much that followed is found in the vast litigation arising out of the Holocaust, particularly the reparations litigation. A complex set of cases most of which were resolved through settlement, beginning with the Swiss Banks litigation, this body of

law is described as “Transnational Holocaust Litigation” in a thoughtful analysis by Leora Bilksy[9]. These important developments, which straddled transitional and domestic justice and are indebted to (and contributed to) both, were in turn an important catalyst in making the past a legal problem in a more general and much more unsettling way. More general because it involved problems that did not have the ‘insulation’ of regimatic change, more unsettling because law began to suggest itself as a means of addressing the problems of our own pasts.

How exactly did this shift happen? The Holocaust reparations movement was extremely important. That movement was premised on the perhaps counter-intuitive and still controversial idea that the most extreme state-sponsored criminal wrongs could (amongst other things) also generate claims to redress through domestic civil litigation. In this sense, the movement redirected the remedial lens away from extra-ordinary legal mechanisms associated with transitional justice and regime change and turned it instead towards the most ‘garden variety’ aspect of the domestic legal system—the civil remedy. Moreover, although it remained centrally premised on the fact of regime change that lies at the core of the transitional justice paradigm, the Holocaust reparations movement also began to shift attention away from the leaders of the Nazi regime and instead towards institutions—institutions which outlived the Nazi era and carried on their existence often not only in Germany but also in countries like the United States, in other words in stable non-transitional regimes. And by beginning to fashion legal claims for civil redress in the domestic courts of stable regimes and directing those claims against long-standing transnational institutions like IBM and Volkswagen, the Holocaust reparations claims marked an important departure from the transitional justice paradigm. Indeed one might say that it began to open up the legal imagination in stable constitutional regimes and served as part of the inspiration for the idea that their own pasts could be a legal problem.

In one crucial respect however, the Holocaust Reparations Movement still remained deeply tied to the transitional justice model. The wrongs were tied to the Nazi regime, not to a continuing state. Had this not been the case, they would have been subject to various legal and political impediments that may have made them seem outlandish. But the fact that they were initially formed in a context where the wrongdoing itself was so apparent and so extreme gave them the kind of normative momentum that helped to enable them to cross barriers that other kinds of claims would not have surmounted. Though the claims remained extremely legally challenging and of course politically controversial, they did nonetheless open the door to making past wrongdoing the subject of legal rectification. However important this was, the past would not have assumed its current legal significance without something more. Legal claims for past wrongdoing needed to be liberated from their transitional justice beginnings. Until the claims could be divorced from the precondition of regime change they would not have real salience for stable constitutional democracies. This happened as it turns out in a surprising way.

In the wake of and inspired by the Holocaust Reparations Movement, ‘reparation’ began to emerge as a powerful legal idea that started to establish a foothold in the domestic legal system. Though the term “reparations” is venerable, referring generically to compensation for (wrongful) injury, the technical

[9] Leora Bilsky, “Transnational Holocaust Litigation”, Eur J Int Law (2012) 23 (2): 349-375.

meaning of the term has changed in telling ways over the course of the last century. The classical legal meaning typically referred to state-to-state payments in the aftermath of war. The link between the idea of reparation and wrongful injury was apparent in the fact that the payments had a punitive quality, with the defeated (presumed the wrongdoer) paying the victor compensation. The most celebrated and apt example for our purposes is perhaps the multi-billion dollar reparations payments imposed on post-war Germany by the *Treaty of Versailles*. However, during the course of the 20th century, the idea of reparations has expanded and in particular has come to encompass a much broader idea of compensation due those who suffer injuries as a result of serious violations of basic human rights. In this sense, "reparations" have become untethered from their original moorings in at least two ways. Neither the recipient nor the payor is necessarily the state (though of course they could be). Thus for example the idea has shifted such that individuals are now thought of as the paradigmatic recipient of reparations payments and institutions (whether state or not) the paradigmatic payors. Moreover, the idea of 'wrong' as the ground of payment is no longer dependent on the aftermath of war and the uncertain morality of victory and defeat—instead, it rests on a different kind of 'transnational' wrong, serious violations of fundamental human rights.

This idea of 'reparation', inspired by what I have elsewhere referred to as a demand for 'reparative justice', started to take hold of the legal imagination in significant ways. Though many aspects of this idea warrant further exploration it is perhaps sufficient for our purposes here to note that how the concept of reparations began to make itself felt in the domestic legal systems of stable Anglo-American legal orders. Reparations derive from the international arena and hence it is not (or has not until recently been) a term of art in the common law legal system. Most significantly perhaps, it is not a cause of action. But the developing idea of reparations expressed a distinctive kind of demand for justice that increasingly placed pressure to respond on the domestic legal system. This quest for reparative justice is more fundamental than the doctrines of common law responsibility (though it arguable underlies them), for example, and the growing demand for it placed normative pressure on many of the doctrines of positive law. Survivors of injustice and their advocates in stable Anglo-American legal orders and elsewhere began to examine how their quest for reparative justice could find expression in domestic courts, especially civil courts. (**do I need more on reparation here and the link between the shifting meaning of the term? International law principles…UN etc)**

There are sadly all too many examples of grievous past injustices to choose from even in stable and notionally just constitutional orders like those that characterize the Anglo-American legal systems. During the period of growing 'reparations' consciousness (ie the idea that grievous wrongs should give rise to some form of legal redress), survivors of serious injustices and their advocates put increasing pressure on the domestic legal system. This, combined with the increasing turn to civil remedies, meant that they explored the possibilities of reparations claims for a wide array of serious past wrongs including slavery, mistreatment of other racialized populations, forced sterilization of the mentally disabled people and many other historic abuses. Of course, it is one thing for claims like this to be raised and mooted, but it is of course quite another for them to have some traction in the legal system. Indeed many of the claims about historic wrongs have gone in a space of a couple of decades from being

legally preposterous to being what I have referred to elsewhere as "legally plausible".[10] But the catalyst behind so much of the transformation that made the past of the stable democracy legally accessible is not among these well-publicized kinds of claims. It did not begin as a movement. It started in a shroud of secrecy—complaints by people who said they were abused as children by priests and then ignored by a Catholic Church that seemed all too prepared to look the other way. It is part of the argument of this paper that the Catholic Church sex abuse scandal was crucial in the transformation of the past into what one might think of as a 'full-fledged' legal problem, a problem at the heart of domestic institutions and seeking redress through the most ordinary of domestic legal processes.

To attribute this role to the Catholic Church sex abuse scandal may seem rather far-fetched. Indeed, for reasons that are worth exploring it is not typically the subject of much legal commentary or consideration at all. Certainly it has not received the kind of scholarly attention that other novel legal developments such as the claims under the Alien Torts Claims Act or the beginnings of International Criminal Law. That is not to say that these developments are not worthy of attention—they manifestly are. But the magnitude of the legal activity arising out of the Catholic abuse claims, the jurisdictions and processes they implicate, the scale of legal changes both legislative and judicial that the claims wrought, as well as the procedural innovations that arose out of the ongoing efforts to address it—the consideration of all of these does give rise to a puzzle about why it has escaped serious scholarly attention. The scope of this piece cannot of course do justice to the full range of this issue nor does it even attempt to do so. But what I do want to argue is that the scandal was the catalyst for profound legal change that touched institutions and jurisdictions in a manner and at a scale that, until now, had never been seen. And this change also opened up the heart of the stable domestic legal system to claims about historic wrongs that will continue to post profound challenges.

The Catholic Church litigation brought about these changes for a range of reasons. First, as with the Holocaust reparations cases, it is no accident that the wrongdoing implicated was of an extremely severe nature touching upon the most fundamental of rights. The sexual abuse of especially vulnerable children by those entrusted with their case is the kind of profound wrong that touches something very basic. As in the other cases that we examine, here too the normative force of the wrongdoing that was involved gave the claims the kind of momentum that began to exert serious pressure on some of the legal barriers that would have posed severe problems for the Holocaust reparations claims had they been litigated rather than settled. Moreover, the universal nature of the Catholic Church, though it had always been an institutional advantage now became a liability. And just as important, in combination with technological change, the issues surrounding the scandal began to create a transnational conversation about liability that fuelled both the claims themselves as well as the broader coverage. As we shall see, this momentum began to move the cases forward in rather surprising ways. The long hand of the law was beginning to reach deeper into the past. But there was at least one important hurdle left to cross, and one that the church abuse scandal did not directly touch. It involved bringing liability home to the true heart of the stable democracy—that is, to the state and indeed the law itself. This would require one more move.

[10] Cite to UTLJ article

As noted above, one of the features that lent momentum to the church abuse cases was the fact that the wrongdoing was so grievous in nature. It was also absolutely clear that the acts committed were wrongs at the time they were committed—many were criminal acts. In this sense then, although domestic institutions like the church and schools may have been implicated, generally speaking the state and the law were not. But as the Catholic Church scandal was gathering steam, another significant legal development was taking place. For over one hundred years, the Canadian government along with various churches ran 'residential schools' for aboriginal children[11]. Nearly 150,000 children were forcibly taken from their parents and communities and placed in these schools for the stated purpose of educating them. While some education took place in these Indian Residential Schools, the scale of mistreatment, malnutrition, cruelty and abuse was horrific, even as documented by the government's own reports at the time. Moreover, because one central aim of the system was to 'take the Indian out of the child', children were forbidden to speak their languages or practice their traditional beliefs, often on pain of punishment. As discussed below, along with and sometimes as part of the Catholic Church abuse cases, these residential schools cases gradually came to court. Eventually, as we shall see, the flood of litigation was such that a massive and innovative settlement was reached.

That ongoing settlement is important for a wide range of reasons but there is one special feature of the residential schools cases that I want to highlight for the purposes of our story here. Unlike the Catholic Church cases, the residential schools claims were not limited to acts that were criminal or wrong at the time. Indeed, the most difficult and controversial cases involved the precise opposite--claims for redress for acts that were actually legal and in some cases even required by law at the time. It was a difficult step for a court to hold that for example the taking of children without parental consent amounted to a legal wrong, even though it was authorized by an old law that had never been held invalid. Yet as we shall see, in the residential schools cases this was at the heart of the matter. Once again, the normative force of the wrongs began to tempt courts to consider breaching that last dam that kept law away from many of the most profound historic wrongs—the wrongs committed by the state and sanctioned by its laws. The implications were huge and a settlement was reached. But I shall argue that the settlement tacitly recognized the wrong and compensated for it. The final step for law was in this way at least partially taken. Not only had historic wrongs become legal problems but law was being called upon to respond to historic wrongs in which law itself was a kind of perpetrator. The past, in others words, had become a profoundly legal problem. But how in particular did this happen? In order to develop a finer understanding of the shift and of its implications, we need to examine a few of the key examples more closely.

So let us begin our analysis of how this transition occurred by looking at each of the examples in turn with an eye to how exactly each contributed to making historic wrongs a problem—indeed perhaps the most profound problem--of law. The three examples outlined above were dynamically engaged with one another and in that sense intertwined. Although they concerned different longstanding historic

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[11] Residential schools for aboriginal children were also a feature of other jurisdictions, including the United States where they were referred to as "Industrial Schools". For a variety of reasons worth exploring, the Canadian legal system proved more open to claims about the wrongs perpetrated in such schools: cite UTLJ article; look for comparative pieces on other res schools.

events, different institutions and different states, they all began to gain serious traction in the mid-1990s. And while the problems they addressed were distinct, there were also very important commonalities that can be seen to contribute to their interrelation.

Transnational Holocaust Reparations Efforts

1. **Overview of the Litigation and the Settlement of the Holocaust Era Cases**

We will start our analysis of how the law came to play such a significant role in the assessments of the wrongs of history with the powerful example that set the ground-work for the new paradigm of responsibility—the Holocaust. As noted above, the horrific events of the Holocaust and their aftermath were absolutely pivotal in the very first instance because of the demand that accountability for the most horrific crimes would be legal and not political. The famous decision to hold criminal trials at Nuremberg and elsewhere worked a sea change in our conception of accountability and sparked what we might think of as a new age of legalized (or at least process-orientated) responsibility.

As many have noted, the first important conceptual move that emerged from the aftermath of the Holocaust was the most foundational and dramatic idea---that legal mechanisms and conceptions of responsibility would be used to adjudicate the horrors of war and atrocity. This manifested itself in the first instance of course in the ground-breaking trials at Nuremberg. Though the legacy and impact of these trials will continue to be discussed and debated, it seems unarguable that they established the foundation for the new encounter of law with the past.

While the Nuremberg Trials were innovative in many respects, it is worth noting that they were ultimately premised on a very traditional view of criminal responsibility—a view that drew its strength from a deeply moral conception of individual responsibility of the kind that finds its purest expression in traditional criminal law. Thus while there were many elements of Nuremberg's judgments that marked innovation in the legal realm, most of the underlying theory of responsibility rest on the pure unitary conception of individual responsibility. Indeed, this should hardly be surprising for it was the moral power of that view that enabled the Tribunal to override the more procedural and institutional objections such as retrospectivity, lack of grounding in positive law, absence of procedural safeguards and weakening of the defense of superior orders. The Nuremberg Trials, especially those of the 23 major defendants at the IMT, represented among other things a choice between a more positivistic understanding of the law and a morally-infused account[12]. In the decisions to weaken the defense of superior orders and to reject the long-standing idea that criminal responsibility could not be retrospective in nature, Nuremberg side firmly with the 'moral' view of responsibility (though its

[12] Cite to Dyzenhaus on Heller etc here

application was undeniably also very partial). And so perhaps it is not surprising that when it did so, it also reinforced the strongest and least complicated understanding of that view. After all, that is what gave the moral view its power. But the unitary intentional understanding of responsibility that underlies the most uncompromising theories of criminal law draws its boundaries very sharply and narrowly. Though important for assessing historic wrongs, exclusive reliance on such an approach would only ever reach a very narrow class of the most egregious wrongs. The idea of retribution thus received expression in the Nuremberg trials, but the idea of reparation did not.

There was however some acknowledgement of the need for reparations or redress in the Reparations Agreement between West Germany and Israel (1952). That agreement provided for limited "material indemnification" for deprivations of property and slave labour. Although the idea of reparative justice can be seen at work in some aspects of the agreement, most of the funds went to the State of Israel and the payments to individuals were small and generally appeared to take the form of hardship payments. Though obviously important, hardship payments are grounded on the idea of relieving suffering not rectifying wrong. In this sense, they are fundamentally different than reparations payments that are premised on the idea of rectification. The result was that the payments did not generally respond to the quest for reparative justice that many survivors expressed. It is worth noting that this is a conceptual issue, separate from though no doubt exacerbated by the fact that the Claims Conference that implements much the Reparations Agreement[13] has also been plagued with difficulties and scandals of its own. The cumulative result of these factors meant that the sense of individual loss and grievance remained, for many, undiminished. Caught between the alternatives of individual criminal responsibility on the one hand and state-to-state agreements on the other, survivors' efforts to pursue legal responsibility on a broader scale languished for several decades.

Pinpointing the exact timing of and causes for a major shift in legal and political consciousness of the kind that I am exploring here is probably impossible. But it is possible to note that something seismic began to happen in the 1980s. Indeed, it is striking that in these very different examples, there was a kind of awakening that can be seen at work across jurisdictions, as well as across issues and problems. For a range of reasons, those with grievances began to look to private domestic law. Part of this came from disillusion with other 'first resort' legal means—feminists and advocates for children frustrated by criminal law started to examine civil remedies, international human rights advocates frustrated with the lack of progress elsewhere looked to domestic courts. Then in 1980, to the surprise of many, a federal court in the United States relied on an old provision in the *Alien Torts Claims Act* (ATCA) to ground universal jurisdiction for gross violations of international human rights (in the landmark *Filartiga* case, torture)[14]. By 1990, advocates for many victims of atrocities were beginning to think about domestic courts. This prominently included the Holocaust survivors and their advocates whom as noted above reparative justice still eluded. Although a range of different Holocaust-related claims were ultimately

[13] http://www.claimscon.org/about/history/

[14] M.Moran, "An Uncivil Action?: The Tort of Torture and Cosmopolitan Private Law", in C. Scott (ed), ***Torture as Tort***, Oxford: Hart Publishing, 2001; L. Bilksy, Transnational Holocaust Litigation (2012), 23 EJIL 349-375, Section 2B discussing the rise of US ATCA litigation.

raised in a number of jurisdictions, let us focus on the Swiss Banks as the most important and illustrative example of a new kind of engagement between law and the past.

A brief outline of the complex legal and legally-related activities is in order. On October 3, 1996, the first of the claims in the Swiss Banks litigation was filed in the United States District Court for the Eastern District of New York[15]. A class action on behalf of survivors, it sought over ten billion dollars as well as punitive damages primarily on the basis of the old private law actions of conversion and unjust enrichment. In the aftermath of the first statement of claim, there was a flurry of legally related activity. In 1996, an Independent Committee of Eminent Persons (ICEP or the Volcker Commission) was established. Its role was to investigate whether Swiss banks continued to hold assets of victims of Nazi persecution which had been deposited in Swiss banks before or during the Holocaust. Shortly thereafter, the Swiss Parliament set up the Bergier Commission which included scholars from Switzerland, the United States, England, and Poland and was designed to "examine the period prior to, during, and immediately after WWII."[16]. At the same time, a number of other class actions suits were also launched and in March 7, 1997 the Honorable Edward R. Korman consolidated the lawsuits as *In re Holocaust Victim Assets Litigation (Holocaust Victim)*. In May 1997 the first "Eizenstat Report" was released. Prepared by the US federal administration's "Interagency Group on Nazi Assets" which was headed by US Under Secretary of Commerce Stuart Eizenstat, it analyzed Switzerland's relationship with Nazi Germany and its handling of looted gold and other assets. These and other developments were catalysts to the settlement discussions and after much procedural wrangling, in early 1999 the "Swiss Banks" Settlement Agreement was signed. The Settlement Agreement covers deposited assets, slave labour, refugees, and looted assets. It also designated persons who were persecuted because of being Jewish, Romani (Gypsy), Jehovah's Witness, disabled, or homosexual, and their heirs. It appointed a Special Master to recommend the allocation and distribution. The Settlement Agreement also released the various defendant banks, UBS and Credit Suisse, as well as virtually all other Swiss governmental and business entities, including the Swiss Federation.

The implementation of the Settlement Agreement continues. The most recent figures available indicate that nearly 1.3B has been distributed under its terms. The implementation of the Settlement Agreement has been complex and litigious with significant challenges underway as recently as 2014. There are many important issues worth probing here. However for our present purposes, the question is how this litigation and in particular the Settlement Agreement affected the relationship between law and the past. It may be tempting to suggest that since it was a settlement with the usual disclaimers of liability and without judicial determinations, it cannot be understood as having any real legal effect. However, when one considers the ultimate impact of these cases from both a financial as well as a legal, moral and political point of view, this seems too simple. The sheer level of legal activity and engagement of the judicial system (including but not limited to the fairness hearing and various other aspects of implementation) suggests otherwise. In addition to the 1.29B payouts under the Settlement Agreement, as the Chronology of *In re Holocaust Victim Assets Litigation* indicates, there have been

[15] Weisshaus v. Union Bank of Switzerland, No. 96 CV 4849 (EDNY)
[16] http://www.swissbankclaims.com/Chronology.aspx

innumerable hearings and rulings issued, disclosures required and multiple reports issued[17]. Important actors in the legal and political system have been charged with managing this complex decades-long process. Given how deeply implicated the legal system was in the negotiation of the Settlement Agreement and continues to be in its implementation, it seems difficult to deny that this is, in a very real sense, a process with deep legal significance. While it may not be our familiar model, the Settlement Agreement and its aftermath have demonstrated the important role that law can play a role in allocating accountability for the wrongs of the past.

Yet however much legal significance can be read into the *Holocaust Victims* Settlement Agreement, it is undeniable that because the cases were settled, many of the legal obstacles that typically face claims of historic injustice were left in tact. These difficulties were openly acknowledged. For example as one plaintiff counsel, Mr Swift noted during the fairness hearing:

> Had we not settled this case, survivors and their heirs were in jeopardy of receiving nothing. The central issue in the litigation was whether these Swiss banks had aided and abetted German financial abuses during World War II. As a quasi-human rights case, it presented many issues of first impression through our courts. And make no mistake: the human rights jurisprudence in this country and the world is still in its incipiency. Swiss banking secrecy and Swiss court aversion to U.S. discovery methods posed enormous obstacles to obtaining sufficient evidence. The destruction of documents during the war and the dislocation and loss of life prevent many survivors and heirs from coming forward today with very specific information.[18]

Thus, the very novelty of the claims meant that they presented challenges that were both procedural and substantive. The role of the passage of time and how to address limitations periods were of course just two of the daunting difficulties that were in this sense not directly touched by the Swiss Banks Settlement. However, another Holocaust-era case came along that provided more in the way of precedent and more illumination about how courts, if forced, might think about some of the difficult issues raised by this new legal encounter with the past.

Not long after the Swiss Banks Settlement, another US federal court ruled in favour of Holocaust survivors attempting to recover assets deposited in French banks during the German occupation of France and the Vichy Government. In *Bodner v Banque Paribas,* the plaintiffs sought recovery of looted assets as well as other damages, primarily on the basis of a restitutionary theory[19]. Johnson, DJ rejected the defendants motion to dismiss. Though many aspects of the decision are interesting, the two holdings that speak most to the law's power to penetrate the past address the limitations problem and the public policy problem. On the limitations question, the Court rejected the defendant's claim that the action was time-barred since the acts had occurred in the 1940s--decades before the legal action was begun:

[17] http://www.swissbankclaims.com/Chronology.aspx
[18] http://www.swissbankclaims.com/Documents/DOC_14_fairnesshearingtranscript.pdf, p.9.
[19] 114 F.Supp.2D 117 (2000)

> The nature of plaintiffs' claim is such that the continued denial of their assets, as well as facts and information relating thereto, if proven, constitutes a continuing violation of international law reasonably within the exceptions to the ordinary laws of accrual. Furthermore, plaintiffs could hardly have been expected to bring these claims at the end of World War II, and claim they have been consistently thwarted in their attempts to recover funds and information from defendant banks.[20]

The Court further found that the theory of equitable tolling with its grounding in fraud would also provide an exception to limitations periods:

> …there is certainly a strong undercurrent to the issues at bar suggesting the a (sic) deceptive and unscrupulous deprivation of both assets and of information substantiating plaintiffs' and their ancestors' rights to these assets. There is no reason that plaintiffs should be denied a forum for addressing their claims as a result of deceitful practices by the defendants which have kept them from knowing or proving the extent of these claims, if that proves to be the case. Defendants are not entitled to benefit from whatever ignorance they have perpetuated in the plaintiffs.[21]

I quote this language in some detail because it illustrates what I have called the "normative force" that can also plausibly be felt in the backdrop of the Settlement Agreement in *In re Holocaust Victim Assets Litigation.* As we will see in some of our other illustrations, the strength of the moral arguments in these cases is often sufficiently strong that courts are willing to find ways to avoid the procedural barriers that protect the past in order to get closer to the heart of the reparative justice argument—in this case, the argument from restitution.

In addition to providing some of the legal theory that could plausibly support these cases on the limitations argument, *Bodner* also helped to put in place another important building block that helped law reach into the deepest problems of the past. In many cases dealing with mass historic injustice and certainly characteristic of the Holocaust era cases in particular, the question of legality poses a profound problem. How ought law to respond if the basis for the current claim involves activity that was sanctioned or even demanded by law at the time? The passage of time brings with it legal change and one of the questions that law must begin to grapple with as its temporal reach extends is how to contend with legal change. This was not a problem for the operation of law in its traditional sphere because its limited temporal reach also meant that there was little chance of encountering significant legal change. But the further that law reaches into the past, the more likely it is that this issue will arise. In *Bodner* the question of the weight that ought to be given to the positive law in force at the time of the wrong arose in perhaps the form in which it was easiest for a court to tackle. The defendant banks argued that "they were merely complying with French law in seizing and retaining the assets of French Jews[22]. Since compliance with the law could not be actionable, they argued that the claim must be dismissed. Once again, the Court rejected this argument, finding "no merit whatsoever" and noting the

[20] 114 F.Supp.2D 117 (2000) at 134-35.
[21] 114 F.Supp.2D 117 (2000) at 136.
[22] 114 F.Supp.2D 117 (2000) at 133.

findings of Nuremberg Tribunal that various Holocaust acts were international law violations including the plunder of private property. The Court further noted that "this Circuit has held that the confiscation of private property during the Holocaust was a violation of customary international law."[23] This aspect of *Bodner* also provides support for a similar reading of *Holocaust Victim Assets.* In that case, the defendant banks had initially argued that legal liability could not attach because they were simply engaging in ordinary commercial activities. Because of the Settlement Agreement, there was no ruling on the matter but it is noteworthy how submissions of the plaintiff's counsel in *Holocaust Victims presage* the holding of the court in *Bodner*. The ordinary concerns about retroactivity are suspended, Counsel Burt Neuborne argues in a Memorandum submitted to Judge Korman in *Holocaust Victims*, where as the Nuremberg Tribunal found the acts involve violations of customary international law[24]. Reading these two cases together prefigures how later courts have responded to one of the most troubling relations between law and the past—the problem that arises when past laws themselves are now understood as profoundly wrong.

Thus, reading the landmark settlement of the litigation in *Holocaust Victim Assets* together with *Bodner* points up the significant effect that the Holocaust era civil litigation had on the idea that law could judge the past. Despite the absence of authoritative legal rulings on most issues, the magnitude of the settlement and the significance of the court-managed process in *Holocaust Victims* belies the idea that because it was only a settlement, it cannot be understood to have effected legal change. The idea that the passage of time is an unbreachable bar against law's inquiry into the past was fatally undermined by this litigation. *Bodner* supplements this interpretation and provides judicial precedent on this issue. Thus, it is no accident that powerful defendants who had strongly argued limitations defences began to settle these cases. Law's own internal prohibition against looking backward was, it seems, increasingly weakened. Similarly weakened was the all-important idea that if an action was authorized or required by extant law, it was immune from liability.

In this way then, the Holocaust-era litigation that began in earnest in the early 1990s, provided both inspiration and model for the idea that law could be used to determine accountability for widespread historic wrongs. The Nuremberg model and its belief that law could be used to judge massive political wrongs was transformed by the Holocaust-era restitution cases into a broader form of accountability—one that reached into the more 'ordinary' aspects of the Nazi regime. In so doing, it shifted the gaze from the personal focus of the criminal law paradigm to the institutional dimension of the Holocaust. For this reason, it began to employ the machinery of domestic civil law and heralded a different model of responsibility premised on private not criminal law. The magnitude of the events concerned, the vast amounts of money involved, and the public and academic interest in the litigation all contributed to the idea that law was going where it had never gone before. Many historians of course did not like what felt like an invasion, but the momentum was undeniable. The past, it seems, was no longer theirs alone.

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[23] 114 F.Supp.2D 117 (2000) at 133 referring to *State of Netherlands v. Federal Reserve Bank of New York,* 201 F.2d 455, 459 n. 4 (2d Cir.1953).

[24] Memorandum of Law Submitted by Plaintiffs in Response to Expert Submissions by Legal Academics Retained by Defendants, June 16, 1997, *In re Holocaust Victim Assets Litigation*, http://www.swissbankclaims.com/Documents/6-16-97.pdf

Cases like *Holocaust Era Victim Assets* and *Bodner* were in some senses the best place to begin breaching the idea that the past was 'law free' terrain. It was critically important that they involved some of the most egregious events of human history and thus had enormous normative force. This force, as we have seen and will see, is vital to generating the will to dismantle the barriers law has erected to liability for the past. It gives courts the extra-ordinary reasons they need to set aside some of the hurdles to liability. But such force alone is not enough. There were also certain other features of the Nazi-era cases that made them in a sense an easier starting point than other cases would have been. They involved profoundly political acts that would normally have posed legal problems with doctrines like Act of State and comity. However, these problems were not in play because of regime change in the form of the defeat of the Nazi state. They are thus the paradigmatic transitional justice cases, as commentators have noted[25]. This feature, combined with the distance (temporal, geographic and of course normative) from our own regimes, arguably made it easier for domestic US courts to consider the cases once the hurdle of 'forum non conveniens' had been overcome (again, easier to overcome given regime change). Indeed, *Bodner* explicitly refers to regime change and the Vichy government as a reason that Act of State doctrine and comity do not apply[26]. Similarly, the institutions implicated in that litigation were, in general, rather far removed from the jurisdiction in which they were judged accountable[27].

Thus, the Holocaust –era reparations litigation can be thought of as a very important foray of law into the past. But it was also a foray with relatively limited significance both because of the absence of judicial reasoning and because it involved events so dramatically removed from the ordinary legal systems in which they were adjudicated. Let us then turn to a very different kind of foray into the past. Premised on actions done in secrecy long before the time of adjudication, the Catholic Church sex abuse scandal serves as an important counterpoint to the Holocaust-era litigation. Focusing for the most part on domestic institutions and heavily litigated, it is an important illustration of how law has begun to demand accountability for actions long past much closer to home.

Catholic Church Sexual Abuse Litigation

Introduction

The history of the sexual abuse scandals associated with the Catholic Church is extra-ordinarily complex. Indeed, it may be that this scandal is the most extensive and sustained example of transnational

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[25] Teitel, "Transitional Justice"

[26] 114 F.Supp.2D 117 (2000) at 129-131.

[27] For an important counterpoint that illustrates this, see *Iwanowa v Ford Motor Company, 67 F.Supp.2d 424 (1999), U S District Court, D. New Jersey, October 28, 1999.*

litigation that has occurred to date. Most of the legal activity has involved two kinds of claims. First, the claims involving direct wrongs done to children at the hands of priests or others involved in the Church. The most common claims against the Church involve horrific sexual abuse of children but also include physical and other abuse of various kinds. In addition to these primary claims, there are also claims about secondary or institutional wrongs, alleging that members of the Catholic hierarchy failed to respond to complaints or even actively covered up by moving known pedophiles around to other jurisdictions without any warnings.

It is clear that the scale of both the wrongs themselves and the resulting claims is vast but attaching reliable numbers to it is extremely difficult for a number of reasons. The wrongs extend over many decades. They involve victims who were typically children and acts generally perpetrated in secret. The evidence suggests that there were also serious and longstanding efforts to cover up the abuse at almost every level. When litigation was eventually begun and it looked like there may be a prospect of some success, settlements were often arrived at and such agreements typically included confidentiality provisions, adding further to the difficulty of assessing the scale of the issue. Moreover, the nature of the 'universal church' is such that as events have unfolded, more and more jurisdictions and organizations have become involved. To date the greatest number of cases emanate from the United States, with the second highest number is from Ireland. While sound estimates are extremely difficult to come by and are continually adjusted upwards, some have suggested that the number of victims in the United States alone could number as many as 100,000.[28] And US figures suggest that by 2011 compensation there had exceeded 3.2B.[29] **insert most recent figures here** Many cases have also been reported in Australia, New Zealand, Canada and in many countries elsewhere in Europe, Africa, Latin America and Asia.

Extensive media coverage was also a critical element of the unfolding story and important exposes such as those of the Boston Globe and the BBC among many others were vital in fuelling both public concern and further legal actions. Moreover and especially germane for our purposes, the range of legally significant activities aimed at holding the Catholic Church accountable for child abuse is also unusually broad. These include many different kinds of actions within domestic legal systems, particularly but by no means only in the United States. In the United States, in the mid-1980s, legal activity began to take place beginning with criminal prosecutions and then followed by civil litigation. The activity in the United States continues to grow and as of 2009, it was estimated that over 3000 civil actions had been filed.[30] Other jurisdictions including Canada, Ireland, the United Kingdom and others also began to see

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[28] http://www.bishop-accountability.org/AtAGlance/data.htm

[29] http://www.bishop-accountability.org/settlements/

[30] The following timeline serves as an example of just a few of the most noteworthy events in the US:

> January 2002: Scandal breaks with reports that priests in Boston sexually abused hundreds of children over past decades; victims across nation later file lawsuits.
> September 2003: Archdiocese of Boston agrees to pay $85 million to settle 552 clergy sex abuse claims. In December 2002 Pope John Paul II accepts resignation of Boston Archbishop Bernard Law after court documents suggested he routinely covered up allegations of abuse involving scores of priests, shuffling some from one parish to the next.
> July 2004: Beset by abuse claims, Archdiocese of Portland, Ore., becomes first to seek bankruptcy protection.

similar activity. The scale and nature of the cases started to shed light on the vastness of this terrible problem. **More detail on law suits and settlements here or somewhere….**

In the wake of the many civil suits and the bankruptcies and settlements that followed, advocates began to push for broader responses and multiple government or other reports were undertaken in a number of jurisdictions. In the United States, the John Jay Report which was issued in 2004 reported that complaints of sexual abuse had been made of almost 4400 priests in the United States. In Ireland, the vast scale of the abuse by the Christian Brothers was described by the Ryan Commission as involving thousands of children who were placed in Christian Brothers' institutions over a sixty year period and became victims of widespread physical and sexual abuse.[31] The Ryan Commission also found that there was a policy of not responding to complaints and indeed, of covering them up. In Canada in the wake of revelations of rampant sexual abuse in a Catholic Church run orphanage, the Law Commission of Canada conducted extensive hearings and research and produced report entitled *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*. In Australia in 2013, sparked by a series of sexual abuse scandals involving the Catholic Church, the government appointed a Royal Commission into Institutional Responses to Child Sexual Abuse. Since 2013, the Australian Royal Commission has handled 18,544 calls and received 9,041 letters and emails. Its mandate is extremely broad, allowing for example opportunities for survivors and others to tell their stories, recommendations about redress programs and many other elements. In addition to government reports and commissions, the Catholic Church litigation has also sparked legislative changes in many jurisdictions, particularly with regard to statutes of limitations.

Perhaps then it is not surprising that in September 2011, a submission was lodged with the International Criminal Court alleging that the then Pope, Cardinal Angelo Sodano (Dean of the College of Cardinals), Cardinal Tarcisio Bertone (Cardinal Secretary of State), and Cardinal William Levada (then-current Prefect of the Congregation for the Doctrine of the Faith) had committed crimes against humanity by

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September 2004: Diocese of Tucson (Arizona) seeks bankruptcy protection, followed in December by Diocese of Spokane.
2006-2011: Six more dioceses or archdioceses seek bankruptcy protection, including Milwaukee.
July 2007: Archdiocese of Los Angeles agrees to $660 million settlement with 508 people who accused priests of sexual abuse, the church's biggest U.S. payout.
September 2007: Diocese of San Diego reaches $198.1 million settlement with childhood sexual abuse victims.
February 2009: Beset by continuing claims, Jesuit order in Northwest (Oregon) becomes first Catholic religious order to seek Chapter 11 bankruptcy protection. In 2011, order agrees to pay $166.1 million to about 500 abuse victims as part of bankruptcy settlement. The abuses spanned decades and states, from remote Alaskan villages to boarding schools on Northwest tribal lands.
June 2012: In Philadelphia, Monsignor William Lynn, a former cardinal's aide, was found guilty of endangering children, becoming the first senior official of the Roman Catholic Church in the U.S. convicted of covering up sexual abuses by priests under his supervision. (Retrieved at http://www.startribune.com/nation/226537021.html)

[31] Cite to Ryan Report, Vol 1

failing to prevent or punish perpetrators of rape and sexual violence in a "systematic and widespread" concealment which included failure to co-operate with relevant law enforcement agencies.[32]

The significance and transnational character of the scandal was such that the United Nations also began to take notice. In early 2014, the United Nations Committee on the Rights of the Child issued a report asserting that the Pope and the Roman Catholic Church protect their reputation rather than protect children:

> The Holy See has consistently placed the preservation of the reputation of the church and the protection of perpetrators above children's best interest. Another matter was the code of silence that was imposed by the church on children and the fact that reporting to national law enforcement authorities has never been made compulsory.[33]

The Committee expressed grave concerns that the Holy See had not acknowledged the extent of the crimes committed, had not taken the necessary measures to to protect children and to address cases of child sexual abuse. Instead, the Committee found that the Holy See had adopted policies and practices which led to the continuation of the abuse and which supported the impunity of, the perpetrators. Although the Vatican refused to answer a list of questions put to it by the UN Committee, recently it has been announced that Pope Francis will set up a Vatican Committee to fight sexual abuse of children in the Catholic Church[34].

This is an extremely and indeed unduly brief overview of what is probably the most far-reaching, heavily litigated and complex example of transnational litigation to date. This litigation has had a profound effect on the reach of law into the past. There is probably no contemporary institution for which the past has become as significant a problem as it has for the Catholic Church. Indeed, the very features which long gave the Church power—its universal character, its global reach, its unitary structure, and its cloak of sovereignty—seem now to have the effect of exposing it to far greater liability than it could ever have imagined.

How the Litigation opened up the past to law

The initial problems that confronted actions for sexual abuse against the Catholic Church were legion. Many of the problems were ones that were nascent in the *Holocaust Victims* litigation but were avoided by the Settlement Agreement. But in the Catholic Church scandal, these problems came to the fore and were heavily litigated. For this reason among others that scandal provides perhaps the most important window into the encounter between law and the past. Moreover, the changes in the law that can fairly

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[32] See the interesting discussion on the viability of this kind of claim in international law at Groome, Dermot, "The Church Abuse Scandal: Were Crimes Against Humanity Committed?" (2011). Scholarly Works. Paper 6. http://elibrary.law.psu.edu/fac_works/6

[33] http://www.unmultimedia.org/radio/english/2014/02/child-rights-precede-reputation-of-the-catholic-church-says-un-committee/

[34] http://www.bbc.com/news/world-europe-25235724

be attributed to this litigation are many, making it salient for its transformative effect as well. And because of the magnitude of litigation and hence government reports and law reform initiatives surrounding this scandal, the scandal provoked much more overt awareness of the difficulties with the civil justice system, accompanied by growing determination on the part of many that victims ought to be able to access civil remedies, regardless of how long ago the abuse took place. An illustration of this can be found in the Law Council of Australia's Submission to the Victoria Inquiry. That submission identifies a number of important barriers to victims successfully pursuing civil litigation claims including the following:

i. the lack of a defendant to sue;
ii. the lack of assets of the potential defendant;
iii. lack of clarity regarding the vicarious liability of institutions;
iv. expiry of the limitation period for the cause of action;
v. issues with evidence - such as accessing relevant records;
vi. the process of giving evidence and being subject to examination and crossexamination;
vii. issues emerging from victims' engagement in internal complaints processes;
viii. personal barriers, such as shame and mistrust of the system;
ix. a lack of understanding of child sexual abuse matters within the court system itself; and
x. the cost of accessing the civil justice system.[35]

As this list indicates these legal difficulties include both statutes of limitations but also immunities which were especially important in the case of the Catholic Church which was in many places protected by both the doctrine of charitable immunity and sovereign immunity because of the status of the Vatican in international law. And even if it were possible to circumvent these procedural barriers, other more substantive doctrines also came into play. These doctrines, like restricted institutional or vicarious liability rules as well as limited duties of care and public policy exemptions all meant that the initial claims for sexual abuse faced significant legal hurdles. Add to this the other non-legal factors associated with the passage of time—the difficulty of obtaining evidence, the unreliability of child witnesses, the unlikelihood of corroboration, among others—and it seems very surprising in retrospect that these cases ever gained any traction at all. However, the sex abuse cases did have powerful normative weight on their side. As in the Holocaust reparations cases and no doubt inspired in part by some of those cases, relentless advocates pressed hard against the reluctance of the domestic legal system to hear the claims.

The Catholic Church sexual abuse cases initially proceeded under the radar—individual cases rarely subject to academic commentary and not generally conceived of as having broader salience. Despite the absence of academic interest however, investigative reporting on this issue was as noted a critical catalyst in many of the legal developments. Bit by painful bit, a very significant amount of legal reasoning and judicial precedent accumulated. Incrementally the Catholic Church sex abuse cases began to open up the domestic legal system to claims of past wrongdoing on a scale heretofore hard to

[35] http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2800-2899/2802_-_Civil_Litigation_Issues_Paper_5.pdf

conceive of. Though there were many more defeats for survivors than victories, slowly some of the barriers began to erode. And the trans-jurisdictional nature of the advocacy movement and the Church itself meant that progress (or for that matter defeat) in one jurisdiction had ramifications for how matters developed elsewhere. But as the barriers began to fall, actions for redress of the problems of the past truly started to become what I have referred to elsewhere as 'legally plausible'.

The magnitude of litigation and other legal activities involving the Catholic Church sex abuse scandal is so vast that it is not possible to cover here all of the changes that it wrought in law's openness to the past. Nonetheless, it is possible to get some insight into how profoundly this issue shaped law's relation to the past by examining some of the key challenges faced by the cases and how the legal system responded.

As noted above, there were many different ways that the past was insulated from legal scrutiny. Some, in fact perhaps most, of the modes of protection are procedural--the means by which law itself explicitly or implicitly barred consideration of the past. The most obvious of these are limitations periods and immunities, purely procedural protections that barred any substantive consideration on the merits. Since these barriers are so complete, they were understandably the first to be challenged. And as they began to open up the possibility of liability, they also brought into play an array of other doctrines that together made up the dominant picture of responsibility--that it was unitary, indivisible, personal and current. In very different ways, the extensive litigation and case law that formed part of what we have come to think of as the Catholic Church sexual abuse scandal played a key role in dismantling both the procedural and the more substantive barriers to liability for the past and in so doing shifted our underlying conception of responsibility in very fundamental ways. Let us begin by examining the threshold procedural barrier—limitations periods.

A. Limitations Periods

As we noted in the context of Holocaust-era reparations claims, the question of limitations period is undoubtedly the most challenging threshold problem for claims involving the past. This was certainly true for the sexual abuse claims against the Catholic Church. Because the injuries in the sexual abuse cases were so individualized, so dispersed and so long hidden, the timeline for these cases is inherently elusive. According to many sources, allegations of abuse had been prevalent for a very long time but it was only in the 1980s that significant legal activity began to take place. An early and important development on the limitations front came not from church-related cases but rather in sex abuse cases.

In both Canada and in the United States, early cases and academic commentary challenged the application of the ordinary limitations rules into cases of childhood sexual abuse on the ground that they unfairly prejudiced the innocent child victim and ignored the reality of sexual abuse. The Canadian Supreme Court led the way on this issue with its ground-breaking decision in *KM,* a civil suit launched by an incest victim long after the limitations period had expired. In that 1992 decision the Court found that a proper understanding of the interaction between the impact of sexual abuse on child victims and the 'reasonable discoverability' rule necessitated an extension of the limitations periods. The essence of

the reasoning behind the rejection of the traditional importance of 'repose' is captured in the reasoning of LaForest J:

> There comes a time, it is said, when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. In my view this is a singularly unpersuasive ground for a strict application of the statute of limitations in this context. While there are instances where the public interest is served by granting repose to certain classes of defendants, for example, the cost of professional services if practitioners are exposed to unlimited liability, there is absolutely no corresponding public benefit in protecting individuals who perpetuate incest from the consequences of their wrongful actions. The patent inequity of allowing these individuals to go on with their life without liability, while the victim continues to suffer the consequences, clearly mitigates against any guarantee of repose.[36]

Other courts in the common law world have tended to follow suit, judicially extending the window for filing actions in the context of childhood sexual abuse. The path was often a complex one however. England serves as an example. Beginning in the 1990s and carrying on until 2008 when the House of Lords settled the question in *A. v. Hoare*[37] there were complex and often conflicting precedents regarding when the courts would extend the limitations period on the ground that it would be inequitable to enforce it. In 1989 Hoare was convicted of a serious and traumatic sexual assault on Mrs. A. and sentenced to life imprisonment. In 2004, while still serving his sentence, he won seven million pounds in the national lottery. Mrs. A sued for damages but it was outside of the six year limitation period. However, overturning a precedent to the contrary, the House of Lords ruled that courts had discretion to extend the time limit for claims like Mrs. A's. Hoare then took his claim to the European Court of Human Rights claiming that the change in the law was unfair to him.[38] The ECHR ruled his claim inadmissible, noting that it was open to the domestic courts to interpret the rules of limitation in a way that was more favourable to victims of sexual abuse.

In the wake of and sometimes in response to judicial decisions such as these and many others, and often occurring in the shadow of revelations surrounding the church and other institutions, there have been efforts to clarify the applicable limitations rules by legislating an extension of limitations periods for survivors of sexual abuse. For example, in Canada following the *KM* decision which itself occurred in the wake of the Christian Brothers sex abuse scandal at the Mount Cashel Orphanage in Newfoundland, provinces began to amend their limitations legislation to avoid prejudicing victims of childhood sex abuse. In Canada now, most provinces do not impose time limits on civil actions for sexual assault[39]. In Australia and New Zealand as well, courts have gradually adopted a position like that adopted by the Supreme Court of Canada in *KM*.

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[36] M.(K.) v. M.(H.) [1992] 3 S.C.R. 6. (La Forest, Gonthier, Cory and Iacobucci JJ) cited by Osborn J in GGG v YYY [2011] VSC 429, para 187.
[37] *A v Hoare*, [2008] UKHL 6.
[38] Iorworth Hoare v the United Kingdom – 16261/08 [2011] ECHR 722
[39] **Add cites**

The State of Victoria in Australia provides another striking illustration of the role of the Catholic Church sex abuse scandal on the removal of limitations barriers in particular. In April 2012, the press in Melbourne reported that police were preparing a coroner's brief on as many as forty suicides connected to sexual abuse by clergy. In response, the Archbishop of Melbourne advocated an investigation and the Parliament of Victoria appointed a committee to investigate "the handling of child abuse by religious and other non-government organisations." As noted above, the work of the committee was comprehensive and it included a recommendation to amend the Limitations Act for such cases. And indeed, earlier this year, it was reported that child sex abuse victims will no longer face a time limit on when they can claim for civil damages in Victoria. The law which has just been introduced will remove the limitation period for child abuse civil claims. The judicially enforced limits, the Attorney-General noted, were complex and often discouraged victims from bringing claims to court.[40]

Similarly in the United States, the Catholic Church sex abuse scandal has fuelled efforts to dismantle limitations defences on both the judicial and the legislative fronts. The magnitude of legal activity in the United States involving the Catholic Church since the Lafayette scandal broke the issue open in the early 1980s is daunting and hence it is not possible to fully document the impact that the issue has had on eroding the power of the limitations defence. However, a few illustrations of the general direction of the law in that regard may be illuminating. As is true elsewhere, the judicial treatment of the traditional limitations rules is complex. Courts in some states appear willing to allow large awards for decades old abuse, while in others jury awards are reversed on limitations grounds[41]. But while there is variation among these cases, two general patterns can be discerned. First, an increasing willingness to make awards despite the age of the cases, accompanied unsurprisingly by a pattern of more frequent settlement. Thus, in many states it appears that regardless of whether limitations periods were a theoretical bar to actions, the increasing importance of settlements has arguably rendered limitations defences, even if theoretically available, much less important.

Second, in response to the complexity of the litigation, many states began to adopt specific extensions for childhood sexual abuse. Thus, since the relevations of the 1980s, there has also been a tremendous amount of legislative reform of statutes of limitations in order to make specific provisions for the difficulties associated with childhood sexual abuse. Indeed, a perusal of US state-by-state limitations periods reveals how important the sexual abuse claims have become[42]. Many states now have specific provisions addressing child sexual abuse and the National Center for Victims of Crime reports that nearly every state now has a basic suspension of the statute of limitation ("tolling") for civil actions while a

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[40] http://www.theguardian.com/australia-news/2015/feb/24/victoria-removes-time-limits-on-civil-claims-over-child-sex-abuse

[41] http://www.bishop-accountability.org/news3/1998_06_10_Moffett_ExAltar_Rocco_Charles_DAngelo_1.htm#mn. **Need more precise fns here.***

[42] See for instance the chart compiled by the National Victims of Crime: https://www.victimsofcrime.org/docs/NCVBA/statutes-of-limitations-guide.pdf?sfvrsn=4 as well as other similar sources: http://bettiandassociates.com/reporting-sex-abuse/sex-abuse-statute-of-liminitations/. On the issue more generally see Erin Khorram, "Crossing the Limit Line: Sexual Abuse and Whether Retroactive Application of Civil Statutes of Limitation are Legal", (2012) 16 UC Davis Journal of Juvenile Law & Policy. 391, accessed at http://jjlp.law.ucdavis.edu/archives/vol-16-no-2/Khorram%20Crossing%20the%20Limit%20Line.pdf

person is a minor[43]. Indeed, 2013 was described by a leading commentator on the issue as "a good year" for victims of childhood sexual abuse, with 16 states introducing legislation to liberalize limitations periods in such cases[44]. In fact, as Marcia Hamilton points out, several states are actually eliminating limitations defenses in such cases[45]. At the same time, and perhaps unsurprisingly, the Catholic Church has become much more active on the legislative front and is challenging the constitutionality of applying such legislative amendments retroactively.[46]

Connecticut provides an illustration of the general trend. Until the 1990s, the traditional limitations defence applied with the result that those claiming sexually abuse as children had to file lawsuits within two years of turning 18. Then, in 1991, state lawmakers extended the statute of limitations to allow alleged victims to bring civil sexual abuse claims until they were 35. After a rash of claims were made against Roman Catholic Diocese of Bridgeport, in 2002 lawmakers again extended the age limit, giving potential plaintiffs until age 48 to file claims. Since then, Connecticut plaintiffs have brought countless successful claims against the church, with an estimated value in the tens of millions of dollars. However in a case currently before the state Supreme Court, the Archdiocese of Hartford is challenging the constitutionality of the retroactive application of the state's civil sexual abuse statute. Rev. Ivan Ferguson was found to have repeatedly assaulted 13-year-old schoolboy "Jacob Doe". Ferguson had been assigned to lead Jacob's school even though he had admitting to the archbishop that he had sexually abused children while a teacher at his previous school. In 2002 when the statute of limitations on civil lawsuits in sex abuse cases was extended from 17 to 30 years post- 18th birthday, Jacob Doe sued the archdiocese. A jury found in his favour and ordered the Archdiocese to pay him one million dollars. The Church is now challenging that award arguing that it is unconstitutional to extend the statute of limitations retroactively[47]. Similar complexities are underway elsewhere such as for example in California where in 2013 Governor Jerry Brown vetoed a bill that would have opened up the limitations periods.[48] D**espite the complexity of the landscape on this issue however, one thing is perfectly clear. Limitations periods no longer provide the reliable shield from scrutiny and liability that they once did.**

B. Immunities

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[43] http://www.ncsl.org/research/human-services/state-civil-statutes-of-limitations-in-child-sexua.aspx
[44] https://verdict.justia.com/2014/01/09/2013-year-review-child-sex-abuse-victims-access-justice
[45] For example, Minnesota and Illinois: https://verdict.justia.com/2014/01/09/2013-year-review-child-sex-abuse-victims-access-justice. See also the comprehensive state by state compilation: http://sol-reform.com/.
[46] https://verdict.justia.com/2012/04/19/the-catholic-bishops-lobby-against-legislation-to-protect-children; http://www.bostonglobe.com/metro/2012/08/01/legislature-postpones-measure-extending-statute-limitations-for-child-sex-abuse-claims/vBYOt8ZUzURvK4tVLJB3OM/story.html
[47] http://www.middletownpress.com/opinion/20140927/editorial-archdiocese-of-hartford-at-odds-with-pope-francis-words-on-money-sex-abuse
[48] https://www.osv.com/OSVNewsweekly/ByIssue/Article/TabId/735/ArtMID/13636/ArticleID/13175/California-Catholics-praise-sex-abuse-bill-veto.aspx

As noted above, another barrier that has typically functioned to protect the past from legal scrutiny takes the form of immunities. While the limitations period hurdle is purely temporally based, there are other types of protections whose effect is further insulate the past from legal scrutiny. The most important of these are immunities. Like limitations periods, these are complete procedural bars but they are premised on the nature of the defendant, not the passage of time. Though their purpose is not explicitly directed to the past, that effect arises because of the uniquely institutional nature of claims about past wrongs. As noted above, the new legal significance of the past has proceeded—and indeed is premised on—a shift in our underlying conception of responsibility.

This involved a move away from a conception of responsibility that was discrete, personal, current and unitary to something much more diffuse. The new conception, which is certainly still emerging, has moved away from all of the old doctrines that tethered responsibility to a single individual, a single volitional act and to the present. This has meant the growing willingness to countenance multiple overlapping duties. So for example, in the paradigm case the individual wrongdoer may be held liable for direct personal wrongs he or she committed and that liability can either be completely transferred to an institution through the doctrine of vicarious liability or can be shared with the institution usually on the basis of its negligence. This increasingly complex picture of responsibility with its distinct overlapping duties has meant that institutions are much more likely to be exposed to liability than they once were. And this movement towards increased institutional liability has in turn played a vital role, as noted above, in opening up the past to law. This has occurred for a number of reasons—as defendants, institutions have a 'shelf life' that extends far beyond the natural limits of human life. And so, the exposure of institutions to liability has meant that even for acts that are anchored in the deep past, there will often be a defendant to sue—a government or agency, a church, a corporation, for example. Moreover, in relation to individual wrongdoers, institutions have resources or, what is crassly referred to as 'deep pockets'. Thus, as even this brief overview illustrates, the shift away from the old unitary personal view of responsibility, towards the a broader conception with a stronger focus on institutions has dramatically opened up the past to law both because the possibility of institutional liability means that there *is* someone to sue and that there may be someone *worth* suing. In the absence of both of these conditions being met, the past would not have been opened up to law as it has been.

And in turn, it is the centrality of institutional liability to responsibility for the past that has also brought the question of immunities to the fore. This is because the kinds of institutions that are frequently exposed to liability have also traditionally tended to be protected by blanket immunities. So for example, churches have historically been protected through doctrines of charitable immunity, governments and their agencies have been protected through Crown or sovereign immunity and foreign governments have been protected through foreign sovereign immunity. Although the immunities, as noted, are premised on the nature of the defendant not the past *per se*, as long as the immunities were in place even the lifting of the limitations bar would not have enabled law to reach into the past in the way that it has. However, as it turns out, alongside the eroding of the limitations barriers, many of the relevant immunities have also been weakened or even entirely removed. (**somewhere—increasing tendency of law to want to resolve matters on the merits rather than through procedural devices to control the flow of actions).** Like with the limitations barriers, the changes wrought by the Catholic

Church sex abuse scandal, alongside other developments, meant that the immunities too were losing their ability to shield the past institutional acts from legal scrutiny.

Although the traditional doctrine of charitable immunity protected churches, it has gradually been limited either legislatively or judicially. In the United States for example, it is clear that the Catholic Church sex abuse scandal has had a major impact in removing the cloak of protection that the church once enjoyed. Thus, while several decades ago, the church would have been immune from liability, in the United States now it does not play an important role in protecting the church. In the vast majority of states, charitable immunity has either been altered and limited through legislation or has been diminished in its effect by judicial decision[49]. Thus, as Cobb notes, the vast majority of jurisdictions in the United States no longer recognize charitable immunity as a defense to tort claims[50]. As of 2010, Cobb noted that thirty-six American jurisdictions no longer extend the protection of charitable immunity. However, some states have responded to judicial refusals to grant charitable immunity by legislatively enacting limits on damages. Thus for example, in both New Jersey and in Massachusetts, the legislature imposed limits on the amount that a plaintiff could recover from a charitable entity. In the case of Massachusetts it limited recovery to $20,000 for claims relating to charitable activities, but placed no restrictions on damages that resulted from a charitable organization's commercial endeavors[51]. However, even in such cases, the magnitude of the wrongdoing in the church context has been such that courts have refused to extend protections in cases where there was an intentional tort (such as fraudulent concealment for example…Picher). Moreover, as commentators have noted, the implications of these cases are such that even if a damage limit is in place and can be used by the defence to limit exposure, the large settlements in many cases speak to the Catholic Church's reluctance to rely on immunities or limits in the unpredictable context of sexual abuse claims. Thus, as with the limitations defences, charitable immunity was also proving an uncertain ground of protection.

This same pattern of the diminishing salience of charitable immunity can also be seen in other jurisdictions. In Canada, this can be seen in the wake of the litigation surrounding the widespread sex abuse involving the Christian Brothers who ran the Mount Cashel Orphanage. For instance, *Re Christian Brothers of Ireland*[52] involved a court-ordered winding up of a charitable corporation for the purpose of compensating the victims who had been abused by some of the brothers at Mount Cashel Orphanage. The assets of the Christian Brothers included valuable interests in two British Columbia schools. They argued that those schools were not available to pay the Mount Cashel victims. The chambers judge held that there was no doctrine of charitable immunity but he also held that assets that were held upon a special purpose trust could only be used to compensate persons for wrongs done in the context of that specific trust. On appeal to the Ontario Court of Appeal, the Court affirmed the unavailability of charitable immunity and also rejected the special purpose trust exemption. The Supreme Court of

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[49] *The Clergy Sex Abuse Crisis and Legal Responses at 161* citing Matthew Cobb, "A Strange Distinction: Charitable Immunity and Clergy Sexual Abuse", 62 Maine L. Rev 703 (2010).
[50] Cobb at 707 citing RESTATEMENT (SECOND) OF TORTS § 895E (1979).
[51] *Clergy Sex Abuse at 161*
[52] *Re Winding-up of the Christian Brothers of Ireland in Canada*, (2000) 184 DLR (4th) 445 (Ont CA).

Canada denied leave to appeal.[53] Similar efforts to shield church property from legal liability arising out of abuse claims have also been active elsewhere. Although the results are understandably uneven, it is nonetheless clear that, as a general matter, the ability of the church to protect itself from liability through charitable immunity or other related devices such as special purpose trusts is increasingly limited and fraught with political as well as legal hazard[54].

In addition to the claims that would once have been available to shield the church through charitable immunity the Catholic Church is in the unique position among churches by virtue of its relationship to the Holy See. This dual nature which enabled the Vatican to claim that it should also be protected by sovereign also granted the Catholic Church another means by which its past might be shielded from scrutiny by law. Indeed, although litigants had long made efforts to include the Vatican as a defendant in sexual abuse cases. And indeed, the Vatican's claim that it was protected from sexual abuse claims under the Foreign Sovereign Immunities Act (FSIA) proved successful as recently as 2006[55]. However, in 2009 this protection too began to weaken. In *Doe v Holy See* the Ninth Circuit Court of Appeals expanded a limited exception to FISA that is triggered by the "tortious act or omission of . . . any official or employee of that foreign state while acting within the scope of his or her employment." Thus, as with the limitations defences and charitable immunity, courts were increasingly willing to find ways, in the context of the horrifying sex abuse scandal, to push aside the old cloaks of immunities in order to examine the behaviour of the Church on the merits. This represented therefore another vital step towards legal accountability for the past.

C. Vicarious liability and Other Institutional Liability Rules

The Court's ruling in *Doe v. Holy See* also serves as a useful bridge to the next shift in liability rules triggered in part by the Catholic Church sex abuse scandal—a shift that forms another step in opening up the past to legal scrutiny. Once the barriers that prevent any adjudication of the past on its merits have been drawn aside, the path to liability is still not, of course, a straightforward one. Even beyond the obvious barriers and immunities, the doctrines of liability themselves have tended to protect institutions rather than pass liability on. In order for law to truly penetrate the past however these barriers also had to make way. And indeed, they are in the process of doing just that. Perhaps the most important of these doctrines is that of vicarious liability. This is the means by which the wrong of an institution's 'servant' can, under certain conditions, be passed on to the institution itself without any proof of wrongdoing on the part of the employer-institution.

However, for most of the history of the common law, an employer or institution could not be held vicariously liable when employees committed intentional torts including sexual assaults or abuse. For

[53] *Christian Brothers of Ireland in Canada (Re)*, [2000] SCCA No 277 (QL).
[54] http://www.broadsheet.ie/2013/11/04/these-are-just-tactics/ discussing similar efforts to shield assets from liability arising out of sexual abuse claims in Ireland, Australia and elsewhere.
[55] See for instance *Bryan v. Holy See* and *Doe v. Holy See* [2006]).

instance in *ST v North Yorkshire County Council*,[56] the English Court of Appeal reversed a finding of vicarious liability against a school council for a teacher who sexually accosted a student with mental disabilities during a school field trip to the continent. It reasoned that the sexual tort was an independent act, outside the scope of the teacher's authority and as such could not be attributed to the employer. But while historically courts have been reluctant to pass on this essentially strict form of liability in the context of criminal wrongdoing such as sexual abuse, this again has changed dramatically over the last several decades and the cases surrounding the Catholic Church sex abuse scandal have been an important catalyst in this context as well.

This pattern can clearly be seen at work in *Doe v Holy See.* In that case which involved the sexual abuse of a boy by a priest and a claim that the Holy See was responsible under the doctrine of vicarious liability, the Ninth Circuit Court of Appeal rejected the traditional exclusion of criminal acts and found that an intentional tort can be within the scope of employment, and can under certain conditions support respondeat superior liability for the employer:

> if conduct that was within the scope of employment was "a necessary precursor to the" intentional tort and the intentional tort was "a direct outgrowth of . . . conduct that was within the scope of . . . employment."[57]

Further, the Court found that Doe's allegations met this standard because he claimed that he "came to know Ronan as his priest, counselor and spiritual adviser," and that Ronan used his "position of authority" to "engage in harmful sexual contact upon" Doe in "several places including the monastery and surrounding areas in Portland, Oregon.[58]" Thus, the Court found that under Oregon law, the plaintiff had alleged sufficient facts to bring his claim within the exception. Consequently, the traditional exceptions to respondeat superior did not protect the Holy See from liability from historic sexual abuse.

Other jurisdictions are also adopting a similar approach and narrowing the exception for criminal wrongs. The Supreme Court of Canada considered the criminal conduct exception to vicarious liability rules in a sexual abuse case that involved not the church but rather a residential treatment facility for children. In its landmark 1999 decision in *Bazley v Curry*,[59] the Supreme Court rejected the traditional exclusion and held that, under certain circumstances, employers could indeed be vicariously liable for sexual assaults committed by employees. The Court held that an employee in a residential treatment facility exercised intimate private control over the children that was akin to a parental relationship and as such created a risk-laden situation that led to the ultimate harm of sexual abuse. The Supreme Court of Canada later applied this approach to the church in *John Doe v Bennett* when it found that a Roman

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[56] [1998] EWCA Civ 1208, [1999] IRLR 98.
[57] *DOE v. HOLY SEE* at para 15 citing *Fearing*, 977 P.2d at 1163.
[58] *Doe v Holy See* at para 16.
[59] [1999] 2 SCR 534.

Catholic Episcopal Corporation was vicariously liable for sexual assaults on children by one of its priests, noting that their 'sufficiently close relationship' was 'akin to an employment relationship'[60] .

Similarly, recent decisions in the United Kingdom hold that a lack of any formal employment relationship is not an impediment to imposing vicarious liability on a church for a priest's actions. In *JGE v The Trustees of the Portsmouth Roman Catholic Diocesan Trust*, the English Court of Appeal found that although there was no contract of service between a priest and the bishop appointing him, the relationship between the priest and the bishop was so close in character to the employer/employee relationship that it could fairly be said to be "akin to employment"[61] with the consequence that it "it is just and fair to hold the employer vicariously liable"[62]. Thus, this and other UK decisions suggest that it is possible under circumstances like these to establish vicarious liability for criminal child abuse by religious personnel, despite the lack of any formal employment relationship. In other jurisdictions as well, although the area is fraught with significant controversy, the overall pattern echoes the ones noted above—the changes in the law wrought by the scandal have opened up the Catholic Church to liability for the past on a scale that could never have been contemplated only decades ago.

Indian Residential Schools

The last chapter of our story about how law has opened up to the past involves the Canadian experience with Indian residential schools (IRS). The IRS system, which existed for well over a century, involved the Government of Canada and several churches.[63] During that period, approximately 150 000 Aboriginal children were forcibly taken from their families and placed into residential schools. Though the ostensible objective was education, once in the schools, children were often punished for speaking their languages and for their beliefs. Malnutrition, neglect, and physical and sexual abuse were widespread. New evidence has also recently come to light concerning experiments that were undertaken on the children in the schools. Mortality rates were high. Educational outcomes were, unsurprisingly, extremely poor. For a long time, experiences in the schools were rarely discussed. However, this silence eventually broke. To a significant degree this was the result of the work of the Royal Commission on Aboriginal Peoples (RCAP) and the willingness of Aboriginal leaders, in particular former National Chief Phil Fontaine who spoke about his own experience in a residential school, to finally begin a process of coming to terms with the traumatic IRS history.

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[60] (2004) 236 DLR (4th) 577 at para. 27.
[61] [2012] EWCA Civ 938 at para 43.
[62] [2012] EWCA Civ 938 at para 44.
[63] On the IRS history, see e.g. JR Miller, *Shingwauk's Vision: A History of Canadian Residential Schools* (Toronto: University of Toronto Press, 1996); John S Milloy, *A National Crime: The Canadian Government and the Residential School System 1879–1986* (Winnipeg, MB: University of Manitoba Press, 1999). This overview section is drawn largely from Mayo Moran, 'Civil Action, Redress, and Memory' (Fall 2012) 22 *Nexus* 30, online: <http://www.law.utoronto.ca/news/nexus/nexus-archives/nexus-fallwinter-2012/civil-action-redress-and-memory> and from "The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools" (2014) 64 UTLJ 529.

In part as a result of this process as well as for a range of other reasons, in the late 1990s, the residential schools legacy began to be litigated. The magnitude of the litigation rapidly became overwhelming. The federal government made an effort to respond in the late 1990s, but those efforts did little to stem the tide of litigation. By 2002, more than 12,000 legal claims had been filed against the federal government and the churches, and the numbers continued to mount. In May of 2005, the federal government asked former Supreme Court of Canada judge the Honourable Frank Iacobucci to undertake negotiations aimed at producing a comprehensive settlement to address the legacy of residential schools. He worked closely with Chief Phil Fontaine, then National Chief of the Assembly of First Nations (AFN). The negotiations included counsel for former students, churches and government, the AFN, and the other National Aboriginal Organizations. They produced an agreement that many had viewed as impossible to achieve given the diversity of interests. The Indian Residential Schools Settlement Agreement (IRSSA) was signed by the over 70 parties in May 2006 and came into effect on 19 September 2007.

As the largest class action settlement in Canadian history, the IRSSA has an estimated value of 5B billion dollars and is daunting in its complexity. Nine judges from across the country approved it. Under a Court Administration Protocol, two 'Administrative Judges,' Madam Justice Brown from BC and Chief Justice Winkler from Ontario, maintain ongoing supervisory jurisdiction, and have issued a number of important rulings. The IRSSA also created a number of important bodies to implement the Agreement. The 'National Administration Committee' (NAC) is composed of representatives of the parties and charged with a number of tasks associated with the Agreement.

Among the various bodies created by the IRSSA, the Truth and Reconciliation Commission (TRC) is certainly the most widely discussed. It was created to promote public education and awareness about the Indian Residential Schools system and its legacy, as well as to provide former students, their families, and communities an opportunity to share their Indian Residential Schools experiences. The TRC has held national and community events and issued an interim report. Its mandate also includes establishing a research centre. Its final report, expected in June 2015 will detail the history and legacy of the schools as well as the prospects for reconciliation.

In addition to the TRC, the IRSSA also contains a number of other elements that are designed to respond to the widespread past wrongs of the IRS system. Important among these are the compensatory programs. The Agreement mandated a 'Common Experience Payment' (CEP) to be paid to every eligible survivor of residential schools covered by the IRSSA. The CEP is significant because it recognizes that being taken from one's family and residing at an Indian Residential School was harmful and wrong in and of itself[64]. It does not require the showing of additional harms beyond the fact of attending an included IRS. Former students of included schools receive $10,000 for the first school year and $3 000 for each subsequent year. The CEP program received over 105,000 applications of which more than 78 000 were found eligible. The average payout per recipient was just over $20,000. The total CEP payout to date is

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[64] The IRSSA itself is silent on the significance of the CEP. I discussits symbolic importance when viewed against the backdrop of the litigation that preceded it in "The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools" (2014) 64 UTLJ 529 at 556-559 ("Responding to the Systemic Harm").

$1.664 billion. The remainder of the $1.9 billion allocated to the CEP in the IRSSA will be distributed for educational purposes.

The other major compensatory program created by the IRSSA is called the 'Independent Assessment Process' (IAP). The IAP is an adjudicative process created by the Agreement to award compensation for serious harms, including physical and sexual abuse. Administered by an independent Adjudication Secretariat, the IAP was designed to be a fair and impartial, claimant-centred adjudication process. Over one hundred adjudicators work in this process, which is headed by the Chief Adjudicator. The Chief Adjudicator is advised by the Oversight Committee. The original projection suggested that the IAP would receive approximately 12 000 to 15 000 claims. In fact, by the 19 September 2012 deadline, over 37 000 applications had been received. As of February 28, 2015, more than 24,249 hearings have been held and 31,229 claims resolved. Over $2.775 billion in compensation has been awarded[65].

The IRSSA also provided for healing funds in the amount of $120 million to be assigned to the Aboriginal Healing Foundation for survivors and their relatives who were affiliated with the residential schools system. The Agreement also makes provision in various ways for commemoration. In addition, though this was not formally part of the IRSSA, on 11 June 2008, Prime Minister Stephen Harper, speaking on behalf of all Canadians in the House of Commons, issued an apology for the residential schools system.

The IRSSA and the Problem of the Past

Like our other illustrations, the legal activity surrounding the IRS litigation and settlement illuminates a great deal about the changing relationship between law and the past. As noted above, it is not an accident that many of the events across these three examples occurred during the same time period and so there are many commonalities between them. This is particularly evident in the close relationship between the Catholic Church sex abuse scandal and the IRS litigation that preceded the Settlement Agreement. As discussed, the Holocaust Reparations movement served as an inspiration to many victims of historic wrongs but in the case of the IRS litigation and that involving the church sex abuse scandal, there is actually substantial overlap between the two situations. The Catholic Church, for example, ran approximately 70% of the Indian Residential Schools and thus is a very important participant in the entire IRS story. In addition, many of the obstacles that prevented law's reach into the past in the Catholic Church cases have exactly the same effect in the IRS cases. For that reason, on a number of the key barriers and how they were gradually diminished over time, the two situations share much in common and indeed advocates followed both developments for that reason. This is particularly true for the issues concerning limitations periods, immunities and vicarious liability where many of the issues are identical. Moreover, since both situations typically revolve around problems long past, a number of the other features that characterize liability for past wrongs also play out in both situations.

For these reasons, the IRS case study provides another important window into how actions for massive past wrongs went from being legally unthinkable to what I have elsewhere referred to as "legally

[65] http://www.iap-pei.ca/information/stats-eng.php. Statistics as of February 28, 2015.

plausible"—a threshold consideration for settlement purposes. As noted above, in the space of a few years, IRS cases that had seemed far-fetched in legal terms rapidly came to the point where the courts voiced concern that they would be overwhelmed by both their sheer number and their complexity. Many of the issues that were significant obstacles to overcome in the Church cases also posed challenges in the context of the IRS litigation. In the IRS cases as well however, issues such as limitations periods, immunities, and vicarious liability rules also proved themselves surprisingly open to adjustment in favour of the victims of serious violations of fundamental rights. As in the other two case studies we have examined, the normative pressure arising out of such grievous wrongdoing proved too powerful for the procedural barriers that once protected the past from the law. Perhaps even more dramatically than in the Catholic Church cases, one by one these protections for the past began to fall.

But while the Catholic Church and the IRS cases in this sense share a common story and thus illuminate in more detail just how law gradually came to have access to the past, there is a distinct aspect to the IRS example that I would like to focus on here. In one important sense, the IRS litigation despite all of the commonalities nonetheless does represent another stage in law's encounter with the past, and it is a stage with profound implications. As we have seen, both the Holocaust reparations litigation and the Catholic Church cases opened up the civil justice system to claims against institutions for wrongs done in most cases many decades earlier. In so doing, they began, tentatively to reach into the domestic legal system. The Holocaust cases, though they sometimes touched upon the acts of *a* state, did not touch the acts of *the* state in the sense of the state of the adjudicating courts. And this is just the point where the IRS cases proved most penetrating and for many most alarming. Unlike the other examples of law's adjudication of the past, many of the IRS claims asked courts to adjudicate the wisdom of their own past and indeed of their own laws. The closest approach to this question otherwise was in *Bodner* which considered the acts of Vichy France. In *Bodner* the defendants claimed that they were protected by the "Act of State" doctrine (which prevents courts from censuring a foreign sovereign) because their acts were sanctioned by French law. However, the Court rejected this argument, noting that even if its decision involved an element of censure of a foreign sovereign, the Act of State doctrine would not apply to the Vichy Government which was the subject of "wholesale rejection" at the end of WWII[66]. In this sense then, the transitional justice framework with the legal break of regime change created a more comfortable distance between the adjudicating court and the acts of the state under scrutiny.

There was however no such comfortable distance in the IRS litigation: it brought its own domestic variant of the act of state question 'home' in a very significant way. Let me explain how. Many of the claims in the thousands of IRS claims that eventually came before the courts involved acts that were illegal and wrong at the time. Paradigmatically for example sexual assault, physical assault and other actions that violated both the criminal and the civil law of the time. Although steering these claims through the civil justice system involved great complexities including some of the significant hurdles noted above, there was an important sense in which in common with the Catholic Church cases and the Holocaust reparations claim, they were 'non-threatening'. This is because in a sense all the cases asked the courts to do was to get past the procedural and other barriers and adjudicate the cases on their merits according to the law that was in place then and indeed now. They were of course extremely hard

[66] *Bodner* , 114 F. Supp. 2d 117 at 130.

cases to succeed in for many reasons outlined above and others which I have explored in detail elsewhere[67]. But in comparison with another aspect of the IRS claims, they could be described as legally simple. However, almost every IRS claim of the kind outlined above was also accompanied by a group of other claims that asked the courts to venture into uncharted territory in the relation between law and the past.

For example, most plaintiffs both in individual suits and in the class actions included a claim for what can be thought of as the 'systemic wrongs'. These kinds of claims were not about the errors and wrongs that occurred in the system, they were about the system itself—its very purpose and how it achieved that. Thus for example plaintiffs asked courts to compensate them for the loss of language and culture, for the loss of family, for wrongful confinement. The significance of this aspect of the IRS claims cannot be understated. First the sheer number of such claims shows how vitally important it was to plaintiff to capture what seemed most profoundly wrong about the IRS system and that in the design and the operation of the system itself, not just in those cases where its implementation went horribly wrong. Reading the claims and the litigation, it is clear that unless a mechanism could be found to respond to this sense of grievance, resolution of the claims would be impossible. Moreover, the systemic claims clearly raised serious anxieties for the adjudicating courts. On one hand, many of the claims seemed to have serious legal problems, either because they were authorized by law (forcible taking of children without parental consent, wrongful confinement) or because of the uncertain status of the interests involved (right to family, language and culture for example). And yet, as in the other examples we have explored, the normative force of the claims tempted courts to venture into uncharted terrain. Exploring this dynamic in greater detail helps to illuminate another kind of problem that the law must begin to wrestle with when it engages with the past.

The issues surrounding the loss of family provide an illustration. Undoubtedly, one of the features of the IRS system that strikes contemporary observers as most deeply wrong is its destruction of family. Children were forcibly taken from their parents. In the ordinary legal system, parental rights to determine the care and well-being of their children are accorded the highest respect and only subject to termination upon showing of extreme neglect, abuse, incapacity, or the like. In the case of the IRS system, however, the rights of Aboriginal parents over the education, residence, and care of their children were effectively terminated en masse through legislation.[68] This meant that the children were deprived of the most fundamental bonds of life – those of parents, brothers, and sisters, and extended family. As they were often without contact or visits for very long periods of time, the relationships that are so vital to both individual and collective well-being were effectively destroyed. The effects of this last a lifetime. For many who view the IRS system now, this destruction of the very fabric of family and self appears to be one of the most fundamental wrongs of the system – a wrong that permeated the entire system and not just individual cases.

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[67] "Reparative Justice"
[68] *An Act to Amend the Indian Act, SC 1919–20, c 50*.

One important effort to capture this was the relatively common claim that the entire IRS system constituted wrongful confinement.[69] For instance, in *Eagle Speaker v Canada*, the plaintiffs argued that Canada and the churches 'compelled the Plaintiffs to live in the residential schools without parental consent or permission where they are said to have suffered abuse.'[70] Initially the courts rejected wrongful confinement claims on the basis that the Indian Act made it mandatory for the defendants to confine students and gave rise to a defence of statutory authority.[71] But the enduring sense of a profound wrong done to the fabric of family life meant that the claims did not go away. Judicial thinking on this issue also seemed to be evolving as the litigation mounted and in an Ontario Court of Appeal decision just before the Settlement Agreement, the claims of wrongful confinement was not treated a controversial. The hint that courts were becoming more willing to countenance systemic IRS claims undoubtedly served as a powerful incentive to settle these actions.

A recognition of the broader nature of the claims that lay behind many of the more individualized harms was also starting to emerge in other cases. Thus, in *Blackwater v Plint*,[72] the plaintiffs alleged that both Canada and the United Church owed them a fiduciary duty because they were forcibly removed from their homes and sent to the Alberni IRS and that this duty was breached because they were deprived of familial relationships, community support, and knowledge of their language, culture, customs, and traditions. Although the lower court had rejected this claim based on traditional doctrines fiduciary duty,[73] McLachlin CJ in the Supreme Court noted the 'broader nature of the fiduciary duty' claims:

> Beneath this specific argument, a second broader argument focussing on Aboriginal children collectively can be discerned. This is the argument that the system of residential schools robbed Indian children of their communities, culture and support and placed them in environments of abuse. This, it is argued, amounted to dishonest and disloyal conduct that violated the government's fiduciary duty to Canada's Aboriginal peoples.[74]

Although she declined to rule on this broader fiduciary duty claim because it was only raised at the SCC level, the recognition of something larger at work behind the individual claims was important.

The broader approach to fiduciary duty in the IRS case was also taken up by the Ontario Court of Appeal. In *Cloud,* Justice Goudge described the essence of the class action claim by students from the Mohawk Institute Residential School as follows:

> Broadly put, their claim is that the School was run in a way that was designed to create an atmosphere of fear, intimidation and brutality. Physical discipline was frequent and excessive. Food, housing and clothing were inadequate. Staff members were unskilled and improperly supervised. Students were cut off from their families. They were forbidden to speak their native languages and were forced to attend and participate in Christian religious activities. It is alleged

[69] See e.g. *Re Indian Residential Schools,* 1999 ABQB 823, [1999] AJ no 1266.
[70] *Eagle Speaker v Canada*, 2000 ABQB 1016 at para 3, [2000] AJ no 1681.
[71] *Re Indian Residential Schools*, [2000] AJ no 638 at para 20, [2000] 9 WWR 437.
[72] 2001 BCSC 997 (CanLII) at para 233.
[73] Ibid at para 247.
[74] *Plint* 2005, supra note 23 at para 61.

> that the aim of the School was to promote the assimilation of native children. It is said that all students suffered as a result.[75]

While these claims had been rejected at the lower levels, the Court of Appeal instead held that the systemic claims did support certification as a class action.

Another systemic feature of the IRS system that figured prominently in the individual claims concerned the loss of culture and loss of language. Like the familial claims with which they often co-existed, these claims were not about the errors of the system but about the system and policy itself. They sought compensation for something that was intended and indeed desired by the IRS system – captured in the now infamous idea that the system was designed to 'take the Indian out of the child.' The claim of loss of culture and language were also extremely common elements in many of the IRS claims. An important example is found in a case called *Bonaparte*—a class action in which the novel claim was that the *children* of survivors of residential schools argued that they had been denied the transmission of their Indian culture. The Ontario Court of Appeal summarizes the claim as follows:

> They allege that the residential schools were established to implement a governmental policy, the objective of which was to bring about the eradication of the aboriginal culture, past, present and future. Hence, they submit that it was foreseeable, if not intended by the Crown, that the long-term consequence of its actions would deprive not only the primary plaintiffs, but also their generational descendants, of their culture, history and status as a nation. In these circumstances, they submit that the fiduciary obligations arising from the Crown's actions extended not only to the residents of the schools but also to themselves as the members of the next generation.[76]

Although the lower court had had struck out the claim, the Ontario Court of Appeal disagreed:

> [T]he very purpose of the Crown's assumption of control over the primary plaintiffs was to strip the Indian children of their culture and identity, thereby removing, as and when they became adults, their ability 'to pass on to succeeding generations the spiritual, cultural and behavioural bases of their people.' Hence, the secondary plaintiffs claim that they were specifically targeted by the governmental policy. They further allege that they were profoundly and adversely affected as a result.

The Court of Appeal reversed the motions judge, noting that the rapid evolution in the law of fiduciary obligations meant that this was not 'an appropriate case to determine in summary fashion whether the fiduciary duty extended to the secondary plaintiffs without the benefit of an evidentiary record.'[77] As with *Cloud*, this decision signalled a willingness to consider the broader structural features of the IRS system.

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[75] *Cloud v Canada*, (2004) 73 OR (3d) 401 at para 12, 247 DLR (4th) 667.
[76] *Bonaparte v Canada*, [2003] 2 CNLR 43 at para 21.
[77] Ibid at para 36.

Thus, the civil redress system seemed to be inching toward liability for the structural and even policy dimensions of IRS cases. Not only was law adjudicating the wrongs of the past, but it was considering something much more dramatic—holding as wrong those policies and laws that were valid at the time but that we now recognize as profoundly flawed. Thus, though they would have counted as valid legal justifications at the time when the acts complained of were undertaken, contemporary courts considering the claims were increasingly tempted to refuse to allow those laws or policies to count as the kind of justification that precluded finding an action as wrong. Something like the famous Radbruch formula developed in the context of considering Nazi law, was it seems tempting courts in a stable constitutional democracy to refuse to give weight to laws and policies that they considered profoundly wrong. Behind this impetus was the enormous normative distance between the values of the adjudicating court and the values of the laws and policies they had to weigh. In the transitional justice context such as the one that Radbruch was operating in, this distance arose out of regime change. But as the IRS cases revealed, a similar (indeed arguably a greater) normative distance can arise in stable regimes when the passage of time and the normative change that it brings with it place the values of the current legal system at odd with the values of their very own system at an earlier moment in time. Many of the problems that law faces in its encounter with the past are significant but none is as profound, none carriers the difficulties and implications of this one. And while the transitional justice literature was important in pointing out the normative gulf, the IRS cases and others like them reveal the extent to which that literature requires an important refinement. The problems of transitional justice while certainly triggered by regime change are not actually confined to that context. Regime change in this sense is illustrative but not definitional. What is, I would suggest, definitional of the classic transitional justice problem is the normative distance or gulf between the values of the court and the values of the law or policy that the court is called upon to adjudicate. It is this distance that gives rise to the dilemmas associated with transitional justice. But as we see in the IRS cases, the dilemmas equally arise in stable regimes when their courts open up to the past and come face to face with the profound moral distance that can arise within a stable regime.

The IRS cases though they came as close as any courts to date have in addressing this issue did not in the end have to resolve it. The willingness of courts to even gesture towards liability for systemic harms based on the law or policy of the day most certainly caused alarm and provided an important incentive for the federal government to find another way to resolve the mounting numbers of cases. The possibility of general liability to all who attended residential schools and to their descendants created a threat that the scale of litigation would be far beyond what anyone would have thought possible only a few years before. This, along with escalating legal costs judicial gridlock and the vulnerability of the plaintiff class, provided strong incentives to settle. The result, as noted above was the IRSSA.

It is interesting to note however that the question of how to deal with 'evil law' did not entirely disappear. The Common Experience Payment, given to every person who attended an IRS regardless of whether they experienced other harm or not, was an important recognition that the system itself was flawed. Though not stated as such, the CEP recognized the wrong done to every person who was taken forcibly away from family and community and put into an institution designed to eradicate all of the markers of Aboriginality. Even without a statement to that effect, providing non-trivial compensation for

attendance alone was very significant. It marked the fact that, whatever the motivations were at the time and whatever the particular individual experience, the idea at the heart of the IRS system was profoundly flawed.

It was also extremely important that this awareness of the central aspect of the IRS system was clearly and unequivocally expressed in the Prime Minister's historic apology, delivered in the House of Commons in June 2008. The apology opens with the recognition that the most fundamental error lay in the system itself and not simply in its implementation. The opening paragraph reads as follows:

> Two primary objectives of the Residential Schools system were to remove and isolate children from the influence of their homes, families, traditions and cultures, and to assimilate them into the dominant culture. These objectives were based on the assumption Aboriginal cultures and spiritual beliefs were inferior and unequal. Indeed, some sought, as it was infamously said, 'to kill the Indian in the child.' Today, we recognize that this policy of assimilation was wrong, has caused great harm, and has no place in our country.

Moreover, the apology as a whole emphasizes the systemic wrongs at the root of the system rather than focusing on discrete individual wrongs of the kind that the civil justice most easily recognizes. Thus, for instance, it reads,

> To the approximately 80 000 living former students, and all family members and communities, the Government of Canada now recognizes that it was wrong to forcibly remove children from their homes and we apologize for having done this. We now recognize that it was wrong to separate children from rich and vibrant cultures and traditions, that it created a void in many lives and communities, and we apologize for having done this. We now recognize that, in separating children from their families, we undermined the ability of many to adequately parent their own children and sowed the seeds for generations to follow, and we apologize for having done this. We now recognize that, far too often, these institutions gave rise to abuse or neglect and were inadequately controlled, and we apologize for failing to protect you. Not only did you suffer these abuses as children, but as you became parents, you were powerless to protect your own children from suffering the same experience, and for this we are sorry.

Many believe that the recognition of the wrong at the heart of the system was critical to the ability to conclude the settlement and also to the larger IRSSA goal of achieving a fair and lasting resolution to the IRS legacy.

It seems undeniable that the willingness of the courts in the IRS context to take the very significant step towards a whole new and potentially threatening form of liability for the past did help to both fuel the Settlement Agreement as well as shape some of its terms. It also seems arguable, though time will have to be the judge on this point, that the willingness to open up the legal system to the wrongs at the heart of the residential schools project should assist reconciliation prospects at least to the extent that it will diminish the sense of grievance. It is possible of course, that the Government of Canada and the churches would have responded to the wrongs even without the pressure of the law, although the history of this and other cases suggests that this is very unlikely.

Conclusion

All of this suggests therefore that the engagement of law with the past is unlikely to be short-lived. Indeed, the dramatic changes that have occurred over the past several decades suggest that we can look forward to a world in which law is an increasingly important force not only in the present but also with regard to the past. In many senses, this is a laudable development, however much historians may lament. Although it is possible to point to other more efficient, less contentious and less expensive means of redressing past wrongs, the evidence suggests that in the absence of the force that law and the courts give to these issues, they simply do not sufficiently figure in the political landscape and hence do not gain attention. Moreover, whatever the vagaries of litigation (and there are certainly many), the three illustrations explored here reveal that it is the normative power of the claim that tends to break through the barriers that have long protected the past from legal scrutiny. And so although critics may point to the imperfection of the method, it is ultimately the power of the sense of justice unrequited that lends these cases their power to break through so many of the traditional barriers. For all these reasons, I would suggest, the story of the increasing engagement between law and the past is one that is ultimately positive. Though law cannot redress all historical grievances and though no legal remedy will make a deeply injured plaintiff whole, it also seems true that without the possibility of 'reparative justice' those who have been wronged remain mired in their grievances. Justice, one might say, is necessary but not sufficient. And though political justice would be desirable, the turn to legal justice to respond to past wrongs has been borne of the failure of political justice to deploy its resources to that effect.

But even an optimist about law and its efforts to respond to past injustices cannot help but see many challenges ahead. If the law's encounter with the past has truly only begun then there is considerable work to do. Some of the work lies with law itself. The legal conception of duty and responsibility, for example, has not developed the kinds of tools it will need to respond to a world where procedural barriers no longer protect it from addressing the very challenging claims of the kind that arise when law comes face to face with the most profound problems of the past. As the procedural barriers fall, the tools that law uses to analyse responsibility will need considerable refinement.

Other larger challenges await as well. It is not surprising that so many of these cases involving widespread historic wrongs settle. A deeper analysis than the one I have been able to engage in here would reveal the very innovative developments that are now taking place under the rubric of such massive settlements. These include the establishment of alternative adjudication models, the development of truth commissions and similar bodies, programs for commemoration, healing, research and education. This too is a fitting topic for further exploration but a caveat is, I think, in order. Every settlement will bear the signs of its origins. The fact that all of these efforts to respond to the wrongs of the past have proceeded through the civil litigation system has certainly given rise to the kind of pressure that has prompted resolution that otherwise would likely have proved illusory. But the origins of the civil litigation system make themselves felt in the design of the settlements in ways that raise their own series of questions—questions that extend beyond the obvious ones about the extent to

which lawyers are the ones who most benefit from such actions to problems that are much more profound. Lawyers design systems that resemble the ones that they know and understand, particularly when they are doing so to settle a civil claim. But those systems have their own challenges and the settlements reflect many of those challenges even as they attempt to respond. Moreover, the interests of the claimants may argue for a different model of redress than the ones that civil litigators naturally reach for. This in turn raises more profound questions about the very nature of what I have called reparative justice. Granting for the present purposes that this is an important imperative that is at work in cases like these, what exactly does it require? It seems plausible I think that there are deeper questions here that our encounter with the past will prompt us to explore. But these are questions for another day.

Similarly, the involuntary sterilization of persons with disabilities can be seen to fall into this second category because of the extensive framework of the law that it rested upon.