LITIGATING THE HOLOCAUST:

CAN WE TRUST LAWYERS AND JUDGES TO BE GOOD HISTORIANS?

A. The Lawyer's Perspective
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A. The Lawyer's Perspective (Whinston)

From the very earliest days of our country, the American courtroom has been the scene where major issues have been debated and, sometimes, resolved. A short list of the well-known and well-studied Supreme Court cases could be the basis for a curriculum in American history: the powers of the Presidency,[1] the legality of slavery,[2] the use of "separate but equal" public services,[3] the right to vote,[4] the appropriateness of the death penalty.[5] As we emerge into a global age, it should not be surprising that events beyond our shores become the grist for the judicial mill. And this has now included the Holocaust.

The issues before a court, no matter how broad their potential impact on society, are framed in a microcosm: the resolution of a dispute between one party and another. It is only in concrete, specific factual situations that a court issues its rulings on the law.[6] A court determines the facts by listening to the testimony of first-hand observers, or witnesses. It is only in special, limited circumstances that the court will allow a witness who was not an observer of relevant facts to testify.[7] Testimony by observers is recognized by law and by human experience as being the most reliable way for a third party (in this case the court) to independently ascertain what occurred. In recognition of the fact that as time goes on human recollection is less precise and

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[1] Marbury v. Madison, 5 U.S.137 (1803).

[2] Dred Scott, 60 U.S. 393 (1856).

[3] Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Education of Topeka, Kansas, 347 U.S. 483 (1954).

[4] Baker v. Carr, 369 U.S. 186 (1962).

[5] Furman v. Georgia, 408 U.S. 238 (1972).

[6] See the excellent discussion of the facts underlying the school desegregation cases in Richard Kluger, Simple Justice (New York: Alfred A. Knopf, 1976).

[7] See, generally, Federal Rules of Evidence, Rules 801 - 807 (hearsay).

therefore less reliable, our society has demanded that cases be brought to court while the facts are still fresh and the witness's testimony still reliable. These rules are known as statutes of limitation.

Cases are often in court because the parties do not agree on the facts. Our legal system is built on the "adversarial" model. In an automobile accident case, for example, the injured pedestrian might observe that the car that hit him was speeding, while the driver of the car might recall that he was going below the speed limit. In such a case, it would be the role of the pedestrian's lawyer to use his or her best efforts to show the judge (or jury) that the car was speeding. Facts that tend to show the car was within the speed limit are rebutted or discredited. The driver's lawyer does just the opposite, and the judge or jury "determines" what actually occurred.

In recent years, litigation relating to events during the Holocaust has been filed in American courts. While this is not an entirely new phenomenon, the recent cases against Swiss banks, German industrial corporations and others have attracted significant public attention. These cases pose interesting and novel challenges to the lawyers and judges involved on many different levels. However, here we are focusing on one aspect of this: how do judges and attorneys, who are not trained historians and who may have read very little about the events in question, assess the relevant "facts" when the traditional kind of witnesses are not available for cross-examination? How are historical works presented to a court in the context of an adversarial system? What role should historians play in this process?

We examine these issues in the context three actual cases – cases brought against the German electronics conglomerate Siemens by involuntary laborers; a similar case against the automobile manufacturer Volkswagen; and litigation against three large Swiss banking

institutions for converting the bank accounts of Holocaust victims and trading with the Nazi government in looted Jewish assets. We suggest that despite the parameters just noted, diligent attorneys and judges have the necessary tools for the proper determination of the facts in these examples and that legal scrutiny may be a creative force in the further examination of these events.

1. The Siemens cases

Siemens is among the two dozen or so Germany companies that were sued in Federal court in the United States beginning in late 1998.[8] Two class action cases[9] were filed against Siemens in federal court in Newark, New Jersey and assigned to Senior United States District Judge Dickinson Debevoise, a highly respected and veteran jurist who was in the United States military (European theater) during World War II.

Both cases were brought by Jewish plaintiffs who were taken from concentration camps and forced to work for Siemens for long hours under grotesquely inhumane conditions. For reasons that are not relevant here, however, the cases sought to assert the claims of very different groups of people. In the first case, plaintiff Malka Lichtman[10] asserted the rights of "all persons

[8] While it is not the purpose here to examine the legal issues involved in these cases, these cases closely followed the determination by a German court in 1997 that the reunification of Germany allowed long-delayed claims from World War II to be finally addressed in court, including those of involuntary laborers.

[9] In a class action, a single plaintiff may bring an action on behalf of all others who are similarly situated, typically those who have suffered the same wrong under the same conditions. Once certain requirements are established, the court notifies the class members of the litigation and offers them the option of participating in the case or excluding themselves from the class. Rule 23, Federal Rules of Civil Procedure.

[10] Ms. Lichtman lived in the area of pre-War Czechoslovakia that was annexed by Hungary in 1938-39. She was deported as part of the massive expulsion of Jews from Hungary in the spring of 1944. At Auschwitz, Ms. Lichtman was among a group of Jewish women selected to work at an underground Siemens factory in Nuremberg. Malka Lichtman v. Siemens AG, No. 98-4252 (D.N.J. September 9, 1998 Complaint at ¶ 4).

taken from concentration camps and ghettos and forced to work for Siemens." In the second case, plaintiffs Martha Klein[11] and Zelig Preis[12] sought to represent "all persons forced to work for Siemens."

Typically, a defendant's first move after being sued is to try to persuade the judge that the plaintiff has not engaged in a violation of law that the court can address, even if all the plaintiff's facts are accepted. The Siemens cases were no exception. Motions to dismiss were filed with the federal court, arguing such legal issues as the statute of limitations, whether the court could assert personal jurisdiction over Siemens, whether the case would be better tried in a German court, whether plaintiffs could sue for violation of international law,[13] and whether claims arising out of a war are the exclusive province of international negotiation rather than individual litigation. While the judge could have turned his attention to any or all of these issues, he decided to focus on whether the involuntary labor program challenged as being a violation of the law of nations was "war-related." If it did, then the weight of legal precedent would hold that such a claim could only be pursued by sovereign entities in the diplomatic arena.[14] If it did not, then the weight of legal precedent would allow individual litigation.

Counsel representing the plaintiffs had many issues to explain to the court and no way of

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[11] Ms. Klein was a native Hungarian deported in the spring of 1944 to work for Siemens at a factory affiliated with the Ravensbrück concentration camp. Burger-Fischer v. Degussa AG, 65 F. Supp.2d 248, 253 (D.N.J. 1999).

[12] Mr. Preis was a native of Poland who was forced to work for Siemens' Bau-Union factory, annexed to the Plaszow concentration camp. Id.

[13] All countries and their citizens are bound by certain established principles of international law. In the United States, courts recognize that this body of international law is enforceable as part of federal law, whether or not a specific federal statute has been passed. See The Paquette Habana, 175 U.S. 677 (1900) For example, federal courts entertained cases alleging torture based on international law before passage by Congress of the Torture Victims Protection Act, which specifically outlawed torture.

[14] This rule is not applicable to stateless persons who have no sovereign to espouse their claims.

knowing in advance which issue would be critical to the judge. Consequently, the briefing on the "war-relatedness" of the German involuntary labor program[15] was neither extensive nor detailed. The Lichtman complaint described the participants in the concentration camp slave labor program as being treated much more brutally than other forced laborers and cited particularly high death rates of Jewish workers. The Jewish workers, it was alleged, were literally starved and worked to death. Both cases noted that the labor program arose in the context of labor shortages in Germany, particularly in industries serving military needs.

In contrast to the Siemens complaints, other cases against German companies had made much more specific allegations regarding Jewish slave labor. For example, in Rosenfeld v. Volkswagen AG, other aspects of which are discussed below, the amended complaint described the Nazi war effort and the recruitment of foreign workers. Then, the complaint detailed a "separate" plan, documented by the Wannsee Protocol, to murder European Jewry which explicitly made reference to slave labor as a means to this end. The complaint alleged that "the natural and intended consequences of [defendant's slave labor program] were not to promote Jewish labor productivity but to hasten the death of Jewish slave laborers."

Much to the surprise of the attorneys involved, the Siemens court focused on whether the involuntary labor was war-related. Although the court recognized that the Lichtman case raised different considerations, it insisted on looking at both cases together and therefore subsumed the Lichtman allegations within those of the Klein case. According to the court's opinion, the distinction between Jewish slave labor and non-Jewish forced labor:

[15]As used in this paper, the term "slave labor" refers to the work conditions imposed on concentration camp inmates and ghetto residents. "Forced labor" refers to work conditions imposed on individuals held in other types of facilities. "Involuntary labor" refers to both slave labor and forced labor.

> if valid, would be applicable only to a small portion of slave laborers and not justify treating the forced labor program differently after World War II. It is true that the plaintiffs in the present cases who were subjected to [slave] labor were seized from concentration camps and were victims of racial persecution. They purport to represent, however, all forced laborers, not just those who were the subject of racial persecution. . . Many victims in the concentration camps were thrust into the forced labor program and, like millions of others, treated abominably, but that did not change the nature of the program as primarily a war related effort, subject to reparations as negotiated by the victorious nations. (65 F. Supp.2d at 276)

Since not a single historical text was cited by the court to support its conclusion, the source of its reasoning cannot be analyzed.

The Lichtman attorneys recognized the serious historical error made by the district judge. Therefore, rather than directly appealing the decision, they filed a motion to reconsider which set forth in some detail the background of the German approach to Jewish slave labor. Historical materials submitted to the court included the Wannsee protocol, the Allied War Crimes prosecution staff's differential description of forced and slave labor and American and German historical sources which clearly described the intent of slave labor as being a device to exterminate Jews rather than to obtain war production.[16]

Unfortunately, the court was not interested in reviewing history at this point in the

[16] The sources cited included: Office of United States Chief Counsel for Prosecution of Axis Criminality, Nazi Conspiracy and Aggression, Vol. I, (Washington, DC: U.S. GPO., 1946), 909-918, 988; Raoul Hilberg, The Destruction of the European Jews (New York: Holmes & Meier, 1985); Daniel Jonah Goldhagen, Hitler's Willing Executioners: Ordinary Germans and the Holocaust (New York: Alfred A. Knopf, 1996); Karl-Dietrich Bracher, The German Dictatorship (New York: Holt, Rinehart & Winston, 1970); Florian Freund, Concentration Camp Ebensee (Vienna: Austrian Resistance Archives, 1990); and Bernd Klewitz, Die Arbeitssklaven der Dynamit Nobel (Schalksmühle: Verlag Engelbrecht, 1986).

litigation. In a shockingly dismissive opinion, the Court simply refused to consider this additional information and suggested that counsel file an appeal. The matter is now pending before the United States Court of Appeals for the Third Circuit and is scheduled to be argued the week of May 22, 2000 in Philadelphia.

The court's approach to the Siemens case was seriously flawed on a number of different levels, both legal and historical. In the traditional case, the judge is able to rely on the parties' presentation of the facts. Unless public records would shed further light on the situation, the judge has no obligation (and no need) to go beyond the parties' version of the facts. Issues of history, we suggest, are of an entirely different nature. A court simply cannot draw accurate conclusions about major historical events without going to source materials. And, if adequate sources are not provided by the parties, the judge should do the needed research. Gross conclusions regarding the nature of the Nazi slave labor program should not be cavalierly reached without a solid historical footing. Yet this is precisely what happened in the Siemens case. Now, unless reversed, the law books will forever contain the conclusion that the Nazis utilized the labor of Jew and non-Jew alike to produce war materiel.

2. The Volkswagen cases

A much more subtle issue arose in the litigation against Volkswagen AG.[17] In addition to raising issues briefed by other defendants, Volkswagen injected a new claim: that it was an arm

[17] Emanuel Rosenfeld v. Volkswagen AG, No. 98-5247 (D.N.J.). Mr. Rosenfeld was born in Hungary and sent to Auschwitz in the spring of 1944. When he identified himself as a sheet metal worker, he was selected with about 800 other inmates to work for Volkswagen. Mr. Rosenfeld worked at the company's main factory in Wolfsburg, where he assembled parts for the V-1 rocket.

of the German state and therefore entitled to a defense of sovereign immunity.[18] In its motion, Volkswagen claimed that it was created by Hitler to provide affordable cars to the German working class. During the war, Volkswagen's production was devoted to military vehicles as well as parts for rockets and airplanes. Following the war, Volkswagen was first controlled by the British occupation authorities and then the Federal Republic of Germany until it was sold to the public beginning in 1961.

The research conducted by plaintiffs' counsel involved both the law and the facts. It was first determined that the key issue for analyzing the sovereign immunity argument was Volkswagen's status at the time of the slave labor-related acts in question. This allowed the historical research to be narrowed to the period from Volkswagen's creation in 1937 until the end of the war. Two points of view emerged. One, represented in the work of Simon Reich, among others, appeared to support Volkswagen's thesis. A second, represented in the work of Gordon Craig, among others, clearly disagreed with Volkswagen's point of view.

Both authors agree on the underlying events. Hitler promised to provide an affordable automobile to the German working class. He first commanded the German private automobile industry, under the leadership of Ferdinand Porsche, and the trade unions to come up with a collaborative design and implementation for such a car. This proved unworkable. While private industry wanted to help achieve Hitler's goal, they were more concerned about the impact of such a car on their profit (see Simon Reich, The Fruits of Fascism (Ithaca, NY: Cornell Univ. Press, 1990 at 152-153). When Hitler saw this collaborative effort going nowhere, he put the

[18] Sovereign immunity is a legal doctrine which holds that a country (or its instrumentalities) may not be sued in the courts of another country. In the United States, this doctrine is embodied in the Foreign Sovereign Immunities Act, 28 U.S.C. §1601 et seq. The law provides for specific exceptions to foreign immunity, including when the actions in question are commercial in nature or when property interests are taken in violation of international law.

project in the hands of the Deutsche Arbeitsfront (DAF). The DAF was the Nazi entity that supplanted the trade unions in 1933. This, according to Reich, made the DAF "an arm of the German state" and its control of Volkswagen resulted in the automobile manufacturer becoming "part of the German state." (Id. at 155). Based on this analysis, VW's sovereign immunity defense would seem to be credible.

Reich's willingness to fuse the German state with the Nazi party, however, is contested by Craig. His study of the inner workings of the German bureaucracy revealed that

> [t]he smoothly functioning Nazi state was never much more than a myth. Instead of party and state being bound together in a harmonious union directed by the will of the Fuhrer - - - an image that Nazi ideologues were fond of evoking - - - relations between the two were characterized by mutual suspicion, competition, and duplication of function, which Hitler attempted neither to correct nor to discourage. (Gordon Craig, Germany, 1866-1945 (New York: Oxford Press 1978) at 591)

While Hitler was head of both party and government, he did not mix the two, according to Craig.

> Hitler had a fondness for setting up special authorities and agencies to deal with problems that could, with greater administrative economy, have been handled within the existing ministerial structure, and these sometimes, by a process of bureaucratic imperialism, deprived the appropriate ministry of any useful function. (Id. at 594)

Among other examples of this situation, Craig pointed to disputes relating to jurisdiction, power and influence between Robert Ley, head of the DAF, and Franz Seldte, Minister of Labor. Bureaucratic disputes between Ley's DAF and Seldte's Labor Ministry covered varied issues such as workers' benefits and control over vocational training. (Id. at 625-626)

Additional information on the DAF was located in biographies of Ley (including Ronald

Smelser, Robert Ley, Hitler's Labor Front Leader (New York: Berg Publishers, 1988)). Smelser's research included the views of German officials of that era and portrays Ley as a power hungry and ambitious Nazi functionary.

> The struggle between Ley, who was always trying to broaden this jurisdiction and blur normative distinctions, and his government opponents, who were trying to narrow his prerogatives and observe and establish legal conventions, was a real social and political Donnybrook. (Id. at 219).

While these texts did not deal extensively with Volkswagen, the description of the adversary relationship between the DAF and the German government was more than sufficient upon which to base an argument. In the legal arena, finding a text which refers to the German government as being an "opponent" of Ley's DAF was critical to the argument that Volkswagen was not wrapped in the sovereign's cloak.

Plaintiff's brief quoted extensively from these and other texts. Volkswagen by contrast, relied on generalities and the fact that the DAF was a Nazi entity.

The differing historical texts present the lawyers and the judge with an interesting dilemma. The Plaintiffs' lawyer, in citing to Craig, Smelser and other similar references, is under no obligation to advise the court that there may be other points of view. Volkswagen's lawyer is similarly free to argue generalities without advising the court that certain historians view the DAF as distinct from the German state. The judge, faced with opposing analyses, must determine which version of history is correct.

The factors involved in this legal determination may be more subtle than, or just plain different from, the consideration that are significant to historians. For example, the source of Ley's salary may be an unimportant historical detail, but it may be a significant issue in the legal analysis of whether or not Volkswagen is a governmental entity. Further, we have no way of

knowing the basis for Reich's conclusion that VW was an arm of the German state. Did he mean it literally, or was he making a broad generalized statement about Hitler's control? In the context of typical litigation, these questions would be subject to close scrutiny and direct inquiry. With history, however, that would not seem to be practical. The judge, who is expected to be a skilled researcher of the law, may find himself at sea when it comes to history. Despite that, a decision must be made.

One possible device available to a court in these circumstances is the appointment of a special master. Under Rule 52 of the Federal Rules of Civil Procedure, a federal judge may appoint an individual, known as a special master, to examine complicated or time-consuming issues and report back to the judge. While masters are typically lawyers, this is not required by the rules. A second device, authorized under Rule 706 of the Federal Rules of Evidence, is the appointment of an expert to advise the court on matters in dispute. This is typically done when the court is faced with a "battle of the experts" retained by the parties to the litigation and the judge perceives the need for an independent expert who has no financial or other ties to the parties to the case. The appointment of an expert to address issues which appear to be historically ambiguous removes the adversary nature of the process, at least to a certain extent, and returns it to the arena of scholarship.

3. The Swiss Banks case.

The "Swiss Banks Case"[19] provides a different model for the interaction between history and litigation. There, in contrast to litigation against German companies, court proceedings were

[19] This is actually a consolidation of four cases identified in court records as In re Holocaust Victim Assets Litigation, No. CV-96-4849 (E.D.N.Y.).

a stimulant to rather than a product of historical research. This provides an opportunity to contrast the contemporaneous exploration of fifty-year-old facts by historians and attorneys.

During the early years of Nazi rule in Germany, increasing restrictions on Jewish ownership and accumulation of business and property were imposed. Similar rules were also imposed in other European countries both before and after armed hostilities commenced.[20] Some of the more affluent Jews in these countries who wanted to protect their wealth took the risky step of depositing assets in Swiss banks. Switzerland was ideal because it had recently enacted stringent laws relating to the privacy and security of banking records. As this was both illegal and a dangerous course of action, one can presume that only those with significant amounts of assets dared follow this path. Most European Jews with Swiss deposits died during the Holocaust. Those heirs who sought access to their assets were typically met with bureaucratic resistance, such as requests for death certificates or bank account numbers. In response to international pressure from the governments of Israel and the United States, Swiss banks purported to conduct sweeping inquiries regarding the existence of "dormant" accounts of Holocaust victims or survivors in the 1960s and again in the early 1990s. Each resulted in the finding only a minimal number of such accounts.

During the War, the United States became concerned about the role of Swiss banks in a possible effort to hide Nazi wealth which could be used to fund continued resistance after the cessation of hostilities. As a result, a concerted secret intelligence effort, known as Operation Safehaven, was established in Switzerland under the personal direction of top OSS officials, including Allen Dulles. Through this, the United States learned that the three largest Swiss

[20] The increasing limitations on Jews in Hungary, for example, is summarized in Lucy Davidowicz, The War Against The Jews: 1933-1945 (Holt, Rinehart & Winston: New York, 1975) at 380-82.

banks had intimate relationships with Nazi officials and the German government, and engaged in substantial and ongoing purchases of gold, precious metals, jewelry and other valuables. Some of the gold was stolen from the national treasuries of countries overrun by the Nazis, while other gold and valuables were taken from Holocaust victims. While the Nazi collection of these valuables was well-known,[21] the role of the Swiss banks as money launderers was not.

All this changed in 1996 when provisions of United States "sunset" laws resulted in declassifying thousands of boxes of archival documents relating to World War II that had previously been declared "secret." Researchers in various academic fields, as well as those supported by Jewish institutions such as the Simon Wiesenthal Center, camped out in the National Archives to review these documents. Before long, stories started to appear in the press regarding the role of Swiss banks both as depositories for Jewish assets and as asset launderers for the Nazis. Jewish organizations, particularly the World Jewish Restitution Organization, began to pressure the Swiss banks to act in response to the newly disclosed information. A number of individuals who had been unable to obtain acknowledgment of their relatives' Swiss banks accounts retained attorneys to pursue their claims in court, and those attorneys participated in the research efforts. The first group of complaints that were to become known as the "Swiss Banks Case" were filed in the fall and winter of 1996-97. With varying degrees of detail, the complaints sketched the known history of the role of the Swiss banks before and during the war.

In response to the negative publicity, the pressure from the WJRO and probably the litigation, the Swiss banks decided to commission their own reviews of bank and archival documents in Switzerland. Accordingly, an International Committee of Experts under the

[21] Perhaps the best reminder of this is a famous picture of American troops examining the vast supply of gold dental fillings, wedding rings and eyeglasses discovered in an underground complex of caves in the final days of the war.

direction of Prof. Jean-Francois Bergier was established to review historical documents and write one or more reports regarding the conduct of the banks during the Nazi era.[22] The United States government expressed its continuing interest by authorizing the State Department's historian to prepare a report based on the newly released National Archives documents regarding the role of the Swiss banks and the financial institutions in other neutral countries with regard to trade with Nazi Germany.

Reports from all these sources were published over the next three years. In addition, authors of various types released their own books interpreting these newly revealed facts (e.g., Tom Bower, Nazi Gold (New York: Harper Collins, 1997); Jean Ziegler, The Swiss, The Gold, And The Dead (New York: Harcourt Brace and Company, 1998)). Finally, legal briefs were filed, often with archival documents attached, in support of the validity of the cases which had been filed.

These various sources combined to create an instant "history" of the role of the Swiss banks in aiding the Nazis. The objectivity and documentation of their conclusions varied greatly. The differing approaches reflected the differing interests and orientations of the authors.

Each view benefitted from the knowledge that the written products would be scrutinized by other disciplines. Historians knew they were writing not just for other historians but for parties to litigation who would carefully scrutinize their conclusions. Lawyers were restrained from being too one-sided knowing that historians with differing approaches were preparing their own analyses.

[22] A separate group, known modestly as the Independent Committee of Eminent Persons ("ICEP") under the direction of former Federal Reserve chairman Paul Volcker was established to review banking records and identify accounts belonging to Holocaust victims or survivors that were improperly handled.

These three cases of the interplay between history and the courtroom do not lend themselves to a simple lesson. When history is an issue in a courtroom, the lawyers can read archival documents and historical texts. They can consult with historians. Indeed, these steps are necessary, since there is an opponent on the other side of the case who is likely to do the same. But judges are under no similar compunction. What is presented to a judge may be misleading or incomplete, or it may reflect a minority viewpoint among historians. Where history is involved, particularly events such as the Holocaust, judges have an obligation not just to the parties but to society as a whole to get it right. They should therefore take a more active role in the investigation of the historical events in question, in scrutinizing the points of view presented to them by the litigants, and in consulting with independent experts. And, when judges put pen to paper on historical subjects such as the Holocaust, they should write like historians, with full citation of historical sources. Absent this type of analysis, a judge runs the risk not only of getting it wrong and thereby doing a disservice to the litigants, but also to the broader popular understanding of historical events.

B. The Historian's Perspective (Bendix)

When I tell fellow academics from the humanities and social sciences the subtitle of our paper – "can we trust lawyers and judges to be good historians?" – the near-automatic response I hear is "no," said with an arch "well isn't it <u>obvious</u>?" inflection. That supercilious tone is unfortunate, since it hides some of the similarities between lawyers and historians. Both pursue "truth" and use "evidence" and argue for their cases, if with different purposes, methods, and sources, and both are regularly challenged, whether by opponents or through alternate readings of the "facts." When Justice Oliver Wendell Holmes wrote that "general propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise," he could have been describing how a historian decides to render a narrative of events.[23]

In a sense, the dismissive tone is understandable when one considers at what remove the humanities and social sciences often stand from the judicial system or the practice of law. In another sense, in a cynical age like our own academics may share American popular attitudes about lawyers and think the idea to "trust lawyers" is an oxymoron. Many academics might agree with one of Shakespeare's characters when he says, in reference to lawyers and justice,

> is not this a lamentable thing, that of the skin of an innocent lamb should be made parchment? That parchment, being scribbled o'er, should undo man?[24]

[23] <u>Lochner v. New York</u>, 198 U.S. 45 (1905), dissenting opinion.

[24] King Henry VI, Second Part, Act IV, Scene II. The character is Cade; he is agreeing with Dick who has just uttered the more famous line "The first thing we do, let's kill all the lawyers."

Yet such negative reactions occur against a backdrop of a steadily increasing supply of lawyers, standing at 894,000 as of 1995, or more than the combined adult population of Atlanta, Pittsburgh and St. Louis,[25] and occur in an era where there is no apparent decline in the demand for lawyers' services, including from academics. We seem in the curious position culturally of increasing dependence upon lawyers and judges while simultaneously thinking the worst of them – not unlike the polls that repeatedly show Americans saying Congress is a terrible, untrustworthy institution while just as strongly averring that their own representative is just fine and does a good job…

My interest is not in lawyers or the judiciary, however, but in historians: what they see their own charge to be, what has led to the current importance of Holocaust issues in American life, and in what manner they do (or do not) fit in to the current flood of Holocaust-related litigation.[26] Thus, I first consider the self-understanding on the part of historians (the historians' context), then the increasing importance of the Holocaust in American public life (the sociopolitical context), and finally the demand for historians in Holocaust litigation (the litigation context). Context matters to historians, so one might regard my reflections as examining the contexts of context.

[25] Andrew Hacker, Money: Who Has How Much and Why (New York: Scribner, 1997), p. 130.

[26] For a legal overview, see Michael Bazyler's article "Litigating the Holocaust" in the University of Richmond Law Review, Vol. 33 (2), May 1999, pp. 601-29.

1. What historians do (or think and say they do)

Historians, like the practitioners of other academic disciplines, have gone through a variety of phases and interpretations of their task. A nineteenth-century fascination with the scientific ideal led some at the time to assert their task was one of strict objectivity. History was about re-creating the past as exactly as possible from the events revealed by reliable sources (such as the letters of ambassadors or parliamentary debates). If possible, one should even infer historical "laws" from the empirical facts revealed in such sources.[27] The faith in the methods of properly conducted research implied strong claims about the truth revealed by the results. As Lord Acton wrote in the late 19th century, "truth is the only merit that gives dignity and worth to history."[28] As for historians, Louis Halphen wrote as late as 1946,

> all we need to do is allow ourselves to be borne along by the documents, one after another, just as they offer themselves to us, in order to see the chain of facts and events reconstitute themselves almost automatically before our eyes.[29]

Beyond the obvious problem of not knowing which documents to select beforehand,[30] historians began to realize that there were problems inherent to the documentary materials themselves. "No document can tell

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[27] Fritz Stern, Dreams and Delusions (New York: Vintage, 1989), p. 248; Fernand Braudel, On History (Chicago: University of Chicago Press, 1980), p. 29.

[28] The History of Freedom and Other Essays [1907], p. 4.

[29] Cited in Braudel, On History, pp. 28.

[30] Or as Henry James put it in the preface to The Aspern Papers, that historians want more documents than they can really use.

us more than what the author of the document thought – what he thought happened, what he thought ought to happen or would happen, or perhaps only what he wanted others to think he thought, or even only what he himself thought he thought," E. H. Carr noted. [31] Conscientious scholars therefore draw not only on archives but also on secondary literature, "threading our way through the accumulated debates and disagreements of generations of our predecessors, the changing fashions and phases of interpretation and interest, always curious, always (it is to be hoped) asking questions."[32] In short, the historians' project was to engage in painstaking research not only of the available literature but also of the accompanying arguments, all the while remaining curious, skeptical, and impartial.

But the scientific model admired in the 19th century was a misleading guide. The natural sciences strove to examine phenomena in the physical world with an eye to providing relevant and precise explanations for events in ways both empirically testable and conforming to probabilistic, law-like, general statements, such as the assertion that the half-life of a polonium atom is 3.05 minutes.[33] Scientific inquiry was about ascertaining and discovering facts and about constructing hypotheses and theories to explain them.[34] Historians, while they might be engaged in discovery of facts and in constructing hypotheses, were not able to conduct empirical tests nor were they readily able to extract law-like statements.

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[31] E.H. Carr, What is History? (Cambridge: Cambfridge University Press, 1961).

[32] Eric Hobsbawm, The Age of Empire 1875-1914 (New York: Pantheon, 1987), p. 4.

[33] Carl Hempel, Philosophy of Natural Science (Englewood Cliffs: Prentice Hall, 1966), pp. 47-49, 66.

[34] Georg von Wright, Explanation and Understanding, p.1.

Historians instead tried to make the past understandable by constructing contextualized stories, a rhetorical mode that did not meet scientific standards of coherence or adequate explanation.[35] For some historians, this could mean imaginatively sharing the viewpoint participants in events had, based on our "own experience as rational purposive agents,"[36] or becoming immersed in place, period and subject. To other historians, the task might be more self-aware or dispassionate, involving "choosing among chronological realities according to more or less conscious preferences and exclusions."[37] Yet even in the choice to take a particular chronological reality and depict it "as it was" implied "at the least that it was not something else - hence that explicit or implicit choices were made, thus that responsibility [for those choices] needs to be assessed."[38]

Our reflexive age furthers this self-consciousness, making historians much more acutely aware that "history is the always incomplete and problematic reconstruction of what is no longer there."[39] "Context" itself shifts, because the older tradition focusing "on the great narratives of high politics"[40] now competes with calls to study the people - often at the bottom - who were left out of such histories. The sources of information

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[35] J.H. Hexter, "Historiography: The Rhetoric of History," The International Encyclopedia of the Social Sciences (New York: Macmillan/Free Press, 1968), Vol. 6, p. 373.

[36] Patrick Gardiner, "History: The Philosophy of History," The International Encyclopedia of the Social Sciences (New York: Macmillan/Free Press, 1968), Vol. 6, p. 432.

[37] Braudel, On History, p. 27.

[38] Charles Maier, The Unmasterable Past: History, Holocaust, and German National Identity (Cambridge: Harvard University Press, 1988), p. 98.

[39] Pierra Nora (Les lieux da la mémoire, Paris, 1984, p. xix), cited in Hobsbawm, Age of Empire, 1987, p. 1.

[40] Maier, The Unmasterable Past, p. 139.

perforce change as well because written history has frequently been that of the victors or rulers. The "social history" of the victims and the ruled has had to be written based on more ephemeral evidence, including artifacts and for the recent past, memory.

Oral history stands at the crossroads of history and memory, between the past as a record "open to relatively dispassionate inspection" compared to the past "as a remembered part of … one's own life."[41] The farther back in time, the more "the past is another country," which we today visit as strangers and outsiders, with our understanding of that past subject to the judgment and corrections of other strangers to that country.[42] But when there are surviving eyewitnesses, there may be clashing concepts of both history and memory. The official Great Patriotic War Against Fascism fought by the Soviet Union was a great deal less heroic to the wounded Russian soldiers on the battlefield of the (German) Eastern Front, for example, and some of the bitterness of personal memory lies precisely in the extent to which official versions of events ignore personal versions. Out of this bitterness also grow restitution and compensation claims. There can be such an emotional dissonance between historical account and remembered past that Holocaust history can seem "to refer to some other world, a realm from which both humanity and sense has been seamlessly removed."[43] At the same time, though memory can be powerful, it can also

[41] Hobsbawm, Age of Empire, p. 3.

[42] Hobsbawm, Age of Empire, p. 4.

[43] Mark Slouka, "Hitler's Couch," Harper's, Vol. 296 (No. 1775), April 1998, p. 53.

be inaccurate[44] and by definition is at best only one small and incomplete piece of a much larger picture.

One also ought not forget what the usual audiences are for historians. For academics, there is a captive audience of students who often want to learn about events but find themselves instead learning guild knowledge about the study of history, or in other words, historiography. Such craft knowledge is honed among an audience of fellow historians at conferences and through specialized journal articles. That audience will concur or dissent about how to interpret evidence, or follow trends in scholarship, and a some remove, debate the nature, direction and norms of the profession. In both cases, historians have audiences who hear a self-defined discourse.

Yet there is a far larger audience of non-academics who claim they are "interested in history," that that may evoke ambivalence among academically-trained historians. A Simon Schama or a Barbara Tuchman bestseller can make academic historians question (as they do more sharply about the work of "amateur" historians) whether scholarly canons have been adhered to (implication: only academic history is acceptable), thereby delegitimizing "popular" history – or at least mark it as somehow different from its more academic cousin. Success in crafting "popular" accounts indicates there is not just a market (and hence money to be made) for accessible writing on historical topics, but that historians might be valued for their efforts outside of academic contexts.

[44] A quote from the historian Fritz Stern in Roger Cohen, "A Peacemaker for the Germans," The New York Times, January 8, 2000, p. B9.

2. Who is interested in the Holocaust in America?

The sociopolitical context of the Holocaust in America forms another, quite different background for "litigating the Holocaust," one with (how could it be otherwise?) its own history. The word "holocaust" was long used but it was not until 1957, and then capitalized, to refer to the Nazi genocide. Survivors who reached the U.S. in the immediate postwar era did not want to dwell on their experiences, and a lack of emphasis on the specifically Jewish aspects of the Holocaust was due to worries about reviving anti-Semitism, because many Jewish organizations did not primarily concern themselves with survivor issues, and to Cold War fears.[45] Only with Hannah Arendt's report on the Adolf Eichmann trial in Jerusalem in 1961 (the same year Raul Hilberg's The Destruction of the European Jews was first published, and a good 15 years after World War II ended) did it become evident just how "unmastered" this past was, whether in terms of understanding the perpetrators (the "banality of evil" argument) or the victims (how could the Jews through their leaders cooperate in their own destruction?).[46]

The Israeli Six Day (1967) and Yom Kippur (1973) Wars were seen by some Americans as decisive proof that Jews were no longer victims and that enemies could be overcome, a sentiment some Israeli politicians tried to exploit, and these events may have made it easier to confront the earlier

[45] See Eva Hoffman's review of Peter Novick's book The Holocaust in American Life (Houghton Mifflin, 2000) entitled "The Uses of Hell," The New York Review of Books, Vol. XLVII, No. 4 (March 9, 2000), pp. 19-23.

[46] Hannah Arendt, Eichmann in Jerusalem (New York: Penguin, 1965 rev. ed.), pp. 11-12, 283-84.

"era of extreme vulnerability."[47] A stronger link between Holocaust remembrance and Jews in America, one can argue, was forged instead in the context of ethnic and identity politics of the 1970s. By the end of that decade, at least partly prompted by President Carter's desire to appease Jewish voters in the wake of the Camp David peace accords between Israel and Egypt, not only had discussions begun about the creation of a United States Holocaust Memorial Museum (USHMM) in Washington, but Congress had created an Office of Special Investigations in the Justice Department whose task was to find Nazi perpetrators in the US. The television series "Holocaust" was also first broadcast in 1978.

The 1980s were characterized by an intensification of what Bunzl calls the "quasi-religious identification with the Holocaust" among Jews in America, one paradoxical reason for which could be the very lack of focus that exists in a group rapidly assimilating into the larger culture and losing its distinctive character. Punctuated by controversies over President Reagan's visit to the Bitburg cemetery in 1985[48] and Kurt Waldheim's candidacy and election to the Austrian presidency in 1986,[49] this intensification was most evident in the sharp increase in both memorializing and studying the Holocaust. According to one tally, a veritable boom ensued in the 1980s that created 34 Holocaust archives, 25 Holocaust research centers, 20 Holocaust museums, 12 Holocaust monuments, 5 Holocaust

[47] John Bunzl, "Österreichpolitik und öffentliche Meinung in den USA," in: The Sound of Austria, John Bunzl, Wolfgang Hirczy, Jacqueline Vansant, eds. (Wien: Braumüller, 1995), p. 49.

[48] Geoffrey Hartman, ed. Bitburg in Moral and Political Perspective (Bloomington: Indiana University Press, 1986).

[49] John Bendix, "Why Didn't Waldheim's Past Matter More?" in: Cultural Strategies of Agenda Denial, Roger Cobb and Marc Ross, eds. (Lawrence: University Press of Kansas, 1997), pp. 183-202.

libraries and 3 specialized journals on the subject.[50]

Observers have been troubled by the "centrality of victimology in contemporary American identity politics"[51] of which this boom is a part. Native Americans and African-Americans had claimed special status on the basis of their past mistreatment, "and as a claim upon official memory, a victim's anguish comes to be seen as a valuable possession."[52] Since claims become associated with a group, other groups contest not only the claims for the special status accorded to victims but even how such claims are made.[53] The particularly Jewish form seemed rife with contradiction - intensely private sorrow mixed with public grief, in a form "ineffable, uncommunicable, and yet always to be proclaimed"[54] - and such contradictions filtered into American memorializations.

In addition, the USHMM is meant to "recast the story of the Holocaust to teach fundamental American values" such as pluralism, restraint on government, or the inalienable rights of individuals,[55] and perhaps also the message "it can't (or should never be allowed to?) happen

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[50] Henryk Broder, "Das Shoah Business," Der Spiegel 16/1993, pp. 248-56. So culturally marked was this phenomenon that Dom DeLillo parodied it in his 1985 novel White Noise; in it the main character, who speaks no German, invents the field of Hitler Studies.

[51] Philip Gourevitch, "Behold Now Behemoth. The Holocaust Memorial Museum: One more American theme park," Harper's, Vol. 287 (No. 1718), July 1993, p. 62.

[52] Maier, The Unmasterable Past, pp. 160-61.

[53] As a contemporary example, in response to Jewish reactions to the Pope's visit to Israel and recent apologies for the acts of the Catholic Church, the Grand Mufti of Jerusalem was quoted as saying that Israel "considers its pain more important than anyone else's" and that "the Holocaust is protecting Israel." Deborah Sonntag, "Mufti Says Israel Uses Holocaust for Sympathy," The New York Times, March 25, 2000, p. 20.

[54] Maier, The Unmasterable Past, p. 165.

[55] The quote is from Michael Berenbaum, project director of the Holocaust Memorial Museum during its planning and construction; Gourevitch, "Behold Now Behemoth," p. 56.

here."

The Americanization of the Holocaust at least at the USHMM is inevitable, since statistically its visitors will overwhelmingly be non-Jews learning about events that took place long ago and far away.[56] The device of issuing USHMM visitors identity cards of Holocaust victims to carry with through the exhibit speaks to the frequent American desire to understand events out of one's ken through the perspectives, experiences and story of an individual. In so doing, this museum marries private sorrow with public grief. American individualism applied this way obscures both the magnitude of genocide and the way Nazis selected victims not according to individual characteristics but according to their (asserted and assumed) membership in a group.

At the same time, the current 'quasi-religious identification with the Holocaust' runs the real danger of both excessive sanctification and trivialization, the latter even called "a crime against the victims themselves."[57] It is true that religions turn excessive sanctification into trivialization[58] - the medieval trade in Christian holy relics is a case in point - and it may be too strong to say that what is available for sale in the mail order catalog available from the Simon Wiesenthal Center's Museum of Tolerance in Los Angeles is religious kitsch. But the very existence of the

[56] Gourevitch feared as well that the USHMM would simply be treated as yet another "must see" stop along the Mall in Washington, seductive, fascinating, enormous, and exotic, but in some structural ways an entertainment no different from, say, the Air and Space Museum, even if the message of the USHMM inverts the rhetoric. The Air and Space Museum is what we stand for; the USHMM is what we stand against. See "Behold the Behemoth," pp. 61-62.

[57] Fritz Stern, cited in Roger Cohen, "A Peacemaker," p. B9.

[58] Hoffman, "Uses of Hell," p. 23. Maier (p. 216) cites an article in Tikkun (1987) by Adi Ophir, entitled "On Sanctifying the Holocaust: An Anti-Theological Treatise" that evidently argues in the same vein.

catalog indicates American Holocaust memorialization has not escaped American commercialization. Monetary aspects become even more troubling when Sam Belzberg, one of the financial backers of the Simon Wiesenthal Center is quoted as saying

> It's a fact that Israel and Jewish education and all other familiar buzzwords no longer serve to rally Jews behind the community. The Holocaust, though, works every time.[59]

Holocaust-related persecution fears (of renewed anti-Semitism, of old Nazis, of neo-Nazis) can all too easily be whipped up by Holocaust centers to bring in more money from donors,[60] leading to the peculiarly grim American joke that there's no business like the Shoah business…[61]

Part of what is difficult about this Americanization of the Holocaust is how differently it plays by generations. The survivor generation, silent in the 1950s, has emerged in fitful ways, in oral history interviews, in Claude Lanzmann's movie Shoah, in visits to schools by eyewitnesses wanting to let the next generation know first-hand what the horrors were. This private, individual reckoning with the past stands alongside the much more public and political identification during the 1970s (again: private sorrow mixed

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[59] The quote is reproduced (in English) in Bunzl, p. 52, citing an article by Teitelbaum and Waldman, entitled "The Unorthodox Rabbi" that appeared in LAT-Magazine, 15 July 1990.

[60] Other organizations, including the Southern Poverty Law Center, use the tactic of keeping fear levels up to good advantage.

[61] For a strongly worded protest of this tendency, see Richard Chaim Schneider, Fetisch Holocaust. Die Judenvernichtung - verdrängt und vermarktet (München: Kindler Verlag, 1997).

with public grief?). The Six Day War, Maier writes, "in effect moved the Holocaust higher on the agenda of memory, but reconsideration sometimes meant a more aggressive exploitation of the dead, a more exclusive property right in suffering."[62]

At that point, Americanized survivors' children had to decide whether to turn from, or embrace, this particular identification in the context of other societal groups making similar choices about how to address the past of the group they were connected with. A historicizing may have been inevitable in that context. Yet to that second, Americanized generation, the Holocaust trauma was that of their parents and took place in unrecognizable sociocultural milieus, or at least unrecognizable in the America of the 1980s. Prosecuting old men for long ago crimes seemed less urgent or important than coming to understand what the exhortation "never again" actually referred to. Lessons today, for the third generation and Americans separated by half a century from the events themselves, increasingly seem tinged by commercialization, if not superficiality. Any form of memorialization, after all, only highlights the distance between lived experience and cultural reproduction, with the reproduction in a museum creating an unavoidable distancing regardless of how much it encourages reverence. Perhaps the very effectiveness of the cultural reproduction of horror (in an America evidently fascinated by it) accounts for the fact that since opening in 1993 "the US Holocaust Memorial Museum has been the best-attended museum in American history."[63]

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[62] Maier, The Unmasterable Past, p. 164.

[63] Eva Hoffman, "The Uses of Hell," p. 19.

C. Historians for Hire?

When historians, particularly those who have devoted years to studying the Third Reich, suddenly find their services in demand,[64] it occurs against backgrounds of professional responsibility and dispassionate scholarship, as well as the very public, emotional commitments to addressing the Holocaust evident in the United States over the last decades. This might seem at first to be no more than a contrast between reason (as represented by academics, the rule of law, the "truth-finding" role of courts) on the one hand and the passions (as represented by victims, interest groups, companies worried about lawsuits and reputation) on the other. But between both stands the notion of interest, seen to partake in the better nature of each: the passion upgraded and contained by reason, and reason given direction and force by passion. The resulting hybrid is then considered exempt from both the destructiveness of passion and the ineffectuality of reason.[65]

In its more encouraging manifestations, the passions of some European companies to think well of themselves are being tempered by the enlightened realization by an (often younger and better educated) set of current directors that it may be very much in their interest to conduct a (rational!) search of their archives to recover, confront and if possible

[64] Barry Meier, "Chroniclers of Collaboration: Historians are in Demand to Study Corporate Ties to Nazis," The New York Times, February 18, 1999, p. B1; Christopher Rhoads, "Historians for Hire: Probes of Nazi Ties Are Creating a Boom," The Wall Street Journal, February 19, 1999; Ulrich Raulff, "Vor dem Archiv," Frankfurter Allgemeine Zeitung, 25 Februar 1999, p. 49.

[65] Albert Hirschman, The Passions and the Interests (Princeton: Princeton University Press, 1977), pp. 43-44.

master their own history – and then be able to move on.[66] Historians in turn would like to think their interest lies between reason and passion, but they face difficult choices. If hired to work on behalf of a class-action lawsuit, what a historian can provide may be used in a manner that stands at uncomfortable odds with a professional commitment to impartiality. If hired to investigate company history, that discomfort may be worsened by academic colleagues (already suspicious or disdainful of "business") who think they perceive a "sellout" particularly when the pay for the work is more than at the usual academic rates.

Historians would prefer to think of themselves as detectives questioning witnesses, as French investigative magistrates,[67] or as playing the judge "in the sense of providing a judgment about what actually was done and was known."[68] Such judgment emerges from long and painstaking investigation, as the historians' "primary purpose is not to determine guilt or innocence but rather to historicize, to evoke an understanding of human behavior in its context," and an understanding of mentality rather than sympathizing, since the very investigation of this particular part of the past may require a "suspension of disgust" rather than of disbelief.[69]

Historians may also face unpalatable choices when hired to investigate the Nazi past because of what it implies for how "history" is (or is to be)

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[66] Gerald Feldman, "The Business History of the "Third Reich" and the Responsibilities of the Historian," paper delivered at the Center for German and European Studies, University of California at Berkeley, on February 4, 1999.

[67] Maier, The Unmasterable Past, p. 62.

[68] Feldman, "The Business History," p. 12.

[69] Feldman, "The Business History," p. 13.

done. If historians provide only unadorned "facts" devoid of interpretation, thereby washing their hands of the uses these "facts" are put to, they fall back into antiquated models of historiography, for those "facts" do not speak for themselves. But if historians provide interpretations that are designed to strip away excuses or show complicity and how self-serving later exculpations were, they may veer too close to advocacy.

These same unpalatable choices are highly political, for providing "facts" has the reactionary potential of legitimating past choices (inasmuch as one can discern these choices) while exposing structures has a reformist or revolutionary potential in trying to delegitimate past choices.[70] Put differently, the presupposition in the law as well as in politics is that a clash of views will help determine the truth or guide ultimate choice. The presupposition in historiography is that sources are at best only partial guides, that an understanding of contexts and various sides are necessary, and that "objectivity, it if resides anywhere, dwells in the free exchange of evidence and criticism."[71]

In the cases we examine here, one can see how difficult this all is. In the VW case, with its clear contrast between the conclusions reached by Simon Reich (of a younger generation) compared with Gordon Craig (a doyen of German historians in the US), one comes closest to the historians' ideal. The conflicting interpretations then become a matter for the skilled

[70] I take this to be Maier's meaning when he writes of the "ambiguity of that methodology [of historicization] - its reformist summons to see through the structures and evasions of a society; its reactionary potential to justify the most destructive anxieties." Maier, The Unmasterable Past, p. 171.

[71] Jonathan Steinberg, The Deutsche Bank and its Gold Transactions during the Second World War (München: C.H. Beck, 1999), p. 12.

advocacy of the lawyers and the ultimate choice of a judge. The Siemens case is much less satisfactory, since the historians were cut off before they were even given a chance – unfortunate because a relatively substantial historiographic literature already exists on this company.

The Swiss banks cases present a rather different scenario, and not just because the archives only opened to historians as a result of legal and political action. Rather, this case points to the role of the historian whose presence and investigations carry a moral message, illustrating Schlegel's 1798 quip that the historian is a prophet in reverse. The religious allusion is relevant because the Swiss banks cases were about rendering judgment not so much about what was done, but about whether what was done (during the war as well as long after it) was morally right. The Harvard historian Charles Maier has suggested that "no matter what material or other public debts are paid, confessional memory is demanded as the only valid reparation."[72] If so, then there is a real role historians can play, and that is to present the evidence that unmistakably forces the confession of past acts, confessions perpetrators and their heirs, both public or private, would not make otherwise.

[72] Maier, The Unmasterable Past, p. 160. If he is correct, this would explain why the apologies of even so repentant a Pope as John Paul II are not sufficient, for apology is still not the same as confession.