

IVAN THE RECUMBENT, OR DEMJANJUK IN MUNICH

Enduring the “last great Nazi war-crimes trial”

By Lawrence Douglas

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At 7:00 A.M. the city is quiet, the sky still dark, but the plaza in the Nymphenburger Straße teems with TV and radio trucks, their generators humming. Hundreds of journalists and spectators stand waiting outside the courthouse, bundled against the cold. A rumor circulates that press accreditations have been issued far in excess of what the courtroom can accommodate, and the jostling begins. A policeman shouts unintelligible instructions as reporters grouse about the staggering absence of organization. Instead of cordons and an orderly queue, the police inexplicably have created a crude funnel, its mouth leading to a single doorway. A sign marks off the *Demjanjuk Sammelzone*—the DEMJANJUK COLLECTION ZONE.

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The fact that a crowd including Jews and a number of Holocaust survivors is being shoved in the direction of a single narrow portal creates resonances that

drab Lutheran chapel. Curiously, one sees no flags, either national or municipal, no scales-of-justice iconography, to indicate a court of law. There is nothing adorning the walls but a simple wooden cross.

And yet the atmosphere in the room is festive, as journalists from around the globe hustle to interview Nazi-hunting luminaries and leading members of the European Jewish community. Serge Klarsfeld, the Frenchman who helped net and prosecute Klaus Barbie, chats with Efraim Zuroff, director of the Simon Wiesenthal Center's

Jerusalem office. Holding forth to a pack of reporters is Michel Friedman, TV pundit and former president of the European Jewish Congress, wearing a black suit, shirt, tie, and an out-of-season tan.

The trial has been vaunted by the German daily *Süddeutsche Zeitung* as the “last great Nazi war-crimes trial,” a designation that misleads on almost every count. The defendant stands accused of assisting the SS in the murder of some 28,000 Jews at the Sobibor



can't be ignored. Perhaps the Germans themselves find reassurance in the disorganization. The SS was terrifyingly efficient. Not so the Munich police. Incompetence signals benevolence. *See, we have changed.*

After four hours of delay, screenings, and pat-downs, I finally enter *Gerichtssaal 101*, the largest and most secure courtroom in Munich. A windowless octagon with a tented ceiling of poured concrete, it is part air-raid bunker, part

death camp, but not of being a Nazi. Nor does the trial involve war crimes, since the systematic extermination of unarmed men, women, and children had nothing to do with the purposes of war. Then there is the question of greatness. Compared with the Nuremberg trials, the trial of Adolf Eichmann in Jerusalem, and the French trials of Barbie and Maurice Papon, the proceeding against Demjanjuk—a peon at the bottom of

More shocking still is his re-entry into the courtroom a few hours later, after the midday break. Gone is the wheelchair, and in its place is an ambulance gurney. Demjanjuk lies flat on this back, a blanket drawn—so it appears from my vantage point—over his head.

Journalists viewing this apparition scribble in their notebooks as a lawyer representing relatives of persons

Demjanjuk puts on a grotesque pantomime, a performance that lends new meaning to the term “show trial.” His mouth opens in a silent grimace; he grips his forehead; he struggles to moisten parched lips. Journalists exchange glances. The consensus is that he is faking it; the defense is overplaying the pity card.

In the coming weeks, Demjanjuk will remain inert, baseball cap pulled



the exterminatory hierarchy—appears extraordinarily inconsequential. And given that the defendant is a seemingly frail near nonagenarian and that sixty-six years have elapsed since his alleged crimes, the most remarkable aspect of the trial is the fact that it is being staged at all. And yet in putting Demjanjuk on trial, Germany has assumed a radical risk. An acquittal would be a highly visible and final demonstration of the utter failures of the German legal system to do justice to Nazi-era crimes. But whatever this trial is, it is likely to be the

last Holocaust case to galvanize international attention.

In *Gerichtssaal* 101 the chatter dies down as a back door opens. Flanked by two medical orderlies and a court-appointed doctor, Demjanjuk is maneuvered into the courtroom in a wheelchair. A sky-blue blanket is drawn to his chin, a blue baseball cap covers his brow. Cameras flash. It is not a sight to dignify jurisprudence: a helpless old man scowling before an onslaught of publicity.

murdered at Sobibor jumps to his feet and gestures at the gurney. “Excuse me, I’d like to know why he’s lying like that.”

A team of three doctors briefly confer, then one announces that the defendant has said he’s uncomfortable sitting.

“If the accused claims sitting is no longer possible, would it be possible at least to raise him?” the lawyer asks.

The doctor confers with Demjanjuk, who appears to reject the suggestion.

This brings Cornelius Nestler, a professor of criminal law and the lead lawyer for the victims’ families, to his feet. Nestler is keenly aware that this trial is more than a colloquy over evidence and law; it is a competition over what images will be transmitted around the world. “The picture this projects is most disconcerting.”

Eventually a compromise is reached: the defendant may remain on the gurney but propped at a 45-degree angle. For the rest of this first day of what will turn out to be a punishingly lengthy proceeding,

low over his brow, eyes hidden behind dark glasses. But the frowns of pain, the silent moans, will cease. Someone, it seems, has given him the message to tone it down.

IVAN THE TERRIBLE

The road backward from *Gerichtssaal* 101 toward some original point of complicity is long and serpentine, traversing the twentieth century’s dreariest bloodlands. The legal drama began in 1977, when the litigation department of what became the Justice Department’s Office of Special Investigations (OSI) filed a motion to strip one John Demjanjuk of Seven Hills, Ohio, of his U.S. citizenship. The Ukrainian-born Demjanjuk had emigrated to the United States in 1952, settling in suburban Cleveland, where he found work as a machinist at a Ford plant. On gaining citizenship in 1958, he legally changed his name from Ivan to John, then went about constructing a typical midcentury American life: raising a family, becoming active in the local Ukrainian church,

winning a reputation as an affable neighbor—"the kind of a guy who would stop to help you fix a flat on the road," someone who knew him remarked.

U.S. officials first learned of Demjanjuk in the mid-1970s, when a Soviet organization established to promote "helpful" cultural exchanges turned over a list of possible Ukrainian Nazi collaborators living in America. This information suggested that Demjanjuk, after

later settled in Israel, prompting the OSI to ask the Israeli police's assistance in identifying the former guard. The goal was not to bring criminal charges against Demjanjuk, since American courts lacked jurisdiction. But Section 340 of the Immigration and Nationality Act made it possible to revoke citizenship obtained through "willful misrepresentation"; OSI officials hoped to denaturalize Demjanjuk

radio. As Marx observed, history has a way of repeating itself, appearing first as tragedy, then as farce. So it was with the trial of Ivan the Terrible that began in Jerusalem in 1987, which similarly aimed to use the courtroom as a way of teaching the larger history of the Holocaust. This aim succeeded in the case of Eichmann, as the dour defendant had been an efficient and tireless facilitator of a continent-wide campaign of genocide. In the case of Demjanjuk, who presented himself as a burly buffoon, an affable oaf who entertained his jail guards with bits of mangled Hebrew, this effort went terribly astray. His defense was simple: the Israelis had the wrong man. On the stand, he insisted that he never trained in Trawniki and never served as a guard, but had survived the last years of the war in a German labor camp. He was a pathetic witness on his own behalf, his story riddled with improbable gaps and contradictions. His lawyers—paid by an American real estate agent with ties to Holocaust-denial groups—committed numerous blunders, none more calamitous than the decision to challenge the authenticity of the Trawniki ID. Whereas the prosecution's document experts attested persuasively to the card's authenticity, the defense's expert collapsed under cross-examination and later tried to kill herself for having lied about her credentials.

Yet it was the three-judge tribunal, presided over by a sitting member of Israel's Supreme Court, that committed the worst missteps. In an astonishing gesture, the court couched its task in terms more fitting for a public memorial than a legal verdict, pledging to "erect in our judgment, according to the totality of the evidence before us, a monument to [the victims'] souls, to the holy congregations that were lost and are no more." As for the evidentiary basis of that judgment, the tribunal explained away the troubling fact that only Sobibor was listed on the defendant's Trawniki card by speculating that Demjanjuk might have worked at both camps, shuttling back and forth between them—though it found no record of such simultaneous service. The idea that there could have been "two *Wachmanns* from Trawniki, one in Treblinka and one in Sobibor, both Ukrainians named Ivan ... both with protruding ears, both



he was taken prisoner by the Wehrmacht during the German invasion of the Soviet Union, had worked for the SS as a guard at Sobibor, an extermination facility set up in Poland in the spring of 1942. The crucial piece of evidence was a copy of an ID card issued at Trawniki, an SS facility designed to prepare specially recruited Soviet prisoners of war for service as SS auxiliaries. Approximately 5,000 Estonians, Latvians, Lithuanians, and, most of all, Ukrainians passed through Trawniki in its three years of operation, on their way to "supervisory" duties in the elimination of Poland's Jews. Trawniki ID No. 1393 had been issued to *Demjanjuk*, *Iwan*. The ID included a photo of what was unmistakably a youthful Demjanjuk and indicated his service as a *Wachmann*—guard—at Sobibor.

Sobibor was a tiny camp, staffed by twenty to thirty SS men and one hundred to one hundred and fifty Trawniki-trained guards. This small group oversaw the murder of a quarter million Jews. Most of the handful of Sobibor's survivors—only a few dozen—

and deport him to a country that could try him.

To the surprise of the Israeli police, the Sobibor survivors failed to pick out Demjanjuk's Trawniki photo—yet several Treblinka survivors, enlisted to assist a completely unrelated investigation, reacted strongly to it. Here, they declared, was none other than the notorious operator of the Treblinka gas chamber, a guard whose unusual viciousness had earned him the sobriquet Ivan Grozny: Ivan the Terrible. Israeli investigators were initially skeptical, since the Trawniki card clearly placed Demjanjuk at Sobibor. But when more and more Treblinka survivors identified him as Ivan the Terrible, the investigators became convinced. And so on February 27, 1986, Demjanjuk—his American citizenship revoked and an extradition petition accepted—found himself on an El Al 747 bound for Israel.

Like the earlier proceeding against Eichmann, Demjanjuk's trial was staged in a public theater hastily converted into a courtroom and broadcast live on TV, the way Eichmann's had been on

the same age and both becoming bald in the same way," was simply too "far-fetched." The court convicted Demjanjuk and sentenced him to death.

No one had been executed in Israel since Eichmann in 1962; in fact, the death penalty had long been abolished for all but the most extreme crimes, such as genocide. Demjanjuk's appeal dragged on for years, and the delay benefited him, as the unraveling of the Soviet Union freed up evidence long hidden behind the Iron Curtain. This information supported a conclusion the trial court had refused to take seriously. It now appeared that there had been two Ukrainian Ivans, one at Sobibor and one at Treblinka. This evidence named Ivan the Terrible as one Ivan Marchenko, a Treblinka guard last seen fighting with Yugoslavian partisans in the Balkans.

This information did not entirely exculpate Demjanjuk; if anything, it only strengthened the possibility that he had served at Sobibor. But it did suggest that Israel was about to execute the wrong man as Ivan the Terrible of Treblinka. In July 1993, the Israeli Supreme Court voided Demjanjuk's conviction, and nearly seven years after his extradition, he found himself back in Cleveland; in 1998, his U.S. citizenship was reinstated. The OSI meanwhile was doubly embarrassed by the collapse of the Israeli case and by a U.S. court's finding that it had suppressed evidence during extradition casting doubts on the case against Ivan the Terrible. Driven to vindicate itself, the OSI brought a fresh round of denaturalization proceedings against Demjanjuk, this time based on the Sobibor evidence. This effort succeeded in 2002, but now the United States could find no country willing to accept the stateless former Ukrainian. Years passed, while Demjanjuk exhausted his legal remedies and his money. Finally, German prosecutors expressed a willingness to bring charges, and on May 11, 2009, Demjanjuk was put onto a government jet and flown to Munich.

Compared with American court proceedings, a German criminal trial is extremely informal. There is no written transcript. Evidentiary rules

are minimal. Hearsay is admissible, and so is a history of past convictions. Almost wholly lacking are the TV-style theatrics that inform American court lore. There are no passionate opening statements and folksy summations designed to sway a jury, for the simple reason that there is no jury. Trials of any significance are decided by a body that consists of three judges and two *Schöffen*, or lay deliberators. The presiding judge in the Demjanjuk trial, Ralph Alt, is a tall, glisteningly bald, and tidily bearded jurist in his early sixties. Soft-spoken and scholarly, with a passion for chess, Alt has the reputation of being a thorough, intelligent jurist, but he lacks previous experience with Nazi-era cases. Perhaps as a consequence, he remains intent on treating the proceeding like any other criminal case before an ordinary German court, an approach that, as the coming months will reveal, will permit the defense to all but derail the trial.

As the presiding judge, Alt largely controls the flow of information before the court and assumes much of the burden of examining witnesses. The prosecution's primary duty, the drafting of the indictment, is completed by the time the trial starts, and once the lead prosecutor finishes reading the indictment, a task he performs while seated and in a near monotone, he will barely utter another word in court.

The Demjanjuk indictment, though flatly presented, nonetheless contains a highly unorthodox legal argument that is for the most part based on the research and work of a jurist named Thomas Walther. A wild-haired sixty-six-year-old whose gaze holds a touch of Dennis Hopper-like monomania, Walther was, until five years ago, a municipal court judge facing a cushy retirement. But after stepping down as a judge, he stunned his colleagues by taking a job as an investigator with Germany's Central Office for the Investigation of Nazi Crimes. His motivations were of the deeply personal nature one often finds among Germany's immediate postwar generation. In 1939, Walther's father, who ran a construction firm, had hidden two Jewish families in an overgrown garden and helped them escape Germany. "I hoped to leave a similar example for my children," he told me.

After joining the Central Office in 2006, Walther turned his attention to the Demjanjuk file, which was collecting dust in the Office's Ludwigsburg headquarters. According to this file, largely the fruit of the OSI's investigations, Demjanjuk was born in 1920 in Dubovi Makharyntsi, a tiny village in western Ukraine. He worked for a time as a tractor driver on a Soviet collective farm. Drafted into the Red Army, he was taken prisoner by the Wehrmacht in May 1942 and sent to a POW camp in eastern Poland. None of these facts were, or are, in dispute. From here, however, the file tells a story very different from the one Demjanjuk has been repeating for decades. Soon after his capture, Demjanjuk was selected by the SS to train at Trawniki, where recruits received instruction in the use of weapons and the techniques of herding and guarding concentration-camp prisoners, as well as in the barked orders of command German—*Achtung! Raus! Mach schnell!* His training completed, Demjanjuk was posted to the Majdanek concentration camp, near Lublin. On March 27, 1943, he was transferred to Sobibor, where he remained until mid-September 1943; thereafter, he was assigned to Flossenbürg, a concentration camp in Bavaria, where he served until the end of the war.

Although no Sobibor survivor has ever been able to identify Demjanjuk, the fact that he served there seems irrefutable when coupled with the evidence of his service at Majdanek and Flossenbürg, which is solidly documented. SS records from Majdanek describe an episode of misconduct in which *Wachmann* Demjanjuk left the grounds without permission during a typhus lockdown, an infraction that earned him twenty-five lashes. And an examination of records from Demjanjuk's postwar years as a Displaced Person in Landshut, northeast of Munich, has turned up a surviving Flossenbürg guard named Alexander Nagorny, also a Trawniki man, who served with Demjanjuk—and who later testifies at trial.

Still, German prosecutors long balked at the idea of bringing charges against Demjanjuk, and even the present indictment conspicuously avoids charging him with any crimes associated with his lengthier and better documented service at Majdanek and Flossenbürg. The rea-

son is simple: mere service as a concentration-camp guard has never been deemed a crime under German law. Walther's breakthrough argument, which he developed with a colleague, Kirsten Goetze, and which became the basis for the indictment, is equally simple. Sobibor, Walther and Goetze insisted, was and is different. Unlike other camps—such as Majdanek and Flossenbürg—where inmates served as slave laborers, Sobibor was purely an extermination facility, whose sole purpose was to murder Jews. Even in the case of Auschwitz, which had been a hybrid facility—part death camp, part labor camp—it would be hard to say, absent actual proof, what exactly a guard's specific responsibilities had been. But not so with Sobibor. Everyone who served there *had* to be involved in the killing process. The numbers are telling. Of the 1.2 million persons sent to Auschwitz, about 100,000 survived; of the approximately 1.3 million Jews sent to the extermination facilities of Treblinka, Belzec, and Sobibor, no more than 125 lived. It shouldn't matter, then, that prosecutors lack evidence about Demjanjuk's specific behavior at Sobibor. The fact alone that he served as a *Wachmann* at a death camp should suffice to prove guilt. Sobibor guards were accessories to murder because facilitating murder was their job description.

It is an elegant theory, and yet in the six-decade history of the Federal Republic, no court has come close to adopting it. As one expert, Christiaan Rüter, ruefully notes at the trial's outset, "It is entirely bewildering how anyone familiar with the German legal system could expect a conviction of Demjanjuk with this evidence." Politically and culturally, Germany is the model of national self-reckoning, its monstrous past the subject of countless memorials, films, symposia, and other public discussions. But its courts have a pitifully thin record of bringing Nazi perpetrators to justice. The obstacles to prosecutorial success have been formidable: former Nazis continued to occupy positions of prominence in the judiciary; German jurists barred all prosecutions for crimes against humanity and genocide, speciously arguing that because these incriminations were not formally recognized until after the war, their application to Nazi crimes would be *ex post facto*. And so the most

serious offense that any Nazi-era criminal could be charged with was murder.

Regarding murder, German law long drew a bizarre distinction between perpetrator (*Täter*) and accessory (*Gehilfe*). The physical act of killing—pulling the trigger, for instance—did not itself guarantee designation as a perpetrator. Only if one killed, or authorized killing, out of base motives *and* demonstrated "individual initiative" in doing so did one qualify. In effect, the German penal code made the Holocaust, insofar as it represented murder, the work of only three men—Hitler, Himmler, and Heydrich—and transformed every death-camp functionary into a mere accessory. To be found guilty as a perpetrator, a camp official had to have been an *Exzeßtäter*, one who killed without orders to do so; or, to put it another way, one who killed in violation of the law *in effect under the Nazis*. In judging those who operated the machinery of death, postwar German courts actually employed SS standards of legality, designating as perpetrators only those individuals who could have been condemned by the SS's own tribunals.

In a trial involving such superannated crimes, it is easy to forget that the devastation they caused remains the stuff of memory. German criminal procedure permits victims and their families to attach themselves to prosecutions as *Nebenkläger*, or "lay accusers." Early in the Demjanjuk trial, two dozen relatives of victims murdered at Sobibor arrive in *Gerichtssaal* 101. Almost all are Dutch: during the five months of Demjanjuk's service at Sobibor in 1943, most of the Jews murdered there—at least 28,000 of them—came from the Netherlands. *Nebenkläger* enjoy many rights, including the right to legal representation, and the testimony of the Dutch contingent provides the trial with its most moving moments. Rudie Cortissos, seventy years old, produces a letter that his mother wrote from Westerbork, a Dutch transit camp, in the hours before her deportation to Sobibor; tossed into the street without a stamp, the letter somehow made it to his house. When the presiding judge asks to see the letter, Cortissos breaks down, as if fearful that the

court will keep it. David van Huiden testifies that his mother, stepfather, and sister were murdered at Sobibor. At the time his family was seized, he had been sent out to walk the family dog, a German shepherd. "Nobody figured a Jewish boy would be walking a German shepherd, so I wasn't stopped. Neighbors took me in." In excellent German he ends his narrative politely, "Thank you for giving me the opportunity to say something."

Not all the *Nebenkläger* get this chance. Martin Haas, seventy-three, a professor of medicine at UC San Diego, has flown in from California to tell the court about the murder of his mother, sister, and brother. He is only partway through his story when Demjanjuk's lawyer rises to remind the court that the afternoon session is over. Haas can resume his narrative the next morning. But the next morning the defendant is a no-show. Demjanjuk, we are informed, has woken up with a headache and a slightly elevated temperature. Court for the day is canceled.

So begins a pattern that will plague the trial. The physicians who examined Demjanjuk upon his arrival in Germany recommended a court schedule of two ninety-minute sessions per day and no more than three days per week. Yet even this abbreviated timetable is apparently too much. Again and again the proceeding will yield to the defendant's headaches, joint aches, chest pains, vertigo, dehydration, and general unwellness. As these cancellations grow in number, so too does suspicion that the defense is stalling, in the hope that Demjanjuk will be declared unfit and the trial called off. Eventually, even the mild Judge Alt will lose patience, responding to the news that "Herr Demjanjuk doesn't feel well today" by observing drily that "many people on trial do not feel well," and ordering him to appear anyway. But for now he defers to the defendant. The trial is scheduled to resume in three weeks—*Gerichtssaal* 101 is needed for other cases—which means that if Martin Haas wants to finish his story, he will have to fly back again from San Diego. In the end he chooses not to, and is denied this belated chance to testify in open court.

Those called to describe their memories of the camp fare no better. Thomas Blatt and Phillip Bialowitz represent a

quarter of the remaining Jewish survivors of Sobibor on the planet. On October 14, 1943, the camp's inmates staged an uprising. Three hundred managed to escape, of whom fifty or so were alive at war's end. Blatt is a famous figure in Holocaust circles, having written two books on Sobibor. We are staying in the same hotel, and on the night before he is to testify, I bump into him in the lobby, where he is sitting in a lounge chair reading a Polish book entitled *Shtetl*. I have just spent the better part of the day reading his book on the Sobibor uprising, and I invite him to dine with me in the hotel's restaurant.

Blatt is a small man of eighty-three, with tidy features and skeptical blue eyes. He has lived in California for more than fifty years but still speaks with a heavy Yiddish accent—the same, nearly extinct accent of my grandfather, who died decades ago. A mysterious aura of history hovers about Blatt. Over dinner he tells me about the town where he grew up. “Ibicza was the only town in all Poland without a church,” he says. “There were 3,600 Jews and only 200 Poles. On Friday nights before the Sabbath the whole town smelled of kerosene because the Jews were too poor to afford soap and used kerosene to wash their hair and kill the lice.” About Demjanjuk he has little to say. “He’s an old man. If he’s convicted is not so important. Whatever happens, he cannot go back to his home in Cleveland. That is punishment enough. What’s important is for the victims to tell their story, to tell about Sobibor.” All at once he volunteers that he himself has been sleeping badly and, despite antidepressants, is often bothered by thoughts of suicide. “Then I take a shower, so hot you could cook an egg. That helps.”

The following morning the courtroom, less than full in recent days, is once again packed, security extremely tight. Blatt looks exhausted and withdrawn. The court has invited him to describe life in the camp, and furnishes an interpreter to translate its questions into English and his responses into German. But Blatt refuses to use the interpreter, and his testimony emerges in a mishmash of English, German, and Yiddish, a linguistic goulash that leaves the court bewildered. “I tell how war ist möglich so viele millions in so kurzer

Zeit to murder.” “Wir arrived in Sobibor on trucks and wir sehen, es war shayn!” “Straight to the gas chambers, the Leute waren dead.” Judge Alt regards Blatt with sympathy, but Thomas Lenz, the youngest of the three judges, a supercilious figure with thickly gelled black hair, can barely control his irritation. His questions are sharp. “In your book, Mr. Blatt, you include diary entries. Was this a diary that you kept contemporaneously, or was this a diary that you later imagined?”

“Meisten my own memory gehabt”—mostly I had my own memories, an answer that clarifies nothing.

His only clear response comes in response to Alt’s question: Can he identify the defendant?

Blatt sighs. “I can’t remember the face of my own mother and father.”

It is his clearest response, and his most poignant. Yet the weakness of memory is not the problem on display. A professional survivor, Blatt has been interviewed so many times, has given so many lectures to schools and synagogues and civic centers, has appeared as a witness in so many cases and served as consultant to so many documentaries, that he can no longer distinguish between original memory and the memory of memory.

Then came the questions of Ulrich Busch, Demjanjuk’s lead lawyer. Busch is not content with challenging Blatt’s testimony. Brazenly, he attempts to draw a moral equivalence between the survivor and his client. At Sobibor the typical life span of a newly arrived Jew was about two to four hours. But a tiny fraction, Blatt among them, were selected to serve the staff and maintain the camp; these were skilled carpenters, masons, tailors, and shoemakers, and those capable of hard labor. How, Busch asks, did a boy of fifteen manage to be chosen for work in the camp? Did he “volunteer,” just as some Ukrainians may have “volunteered” as guards?

Blatt doesn’t seem to notice the ugly cynicism in the phrasing of the question. The word Busch uses for “chosen,” “*ausgewählte*,” is typically reserved for the expression “*das ausgewählte Volk*”—the Chosen People. But he resists the thrust of Busch’s question. “Ich bin das selber wie the

mann over there? Nur ein idiot könnte das sagen”—“I’m the same as the man over there? Only an idiot could say that.”

Demjanjuk’s defense team consists of two court-appointed lawyers. Günther Maull, a bald seventy-three-year-old with a taste for black shirts and burgundy ties, remains for the most part a passive figure, letting Busch, who has personal connections to the Demjanjuk family, do the heavy lifting. Gigantic, bearded, and frequently disheveled, Busch is an excitable man with a choleric temper. At critical junctures his face reddens in a frightening, infarction-heralding manner, as if it is he, and not his client, who is about to succumb to the stresses of the trial. The defense will inundate the court with 515 motions to dismiss or to delay. Virtually all will be denied.

Today Busch reads from a motion to dismiss on grounds of *Befangtheit*—prejudice. Motions alleging prejudice typically are brought against a specific judge for conflicts of interest. Busch’s motion, however, is directed against the entire German judicial system. It introduces a charge he will repeat over and over: the German legal system is trying to make good on its pathetic record of dealing with Nazis by trying a man who was neither a German nor a Nazi. New standards are being used against his client. The rules of the game are being changed.

There is some truth to this. No amount of research has ever established a single example of a German executed during the Nazi era—or even severely punished—for asking to opt out of genocide. Yet for decades German courts trying former Nazis were exceptionally receptive to the defense of “putative necessity.” In contrast to a pure necessity defense, which must show that the defendant had no choice but to engage in the criminal act, putative necessity must show only that the defendant *believed* he lacked choice, and that this belief, even if erroneous, was reasonable under the circumstances. This defense led to the 1966 acquittal of Erich Lachmann, an SS sergeant in charge of the Trawniki guards at Sobibor. A decade later, a Hamburg court acquitted Karl Streibel, the former commandant of Trawniki, and five

other SS functionaries at the camp of all criminal charges, reasoning that the evidence failed to prove that the commandant and his support staff knew the nature of the work for which their trainees were being prepared. Such rulings fuel Ulrich Busch's outrage. He never tires of reciting a litany of Nazi perpetrators set free by German courts or never tried in the first place. How, he rails, can a system that acquitted Streibel convict Demjanjuk?

The problem with this argument isn't that it's wrong but that it draws a false implication. Courts, like other institutions, learn over time. Demjanjuk's lawyers may bemoan the fact that the German legal system has decided to use his case as an occasion to self-correct, but they can hardly claim he has suffered an injustice as a consequence. The fact that others were wrongly acquitted does not grant him immunity from prosecution. Logic alone, however, doesn't deter Busch. "Let us not forget," he cries, "that my client already spent over six years in an Israeli prison, including four awaiting execution. And this for a case of mistaken identity!" Far from being a criminal, Busch argues, Demjanjuk was as much a victim of the Nazis as was Thomas Blatt—a statement greeted with hisses from spectators and journalists alike.

Is Busch tone-deaf, or does he relish such provocations? Freud famously told the story of a man who, charged with breaking a borrowed teakettle, insisted, "In the first place, he had returned the kettle undamaged; in the second place, it already had holes in it when he borrowed it; and in the third place, he had never borrowed it at all." Busch's defense has a similarly overdetermined quality. During the course of the trial he argues, *seriatim*, that the trial is a political show; that his client is fully innocent; that he never trained at Trawniki; that he never served as a guard at Sobibor or, for that matter, at any other camp; and that, even if he had, he had no more choice in it than did the Jews who worked at the camp.

The claims of innocence force the court to revisit issues that have been considered *ad nauseam* over the decades, including the authenticity of Demjanjuk's Trawniki Service Card, by now surely one of the most thoroughly examined documents in legal history. A Ger-

man documents expert, Anton Dallmayer, is able to identify the typewriter responsible for the information typed on the card, an Olympia 12 manufactured in Erfurt. The ID is clearly authentic, Dallmayer testifies, a conclusion supported by his painstaking comparison of Demjanjuk's card with three other Trawniki service IDs.

Busch offers another teakettle explanation for these similarities. Perhaps, he speculates portentously, *all four cards are KGB forgeries.*

Rebecca West described the Nuremberg trial as a "citadel of boredom," and perhaps tedium is the invariable result when the expectation of spectacle collides with the reality of law's dullness. The Demjanjuk trial is no different. Its beginning is a heady time: the court is packed, drama is in the air, nerves bristle. As weeks and months pass, however, the trial settles into a routine. Spectators come and go, as do journalists and tourists. A steady stream of classes make their way into *Gerichtssaal* 101, but it isn't always clear who or what is being taught. A group of sixteen-year-olds studying to be hairdressers at a nearby vocational school spend thirty minutes in befuddled attendance, then are replaced by a class of tenth graders from a local *Gymnasium*. I ask a boy in lime-green surfer shorts what the trial is about.

"Nazis," he says, with a shrug.

Yet the boredom masks an underlying anxiety and a deepening pessimism. If the court is to convict, it must find not only that Demjanjuk was involved in the extermination process but that he acted voluntarily. This is ultimately a legal question that the court alone can answer, but it turns to a historian for help. Dieter Pohl, whose boyish sandy-brown hair and eager graduate-student demeanor belie his distinguished position at Munich's Institute for Contemporary History, has written extensively on the experience of Ukrainians during the war. Pohl testifies that by the time Demjanjuk was captured in the spring of 1942, Hitler had decided that Soviets taken prisoner should not be killed or starved to death, but instead integrated into the labor force in Germany—a decision designed in part to compensate for Jewish labor lost to genocide.

Conceivably, Pohl concedes, Demjanjuk might not have known of these improved prospects at the time of his transfer to Trawniki. Nor would he have necessarily known in advance that he was to be trained as a death-camp guard. Once he arrived at Trawniki, however, the nature of his assignment would have been clear, since the facility included a small Jewish slave-labor camp that permitted recruits to practice "pacifying" Jews. And the purpose of Sobibor itself would have been immediately obvious to an arriving *Wachmann*. According to Pohl, *all* Trawniki men were mobilized when trainloads of Jews arrived: some served guard-tower duty, while the rest manned the train ramp and ran the well-rehearsed process of destruction. In this regard, all Trawniki men facilitated the camp's sole function—the mass killing of Jews. This point is crucial: were the defense able to demonstrate that some Trawniki men worked, say, *only* as cooks, Walther and Goetze's novel theory of wrongdoing would be weakened. But Pohl's testimony strongly supports the prosecution's contention that Sobibor guards were accessories to murder because *that was their job*.

In assessing the voluntariness of Demjanjuk's service, the court focuses on one question: Was there a meaningful opportunity to flee? Peter Black, a historian at the U.S. Holocaust Memorial Museum, has estimated that of the 5,000 Trawniki men, up to one fifth—fully one thousand men—deserted. Neither he nor Pohl can peg the desertion rate at Sobibor, since its records were largely destroyed. Nonetheless, documents from other death camps suggest that of the Trawniki who fled and were caught, only those who deserted with their weapons faced possible execution while those who left weapons behind typically suffered less draconian punishment and were reassigned as guards. Does this tell us that Demjanjuk served voluntarily? The trial will turn on the court's answer. If it ever has the opportunity to provide one.

Among observers, lawyers, and the *Nebenkläger*, doubts take root and grow. The trial, expected to last five months, pushes on for well over a year. The long gaps between court dates, the frequent cancellations due to the defendant's al-

leged infirmities, and most of all the endless barrage of frivolous but time-consuming motions and filibustering arguments that issue from the defense threaten to derail the proceeding altogether. Busch has transformed himself into the second coming of Slobodan Milošević, who succeeded at dragging out his trial in The Hague to literally terminal lengths. Stall and die seems to be the strategy.

However clownish Busch appears at times, his tactics have boxed Judge Alt into an awkward position. Alt must be careful not to let himself be provoked into actions that might open the door to an appeal. He does not always succeed. When Busch pushes a witness to explain whom exactly the Trawniki men assisted at Sobibor, Alt sardonically quips, “Presumably not the Red Cross,” as laughter ripples through the gallery. And during Busch’s summary argument—a rambling, mind-numbingly repetitious diatribe that lasts an incredible fifteen hours—*Nebenkläger* lead lawyer Nestler briefly leaves the courtroom in disgust, leading Alt to comment, “Unfortunately, the court cannot leave out of protest.” The remark, audible to all, is incautious. The trial has brought out in the mild-mannered chess aficionado a different side, prickly and sarcastic. He wants to be done with it.

THE END OF SOMETHING

And then, suddenly, we are there. May 12, 2011, 1:30 P.M. The three judges and two *Schöffen* file back into *Gerichtssaal* 101. After ninety-three open sessions over eighteen months, their deliberations have lasted little more than two hours—not altogether unusual for a German court, which discusses the case while the trial is ongoing. The defendant is brought before the judges in his wheelchair. He does not remove the dark glasses that have obscured his eyes for the past year and a half. Judge Alt pronounces judgment. The court finds John Demjanjuk guilty of serving as an accessory to the murder of at least 28,060 Jews at the Sobibor death camp. It condemns him to five years in prison. Then, as if in an afterthought, it releases him, pending appeal. No gavel sounds the end of the trial. The judges collect their binders and quietly exit the room.

People linger in the courtroom and the hall outside. It’s as if no one is quite prepared to bring the most convoluted and lengthy case to arise from the crimes of the Holocaust to an end. Speaking to reporters, Ulrich Busch announces his intention to lodge an appeal. The *Nebenkläger*, for their part, express satisfaction with the verdict. Their responses convey relief that the trial has finally concluded in a conviction, and melancholy that it failed to live up to the impossible expectations that burdened the proceeding.

In the hours and days to come, media coverage in Europe and America will reflect this same mix. Rabbi Marvin Hier, head of the Simon Wiesenthal Center, will call Demjanjuk’s release “an insult to his victims and the survivors,” while Deborah Lipstadt will opine, in the *New York Times*, that justice has been served—that however slowly its gears turn, turn they do. Others will speak of the “closure” the verdict represents for victims’ families, as if the success of a criminal trial might be measured by its therapeutic value. For their part, German prosecutors will eagerly announce their intention to use the fresh precedent to reopen dozens of cases against camp guards and officials even as they privately express doubt that any will go to trial.

Lost in the commentary is any recognition that in its modest, Solomonic verdict, Alt’s court has managed something no German court had since the founding of the Federal Republic. “‘Mass murder and complicity in mass murder’ was a charge that could and should be leveled against every single SS man who had ever done duty in any of the extermination camps”: Hannah Arendt wrote these words in the 1960s, and no German court paid heed—until now. It took until 2011 for the judicial system to digest the simple, terrible logic of the exterminatory process. That this belated understanding should coincide with the passing of the generation of the perpetrators is as ironic as it is unsurprising.

Some years ago I lived for a while in Berlin, and within a hundred yards of my apartment were three separate monuments to Nazi atrocity: a brass cobblestone memorializing a Berlin Jew deported to Auschwitz; a sculpture,

called *Treblinka*, of what appeared to be a stack of waffles but was, on closer inspection, a pile of stylized corpses; and a plaque, affixed to an attractive apartment house, informing passersby that in this lovely building thousands of innocent persons were condemned to death during the Third Reich. With such efforts of commemoration, Germany has addressed the task known as *Vergangenheitsbewältigung*—confronting the past.

A Holocaust trial confronts the past in the living form of a defendant: Demjanjuk, old man, historical relic, and persistent dissembler. Outside *Gerichtssaal* 101, many observers express a fervent wish that he had chosen to speak—not to confess, not even to apologize to the families of those who died there, but simply to acknowledge the enormity of the dreadful events in which he had participated. “My dream,” says Thomas Walther, “would be for Demjanjuk to stand up and say, ‘It was so.’” The same wish is voiced by Hardy Langer, a lawyer for the *Nebenkläger*, who in his closing argument spoke straight to the defendant: “Find the strength to give us a detailed account of what you experienced,” he beseeched. “Demjanjuk, use this last chance to break your silence!”

But Demjanjuk has stubbornly demurred. Throughout his trial, the defendant presented himself as an inert mass—“Ivan the Recumbent,” journalists dubbed him, “Ivan the Corpse.” Several days after his release pending appeal, Demjanjuk is photographed strolling the grounds of a Bavarian nursing home, no wheelchair in sight, but his silence remains implacable. His only direct statement came early in the proceeding, when he irritably snapped at a film crew outside the court, “What’s up? I’m not Hitler.” At trial’s end, asked by his judges whether he desired to make a final statement, Demjanjuk muttered a single word to his Ukrainian interpreter: *Ne*.

Ne. As Shakespeare understood, silence is the criminal’s last retort, his dying blow against the righteous. *What you know, you know: From this time forth I never will speak word*. Now history shuts the door, and that last chance vanishes. It was never Demjanjuk’s chance, anyway, but ours, and it will not be answered. The last trial closes, an end without an ending. ■