
Mary Reiko Osaka

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By Mary Reiko Osaka*

Member of the Class of 1982.

The problems involved in making reparations payments have faced civilized nations throughout history. While reparations have usually been exacted from defeated nations by the victors, at least two situations in recent history have presented special considerations—those of the Central European Jews and of the Japanese American citizens and resident aliens displaced during World War II.

The atrocities committed by the Third Reich against the Jews have been well-documented. The successor state to the Third Reich, led by Konrad Adenauer, committed itself to a policy of reparations to the Jews, motivated by a sense of moral obligation and the desire to establish the Federal Republic of Germany as a legitimate, friendly world entity.

The same war which evoked the Nazi atrocities generated another racially-based deprivation of liberty. Claiming military necessity, the military commander of the Western Defense Command of the United States recommended that all Japanese Americans and resident aliens of Japanese descent be removed from militarily sensitive areas. As a result, President Roosevelt signed Executive Order No. 9066. Under the order, thousands of people were forcibly moved from their homes on the Pacific Coast to "relocation centers" throughout the western United States.

Property, businesses, and educational opportunities were lost as a result of the Evacuation. The order was upheld by the United States

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* The author wishes to particularly acknowledge Lyle C. Wing, Dr. Franklin Ng, Professor Ted C. Hinckley, Professor Williamson B.C. Chang, and Edward Kitazumi.

2. See text accompanying notes 38-53 infra.
3. See text accompanying notes 16-22 infra.
5. In a letter to the National Coalition for Redress and Reparations dated September
Supreme Court as within constitutionally granted emergency war powers of the President, an official viewpoint which has never been retracted. Thus, Japanese American citizens and resident aliens (hereinafter Japanese Americans) have not had an adequate remedy for their losses.

Spurred on by various citizens’ groups, Congress established a commission in July, 1980 in order to “gather facts to determine whether any wrong was committed against those American citizens and permanent resident aliens affected by Executive Order No. 9066.” The institution of this commission may lead to a governmental admission that a wrong was committed and may additionally provide the basis for making amends to the Japanese Americans affected by the experience.

In support of the concept of reparations for Japanese American internees, the response of the Federal Republic of Germany to the

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6. Although Executive Order 9066 was retracted by President Ford in 1976 (Proclamation No. 4417, 41 Fed. Reg. 7741 (1976)), the Supreme Court cases upholding the constitutionality of the order are still valid. See United States v. Hirabayashi, 320 U.S. 81 (1943) and United States v. Korematsu, 323 U.S. 214 (1944), discussed at text accompanying notes 23-37 infra.

7. The author chooses not to distinguish between those Japanese Americans who were citizens by birthright and those, usually the parents of such citizens, who were not citizens because the law did not permit their naturalization. See generally A. Bosworth, America’s Concentration Camps 35-37 (1967). This categorization results from a firm belief that a substantial number of the Japanese resident aliens in the United States would have become citizens if they had been allowed to.


Sec. 4(a): It shall be the duty of the Commission to—

1) review the facts and circumstances surrounding Executive Order numbered 9066 . . .

2) review directives of the United States military forces requiring the relocation and, in some cases, detention in internment camps of American citizens . . .

3) recommend appropriate remedies.

(b) The Commission shall hold public hearings in such cities of the United States that it finds appropriate.

(c) The Commission shall submit a written report of its findings and recommendations to Congress not later than . . . one year after the date of the first meeting . . . .
crimes against the Jews can be used as a precedent for the United States. Based on moral obligation and a sense of fair play, the policy of *Wiedergutmachung,* or a making of amends, sets a significant example for the United States. This policy could be termed governing national policy through conscience.

The United States' treatment of the Japanese Americans was grounded on the same deprivation of liberty and property as was the injustice to the Jews. This Note will focus on the need for the United States to clearly identify that treatment as wrong.  

The nature of the wrong inflicted on the Jews and the Japanese Americans will be explored, as well as the political climate existing at the time the wrongs were inflicted and at the time the reparations to the Jews were made. The Note will conclude with a discussion of remedies offered by the Federal Republic of Germany, and strengths and weaknesses of remedies available for the Japanese Americans.

**I. THE NATURE OF THE WRONG**

**A. Federal Republic of Germany**

The injury to the European Jews was a result of Nazi Germany's national policy of racial discrimination and genocide. Legislation aimed at depriving Jews of their freedom and personal possessions was an integral part of Nazi society; Jews were singled out for persecution and discrimination in an overt and clearly intentional way through the use of express governmental and societal institutions.

As a result of the *Anschluss* and other Nazi takeovers in Europe, the policy of persecution spread from Germany over most of the continent. The issue of possible later restitution thus became international in nature, going beyond the scope of governmental indemnification

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10. It is beyond the scope of this Note to detail the legislative mechanics of the exclusion, or to discuss fully the constitutional violations involved. For a comprehensive analysis of the constitutional issues involved, see Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489 (1945); California State Bar Subcommittee on Redress/Reparations; briefs of the Bay Area Attorneys for Redress to the Congressional Commission, 1981.


12. For a detailed look into German life under Hitler, see The Nazi Years, *supra* note 1; D. Schoenbaum, *Hitler's Social Revolution* (1966).

13. Jews from Russia, Poland, France, and other occupied areas of Europe suffered or fled, as did millions of others whom, for whatever reasons, the Nazi regime would not tolerate. See N. Rich, *Hitler's War Aims: The Establishment of a New Order* 1-8 (1974).
solely to citizens of the offending government's country. The international nature of the persecution helped open the way for later restitution—claims could be pursued against the German government by other national governments and international organizations in accordance with international law.

In addition to claims based on loss of property and liberty, the Jewish people had a unique claim against the German state. The policy of exterminating an entire community of people was grievous enough to support special claims, such as payments to Israel, a nation of Jews which was not even in existence at the time of the wrong. Another unique aspect of the claim against the German government is that the claims were made against a successor government which had not directly perpetrated the wrongs complained of. In the United States, the claims by Japanese Americans are being made against the same government that was in power at the time the claims arose.

B. United States

The policy of evacuation of Japanese Americans pursuant to Executive Order No. 9066 was executed within the framework of a constitutional system of government that was ostensibly seeking to protect its internal security in time of war. Officially, the incarceration was based on the presumption that Japanese Americans were more likely than other people to aid and abet the enemy. The program was primarily limited to Japanese Americans living in the West Coast states; however, the basis for designating the entire Japanese American population on the Pacific Coast as a menace to the rest of the country has never been fully or fairly explained.

14. Included in the eventual German-Israeli agreement was a payment of DM 3 billion for Israel's integration and absorption of Jewish refugee/immigrants. See N. BALABKINS, supra note 11, at 143.
15. See text accompanying notes 48-50 infra. The payments by the Bonn government served, in part, as a repudiation of the Third Reich's actions. See text accompanying notes 51-53 infra.
16. See text accompanying note 18 infra.
17. While Hawaii and Alaska also had some temporary detention centers, no large scale evacuation was carried out in either of these areas, despite the coastal nature of their locations. This would seem to weaken the justification for designating the West Coast population as more suspect than others simply because of its easy access to the Pacific. See A. BOSWORTH, supra note 7, at 121-25; J. TENBROEK, E. BARNHART & F. MATSON, PREJUDICE, WAR AND THE CONSTITUTION 134-35 (1954) [hereinafter cited as J. TENBROEK]. Indeed, in a secret report, a State Department representative, Curtis Munson, expressed his opinion that racial animosity was the basis for the segregation of the Japanese Americans on the mainland. The Japanese Americans in Hawaii were allegedly more easily accepted by their non-Japanese peers, and thus less likely than their mainland counterparts to appear treach-
In 1942, Lt. General DeWitt, military commander of the Western Defense Command (San Francisco), submitted a report to the President expressing his opinion that those persons of Japanese ancestry who resided on the West Coast were in a likely position to aid the Japanese war effort against the United States. Although no evidence has ever been presented to substantiate DeWitt’s opinion of Japanese American treachery, under his recommendation all Japanese Americans, except insane persons or persons on their deathbeds, were suspected of possible treason. In all, over 100,000 Japanese Americans were forcibly evacuated from their homes and sent to relocation centers in various “safe” locations. Some individuals remained in these “detention centers” for up to three years.

The United States Supreme Court upheld the right of the government to decide what constituted “military necessity” without further significant judicial investigation as to the reasonableness of that decision in Hirabayashi v. United States (1943) and Korematsu v. United States (1944). In Hirabayashi, Chief Justice Stone wrote: “In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision they made.” The court thus upheld the order without subjecting it to the strict scrutiny traditionally required where allegedly discriminatory action is based on racial classification.
It is notable that in *Korematsu*, Justice Black took great pains to emphasize that basic principles of American justice forbid exclusionary orders based on race. He stated that:

Our task would be simple, our duty clear, were this a case . . . of a loyal citizen in a concentration camp because of racial prejudice. . . . To cast this case into outlines of racial prejudice without reference to the real military dangers . . . presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion. . . .

What the decision seems to say is that whenever the "properly constituted military authorities" fear an invasion, they are free to do what they wish, even infringe on the personal liberty rights of an entire subclass of the population. All that would be required is some "rational basis" for the action. There was no mention of a need to declare martial law.

The actions of the United States government did not go unquestioned at the time. In an excellent analysis of the possible constitutional violations involved, Eugene Rostow, then a professor at Yale Law School, wrote:

Our war-time treatment of Japanese aliens and citizens of Japanese descent on the West Coast has been hasty, unnecessary and mistaken. The course of action which we undertook was in no way required or justified by the circumstances of the war. It was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind.

Rostow went on to criticize the proposition that military action be treated like that of other administrative agencies, to be upheld if sup-

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that German and Italian aliens chose to remain citizens of their home countries, while because of restrictive naturalization laws, the Japanese aliens were denied the opportunity to become citizens. Under the decision in *Bessho v. United States*, 178 F. 245 (4th Cir. 1910), aliens of the Japanese race were specifically deemed ineligible for naturalization. In the *Bessho* case, the court held that under the Immigration Act of 1906, the privilege of naturalization was limited to free white persons and persons of African descent, thus excluding Japanese. 178 F. at 246-47. Public Proclamation 5 specifically granted more favorable treatment to German and Italian aliens. *See A. GIRDNER & A. LOFTIS, THE GREAT BETRAYAL* 522-23 (1969).

27. 323 U.S. at 223.

28. Many internees protested, and were then physically isolated from their peers by war authorities. For a study of this segregation of internees, *see D. THOMAS & R. NISHIMOTO, THE SPOILAGE* (1946).

ported by some "rational basis." He felt that some stricter standard of review was necessary. In *Korematsu*, for example, he found fault with the lack of a judicial attempt to show a reasonable relation between the situation and the remedy adopted to deal with it.  

Indeed, by the time *Korematsu* was decided, three justices from the unanimous *Hirabayashi* court had changed their positions. Most significantly, Justice Jackson recognized a serious problem in the Court's validation of a military order: while a military order lasts only for the duration of the emergency, a court validation of such an order validates the principle of racial discrimination embodied in that order. The principle then "lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of urgent need."  

It is significant that in the later case of *Ex parte Endo* Executive Order No. 9066 was held to confer only the right of evacuation and exclusion on the military, not the right to detain the Japanese Americans in the camps. As Justice Douglas wrote:

> We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers . . . that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used. . . .

Although in *Endo* the Court did not invalidate the *Hirabayashi* and *Korematsu* holdings that the President and other authorities could order the evacuation and continued exclusion from militarily sensitive areas, it did hold that to detain loyal citizens in the relocation centers

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30. *Id.* at 506.

31. In his dissent, Justice Roberts said: "[I]t is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty. . . ." *323* U.S. at 226.

Justice Murphy penned the strongest and most memorable words in his dissent:

> This exclusion of 'all persons of Japanese ancestry, both alien and non-alien' from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.

*Id.* at 233.

32. *323* U.S. at 246 (Jackson, J., dissenting).

33. *323* U.S. 283 (1944). See also note 22 *supra*.

34. *323* U.S. at 300.
was not consistent with the stated purpose of the Evacuation.\textsuperscript{35} Thus, there was some recognition that an interference of serious dimensions was indeed involved, perhaps dangerously close to the parameters of constitutional protection. This case indicates not only a "softening" of the Court's previous hard-line approach, but is also significant because it may lay the groundwork for damages arising from the internment of Japanese Americans, as discussed below.\textsuperscript{36}

To date, the \textit{Hirabayashi} and \textit{Korematsu} decisions have not been overruled, and there has been no official retraction regarding the validity of the military decision. Thus, until there is a determination by the special commission\textsuperscript{37} that a wrong was committed by the government in sequestering Japanese Americans, the Japanese Americans affected by the sequestration will have no adequate remedy for their internment.

\section*{II. THE POLITICAL CLIMATE}

\subsection*{A. Federal Republic of Germany}

1. Leadership

The attitudes within the Federal Republic of Germany (FRG), the successor state to the Third Reich, contributed immeasurably to the eventual success of the Jewish-German agreement. Many commentators have attributed the institution of a reparations policy (\textit{Wiedergutmachung})\textsuperscript{38} to the singleminded zeal of the Federal Republic's first chancellor, Konrad Adenauer. Dr. Nahum Goldmann, then chairman of the Conference of Jewish Claims Against Germany, stated:

\begin{quote}
The example, which Dr. Adenauer has given his people, in his attitude to the problems of Israel and the question of reparations . . . must serve . . . Germany as a guideline . . . [H]e has also made every effort to fill his people with a new spirit of democracy and deep respect for moral and spiritual values, which alone constitute an effective guarantee against a revival of the horrors of the past.\textsuperscript{39}
\end{quote}

In his autobiography, Adenauer outlined his goals for the Christian Democratic Party. He believed in a strong Christian party, to help

\begin{footnotesize}
\begin{enumerate}
\item The stated purpose of the Evacuation was "the protection of the war effort against espionage and sabotage." \textit{Id.}
\item See text accompanying note 91 infra.
\item See note 8 and accompanying text supra.
\item See text accompanying note 9 supra.
\item \textit{The German Path to Israel} 186 (R. Vogel ed. 1969).
\end{enumerate}
\end{footnotesize}
counter the “increasingly materialistic approach to political matters.”

He also hoped for a political life in the FRG which was not based on interests of separate strata and classes, one which would seek to include all denominations, including, of course, the Jews. He strongly believed in the Western Christian principle of the dignity and liberty of the individual over the concerns of the state; this he saw as the bulwark of defense against an atheist dictatorship of either left or right. In a letter to Dr. Goldmann on December 6, 1951, Adenauer applied these goals to the problem of compensating the Jews: “I would remark that the Federal Government regards the problem of reparations above all as a moral obligation, and considers it a duty of honour for the German people to do their utmost to make good the wrong done to the Jewish people.”

Adenauer led the way towards a settlement of the reparations claims. As early as 1949 he publicly pledged support for a new German-Jewish policy, and in 1951 he promised the chief Jewish negotiator, Dr. Noah Barou, that he would acknowledge before the Parliament the nation’s responsibility for Nazi acts, and make a public declaration of the Federal Republic’s intent to compensate European Jewry for material losses suffered.

During the delicate negotiations, and often going against the advice of his economic advisors, Adenauer steadfastly continued to meet with Jewish leaders in efforts to reach an agreement. Adenauer even raised the issue at the London Debt Conference of February, 1952, where the main purpose was to settle pre- and post-war debts owed to creditors. However, Hermann Abs, head of the German Credit Institution for Reconstruction and chief negotiator for the German delegation in London, warned Adenauer that the debt settlements would have to come before any monetary commitments to the Jews could be formed. Meanwhile, the Jewish leaders wanted to have their claims separated from those in London, and the Allied powers had already indicated that they would not support a claim for reparations from a

41. The German Path to Israel, supra note 39, at 44-45.
42. Id. at 36.
43. N. Balabkins, supra note 11, at 85. Adenauer offered Israel DM 10 million worth of German-made goods as a “symbolic gesture of material amends.” Id.
44. Id. at 90-95.
46. The German Path to Israel, supra note 39, at 42-43.
47. N. Balabkins, supra note 11, at 45.
country (Israel) which did not exist at the time of the wrong. 48

An additional factor which widened the international scope of the reparations problem was the relationship of the parties seeking and granting reparations. The claims by the world Jews were filed primarily through Israel, a new nation which the Jews wanted to make into their national homeland. Israel sought to collect general reparations claims, individual relief, the individual claims of those who died without heirs, and the costs of integrating hundreds of thousands of refugees into the nation after the destruction of traditional Jewish areas in much of Europe. 49 Although other groups participated in the negotiations, most notably the Conference on Jewish Claims against Germany, all payments were ultimately made to Israel. Individual claims were, in turn, processed by Israel. 50 Thus, the eventual settlement was effected between two nations, rather than as a compensation scheme between a government and its former citizens.

2. Public and World Opinion

The German public, meanwhile, was not strongly united behind Adenauer’s efforts. While not openly adverse to the negotiations, it seems that the public was apathetic. For example, when the eventual reparations agreement with Israel became law, a popular contributions drive was instituted that netted only about DM 100,000. 51

World opinion may have influenced the German legislators in their eventual support of a reparations agreement. Reestablishment of relations between world Jewry and the FRG would tend to show that a new Germany, one which even the Jews could deal with openly, was now a trusted, legitimate world entity. Although the Allied powers did not publicly support the Jewish claims, there is some indication that such a policy was favored. 52 If the FRG could gain some status as a respectable world entity, one which her neighbors and conquerors could view as a friend and economic trading partner, her post-war recovery would be that much faster, and prosperity and peace could return to the people. 53

49. N. BALABKINS, supra note 11, at 83.
50. Id. at 143.
51. Id. at 139.
52. Id. at 130-31. In the impasse between Dr. Abs of the German delegation of financial experts and Dr. Shinnar of Israel, President Truman intervened on behalf of the Jews and helped set up a conference between the two parties. Id.
53. THE GERMAN PATH TO ISRAEL, supra note 39, at 39. See also R. HISCOCKS, supra note 45, at 29.
While the reparations policy might have stemmed from a true desire to atone for a wrong, such a "noble stand" could also only help the new government gain status in the eyes of the world. Thus, the need to rebuild the nation was sufficiently strong to take the reparations issue out of a strictly "moral obligation" and elevate it to a matter of great economic and political significance.

B. The United States

1. Leadership

The Japanese Americans have no counterpart to Konrad Adenauer in the United States government. Although some politicians might agree that the Evacuation was a mistake, there is no apparent strong moral commitment among national leaders to remedy the past wrong. Significantly, the Japanese American cause lacks a particularly powerful leader to spearhead the movement for a reparations policy. Without such leadership, there is no official opinion on the subject, nor is there an official direction to follow with respect to a reparations plan.

2. Public Opinion

Although many citizens might also agree that the Evacuation was a mistake, there is no apparent popular national movement towards remedying the past wrong. It may well be that many people still justify the Evacuation as a "military necessity" or by thinking that its purpose was to "protect" the Japanese Americans. In addition, American taxpayers may be hostile to the idea of distributing money as reparations, particularly to a class which is traditionally economically stable. Indeed, many Japanese Americans are unsure whether monetary reparation is warranted.


3. World Opinion and the National Scope

Since the problem in the United States is entirely within the framework of the Constitution and national policy, with little or no international ramifications, the government does not stand to gain an elevation in world status of the same magnitude as did the FRG. The United States government is not that of a vanquished state, seeking to gain world favor in order to establish the validity of a successor government.

While a move to compensate the Japanese Americans for losses suffered as a result of the Evacuation would be morally laudable, it does not seem likely that many nations would be inclined to react more favorably to the United States if compensation were made. Indeed, the United States might be open to even more criticism, as a result of having waited so long to render justice to its citizens. Such a later acknowledgement might serve as a perfect opportunity to argue that a democracy does not work as reputed.57

This issue presents another interesting comparison between the FRG and the United States. While the Bonn government’s moral obligation to redress the Jews was concurrent with a repudiation of the government which perpetrated the wrong, the moral obligation of the United States to redress the Japanese Americans would be an affirmation of the constitutional rule of law which should have initially protected the Japanese Americans.

Because of the national scope of the problem in the United States, any remedy will have to come from either the courts or the legislature. Absent any case law to challenge the Hirabayashi58 line of cases, a decision based on nontraditional grounds will have to govern the Japanese American case. The absence of precedent did not preclude the FRG from pursuing a comprehensive reparations policy based on moral obligation. It should likewise pose no obstacle to the United States.

III. REMEDIES

A. The Federal Republic of Germany

1. Legislation

The German-Jewish settlement came about after extensive negotiations between the FRG and Israel. The agreement, formulated at

58. See text accompanying notes 23-26 supra.
Wasenaar, the Netherlands, on September 10, 1952, had all the traditional characteristics of a treaty between two nations; although at that time Israel was not an officially recognized country, it was treated as such.

As a treaty, the agreement had to be presented to both houses of the German legislature before being signed into law. In Israel, the Parliament likewise had to approve the agreement. Thus, even though the policy was carried out as a function of national law, it originated as an international treaty agreement.

In the FRG, Adenauer lent the support of his leadership position and of his Christian Democratic Party to the ratification debates. As the German legislature was about to convene to discuss the matter, Adenauer urged ratification in his opening speech, reinforcing the moral reasons for reparation by stating that "[s]uch action is a necessity, if only for moral reasons."

Every major political party in the legislature eventually followed the executive lead, and the ratification was signed into law on March 20, 1953. Certainly, all involved realized the significance of a reestablishment of German-Jewish relations. Most of the sparse dissent was based on the grounds that the FRG could not afford to meet the terms, which called for a total of DM 3.45 billion to be paid in currency, gold, silver, and products within the following twelve to fourteen years.

Some dissent was also based on other grounds. For example, a neo-Nazi group claimed American capitalism was responsible for the entire scheme. The Arab nations also registered strong disapproval, claiming that Israel was a potential aggressor state, having already seized and kept Arab property when settling in Palestine. The Arabs were mollified somewhat by the Federal Republic's promise to supply


60. For example, the treaty was subject to adjudication in German courts in case of disputes; the Israeli mission at Cologne had status and privileges generally accorded to diplomatic and not just trade missions, including immunity from prosecution and freedom from taxes. N. Balabkins, supra note 11, at 146, 151.


62. The German Path to Israel, supra note 39, at 69 (text of speeches before the legislature, March 4, 1953).

63. N. Balabkins, supra note 11, at 150.

64. The German Path to Israel, supra note 39, at 69-87; N. Balabkins, supra note 11, at 205-14. See text accompanying notes 52-53 supra.

65. The German Path to Israel, supra note 39, at 56-67.

66. N. Balabkins, supra note 11, at 141-42, 149-50.
aid to the Arab states as well.\textsuperscript{67}

As for the criticism that Israel could not rightly receive reparations because there had been no war between the FRG and Israel, Chancellor Adenauer characterized the payments not as reparations but as compensation for Israel's costs in settling the refugee Jews who were displaced by Nazi actions.\textsuperscript{68} He also said that the basis for this agreement vested not on strictly legal grounds, but rather on a moral obligation that was so strong as to be elevated to a legal obligation.\textsuperscript{69}

2. In Israel

In Israel, there was more of an ideological split; the leaders realized the importance to the FRG of establishing good relations with world Jewry, and many people felt that to deal with Germany again meant according Germans human status, whereas in reality, to many Jews, Germans were all still inhumane Nazis.\textsuperscript{70}

There was also the concern that the promises of the government and of Adenauer were really "paper promises," unenforceable in reality, and useful only to the Germans as a sort of absolution for their crimes. The wrongs suffered at the hands of the Nazis were considered incompensable: as one writer said, "How much money for one dead Jew?"\textsuperscript{71} Indeed, the idea of dealing with the Germans was so repugnant to some people that a riot took place while the Israeli Parliament was debating whether to enter negotiations for a treaty.\textsuperscript{72}

The treaty was ratified, however, and on the whole, the Israeli leaders were pleased.\textsuperscript{73} Although the terms were not as originally demanded, they represented at least a good faith effort by a government with only limited capacity to make reparation payments.\textsuperscript{74} Property losses were calculated, but the adequacy of this remedy for the Jews was not really at issue; there could, of course, be no real compensation for the murder of six million Jews, except in principle.

3. Mutual Benefit

The agreement was in some ways a convenient vehicle for two

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\textsuperscript{67} \textit{The German Path to Israel, supra} note 39, at 72-73.
\textsuperscript{68} \textit{Id.} at 70.
\textsuperscript{69} \textit{Id.} at 71.
\textsuperscript{70} N. Balabkins, \textit{supra} note 11, at 93.
\textsuperscript{71} \textit{Id.} at 138. DM 3 billion for 6 million Jews killed was calculated to be only DM 500 for each murdered victim.
\textsuperscript{72} \textit{Id.} at 120-22.
\textsuperscript{73} \textit{Id.} at 139.
\textsuperscript{74} \textit{Id.} at 190-205.
\end{flushright}
governments seeking friendship, as well as political and economic aims. The FRG gained a better world image to help in its rebuilding efforts. In addition, the agreement created the sense that insofar as was possible, the German people had attempted to repudiate Hitler and all he represented.

The Jews got much needed aid for their new homeland. In addition to the monetary compensation, there was a very significant moral concession—the acceptance by the Bonn government of an obligation to redress some of the injustices perpetrated by the Nazi government. Finally, Israel gained credence as a new, legitimate nation by successfully negotiating a treaty settlement with another nation, in a situation which demanded the utmost skill and diplomacy.

In accordance with the often complicated and sensitive balance of international relations, these two countries were able to come to a compromise which, while not wholly satisfactory for either side, at least accomplished some important ideological and economic ends, all within the framework of international law.

B. The United States

The damage suffered by the Japanese Americans was more restricted than was the harm to the Jews. That fact, in addition to the solely national character of the wrong, means that a settlement for the Japanese Americans would have no international ramifications. In the absence of treaties to negotiate or an international community to repay, the only remedy offered thus far has been the 1948 Japanese American Claims Act. As discussed below, the Act was inadequate as a means of redress.

1. Legislation

After the United States Supreme Court determined in Hirabayashi that the abrogation of liberty interests involved in the Evacuation was not unconstitutional, the only claims left to the Japanese Americans were for losses resulting from deprivation of property without due process of law. In many cases, the evacuees were given as little as three days to sell or store everything except household and personal items which could be hand-carried. It was inevitable that "scalpers" would

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75. THE GERMAN PATH TO ISRAEL, supra note 39, at 115-17.
77. See text accompanying notes 23-26 supra.
78. A. BOSWORTH, supra note 7, at 113; M. WEGLYN, supra note 17, at 77.
take advantage of the situation to buy valuable businesses, land, homes, and other possessions at outrageously unfair prices.\textsuperscript{79} Those who managed to store their belongings in government-designated warehouses quite often returned to find that lax security measures and an apathetically administered identification system resulted in widespread theft and loss.\textsuperscript{80}

President Truman, responding to the recognized need for some sort of compensation, signed the Japanese American Evacuation Claims Act in 1948 (1948 Claims Act).\textsuperscript{81} The Act authorized the Attorney General to adjudicate and settle the claims of Japanese Americans for damage to or loss of real or personal property, \textit{provided that the damage or loss was a reasonable and natural consequence of the Evacuation and subsequent exclusion} from military areas in Arizona, California, Oregon, Washington, Alaska, or Hawaii by Executive Order 9066.\textsuperscript{82} Among those claims not included in the Act were the following:

a. Claims of persons who, after December 7, 1941, were voluntarily or involuntarily deported from the United States to Japan;

b. Claims for damage or loss due to personal injury, personal inconvenience, physical hardship, or mental suffering;

c. Claims for loss of anticipated profits or earnings.\textsuperscript{83}

While there were other excluded claims, the three mentioned here had the most severe impact. On its face, the 1948 Claims Act was not an acceptable or adequate compensation scheme. Many claims were precluded which could in fact be said to be quite reasonable and entirely justified.

\textbf{a. Deportation}

In the United States, the usual basis for deporting people against their will is a finding by the authorities that the person is an undesirable presence in the country.\textsuperscript{84} Many Japanese Americans were involuntarily deported on this basis, particularly those who had strong ties to their Japanese heritage, such as community leaders, Japanese school

\textsuperscript{79} A. Bosworth, \textit{supra} note 7, at 243.
\textsuperscript{80} \textit{Id.} at 244. For a more comprehensive analysis, see D. Meyer, Uprooted Americans, 245-56 (1971).
\textsuperscript{82} \textit{Id.} § 1 (emphasis added).
\textsuperscript{83} \textit{Id.} § 2.
\textsuperscript{84} See generally 8 U.S.C. § 1251 (1976).
officials, and any whose positions suggested loyalty to the Emperor.\textsuperscript{85} To make the preclusion from bringing a claim under the 1948 Claims Act to operate fairly, there should have been an additional determination that those who were proclaimed undesirable and subject to involuntary deportation were given a \textit{fair} deportation hearing, not one subject to the same war hysteria that clouded the Evacuation proceeding generally. The 1948 Claims Act did not provide for such a determination.

Those who accepted voluntary deportation raise another issue; namely, whether they should be automatically precluded from claiming compensation. An example of voluntary deportation is the case of the so-called "no-no boys," who refused to swear unqualified allegiance to the country that had imprisoned them as security risks.\textsuperscript{86} Many were frightened or bitter\textsuperscript{87} and preferred the risk of travelling to war-torn Japan to staying in a relocation center where no one was certain of what the military was planning. While such voluntary deportation may seem \textit{pra facie} evidence of disloyalty, the evidence does not seem so clear when considering the alternative. The Japanese Americans faced

\textsuperscript{85} J. \textsc{TenBroek}, \textit{supra} note 17, at 101. This group included all the fishermen working at Terminal Island.  

\textsuperscript{86} The "no-no" boys were those who answered "no" to both questions 27 and 28 on the "loyalty questionnaire" to be filled out by all male Japanese American citizens aged 17 or older. This questionnaire, issued by the U.S. War Reclamation Authority, (Washington: Government Printing Office, 1943-1946), asked:  

\begin{itemize}
  \item 27. Are you willing to serve in the armed forces of the United States, in combat duty, wherever ordered?
  \item 28. Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any and all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power, or organization?
\end{itemize}

A. \textsc{Bosworth}, \textit{supra} note 7, at 165. Questions for female citizens and all aliens were much the same except for reference to military service. "No" answers to one or both of the questions were not necessarily indicative of disloyalty. As Bosworth points out, a \textit{yes} answer to number 28 would leave the aliens stateless. \textit{Id.} at 165-68. Moreover, if the alien parents answered "no" and the citizen children answered "yes," a family might be separated, which was especially undesirable when the parents were aging or non-English speaking.

\textsuperscript{87} With respect to question number 27, many of the "no-no" boys were confused, resentful, and bitter about being required to defend a country that marched parents, sisters, wives, and children off to barbed-wire enclosed camps. The problem was compounded by the dual citizenship system of Japan, under which children of Japanese nationals were automatically given Japanese citizenship. In 1924, however, the parents were required to register their children's births with the Japanese consulate or the children would hold only American citizenship. Thus, by the time of the Evacuation, only fifteen to twenty-five percent of the Japanese Americans held dual citizenship. Nevertheless, fears of treachery were heightened by misconceptions regarding dual citizenship. J. \textsc{TenBroek}, \textit{supra} note 17, at 271-73, 311-21.
voluntary bankruptcy and a move, *en masse*, to desolate, primitive surroundings, to live enclosed in barbed wire, all in order to "prove" loyalty to the United States.\(^8\)

b. *General Tort Claims*

The denial of general tort claims—personal injury, personal inconvenience, physical hardship, and mental suffering—assumes that the only damages suffered as a result of the Evacuation were those to property. Under this assumption, a great deal of actual damage is not compensable by the terms of the 1948 Claims Act. Significantly, this denial further supports the "legality" of the Evacuation, by deeming compensable only those losses which amounted to a taking of property without due process of law, while giving no recognition to the other damages sustained. Hence, there is no recognition of the wrong committed in evacuating and interning the Japanese Americans.

The physical, mental, and emotional damages suffered by the interned Japanese Americans were not only severe, but long-lasting. For example, the Evacuation and internment disrupted an entire way of life for Japanese Americans, whose extended families are traditionally the focus of their lives. The decentralization of their families left many members, particularly traditional parents, with a sense of disrupted patterns that went to the very fabric of their lives.

The 1948 Claims Act provided no compensation for the mental and emotional turmoil suffered by these people. Similarly, the Act provided no compensation for the lasting emotional distress of the young people, born in America, who were locked up as potential saboteurs while older brothers died fighting for America on foreign soil. Although this was perhaps the greatest irony of the sequestration, it was never taken into consideration by the Act. Likewise, no compensation was offered for the physical hardships endured.\(^9\) Consequently, the largest claims against the government went uncompensated. Yet, if one failed to file under the 1948 Claims Act, all future claims were barred.\(^10\)

88. Alternatives to moving to a relocation center included voluntary relocation to areas outside the militarily sensitive areas. For example, the chick-sexing industry was heavily dominated by Japanese American workers, most of whom were allowed to move outside the military zones on demand of the poultry industry. See A. Bosworth, *supra* note 7, at 112, 135–36.


By denying compensation for claims other than property loss, the government was lessening its responsibility for actual damages inflicted, particularly by the internment. This is significant, considering that the court in *Ex parte Endo* determined that such internment actually exceeded the authority of the Executive Order, and was thus illegal.\(^9\) By agreeing only to compensate for damage or loss arising out of the evacuation and exclusion orders, not internment, the government limited its liability for damages arising out of the internment policies, even though these had already been judged illegal.

c. *Loss of Anticipated Earnings*

The effect of denying claims for loss of anticipated profits or earnings was severe and not readily apparent. A great majority of Japanese Americans, particularly in California, were farmers; their claims for loss would ordinarily and reasonably have included the fair market value of unharvested crops.\(^9\) But, under the 1948 Claims Act, such claims were expressly precluded.\(^9\) The Act also failed to authorize compensation for loss of land, or for the loss of profits to be made from later selling greatly appreciated property.

Similarly, businessmen were not allowed to file claims for anticipated earnings or business opportunities lost as a result of the Evacuation. Such losses included rents and debts otherwise due, which the evacuees could not collect while interned. Students who had to forego college educations were also denied a remedy under law, as were community workers (e.g., Japanese language school teachers) who became unemployed when the Japanese communities were displaced. While problems of proof might have been substantial, these potential claimants were denied even the chance to seek compensation.

2. Application

The compensation provided under the 1948 Claims Act was also inadequate in practical application. In contrast to the payments made by the FRG, which were at least a good faith effort to compensate the Jews,\(^9\) the amounts paid out under the 1948 Claims Act were grossly inadequate. In 1942, the Federal Reserve Bank of San Francisco esti-

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\(^9\) See text accompanying notes 33-35 *supra*.

\(^9\) This would be particularly true of farmers who only leased their land and equipment; without valid claims to the unharvested crops, they lacked a valid claim to any sort of compensation for their labor. *See A. GIRDNER & A. LOFTIS, supra* note 26, at 127-30.


\(^\) This is not to suggest that the FRG payments could ever compensate for the grave
mated the total loss as a result of the Evacuation to be $400 million. By the deadline date of 1951, claims totalling approximately $132 million had been submitted. Of this amount, the average return realized was only ten cents to the dollar. This low rate of return effectively turned the Act into nothing more than a token effort at compensation, that barred future suits as well.

3. Significance

As in the case of the German Jews, no monetary compensation can adequately redress claims such as mental and emotional suffering, loss of communities, and the deprivation of personal liberty. Since these types of claims cannot truly be compensated monetarily, it may seem that the inadequacies of the 1948 Claims Act were unavoidable. However, even casting aside the other inadequacies of the Act, the important fact remains that the 1948 Claims Act never undertook to admit governmental wrongdoing in interning United States citizens and resident aliens without due process of law.

The legislative history of the 1948 Claims Act contains a letter from the Secretary of the Interior to the Speaker of the House regarding the appropriateness of the Act. While the letter advocated compensation for the material losses suffered, there was no mention of the possible invalidity of the Evacuation in the due process analysis.

Another consideration, however, was mentioned: "Not to redress these loyal Americans in some measure for the wrongs inflicted upon them would provide ample material for attacks by the followers of foreign ideologies on the American way of life and to redress them would be simple justice." Thus, one paragraph neatly encapsulated two considerations which were far more prominent in the case of the FRG than in that of the United States: world opinion and moral obligation. It was the first official suggestion that perhaps the Japanese Americans had suffered an injustice, even though concern for the Japanese Americans was subordinated to a concern for the anti-American propaganda value that a denial of redress might have.

Significantly, however, the wrongs alluded to were only those in-

injustices done to the Jews; the FRG payments, however, were a good faith effort by a country with limited capacity to pay for some of the wrongs inflicted.

95. A. Bosworth, supra note 7, at 236.
96. Id.; A. Girdner & A. Loftis, supra note 26, at 433.
97. A. Girdner & A. Loftis, supra note 26, at 436.
99. Id. at 2301.
flicted as a result of Japanese American compliance with the Evacuation orders, and not the invalidity of the Evacuation itself. Had the Japanese Americans never left the area, there would have been no material losses; the 1948 Claims Act dealt with the consequences of the orders and did not acknowledge that the orders themselves were inherently wrong. Thus, the Act was clearly an inadequate expression of reparatory intent.

4. Possible Future Legislative Remedies

Direct claims arising out of the Evacuation are barred in the courts by the stare decisis effects of the Korematsu and Hirabayashi decisions. Claims arising only out of the internment, which would not be barred by Korematsu and Hirabayashi, but would be governed by Endo, are also barred now due to the statute of limitations.

Further impediments to bringing claims might be found in problems of proof after so many years, and by the fact that some elements of damage are difficult to calculate. Additionally, the 1948 Claims Act may act as an estoppel to future property loss claims. Whether other remedies will be available depends upon the flexibility and imagination of the recently formed congressional commission established to investigate this situation.

If the commission determines that a wrong was committed, this would open the way for further legislative action creating a remedy for the Japanese Americans. As Chief Justice Burger has suggested, Congress is the proper body to create a remedy for fourth amendment violations, since Congress "has the facilities and competence for that task—as we do not."

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100. The Endo decision determined that the internment was not an authorized part of the Evacuation. See text accompanying notes 33-35 supra.

101. Section 4(d) of the Act says the awards under the Act will be "final and conclusive for all purposes, notwithstanding any other provisions of law to the contrary, and shall be a full discharge of the United States and all of its officers . . . with respect to all claims arising out of the same subject matter." Pub. L. No. 80-886, ch. 814, 62 Stat. 1231, § 4(d) (1948). Whether this would apply to those who did not file claims originally is not certain. However, it seems that an order of dismissal may be set aside and compensation allowed upon a new review of the facts.

102. See note 8 and accompanying text, supra.

103. Chairperson Joan Bernstein has indicated that some wrong was committed. See U.S. Panel Seeking "Why" of Japanese Internment, Nichi Bei Times, July 15, 1981. Former Supreme Court Justice Arthur Goldberg, also a commission member, has vigorously denounced the Supreme Court cases upholding the Evacuation. See, e.g., Commission Member on Korematsu Ruling, Nichi Bei Times, May 13, 1981.

In *United States v. Sioux Nation of Indians*, the Supreme Court gave Congress judicial clearance to redress a moral debt "not only by direct appropriation, but also by waiving an otherwise valid defense to a legal claim against the United States." That case presents a method by which Congress could provide redress for the Japanese Americans through a lump sum appropriation, or by waiving the current barriers to litigation of the claims in court.

Government culpability might actually be lessened if redress is available to Japanese Americans solely through the court system. The cumbersome process of finding liability, then deciding how much to award to whom and on what basis, would probably take years to complete; many elderly victims now living would not survive to be directly compensated. In addition, under general tort principles, those who have died since the Evacuation would not leave surviving tort claims, absent special dispensation.

Finally, the expense, inconvenience, and an ideological resistance to suing the government would probably prevent a great many Japanese Americans from filing suit. This illustrates a split among Japanese Americans. While most Japanese Americans today would agree that the Evacuation was a grave injustice, there is a minority that feels that monetary compensation is not necessary, or even desirable, expressing sentiments much like those expressed by post-war Jews, that to accept reparation payments would imply the wrong committed is compensable; *i.e.*, that monetary reparations would be demeaning. Consistent with this latter view, some Japanese Americans would be satisfied with an official apology and an invalidation of the *Hirabayashi* and *Korematsu* cases. President Ford rescinded Executive Order No. 9066, and some feel that this is an acceptable apology.

However, considering the delay in investigating the situation, the injustice of barring relief for tort claims, and the ineffective means of compensating for millions of dollars of property loss, the official position of the National Coalition for Redress and Reparations and of the Japanese American Citizens’ League is that a mere apology will not be

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106. *Id.* at 397.
107. *Id.* at 390-407.
109. See note 56 *supra*.
110. See note 6 *supra*.
IV. CONCLUSION

Though similar in a general way, the character of the wrongs committed against the Jews and the Japanese Americans are not comparable. In the former case, negotiations for reparation were international in scope, while they were essentially national in the latter. In Germany, there was a successor government to the original wrongdoer; in the United States, there is no such difference.

Despite such distinction, there is one overwhelming similarity: any compensation provided for innocent persons deprived of their liberty, solely on the basis of race, should not have to rely on legal obligations. Such compensation should rest on the moral obligation to atone for an injury to human rights, an injury for which there can never be adequate justification or absolution. There can, however, be a good faith effort to redress the injury. What distinguishes the policies of the FRG so particularly is that, even though other gains were at stake, no real legal obligation to make amends existed. For this reason, the policy sets a strong precedent for all nations.

"Governing through conscience" is not so foreign a concept that the United States can completely ignore it. As a self-professed leader in the fight for international human rights, the United States should not wait for legal precedents, or the potential for international benefits, in order to act swiftly and uncompromisingly to right a grave injustice in this country's history. The fact that the commission was established is an encouraging sign that the government is willing to atone for its wrong; it should use the opportunity to do so meaningfully, and not as a method of easy absolution.

Konrad Adenauer, in a speech before the German federal legislature, enunciated the significance of moral considerations. In reference to laws of the Federal Republic forbidding discrimination based on sex, race, etc., he said:

These legal principles have the immediate effect of law, requiring every German citizen—and in particular, every official of the state—to reject any form of racial discrimination. . . . These principles, however, can take effect only if the convictions out of which they were born become the common property of the entire people. Justice is primarily a problem of education. The Federal govern-

ment considers it urgently necessary . . . that the spirit of human
and religious tolerance in the . . . people . . . shall not only be for-
mally recognized, but shall become a fact in spiritual attitude and
practical action. . . . »113

In the case of the Japanese Americans, the United States has an
opportunity, like the FRG, to translate a spirit of democracy and equal
justice into the common property of the entire nation. In this manner,
the United States can reaffirm the principles upon which the nation was
founded; hopefully the nation will respond with fairness, thoroughness,
and justice.

113. THE GERMAN PATH TO ISRAEL, supra note 39, at 32.