HOLOCAUST DENIAL *and the* LAW

[A COMPARATIVE STUDY]

by ROBERT A. KAHN

Holocaust Denial and the Law

A Comparative Study

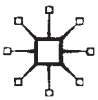
This page intentionally left blank

Holocaust Denial and the Law

A Comparative Study

Robert A. Kahn

palgrave
macmillan



First published 2004 by
PALGRAVE MACMILLAN™
175 Fifth Avenue, New York, N.Y. 10010 and
Houndmills, Basingstoke, Hampshire, England RG21 6XS
Companies and representatives throughout the world

PALGRAVE MACMILLAN is the global academic imprint of the Palgrave Macmillan division of St. Martin's Press, LLC and of Palgrave Macmillan Ltd. Macmillan® is a registered trademark in the United States, United Kingdom and other countries. Palgrave is a registered trademark in the European Union and other countries.

ISBN 1–4039–6476–9 hardback

Library of Congress Cataloging-in-Publication Data
Kahn, Robert A. (Robert Andrew), 1963–
Holocaust denial and the law : a comparative study / Robert A. Kahn.
p. cm.
Includes bibliographical references and index.
ISBN 1–4039–6476–9 (HC)
1. Nuremberg Trial of Major German War Criminals, Nuremberg, Germany, 1945–1946. 2. War crime trials. 3. Holocaust denial. 4. Comparative law. I. Title.

KZ1176.5.K34 2004
341.6'9'0268—dc22 2003063202

A catalogue record for this book is available from the British Library.

Design by Newgen Imaging Systems (P) Ltd., Chennai, India.

First edition: June 2004
10 9 8 7 6 5 4 3 2 1

Printed in the United States of America.

Contents

This page intentionally left blank

Preface

The idea for this book came almost ten years ago when I was a graduate student studying comparative politics at Johns Hopkins University. The early 1990s saw an outpouring of books applying American principles of constitutional democracy to the new democracies of Eastern Europe. In this flurry of books on constitutionalism, I noticed a major gap. Few authors described how constitutional rights played out in the concrete context of a single, high-profile trial. Then I had the good fortune to stumble across John Langbein's 1978 textbook *Comparative Criminal Procedure: Germany*,[1] which describes the manslaughter trial of Dr. Brach. Reading Langbein's account (borrowed from Sybille Bedford's remarkable legal travel book *The Faces of Justice*),[2] I was amazed how differently the German trial unfolded. The judge asked the witnesses questions, retired with the jury, and defended the jury's verdict in a written opinion that described the accused and the crime in great narrative detail. I decided to write a book on how differences in criminal procedure affected the course and outcome of high-profile criminal trials and was soon looking for cases.

The choice of Holocaust-denial cases was in part fortuitous. I was attending a panel at the 1994 American Political Science Association meetings on Hannah Arendt and Anti-Semitism, at which I was surprised (like most Americans) to hear that France and Germany prosecuted Holocaust deniers. I soon began reading books on the Holocaust, Holocaust denial, and the legal action taken against deniers. The large number of cases prosecuted in France and Germany interested me, as did the fact that most prosecutions took place in Continental Europe, where civil law (inquisitorial) norms prevail. At the same time, as I read through these works, I was disappointed by their failure to address the comparative aspect of Holocaust-denial litigation. Suing Holocaust deniers was either good or bad, for all places and times. There was no middle ground, a tendency that weakens Lawrence Douglas's otherwise very good book on the legal trials of the Holocaust and Holocaust deniers, *The Memory of Judgment*.[3] While Douglas concluded that the law's "evidentiary agnosticism" made it a flawed tool for expressing the truth about the Holocaust,[4] my response is to ask: Which law? In what place?

This book, then, attempts to capture the diversity of the law as it responds to a series of difficult challenges. That itself was a challenge. It is one thing to agree with Clifford Geertz[5] (and Tip O'Neil) that "all law is local." It is another to trace connections between distinct legal norms and outcomes of given trials. While the expanded role of the judge in inquisitorial legal

systems is one reason why German Holocaust-denial prosecutions unfolded differently than *R. v. Zundel*, a Canadian case and the only denial prosecution in the common law world, political factors also came into play. Germany, as the land of the perpetrators, has a special relationship with the Holocaust—and special expectations about how a Holocaust-denial trial should unfold—that are simply absent in Canada.

A second problem, one related to all comparative projects, is distinguishing differences from similarities. The first part of the book, which takes up the problems prosecutors and judges faced in using the tools of the law to disprove Holocaust denial, focuses on how the different legal norms in Canada, France, Germany, and the United States made this task easier or harder. At the same time, one must not lose sight of the larger similarity—in all four countries judges and lawyers were bound to these national norms and did not make special exceptions for the Holocaust. The commitment to Weberian norms of legal fairness is universal but the content of those norms varies. The second part of the book, which examines legal scandals, presents the same duality. On the one hand, all legal systems occasionally rule in favor of the accused and, given the proper external circumstances, sooner or later all justice systems experience scandal when this happens. The pattern of legal victory and scandal reflects a truism of law noted by Emile Durkheim more than a century ago—the criminal law plays an important symbolic role in marking out what a society will and will not accept.[6] When the legal system fails in this role, society must act to restore faith in the law. This is true, but it does not mean that all legal systems react in the same way to scandals, or that the same types of cases cause scandals in all countries.

A final interest in the book concerns the relationship between freedom of speech as a cultural norm and legal institutions. If the difference between common law and civil law countries is one major divide in the liberal democratic legal world, the difference between the United States, which protects almost all political speech, and the rest of the world, which is far quicker to ban group libel, hate speech, and Holocaust denial, is another. It seemed unfair to focus on the scandals that prosecution caused in France, Germany, and Canada without also looking at whether toleration of Holocaust deniers in the United States also promoted scandal.

This was the origin of the third part of the book, which looks at the scandals that developed on American college campuses when a small group of student newspapers ran ads denying the Holocaust. There has been considerable debate as to why the students ran the ads. Were they bound by the First Amendment to do so? Did they think they were? Or were the students simply careless and/or poorly educated about the Holocaust? However one answers these questions, one point is clear—the powerful role of anticensorship norms in American society. This is especially notable when one compares the American editors with similarly situated actors in France, Germany, and Canada, where Holocaust denial is illegal.

In addition to a comparative work, this book is also a history of the principal Holocaust-denial trials and scandals of the 1970s, 1980s, and early

1990s. As such, it is a study of how Western legal systems came to terms with Holocaust denial during the period when it had the greatest power to shock. It was also the period when Holocaust-denial litigation carried the greatest risk of scandal. By the late 1990s, this had begun to change. The sheer volume of Holocaust-denial litigation (and controversy) during the previous decades lessened the power of denial to shock, even if denial is still seen as dangerous and offensive. Therefore, the book only mentions the *Irving v. Lipstadt* libel case in passing, and does not look at other recent cases. Likewise, the book does not examine cases from other countries with Holocaust-denial laws such as Austria, Switzerland, and Belgium. Nor does the book describe the difficult law enforcement problems the Internet poses for Holocaust denial.

On the other hand, the key cases of the 1970s, 1980s, and early 1990s are described in detailed narratives that provide both the legal and political context. These include the *Mermelstein* case, in which an American Holocaust survivor sued a Holocaust-denial group in civil court; the Canadian prosecution of Ernst Zundel for spreading false news; the multiple prosecutions of Robert Faurisson, the leading Holocaust denier in France; and the *Deckert* case, in which two German judges were removed from the bench after issuing a verdict that offended public sensibilities about the Holocaust. In addition, the book also describes German denial cases from the early 1970s and 1980s and French cases brought under the Gayssot Law. Likewise, the chapter on the United States provides four detailed case studies on campuses that ran ads denying the Holocaust. Therefore, the book should interest not only students of comparative politics, Holocaust studies, and the sociology of law, but also lawyers, journalists, and the general reader interested in an in-depth look at the pros and cons of speech prosecutions.

*

This book is a revision of my doctoral dissertation in political science from Johns Hopkins University. I want to thank my dissertation chair Richard Katz, who got me interested in comparative politics, and my second reader, Joel Grossman, who helped me a great deal in framing the project. In addition, J. Woodford Howard, also of Johns Hopkins University, gave me a great deal of inspiration and advice particularly with the early versions of the draft. Finally, the finished book owes a great deal to Douglas Dow, who over the years has read and commented on multiple versions of the project, and David Patton, who read the entire draft in 2002. Both Doug and David have given me excellent advice, even if I have not always followed it.

I also want to thank Professors Suzette Hemberger, Richard Flathman, and Thomas Berger, also of the Johns Hopkins Political Science department. Colleagues also supplied me with important advice. Mark Cushman read extensive portions of the work providing many useful suggestions and encouragement. At the Berlin Program for Advanced European and German Studies, I must thank Patricia Stokes, whose work and perseverance were a model to emulate. I also want to thank Frank Ravitch. His enthusiasm has

been a constant source of inspiration. The book also benefitted from feedback following presentations at the Berlin Program seminar meetings, the Law and Society Association, and the Northeastern Political Science Association. Finally, I want to thank my two anonymous readers at Palgrave Press. Their comments made this a much better book.

A second kind of debt involves institutions that supported my research. A grant from the Social Science Research Council's Berlin Program for Advanced German and European Studies enabled me to spend a year in Berlin gathering materials on French and German Holocaust-denial litigation. My year in Berlin also improved my language abilities, and gave me a sense of German society and how the Holocaust influences it. I also received a grant from the Canadian Government, which I used to travel to Toronto, meet with members of the Canadian Jewish Congress, and photocopy large portions of the *Zundel* transcript.

Other debts involve individuals and institutions that opened up their archives to me. In New York, I want to thank the student members of the *Queens College Quad*. In Los Angeles, I want to thank members of the Simon Wiesenthal Center and the Records Office of the Los Angeles Superior Court. My research in the United States also included work at the New York Public Library, the American Jewish Committee's Blaustein Library, and the library at the Holocaust Museum, where I was able to interview Christopher Browning, who testified in Ernst Zundel's 1988 trial.

In Canada, I want to thank Steve Schulman and Manuel Prutschi of the Canadian Jewish Congress, Sol Littman of the Simon Wiesenthal Center Toronto Office, and Mendel Green. I also want to thank Alan Borovoy of the Canadian Civil Liberties Association, Peter Griffiths, and John Pearson—the two attorneys who prosecuted Zundel—for agreeing to interviews. Although these interviews do not figure prominently in the final version, they were invaluable as background. My Canadian work also included research at the libraries of the University of Toronto and Osgoode Hall Law Schools.

In France I owe a great debt to Matire Jean Serge Lorrach, an attorney for two deportee organizations, who provided me with a great amount of materials on the Gayssot-law litigation. Without these materials the fifth chapter could not have been written in anything like its present form. In addition, Stephanie Courable, a French scholar of Holocaust-denial litigation, has provided me with samples of her work as well as valuable citations to secondary research. My work in France also involved research at the Biblioteque nationale de Paris, and the University of Paris law school library.

In Germany there are many people to thank. First and foremost is Ingeborg Mehser, coordinator of the Berlin program, who took me under her wing and provided me with contacts to experts in the field. While most of my research was undertaken at the Free University, especially in its law library, I also worked extensively at the Anti-Semitism Research Center of the Berlin Technical University. There I must thank Juilane Wetzel and especially Peter Widman, the archivist, who presented me with copies of the full

written verdicts in the *Deckert* and *Althans* cases, set up a screening of *Beruf Neonazi*, and gave me access to the research center's extensive newspaper clipping files. I also availed myself of the newspaper clippings maintained by the Otto Sühr Archiv of the Free University of Berlin, as well as the Institut für Sozialforschung (Hamburg) and the Dokumentationsarchiv des österreichischen Widerstandes (Vienna).

Let me address a few technical matters. The book uses a wide variety of legal and nonlegal source materials. When citing legal sources I have tried to follow the legal citation norms of the country in question. When citing nonlegal sources I rely on the *Chicago Manual of Style*. In Germany, where periodicals such as *Kritishe Justiz* and *Neue Juristische Wochenzeitung* publish both articles and legal cases, citation form varies with the type of material. Finally, unless otherwise noted, all translations are my own. Chapters 3 and 4 are an expanded and revised version of my 1998 article "Who Takes the Blame? Scapegoating, Legal Responsibility and the Prosecution of Holocaust Revisionists in the Federal Republic of Germany and Canada" published in volume 16, number 2 of *The Glendale Law Review*. Parts of chapters 6 and 7 were previously published at 9 Geo.MasonU.Civ.Rts.L.J 125 (1998), George Mason University Civil Rights Law Journal Association, copyright 1998.

This book has taken many years to write. At times it seemed less than certain that I would ever finish. During these times I fell back on support of my family. Unfortunately, my dad did not live to see this book, but the memory of his warmth and humor inspired me. I also want to thank my mother and brother. Over the years we had many interesting discussions about the book, the writing process, and life in general. My in-laws also took an active interest in the book, sending me a steady flow of newspaper clippings on genocide denial. Finally, I owe a great deal to my wife, Jacqueline. In addition to making excellent substantive and editorial suggestions about the book, her ability to look at the long term lifted my spirits. Therefore, I dedicate this work to Jacqueline Baronian.

This page intentionally left blank

Introduction

In January 1985 Judge Hugh Locke sat in a Toronto courtroom preparing to issue an evidentiary ruling in the prosecution of Ernst Zundel for spreading false news. Zundel, a Holocaust denier, was on trial for issuing a pamphlet entitled *Did Six Million Really Die*? The prosecution had asked the judge to take judicial notice of the Holocaust as a fact beyond dispute. To make his ruling, Judge Locke had to apply the general rules of legal fairness that protect all criminal defendants to the special context of the *Zundel* case, the first prosecution of a Holocaust denier in Canada. Although Locke was aware of the overwhelming evidence that the Holocaust happened, he worried that such a ruling would bias the jury in the prosecution's favor and, therefore, rejected the judicial notice motion. Faced with a difficult choice, Judge Locke chose legal fairness over sensitivity to the Holocaust.

This book explores the dilemma faced by Judge Locke and his counterparts in other countries who had to choose between adhering to principles of legal fairness and protecting the Holocaust from those who would deny it. It draws on cases from Canada, France, Germany, and the United States. It covers criminal prosecutions, civil litigation, and the problems editors of college newspapers in the United States faced in deciding whether to run ads denying the Holocaust. The book focuses on the 1970s, 1980s, and early 1990s, a time when legal systems and societies were adjusting to the emergence of Holocaust deniers on the social and political landscape. The countries were chosen because they have each experienced a major scandal relating to the conflict between law and respect for the Holocaust.

The book is organized around three manifestations of this central tension. The first theme involves proof. Must a prosecutor prove that denial is false? If so, can the court follow the example of historians and dismiss the deniers out-of-hand? Or must it give the accused the chance to tell her or his side of the story? Second, what happens when a court rules in favor of the accused? Does society accept such a ruling with resignation as part of the inevitable uncertainty of criminal law? Or does the ruling demand a symbolic response to show that the justice system and society as a whole repudiates denial? Third, is a society that refuses to prosecute Holocaust deniers forced to tolerate denial in other walks of life? Or can the society refuse to prosecute deniers but still insist that newspapers and other media outlets censor them?

The major thesis of this book is that, in dealing with Holocaust-denial cases, courts in each country fell back on nationally distinct norms of legal fairness. These norms determine how a given country's courts handle Holocaust-denial cases and how that society responds to its courts' work. The most important differences involve procedural norms (the inquisitorial

norms found in France and Germany are more prosecution-friendly than the adversarial norms that prevail in Canada and the United States) and attitudes toward freedom of speech (the United States is highly protective of political speech, the Canadians somewhat less so, and the French and Germans are significantly less protective).

The pattern of litigation established by each country's distinctive norms of legal fairness was further modified by political and historical factors. In the abstract, a society might criminalize Holocaust denial for several reasons—its assault on the truth; the offense it gives to survivors; or the danger of a right-wing (or anti-Semitic) revival it carries with it. In practice, however, countries tend to criminalize only that speech that embarrasses, threatens, or insults it.[1] When the Germans deny the Holocaust, they reawaken doubts that the nation has placed its Nazi past behind it. When the French deny the Holocaust, they revive a debate between those who collaborated and those who resisted the Nazi occupation. Both states, therefore, view Holocaust denial as a national embarrassment and political threat, which must be dealt with systematically. This, in turn, puts greater pressure on the legal system to prosecute deniers in a way that discredits them, especially in the aftermath of a scandalous ruling. In the United States and Canada the impetus for prosecutions comes from the large Jewish communities (and Holocaust survivors) who reside there. The survivors in particular have played a major role in initiating Holocaust-denial litigation. But, when scandal occurs, the response is often muted by a fear of alienating the larger society, which does not have the same stake in combating denial.

The rest of the introduction discusses the political and legal contexts of Holocaust-denial litigation in greater depth and lays out the plan of the book.

THE POLITICAL CONTEXT OF HOLOCAUST-DENIAL LITIGATION

Holocaust deniers assert that the Nazi Holocaust of the Jews never happened.[2] Until the mid-1970s deniers were disorganized and received little attention from the mainstream press. Over the next few years this started to change. In 1978, Robert Faurisson placed a letter denying the Holocaust in the French newspaper *Le Monde*. That same year saw the founding of the California-based Institute for Historical Review (IHR). Since then, the IHR has held yearly "revisionist" conferences. It also runs "scholarly" articles on Holocaust denial in its *Journal of Historical Review*. Operating out of Canada, Ernst Zundel reached a different audience by using science fiction stories about secret Nazi bases in Antarctica to introduce readers to Holocaust denial.

Despite these publicity efforts, Holocaust deniers failed to win a major following for their position. Opinion polls taken in the 1980s and 1990s put public support for denial in the single digits.[3] The deniers' failure to convince a large segment of the public has not led North Americans or Europeans to dismiss them as irrelevant. Rather, the extent to which a society

views denial as a serious threat depends on the role the Holocaust plays in national life.

In Germany that role is immense.[4] The Federal Republic was founded as an ideological repudiation of the Nazis, a point not lost on the deniers themselves, who often have harsh words for the Republic. The Federal Republic was also a repudiation of the weak Weimar state, which was seen as lacking the moral and political will to resist the Nazi rise to power. Finally, as the land of the perpetrators, Germany is judged by how it shows respect for the Holocaust and the small Jewish community that has continued to live there. When a wave of anti-Semitic incidents (including cemetery desecrations and anti-Semitic comments by public officials) swept though West Germany in the late 1950s, other Europeans expressed concern and Chancellor Konrad Adenauer apologized to the world. Thirty years later reunification brought about renewed fears in the international community, and a new wave of right-wing violence, this time directed at foreigners. Under these circumstances, Holocaust deniers pose two distinct threats. First, any German who denied the Holocaust would tarnish the nation's post-1945 image as a liberal, tolerant society. Second, especially in the 1990s, Germans worried that the deniers, by whitewashing Hitler's crimes, would attract a new, younger generation of Germans to Nazism.

France also sees denial as a threat, but for slightly different reasons.[5] On the one hand, the French, like the Germans, worry about the connection between Holocaust denial and the extreme Right. These fears are reinforced by National Front leader Jean Marie Le Pen's electoral successes. Le Pen, who in 1986 referred to the Holocaust as a "detail of history," has garnered more than 10 percent of the vote in the last three presidential elections.[6] There is also room for national embarrassment; when Robert Faurisson tells French readers that the gas chambers are an impossibility, he echoes the reassurances of Vichy leaders that the Jews being sent to the east were merely being resettled. Added to this mix is a third factor—France's large Jewish community, a community that includes a large number of Holocaust survivors. While the Germans and the French political elites view Holocaust denial as a threat—to be handled with a calibrated mixture of litigation and benign neglect—Holocaust survivors are far more likely to view denial as an outrage, and deniers as reprehensible individuals who must be prosecuted at every opportunity.

The shift from threat to outrage is even stronger in North America. Although many Canadians feel ashamed of their government's refusal to admit more Jews into the country in the years before and during World War II,[7] they do not feel "responsible" for the Holocaust in the way the Germans do. The same is true in the United States, where debates about whether President Roosevelt should have bombed the railroad tracks leading to Auschwitz have not created a feeling of national responsibility for the Holocaust.[8] Among the general public in both countries, therefore, the tendency is to view deniers as harmless kooks.

This changes, however, as soon as one turns to the Jewish community in general and Holocaust survivors in particular. For Canadian and especially

American Jews the half-century since the Holocaust was a golden age in which the quota system, restrictive covenants, and other indicia of political and social anti-Semitism have fallen by the wayside.[9] One can question the long-term consequences of the golden age for American (and Canadian) Jews[10] without ignoring the more immediate threat Holocaust denial poses, or appears to pose, to the current era of tolerance. If deniers can convince a substantial segment of the American population that the Holocaust was a hoax, or simply move that segment to think that Jews focus too much on the Holocaust, the possibility of an anti-Semitic backlash emerges. This is why some writers refer to denial as the twenty-first-century version of the *Protocols of the Elders of Zion*.[11]

The concern about anti-Semitism has led Jews in Canada and the United States to take a cautious approach toward Holocaust denial. A major fear in both countries is that deniers will use prosecutions, or any other form of publicity, as a platform from which to spread their ideas. Hence, Deborah Lipstadt admonishes her readers not to engage in debates with deniers about the Holocaust, but to expose the deniers as racists and anti-Semites.[12] Likewise, the Canadian Jewish Congress, the umbrella organization for Jews in Canada, refused to endorse the prosecution of Ernst Zundel until Canadian Holocaust survivors forced their hand by prosecuting Zundel on their own. For the mainstream Jewish communities of both the United States and Canada the preferred way to respond to Holocaust deniers, especially during the 1970s and 1980s, was to marginalize them, with or without the assistance of the law.

American and Canadian Holocaust survivors had very different ideas about how to combat deniers. To many survivors the strategy of the mainstream Jewish communities recalled the 1930s when no one said anything until it was too late. As a result, American and Canadian Holocaust survivors sought to engage the deniers at every turn. So, too, did a minority of the larger Jewish community. Once, however, the survivors found themselves in a fight (legal or otherwise) against the deniers, the Jewish community, and a large segment of the general public, rallied around the survivors. While it may not have been eager to prosecute Zundel, the Canadian Jewish Congress was ready to express outrage about the conduct of the trial. The American Jewish community played a similar role in the *Mermelstein* case, and in the controversy during the early 1990s that arose when several college newspapers ran ads denying the Holocaust. At these moments, the Jewish community shared the outrage generally expressed by survivors.[13] Overall, however, America and Canada as societies were less concerned about Holocaust denial than France and Germany.

The Legal Context of Holocaust-denial Litigation

The legal context is just as important as the political context in explaining the course, outcome, or absence of Holocaust-denial litigation in a given

country. This is because the legal systems of Germany, France, Canada, and the United States differ from one another in several important ways. In the words of Clifford Geertz "law is local knowledge not placeless principle[.]"[14] Too often, however, American students of comparative law and politics have treated the law as just that—a "placeless principle," one with strong affinities to the legal norms prevalent in the United States, most notably an adversarial justice system and a strong prohibition on political censorship.[15] Each of these factors should be recast as a variable that has had a major impact on Holocaust-denial litigation.

When Americans (or Canadians) think of a criminal trial, the image evoked is that of a prosecutor and defense attorney each of whom presents one side of the story to the jury. The role of the judge is limited to making sure that both sides adhere to the procedural rules, especially the rather complex exclusionary rules (such as the rule against hearsay) that exist to make sure the jury reaches the right verdict.[16] This legal environment does not seem ideally suited for Holocaust-denial litigation. For one thing, the role of the parties in gathering evidence seems to offer deniers a golden opportunity to present their views to a wider audience. For another, the rule against hearsay, which prevents the court from hearing testimony generated outside the courtroom (which in theory covers all written testimony),[17] appears ill-suited to the factual examination of an event of immense scope that took place over half-century ago. Finally, because of the need to rely on live witnesses, a prosecution of a Holocaust denier would of necessity be a drawn out affair, during which the deniers could use the publicity of the trial to gain media coverage for their cause. It is not, therefore, surprising that most Americans express mild shock when told that other countries prosecute Holocaust deniers or that they quickly determine that any such prosecution must backfire.[18]

But America is not the world. When a native of Germany (or France) thinks of a criminal trial, a rather different picture emerges. While there may still be a jury, the role of the judge is far greater. It is the judge who gathers the evidence and decides what evidence will be presented at trial. It is also the judge who (with or without lay jurors) renders the verdict, and who alone justifies the verdict in a written document that explains the background of the case, the personal history of the accused, and the reasoning behind the verdict.[19] The judge's reasons for the verdict can be appealed, on the merits, by either side. Because of this, German criminal procedure does not require complex exclusionary rules. While some concerns about secondhand testimony remain, the German court does not exclude written evidence merely because it was prepared out of court.[20] In theory, the German criminal court's inquisitorial (judge-centered) rules should make it a particularly hospitable venue for Holocaust-denial prosecutions. As the chief fact-finder the judge can dismiss Holocaust denial out of hand. Meanwhile, the absence of strong exclusionary rules should speed up the course of the trial.

As regards the second major difference—attitudes toward censorship—the major fault line runs between the United States, where the First

Amendment guarantees the protection of most forms of political speech,[21] and France and Germany, where state censorship of libelous and seditious ideas has always been an accepted part of the legal system.[22] Canada, which adopted the Charter of Rights and Freedoms in 1981, stands inbetween Europe and the United States. In *R. v. Keegstra* the Canadian Supreme Court upheld a hate speech law, but did so by a single vote.[23]

The gap between European and American approaches to political censorship is considerable. Germany outlaws Holocaust denial under two penal code provisions. Penal Code § 130 at first outlawed incitement to class conflict and was used during the nineteenth century to prosecute libels of the Kaiser. It was amended in 1960 to cover racial and religious incitement and in 1994 to cover Holocaust denial. A second provision, § 185, outlaws speech that insults a group. While it has been used against Holocaust deniers, it has also been used against defamers of the pope, NATO, the police, and Bavarian politician Franz Joseph Strauss. Likewise, in France the power of the state to censor extremist speech was confirmed in the Law of the Press of 1881, which was viewed as liberal because it reduced a welter of specific categories of censorship to a few general norms.[24] Under these circumstances, prosecuting Holocaust deniers was not a major departure from preexisting legal norms.

For most of its history the United States was not radically different from France and Germany. During the nineteenth century many southern states passed laws outlawing abolitionist literature; the remainder of the century saw laws against ex-confederates, pornographers, and anarchists.[25] While the dissent of Holmes and Brandeis in *Abrams*[26] pointed the way to a more libertarian approach to speech offenses, this did not prevent several American states from enacting laws against hate speech in the 1930s. The critical period came only in the 1950s. In 1952 the Supreme Court upheld a group libel statute in *Beuharnais v. Illinois*.[27] That proved to be a last gasp. In the years that followed the courts became increasingly tolerant of political speech, in large part because of the civil rights movement and the Vietnam War.[28] It was only in the 1960s, 1970s, and 1980s that the Holmes–Brandeis belief in the marketplace of ideas took force in American public life.

The current entrenchment of anticensorship norms has made American opponents of Holocaust denial extremely skeptical of prosecutions. This stands in sharp contrast to Germany and France, where Holocaust denial itself is a crime, and Canada, where Holocaust deniers are brought before province-level human rights boards and the possibility of prosecutions under hate speech laws remains open. But attitudes toward prosecution are not the only impact of anticensorship norms on the American treatment of Holocaust deniers. When student newspaper editors had to decide whether to run paid advertisements from the Committee for Open Debate on the Holocaust, they often fell back on a set of views about political speech and censorship values that were markedly more libertarian than those shared by the Canadians, French, or Germans.

In addition to these broad differences in procedural norms and attitudes toward political censorship, there are also national-level differences that

make the legal system of each of the four countries unique and alter the course, outcome, and very possibility of Holocaust-denial litigation. The role played by these national-level differences will emerge through the course of the narratives that follow.

Plan of the Book

The book is organized into three parts each of which corresponds to a specific dilemma Holocaust denial poses for the law. These dilemmas are: (i) the dilemma of proof; (ii) the dilemma of trial uncertainty; and (iii) the dilemma of toleration.

Part I, "The Dilemma of Proof," starts from the premise that most historians have little difficulty rejecting Holocaust denial out of hand. Does this same ethos exist in the legal world? Or do courts find themselves more closely aligned to journalists, whose directive is to tell both sides of the story? Finally, to what extent do legal norms of fact finding complicate the efforts of Holocaust survivors and state prosecutors to prove in court that Holocaust denial is false?

The answers to these questions depend, in large part, on rules of evidence and criminal procedure. Here comparative differences among legal systems come to the fore. A major divide in the legal world is between civil law countries (primarily Continental Europe and Latin America), which generally have highly truth-centered (and prosecution-friendly) inquisitorial norms and common law countries (Great Britain and most of its former colonies, including the United States), which generally have fairness-centered (defense-friendly) adversarial norms. While Holocaust denial litigation is extremely rare in the common law world (*R. v. Zundel*, a Canadian case, is the only criminal prosecution), prosecutions are much more frequent in the civil law countries of Continental Europe. The individual chapters of part I explore the reasons for this.

Chapter 1, "Inquisitorialism, Adversarialism, and Judicial Notice," asks whether civil law countries are more likely than common law countries to take judicial notice of the Holocaust (i.e. accept the Holocaust as beyond dispute). If the common law versus civil law divide does not explain the differences across the four countries, what else does?

Chapter 2,"The Holocaust as Hearsay," takes a more focused look at one adversarial norm—the rule against hearsay—and shows how the rule forced the trial judge in the *Zundel* case into a difficult choice between bending the law to allow prosecution evidence to come in and strictly adhering to common law evidentiary norms.

Part II takes up what I call "the dilemma of trial uncertainty," which is inherent in all litigation, but takes an especially sharp form in Holocaust-denial cases. In any legal system where judges follow impartial norms, the accused will occasionally win a legal victory (such as an acquittal, or a successful motion to present or exclude evidence). In the highly charged setting of Holocaust-denial litigation, legal victories can acquire symbolic

value for the deniers. Even prosecution legal victories can become political victories for the deniers if judges (deliberately or otherwise) use language that appears to praise the accused or question the Holocaust. Under the right circumstances, these symbolic victories can develop into full-fledged scandals in which the general public accuses the court of being soft on Holocaust denial. The legal system, on its own or with prodding from politicians and other influential parties, then engages in a series of restorative actions meant to purge the taint of denial from the legal system. The pattern of symbolic victory, scandal, and restorative acts varies from country to country.

Chapter 3, "Holocaust Denial, German Judges, and Political Scandal" explores what happened after two judges wrote an opinion that, while convicting the accused (a right-wing extremist), praised him lavishly and complained about "Jewish pretensions about the Holocaust." The German inquisitorial legal system concentrates great power in the hands of the judge. How does such a system respond to a judge who steps out of line?

Chapter 4, "Taking the Blame for *R. v. Zundel*," looks at how a society with an adversarial legal system responds to scandal. After weeks of reading headlines trumpeting Holocaust deniers' view of the world, including a headline about how Auschwitz had a swimming pool and ballroom, Canadian public opinion reached its breaking point. But who was blamed? The media for writing the headlines? The Holocaust survivors for bringing the case? Or the judge for letting the deniers testify?

Chapter 5, "The Limits of Symbolic Repression: The Gayssot Law," is about the limits of restorative acts taken in response to a scandal. After a series of rulings in which courts refused to reject Holocaust denial as false history, the French passed the Gayssot Law, which makes it illegal to question the veracity of the Holocaust. By expanding the scope of the offense, French legislators hoped to make future scandals impossible. But is this ever possible? What happens when deniers learn to speak in code, survivors still prosecute, and judges continue to adhere to the procedural norm of fairness to the accused?

Part III, "The Dilemma of Toleration," brings the focus back to the United States. The American has an easy solution for problems of proving the Holocaust in court, and the scandals that arose in Germany, Canada, and France after judges issued unpopular rulings. Do not prosecute deniers. Let them stand on the street corner and spew their nonsense to their hearts' content. Part III asks whether this solution has any downside.

Chapter 6, "A Panacea of Toleration," looks at several college newspapers in the United States that in the early 1990s ran paid advertisements denying the Holocaust. Why did the student editors take this step? Were they ignorant about the Holocaust? Or were they following anticensorship norms entrenched in the broader culture? How did the affected campuses respond to the ads? With tolerant understanding? Or with scandal and restorative acts?

Chapter 7, "The Hidden Benefits of Criminal Sanctions," looks at the same question from a comparative perspective. How did the Canadian, French, or German equivalents of the American college newspaper editors

respond to similar attempts by the deniers to get publicity for their views? Did the fact that Canada, France, and Germany criminalize hate speech play any role in their decisions?

Taken together, the chapters show how Holocaust denial poses a dilemma for the law—the dilemma of the unpopular accused. How does a legal system remain fair when society wants the justice system to repudiate the accused before the trial begins? In a sense, all four countries answered the question in the same way—in case after case, fairness to the accused trumped the concerns of the larger society, which, in turn, led to scandal and restorative acts. At the same time, the distinctive mix of political and legal factors present in Canada, France, Germany, and the United States made each legal system's response to denial unique.

To explore these ideas further, the conclusion looks briefly at *Irving v. Lipstadt*, a British libel case in which David Irving accused Deborah Lipstadt of calling him a Holocaust denier. While Lipstadt won the case, her victory turned on unique factors that did not alter the basic dilemma of Holocaust-denial litigation, a dilemma rooted in the dual nature of the law as both a source of norms for legal professionals and as a symbolic representation of the society as a whole.

This page intentionally left blank

Part I

The Dilemma of Proof

Deborah Lipstadt began *Denying the Holocaust* with the story of how, during the preparation of her book, producers invited her to debate Holocaust deniers on radio and television talk shows. She refused. Such appearances would only legitimate denial by creating "a debate that is no debate and an argument that is no argument."[1] To avoid granting Holocaust deniers this recognition, Lipstadt was willing to let their factual claims go unanswered. Instead, she dedicated the book to unmasking Holocaust deniers as racists and anti-Semites. As she put it: "The stripping away of the deniers' cloak of respectability—which was one of the main objectives of this book—reveals that at their core they are no different from these neofascist groups. They hate the same things—Jews, racial minorities, and democracies—and have the same objectives, the destruction of truth and memory."[2]

Lipstadt's book was a great success. But is it possible to discredit Holocaust deniers without rebutting their factual claims? There are reasons for doubt. Lipstadt's strategy of unmasking suffers from the problems shared by all *ad hominem* attacks. It leaves open the question of whether the argument under fire is correct, in this case the denier's rejection of the Nazi Holocaust. Lipstadt recognized this danger. She devoted a short appendix of *Denying the Holocaust*, entitled "Twisting the Truth," to countering deniers' arguments. Second, *ad hominem* attacks are unfair. Fairness requires hearing from both sides. Hannah Arendt traces this back to Homer, who "chose to sing the deeds of the Trojans no less than those of the Achaeans, and to praise the glory of Hector, the foe and defeated man, no less than the glory of Achilles, the hero of his kinsfolk."[3] While Lipstadt might reply that Holocaust deniers have no story worth telling, the victims of *ad hominem* attacks are often viewed with sympathy, a fact that complicates her strategy of unmasking the deniers.

In any event, Lipstadt's successors have not followed her lead. The 1990s saw an explosion of books and pamphlets, many from Jewish community organizations, which rebut the factual claims of Holocaust deniers.[4] Others, including Holocaust survivors, have debated deniers on television. These efforts at rebuttal reflect a growing perception that Holocaust denial cannot be fought with *ad hominem* attacks alone. Kenneth Stern, a researcher with

the American Jewish Committee, is wary of those who refuse to debate: "Once one admits that he or she cannot debunk the deniers' 'facts,' the deniers move in for the kill."[5] For Stern, at least, factual engagement with Holocaust denial is an unpleasant necessity.

Courts that try persons accused of denying the Holocaust face the same dilemma that troubled Lipstadt and Stern. On the one hand, courts are society's dispute-resolving fora. Using these fora to debate Holocaust deniers expends judicial credibility and resources on "a debate that is no debate," while turning the deniers into legal celebrities. Lipstadt opposes prosecutions for just this reason.[6] Yet deniers are prosecuted, often under laws that incorporate falsity as an element the prosecution must prove. Fairness obligates courts to consider the view that the Holocaust never happened. However much judges and lawyers share Lipstadt's concerns about debating deniers, the question—"Did the Holocaust happen?"—hovers over legal proceedings, at least potentially.

The real picture is more complex. The requirement that the prosecution prove the Holocaust does not, by itself, guarantee a courtroom debate over whether the Holocaust happened. Whether the Holocaust is "put on trial" depends on two factors: (i) the willingness of legal professionals to apply norms of legal fairness to Holocaust denial cases and (ii) the substantive content of these norms. One crucial norm is judicial notice; that is the judge's power to deem well-established facts to be true without formal evidence-taking. Where judicial notice is broadly applied Lipstadt's dilemma evaporates. Where judicial notice is applied more narrowly, the stage is set for a factual debate with Holocaust deniers. The course of this debate depends on the rules of evidence more generally. The more formalistic the evidentiary rules, the more likely they will degrade the Holocaust. This, in turn, shapes the public reaction to Holocaust denial litigation, a subject we take up in Part II.

For now our concern is with the law of evidence. Chapter 1 examines judicial notice as it relates to Holocaust denial. If a ruling that the Holocaust happened promised to simplify the prosecution's task, some courts were distinctly more willing than others to ease this burden. Chapter 2 is an in-depth study of what happens when courts are less obliging. In *R. v. Zundel*—the only prosecution of a Holocaust denier in the common law world—formal rules of evidence presented enormous difficulties to both sides. Once the judge bypassed these by crafting an "exception" to the hearsay rule for the prosecution's historical experts, a new problem surfaced. Were Holocaust deniers testifying for the defense entitled to the same exception?

Chapter 1

Adversarialism, Inquisitorialism, and Judicial Notice

A major fault line in the legal world separates the common law countries of the United States, Great Britain, and its former colonies from the civil law countries of Continental Europe and Latin America. While the major difference between the two systems concerns the source of law (in common law countries the judge creates the law through precedent; in civil law countries the legislature creates the law, which the judge merely applies),[1] the two systems have a second difference that bears on the dilemma of proof. This is the distinction between adversarial (common law) and inquisitorial (civil law) norms of criminal procedure. In adversarial countries the parties (prosecution and defense) present the evidence and question the witnesses; the judge is reduced to an umpire. In inquisitorial countries the roles are reversed. It is the judge who gathers the evidence, presents it, and questions the witnesses.[2]

Adversarial and inquisitorial procedures are structured around different normative views of the trial. Under the adversarial ideal the law is a game, courts are where the contest takes place, and the goal of criminal procedure is to make sure the outcome is fair, even if the prosecution does not uncover the truth.[3] Under the inquisitorial ideal, the goal of the law is fact finding, and the criminal trial is a search for truth. The length to which the inquisitorial judge will go to find the truth is demonstrated by the root of the word "inquisitorial," which comes from the Latin word for torture, *quaestio*.[4] While torture fell out of fashion during the eighteenth century, the primacy of truth over fairness to the accused remains a staple of the inquisitorial system.

For over a century critics of adversarialism have maintained that it promotes lies and falsehood. In *Economy and Society*, Max Weber dismissed " 'common law' procedure" as "khadi justice."[5] More recently, John Langbein argued that adversarialism leads to witness coaching and the battle of the experts, problems avoided in Germany, where judges take a more active role.[6] In the United States a small, but growing number of voices have called for reform of the adversarial system.[7] Lawrence Douglas, who has studied the *Zundel* case in some detail, shares this critique of adversarial justice: "Clearly

there is something wrong with viewing adversarial jurisprudence as an efficient tool for the arriving at the truth."[8]

If this is true, then dilemma of proof—the tension between the huge mass of facts documenting the Holocaust and a legal system that must give both sides a chance to tell their story—should take a much sharper form in the United States and Canada (both adversarial, common law countries) than in France and Germany (both inquisitorial, civil law countries). Chapter 1 tests this idea by looking at how the four countries used (or refused to use) the doctrine of judicial notice to legally ratify the Holocaust as an indisputable fact. The doctrine of judicial notice allows a court to accept certain well-established facts as true. In theory it is the perfect analogue to the historian, who is free to reject Holocaust denial out-of-hand. But judges are not historians, and judicial notice is a legal doctrine whose practice is constrained by broader norms that govern the legal system as a whole.

To that end, this chapter presents four case studies in which German, American, French, and Canadian judges were faced with the task of applying (or refusing to apply) the doctrine of judicial notice to the Holocaust. The case studies are presented in rank order according to the extent to which the judges were willing (or able) to accept the Holocaust as a given fact without either (i) requiring the prosecution to prove its case, or (ii) allowing the deniers to use the judicial notice process as an opportunity to present their own views about the Holocaust. These criteria track Deborah Lipstadt's view that a public debate with Holocaust deniers is harmful because it gives deniers unwarranted legitimacy and can serve as rough measuring posts for severity of the dilemma of proof.

In addition to looking at outcomes, the chapter looks at processes. How does a judge take notice of a fact that is both indisputable but also indescribable? Many of the legal professionals involved in the judicial notice decisions had little, if any, direct experience with the Holocaust, yet they would have to find words to express the legal system's recognition of the Holocaust as an act of great human suffering. And those judges who found themselves, for whatever reason, unable to extend the respect of the law to the Holocaust would have to find other words to express their sympathy for its victims and their regret for their rulings. But as with the rulings themselves, the difficulties judges had in putting the Holocaust into prose varied from country to country. And nowhere were the difficulties more intense, nowhere was the Holocaust a more sensitive, even embarrassing issue, than in the Federal Republic of Germany.

GERMANY: THE HOLOCAUST, INQUISITORIALISM, AND THE NAZI PAST

The Holocaust-denial prosecutions that began in the mid-1970s reflected the central role the Holocaust played in German public life. The Federal Republic was founded on an ideological rejection of Nazism and anti-Semitism. This rejection allowed the new West German elites to reassure themselves and the world that, despite the large number of former Nazis who rose to prominence

in the 1950s, the Federal Republic had fundamentally changed. To establish this to the satisfaction of internal and external critics, West Germans erected a taboo against public expressions of anti-Semitism. In the 1990s Rainier Erb, a leading researcher on German anti-Semitism, called statements against Jews "a breach of rules."[9]

The need for social rules against anti-Semitism more than half a century after the Holocaust demonstrates the continued sensitivity Germans have about the Nazi past. The basic pattern was set in the late 1950s when a wave of anti-Semitic synagogue desecrations swept across West Germany. The desecrations were accompanied by derogatory comments about Jews from public officials and acquittals of anti-Semites. These events led to international outrage, as the former Western allies asked themselves whether Germany had truly changed. This fed a determination among German elites that such events never happen again.[10] In the years that followed, anti-Semitic incidents have been condemned by German politicians and opinion leaders.

What applied to anti-Semitism generally took on a particular urgency as regards the Holocaust. A respectful, proper remembrance of Nazi crimes against humanity was the surest protection against a return to Nazism. Those who denied the Nazi extermination of the Jews threatened the postwar image of Germany as a nation that has fundamentally changed its ways. Holocaust denial was a national embarrassment. Like anti-Semitism, Holocaust denial was "a breach of the rules," one with disastrous consequences.

One of the most feared consequences was that the Federal Republic would become a new Weimar. Critics of the Weimar Republic accused it of coddling Hitler and his followers. The soft sentences meted out to Hitler and his confederates following the 1923 Munich putsch led to complaints that German justice was "blind in the right eye." The image of a weak government terrified the founders of the postwar Federal Republic. They gave the state extensive powers to fight left- and right-wing extremism. Despite a plethora of constitutional provisions targeting the revival of Nazism and occasional stern actions, such as banning of the Socialist Reich Party in 1952, many Germans questioned whether the state would take action against a serious right-wing threat. Accusations of "one-eyedness" arose whenever far Right parties met with electoral success.

The fear of a right-wing revival colored the German response to Holocaust denial. For the citizens of the Federal Republic, denial was more than a historical argument about the Holocaust. Nor was it simply a clever form of anti-Semitism. It was, rather, a symbolic affirmation of Nazism. If remembering the Holocaust was a safeguard against the return of the Nazis, Holocaust denial was Nazi propaganda, no different from the Hitler salute, the Swastika, and the first verse of *Deutschland Über Alles*, all of which the Federal Republic bans. Each of these shares a symbolic, pre-expressive quality. The words of *Deutschland Über Alles* do not offend the post-1945 German sensibility so much as the song's symbolic representation of the Nazi era. Likewise, the greatest harm flowing from Holocaust denial was not its falsity, but the implicit stamp of approval it gave to neo-Nazi activity.

By viewing Holocaust denial as dangerous, the West German approach toward denial eased the dilemma of proof in two ways. First, because prosecutions turned on danger, rather than falsity, taking judicial notice of the Holocaust would not resolve the ultimate issue of the case. The courts, and society, could still debate the dangerousness of Holocaust denial, even as they agreed that it was false. Second, the very danger denial posed (or was perceived to pose) to West German society put a premium on resolving factual issues posed in Holocaust-denial cases as quickly and quietly as possible.

German judges by and large did just that. But they could only do so because of a second, equally important factor—the strongly inquisitorial evidentiary norms that govern the German legal system. The German criminal proceeding is centered around the judge, who under § 244 of the Criminal Procedure Code must explore "all facts and evidentiary materials . . . of significance to the verdict." The judge must describe these facts in a written verdict. By contrast, roles of prosecutor and defense counsel are limited. If they want the court to consider a piece of evidence, they must apply by special motion to the judge, who retains the power to reject requests on the grounds of relevance and delay.[11] In addition, a judge can also reject evidence that is "superfluous on account of obvious knowledge."[12]

This brings us to the doctrine of *Offenkundigkeit*. The etymology (*offen* = open + *kundig* = known) describes the law's scope and rationale.[13] The doctrine applies to facts that are "general knowledge," that is those facts "of which rational people generally have knowledge or about which they can easily inform themselves from generally available sources without needing specialist knowledge."[14] The requirement that the knowledge be open, general, and accessible is based in democratic theory. The individual against whom a fact is established as *offenkundig* must have had a chance to take part in the process by which the fact was established as beyond dispute. For example, citizens are assumed to have played a role in creating the political structures in the locality in which they reside. The court will, therefore, take notice of these structures, but not those of other localities.[15]

While the language of *Offenkundigkeit* bears a striking similarity to common law treatments of judicial notice, differences emerge in actual practice. Typical common law judicial notice motions concern highly specific bits of factual information such as place names, the weather, and the days of the week.[16] By contrast, German courts take judicial notice of broad generalizations. For example, a German court held as obvious the fact that the German Communist Party "is an organization whose goals and acts which directs itself against the regular constitutional order."[17]

The greater willingness of German courts to recognize broad, sweeping statements as *offenkundig* facts reflects the different roles judicial notice plays in inquisitorial and adversarial systems. In adversarial countries, where the parties to the litigation supply the evidence, and judicial notice is seen as a usurpation of power by the judge, the spectrum of facts held to be "generally recognizable" is quite narrow. In Germany, however, judicial notice is not a usurpation; it is an ordinary instance of judicial fact finding. Therefore,

German courts interpret the term "generally recognizable fact" far more liberally than their North American counterparts.

This expansive reading of *Offenkundigkeit* was on display as German courts grappled with Holocaust denial. At first, however, the Federal Supreme Court[18] took a tentative position. In an unreported Holocaust denial case from 1976, it declared that the "recent historical events of the National Socialist persecution of the Jews" were "generally known in their basic facts," perhaps even "publicly known." At the same time it suggested that these facts might best be proven by a historical expert.[19] This raised a question: If the Holocaust was "generally known," why the need for additional evidence?

The answer came in the *Zionist Swindle* case. In 1975 a poster appeared on a common wall separating several homes denouncing the "murder of six million Jews" as a "lie," a "Zionist swindle," and a "meaningless assertion." The poster stopped short, however, of explicitly blaming the Jews.[20] One resident, a man whose Jewish grandfather was killed at Auschwitz, filed a complaint under § 185 of the Penal Code. Section 185 punishes insulting behavior that violates the honor of the complainant.[21] In 1977 the case reached the Mainz District Court. The legal question was whether Holocaust denial insulted the complainant's honor. The court, agreeing with the complainant, made the following statement:

> [E]very relative of a Jew killed by National Socialist acts of violence could with right feel insulted. Besides, on the basis of countless documents it stands historically beyond doubt that in the Third Reich millions of Jewish people were, in fact, killed by violent means by the National Socialist power holders, especially in East and Southeastern Europe.[22]

The court sidestepped the historical question. It did not present evidence that the Holocaust happened. Nor did it use § 244 of the Criminal Procedure Code to take notice of the Holocaust as an obvious fact. Instead, it used the fact that Holocaust happened to illustrate the legal argument that Holocaust denial insulted Jews. The Holocaust formed part of a legal syllogism linking other, already proven facts (the accused drafted the poster, the poster denied the Holocaust, etc.) to a legal conclusion (the poster insulted the complainant). As an intermediate explanatory principle, it did not require proof.

The same pattern repeated itself when in 1978 the *Zionist Swindle* case went on appeal. This time the accused won an acquittal, convincing the court that the complainant did not have standing to sue because he was not a Jew. As such, he could not have been insulted by Holocaust denial.[23] To rule otherwise, said the court, would make potential complainants out of everyone who believes that "millions of Jews were murdered" in the Third Reich. While liability under insult law is limited to a "narrowly bounded group," those who accepted the Holocaust as a historical fact constituted a group "to which countless persons belong." By identifying the Holocaust as a belief to which "countless persons" agree, the court took the next step toward treating the Holocaust as legally beyond dispute.

Despite this, the appeals court ruling was sharply criticized, especially the part about the complainant's lack of standing to sue. Critics noted that the complainant's grandfather perished at Auschwitz and accused the court of right-wing bias. For many, the ruling demonstrated the "fascist tendencies" in West German society.[24] Therefore, there was great interest (and relief) when, in September 1979, the Supreme Court reversed the appeals court and reinstated the insult charges. The Supreme Court reversed the verdict, but as regards judicial notice it continued the trend of the two lower courts.

Like its predecessors, the Supreme Court declined to use the *Offenkundigkeit* doctrine. Instead, it assumed the truth of the Holocaust without proving it. Thus the Supreme Court began with a unambiguous assertion that the Holocaust happened.

> First of all it is clear that no one can depend on the protection of freedom of expression for statements which deny the historical fact of the Jewish murders in the "Third Reich." Even in the confrontation over a question that essentially disquiets the public, as is the case here, no one has a protected interest in spreading untrue statements.[25]

Once again, however, the court's affirmation that the Holocaust took place appeared within a legal syllogism. Because Holocaust denial was an "untrue statement," it lacked protection under the constitution.

Next, the Supreme Court considered the defense argument that only two million Jews died in the Holocaust. Here was a golden opportunity to dismiss Holocaust denial as factually untrue. Instead, the Supreme Court eschewed factual analysis and couched its response in moral language, a language that highlighted the sensitivity Germans feel about the Holocaust and the acute sense of embarrassment caused by Holocaust denial. According to the Supreme Court, the two-million figure proposed by the defendant was not really a new historical estimate of the number of Jews killed during the Holocaust. Rather, it was a "direct attack" on the "self-conception" of all those who were singled out as Jews for persecution during the Third Reich, including Jewish citizens of the Federal Republic.

The experience of the Holocaust constituted a special Jewish "self-understanding," which formed part of their human worth. This special self-understanding led to a correlative duty on the part of Germans, the duty of respect. This duty required taking all possible steps to avoid any repetition of the Nazi crimes. Only this "guarantee against the repetition" enabled Jews to proceed through life with respect. As such, it was "an essential condition for their life in the Federal Republic." Holocaust denial, the court concluded, took from every Jew living in the Federal Republic "the respect to which they have a claim."

In effect, the Supreme Court projected West German fears about fascism and the impact of Holocaust denial on its liberal, post-fascist image onto the small number of Jews living in postwar West Germany. Holocaust denial threatened the repetition of Nazi crimes. Because this made Jews (read: Germans)

living in Germany uneasy, they could sue for defamation under § 185 of the Penal Code. By treating Holocaust denial as a personal insult, rather than a historical claim, the Supreme Court rendered the question of judicial notice moot.[26] This was in keeping with the larger, national tendency to view neo-Nazi propaganda, including Holocaust denial, in symbolic terms.

The *Zionist Swindle* case marked a turning point. Henceforth, "the facts and circumstances of the murder of the Jews" no longer required explanation.[27] In sustaining a prosecution in 1980 the Cologne Appeals Court kept to the formula set forth by the Supreme Court the previous year. Because the Holocaust was essential to "the personal self-understanding of Jews living in Germany," an understanding that "call[ed] forth among all others a special responsibility," the prosecution did not need to prove that the Holocaust happened.[28] While this was in part a function of the Holocaust's status as "historically secure and thus generally accepted knowledge,"[29] it also reflected a widespread accord with the Supreme Court's solution to the judicial notice problem. Nevertheless, because the Supreme Court neither invoked § 244 of the Criminal Procedure Code, nor explicitly described the Holocaust as an "obvious" fact, it was not at all clear whether its ruling prevented the defense from presenting evidence that the Holocaust never happened. Two subsequent cases addressed this question directly.

In 1982 the screening committee of the Federal Constitutional Court considered its first Holocaust denial case. While the screening committee did not refer the case to the full court, a fact that limited the precedential value of its ruling, the committee's opinion represented a new development in the treatment of factual claims of Holocaust denial. For the first time, a court described the Holocaust with the language of *Offenkundigkeit*.

> The constitutional complainant, who not once concerned himself with the numerous generally accessible sources about the mass annihilation of the Jews . . . is neither harmed in his rights, nor in his claim to basic legal representation when the court judges the mass annihilation as obvious knowledge (*offenkundig*) and rejects the testimony of a single witness as irrelevant.[30]

Once more, the committee introduced its factual evaluation of Holocaust denial through a syllogism. But this time, the factual premise was not the massive evidence documenting the Holocaust, but the fact that other German courts have taken judicial notice of this evidence. This was surprising since no court had heretofore applied the doctrine of *Offenkundigkeit* to Holocaust-denial cases. The screening committee's judicial notice decision was also noteworthy for its brevity. The committee limited its factual analysis to a single phrase about the "generally accessible sources about the mass annihilation of the Jews."

It was not until in 1991 that a German court squarely faced the question of whether a defendant could present evidence denying the Holocaust. The published decision of the Dusseldorf Appeals Court contains a lengthy discussion of the question.[31] At trial the defense moved under § 244 of the

Criminal Procedure Code to submit evidence that the Holocaust never happened. The trial court, in rejecting this motion, followed the language of § 244 closely: "The million-fold murder of the Jews by the National Socialist powers during the Second World War is a judicially noticed fact and therefore the raising of evidence about the main fact or even circumstantial facts would be superfluous."[32]

The appeals court affirmed the trial court's ruling. After stating that there was "no need for evidence on a fact that everyone knows," the court reviewed the criteria of obviousness. The fact in question must form part of the knowledge of reasonable persons or be something they could learn about without special knowledge—for example, the traffic conditions in a locality. According to the court, the Holocaust easily met this test: "The fact that in the time of National Socialist rule in countless concentration camps, especially in Auschwitz, Birkenau and Majdanek, millions of murders of people of Jewish origin took place, is a historical fact and as such is known to the revising court."[33] That was the extent of the court's factual analysis. There were no references to historical works, documents or eyewitness testimony, nor any sociological surveys of what the German public actually believed. Instead, the court relied on a legal standard. To present evidence contrary to a noticed fact, the defendant must supply more than a "bare statement" denying the fact. He or she must also explain, in detail, how the proffered evidence would disprove the noticed fact.

Like the Supreme Court in the *Zionist Swindle* case, the Dusseldorf Appeals Court refused to engage in a detailed assessment of the merits of Holocaust denial. But the stated reason for this reluctance had changed. While the Supreme Court worried that discussing denial would offend West Germany's small Jewish community, the Dusseldorf Appeals Court made reference to the judge's power to take notice of "obvious" facts. The powerful role of the trial judge in Germany's inquisitorial legal system thus helped the court sidestep a politically sensitive subject.

German reunification led to a new phase in the national debate over Holocaust denial and a new approach to judicial notice. A reunified Germany rekindled fears in the international community, fears that had gradually receded during the forty years of the Bonn republic. These fears were reinforced as right-wing extremism surged and prominent Holocaust deniers such as Ernst Zundel visited Germany to gain new recruits. In an atmosphere tinged with antiforeigner violence, Holocaust denial returned to the front pages and prosecutions were again reported, and criticized, in legal periodicals. In the second wave of Holocaust-denial litigation, German courts faced the question of judicial notice once more.

In March 1994 the Federal Supreme Court held that the bare denial of the Holocaust did not constitute racial incitement as defined by § 130 of the Penal Code.[34] This decision proved controversial because the defendant, Günter Deckert, was the leader of the far Right National Democratic Party (NPD). But the court also addressed a second issue: Had the lower court properly rejected a defense motion to introduce evidence about the

Holocaust? On this question the Supreme Court affirmed the lower court. It agreed that "the mass murder of the Jews, committed above all in the gas chambers of concentration camps during the Second World War was an obvious fact." Therefore, the defense's evidentiary motion was superfluous. This was in keeping with earlier Holocaust-denial cases.

What changed was the Supreme Court's justification for this conclusion. In the *Zionist Swindle* case it had viewed Holocaust denial as a moral outrage. Now, for the first time, it based its ruling explicitly on the doctrine of *Offenkundigkeit*. This approach, said the court, was "in agreement with the precedents."[35] There followed a string of citations. Except for the 1982 Constitutional Court ruling, none of the cases cited discuss the question of *Offenkundigkeit*. Instead, the Supreme Court referred to previous instances, including its own 1979 decision, where courts described the Holocaust as an uncontestable fact. In some instances this connection was quite tenuous.[36]

The *Deckert* case made the fact that the Holocaust happened a legal precedent. Rather than a fact to be proven by a historian, or deduced by the court's own institutional knowledge of history, the Holocaust was now part of the law itself, a legal premise beyond dispute. The trend continued in the April 1994 *Holocaust Denial* case. The case involved a 1991 rally in Munich at which David Irving was scheduled to speak. After the Munich authorities cancelled the rally, Irving filed a constitutional complaint based on freedom of speech. In 1994 the Constitutional Court held that Holocaust denial was not protected speech. Like its predecessors, the court in the *Holocaust Denial* case was faced with the task of defining and responding to the deniers' factual claims about the Holocaust.[37]

The court first distinguished between opinions, even those based on facts, which are protected under Basic Law Art. 5(1), and false statements of fact, which are not. The crucial element of a fact is "the objective relationship between the statement and reality." This quality made facts "amenable to . . . testing of their truth content."[38] The court then concluded that Holocaust denial was not an opinion: "The statement that in the Third Reich there were no persecutions of Jews, is a factual assertion, which after countless eyewitness reports and documents and determinations of courts in numerous prosecutions, has been proven untrue."[39]

The court did not specify what made Holocaust denial a "untrue factual statement" as opposed to an opinion based on facts. Reading between the lines, however, the answer was clear. The evidence supporting the Holocaust was so well established that no reasonable person could doubt it. As we shall see, this was precisely the step Judge Locke refused to take in *R. v. Zundel*. Judge Locke was concerned with using judicial notice to determine what beliefs are reasonable. That the court had no such qualms is the result of German sensitivity about the Holocaust and the inquisitorial norms of the German legal system.

The *Holocaust Denial* case brought mixed reactions from legal scholars and social critics. Some tried to limit the case to Holocaust denial. Dr. Helmuth Schulze-Fielitz restricted the category "untrue fact" to single

false facts, such as inaccurate statistics, facts that are untrue "to every reasonable observer." If Holocaust denial fit this category, "[i]t would be difficult, even theoretically, to find a second example."[40] Others opposed the *Holocaust Denial* case as the first step toward a state-backed truth monopoly.[41] A third group viewed the case more positively. Fearful of the post-unification surge of right-wing radicalism and its impact on Germany's domestic politics and international reputation, they saw the case as cause for relief.[42]

Either way, the *Holocaust Denial* case marked the end of a twenty-year process during which the Holocaust, once a well-established but potentially questionable fact of history, became an unchallengeable rule of law. In 1976 the Supreme Court asserted that the Holocaust was a historical fact to be proven, possibly with expert testimony. Three years later, in the *Zionist Swindle* case, the court made it clear that such testimony was not necessary. In 1982 the Constitutional Court's screening committee called the Holocaust an *offenkundig* fact. Nine years later the Dusseldorf Appeals Court used the *Offenkundigkeit* doctrine to prevent defendants from raising Holocaust denial at their trials. In the *Deckert* case the Supreme Court took the next logical step. Instead of leaving the judicial notice question in the hands of individual judges, who might theoretically reach their own conclusions, it established the *Offenkundigkeit* of the Holocaust as a matter of law. Finally, in the *Holocaust Denial* case, the Constitutional Court held that Holocaust deniers had no right to self-expression because denial was not opinion.

All the while, the judges steadfastly refused to admit what they were doing. From the very start the judges relied on legal syllogisms to distance themselves from the fact-finding process. Better to mention the massive evidence supporting the Holocaust in passing, as an adjunct to a legal argument, than engage in a public debate with Holocaust deniers. If German judges followed Lipstadt's advice, they had little choice. The judges had to find a way to dismiss the factual claims of Holocaust deniers. The alternative, an open debate over the historical merits of Holocaust denial, was politically unacceptable. But if the political atmosphere drove German judges to take judicial notice of the Holocaust, inquisitorial legal norms made it possible. In dismissing the claims of Holocaust deniers, German judges were the beneficiaries of a strongly inquisitorial legal culture that concentrated fact-finding powers in the hands of the judge. Their counterparts in the United States, France, and Canada were not as lucky.

THE UNITED STATES: A DEPARTURE FROM ADVERSARIALISM

Holocaust survivor Mel Mermelstein's success in convincing two California courts to take judicial notice of the Holocaust was surprising given the deeply entrenched adversarial culture in the United States. One of the hallmarks of this culture is that the parties supply the evidence; another is that the jury finds the facts. This section shows how Mermelstein convinced an

American court to temper its adversarial ethos enough to take judicial notice of the Holocaust.

The *Mermelstein* case grew out of a contest sponsored by the California-based IHR in 1978. At the time, the IHR was at the center of Holocaust-denial activity in the United States. To garner publicity, the organization mailed letters to a number of Holocaust survivors promising them $50,000 if they could supply reliable evidence proving that Jews were gassed at Auschwitz. One of the recipients was Mel Mermelstein, a Southern California businessman and survivor of Auschwitz.[43] At the time Mermelstein was active in Holocaust-related causes, including the fight against Holocaust denial. In July 1980 he wrote a letter to the *Jerusalem Post* warning its readers about the IHR's contest. His letter closed with a challenge: If IHR members accompanied him to Auschwitz he would show them where he saw "the actual gassings of men, women and little children in gas chambers described as shower rooms."[44]

The IHR responded by mailing Mermelstein a formal contest application. In his cover letter, IHR representative Lewis Brandon invited Mermelstein to apply, adding that, if Mermelstein did not respond to the contest, the IHR would "draw our own conclusions, and publicize this fact to the mass media, including the *Jerusalem Post*." The letter had a devastating impact on Mermelstein. Nightmares of his captivity at Auschwitz returned. Mermelstein was determined to respond. As he stated in a psychological evaluation prepared for the subsequent litigation: "I will not allow myself to be mocked. We sat idly by in Europe—no more!"[45] Instead, he would fight. He would fight in the courtroom rather than giving in or taking to the streets. In this regard, Mermelstein responded to Holocaust denial in terms of outrage, rather than fear. He would do whatever it took to repudiate the deniers.

Legally, this would be a difficult task. American law is highly deferential of speech, even speech hurtful to its victims. The First Amendment ruled out the possibility of criminal prosecution. This left Mermelstein with two options. He could sue the IHR in civil court for the intentional infliction of emotional distress. This had the advantage of setting a precedent that could be used against other deniers in the future. But this strategy faced a major hurdle. To establish his case, Mermelstein would have to show that the IHR's outrageous conduct caused him harm. While he might convince a jury that the contest was outrageous, and that it caused him harm, the case would probably never get that far because American courts define "outrageous conduct" by reference to the First Amendment. In other words, the more the outrageous behavior resembles political speech, the less likely courts would allow tort suits. Given the expressly political nature of Holocaust denial, the free speech concerns were probably strong enough to jeopardize a tort suit, especially in the wake of the resurgent civil libertarianism characterized by the just-decided *Skokie* case.

Alternatively, Mermelstein could take the contest at face value by completing the application form and mailing it to the IHR. If, after judging

Mermelstein's evidence, the IHR conceded that Jews were gassed at Auschwitz, so much the better. If, as was more likely, the IHR rejected his claim or refused to process it, Mermelstein could then sue the IHR for breach of contract. Were that to occur, Mermelstein could at least rely on IHR representative Lewis Brandon's statement that "the evidence [for the contest] will be judged along the same standards as evidence in a U.S. Criminal Court; not the standards of the Nuremberg trials."[46] While the juxtaposition of the Nuremberg trials with an American court was meant to score propaganda points for the deniers, Brandon's language could be interpreted as an enforceable promise to assess contest entries according to legal rules of evidence.

In the end Mermelstein split the difference. He decided to take the contest at face value. In mid-December his attorney, William Cox, mailed Brandon a completed application.[47] Cox warned Brandon that Mermelstein would sue the IHR for breach of contract if the application was not processed within a month. In late January the IHR told Cox that it had put Mermelstein's application on hold. The IHR had decided to process a claim from Simon Wiesenthal that had arrived in the interim.[48] Cox then filed a complaint in Los Angeles Superior Court charging the IHR with breach of contract. At the same time, Mermelstein added three tort claims to his complaint—intentional infliction of emotional distress, libel, and injurious denial of an established fact. The latter claim alleged that "[d]efendants knew or should have known that their denial of the Holocaust . . . would cause grave mental anguish to one who was the sole survivor of his family and who would by implication, be labeled a liar for writing and speaking about its effect."[49]

In June 1981 Cox filed two motions. First, he asked the court to take judicial notice of the Holocaust. By taking this step, Mermelstein would satisfy his obligation under the terms of the contest to prove that Jews were gassed at Auschwitz. Second, Cox moved for summary judgment on the breach of contract claim. His argument was simple. Once Mermelstein fulfilled the contest terms he was entitled to the reward money. In practice, the breach of contract claim was problematic. The IHR's lawyers denied there was a contract, characterizing Brandon's letter as an invitation, not an offer. They further argued that Brandon lacked the authority to make such an offer.[50]

Trial judge Thomas T. Johnson rejected Mermelstein's summary judgment motion, explaining that factual questions existed concerning the nature of the contract between Mermelstein and the IHR.[51] As a result, the *Mermelstein* case dragged on for years, settling on the eve of trial in 1985 and only then after the IHR calculated that a trial would prove more costly than a settlement. Under the settlement terms Mermelstein received the $50,000 reward money, $40,000 as additional compensation, and a written apology in which the defendants expressed their sorrow for "the pain, anguish and suffering" Mermelstein and "all other Holocaust survivors" experienced due to "the $50,000 reward offer for proof that 'Jews were gassed in gas chambers at Auschwitz.' "[52]

The outcome of the *Mermelstein* case is less noteworthy than Judge Johnson's ruling on Cox's judicial notice motion. At the same pretrial conference in which he denied Cox's summary judgment claim, the trial judge took notice of the fact that "Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944."[53] Judge Johnson's ruling was a huge personal victory for Mermelstein and a guarantee that the IHR would not use the case to "put the Holocaust on trial." But, from a comparative legal perspective, Judge Johnson's ruling is hard to explain. At first blush, it appears to violate America's common law tradition of leaving factual questions for the jury. Rather it mirrored the German cases considered above; but the German courts benefited from an inquisitorial legal culture.

By contrast, Judge Johnson operated in an adversarial legal culture that sharply restricted the scope of judicial notice. Federal Rule of Evidence § 201 refers to facts "generally known" or "capable of accurate and ready determination." California Evidence Code §§ 452 (g)–(h) refers to "facts of… common knowledge" or those "subject to immediate and accurate determination" by "reasonably indisputable" sources. While these provisions mirror the German Criminal Procedure Code, which lets the judge take notice of facts "which reasonable persons regularly take notice of" or which can be found in "accessible sources,"[54] the American doctrine has a different logic of legitimation. The German doctrine of *Offenkundigkeit* rests on a model of participatory democracy—the court can take judicial notice of obvious facts because the accused shared, or could have shared, in the process that made those facts obvious.[55] While American evidence law also uses democracy as a legitimating device, the democratic element comes from the citizen jury, a body that forms the principal "protection against an overbearing sovereign." Because of its important role, the citizen jury must be able to return a verdict, "which as an exercise in logic flies in the face of reason."[56]

The goal of judicial notice, and the rules of evidence more generally, is to minimize the situations in which the jury renders a verdict that "flies in the face of reason." Hence, the American system restricts judicial notice to those facts beyond the ken of the average jury member or that are so well established that the jury's failure to recognize them would be a public embarrassment. In this regard, judicial notice is an exception to the normal rules of evidence, which seek to influence jury behavior by regulating the type of information they receive. The more radical step of removing the fact-finding responsibility from the jury, which provides the principal democratic check on legal proceedings, is not taken lightly, especially in criminal litigation, as we shall see in *R. v. Zundel.*

Even in civil cases the party seeking judicial notice faces formidable obstacles. First, the personal knowledge of the judge plays no role in this assessment. Unlike Germany, where the court may notice a fact on its own accord, an American judge must base his or her ruling on evidence that the fact is beyond dispute. Ironically, the decision that a given fact is "so well-established as to not require evidence" itself requires evidence. In the Holocaust-denial context

this potential trial within a trial carried Deborah Lipstadt's danger of granting Holocaust deniers undue legitimacy. Second, judicial notice rulings are made on an *ad hoc* basis. Once one moves beyond the easy cases—names of state capitals, that a given date fell on a Sunday, or the law of the jurisdiction—courts will not specify particular sets of facts for which notice is or is not appropriate.[57] In the case of historical facts, courts will recognize "the dates upon which wars began and terminated."[58] Beyond that, the law is extremely unclear.

Mermelstein's attorney William Cox was aware of these problems when he submitted his judicial notice motion to Judge Johnson's chambers in June 1981. The briefs and accompanying exhibits ran almost 300 pages. Its centerpiece was a series of affidavits from Nazi hunters, Holocaust scholars, and prosecutors of Nazi war criminals, including Simon Wiesenthal, Gideon Hausner, Martin Brozat, and Ysrael Gutman. Rounding out the exhibits was a narrative by a Holocaust survivor, a literature professor's analysis of Holocaust denial as propaganda, and a list of French Jews deported to Auschwitz that went on for almost sixty pages. Taken as a whole, Cox's exhibits were a physical representation of the massive evidence documenting the Holocaust, evidence the German courts mentioned but did not supply.

To support his motion, Cox wrote a *thirty-four*-page brief entitled "Review of Literature."[59] He began with a definition from the 1955 Funk & Wagnalls *New Practical Standard Dictionary: "Auschwitz* (ow'-schwitz) A city in SW. Poland; site of a German extermination camp, in which, and in the nearby Birkenau camp, 1,715,000 Jews were slaughtered during World War II." He followed this with quotations from the *Encyclopedia Britannica*. Both of these were "reasonably indisputable" sources and as such demonstrated that the Holocaust met the technical requirements of the California Evidence Code.

But Cox had a second reason for using these sources; he wanted to make the Holocaust an understandable, comprehensible event, an important consideration at a time when popular knowledge of the details of the Holocaust was just beginning to become widespread. This pattern continued throughout Cox's brief. Lengthy quotes from the Nuremberg trials, the Frankfurt trial of Auschwitz guards, Gideon Hausner's book on the Eichmann trial, *Justice in Jerusalem*, and John Toland's book, *Adolf Hitler*, served a two-fold purpose. They demonstrated the scope of the consensus that the Holocaust happened and introduced the Holocaust as a human story of good and evil.

In the final third of his brief Cox proceeded from description to analysis. After citing eleven books on the Holocaust and Holocaust denial, each of which concurred that the Holocaust was a historical event, Cox turned to the expert affidavits he had attached as exhibits. Cox quoted Simon Wiesenthal relating how "[t]here was not one trial in Germany and Austria" where the accused doubted the gas chambers, a weighty claim from one of the world's foremost Nazi hunters. He borrowed historian Ysrael Gutman's distinction between Holocaust denial and real history. The "serious historian . . . is interested in the motivations, the psychological structure of the people who

performed these acts, and in the problems and changes experienced by the person living in the concentration camp." By contrast, the deniers focus on "[t]he question of gassings," which Gutman concluded, was "not a question at all" but "the universally accepted historical fact from which all legitimate interpretations arise." Cox closed with George Santayana's warning that "[t]hose who cannot remember the past are condemned to repeat it."[60]

Cox reserved his legal argument for a three-page supplemental brief in which he cited a handful of cases to establish the legal power of courts to take judicial notice of historical facts. Many of these were probate cases from the 1940s, in which it was imperative to prove that the person in question died during World War II. Cox did not analyze these cases in detail. Instead, he made a separate, freestanding argument based on considerations of policy. Judicial notice was meant to help "those who . . . [are] called upon to offer proof of events normally beyond the ability of individual litigants to provide." Because the Holocaust "is such an event of epic proportions" judicial notice should follow upon the presentation of proper evidence. Cox's reticence to discuss precedents was a mirror image of the situation in Germany. While the German judges used legal syllogisms to avoid dealing too closely with the factual details of the Holocaust, Cox assembled powerful factual proof of the Holocaust to draw attention away from the absence of clear legal precedents.

The IHR's lawyer, Richard Fusilier, opened his reply brief with an attack on the Nuremberg trials.[61] Brandon's letter to Mermelstein stated that the "evidence [for the contest] will be judged along the same standards as evidence in a U.S. criminal court; not the standards of the Nuremberg trials." From this Fusiler reasoned that any evidence of the Nuremberg procedures was inadmissible. The meaning of this argument was unclear. On one level, Fusiler appeared to argue that Brandon's letter barred Mermelstein from relying on evidence from the Nuremberg trials. If this point was primarily for show, since much of the evidence assembled by Cox was not related to the Nuremberg trials, the second interpretation of Fusiler's argument had a more direct legal consequence. If it was an American criminal court, and not the Nuremberg trials, that provided the relevant standard, then judicial notice was inappropriate because it infringed on the defendant's right to a jury. Here Fusiler drew upon the implicit adversarialism of American legal culture to cast doubt on the propriety of judicial notice.

In addition, Fusiler made two specific arguments against taking judicial notice. First, he argued that Cox had applied the wrong legal standard. It was not enough that the facts in question appear indisputable, the matter at hand must be "authoritatively settled." In support of this standard Fusilier cited *Communist Party of America v. Peek*,[62] in which the Los Angeles Superior Court refused to take judicial notice that the Communist Party advocates force and violence. *Peek* helped the defense in two ways. First, Fusiler argued that the very existence of Holocaust denial demonstrated that the Holocaust was not an "authoritatively settled" truth. Second, by invoking a case involving Communists, Fusilier hinted that a ruling in Mermelstein's favor might impact more than just Holocaust deniers.

This led to Fusilier's second argument, which stressed the danger posed by judicial notice of historical facts to a free society. It was Mermelstein's right to "transform into sacrosanct dogma a version of history which a growing number of other people sincerely and seriously dispute," but a court should not help him.[63] Especially since his version of events was "currently under heavy and well-supported attack," an attack that illustrated how ill suited judicial notice was to history, where "uncertainty and the need for correction" are quite common. Fusilier concluded his brief with Voltaire's comment in *Essai sur le moeurs*: "A fair minded man, when reading history, is occupied almost entirely with refuting it."[64]

Compared to the lengthy presentations of both sides, Judge Johnson's ruling was extremely spare. The entire matter took a single paragraph:

> The court, pursuant to Evidence Code Section 452(h) takes judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during 1944. This is a fact not reasonably subject to dispute, determinable by resort to sources of reasonably indisputable accuracy. Otherwise, the request to take judicial notice is denied. Plaintiff is to give notice as to all motions.[65]

Aside from narrowing the scope of the ruling from the Holocaust to "the fact that Jews were gassed to death at Auschwitz Concentration Camp in Poland during 1944" the decision conveys little of substance. Johnson simply repeated the language contained in § 452 of the Evidence Code.

There may be a simple reason for this brevity. Judge Johnson made the actual decision orally during a pretrial conference; but we do not have most of the hearing transcript. We do not, therefore, know if Judge Johnson had more to say about the judicial notice motion at the hearing. Fortunately, Mel Mermelstein reprinted the final page of the hearing in his book, *By Bread Alone*. The excerpt contains Judge Johnson's explanation for his ruling, which is also rather spare:

> THE COURT: [N]ow going back to the plaintiff's request for judicial notice—and I do not know that the ruling that I am going to make right now really determines any of the causes of action completely—I think the plaintiff's request is entitled to be complied with to this extent: Under Evidence Code Section 452(h) this Court does take judicial notice of the fact that Jews were gassed to death at Auschwitz Concentration Camp in Poland during the summer of 1944. It is simply a fact that falls within the definition of Evidence Code Section 452(h).
>
> It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact. It does not determine this lawsuit necessarily.
>
> MR. FUSILER: What sources?
>
> THE COURT: Any number of sources, any number of books, publications of really indisputable accuracy.[66]

Judge Johnson reassurance to the IHR that his judicial notice ruling did not resolve the case reflected an adversarial reluctance to take the ultimate issue

in the case away from the jury. At the same time, the judge was clear about the Holocaust: "It is simply a fact." When Fusiler asked what sources he relied on in reaching that conclusion, Judge Johnson did not give a specific answer, even though he could have mentioned any of the books cited in Cox's brief.

Another reason for Judge Johnson's terseness was the context of his ruling. As the presiding judge at a pretrial hearing in a complex civil case, he had to dispose of a bevy of issues. These included Cox's motion for summary judgment on the contract claim, and a defense summary judgment motion, also based on the contract issues. Whatever the symbolic impact of judicial notice as a repudiation of Holocaust denial, it played a secondary role in terms of the trial. To be sure, Mermelstein had to prove that Jews were gassed at Auschwitz to prevail on their contract claim, and the judicial notice motion helped them in this endeavor. But it is likely Mermelstein could have made this showing without judicial notice. By contrast, the contractual aspects of the case were far from clear. Therefore, Judge Johnson spent the bulk of the hearing on contract issues.

That Judge Johnson treated Cox's motion this way reflects the political atmosphere under which the case unfolded. In contrast to the *Zionist Swindle* and *Deckert* cases, which captured the rapt attention of Germany's anti-fascist activists, mainstream politicians, and foreign observers, the *Mermelstein* case was litigated out of the public spotlight. It arose at a time when major American Jewish organizations, such as the Anti-Defamation League, were committed to driving Holocaust denial underground by ignoring it. There was no need for a stinging repudiation of Holocaust denial; in fact, a well-publicized repudiation might even have been counterproductive if it drew attention to the existence of Holocaust denial.

By 1991, when Mermelstein filed his second judicial notice motion, times had changed.[67] Once again the judge took judicial notice without much difficulty and indeed the judge in the second case had less patience for the deniers. After the IHR's lawyer expressed his opinion that the "whether the Holocaust happened" was for jurors to decide, the judge compared the deniers to the flat earth society and questioned the lawyer's seriousness in even raising the issue. In response to the argument that the existence of denial meant that the Holocaust was not authoritatively settled, the judge replied: "So . . . some people may not want to take Caribbean cruises for fear of falling off the end of the earth. But reasonably indisputably accurate, I'd say the earth is a sphere. I mean—you know—how far are we going to carry this?"[68] What Judge Johnson had seen as a serious issue now became a farce.

This new attitude reflected the changing role of Holocaust denial in American society. By the late 1980s a broader segment of the American public knew that Holocaust deniers existed. But compared to the mid-1990s, few understood why people denied the Holocaust. As a result, the whole idea of denial sounded like a joke, a point reinforced by an infamous Saturday Night Live skit in which an insensitive home shopping network salesperson tells a caller that the Holocaust never happened. But this was a

transitory state. The same year that Mermelstein got his second judicial notice ruling, the leader of the next generation in American Holocaust denial, Bradley Smith, scored a major breakthrough when he convinced a handful of college newspapers at elite universities to run ads denying the Holocaust. As we shall see in chapter 6, the Smith campaign and the controversy it generated went a long way toward informing the American public at large about the background and motivations of Holocaust deniers.

Given this, how did the two *Mermelstein* rulings impact the legal system and larger society? If the German cases symbolized a societal rejection of Holocaust denial, the impact of Mermelstein's judicial notice rulings was less clear. The 1981 ruling did have a tangible legal impact. By placing the Holocaust beyond factual dispute, Judge Johnson placed it beyond legal dispute as well. The rest of the trial turned on contract law, not history. If Mermelstein hoped to stop the IHR from turning the lawsuit into a debate over the Holocaust, he succeeded admirably. On the other hand, the impact of the rulings on the legal system as a whole was minimal. As a paragraph-long order in an unreported civil case that was ultimately settled, Judge Johnson's ruling did not appear in any evidence hornbooks. Only an extremely unusual set of facts let Mermelstein bring suit against the IHR. The First Amendment (and a more cautious set of deniers) would make a repeat of the case almost impossible.

Nor can it be said that Judge Johnson's ruling played a major role in awakening Americans to the dangers of Holocaust denial. To be sure, the case was a personal victory for Mermelstein. In a press release accompanying the 1985 settlement his lawyer, Gloria Allred, described the case in glowing terms:

> Through this case, we have brought these formerly influential and powerful defendants to their knees. The record we have made in this lawsuit will be sent throughout the world and remain a written memorial to the six million Jews murdered by the Nazis and the courageous survivors of those concentration camps. It will serve as testament to future generations that the truth will live forever and be a reminder of our hope that Jewish people will never again suffer another Holocaust.[69]

But Mermelstein's efforts to take advantage of his "legal victory" were less successful. His insistence that the IHR, by settling the case, admitted the truth of the Holocaust generated further litigation. But aside from a made-for-TV movie in which Leonard Nimoy played Mermelstein there was little press coverage on his case, either inside or outside the Jewish community. The time was not ripe. The consciousness-raising Mermelstein hoped to achieve with his lawsuit would have to wait until the early 1990s and the furor over the Bradley Smith ads.

From a comparative perspective, *Mermelstein* shows how the U.S. legal system was only imperfectly adversarial. To be sure, this was not Germany, where the judges decided the judicial notice issue on their own. Mermelstein and his lawyer did have to brief the judicial notice issue. Under other circumstances,

the briefing process could have led to controversy, especially if the public had read the defense brief. But, overall, the civil plaintiffs had a pretty easy time of it. Judge Johnson took judicial notice in a brief one-paragraph opinion that did not consider any of the factual, sociological, or political arguments raised by the defense. This was largely because of the case's unusual legal posture (a civil breach of contract case, rather than a criminal trial) and the relative insignificance of Holocaust denial in American culture in the 1980s.

France: An Adversarial Bastion in the Civil Law World

On February 15, 1979, nine civil rights and deportee organizations charged Robert Faurisson with violating § 1382 of the French Civil Code, which prohibits actions that "cause damage to others."[70] The groups alleged Faurisson harmed them by denying the Holocaust. At issue were four articles appearing in French newspapers in late 1978 and early 1979. In these articles Faurisson wrote that the gas chambers did not exist and that "the supposed Hitlerian gas chambers and the supposed genocide of the Jews form one and the same historical lie."[71] According to the civil plaintiffs, these articles falsified history. In July 1981 the trial court ruled against Faurisson and awarded the civil plaintiffs one franc in symbolic damages. This ruling was affirmed on appeal two years later.

From a strictly legal perspective the trial was a victory for the deportees. This, however, was not how Faurisson viewed the matter. In a postmortem article in the *Journal of Historical Review*, he exclaimed:

> It seems permissible henceforth, basing oneself on revisionist works, to say that the Germans' homicidal gas chambers had no existence in reality and to be suspicious of all the testimonies to the contrary for forty years . . . on condition that one shows, even better than I have done, respect for the victims of the persecutions and deportations and on condition of taking care . . . not to appear insulting or offensive to anyone.[72]

As we shall see, Faurisson had reason for this claim. Neither the trial nor the appellate court addressed the question of whether the Holocaust happened, even though the charge of "falsifying history" would seem to force a legal evaluation of the factual premises of Holocaust denial. This segment explores these rulings which, whatever their legal import, politically appeared to favor the deniers.

Robert Faurisson, a professor of literature at Lyons-II University, traces his interest in Holocaust denial back to 1960. In the early years his activities garnered little public attention. Attempts to place revisionist articles in *Le Monde* came to naught.[73] In the 1960s, France had not worked through the Vichy experience. At the time the tendency was to minimize the problem of collaboration by asserting that most French sympathized with the Resistance, or, alternatively, that the Vichy regime itself shielded France from

the Nazis.[74] Either way there was little interest in the Holocaust or Holocaust denial. During this period the activities of Paul Rassinier—Faurisson's predecessor and one of the first Holocaust deniers—aroused comparatively little interest.[75]

This benign view of Vichy was challenged by the scholarship of Robert Paxton, particularly his 1973 *Vichy France and the Jews.* Paxton's writing shattered the collective amnesia toward Vichy in general and the Holocaust in particular. Marcel Ophful's 1971 film *The Sorrow and the Pity* had a similar effect.[76] As the French became obsessed with the Holocaust and asked how the deportation of 80,000 French Jews to Auschwitz could have taken place, they frequently asked another question as well: Did Vichy officials know of the Final Solution when they authorized the transports to Auschwitz?

To this latter question, Robert Faurisson had a comforting answer. If he doubted the gas chambers in 1978, Vichy officials could reasonably draw the same conclusions in 1942, 1943, and 1944. Indeed, the Vichy connection led to his fame and eventually to the trial. In October 1978 the conservative weekly *L'Express* ran an interview with Darquier de Pellpoix, former Vichy Commissioner General of Jewish Affairs. During the war Darquier defended the deportations on grounds of "public hygiene." Condemned to death in absentia, Darquier was widely presumed dead. Instead, *L'Express* journalists uncovered him alive in Spain. In his interview Darquier defended the policy of deportation, adding: "Only lice were gassed in Auschwitz."[77] The National Assembly debated the propriety of the interview. There was talk of a defamation suit.[78]

Faurisson seized his chance. He submitted a letter to *L'Express* praising Darquier. The Socialist daily *Le Matin* interviewed Faurisson shortly thereafter. In the interview Faurisson said that "the massacres in so-called 'gas chambers' are a historical lie." This opened even more doors to Faurisson. *Le Monde* invited him to write a commentary on the gas chambers. The paper then ran a series of exchanges between Faurisson and George Wellers of the Center for Contemporary Jewish Documentation. The publication of Faurisson's views by France's newspaper of record touched a nerve in the country. Criticism came from the deportees, France's 600,000-strong Jewish community, members of the Resistance, and the political Left.[79] It set the stage for Faurisson's trial.

The Faurisson trial brought the French legal system face-to-face with Holocaust denial. The nine civil plaintiffs included the League Against Racism and Anti-Semitism (LICRA), the Movement Against Racism and for Friendship Among Peoples (MRAP), and seven groups of Holocaust survivors each organized around a given concentration camp. The civil plaintiffs sued Faurisson under §1382 of the Civil Code, a tort statute that punishes those who by failing their duty harm others. More specifically, it punishes professionals (doctors, lawyers, university professors) whose conduct falls below professional standards. The civil plaintiffs argued that the *Le Monde* articles lacked the neutrality, objectivity, and balance required of the historian.[80]

The civil plaintiffs accused Faurisson of ignoring evidence that contradicted his position. They also accused him of distorting the diary of SS Doctor Joseph Kremer and the confession of Auschwitz commandant Höss. In addition, they took issue with Faurisson's interpretive techniques, which they found "fallacious."[81] Like Mel Mermelstein, the civil plaintiffs supported their arguments with a massive display of evidence. Civil plaintiffs also made use of eyewitness testimony from Holocaust survivors. For his part, Faurisson, without conceding the charges, based his defense on two nonfactual grounds. The falsifying history claim violated freedom of speech and it represented a judicial usurpation of the historian's role.[82]

The contending legal strategies played out in the May 1981 trial. The civil plaintiff's attorney Robert Badinter stressed that the case was not a criminal prosecution; Faurisson would still be allowed to publish his materials. His articles would not be seized by the police. Faurisson had a "perfect right" to spread his lies but as a published author Faurisson was "responsible" for what he said. That was why the civil plaintiffs limited their damages to a single franc, a token amount.[83]

This was not how defense attorney Eric Delcroix perceived the situation. According to Delcroix: "The symbolic franc aimed at the moral and material ruin of Mr. Faurisson." Delcroix compared Faurisson to Galileo. A second lawyer, Yves Chotard, made the same point in softer tones: "I do not approve of Faurisson's theses. In the historical debate I would be his adversary." But even those in error should be able to "speak freely." Chotard also questioned the court's competence to judge Faurisson's work. Chotard stressed his own limitations: "I do not know everything, I am not a genius: I could not definitively respond to Faurisson's serious theses. I am not a historian." He extended this analysis to the court—a judicial tribunal was not a doctoral jury. Mr. Berthout, another defense lawyer, likened the historical debate over the existence of gas chambers to the Inquisition, which sought to prove the existence of God.

The civil plaintiffs did not respond to these arguments directly. Rather than calling on the court to prove the Holocaust, Badinter argued that "one does not debate with falsifiers." Instead, one brings suit and condemns them for spreading lies. The trial, Badinter insisted, did not oppose "revisionists" to "exterminationists," it opposed "the truth" to "a myth." The central question was not one of "objectivity" (i.e. an objective inquiry into whether the Holocaust happened) but about the "honesty" of Faurisson's research. Badinter's refusal to debate the facts of the Holocaust avoided the debate with deniers and subsequent legitimacy for denial feared by Deborah Lipstadt. But it came at a cost.

This cost was apparent when the court issued its verdict in July 1981.[84] The civil plaintiffs received their symbolic franc of damages. They also won the right to publish the verdict (at Faurisson's) in *Le Monde, Le Matin*, or a similar journal, a common remedy in defamation cases. But this was not a verdict the civil plaintiffs were eager to publish. Read out of context, it seemed to ratify Faurisson's doubts about the Holocaust. This is in sharp contrast to the

unequivocal language of the German Supreme Court and the *Mermelstein* case. To see why this was so, it is worth looking at the verdict at length.

The trial court first rejected Faurisson's defense that, as a literature professor, he was not a historian for the purposes of § 1382. It then accepted the defense position that it could not judge history:

> [T]he tribunal, called to decide the litigation exclusively with the materials supplied by the parties, has neither the authority, nor the competence to judge History; [and d]eprived from all inquisitorial powers of research and official action, it has not received from the law the mission of deciding how thus and such episode of national or world history must be represented and characterized.[85]

The Holocaust became a "thus and such episode of national or world history," the truth or falsity of which the court would not judge. To do otherwise would be to impose an official truth. By contrast, *Mermelstein* Judge Johnson was content to call the Holocaust "simply . . . a fact."

The court next considered the liberty of the historian. The historian can choose subjects freely and pursue research with a degree of subjectivity and engagement, since public opinion and peer review act as a check. The only real limit was the "common rule" that links freedom to "responsibility." Unable to judge history, the court could judge the historian, especially his or her choice of topic:

> While it is possible that the historical specialist of a largely bygone era may, with total juridical impunity, manipulate or indeed solicit texts and documents and contribute thus, by an exercise of historical virtuosity, to a reversal of status or an eradication of theses or secular beliefs, such an "intellectual game" cannot be conceived with the historian who chooses to train his researches and his reflections on a recent period of the tragic and painful History of man, an epoch from which the witnesses still live and the victims merit regard and consideration.

This passage was ambiguous. On the one hand, the court's show of "regard and consideration" for the victims of the Holocaust presumes the stories of victimhood were true. On the other hand, the court failed to say if historians "of a . . . bygone era," whose "historical virtuosity" reversed "secular beliefs and theses," exercised their skill in the name of the truth or falsehood. The latter possibility implied that the Holocaust might also rest on falsehood.

The court then turned to the historian's "responsibility." Historical research must meet a standard of prudence. Doubt of received historical facts was permissible, but only a "scientific" doubt that carefully examined every source. Because Faurisson's work did not meet this standard, the court ruled in the civil plaintiffs' favor. Faurisson demanded just "one witness" of the gassings, but rejected evidence of the gas chambers on principle. This was not "scientific doubt"; it was a demand for "impossible proof."

The court also took issue with Faurisson's presentation of his findings. Not only did he refer in "quasi-messianic tones" to "good news," a formulation

ill-becoming to a scientist, Faurisson called the Holocaust a "historical lie." This, too, belonged "more to political argument than scientific research." Nevertheless, the court again refused to pass judgment on Faurisson's arguments as history:

> *Without having to research whether or not such a discourse constitutes a "falsification of History,"* it suffices that in dismissing with the label myth, that which he cannot or will not admit, and in proclaiming definitively the "good news" of "historical truth," Faurisson, a French university professor, lacks the requirements of prudence, objective circumspection and intellectual neutrality, that are imposed on the researcher he would wish to be.[86]

The court's biting characterization of Faurisson as an individual was countered by its refusal to say that he falsified history. A passing observer might conclude that the verdict discredited Faurisson but not Holocaust denial. The final paragraphs, where the court addressed the moral harms caused by Faurisson to deportees and their families, did not alter the overall impression generated by the opinion that the Holocaust was still subject to debate.

The court's failure to label Holocaust denial as false history is puzzling. The court did not sympathize with Faurisson. The judges declined several opportunities to dismiss the case outright. They neither excluded Faurisson from liability because he was not a historian nor did they extend their unwillingness to judge history to the "historian" himself, as the harsh personal rebuke of Faurisson attests. Rather, the difficulty came from French norms of legal fairness that left the trial court with little choice but to rule as it did.

This may strike the reader as strange. As noted earlier, France is a civil law country. Indeed, in many respects it is the quintessential civil law country. Few nations go further in limiting the role of precedent and judge made law. But with regard to law of evidence France shares more with the adversarial common law world, than with civil law countries like Germany. French evidentiary law rests on the principle of adversarialness (*principe contradictoire*).[87] The basic idea is simple. Every legal and factual issue that arises in a lawsuit should be decided by the parties. The judge must also observe this principle.[88]

The strong adversarial tinge of French evidence law had a major impact on the Faurisson case. Indeed, in the area of judicial notice, the French legal system is the most adversarial of the four countries; it alone does not have a formal concept of judicial notice. Not only that, when it comes to historical facts, French courts are unable to render judgments, let alone do so without hearing the evidence of both sides. Bernard Edelman, a law clerk at the Paris Court of Appeals, made this point strongly in an article on the Faurisson case.[89] No friend of Holocaust deniers—Edelman supported the prosecution because of the threat he felt Faurisson posed to French society—he defended the trial court's refusal to judge history, which he saw as an application of two fundamental principles of adversarialism.[90]

According to Edelman, two principles were critical: (i) there can be no judgment without proof; and (ii) there can be no proof except according to

evidence presented by the parties. Edelman illustrated the applicability of these principles to historical disputes with an example. In 1970 the Association of Cadets of Saumur sued to ban a film that described the German invasion of France in what it felt to be an "inexact" manner. The trial court let the film run but suppressed certain "shocking" sequences in the film. The French advocate general harshly criticized this decision: it was not the role of a French judge to determine what was or was not historically "shocking."

Edelman then presented a rationale for courts abstaining from historical disputes. A lawsuit is "a personal affair of the parties." By keeping a trial in the personal realm, the judge plays an important role in maintaining a "symbolic separation of powers" essential to the functioning of a democracy. Unlike the traditional division between legislative, executive, and judicial, the symbolic version divides "the Institutions," on the one hand, and "collective memory," on the other. The task of "the Institutions" is to manage society; as such they require absolute neutrality. History and politics must remain separate. To confuse the two is the hallmark of totalitarianism. Within this schema, the judge remains "imprisoned in his office of neutrality." The truth of the judge is not a historical truth, good for all times and places; it is relative and temporary. The court is not a place for "metaphysical" battles between "the forces of good and evil." This "radically anti-totalitarian" conception of judicial power prevents the court—any court—from judging history.

Edelman's note illuminates the Faurisson verdict. When the court denied its competence to judge history—even the history of the Holocaust—it restated a procedural norm. The same applies to its refusal to find that Faurisson "falsified" history. To demonstrate a lie requires a view of the truth, which in turn requires a judgment about history. This the court could not supply. On offer instead were a biting critique of Faurisson's methods and repeated references to victims of the Holocaust. These at least show us which side the court favored. As we shall see, the Court of Appeals would be more guarded in its sympathies.

By 1982 when the case was argued before the Paris Court of Appeals Faurisson changed his legal strategy. Earlier content to rely on legal arguments, he now planned to address the facts. The success of this strategy was borne out in the April 1983 verdict, a verdict widely regarded as a political victory for Faurisson, even though the Court of Appeals upheld the judgment against him.

The verdict began by restating the norm against judicial interpretation of history in a way that appeared to validate Faurisson's work as legitimate. "The value of the conclusions defended by M. Faurisson remain, therefore, subject to the appreciation of the experts, historians and the public alone."[91] The verdict also rejected the civil plaintiffs' attack on Faurisson's methodology. Instead the Court of Appeals said that "the accusations of frivolousness formulated against him lack pertinence and are not sufficiently established," adding that Faurisson's arguments were "of a scientific nature" in so far as he argued that the gas chambers were an "absolute impossibility."

By refusing to call Faurisson's work "frivolous" the Court of Appeals abandoned the trial court's strategy of distinguishing Faurisson's factual claims (which it could not criticize) from his methods (which it could). Instead, the Court of Appeals justified its holding entirely on the basis of Faurisson's provocative rhetoric or what the high court referred to as his "political slogans." These slogans represented a departure from, and an abuse of, Faurisson's "critical work." Moreover, "in reporting on the reality of racial, persecutions and the deportation *en masse*, which caused the deaths of millions of persons, Jews or not" Faurisson never once had a word of respect for the victims. By drawing a distinction between Faurisson's narrow argument about the gas chambers, and his complete dismissal of the Holocaust, the court signaled its political loyalties. It did the same by warning that Faurisson's association with Holocaust denial could reinforce a "global rehabilitation of Nazi war criminals."

The Court of Appeals verdict brought strong reactions from both sides. For Robert Faurisson it was a political victory. Pierre Vidal-Naquet, a leading critic of Faurisson, agreed:

> The lawsuit brought against Faurisson in 1978 by several antiracist organizations ended with a decision by the Paris Court of Appeals on April 26, 1983, which recognized the seriousness of Faurisson's work—which is quite outrageous—and finally found him guilty of only having acted malevolently by summarizing his theses as slogans.[92]

George Wellers of the Center for Contemporary Jewish Documentation took pains to minimize the ruling, reminding Faurisson that the Court of Appeals had ruled in favor of the civil plaintiffs.[93]

All in all, Faurisson and Vidal-Naquet probably have the better argument; the two Faurisson decisions give the impression that Faurisson was a serious scholar, precisely what Deborah Lipstadt feared would happen if opponents tried to debate deniers. But the ruling pointed one way out of this dilemma. When, in 1990, the French legislators took action against denial, the law they passed took the factual question away from the judiciary by making the contestation of genocide, not the *false* contestation of genocide, the criminal act. Meanwhile, from a comparative perspective the French case shows the importance of distinguishing general legal families (such as common law and civil law), which may generally have more or less adversarial norms, from the specific traditions of a given country in a given doctrinal area. Like politics, all law is local.

Canada: Adversarialism on Trial

Canada represents the far end of the judicial notice continuum. Unlike the Paris trial court, which refused to condemn Faurisson's historical claims because it felt that judges should not usurp the role of the historian, Judge Hugh Locke explicitly refused to take judicial notice of the Holocaust, the

only instance of such a refusal in the history of Holocaust denial litigation. By taking this step, Judge Locke created the impression that the Holocaust was not an indisputable fact. As Irwin Cotler, a Canadian law professor, put it:

> Could the courts have taken judicial notice of the existence of the Holocaust as a historical fact? As many of you know, judicial notice is a principle of evidence; courts are authorized to take judicial notice of matters which are common knowledge and about which reasonable people would agree. One would have hoped, indeed argued, that the Holocaust is at the very least such a matter. One might draw a disturbing inference if judicial notice of the Holocaust was not taken. Maybe the Holocaust isn't a matter of common knowledge about which reasonable people agree.[94]

Why did Locke refuse to take judicial notice of the Holocaust? As we shall see, the trial judge had no doubts about the Holocaust whatsoever. His concern stemmed from the fact that the trial over which he presided—*R. v. Zundel*—was a criminal proceeding. In refusing to take judicial notice of the Holocaust, he set the obviousness of the Holocaust against the right of the accused to a fair trial. What remains debatable was the role of adversarialism in Locke's decisionmaking process. Was Locke's ruling the necessary outcome of the application of adversarial norms to a criminal trial? Or were there special circumstances that, without totally letting adversarialism off the hook, are necessary to fully understand his ruling?

The first special circumstance concerns how the case reached the court. Ernst Zundel, the president of the Toronto-based *Samisdat Publications*, distributed revisionist and anti-Semitic writings worldwide. Among these figured a thirty-page pamphlet entitled *Did Six Million Really Die?*[95] After gathering "irrefutable evidence" to show that the "allegation" was not "merely an exaggeration but an invention of post-war propaganda," the pamphlet concluded that "Jewish casualties during the Second World War can only be estimated at a figure in thousands."[96] In December 1983 an organization of Holocaust survivors, the Canadian Holocaust Remembrance Association (CHRA), charged Zundel under an obscure statute that outlawed the knowing dissemination of false news harming a public interest.

The False News Law guaranteed that the case would become a factual contest over the Holocaust. It provided that "Every one who willfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offenses and liable to imprisonment for a term not exceeding two years."[97] The indictment filed by the CHRA alleged that Zundel, by publishing *Did Six Million Really Die?* was likely to cause mischief "to the public interest in social and racial tolerance[.]"[98] The concern with ethnic and racial tolerance is well entrenched in Canadian legal and popular culture. But the False News Law required more than a libelous statement that harmed public interest. The indictment also had to allege statements of fact known to be false. The requirement that the prosecution prove that Zundel published *Did Six Million Really Die*? knowing it was false would cause problems for John

Griffiths, the Ontario prosecutor who took over the case from the CHRA in 1984, for Judge Locke who ruled on Griffiths' judicial notice motion, and for the Ontario Court of Appeals, which had to affirm or reverse Locke's ruling.

In January 1985 *R. v. Zundel* went to trial before Judge Locke. At a pretrial conference, Griffiths described his plan for the case. He would show that *Did Six Million Really Die?* was false through the testimony of Holocaust expert Raul Hilberg, six Holocaust survivors, and a letter from the International Red Cross (Tr.: 472–76). Zundel's knowledge of the pamphlet's falsity posed a problem. How could the prosecution step into the mind of the accused and read his thoughts? What if Zundel took the stand and said he mailed the pamphlet believing it was true?

To resolve this problem, Griffiths planned to establish that Zundel was "reckless" with regard to the contents of the pamphlet. In other words, he would try to convince the jury that Zundel's belief that the Holocaust never happened was so "unreasonable," so beyond the scope of normal public opinion, that he must have known it was false. To that end, Griffiths would ask the court to take judicial notice of the Holocaust as "a matter within the common knowledge of each and every person" (Tr.: 480). In other words, judicial notice would not simply disprove the pamphlet, it would also be used to infer Zundel's state of mind.

Griffiths' argument that Zundel must have known the Holocaust happened was a risky strategy. Defense counsel Douglas Christie could have argued that his client was a sincere (and probably harmless) kook who believed the pamphlet even if nobody else did. However, Christie did not make this argument. Instead, he would stress his client's right to doubt whether the Holocaust happened and question the authority of courts to judge historical disputes. Most critically, Christie would also argue that the Holocaust was not beyond dispute (Tr.: 487–88). By attempting to use the case to "put the Holocaust" on trial, Christie and Zundel eased Griffiths' legal dilemma of how to convict Zundel even as they increased his political dilemma of how to do so without allowing the accused and his lawyer to disrespect the Holocaust.

The pretrial conference set the tone for the prosecution case. Prosecution witnesses documented the Holocaust and rebutted statements made in the pamphlet but said nothing about Zundel's state of mind in publishing it. Griffiths expected the court to grant the judicial notice motion, which would take care of that part of the prosecution's case. Christie, for his part, tried with some success to use his cross-examinations to slip in material that denied the Holocaust. Like Griffiths, Christie showed little interest in what, from a legal perspective, should have been a major issue—Zundel's honest belief (or lack thereof) in the contents of the pamphlet. Both prosecution and defense were content to focus the trial on the Holocaust itself.

At the end of the prosecution case Griffiths made his judicial notice motion. He requested that the court take notice that "millions of Jews were annihilated from 1933 to 1945 because of the deliberate policies of Nazi Germany" and that "the means of annihilation included mass shootings,

starvation, privation and gassing" (Tr.: 2073). Griffiths supported his motion with a legal analysis of judicial notice. For the proposition that courts could take notice of historical facts he cited a British Columbia case involving the treaty rights of indigenous peoples. Griffiths also cited a wealth of American articles and precedents. He cited Morgan and Wigmore, two well-known evidence hornbooks, for the proposition that judicial notice would prevent the accused from presenting contrary evidence, a conclusion that would foreclose most of the defense case (Tr.: 2082–88).

Midway through his presentation, Judge Locke asked Griffiths a decisive question: What questions would a finding of judicial notice leave for the jury? Griffiths' response is revealing:

> I have purposefully, Your Honor, made the definitions . . . quite broad, not to the particular of how many people were at Belzec or whether Nuremberg was a properly conducted trial, but dealing with the broadest, most commonly known, I would suggest, generalization of history, and it would leave the particulars which are in dispute, and there are certainly quite a number of those indicated in the pamphlet, *and it would leave Zundel's belief in dispute*, and whether or not this pamphlet, Exhibit 1, created a mischief to a public interest. (Tr.: 2093–94, emphasis added)

Despite his earlier statement that he would demonstrate Zundel's state of mind through "recklessness," and despite having presented no other evidence on Zundel's mental state, Griffiths now suggested that judicial notice would not foreclose the question of whether Zundel honestly believed the contents of the pamphlet.

After a day of oral argument Judge Locke issued his ruling denying Griffiths' motion. He began his opinion by citing dictionary and encyclopedia entries describing the Holocaust. He then reviewed the evidence submitted by both sides. Judge Locke did not have any factual doubts about the Holocaust. After summarizing the evidence he concluded that, based on his reading and listening to oral argument, "there exists wide and highly regarded opinion that the Holocaust did occur" (Tr.: 2188).

What remained was a question of judicial prudence. Should the court take judicial notice "in light of the circumstances of this particular trial?" To answer this question he quoted the pamphlet at length. The author of *Did Six Million Really Die?* promised the reader "irrefutable evidence" that the "allegation that 6 million Jews died during the Second World War, as a direct result of official German policy of extermination, is utterly unfounded." After citing the four elements of the False News Law (publication, falsity, the accused's knowledge of its falsity, and harm to the public interest), Locke gave his ruling and his rationale for it:

> It seems to me that from my perusal of the author *Wigmore on Evidence*, and as a result of other cases I have read, to grant this motion, however tempted I may be to grant it, would have the effect, in the eyes of the public, as well perhaps in the eyes of the jury and the accused, of not providing the defense and accused

> with full answer and defense. It would have the effect of substantially eliminating a portion of the duty incumbent on the Crown insofar as the guilt of this accused is concerned. (TR.: 2191)

Judge Locke ended by stating that it was "with no little regret" that he dismissed Griffiths' claim (Tr.: 2191).

In addition to raising regrets, Judge Locke's ruling raises questions. First, Locke in his concern about "providing the . . . accused with full answer and defense," went further than the Anglo-American law of judicial notice requires. For instance, Professor Graham C. Lilly's treatise on evidence refers to the "decided tendency" in criminal cases "to let the jury refuse to find any contested fact adverse to the accused, whether or not it is reasonably disputable."[99] This takes the form of an instruction that the jurors "*may* (but are not required to) accept judicially noticed facts as conclusive."[100] Why was Judge Locke unwilling to use a similar arrangement in *R. v. Zundel*?

Second, what "portion of the duty incumbent on the Crown" would the taking of judicial notice eliminate? On this Judge Locke was no more specific than prosecutor Griffiths. If all that was at issue was the falsity of the pamphlet, one could argue that the prosecution had already supplied sufficient proof in the testimony of Raul Hilberg, six Holocaust survivors, and the additional documentary evidence. Judge Locke's fears of reducing the burden on the Crown to prove its case are hard to fathom unless one assumes the trial judge was also referring to the requirement that the Crown prove Zundel's state of mind.

In the meantime Griffiths, despite losing on the judicial notice motion, convicted Zundel of spreading false news. Zundel then appealed, challenging his conviction on procedural and constitutional grounds. Griffiths' replied with a challenge of his own against Judge Locke's judicial notice ruling, which the Court of Appeals rejected.[101] In its ruling the court clarified the reasons behind Judge Locke's otherwise enigmatic decision.

The court began by stating the test for judicial notice in Canada as announced in the 1982 case *R. v. Potts:* "[G]enerally speaking, a Court may properly take judicial notice of any fact or matter which is so generally known and accepted that it cannot reasonably be questioned, or any fact or matter which can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned."[102] The court then entered into a lengthy discussion of the debate between Morgan and Thayer, two evidence law treatises, over the impact of judicial notice on the party against which it is taken. Like Locke, the Court of Appeals took the modern view that judicial notice closes off further evidence on the point in question.

Turning to Judge Locke's prudential grounds for not taking judicial notice, the court identified the problem of fairness that would have arisen had the judge recognized the Holocaust as an indisputable fact:

> In the present case, the prosecution was required to prove, *inter alia*, (a) that the pamphlet was false, and (b) that the appellant subjectively knew that it was

> false. There was no direct evidence of the appellant's knowledge of the falsity of the pamphlet, such as an admission, and, indeed, the defense position was (a) that it was true and (b) even if it was not true the appellant honestly believed it to be true. The Crown, in order to succeed, was required to prove by circumstantial evidence of inference that the appellant knew the pamphlet was false.[103]

In other words, because Griffiths had not supplied any direct evidence of Zundel's state of mind, he would have to ask the jury to make an inference from the notoriety of the Holocaust to Zundel's knowledge of it. This gave the judicial notice motion added significance.

> If the jury on the evidence concluded that the existence of the Holocaust was so notorious as to be indisputable by reasonable men and women, that would be a circumstance, but only a circumstance, from which the jury might infer that the appellant knew that the pamphlet was false, but the jury would not be required to draw that inference. However, if the trial judge had taken judicial notice of the existence of the Holocaust, he would have been required to so declare to the jury and to direct them to find that the Holocaust existed, which would have been gravely prejudicial to the defence in so far as it would influence the drawing of the inference concerning the appellant's knowledge of the falsify of the pamphlet. In our view, the judge exercised his discretion judicially in refusing to take judicial notice of the Holocaust.[104]

The passage helps us understand Locke's ruling. Were the falsity of the pamphlet the only question at issue, the vast array of prosecution evidence would render harmless any advantage judicial notice gave the Crown. Under these circumstances, refusal to take judicial notice would raise questions about the law's commitment to the truth. But in this instance, the prosecutor was using judicial notice not to prove a historical fact (that the Holocaust happened), but to prove a sociological fact (that no reasonable person could honestly dispute the Holocaust). The question of whether Zundel was a reasonable person remained for the jury to decide. That the prosecution presented no evidence on Zundel's state of mind until after the judicial notice ruling created the suspicion that the Crown would use the doctrine of judicial notice to bootstrap an otherwise weak part of its case. One cannot blame Prosecutor Griffiths for trying this strategy. But it is unfair to attribute the failure of Judge Locke to take judicial notice of the Holocaust to adversarial blindness for the truth.

The centrality of the False News Law in Locke's judicial notice ruling is also demonstrated at Zundel's retrial when Judge Ronald Thomas ruled that "[t]he mass murder and extermination of Jews of Europe by the Nazi regime during the Second World War is so notorious as not to be the subject of dispute among reasonable persons" (1988 Tr.: 1007). Judge Thomas downplayed how his ruling would impact the accused: "It is my view that the fact that the Holocaust is generally known and accepted by the community may operate 'unfortunately' for the accused when he seeks to defend on the basis

of lack of knowledge, but it is not 'unfair' to use that against him" (1988 Tr.: 1008).

At first, it might appear that Judge Thomas rejected the position of Locke and the Ontario Court of Appeals, which might, in turn, suggest that Locke's ruling was simply a expression of the normal adversarialism in Canadian legal culture (albeit an overstated one), rather than a response to the specific legal problems posed by the False News Law and prosecutor Griffiths' aggressive legal strategy.

A closer analysis of Judge Thomas's ruling dispels this notion. In making his ruling Judge Thomas relied on a promise by the prosecution that it would show twenty-five different instances where the pamphlet was false. In addition, the prosecution would be leading evidence on Zundel's state of mind, evidence that Zundel had Nazi leanings that gave him a motive to lie about the Holocaust. This additional evidence pushed the Holocaust into the background. The judicial notice ruling now only served to supply a context for the litigation. The Ontario Court of Appeals concurred. Ruling on the case for a second time it held that the trial judge took judicial notice "of historical facts which were not in contention and which were no more than background."[105]

By contrast, Griffiths' motion forced the trial judge to make a judgment, not about truth and falsity, but fairness. The question was not "Did the Holocaust happen?" but rather: "Was it fair to let the jury use judicial notice to infer Zundel's state of mind?" Locke's refusal to permit jurors to make this step reflected a commitment to treating the accused fairly, and demonstrated how judges of Holocaust-denial cases relied on norms of legal fairness to resolve difficult legal questions. Ultimately, Locke's ruling was compelled by the False News Law. By requiring knowing dissemination of false news, the law established a standard of proof only rarely established with direct evidence. The Crown was left with no choice but to infer Zundel's mental state from the falsity of the statement.

Conclusion

While judges in Germany, the United States, France, and Canada all faced the same question—whether to take judicial notice of the Holocaust—they arrived at different answers. The answers the judges reached depended on three factors: (i) the evidentiary norms of a given country; (ii) the procedural posture of the case; and (iii) the political pressure to avoid a ruling that appeared to place the Holocaust in doubt. In Germany two of the three factors favored taking judicial notice. Strong inquisitorial norms, combined with a political sensitivity to the Holocaust forced German judges to find some way to dismiss the factual claims of Holocaust deniers. In the United States the legal norms were less favorable to taking judicial notice, but this was more than made up for by the procedural posture of the case—a civil trial that turned on other issues. In France extremely strong adversarial norms made it impossible for the Paris courts to dismiss Faurisson's historical claims

out of hand, while in Canada adversarial norms combined with an extremely unfavorable procedural posture and a risky prosecution strategy produced a dramatic refusal to take judicial notice.

The thesis that the dilemma of proof would be stronger in civil law countries (France and Germany) than in common law countries (Canada and the United States) requires revision. It is the distinction between adversarial and inquisitorial norms that matters; not the broader one between civil law and common law legal systems. Adversarial and inquisitorial norms operate at the level of individual countries. Even within countries there are considerable differences across doctrinal areas. French judges were skittish about judging history, even though the French legal system as a whole is generally inquisitorial. Judicial notice is not the only doctrinal area where adversarial norms presented problems for prosecutors and judges of Holocaust deniers. As we shall see in chapter 2, the rule against hearsay—found almost exclusively in the common law world—posed immense problems for the prosecution in the *Zundel* case.

Turning from outcomes to processes, the four case studies show the difficulty judges had in describing the Holocaust, and in expressing sympathy and regret when unable to rule in favor of the prosecution or civil plaintiffs, depended in large part on legal norms and the extent to which the Holocaust was already a sensitive issue in the country in question. German judges struggled to find a way to take judicial notice without being seen to grapple with the facts. To describe the facts of the Holocaust, let alone those of the deniers, generated a sense of uneasiness in a society still uncertain about how to best resolve its own relationship with the Nazi past. Meanwhile, the French example shows how judges who know they cannot give the public what it wants (a clear denunciation of Holocaust denial as false) sweeten the bitter pill with harsh condemnations of Faurisson's politics and repeated references to the victims. By contrast, in North America, where the Holocaust plays a smaller role in public life, Judge Locke limited himself to a business-like statement of regret, while Judge Johnson, who took judicial notice, referred to the Holocaust as "simply a fact," no different from the names of state capitals or the days of the week.

Chapter 2

The Holocaust as Hearsay?

R. v. Zundel is the only criminal prosecution of a Holocaust denier in the common law world. As we have seen, this complicated life for trial judge Hugh Locke, whose controversial refusal to take judicial notice of the Holocaust was grounded on common law norms of adversarialism. But this was not Locke's only difficult ruling. Throughout the trial, he had to fit prosecution and defense evidence about the Holocaust into the strictures of the common law rule against hearsay. This chapter outlines the hurdles Locke faced, the solutions he reached, and the problems his solutions created.

The Rule Against Hearsay

Reviewing *R. v. Zundel* on appeal, the Ontario Court of Appeals praised Judge Hugh Locke for presiding over "a difficult and complex trial" in which rulings were made daily "on difficult and involved questions of law."[1] Most of these obstacles involved the rule against hearsay. The rule is one of the central norms of legal fairness in the common law system. John Wigmore called it "a fundamental rule of safety," albeit one that can be "overenforced and abused."[2] The basic idea is simple—all testimony must be subject to cross-examination. When a witness testifies to statements he or she overheard, there is no possibility for cross-examination. As a consequence, the court and juror have no basis for assessing the truth of the secondhand statement. The rule assumes that careful analysis of witness demeanor helps jurors separate truth from lies. It also places great faith in the power of cross-examination to ferret out the truth.

The rule against hearsay is interpreted rigidly. Operating in a conservative, precedent-driven area of the law, lawyers and judges rarely challenge the hearsay rule directly. The preference is to use already-established exceptions to the rule.[3] This, indeed is what happened in the *Zundel* case. Instead of arguing that the hearsay rule should not apply to the Holocaust, Judge Locke and the two lawyers struggled for ways to fit testimony about the Holocaust into several well-established exceptions to the rule.

The struggle was often hard because of the type of evidence the prosecution and defense planned to use at trial. To prevail on the False News claim,

prosecutor Peter Griffiths had to convince a jury that *Did Six Million Really Die?* contained falsehoods. To meet this burden, he wanted to use Holocaust survivors, documentary evidence, and expert testimony on the Holocaust from Raul Hilberg. Each type of evidence posed potential hearsay problems. If survivors told the stories of others, that was hearsay. So, too, were documents prepared outside of the courtroom and Hilberg's expert testimony based on those documents.

Defense counsel Douglas Christie was in a similar situation.[4] To make this case that the pamphlet was basically true Christie wanted to use the testimony of Zundel's friends in the Holocaust denial movement. When these witnesses testified about their relationship with the accused and the sincerity of his researches into the Holocaust there was no hearsay problem. When, however, the witnesses testified about their own knowledge of Holocaust denial they faced the same hearsay problems that the prosecution faced—they formed their opinion on the basis of evidence not before the jury.

Judge Locke had to find a way to allow both sides to present their cases without violating the rule against hearsay. Chapter 2 looks at how Judge Locke tried to do this. It focuses on three areas: (i) survivor testimony; (ii) documentary evidence; and (iii) expert witnesses.

WITNESSING THE HOLOCAUST

Six Holocaust survivors testified at the first *Zundel* trial. Their testimony provided some of the trial's high points. Christie's harsh cross-examination created a spectacle that went a long way toward discrediting the accused in the eyes of the Canadian public.[5] But the witnesses were not on the stand to evoke sympathy or to make defense counsel Christie look like a bully. They were selected to make specific factual points about the Holocaust. The composition of the witness list reflects this. One of the six witnesses, Dennis Urstein, served as a *Sonderkommando* at Auschwitz. He removed the bodies of the dead from the gas chambers. Another survivor, Rudolf Vbra, became famous for his estimate of the number of Jews killed at Auschwitz. When he escaped in 1944, his report on the gas chambers became widely released. He recounted his experiences in his book, *I Shall Never Forgive*.

As survivors of the Holocaust the witnesses were uniquely positioned to rebut *Did Six Million Really Die?* As eyewitnesses, they painted a grisly picture of the Nazi concentration camps. Here, for instance, is Urstein's description of his experience as a *Sonderkommando*:

> Q. (Griffiths) What did you see?
>
> A. Bodies, lots of bodies. But the unusual part of these bodies were, I saw bodies in a camp, they weren't just laid out, they were entangled with each other. Like we found later on, I found later on scratch marks. They were trying to get on top of each other, I don't know why, but the strongest were on top, the weakest were in the middle, the children usually were in the bottom. And we were told not to be squeamish and get those Jew bastards out, in German. So we did. (Tr.: 1748)

Such testimony could be quite moving and was a powerful, factual rebuttal to the pamphlet's denial of mass gassings at Auschwitz.

But the survivors labored under a restriction. The hearsay rule prevented them from relating secondhand testimony. For instance, in the second to last sentence of the passage just cited, Urstein refers to an order to "get those Jew bastards out." This statement was hearsay. In it Urstein repeats the statement of a third party, probably an SS Guard, who was not present in court to testify. The court had no way of assessing the reliability of the guard's statement.[6] Although the court allowed this particular sentence to slip through, Crown attorney Griffiths directed Urstein: "Don't tell us what he said. Tell us what you did" (Tr.: 1747).

While Griffiths' warning did not diminish the force of Urstein's testimony, this was not always the case with other witnesses. During the testimony of Arnold Friedman, Christie repeatedly raised hearsay objections. Friedman told the jury how Dr. Mengele visited Auschwitz, but could not repeat what Mengele said. When Friedman described how prisoners committed suicide by touching the electric fence surrounding the camp, Christie objected. Judge Locke sustained Christie's objection. Friedman could testify to the frequency of suicides but could not explain what led the other inmates to take their lives. Christie also objected, this time unsuccessfully, to Friedman's statement that among inmates, Birkenau was known as an extermination camp.

This last objection shows the limits of survivor testimony. As eyewitnesses, the survivors could relate personal experiences. Sometimes these experiences were directly relevant. More often, however, the recounting of experiences focused the discussion on those concentration camp inmates who survived. The hearsay rule kept survivors from speaking about the dead. This created an opening for Christie, who asked Friedman: "You, yourself, then are not an eyewitness to anything other than some people getting shot and some people being killed by prison inmates themselves. Is that right?" (Tr.: 417).

Judge Locke permitted the question over Griffiths' objection. Rhetorically speaking, Christie had a point. As an inmate who had not, like Urstein, worked in the gas chambers, Friedman had no direct evidence that the gas chambers were used for mass killings. At this point, a historian might want to hear what Friedman knew about the gas chambers, which, even if secondhand, might be worthwhile. The common law, however, categorically excludes such evidence. The alternative, judging hearsay on a case-by-case basis, would undermine the rule against hearsay and, by extension, the entire proceeding.

More was at stake than epistemology. In common law systems, enforcing the hearsay rule strictly (or at least claiming to do so) itself becomes an element of legal fairness, as the following exchange between Griffiths, Christie, and Locke that took place at the start of Friedman's testimony demonstrates.

> Q: Did the status of the Jewish families in that village change at some time in 1944?
>
> A: Yes. Around Jewish Passover there was information given to us by the police …

> MR. CHRISTIE: Your Honour, this obviously, I believe, is trying to inquire into the truth, and if we get into the realm of information given by the police or given by somebody else, we end up in the position of having to face hearsay, which we can't test the validity of. (Tr.: 307)

Christie then asked for a more general ruling about hearsay testimony:

> MR. CHRISTIE: And I recognize when everybody tells stories about their lives, it inevitably involves hearsay, and we are in a court of law, so I must say, please rule on whether I am right that hearsay should not be admitted to prove truth; and I am not sure under what other exception in this situation it could be legitimately introduced.
>
> THE COURT: Thank you, yes.
>
> MR. GRIFFITHS: My friend is quite right. I will endeavor, if I know Mr. Friedman well, to eliminate hearsay.
>
> THE COURT: Proceed.
>
> MR. GRIFFITHS: And I hope the Court will bear with us if there is a slip from time to time. I know Mr. Christie will be very vigilant.
>
> MR. CHRISTIE: I will endeavor to be.
>
> MR. GRIFFITHS: Thank you. (Tr.: 307)

Two things stand out in this passage. First, Christie, Griffiths, and Judge Locke agree that hearsay must be watched with "vigilance." Second, Christie's references to "having to face hearsay" and the problems this causes because "we are in a court of law" illustrate the noninstrumental way in which the rule is applied. If telling a life story "inevitably involves hearsay," better the story be truncated than the court tainted with unreliable evidence. The rigid application of the hearsay rule meant that survivors would have difficulty relating their own experiences, let alone the experiences of those who did not return. It prevented them from stating what was common knowledge—the gas chambers were used for extermination. Not surprisingly, both sides sought to supplement eyewitness testimony with other forms of evidence.

DOCUMENTARY EVIDENCE

A second major form of evidence presented at *R. v. Zundel* consisted of physical documents. Documentary evidence had the potential to fill the gaps left by eyewitnesses. But this evidence also faced hearsay objections. Produced outside of the courtroom, a written document is by definition hearsay. The goal of prosecutor Griffiths was to find exceptions to the hearsay rule that fit the two documents he wanted to submit—a letter from the International Committee of the Red Cross (ICRC) and the film *Nazi Concentration Camps*.

Griffiths planned to use the Red Cross letter to point out a falsehood contained in the pamphlet *Did Six Million Really Die?* At page 30 of the

pamphlet, the author made the following statement:

> In 1955, another neutral Swiss source, *Die Tat* of Zurich (January 19th 1955), in a survey based on figures of the International Red Cross, put the "Loss of victims of persecution because of politics, race or religion who died in prisons or concentration camps between 1939 and 1945" at 300,000, not all of whom were Jews, and this figure seems the most accurate assessment.[7]

In 1978 the ICRC released a letter, entitled "False Propaganda," in which it denounced Holocaust denial and confirmed that the Red Cross "never published—or even compiled—statistics of this kind which are being falsely attributed to it."[8]

From the perspective of the historian, the administrative law judge, or the French or German criminal court, the arguments in favor of using the letter are strong. The letter is clearly relevant to the litigation. What is more, Griffiths produced a witness from the Canadian Red Cross to vouch for the letter's authenticity. But the rule against hearsay does not turn on epistemology alone. To have the letter considered by a jury, Griffiths had to develop a doctrinal argument, that is a legal story, about why the Red Cross document fell under a hearsay exception. The success of his story turned on non-epistemological considerations. The letter's reliability mattered less than Griffiths' ability to craft a compelling legal analogy.

The legal story Griffiths chose involved the business records exception. Section 30 of the Canada Evidence Act lets the court admit written records made "in the usual and ordinary course of business."[9] As examples of business records *Martin's Annual Criminal Code* lists inventory sheets, fingerprint records, and computer printouts made by detection equipment.[10] The rationale is that "business entities rely heavily upon regularly kept records" so that "there is an organizational motivation to be thorough and accurate."[11] In relying on the business records exception, Griffiths stressed the ICRC's organizational motive to be accurate, a motive that would counteract any doubts about the letter's secondhand nature. But to use the business records exception, Griffiths also had to argue that the ICRC letter was drafted "in the usual and ordinary course of business." This second, doctrinal argument dominated the debate over the letter's admissibility.

Defense counsel responded that the letter was not made in "the ordinary course of business" because the first paragraph called *Did Six Million Really Die?* a "whitewash" of National Socialism. This "editorial comment" went "much beyond … an ordinary business record[.]" As an example of an ordinary business record, Christie cited a case involving a nurse's chart. In response, Griffiths argued that the letter was printed in the ICRC's monthly bulletin, which, he claimed, appeared "in the usual and ordinary course of business" (Tr.: 1951). Griffiths also volunteered to restrict his use of the letter to the paragraph where the ICRC stated that it did not collect statistics on World War II refugees.

Judge Locke found Griffiths' argument "very novel" and adopted it in his ruling, which excluded the letter except for the paragraph discussing statistics.

Locke called the paragraph "a statement of the past and present policy of the Red Cross in a particular area" and compared it to "a statement of policy to be found in the minutes of the meeting of the directors of a corporation" (Tr.: 1986–87). Locke did not explain how, if the first paragraph of the letter was not written in the ordinary course of business, the remainder of the letter remained a business record.

The Ontario Court of Appeals later reversed Locke's ruling. In doing so, the high court did not address the nature of letter. Instead it took issue with the first prong of Griffiths' "novel" argument—that the ICRC was a business. The Canada Evidence Act defines "business" as:

> any business, profession, trade, calling, manufacture or undertaking of any kind carried on in Canada or elsewhere whether for profit or otherwise, including any activity or operation carried on or performed in Canada or elsewhere by any government, by any department, branch, board, commission or agency of any government, by any court or other tribunal or by any other body or authority performing a function of government.[12]

This broad definition might well include the ICRC. Judge Locke thought so; he ruled that the ICRC was a "business" in the sense of the Canada Evidence Act. The Ontario Court of Appeals disagreed. It found "no evidence that the document was made in the usual and ordinary course of business by the International Committee of the Red Cross." In reaching this conclusion, it concluded that the ICRC was "a private, non-political institution composed of a maximum of 25 Swiss citizens."[13] The court supplied no precedent for its holding that the ICRC was not a business. Nor did it explain how the size of the ICRC, or the fact that it was "a private, non-political institution," made the letter any less reliable. Legal doctrine trumped epistemology.

The ICRC ruling demonstrates the unpredictability of the hearsay rule. Judge Locke and the Ontario Court of Appeals applied the same legal principle differently. The resulting uncertainty was the cost of Griffiths' legal novelty. That a novel legal argument was necessary to let the jury consider a relevant, properly authenticated document attests to the epistemological formalism of the rule against hearsay. In our next example, involving the film *Nazi Concentration Camps*, the argument against admissibility had a stronger epistemological basis. Yet this did not stop the debate from turning on legal formalities.

Did Six Million Really Die? maintains that concentration camps were not places of great human suffering and calls conditions at Dachau "humane." An accompanying picture depicts a group of sturdy looking prisoners walking along a road with the caption, "Healthy and cheerful inmates released from Dachau."[14] To prove this aspect of the pamphlet false, Griffiths wanted to show the jury the film *Nazi Concentration Camps.*

The film was shot by American troops who liberated the concentration camps in western Germany in April and May 1945. Later that year Hollywood

director George Stevens edited the footage. Eventually a narrative was added. The resulting hour-long film was shown by the American prosecutors at Nuremberg.[15] It depicts the conditions of the camps at liberation in graphic terms.[16] The narrative elaborates on these scenes but also discusses events that took place well before the liberation.[17] After the trial the film was stored at the National Archives in Washington D.C.

For the jury to view the film, it would have to survive two hearsay objections. First, the film itself was hearsay. In a sense, this objection is a formality, one that can be made against all written documents. In the case of *Nazi Concentration Camps*, however, this objection had a substantive bite. The troops who liberated the camps shot more than 80,000 feet of film, of which only 6,000 made it into the final version. Were the scenes included in the film representative? This was a substantive question that deserved an answer. Unfortunately, George Stevens passed away in 1975, leaving this question unanswered. Second, the narrative did more than simply describe the pictures. It recounted events from other times and places. Any relaxation of the hearsay rule that might apply to a film could not apply to what was, in effect, written testimony from a secondhand source. While the film itself was extensively documented there were troubling questions about the narrative. Its author was unknown, as was the narrator.

Despite these substantive concerns about the film's reliability, the debate over *Nazi Concentration Camps* was formalistic. The lawyers and judges asked if the film fell into a generally recognized hearsay exception. Griffiths raised two possibilities—the business records exception and the public records exception.

Relying on Griffiths' second alternative, Judge Locke admitted the film. He noted that the Supreme Court of Canada had already recognized a public records exception in *Finestone v. The Queen*.[18] According to Locke, the exception covered "documents made by a public official in discharge of a public function with a view to making a permanent record and to which the public has had access" (Tr.: 2296). For a document to be a public record, four factors must be present: (i) the creator of the record must have had an official duty to inquire; (ii) there must have been an inquiry; (iii) the document must have resulted from that inquiry; and (iv) the document must be available to the public (Tr.: 2297). Locke did not answer these questions, he simply asserted that the four requirements were met. He then described how, in *R. v. David Williams*, a film was admitted into evidence (Tr.: 2298). This direct precedent sealed the issue for the trial judge.

Once again, the Ontario Court of Appeals found Locke's arguments unconvincing. It noted that the *Finestone* case concerned a U.S. Customs form. In that circumstance the author of the document—U.S. Customs—was known to all. By contrast, the author of the narrative to *Nazi Concentration Camps* was unknown. One could not discern what the official duty was. Therefore, the film did not fall "within the narrow scope of the public duty exception to the hearsay rule."[19] Next the Appeals Court asked whether the film could be admitted as an ancient document. This too was

answered in the negative. Citing Wigmore's treatise on evidence law, the court explained the ancient document rule covered property deeds, something far different from an hour-long film.[20]

The debates over *Nazi Concentration Camps* further exposed the formalism of the common law. The author of the narrative was unknown. The Ontario Court of Appeals identified this as a problem, so might a historian. But the high court did not exclude the film on this basis. Instead, it distinguished the film from a customs form. This type of formalistic reasoning derives from the doctrinal context in which common law judges and lawyers operate. The prosecution cited, and Locke adopted, *Finestone v. The Queen*. If the Ontario Court of Appeals wanted to reverse Locke, it would have to explain why *Finestone* did not fit.

The highly doctrinal nature of common law evidentiary rules greatly complicated the task of proving the Holocaust in court. Each Holocaust-related document the prosecution submitted to court was presumed to be hearsay. To defeat this presumption Judge Locke had to cobble together a new exception to the hearsay rule. This case-by-case process was ill-suited to the evidentiary task of evaluating Holocaust denial as a historical claim, which required discussing scores of documents, each with its own hearsay problems. For the *Zundel* trial to proceed in a meaningful way, Judge Locke had to find another solution.

HISTORIANS, EXPERTISE, AND FAIRNESS

In a case requiring extensive documentation, expert testimony is a common recourse. In giving his or her opinion, the expert is free to rely on primary documents and secondary literature, the very materials the law excludes as hearsay. Here is a legal doctrine ideally suited to Holocaust-denial litigation. By presenting evidence otherwise excludable as hearsay, the expert enables the prosecution and defense to conduct a full debate over Holocaust denial. Not surprisingly both sides sought to rely on experts.

To that end, Griffiths sought to have Professor Raul Hilberg testify as a prosecution expert. The basis of Hilberg's testimony was his expertise as a historian of the Holocaust. Under the common law, an expert is distinguished by the possession of knowledge or skill that the ordinary witness lacks. In other words, "the expert is in a position superior to the other trial participants, including the jury, to draw inferences and reach conclusions within a field of expertise. It follows that a witness who qualifies as an expert should be entitled to render opinions and conclusions within the area of his specialty."[21]

But not all specialties will do. The area of expertise must be "sufficiently removed from common experience so that the trier will benefit from the assistance of a specialist."[22] The typical expert is the scientist, who can interpret hard facts that are beyond the understanding of the ordinary juror. An important consideration is "helpfulness" to the jury.[23] While this test does not directly exclude historians, neither does it encourage courts to think of them as scientific experts.

The question of scientific expertise troubled Judge Locke. It also engaged the attention of Douglas Christie who, from the very start, was skeptical. Scientists interpret facts, historians prove them. This makes historians poor experts. Acceptable expert testimony, such as breathalyzer tests and radar, measure facts that are already proven. To back this up, Christie cited *R. v. Abbey*.[24] In *Abbey* the Canadian Supreme Court held that a psychiatrist could not give an opinion on the accused's mental state on the basis of secondhand interviews. Christie argued that the historian who relies on hearsay to prove disputed facts of history does the same thing. He also stressed the novelty of allowing a historian to testify as an expert and the taint that comes from hearsay: "Now, this is the first time, in my submission, in Canadian jurisprudence, that a person has been required to testify in what happened in a situation where they were not physically present and have no direct first-hand knowledge" (Tr.: 648–49).

Christie had a pragmatic reason for attacking the use of hearsay. He told Judge Locke that "without people like Dr. Hilberg" the prosecution would "have a difficult time proving that the thesis of this booklet is wrong…" (Tr.: 657). But his argument that Hilberg's testimony was hearsay struck a chord among lawyers and judges who used the rule routinely. In this regard Christie's call for Judge Locke to enforce the rule against Raul Hilberg was no different from the way he, Locke, and Griffiths jointly enforced it against Arnold Friedman.

Griffiths scrambled for a response. He argued that because Hilberg had testified in an extradition case later affirmed by the Ontario Court of Appeals, the high court had implicitly endorsed "an exception to the hearsay rule matters of history."[25] As an alternative, Griffiths asked the court to let Hilberg testify whether *Did Six Million Really Die?* cited documents accurately. In other words, if Hilberg was unable to testify as an expert, he could at least operate as a human transmission belt, allowing the court to receive documents otherwise barred by the hearsay rule.

At last, Judge Locke weighed into the argument. Relying heavily on *McCormick on Evidence*, he used a two-part test to determine if Hilberg could testify as an expert. First, the expertise " 'must be so distinctively related to some science, profession, business, or occupation as to be beyond the ken of the average layman.' " Second, " 'the witness must have sufficient skill, knowledge, or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier of fact in his search for truth' " (Tr.: 687).[26] Hilberg met this test because of his "specific expertise" in the study of the "systematic… destruction of Jews" (Tr.: 698). The jury lacked similar knowledge. Locke concluded that Hilberg had the requisite knowledge to testify.

There remained, however, the question raised by *R. v. Abbey*. Could Hilberg testify on the basis of secondhand information? In allowing Hilberg to testify, Locke recast *Abbey* as a situation where the prosecution failed to disclose the use of hearsay. The jury had not been told that the expert testimony was based on secondhand interviews. With Hilberg's testimony, the reliance on hearsay would be clear.

Locke closed his opinion with a reflection on the nature of historical expertise:

> I part with this ruling by saying that experts in the field of science, medicine and the practical mechanics of day-to-day living of people in this world surely should not be the only experts who are permitted to testify in courts of law. Expertise in the field of history is just as much a field of expertise as that of pure science. One can never be entirely satisfied that the evidence of a psychiatrist, who is also a qualified medical person, is in total or in the main, scientifically based. (Tr.: 692)

By stretching the common law to accommodate new circumstances, Locke recognized that he was creating new law. This broad language helped Locke's argument with the Ontario Court of Appeals.[27] But by announcing his decision as part of a general principle that nonscientists could testify as experts, Locke's ruling opened the door for the defense argument that Zundel's witnesses should also be able to testify as experts.

Locke's ruling had an enormous impact on the trial. For the next week Hilberg was on the witness stand. The direct and cross-examination covered most aspects of the pamphlet. For the defense case, Christie planned to call Robert Faurisson. But was Faurisson an expert in the same sense as Hilberg? This question forced Locke to flesh out the conception of expertise he developed a few weeks earlier with regard to Hilberg. Later, toward the end of the trial, Locke was faced with the question of whether other, less well-known revisionists could testify.

As he had with Hilberg, Locke sent the jury away so that Christie and Griffiths could question Faurisson in private. Faurisson discussed his academic background, his interest in Holocaust denial, and his litigation with deportee and civil rights groups in France. He also noted how the Paris Court of Appeals refused to call his work frivolous. To explain why he, as a literature professor, should be considered an expert on the Holocaust, Faurisson replied that very few people in Holocaust studies have formal training as a historian. This included Hilberg whose training was as a political scientist specializing in public law.

The comparison between Hilberg and Faurisson was part of a larger theme raised by Christie—fairness. At times the object of equal treatment was Faurisson. If Faurisson's work on the Holocaust was controversial, so was Hilberg's (Tr.: 2452). Faurisson should not be prohibited from testifying simply because he is a Holocaust denier. According to Christie:

> If you write a controversial point of view or if you hold an opinion that is counter to the large number of people, you become subject to the type of thing Dr. Faurisson has been through, and when you do, then your right to testify to your opinion can become suspect. If that is the way the procedure operates it would seem to be a rather vicious circle and rather unfair. (Tr.: 2453)

Locke had little difficulty rejecting the contention that Faurisson himself had a right to fair treatment. Indeed, he chided Christie for speech-making.

Fairness to the accused was another story. Christie maintained that Zundel became convinced of the truth of *Did Six Million Really Die?* after reading Faurisson's work. As such, Faurisson's testimony could establish Zundel's sincerity by showing that the Toronto-based publisher had a basis for his unusual beliefs about the Holocaust. If this meant the jury—and the Canadian public—got to hear the deniers' account of the Holocaust, so much the better. Christie used his client's sincerity as a wedge to let the jury hear evidence that might otherwise be dismissed as irrelevant or hearsay.[28]

Christie also argued that Faurisson's evidence was essential to the defense case. To exclude this testimony would leave the jury with only one side of the story. The stringent restrictions of the hearsay rule made expert testimony a necessity for an intelligible discussion of the pamphlet. To allow only one side to use experts was unfair. Griffiths had no effective counter to this. He tried to destroy Faurisson's credibility by contrasting the professor, whom he called "an amateur," with the ideal expert who "should be moderate, fair and strictly professional" (Tr.: 2458, 2461). Locke had little difficulty dismissing this argument.

What remained open was the scope of Faurisson's proposed testimony. During oral argument Locke put this question to Christie, who replied that his witness would testify on a broad range of subjects including survivor stories of the Holocaust, the workings of the gas chambers, and Zyklon-B, the gas used by the Nazis to kill the Jews. Griffiths objected that Faurisson had no expertise whatsoever as a scientist, adding ironically that Faurisson was least qualified to speak about gas chambers, his area of putative expertise.

Judge Locke allowed Faurisson to testify about the Holocaust generally but not about the technical operation of the gas chambers. In reaching this conclusion, he refused to compare Hilberg and Faurisson explicitly. It did not matter if Hilberg was already a witness, nor that Faurisson, unlike Hilberg, had never testified in a Canadian court. Following a pattern seen earlier, Locke answered the question—"Could Faurisson testify?"—by turning to the formal law, in this case *McCormick on Evidence*. According to McCormick, the relevant question was whether Faurisson possessed "a certain field of knowledge and expertise beyond the ability of the ordinary witness" (Tr.: 2472).

Applying this test to Faurisson's competence to speak about gas chambers, Locke remarked that most literature professors do not develop expertise "in the chemical proclivities of Zyklon-B or the details of the construction of gas chambers" (Tr.: 2473). To allow Faurisson to testify here, would allow anyone to become an expert by reading up on a subject. On the other hand, Locke found that the witness, although not a historian, gathered "a certain field of expertise on a certain subject" (Tr.: 2474). More specifically, Faurisson "has studied documents, judgments and the ideas of authors on the subject of whether the Nazi German government in 1933 to 1945 deliberately embarked on a scheme to annihilate Jews in Europe" (Tr.: 2474).

The Faurisson ruling was a compromise. Balancing Christie's demand for formal equality with his own uneasiness about Holocaust denial as form of

expertise, Locke split the difference. Faurisson could testify on Holocaust denial as a set of ideas, but not about the specific arguments that led him to accept Holocaust denial as true. Faurisson could refer to authors and texts that asserted there were no gassings at Auschwitz, but he could not say why he agreed or disagreed with them. For yet another time, Judge Locke creatively refashioned the rules of evidence, without admitting he was doing this. Instead of following Christie's argument that if Hilberg testified so must Faurisson, Locke turned to his copy of *McCormick on Evidence*. By following this old hornbook, at least formally, Locke legitimated his ruling in the eyes of the two lawyers, the reviewing court, and the legal community in general.

In practice, however, Locke's ruling led to confusion. The scope of Faurisson's expertise was constantly at issue. When Faurisson testified that architectural plans demonstrated that the post-1945 reconstruction of Auschwitz was a fraud, Griffiths immediately objected. Locke scolded Christie for exceeding the scope of the ruling. This deterred neither Christie nor Faurisson. Soon thereafter the defense sought to file a paper written by Faurisson entitled "The Mechanics of Gassing." Christie said that Zundel had read this paper, and relied on it in reaching his conclusions about *Did Six Million Really Die?* Both Griffiths and Locke took exception to this, but Christie's response, that he interpreted Locke's ruling as covering only physical evidence, reflects the ambiguity already present in Locke's order.

Christie's assertion that his client relied on Faurisson's paper in forming an opinion about the pamphlet returns us to fairness. Whatever the specifics of Locke's ruling, Zundel was a criminal defendant. As such, he had to be treated fairly. Christie used this argument again and again, not just with Faurisson, but also with other, less scholarly defense witnesses. In the process, fairness to the accused considerably expanded the scope of Judge Locke's novel "historical expert exception" to the hearsay rule.

THE HEARSAY RULE UNDER FIRE

Robert Faurisson was not the only planned defense witness. Christie arranged for a wide variety of people to testify on Zundel's behalf. Some of the potential witnesses would have posed no problem for the court in any event. Russell Barton, a psychologist present at Bergen-Belsen just after iberation, discussed an old article he wrote that attributed camp conditions to mass hysteria. His testimony fell within a well-established area of expertise, so Locke had little difficulty admitting his testimony.[29] Thies Christopherson, a former army officer stationed near Auschwitz, who in 1944 heard rumors of gas chambers but found nothing, was admissible as a fact witness.

The true test of legal fairness (and Locke's ruling) arose when Christie presented witnesses who claimed to be experts, but lacked the credentials of Hilberg, or even Faurisson. This led to a clash of commitments. On one side stood the hearsay rule, as modified by Judge Locke's earlier rulings; on the

other, the right of the accused to raise a full and fair defense. The debate that followed concerned three defense witnesses: Dr. William Lindsey, Charles D. Weber, and Dietlieb Felderer.

Dr. Lindsey, a chemist, had always been interested in history, which he advocated viewing from "a technical approach" or "the standpoint of a chemist." This perspective allowed him to evaluate "the vast number of charges made under the generalized heading of the Holocaust" (Tr.: 3046). Over the past decade Lindsey reviewed the volumes of the Nuremberg trial and read many popular books on the Holocaust, including Raul Hilberg's *The Destruction of European Jews*; he also engaged in archival research. Griffiths did not object to Lindsey testifying as a chemist, but did not want him to testify as a historian. At the time, Christie accepted this limitation. Despite possessing a broad historical knowledge that rivaled Faurisson's, Lindsey was limited to chemistry, his area of special expertise. When Lindsey sought to compare the Holocaust to interwar charges concerning the German treatment of Belgians, the court warned the witness not to talk about history. Nonetheless, Lindsey was able to testify about Zyklon-B, and so was not a complete loss for the defense.

Charles D. Weber, a retired professor of German, was on the advisory board of the *Journal of Historical Review*. In this capacity he prepared *The Holocaust: 120 Questions and Answers*. Unlike Faurisson and Lindsey, Weber admitted he did not read books on his subject from cover to cover. Locke focused on Weber's admission that he could neither remember which books he had read, nor describe the books that affected him. Nor did Weber study primary documents. Weber did have relevant personal experience, in 1945 he served as an American intelligence officer attached to the Nuremberg prosecution. Christie argued that on this basis, Weber could testify as to how documents were kept, a point Griffiths conceded. The defense also suggested that Weber's personal experience might qualify him more generally as an expert. To this, Griffiths repeated his concern that Weber had not "read widely enough." Judge Locke agreed with Griffiths. The court found Weber's lack of wide reading particularly troubling. Based on Weber's responses during the hearing Locke concluded that it was "perfectly obvious that this witness does not possess … the necessary qualifications."[30] Even fairness had limits. Weber did not even reach the threshold of expertise. For once, Locke could exclude a defense witness without appearing biased.

While Locke sailed through the debates over Lindsey and Weber with little difficulty, the case of Dietlieb Felderer was more difficult. Felderer, a former Jehovah's Witness, first became interested in the Holocaust while researching the alleged killing of 60,000 Witnesses at Nazi hands during World War II. He concluded that far fewer, perhaps 200, died. In the 1970s Felderer took an interest in the Holocaust, visiting Auschwitz and taking pictures that supported the revisionist cause. Christie did not seriously present Felderer as an expert. Instead, he argued that Zundel relied on Felderer's material in forming his opinions. On this basis alone, Felderer was allowed to testify. He was not, however, allowed to present his slides.

As promised, Felderer testified that Zundel relied on his research. Christie, never at a loss to present revisionist material to the jury, asked Felderer to describe his research. At this, Judge Locke dismissed the jury, scolded Christie, and ruled that the defense counsel could ask Felderer only one question: "Did you present your views that you've expressed here to Mr. Zundel?" (Tr.: 3183). In no way would the court "receive this man's views as to an event of history he hasn't been qualified" to discuss (Tr.: 3183–84).

Locke's intervention came to naught. The next morning Christie asked Felderer the following question:

> Q. Mr. Felderer, when you were investigating the situation at Auschwitz … did you find anything in the nature of a swimming pool?
>
> A. Yes. I must admit to you that the first time I saw it, I didn't believe it was the swimming pool because it didn't fit my theory of what, at the time, I thought was an extermination, that it was a fictitious extermination, and then I saw to my astonishment that that was a swimming pool. (Tr.: 3186)

The news media reported the testimony with sensational headlines—the *Toronto Star* carried the caption "Prisoners at Auschwitz Dined, Danced to Bands Zundel Witness Testified."[31] Felderer's testimony created a scandal over the trial and the media coverage of it. Locke did not prevent this testimony, or reprimand Christie. The damage had already been done.

The testimony of Felderer illustrated the difficulty of crafting a ruling that would give the defense some flexibility in presenting evidence without equating Holocaust deniers with experts. Here was a witness on whom the accused relied in forming his opinions, who had no background as a historian, and was determined to say the most outlandish things about the Holocaust. More than any other single incident, Felderer's testimony led critics to charge that the *Zundel* case put the Holocaust on trial. Yet, Locke had no real choice. When the prosecution was presenting evidence, the formal norms of legal fairness—that is the hearsay rule—coincided with the substantive norm of fairness to the accused. As a result, the rules of hearsay were interpreted strictly. When the defense testified, this equation changed. Now the formal and substantive criteria of fairness were opposed. Too rigorous an application of evidentiary rules would deprive Zundel of a fair trial. Thus Locke backed off, especially where the accused relied on the testimony in question.

CONCLUSION

A study of *R. v. Zundel* shows the difficulty of prosecuting Holocaust deniers in a common law country, at least when the prosecution must prove that the accused spread Holocaust denial knowing it was false. During the prosecution case rules against hearsay will be enforced rigidly, seriously complicating the task of presenting proof that the Holocaust happened. When the roles are reversed, the common law's reliance on the parties to gather evidence,

combined with a normative bias in favor of the accused present in almost all legal systems, make it equally hard to keep the revisionist evidence away from the jury and, hence, out of the public spotlight. Such trials run a high risk of becoming media events. This is why *Zundel* has not been repeated, either in Canada or in any other common law country.[32]

This page intentionally left blank

Part II

The Dilemma of Trial Uncertainty

In his 1961 book *Political Justice: The Use of Legal Procedure for Political Ends*, Otto Kirchheimer distinguished show trials from trials that followed the rule of law by maintaining that the latter contained an irreducible amount of uncertainty.[1] Without arguing that every guilty verdict in a politically charged trial indicates a lack of legal fairness, one can accept Kirchheimer's basic insight—a trial where the rule of law is followed must by its very nature give the defense a chance to win either a legal or symbolic victory.[2] The former helps the accused in a concrete sense; it leaves the accused at liberty and may necessitate a retrial. The latter occurs when the judge issues a ruling that serves the political ends of the accused. A symbolic victory can also be a legal victory, but it need not be. The civil prosecutions of Robert Faurisson, discussed in chapter 1, provide an example of this last possibility. The Paris courts found Faurisson guilty (a legal defeat) but did so with language that refused to dismiss Holocaust denial out-of-hand (a symbolic victory). Given enough prosecutions, defense symbolic victories are almost inevitable.[3]

The concern with "symbolic" victories varies from context to context. In the run of the mill robbery or murder case the public will pass over an acquittal or court ruling that praises the accused. Its high-profile nature makes Holocaust-denial litigation different. Does a court that acquits a Holocaust denier, praises a denier, or speaks about the Holocaust in uncertain terms condone denial? Many observers, even who oppose prosecuting deniers, are tempted to say yes, especially at times and places—such as Germany in the mid-1990s—when the societal focus on Holocaust denial is high.[4] Under the right circumstances, the symbolic victories will boil over into full-fledged scandals in which the general society accuses the legal system of tolerating or even sympathizing with denial. To cleanse the legal system (and itself) from the taint of denial, the society insists on restorative acts. These run the full gamut from a simple apology to the victims of the Holocaust, through traditional legal remedies (such as appealing the unpopular verdict, or launching a new prosecution), to extra-legal remedies (such as removing judges and/or passing new, stricter legislation that eliminates—or seeks to eliminate—all possibility for judicial discretion).

Part II is about scandals that unfolded in Germany, Canada, and France—the three countries in the book that have criminally prosecuted Holocaust deniers. The case studies raise two questions. First, why do judges acquit deniers or issue rulings that seem to disrespect the Holocaust? Second, why do societies treat these acquittals and rulings as cause for scandal?

These questions reflect a duality in the role of law in modern societies that has been at the center of legal sociology for over a century. On the one hand, judges acquit deniers because they want to be fair. But fairness, in this context, takes on a Weberian cast; it is not fairness in general, but fairness to specific legal norms. In other words, the law—like any other modern bureaucracy—discharges its "business according to *calculable rules* and without regard for persons."[5] To put it another way, a ruling is "fair" to the extent it follows the established "rules of the game."[6] Because each legal system has its own rules and procedures, what "fairness" requires will change from country to country. This, in turn, affects the extent to which a judge will have to choose between adhering to professional norms and avoiding rulings that appear to offend the Holocaust or condone denial. But sooner or later most judges will have to choose.

At the same time, the law plays a representative role vis-à-vis society as a whole. According to Emile Durkheim, a guilty verdict in a criminal case expresses a society's distaste for deviant behavior. It reassures us that the rest of the society remains healthy.[7] Normally, this reassurance operates even though judges and juries occasionally acquit persons whom society as a whole believes are guilty. Holocaust denial is different because it is novel. When a murderer is acquitted, the controversy is muted by the large repository of successfully prosecuted cases which reassure society that the legal system repudiates murder. When a Holocaust denier is acquitted, the repository of successful prosecutions is small or nonexistent. The demand that the legal system (and society) distance itself from Holocaust denial now leads to restorative acts. These acts have two purposes: (i) to show that society cares about Holocaust denial, and (ii) to make future scandals impossible.

As we shall see, the first goal is easier to achieve than the second. This, in part, is because of the legal professionals. While they are willing take a symbolic stance against Holocaust denial (even if it means sacrificing a colleague), they will not abandon their commitment to the rule of law and, hence, to trials that follow an uncertain course. While society stands reassured, the possibility of scandal remains.

Each case study presents a different variation of the pattern of symbolic victory, scandal, and restorative acts. These variations reflect the distinctive legal and political contexts of the countries in question. Chapter 3 explores Germany, where an inquisitorial legal system and lingering doubts about the judiciary led society to blame defense victories on the trial judges. The German case study also shows how intense a legal scandal can be when the offensive ruling involves a sensitive issue like the Holocaust.

Chapter 4 returns to *R. v. Zundel*. We have already seen how Canada's adversarial evidentiary norms exacerbated the dilemma of proof. Chapter 4

shows how these same adversarial norms helped determine who took the blame for these difficulties. Specifically, Judge Locke, whose rulings made Zundel's trial tactics possible, escaped blame. Who, then, took his place?

In the final case study, the focus shifts from the scandal and blaming to restorative acts. In responding to the two Faurisson rulings, the French passed the Gayssot Law, which made it illegal to question the Holocaust. The French case neatly demonstrates the two distinct aims of restorative acts. As a political rebuke to Faurisson, denial, and the extreme Right the law succeeded. As a legal response to scandal, the new law was considerably less successful.

Taken as a whole, the case studies raise a question that must trouble any advocate of Holocaust-denial prosecutions. If scandals are inevitable, why prosecute? A full answer to this question will have to await a consideration of the alternatives to prosecution in part III.

This page intentionally left blank

Chapter 3

Holocaust Denial, German Judges, and Political Scandal

In Germany the dilemma of trial uncertainty has led to repeated scandal. In the 1959 *Nieland* case Judge Nicholas Budde came under fire for dropping the charges against an anti-Semitic pamphleteer. In the 1994 *Deckert* case two judges, Ranier Orlet and Wolfgang Müller, were placed on sick leave following an unpopular verdict. The judges found the accused, National Democratic Party (NPD) leader Günter Deckert, guilty of racial incitement. The problem was with the written verdict that praised Deckert as a "strong willed" and "responsible" person and referred repeatedly to "Jewish pretensions about the Holocaust." In the 1995 *Auschwitz-Myth* case, Judge Albrecht Kob acquitted two defendants who used the term "Auschwitz-Myth" in relation to Steven Spielberg's film *Schindler's List*. Once more, controversy ensued. This time, however, the judge calmed the waters by releasing a written verdict sharply critical of right-wing extremism and Holocaust denial.

In all three cases judges bore the onus for unpopular verdicts. From a legal perspective blaming judges reflects the central position held by the judge in Germany's inquisitorial legal system. The cases below demonstrate the burden that comes with this power. As the master of the proceedings, the German trial judge must support his or her verdict with a written statement of reasons that describes the accused, the crime, and explains the legal outcome. When the accused is unpopular, this statement serves—or should serve—as a moral repudiation of the criminal and the crime. The failure of German judges to issue these repudiations in Holocaust denial cases caused them great difficulty, a difficulty enhanced by the historical tradition of blaming judges for being soft on right-wing extremism. The accusation of one-sided or "one-eyed" (*einaugig*) justice dates to the Weimar period when, so the story goes, judges looked the other way as Nazis destabilized the young democracy while taking a hard line against the Left. The suspicion of the judiciary deepened in the immediate postwar years as a large number of Nazi judges returned to their posts in the German civil service.

If German judges who acquit or sympathize with Holocaust deniers are easy targets, are they also scapegoats? In other words, is it fair to blame the acquittals, suspended sentences, and expressions of sympathy on right-wing bias? Or are there other factors, rooted in norms of legal fairness, that explain the unpopular verdicts? As we shall see, the answer to this question varied from case to case.

THE *NIELAND* CASE

Although the *Nieland* case involved anti-Semitism more than Holocaust denial, it set the pattern that was followed in the *Deckert* and *Auschwitz-Myth* cases. In early 1957 Friedrich Nieland mailed *Wieviel Welt (Geld-) Kriege müssen die Völker verlieren?* ("How Many World (Money) Wars Must the People Lose?") to 2,000 prominent West Germans, including every member of the federal parliament.[1] Nieland's pamphlet blamed "International Jewry" for both world wars and claimed it was planning another. An early Holocaust denier, Nieland called "the gassing and slaughter of 6 million Jews" a "terrible lie" and asserted that the idea for the gas chambers "could come from no German." According to Nieland, Hitler had been an agent in an international Jewish conspiracy to discredit Germany.

These were explosive remarks, especially in the context of the late 1950s, a time that saw a wave of anti-Semitic incidents, including cemetery and synagogue desecrations. A few cases attracted national attention. The *Zind* case involved a bar fight in which one of the combatants told the other, who was Jewish, that "the Nazis had not yet gassed enough Jews." The local authorities hushed up the affair until, nine months later, the *Süddeutsche Zeitung* broke the story. The result was a scandal and the prosecution of Zind for defaming the memory of the dead.[2] Events such as these prompted doubts about whether the Federal Republic had moved beyond its Nazi past. Books like T.H. Teetens' *The New Germany and the Old Nazis* combined descriptions of West German anti-Semitism with dire warnings about the future. As a *London Times* correspondent put it—Germany is "still not entirely trusted, and knows it."[3]

Chancellor Adenauer's government took a great interest in Nieland's pamphlet. In April 1957 he assured parliament that the state prosecutors had already drawn up charges against Nieland. The case file went to the First Criminal Chamber of the Hamburg District Court, which handled politically sensitive issues. Presiding Judge Nicholas Budde ordered a psychological review to determine if the accused was fit to stand trial. The psychiatric expert, however, declared Nieland mentally sound. At this point Judge Budde should have recommended the case for trial proceedings.[4] Instead, he dropped all charges against Nieland.

One charge against Nieland, endangering the state, rested on a passage where Nieland demanded that: "No Jew hold any important post whatsoever, be it in the government, be it in political parties or in the banking world or anywhere else."[5] The prosecution argued that this endangered the state

because it constituted a form of discrimination. Budde, however, argued that the passage was not directed "against Jews generally" but "only against a narrowly limited circle of Jews" responsible "for the world historical events of recent decades." He identified several places where Nieland distinguished "the Jewish people" from "International Jewry." Indeed, Nieland had even wanted to warn the "great mass of Jewry" of the dangers posed by this small group. According to Budde, there was no evidence that Nieland intended the pamphlet to apply to all Jews.

Budde's adoption of Nieland's distinction between "International Jewry" and "Jews generally" echoed Weimar times. It recalled a 1922 case in which the predecessor of the Federal Supreme Court held that the phrase "Jew Republic," used to describe the Weimar Republic, was neither anti-Semitic nor an insult to the state; it merely reflected the view, held by many citizens, that a small number of Jews exercised a disproportionate influence in public life. Similar to the *Jew Republic* case, Judge Budde acquitted an anti-Semite with language that itself bordered on anti-Semitism. In Weimar such expressions were politically acceptable. Thirty years later, they were not. The Nazi experience had changed the political landscape.

This was quite evident when, in January 1959, Budde's ruling became public. Hearing of the decision, Max Brauer, the Social Democratic Mayor of Hamburg, went to Bonn to demand action. Over the next weeks, debate over the *Nieland* case raged across the new Federal Republic. Speaking before parliament, Chancellor Adenauer apologized on West Germany's behalf to the world. His cabinet revived an old proposal to expand § 130 of the Penal Code to cover anti-Semitic writings.[6] For Judge Budde the consequences were no less serious. Receiving death threats, the harried judge asked to be transferred to the chamber of the court that handled landlord–tenant cases.

The intensity of the response owed something to the revelations about Budde's past made public by *Der Spiegel* after the scandal broke.[7] In the Weimar period the judge had been fined 600 Marks for insulting the state. After the Nazis took power, Judge Budde wrote about "the Jewish question" in the 1935 edition of the *Althanoverischen Kalendar*.[8] Added to this were three decisions Judge Budde wrote as a judge in the Federal Republic. In one instance he acquitted a police officer who had insulted the flag. He held that the officer's reference to it as a "piece of shit" had no political meaning. The other two cases demonstrated a rather casual attitude toward victims of the Nazis.

These revelations fueled a growing moral outrage over the role of former Nazis in West German society. The most prominent of these was Hans Globke. As chief legal advisor to the Office of Jewish Affairs in the 1930s, Globke helped draft the Nuremberg Laws. Twenty years later he presided over the Federal Chancellor's office, a position of great prominence.[9] When the debate over the Nieland affair moved into parliament, the political opposition used the opportunity to decry Globke's role in the government. Budde's postwar rulings also raised a second question. Given the

large number of officials who served under Hitler, it would not suffice to distinguish "those who were" and "those who were not" active supporters of the Third Reich. Integrating former Nazis was a fact of political life in Adenauer's Germany. The real concern was separating "those who were and no longer are" from "those who were and still are."[10] According to his critics, Judge Budde fell into the latter category because of his rulings in *Nieland* and the other post-1945 cases.

By early February *Nieland* had become a full-blown "justice scandal." Citizens expressed outrage that Nazi justices still sat on the bench. As one letter-writer to *Die Zeit* complained: "Why don't all the judge and lawyers from Hamburg to Munich, who see their colleagues make such clear mistakes and mistaken decisions, explain that they, as democrats committed to rule of law, will no longer have anything to do with such colleagues?"[11] East Germany took advantage of the scandal with a brochure titled *600 Nazi-Jurists in the Service of Adenauer*. In parliament, both government supporters and the opposition distanced themselves from Budde. Christian Democratic representative Dr. Kanka cited the large number of cases tried in the Federal Republic each year without incident. The SPD wanted judges with Nazi pasts to recuse themselves in case involving anti-Semites.

Were these criticisms of Budde fair? On the one hand, Budde received support from an unexpected quarter. In November 1958, just before the scandal broke, prosecutors filed written appeals of Budde's verdict. Though critical of Budde's decision to acquit, these appeals cast Budde's ruling in a more positive light.[12] Like the public, the prosecutors faulted the judge's interpretation of Nieland's demand that all Jews be restricted from public life. Nieland's rationale for restricting all Jews (rather than merely "International Jewry") from positions of public prominence—that "no one can look into the heart of a Jew"—made Budde's reliance on Nieland's intent especially suspect. Other passages cited by the prosecutors, but ignored by Budde, were clearly anti-Semitic. Still, the prosecutors showed a greater respect for Budde's opinion than did the general public. When Budde interpreted the pamphlet to apply only to "International Jewry," the general public saw a Nazi sympathizer who, like his Weimar predecessors, toyed with anti-Semitism. By contrast, the prosecutors credited Budde's legal argument that there was no proof that Nieland intended the passage to apply to Jews generally.

Der Spiegel also gave some comfort to the embattled judge. Penal Code § 88 penalized the production or distribution of texts that "have the effect of" (*sollen*) causing violent acts. If Budde erred in interpreting "*sollen*" to require that the defendant "wanted" (*wollen*) this result, the error fell within "the wide range for judicial interpretation."[13] For *Der Spiegel*, Budde's real mistake was not legal, but political; he did not consider anti-Semitism a threat to the state. The judge erred because anti-Semitic propaganda, "be it hate or humbug," threatened the reputation of the Federal Republic abroad.

At the same time, Budde's ruling was needlessly antagonistic. We see this in Budde's treatment of an accompanying complaint filed against the

pamphlet by a Jewish politician. The politician, Mr. Kuraner, argued that the pamphlet insulted him as a Jew. Budde resolved Kuraner's complaint in the same opinion where he dismissed the charges for endangering the state. The rationale was similar: "There is missing a sufficient proof of insult of Kuraner, because there arises no evidence from the pamphlet that the complaining witness belongs to the imagined narrow circle of Jews (International Jewry)."[14] In the end, Hans Gathmann of the politically conservative *Politische Meinung* was probably right when he wrote: "It will never be proven if the court director Dr. Nicholas Budde acted out of sympathy to anti-Semites"[15]

While Budde had been transferred, his unpopular verdict remained on the books. Waiting in the wings was Max Gude of the federal prosecutor's office. He had hoped Budde would convict Nieland. Disappointed, Gude now brought a proceeding against the pamphlet itself under § 93 of the Penal Code, which authorizes prosecutions against written materials. The Federal Supreme Court held the pamphlet was illegal.[16] In the process, it drafted the opinion Budde should have written.

The Supreme Court left no doubt as to the anti-Semitic nature of the pamphlet. Nor was there any doubt that the call for exclusion of Jews from government, politics, and the banking world, applied to Jews generally. In its most obvious sense the passage "demands that Jewish citizens be excluded from all important offices through special laws or other similar measures." The court addressed the political implications:

> Special laws, like all state measures that proceed from the idea that members of a group of citizens should be excluded, on the basis of a nonsensical historical ground, . . . harm those citizens deeply in their human dignity. This amounts to the marking, branding and persecution of those the state powers, in the name of protecting human dignity, find guilty. This type of false accusation stands on a level with National Socialist racial hatred. . . . Whoever as a bearer of state power gives into these suggestions, violates a core principle of the regular constitutional order[.][17]

The Supreme Court explained how the Basic Law incorporated this core principle in articles protecting life, free development of personality, and equality before the law. It called on citizens to fight discrimination from the start, lest "state life again poison itself."

The repudiation of Budde's decision was complete. In the place of a decision that recalled the politically ambiguous hair-splitting of Weimar, the court ruling evoked a new, democratic Federal Republic that repudiated National Socialism and racism. At stake was the image of the new Germany. Nieland and Budde had soiled it; the Supreme Court purified it. Whatever the norms of legal fairness required in a given situation, there was only one acceptable outcome in a case involving an anti-Semite—the public humiliation of the accused. As the next case shows, even a guilty verdict could not shield a judge who failed in his duty to humiliate the accused.

THE TRIAL OF GÜNTER DECKERT

Even by German standards, the *Deckert* case touched off an exceptionally strong justice scandal. Günter Deckert, leader of the NPD, was particularly disgraceful. Throughout his career he threatened and insulted foreigners. In October 1991, he invited Fred Leuchter, an American Holocaust denier, to address a closed audience in Deckert's home town of Weinheim. In his lecture, entitled "Poland, the Gas Chamber Myth and My Persecution by the Jews: An Update,"[18] Leuchter described his 1988 trip to Auschwitz to collect evidence for Ernst Zundel, his conclusion that there were no mass gassings at Auschwitz, and his persecution by the Jews since then.

There was much in Leuchter's speech to offend the taboos of post-Holocaust Germany. While most of Leuchter's language was dry and technical—an attempt to appear scientific—he also told jokes about the Holocaust. Leuchter asserted that a crematorium could only process 6.8 corpses a day. He then added: "A simple calculation reveals that it would take some 68 years to execute 6 million persons and some thirty five years to cremate them. If this is true, the executions are still in process and will be going on until the year 2006. Let's stop them now and end the Holocaust!" Leuchter also dabbled in anti-Semitism. Describing his personal tale of woe, which included vilification in the media, threats against his family, and a "spurious illegal criminal complaint," Leuchter frequently referred to "problem Jewish elements" and his "Jewish persecutors."

Nor had Deckert been a neutral translator of Leuchter's speech. Instead, he added further anti-Semitic content. Thus Deckert shortened Leuchter's "Holocaust" to "Holo," an abbreviation the Mannheim court that tried Deckert found pejorative. While Deckert avoided Leuchter's references to "the problem Jewish elements" and "my Jewish persecutors," which could be interpreted as racial incitement, he mistranslated the names of specific persecutors to highlight their Jewish character. Thus, "Silverman," the name of one of Leuchter's business clients, became "Silbermann" and the "Klarsfeld association" became the "Klarsfeld clan."

Deckert followed Leuchter's remarks with a brief speech of his own, one that further tested German taboos against Holocaust denial and anti-Semitism. If Deckert failed to test Leuchter's evidence against the impartial truth, he would be "a hypocrite, a conformist, an opportunist" and an "armchair criminal." Deckert called for an international commission of academics to study Holocaust revisionism. When the NPD leader demanded that the "lie" of the Holocaust "be swept away," the crowd burst into applause.

Deckert was charged with violating § 185 of the Penal Code (insult) and § 130 (racial incitement). The Mannheim Court rejected Deckert's efforts to enter evidence questioning the Holocaust and found him guilty of insult and race incitement. Deckert received a year's suspended sentence and a fine of DM10,000. This passed with little fanfare.[19] Both sides appealed.

The first *Deckert* trial did not attract great attention. While Holocaust denial was an important issue, the time was not yet quite ripe. In 1991 and 1992 most

Germans were more concerned about right-wing extremism and antiforeigner violence than Holocaust denial. This changed in late 1993 with the appearance of the film documentary *Beruf Neonazi* ("Profession Neonazi"). The film depicted Ewald Althans, a young German of middle-class origins, denying the Holocaust while standing in the gas chamber at Auschwitz. The image of a German denying the Holocaust at Auschwitz violated the national taboo about the Holocaust and revived lingering doubts about whether Germany (especially in its new, reunited form) had overcome its Nazi past.

Against a background of increasing worry, the Supreme Court released its decision in the *Deckert* case in March 1994. While, as we saw earlier, the Supreme Court affirmed the lower court's judicial notice ruling, holding that the "mass murder of the Jews . . . above all in gas chambers of concentration camps" was a "historical fact" this was the only bright spot for the prosecution.[20] Far more important was the Supreme Court's holding that the racial incitement provision of the Penal Code—which required a showing that the accused harmed the human worth of the victim—applied to accusations that Jews invented the Holocaust but not to "bare denial of the gas chamber murders." The court remanded the case to the Mannheim District Court for a new trial to determine whether Deckert had, in fact, harmed the human worth of Jews.

The ruling that bare Holocaust denial did not constitute racial incitement generated controversy. The Supreme Court went against the spirit of its 1979 decision, which spoke of Holocaust as a moral offense against Jews living in Germany.[21] The ruling came at a time when the German concern about Holocaust denial was at an all-time high. Federal Justice Minister Sabine Leutheusser-Schnarrenberger promised that the law would be corrected, which it was later that year.[22]

The furor surrounding the Supreme Court ruling focused national attention on the *Deckert* case. Henceforth, the German public would follow the case closely. They were looking for the same type of symbolic repudiation that the Supreme Court itself had provided in the *Nieland* case. At first, it appeared that the Mannheim District Court would meet these expectations. On June 22, 1994 it found Deckert guilty of incitement and insult and gave him a one-year suspended sentence, the same punishment Deckert had received at his first trial. Six weeks later the panel released its written verdict. This ignited a scandal that made the disturbance surrounding the Supreme Court ruling pale in comparison.

What made a guilty verdict so offensive to the German public? The answer to this question lies in the two-sided quality of the document produced by Judge Ranier Orlet and his colleagues. On the one hand, Orlet went to great length to find Deckert guilty of racial incitement. To do so, he dissected Leuchter's speech and Deckert's translation in painstaking detail. On the other hand, Orlet expressed sympathy for Deckert and his ideas. It was these latter passages that dominated the public reaction to the verdict.

Words of praise and sympathy for Deckert run throughout Orlet's opinion. The first passage occurs at the start of the verdict. After relating

Deckert's upbringing, education, family life, and work experience, Orlet turned to politics. The accused was "no anti-Semite in the sense of National Socialist race ideology," but had a bitter resentment against the Jews on account of their "constant insistence on the Holocaust" and their "financial, political and moral" demands on Germany.[23] Orlet's language recalled the Weimar "Jew Republic" decision and Judge Budde's ruling in *Nieland*.

A second controversial passage concerned the application of Penal Code § 193, which provides a defense to charges of insult when the accused has a "justifiable interest" to protect. As an example of a justifiable interest, the court cited Deckert's efforts to ward off "the claims still raised against Germany a half-century after the Holocaust." The problem was that Deckert failed to pursue this interest with the "required and measured means" of the law. Orlet then suggested what Deckert should have said: "It would have sufficed for the pursuit of his desired aim, to have drawn attention to the long time since the period of National Socialist persecution of the Jews, the extent of the German acts of reconciliation already brought forth and the unatoned and unregretted mass crimes of other peoples." When critics called the *Deckert* verdict an "instruction manual" for the far Right, they had this passage in mind.[24]

A third area of controversy involved sentencing and probation. In support of its conclusion that Deckert deserved a one-year sentence, Orlet listed factors weighing for and against the accused. Some factors were routine. Prior disciplinary proceedings justified a longer sentence. Deckert's lack of a criminal record and the unexpectedness of Leuchter's verbal formulations pointed in the other direction. Other factors were "political." Orlet mentioned the sufferings of the Jews during National Socialism as a reason to enhance the sentence. This was in accord with other Holocaust-denial cases and the expectations of the general public. The same could not be said for Orlet's corresponding "political" rationale for a lesser sentence:

> Not to be left out of consideration is the fact that Germany even today, roughly fifty years after the war's end, is set upon by wide-reaching claims of a political, moral and financial type arising out of the persecution of Jews, while the crimes of other people remain unatoned. This represents, in any case in the political view of the accused, a heavy burden on the German people.

This statement skirted the line between sympathy for the accused and a wholesale adoption of his point of view. Only the words "in any case in the political view of the accused," preserved the neutrality of the court.

Orlet's discussion of probation was similar. Section 56 of the Penal Code provides for probation when it is expected that the accused will remain out of future legal trouble. Deckert was a "strong-willed, responsible personality" for whom "political beliefs" were "a thing of the heart." His good family relations—Deckert had a wife, daughter, son-in-law, and grandchild—stood to his credit. The "loyalty to the law" of such a man, reinforced by his conduct at the trial, left the court with "no doubts" as to his "favorable social prognosis."

With one exception, the accused survived "more than 30 years of political life" without criminal penalty. This pattern would most likely continue in the future.

Orlet did not "overlook the fact" that no change in his "political opinions in general nor his opinion in particular over the Holocaust" could be expected. Probation did not require "a change in point of view" but merely an "expectation of a crime free way of life." Orlet conceded that "the accused will from here on adopt revisionism and will in all foresight continue to do so in the future." He reconciled this with his expectation that Deckert would henceforth be crime free by arguing that Holocaust denial "as a method of thought" was not illegal. He concluded that "the overwhelming majority of the population would understand" the decision to suspend the sentence of "a 54 year old grandfather with no previous convictions, whose crime had consisted in the expression of an opinion." Especially since, as Orlet added almost apologetically, the accused had distanced himself from the recent attacks on asylum-seekers and Jewish community institutions.

By praising Deckert, sympathizing with (if not adopting) his beliefs, and questioning the legal status of Holocaust denial, Orlet's court used the written verdict to acquit Deckert rhetorically even as it convicted him legally. He would soon discover that a written verdict could be a two-edged sword.

The Scandal Verdict

The *Deckert* verdict unleashed a justice scandal of epic proportions. Business leader Günter Verheugen called it the "most unbelievable justice scandal in the last decade."[25] He was not alone. Politicians, community leaders, prosecutors, and judges harshly criticized the ruling, which would become known as the "scandal verdict" (*Skandalurteil*). The verdict insulted Jews and trivialized the Holocaust. This view was shared by Justice Minister Leutheusser-Schnarrenberger, who called the decision "a slap in the face for Holocaust victims," and Ignatz Bubis, leader of Germany's small Jewish community, who demanded that the federal government distance itself from the verdict.[26]

The verdict also insulted the German state. An op-ed piece in the *Frankfurter Allgemeine Zeitung* warned that if Deckert was right about the Holocaust, "the Federal Republic was founded on a lie" and "every Presidential talk, every minute of silence and every history book had lied."[27] There was also fear about the verdict's international consequences. Chancellor Helmut Kohl lamented a disgraceful verdict that "brought shame to the reputation of Germany abroad."[28] The German press closely monitored foreign reception of the verdict. The *Süddeutsche Zeitung* reassured its readers that the Israeli press coverage of the verdict was rather minimal.[29] The *Tagesspiegel*, reviewing articles on the Deckert case appearing in Poland, Israel, France, the United States, and Italy, informed its readers that only the Italian *La Stampa* editorialized against the verdict.[30]

As with the *Nieland* case thirty years ago, Germans asked themselves if the *Deckert* verdict reflected a right-wing bias in the justice system. Günter

Weber, president of the Mannheim court, did not think so. He called the verdict a "little mishap," the work of judges who "had not reckoned that this opinion might become public,"[31] a strange view given the fact that the written verdict is a public document. Peter Masqua of the German Judges Union agreed; the *Deckert* case was exceptional. On the other hand, Bernd Siegler compared the *Deckert* verdict to antiforeigner violence cases in which judges also used offensive language.[32]

The search was on to see who actually wrote the opinion. Initial suspicions focused on Judge Wolfgang Müller, who with Ranier Orlet and a third colleague had handled the case. Soon there were demands for Müller's removal. But Müller, described as "a liberal with a dash of conservatism," seemed an unlikely culprit.[33] It was reported that family burdens had kept Müller from working actively on the case. Speculation, and later blame, fell on Ranier Orlet for three reasons. First, as the reporting judge, he drafted the written verdict. Second, Orlet was politically suspect. Not only did he purchase the far-Right *National Zeitung*, during the 1960s and 1970s Orlet, then a county judge in Heidelberg, earned the title "blood judge" for his harsh measures against student protestors. Third, unlike Müller who apologized, Orlet defended the *Deckert* verdict as written.

Having identified the perpetrator, the next step was to craft a response that would calm the public fury the verdict aroused. Prosecutor Hans-Heiko Klein announced he would test the verdict itself for criminal violations. At the same time the *Frankfurter Allgemeine Zeitung* cautioned that the *Deckert* case could not be resolved "politically"; those seeking redress would have to wait for the prosecution to "appeal" the scandalously worded guilty verdict.[34] As it turned out, redress came sooner. A few days after the verdict, president of the Mannheim court Günter Weber released the following statement: "Due to long-term illness preventing presiding judge Dr. Müller from assuming his duties, presiding judge Nussett will immediately take over the leadership of the court." Judge Orlet was also placed on sick leave.[35]

The use of sick leave to remove Müller and Orlet won mixed reviews. Justice Minister Leutheusser-Schnarrenberger saw it as proof that German justice was not politically biased.[36] Hanno Kühnert told the *Deutsche Richterszeitung* that the *Deckert* verdict had created "an emergency situation," which justified the removal. The swift action against the judges demonstrated "the quick and effective action of the immune system," which had removed a threat to the community.[37] Other contributors to the *Deutsche Richterszeitung* were less understanding of Weber. Kurt Rudolph argued that the public would question the use of sick leave to remove Orlet and Müller. But he stopped short of open criticism; the "democratic public" would have to live with the actions of the Mannheim court president.[38]

Whatever the differences over the correct response to the *Deckert* case, a consensus emerged as to the problem. Ranier Voss, head of the German Judges Union, told his colleagues: "The reputation and acceptance of jurisprudence depends essentially on us judges. We conduct the hearings, we write the opinions. When we are not up to the task, we have no hesitation

in pointing a raised finger at one another." In the *Deckert* case, Voss continued, "justice failed"; it failed because of its "political blindness" to the threat of right-wing extremism.[39]

That blindness speaks volumes about the role the German judges play in high-profile cases. A judge does more than attach verdicts and sentences to criminal acts. A judge voices the response of the community to those acts. Kiel criminologist Monika Frommel expressed this sentiment when she said: "What is asked for is not hard sentences against individual scapegoats" but "clear statements of basic norms of living together in peace."[40] The trial court verdict is the voice of the people. A verdict that imperfectly expresses this voice, like a failed ritual, draws the wrath of the community. In this case the public found it essential to stress the danger posed by the extreme Right and Günter Deckert. Descriptions of Deckert as "strong-willed" and "responsible" did not create the required picture of a right-wing extremist and, as such, did not express the feelings of the community. That is why the verdict was described as "breaching a taboo," "crossing a line," and "a slap in the face."[41] It also explains why almost everyone who spoke about the case, save Deckert and Orlet, condemned the verdict. To do otherwise, was to become tainted.

The political taboo violated by the verdict forestalled any attempt to find a legal basis for Orlet's language. Nobody argued that the probation and sentencing laws required Orlet to assess Deckert's character, or that § 193 forced him to consider the defense's suggestion that Deckert had "a justifiable interest" in promoting his political views. The closest any commentator came to sympathizing with Orlet was Kurt Rudolph, who spoke of the duty of the criminal judge to "see that justice is done to the accused," but, says Rudolph, Orlet carried this to "absurdity."[42] If it was impossible to sympathize with Orlet, there could be empathy for the judiciary as a whole. Instead of fairness to the accused, commentators stressed the independence of the judiciary. This allowed supporters of judicial independence to make arguments that could not be made in reference to the accused. For example, Heribert Prantl opposed Orlet's removal, warning that other judges might suffer a similar fate for issuing left-wing verdicts.[43] Likewise, Rudolf Wassermann had no trouble criticizing the verdict, which he saw as so favorable to Deckert that Orlet's loyalty to the state came into question. But, Wassermann added, attacking the judiciary was not the solution. Instead, he advocated educating the judiciary about the true nature of the right-wing threat.[44] By defending the independence of the judiciary as a whole, critics of the removal distanced themselves from Deckert and Orlet, both of whom had become taboo.

With Orlet removed, the next step was the repudiation of his decision. This occurred in December 1994 when the Supreme Court, in a manner reminiscent of the *Nieland* case, wrote the opinion that Judge Orlet should have delivered.[45] The Supreme Court made its contempt for Deckert (and Orlet) transparent. If Deckert held his political ground at trial, this was not out of "character strength and a sense of responsibility," as Orlet thought,

but because of "short-sightedness" and "stubbornness." The Supreme Court rejected Orlet's suggestion that Holocaust denial was legal in Germany: "Whoever closes their eyes to historical truths and does not want to recognize them deserves no reduction in sentencing." The case was sent back to Mannheim for retrial before a new set of judges.

By following the proper formula—castigating the accused, reasserting the Holocaust as historical truth—the Supreme Court restored faith in German justice. Justice Minister Leutheusser-Schnarrenberger concurred: "Germany's highest criminal court has made it clear that Nazi propaganda will receive a decisive answer from the law." Both Ignatz Bubis and Elan Steinberg of the World Jewish Congress in New York welcomed the ruling.[46] Deckert's retrial followed the pattern established by the Supreme Court. According to Judge Eva-Marie Wollentin, to speak of gas chamber and Auschwitz lies was "unimaginable"; whoever, like Deckert, spreads Nazi propaganda "practices an immoral form of dangerous intellectual arson."[47] Deckert was sentenced to two years without probation.

Meanwhile, judges and lawyers debated whether Wolfgang Müller and Ranier Orlet should return to the bench. Their respective fates demonstrate the judiciary's role as a moral representative of the people. Judge Müller apologized for the verdict during the first week of the scandal. His "explanation" of the verdict regretted any "misunderstood or unfortunate formulations" and stated his rejection of "anti-Semitic and National Socialist ideas."[48] If some found the apology less than satisfactory, it sufficed to allow him to return to work in September 1994.

Judge Orlet's case took a different path. Not only did he fail to apologize, he defended the opinion as written. As a result, protest followed Orlet wherever he went. Antiracist protestors greeted his return to work in November 1994. Back in office the beleaguered judge faced further problems: lay jurors refused to sit with him and criminal suspects requested that the "Nazi-judge" be recused from their cases.[49] By mid-March local politicians discussed removing Orlet permanently. They planned to use Basic Law § 97, which authorizes removal on a two-thirds vote of the state parliament and a subsequent two-thirds vote of the second senate of the Federal Constitutional Court. The critics zeroed in on post-verdict statements in which Orlet praised Deckert. While Orlet's opponents had enough votes in the state parliament, prospects in the Constitutional Court were uncertain. Orlet's opponents needed the support of six of the eight justices. As *Der Spiegel* put it, if even three judges side with Orlet, the result would be "a celebration with free beer for the right-wing extremists in the NPD headquarters in Stuttgart."[50]

In the end, Orlet backed down. On May 5 he publicly distanced himself from Deckert and right-wing extremism. The SPD rejected the distancing as "formal" and "without content," but the CDU, whose votes were needed for removal, announced a detailed review.[51] While this was underway, Orlet announced his retirement. Armed with a doctor's note, the embattled judge told the parliament he feared a removal proceeding would cause a heart

attack. Orlet's lawyer did not deny the opportunistic appearance of this, but insisted that a removal proceeding could be "life threatening" for his client.[52] The CDU and SPD were content to let matters rest, a decision that secured Orlet's pension.

The *Deckert* case demonstrates the power of the written verdict in the German legal system. With the power to speak the law comes responsibility. As the voice of the people, the judge who fails to conform to popular conceptions of justice faces criticism or worse. At a time of social anxiety over right-wing extremists, Orlet minimized the danger posed by Günter Deckert; in a society where Auschwitz remained a taboo, he suggested that Holocaust denial might be legal. For this sin Orlet paid a price. He himself became taboo as lay jurors and criminal suspects refused to work with the "Nazi judge." This paved the way for his eventual ouster.

Meanwhile, the suspension of Müller and Orlet played an important role in restoring the faith of Germany in its legal system and, more importantly, in its post-1945 identity as a nation that had come to terms with the Nazi period and the Holocaust. In Hanno Kühnert's poignant words, the explosion of anger directed at the verdict reassured Germans and the world that the nation's "immune system" remained intact.[53] As such, the response to the *Deckert* verdict is a paradigmatic example of a post-scandal restorative act. On that level, it was successful; the repudiation of Judge Orlet's opinion was clear. In large part, this success depended on the German judges who were willing to sanction Müller and Orlet for their behavior.

The *Auschwitz-Myth* Case

But restorative acts have a second purpose. In addition to supplying reassurance, such acts seek to render future scandals impossible by assuring an endless flow of prosecution victories. This second, prospective form of restoration required more from the judges than a simple act of condemnation of a colleague; it required them to temper their attachment to norms of legal fairness. Here judicial cooperation ended. Nowhere was this more clearly displayed than in a Hamburg courtroom where, in February 1995, only six months after the *Deckert* verdict, Albrecht Kob, an administrative court judge, acquitted two right-wing extremists who had been charged with denying the Holocaust by using the phrase "Auschwitz Myth."

At the same time, the *Auschwitz-Myth* case tells the story of how an inquisitorial judge who felt compelled to render an unpopular verdict tried to sweeten the pill by writing a verdict that comported with community norms. As such, Judge Kob's ruling stood in contrast to the *Nieland* and *Deckert* cases where the judges wrote opinions that made little, if any, effort to respect German norms about anti-Semitism and the Holocaust. But would Judge Kob's kind words make a difference to the general public? Or would the public, focusing on the verdict itself, view Kob as another "Nazi Judge"?

In February 1994 the Hamburg press uncovered a telephone network operated by local neo-Nazis. Whoever dialed the network heard prerecorded

announcements for upcoming events, right-wing slogans, and threats to local anti-fascists. In April, Hamburg police raided the house of Jens Siefert and seized an answering machine tape. The recording, made by Andre Goertz, referred to Steven Spielberg's film *Schindler's List:*

> As is not unexpected, the Hollywood soap opera of Steven Spielberg the Jew was showered with Oscar awards. A film by Spielberg on principle obtains an Oscar. It directed itself against Nazi Germany and what's more kept the Auschwitz myth alive, it became, with seven Oscars, the film of the year. In Germany despite the media propaganda only 300,000 manipulated ones have seen the film. Above all many school children have been compelled to see this shoddy effort. By comparison, "Otto, the Film," had over three million viewers.[54]

Based on the phrase "and what's more kept the Auschwitz-myth alive" the Hamburg prosecutor charged Siefert and his colleague Andre Goertz with racial incitement and defaming the dead. Siefert and Goertz were prominent members of the right-wing scene in Hamburg. So all the elements of a scandal were in place when, on February 1, 1995, Judge Albrecht Kob acquitted both defendants on all charges.

Kob's acquittal, coming in the midst of the ongoing debate over the future of Judge Orlet, invited parallels to the *Deckert* case. Hamburg politician Robert Vogel said it was "horrible" to see "the Mannheim Deckert verdict repeated."[55] The Mannheim parallel extended to the appropriate response of society to the acquittal. An op-ed piece in the *Frankfurter Rundschau* made this clear:

> One must be reminded, or be warned of days past. Once again, as months ago, when it fell to the Mannheim judges to praise NPD chair Günter Deckert to the (brown) skies and to attest to his "strength of character." And again the outrage slowly begins, which this time catches fire with the acquittal by the Hamburg local court of two right-wing extremists, who with the concept "Auschwitz-Myth" insulted the mass murder of Nazi victims.[56]

From the early response, the *Auschwitz-Myth* case had all the earmarks of the dilemma of the unpopular accused. Because a Holocaust denier was acquitted, it did not matter what the judge said.

Critics saw Albrecht Kob as another Ranier Orlet. Both judges were proof that, fifty years after Hitler, German justice still had a soft spot for the extreme Right. Following the pattern set in both *Deckert* and *Nieland*, the trial judge was put under a microscope. But unlike his predecessors, Kob lacked a suspect past and showed no current signs of right-wing sympathy. Crucial to Kob's vindication were character references. Otmar Kury, a defense attorney in Hamburg, called Kob "a man with impressive democratic consciousness." Wolf Römmig, a fellow judge, called the assertions that Kob supported right-wing radicals "pure nonsense."[57] These testimonials softened the criticism against Kob. And, because he was neither an old Nazi nor a reader of the far-Right *Deutsche Nationale Zeitung*, Kob benefitted

from the investigation into his past. Loved by his student interns, supported by his colleagues, Kob weathered the storm. But equally crucial to this outcome was Kob's written explanations of the acquittals. Unlike Orlet and Budde, Kob told the public what it expected to hear when a Holocaust denier sat in the dock.

In a preliminary statement issued just after the verdict, Kob explained his decision. (In Germany, written verdicts are normally issued several weeks after the judge makes his or her ruling.) Goertz and Siefert accepted the Holocaust as a historical fact and by the term "Auschwitz-myth" had not intended to deny the Holocaust. Kob conceded that some in right-wing circles used the phrase to escape punishment for Holocaust denial, but this usage did not inhere in the term itself. The German word *Mythos* ("myth") was "ambiguous." *Der Spiegel* had used the term "Auschwitz-myth" without raising suspicions. Given this, Kob was compelled by the principle *in dubio pro reo* ("in doubt for the defense") to acquit the two defendants.[58]

The public debate turned on the plausibility of Kob's interpretation of "*Mythos.*" The *Süddeutsche Zeitung* noted that the *Duden* foreign-word dictionary listed three definitions of the term: "an epic, poem or story handed down from the prehistory of a people," "a glorified person, thing or event, which has a legendary character," or "a fairy tale."[59] Critics expressed disbelief at Kob's interpretation of *Mythos.* Ignatz Bubis put it bluntly: "They wanted with the word 'myth' to express clearly the comparable word 'lie.' "[60] Michael Friedman saw another example of the "inability" of the German law "to understand the violence which hides just in words."[61]

Even though most who followed the trial felt that "myth" meant "lie," Kob's error was seen as naïve not malicious. Kob had been "tricked."[62] An article in *Die Zeit* took this line.[63] Kob, as an administrative judge, stood at the bottom of the legal hierarchy. The typical administrative court judge was more a "social therapist" than a legal expert. The laws involved—racial incitement, defamation—were the province of the Supreme Court. It would have taken "great effort" to prove that two defendants, who "knew all the tricks," actually denied the Holocaust. Defendants like Goertz and Siefert were dangerous because they concealed their true hatred behind a mask of good impressions.[64] Instead of undertaking the hard work necessary to rip off the mask, Kob took the accused at face value. A debate over Kob's naïvete placed his sincerity beyond reproach. Goertz and Siefert then, not the judge, were the villains.

Meanwhile, Horst Meier, an opponent of German Holocaust-denial laws, defended Kob's decision on the merits. Neither naïve nor scandalous, the verdict was "what can be expected from a criminal judge who takes his work seriously."[65] Facing an unclear text, a judge must follow the interpretation that favors the defendant. "Whoever speaks mistrustingly of this as a 'formal juristic' game," Meier added, "has not understood criminal justice in a constitutional state." There can be no punishment without a previously specified crime; otherwise, society risks a return to the Nazi time, when punishments were justified by reference to "healthy popular opinion." Meier objected, not

to the judge, but to the use of law for symbolic ends: "Generally criminal justice is suited least of all to be involved in symbolic management of the past."[66] Any response to neo-Nazis must be political not legal in form. He predicted that the new law, which forbids the "trivializing" of the Holocaust, would produce new scandals.

If Kob's critics outnumbered his defenders, the critics did not leave him with all the blame. Judge Kob still, however, had one more hurdle—the written verdict. The verdict would force Kob to describe the accused and their actions in great detail, the very process that tossed Orlet and his colleagues into the center of a political storm. To avoid a similar fate, Kob would have to show he understood the threat posed by the extreme Right. In this he succeeded admirably. As L.G. Bertram wrote in the *Neue Juristische Wochenschrift:* "Nobody—even his most annoyed critics—suggested that he said in the trial or in his written verdict a single anti-Semitic, tactless, suspicious or overall 'incorrect' word."[67]

Judge Kob's verdict began by restating the defense position. Neither accused denied the Holocaust; the phrase "keep the Auschwitz myth alive" simply reflected Goertz and Siefert's view that the Holocaust "had become unnecessarily emotionalized."[68] In assessing the phrase the court was required to favor any interpretation that kept the two accused from punishment. In other words to convict Goertz and Siefert, Kob would have to rule that the word *Mythos* had a single possible meaning and that this meaning was illegal. To that end, Kob looked at two recent usages of the term in the popular press. Both *Der Spiegel* and the *Tageszeitung* used *Mythos* in contexts totally unrelated to Holocaust denial. *Der Spiegel* referred to how Holocaust survivors dealt with the "present-day myth of Auschwitz," while the *Tageszeitung* stated that Israel's "relationship to Germany today, however, has nothing to do with the myth of the Holocaust."[69] Based on this evidence, Kob concluded that "Auschwitz-myth," viewed objectively, was "neutral" and did not carry the negative connotation of "Auschwitz-lie."

Kob then examined the context in which the term arose. He accepted that "members of the right radical conviction," which he termed a "discriminatory ideology," used "Auschwitz-Myth" as a code for Holocaust denial. But the fact that followers of this ideology have, "against all recognized principles of humanity served an anti-Semitic sentiment," did not mean the accused also denied "the horrible crimes against the Jews." Had this been the case, then a conviction would follow because to deny the Holocaust was to "disrespect and tread underfoot" those "Jews killed in the gas chambers or who survived this gruesome persecution." In justifying the acquittals Kob distinguished the two accused from the evil of Holocaust denial. To conclude that because Goertz and Siefert belonged to the right-wing scene they too interpreted "*Mythos*" to mean "lie" was to punish them for their associations. While ultimately acquitting the two accused, Kob's references to the "horrible" and "gruesome" crimes against the Jews and the "discriminatory" nature of anti-Semitism made his repudiation of the extreme Right clear to all.

The written verdict silenced the critics. The *Süddeutsche Zeitung* reported that Kob was viewed by coworkers as having "absolute integrity."[70] On March 4, 1995 the *Frankfurter Rundschau* ran the entire opinion.[71] Kob's acceptance of community norms and his good character references saved his job. Meanwhile, Kob changed how the German public viewed Holocaust-denial litigation. Goertz and Siefert were the villains: Kob was, at worst, naïve. This pattern continued when both sides retried the case on appeal.

In September 1995 the Hamburg District Court affirmed Judge Kob. Prosecutor Robert Junck argued that in the context of the extreme Right "myth" meant "fairy tale." The real message of the accused was that "the Jews invented Auschwitz to blackmail Germany morally and financially."[72] The court disagreed: "It is not certain that Andre Goertz with the concept 'Auschwitz-myth' meant 'Auschwitz lie' and so wanted to deny the mass murder of the Jews." Nor was there any evidence that in right-wing circles "Auschwitz-myth" served as a code word for denial. Because there was no proof that the accused intended to deny the Holocaust, or that listeners interpreted Goertz's term as a denial, the court acquitted them.[73]

The response to the acquittal was muted. The limited debate that did take place followed the pattern of the previous February. Michael Friedman, a conservative German Jewish journalist, raised the question of naïvete: "How naive and good-willed can we allow ourselves to be when we know from whom, to whom and through which means the idea 'Auschwitz-myth' was used?" Most of the anger, however, fell upon the accused rather than the court. Hamburg Jewish community leader Heinz Jaeckel asked critics to direct their attention away from the judges to those who "again and again" evade the legal rules.[74]

A new sentiment now emerged: resignation. As a Christian Democratic politician explained: "Sometimes one must swallow a decision, the political effects of which one does not like."[75] A *Hamburger Abendblatt* editorial made the same point. Whoever denies the Holocaust deserves punishment. In Goertz and Siefert's case a finding of guilt would be "simple" and "popular" but unsupported by the evidence. The acquittal left "a bad feeling" but such a feeling, by itself, cannot justify a guilty verdict. Instead, the paper held the two accused to be "morally" guilty.[76]

By September 1995 Germany had seen almost two years of high-profile prosecutions of Holocaust deniers. That month the Berlin District Court handed down a ruling in the prosecution of Ewald Althans, the "star" of *Beruf Neonazi*. Althans, sued for statements he made during the film, claimed the director had tricked him. The court rejected this claim and sentenced Althans to three and a half years of hard labor. Not only was the sentence harsh, but the written verdict was, from an anti-revisionist perspective, exemplary. The accused was "just as dangerous for the public" as a violent offender. Worse still, he used his rhetorical talent to create a "breeding-ground" for the antiforeigner violence at Mölln and Hoyerswerda, where skinheads had attacked and killed Turkish guest workers. The accused, concluded the court, was "a dangerous intellectual arsonist."[77]

In the *Althans* case the court said the magic words. Its sharp rebuke of Althans marked the end of a period of intense moral concern over Holocaust denial. Prosecutions continued but occupied a smaller space in the popular imagination. The scandals Meier predicted under the new racial incitement law never materialized. Nor was there much notice when, in 1998, the Hanseatic Appellate Court upheld the acquittal of Siefert and Goertz. Exhaustion had set in; the time for scandal was over.

The German public's increasing tolerance of acquittals and other legal victories of deniers in the years after 1995 can be traced to two factors. First, the public outrage over Holocaust denial was episodic in nature. For a variety of reasons—some related to broader trends such as German reunification, others (like the Althans film) fortuitous—German anxieties about Holocaust denial peaked in the mid-1990s. By contrast both late 1980s and late 1990s were periods of relative disinterest. Second, the restorative acts taken after the *Deckert* case and Albrecht Kob's politically sensitive ruling in the *Auschwitz-Myth* case had a lasting impact on how German society viewed Holocaust-denial litigation. The former demonstrated that legal rulings which showed disrespect for the Holocaust would be punished; the latter showed that is was possible to acquit a denier while adhering to community norms about the Holocaust and the Nazi era.

CONCLUSION

From a Durkheimian perspective, the German cases show the representative role that law plays in modern society. As the author of the verdict, the German judge is the voice of the community. The task of the judge is not conviction or acquittal *per se*, but the telling of a story about the accused and the crime that satisfies the general public. In the Holocaust-denial context, this means repudiating the accused and the crime in harsh words and avoiding cavalier, tongue-in-cheek opinions that trivialize the Holocaust and recall the anti-Semitic rulings of the Weimar era. Judges who tell acceptable stories, like Albrecht Kob, will survive scandal despite acquitting unpopular defendants. Judges whose stories do not meet community norms, such as Ranier Orlet, will face problems even if they reach the "right" verdict.

From a Weberian perspective of the law as a system of bureaucratic norms, the evidence from the *Nieland*, *Deckert*, and *Auschwitz-Myth* cases is murkier. On a formalistic level, legal norms structured the decisions the judges made. But the contrast between Judge Kob's ruling and the rulings of Budde and Orlet, suggest that German judges have at least some flexibility in how they draft their opinions. This is not to say that professional norms had no place in the German cases. It was one of these norms, *in dubio pro reo* (if in doubt, side with the defense), that compelled Judge Kob to acquit Goertz and Siefert. Likewise, Judge Budde's dismissal of the charges against Nieland has a legal basis, even if it was not a popular one, in the argument that the accused did not intend his pamphlet to discriminate against the Jews, even if that was its effect.

But in the greatest of the scandals—the *Deckert* case—the accused was convicted. The problem here were not the norms of legal fairness, but the German written verdict, which enabled Orlet (and Müller) to pull defeat out of the jaws of victory. To put it another way, the German written verdict, with its directive to tell the story of the accused and the crime, gives the judge great power and a temptation to express her or his own personal political views. If there is nothing inherent in the right of the accused that requires a written verdict, such a verdict provides a critical measure of accountability in an inquisitorial legal system that leaves all important procedural decisions to the judge. By contrast, Judge Locke, who had to follow complex rules of evidence, had a much lower profile.

This page intentionally left blank

Chapter 4

Taking the Blame for *R. v. Zundel*

While the Holocaust did not play the same pivotal role in Canada that it did in Germany, this did not prevent the highly publicized *Zundel* case from generating a scandal. Although it ended with a guilty verdict, the eight-week trial saw Canadian newspapers run a series of headlines that seemed to cast doubt on the Holocaust. Headlines such as "Women Dined and Danced at Auschwitz, Expert Witness Says," made Canada, in the words of McGill law professor Irwin Cotler, "the international centerpiece of Holocaust denial litigation."[1] Despite the guilty verdict, *R. v. Zundel* was, in the eyes of many, a symbolic victory for the accused.

As in Germany, a flawed prosecution led to public outrage. But the focus of the public anger shifted away from the trial judge to other players in the courtroom drama including the two lawyers who represented the prosecution and the defense, the news media who wrote the headlines, and, in an odd twist, the Supreme Court of Canada, which belatedly (in 1992) voided Zundel's prosecution on the grounds of free speech. Why did the Canadian public refuse to blame the scandal on Judge Locke, who as the trial judge made the rulings that, in turn, made the defense tactics possible? Why did it place the blame on parties whose influence on the litigation was more tangential? A large part of the answer turns on the specific Canadian legal and political context, a context that made some actors better targets for blame than others.

This chapter focuses on a specific type of restorative act—casting blame. Blaming is a common way people and societies respond to otherwise inexplicable events.[2] While the chapter provides the reader with ample opportunity to assess whether the blame cast upon the news media, prosecutor Griffiths, defense counsel Christie, and the Canadian Supreme Court was "fair," the gist of the chapter lies elsewhere. Starting from the premise that who gets blamed depends (at least in part) on the cultural context, this chapter argues that the pattern of blame evidenced in *R. v. Zundel* reflects Canada's adversarial legal system.

THE *ZUNDEL* TRIAL

The *Zundel* case had its share of potentially blameworthy acts. During the prosecution several Holocaust survivors testified. They were sharply questioned by the defense, which, during its own case, presented a series of witnesses who testified to the revisionist view of the Holocaust. Observers found Dietlieb Felderer's testimony that Auschwitz had a swimming pool especially offensive.

The Canadian Jewish Congress (CJC) planned a demonstration in downtown Toronto in the event that Zundel was acquitted.[3] Fortunately for the prosecution, Zundel testified on his own behalf. This allowed prosecutor Peter Griffiths to unleash a devastating cross-examination centered around another Zundel publication—*The Hitler We Loved and Why*.[4] The 120-page photo essay presented a new image of Zundel. Its dripping praise for Hitler contradicted Zundel's courtroom image as pacifist who opposed racial stereotyping. Under Griffith's persistent questioning, Zundel revealed himself as a neo-Nazi who lied about the Holocaust to rehabilitate his idol, Adolf Hitler. On March 1, 1985, the jury found Zundel guilty.[5] While the CJC heaved a sigh of relief, Christie appealed.

This appeal was successful. Finding fault with Judge Locke's handling of jury selection and his charge to the jury, the Ontario Court of Appeals threw out the guilty verdict in January 1987.[6] After a short debate the Ontario Attorney General decided to retry Zundel. At the retrial both sides changed legal strategy. No Holocaust survivors testified; nor did Zundel. A new judge, Ronald Thomas, took judicial notice of the mass murder of Jews but left open questions of planning, exact numbers, and means of execution. As a result, the second jury heard even more revisionist evidence than its predecessor—including the "scientific" evidence Fred Leuchter gathered in Poland. Nonetheless, the jury convicted Zundel. In 1990 the Ontario Court of Appeals affirmed the verdict and Zundel appeared headed to prison.[7] But this was not to be. In August 1992 the Supreme Court of Canada overturned Zundel's conviction, ruling that the False News Law was unconstitutional.[8]

Although each of Zundel's trials ended in a guilty verdict, Christie's harsh questioning of Holocaust survivors and Felderer's insulting testimony about Auschwitz left the CJC and its supporters perplexed. How could the legal system be perverted by the Holocaust deniers? It also left them scared and angry. After the 1985 trial a poll was sponsored by the Jewish community to see if the trial caused an upsurge of anti-Semitism. The results were mixed—while anti-Semitism did not increase in the wake of the trial, a majority of those polled thought it had.[9] Meanwhile, two sociologists measured the trial's impact on the local Jewish community itself. Over 80 percent of the Jews in the Toronto area who watched the trial reported psychological harm. Thirteen percent of the sample thought Zundel deserved the death penalty.[10]

If the concept "symbolic victory" is sometimes difficult to apply precisely, the 1985 prosecution of Ernst Zundel clearly backfired. What had been an

attempt to silence Zundel, and possibly use the legal system to repudiate denial, became instead a public relations coup for the Toronto publisher and his supporters. Holocaust survivors, the CJC, and others offended by the trial wondered what went wrong. In answering this question, the critics looked not only at the trial itself, but at the broader political context, a context that made some individuals and institutions more likely objects of blame than others.

Judge Locke—Too Important to Blame?

From a strictly legal perspective, Judge Locke looked like an obvious candidate for blame. To begin with, he allowed the testimony that critics of the *Zundel* case found so offensive. Not only that, his legal errors led the Ontario Court of Appeals to dismiss the charges against Zundel, forcing the Ontario authorities to order a second trial during which Zundel repeated his previous trial tactics. Yet Judge Locke emerged from the case unscathed. German judges had borne responsibility for the *Nieland*, *Deckert*, and *Auschwitz-Myth* cases. Why was their Canadian counterpart immune from criticism?

One explanation focuses on the structural position of the judge in each legal system. The German judge must put the court's verdict into words; as we saw, this gave an angry public an easy target. In Canada the jury issues the verdict. Judge Locke could not be blamed for a verdict he did not write. Yet the comparatively marginal role of the judge in the common law legal system cannot, by itself, explain why Judge Locke escaped blame. When Judge Locke ruled on points of evidence and trial procedure he put himself at the center of the action. Several of these rulings led to defense victories, victories that led the CJC and their supporters to question the fairness of the trial. But these critics rarely blamed Judge Locke. Even when Locke rejected the prosecution's judicial notice motion because it risked biasing the jury against the accused, Manuel Prutschi of the CJC accepted Locke's ruling at face value.[11] Blame, when it came, fell elsewhere.

Nor was Judge Locke criticized after the Ontario Court of Appeals threw out the guilty verdict because of technical errors. Since these errors necessitated a new trial, they are worth a brief review. First, Locke erred by preventing the defense from questioning jurors. Canadian law allows juror questioning upon a showing of adverse pretrial publicity. Douglas Christie, Zundel's lawyer, wanted to ask jurors about Jews and the Holocaust. While holding that Locke properly excluded these questions, the Ontario Court of Appeals criticized Locke for not allowing the defense to ask any questions at all.[12] Locke's second error concerned the jury charge. Twice he misstated the proper burden of proof. Rather than telling the jury that the prosecution had to prove Zundel published the pamphlet "knowing it was false," Locke spoke of Zundel's "honest belief in the essential truth" of the pamphlet. Locke's transposition shifted the burden of proof from the prosecution to the defense. While reserving great deference "to the learned trial judge who conducted a difficult trial in an admirable manner," the Court of Appeals

held that the faulty instruction "constituted a serious error" that was "gravely prejudicial" to the accused.[13]

These errors had little to do with balancing the need for a smooth prosecution that repudiates Holocaust deniers with Zundel's right to a fair trial. They were, instead, instances of simple, avoidable mistakes on Locke's part. Locke's errors annulled Zundel's guilty verdict, the one positive result of a lengthy prosecution that had caused the Jewish community such pain. If ever there was a time and place for criticism, here it was. Because of Locke's mistakes Zundel was free and the Jewish community faced the prospect of a retrial. But Locke was not blamed. That is not to say that Canadian Jews greeted the reversal with joy. Helen Smolack of the Canadian Holocaust Remembrance Association—the group that initiated the case against Zundel in 1983—called the reversal "incredible" and a "shame," but did not accuse Locke of anti-Semitism or incompetence. Neither did Alan Shefman of the League For Human Rights of B'nai B'rith nor Manuel Prutschi of the CJC.[14]

There are several reasons for this. First, the Court of Appeals judgment contained a significant victory for the Jewish community; the panel agreed with Judge Locke that the False News Law did not violate the Charter of Rights and Freedoms. In doing so the appellate court noted: "The maintenance of racial and religious harmony is certainly a matter of public interest in Canada."[15] Prutschi remarked that this was "the first time" a high court has recognized "that racial and religious harmony is a primordial component of what constitutes the public interest."[16] Second, Canadian criminal procedure insulates the judge by preventing the media from reporting on pretrial proceedings before the jury renders its verdict, or commenting on the evidence presented at trial (as opposed to reporting on it).[17] These rules hamstring press coverage of prosecutions and insulate the judge from adverse comment typical of high-profile American trials. Whatever the jury cannot hear, the public is also unable to discover. The lack of contemporaneous reporting of pretrial motions made criticism of Locke very difficult.

If restrictive laws explain why the general public did not blame Locke, what about the CJC, whose members attended the trial? The CJC knew of Judge Locke's evidentiary rulings the moment they happened and they knew the potential problems lurking on appeal. But they did not criticize Locke. To understand why the CJC refused to criticize Locke, the analysis must shift from the role of the judge in the courtroom to how the society as a whole perceives its judges. The Canadian trial judge "is on display to the public as the epitome of . . . the legal system." As such, the judge must "act with equal impartiality."[18] High-profile trials threaten the public perception of fairness. According to Canadian political scientist Peter Russell, such threats are "particularly likely during a period when radical or minority political groups are apt to use court trials as vehicles for advancing their political cause."[19] As the face of authority in a highly contested public trial, Judge Locke was too important for critique.

To blame *R. v. Zundel* on Judge Locke risked isolating Jews from the mainstream of Canadian political culture. In January 1987 it was not clear Zundel

would be retried. If the CJC criticized Locke, it would strengthen the hand of those, like the *Globe and Mail*, that opposed further prosecution.[20] Therefore, the Jewish community downplayed the outrage that had accompanied the first trial. In an April 1987 memo, Prutschi suggested responses to concerns that a new trial would offend Jews. These included stressing the toughness of the Jewish community; its determination that "the legal system must be used"; and "the protracted conflict" between society and Zundel.[21]

In the end, Judge Locke escaped blame because he was too close to the law itself. As we saw in part I, Canada's common law, adversarial norms posed a major obstacle to the prosecution of Ernst Zundel. Judge Locke applied those norms and, for better or worse, he represented them. An attack on Judge Locke was, therefore, an admission that the Canadian legal system as a whole had failed. While this would satisfy critics of the Canadian legal system, it would also undermine the rationale for the prosecutions.

Blaming Legal Outsiders

While Locke escaped blame, the Jewish community's discomfort with the first *Zundel* trial—and its reversal on appeal—was real. The cross-examination of Holocaust survivors and the "evidence" denying the Holocaust was extremely painful. If the real cause of this discomfort was legal fairness, especially the right of the accused to tell her or his side of the story, admitting this might lead to questioning the value of the *Zundel* prosecution altogether. It would be far easier to find others to blame. The principal targets were the news media, prosecutor Griffiths, and defense counsel Christie. The critical factor that linked all three of the targets was their status as legal outsiders. One could criticize the news media and lawyers without appearing to criticize the law itself. This made them more acceptable targets of blame, whatever their actual responsibility for the events of the trial.

A heavy share of the blame for the *Zundel* scandal fell on the newspapers that covered the trial. Instead of arguing that courts should not give Holocaust deniers equal time, critics charged the media with the same fault. At the close of the first trial Manuel Prutschi complained that the media "all to frequently" shifted attention from "the reality of the Holocaust to report uncritically on the Holocaust denial lie." The excessive focus on the defense cross-examination and witnesses gave Zundel and his followers a "totally undeserved legitimacy."[22]

The Jewish community was especially troubled by misleading headlines that ran in the Toronto papers covering the trial, headlines that often gave Holocaust denial undue credence. For example, after prosecution witness Raul Hilberg admitted he disregarded parts of former SS officer Kurt Gerstein's confession as " 'pure nonsense,' " the Toronto Sun ran an article under the headline, "Expert's Admission: Some Gas Death 'Facts' Nonsense."[23] A *Globe and Mail* headline from the previous week—"Lawyer Challenges Crematoria Theory"—was scarcely better. It implied that the Holocaust was a theory, open to dispute, rather than a settled fact.[24]

Other headlines, while not misleading, were sensationalistic and as such trivialized the Holocaust. This was especially the case as regards the testimony of Dietlieb Felderer. As we have seen, Felderer testified—against Judge Locke's express order—that Auschwitz had a swimming pool. While Felderer's testimony was scandalous enough, the headlines in the local papers intensified the outrage. The *Globe and Mail* reported "Prisoners at Auschwitz Dined, Danced to Bands Zundel Witness Testifies."[25] The *Toronto Star*'s headline—"Camp Gas Chambers Fake, Holocaust Revisionist Says"[26]—at least qualified the message by citing its source.

As we have seen, McGill law professor Irwin Cotler felt that these headlines made Canada "the international centerpiece for Holocaust denial litigation." In expressing this view, Cotler conflated the notoriety of *R. v. Zundel* with press coverage of it. Why was Canada the center of Holocaust-denial litigation? Because "the country was exposed to newspaper headlines . . . such as 'Women Dined and Danced at Auschwitz Expert Witness Says.' "[27] The media headlines became the case. The events the media reported, in this case Felderer's testimony, remain obscured. Rather than asking how a legal system could credit the opinions of witnesses like Felderer, a question that goes to the heart of the dilemma posed by norms of legal fairness, Cotler blamed the messenger. Robert Fulford, a well-known Canadian media critic, made the same basic accusation: "To an innocent reader of Canadian newspapers during February and March, it appeared that the Holocaust might have happened or, on the other hand, might not. The Crown said that it had, the defense said it hadn't. Scrupulously, the press reported both sides as if each were credible."[28] Like Cotler, Fulford saw the media, not the court, as the responsible party. Both blamed the press rather than the legal system.

Media critics traced the poor coverage to a lack of education. Prutschi claimed the press approached the trial without "a knowledge of the fundamental historical matters at issue." Consequently, the media were guided by the faulty principle that "the Holocaust was not news and no Holocaust was news." To remedy this deficit, Prutschi sent out a press release that defined the Holocaust, spoke of the "negative impact" of the coverage on the Jewish community, and expressed the community's "acute sense of vulnerability."[29]

The CJC's educational effort took place immediately after the first trial. Sherry Sharzer, associate managing editor of the *Globe and Mail*, said her meeting with Manuel Prutschi "sensitized" her cohorts "to the feelings of the Jewish community" and helped her realize "how carefully the media must tread."[30] Before Zundel's retrial in 1988 there was a second round of meetings. The goal was to "sensitize the media to their particular obligation," which was "to cover hatemonger prosecutions in a responsible manner." According to CJC member Joseph Wilder, the meetings went well; he expected that "this time around there will not be cause for our community's unease."[31]

Like the critics, the educators blamed the media for the spectacle of the first trial. But how fair was this judgment? The newspapers operated

under a series of restrictions that hindered their scope of action. They could not describe Judge Locke's evidentiary rulings or rebut Zundel's witnesses with facts from outside the trial. Indeed, the prohibition on commentary stopped the CBC from supplementing its stories on the trial with file footage of the death camps.[32] Even with these restrictions the actual coverage was more balanced and less outrageous than the headlines suggested. Wendy Darroch, in her February 13, 1985 *Toronto Star* article, "Prisoners at Auschwitz Dined, Danced to Bands Zundel Witness Testifies," led with Felderer's testimony that the camp had a swimming pool but added: "The picture was a far different one from those drawn earlier in the trial by survivors who said they were starved, tortured, worked to death and shot." Darroch added that Felderer was convicted of racial hatred in his native Sweden.[33]

According to Kirk Makin of the *Globe and Mail*, the critics did not understand "that the trial was about whether the record was straight or not. That was the whole issue."[34] Makin denied that his reporting was biased in favor of the defense. And he did, on occasion, describe the prosecution in a positive light.[35] Darroch and Makin reported what they saw. The public outrage stemmed from the trial, not the coverage. The complaint against the press was not that it provided unbalanced coverage of an event but that it provided coverage of an unbalanced event.

A study of the "controversial" newspaper headlines bears this out. Contra the critics, not all the headlines cast doubt upon the Holocaust. Instead, the headlines followed the course of the trial. When Holocaust survivors testified, the captions were respectful. The *Toronto Star* accompanied the testimony of Rudolf Vrba with a story titled "Victims Stripped in Dark and Were Gassed, Trial Told."[36] The corresponding headline in the *Globe and Mail* was similar: "Escaper Tells of Arrivals in Auschwitz."[37] Later, when Griffiths cross-examined Zundel, there followed a round of captions that cast the accused in a negative light: "Zundel Tape Reveals Plan to Rescue Aryans Court is Told";[38] "Zundel Boosted Aryan Tracts";[39] and "Gun-Barrel Justice for 'Traitors': Zundel."[40]

At the same time, the *Canadian Jewish News* ran headlines that, if less shocking than those of the daily papers, stressed the same themes. Its January 24, 1985 caption, "Defence Challenges Hilberg on Survivor Stories," cast doubt on the credibility of survivor accounts. If even the *Canadian Jewish News* ran scandalous headlines, more was at stake than an uneducated media. The problem was the court. But there education would be counterproductive. As Joseph Wilder warned with regard to the 1988 retrial: "We cannot afford to short-circuit the very judicial process that we have invoked as an important defense for minorities against victimization by racists."[41]

The extent to which the *Zundel* case was seen as a media event was clear at the second trial. Two years of community education would be put to the test. Kelly Irwin expressed the mood at the start of the retrial: "On January 19, 1988, Ernst Zundel again waited anxiously to see whether he had succeeded in grabbing the nation's attention once again."[42] He failed. At the second

trial the amount of coverage dropped considerably; of the three local papers only the *Toronto Star* carried daily stories on the trial.[43] The CBC dropped coverage altogether. The major explanation for the lack of coverage was newsworthiness; by 1988 Zundel was stale news. Irwin wondered whether there had been a "journalistic surrender."[44] Zundel charged the media with cowardice.[45]

The difference in the trial coverage reflects the differences in the two trials. Neither Zundel nor Holocaust survivors testified at the 1988 trial. Equally important, the court took judicial notice of the Holocaust. What mattered ultimately were courtroom events, not how the media covered them. When the deniers testified, the scandalous headlines returned. The *Toronto Star* covered Felderer's 1988 testimony with the following headline: "Gas Chambers Just Used for Storage Witness Says."[46] The restrained coverage in 1988 reflected the restraint of the parties. Conceding this meant laying the blame for the 1985 coverage on the legal system rather than the media. A few lonely voices were willing to do just that. Klaus Pohle, a journalism professor at Carleton University interviewed by Irwin, argued that the press was "not in the business of deciding truth." That, he added, was " 'not the role of the media, that's the judge and jury's job.' "[47] The trend, however, was to view the first trial as a public relations disaster, rather than a conflict between the competing demands that the *Zundel* trial placed on the justice system.

Prutschi argued that the media created the impression that the "jury of history was still out on the certainty of the Holocaust."[48] But whose fault was this? Reporters for the *Toronto Star* and *Globe and Mail* gave equal time to the defense because the law required Judge Locke to afford Zundel the same courtesy. They reported on defense counsel Christie's cross-examinations of Holocaust survivors because Judge Locke let that questioning take place. They treated revisionist ideologues as experts because Judge Locke let them testify as experts. Focusing on the messenger rather than the message, critics were able to object to the trial without criticizing the law. The media, however, was not the only object of blame.

Immediately after the first trial, Prutschi praised the performance of Crown attorney Griffiths in a memo to the CJC. He spoke of the prosecutor's "absolutely superb job," noting that Griffiths "had before him a very uphill battle."[49] This is to be expected; Griffiths won the case. Others were less approving. At a forum on the trial at Cardozo Law School, Professor Cotler faulted Griffiths as "unprepared for, but in a certain way outmaneuvered by, the defense." By way of explanation he added: "[T]he Crown attorney's only experience was with breaking and entering cases and this was the first case he had ever handled involving Holocaust denial litigation."[50]

What had Griffiths done to merit such criticism? A jury had found Zundel guilty, but the prosecutor failed to convince Judge Locke to take judicial notice of the Holocaust. This ruling disturbed Cotler greatly. It suggested that the Holocaust was not a matter of common knowledge. But instead of blaming Judge Locke, Cotler criticized Griffiths. By making the motion at the close of his evidence, Griffiths put the judge in a situation where the

prosecution but not the defense would be able to present evidence. Under these circumstances the court, "perhaps properly," in Cotler's words, feared that the motion if granted would deprive the accused of a fair trial. Cotler also took issue with Griffiths' failure to rely on "comparative jurisprudential authority" in crafting his motion.[51]

Griffiths had his defenders. In 1990 in the *Simon Wiesenthal Annual*, Leonidas Hill questioned the importance of the timing of the judicial notice motion, noting that Griffiths raised the issue at the start of trial. As for the lack of comparative authority, the trial transcripts demonstrate Griffiths' awareness of the *Mermelstein* case.[52] Cotler's criticism of Griffiths as unprepared is also inaccurate. Far from being a new attorney, Griffiths had been prosecuting cases since 1979. In point of fact, Griffiths had a fairly sophisticated view of the judicial notice question. Fearing possible acquittal, he gambled that Locke would allow the Crown to present its evidence and then, through the judicial notice ruling, restrict the defense's presentation of its case.[53] While his gamble failed, it was a reasonable one, given the high stakes nature of the trial and the scandal that the defense testimony eventually unleashed.

Finally, there is Cotler's contention that defense counsel Christie "outmaneuvered" Griffiths. Did Griffiths let defense counsel Douglas Christie run roughshod over Crown witnesses and introduce revisionist testimony at trial? Here the rule against the publication of pre-verdict hearings worked against Griffiths. Nobody during the trial knew of Griffiths' valiant, if futile, effort to foreclose the entire defense case through the judicial notice motion, nor of his more prosaic battles with Christie throughout the trial. The resulting image of a prosecutor who would not lift a finger to protect his witnesses was false.

In reality Griffiths could do little about Christie's often biting cross-examination of Holocaust survivors. Canadian law gives the defense wide latitude in cross-examination. The False News Law allowed truth as a defense, therefore the defense had a legal right to question the Holocaust. What the law permits, society will often find scandalous. But critics of the prosecutor never faced this tension squarely. Instead, they portrayed Griffiths as a bumbling prosecutor. In doing so, critics of the trial explained why this particular prosecution went awry without suggesting that all such prosecutions must fail.

The attacks on Griffiths paled before those raised against defense attorney Douglas Christie. Griffiths was accused of incompetence; critics of Christie challenged his good faith. The critics faulted Christie on three grounds. First, there was Christie's choice of clients. Christie had acquired a reputation of defending hatemongers. Besides Zundel, he represented Jim Keegstra, an Alberta school teacher who taught his students about the Jewish conspiracy behind modern history.[54] This alone rendered Christie suspect.

Second, the critics also questioned Christie's choice of trial strategy. Christie wanted more than a finding that his client was "an innocent, honest idiot."[55] He wanted to show that Zundel was right, or at least that his beliefs

were reasonable. As we have seen, Christie stressed this point in his opening statement: "When it says, 'Did Six Million Really Die?,' the position of the defense is, did six million Jewish people really die" (Tr.: 2337). The decision to defend the truth of *Did Six Million Really Die?* surprised and shocked observers. Whether this strategy originated with Christie or Zundel is unclear. Whatever the origins, it was Christie who took the heat. Claude Adams, writing in the April 1985 *Canadian Lawyer*, argued that Christie's insistence on proving the truth of *Did Six Million Really Die?* ill-served his client. According to Adams, this strategy threw away defense's only remaining trump card, that Zundel was wrong about the Holocaust but did not lie about it deliberately.[56]

Third, many observers faulted Christie's trial tactics. His cross-examinations were reviled. In one case he asked a survivor to supply the names of relatives he lost in the Holocaust. More frequently, Christie asked the survivors questions requiring expert knowledge. Other times he simply tried to shake their stories. All of these tactics brought criticism. To Adams, Christie's cross-examination only "heightened the impact" of the survivors' testimony. He continued: "An attuned defense lawyer would have left them alone, politely helped them off the stand."[57] Leonidas Hill concurred, explaining that Christie's "bullying" of the witnesses "probably damaged his own case in the eyes of the jury."[58]

The first two criticisms of Christie are not justified. As for his choice of clients—in any civilized system of law everyone accused of a crime is entitled to representation. To the extent that Christie was more resourceful than the standard public defender was this grounds for criticism? The same holds for Christie's choice of defense. As a criminal defendant Zundel could rely on any defense he chose. Preventing Zundel from raising Holocaust denial as a defense by shaming his lawyer is no less unfair to the accused than Griffiths' judicial notice motion that Judge Locke rejected. But while Judge Locke escaped unscathed, Christie was savaged. Christie's cross-examination of the survivors presents a closer question. But his lack of respect for their suffering, however palpable, must be viewed from a legal context. As witnesses in a common law trial they ran the risk of cross-examination. When Christie made this risk a reality, he drew the blame for a situation that the Holocaust survivors who brought the case, prosecutor Griffiths, and Judge Locke all had a hand in creating.[59]

One final controversy involving the defense counsel puts the priorities of the Canadian legal system into sharp relief. In 1993 Christie faced a disciplinary proceeding for his behavior in *R. v. Zundel.* At issue was not his choice of client or cross-examination of Holocaust survivors, but an unfounded allegation of bias against Judge Ronald Thomas, who presided over the second *Zundel* trial. The Court of Appeals, affirming Zundel's 1988 conviction, noted that Christie's appellate brief mounted "a virulent attack on practically every aspect of the trial judge's conduct." After reviewing and rejecting the allegations, the appellate court concluded that "to make unfounded charges of personal bias against a judicial officer, where there is a complete absence of reasonable grounds, is irresponsible and reprehensible. Mr. Christie did so

in this case."[60] In response, Bert Raphael informed the Law Society of Upper Canada of Christie's misconduct. The Law Society would decide whether Christie's brief constituted "an unfounded assault upon the integrity of the trial judge."[61] Chair of Discipline Harvey T. Strossberg disposed of the claim, arguing that "Christie was plainly wrong to assert actual bias" but could have asserted "appearance of bias" with "very similar arguments." Consequently, Strossberg dismissed the complaint.[62]

The ethics complaint returns us to our starting point. What matters in Canada is "the integrity of the trial judge." The Jewish community may have reviled Christie's brutal cross-examinations of survivors or the revisionist witnesses he paraded before the court. For the Ontario Bar, however, this was less important than Christie's unfounded allegations of judicial bias. Christie took the blame for a legal system that gave him the leeway to defend Zundel as he saw fit. As it had with both the news media and Griffiths, blame fell on a legal outsider, someone who could be blamed without subjecting the legal system to a more general criticism.

The Supreme Court

The final target for blame in the *Zundel* case was the Supreme Court of Canada, which was harshly criticized in academic circles for invalidating the False News Law and setting aside Zundel's verdict. At first this seemed to break the pattern of blaming legal outsiders established after the first trial. Here, at last, a legal insider—the Supreme Court no less—was called to task for its actions. But this exception proved the rule. The Court was not criticized for its role in the case. Rather, the accumulated scandals of *R. v. Zundel* were used by Left-leaning Canadian legal academics (who were concerned that the Charter of Rights and Freedoms would lead to the development of an American-style constitutional politics in Canada) to tar both the Court and the Charter.

By contrast, public reaction to the ruling was restrained. The press welcomed it; the *Globe and Mail* even worried about the narrow margin and faulted those who called for new hate crimes legislation.[63] In the Jewish community disappointment with the ruling mixed with the hope of prosecuting Zundel for racial incitement. As Marvin Kurz of B'nai B'rith put it: "While we regret the Supreme Court's decision, we feel that another effective remedy for Zundel's hatemongering is already on the books." These early critics distinguished the action of the Supreme Court from the trial itself. Thus CJC member David Satok reminded supporters of the prosecution that, whatever the Supreme Court's decision, a jury had voted twice to convict Zundel.[64]

Criticism arose later as opponents of the Charter of Rights and Freedoms used *R. v. Zundel* as a symbol of all that was wrong with the Charter. York University law professor Michael Mandel called the case "the most shameful Supreme Court decision under the Charter." He added that the arguments of Justice Beverly McLachlin, who spoke for the majority, deserved "the

Kafka prize for legal reasoning" and made the opinion "read like, and indeed form a part of, Holocaust denial literature itself."[65] Joel Bakan found McLachlin's suggestion that Holocaust denial might serve the public "disgusting." For Bakan, the case "vividly illustrates how the Charter can serve to protect a professional racist such as Zundel."[66]

Mandel viewed the *Zundel* case differently from the Canadian Jewish community. While David Satok stressed the guilty verdicts against Zundel, Mandel emphasized the suffering the Jewish community experienced during the trials. This suffering was then laid at the feet of the Supreme Court.

> If it [the False News law] was a bad law it should have been repealed before Holocaust survivors had to go through two trials and two convictions only to have four smug judges of the Supreme Court of Canada wade in with a judgment that was both stupid and harmful. The prosecution was indeed ill-advised, but it was ill-advised precisely because courts can be expected to behave this way, which doesn't let the courts off the hook one bit.[67]

Mandel's tone recalls the critics of judges Budde and Orlet. The Supreme Court took the blame for all the survivors "had to go through." But Mandel and Bakan's real concern was not with Zundel or Holocaust denial, but with the "smug judges of the Supreme Court." Rather than blaming the high court for the ills of the *Zundel* litigation, Mandel and Bakan used the case to highlight the evils of the Charter.

To that end, Mandel pored over Justice McLachlin's ruling in great detail. Save for a reference to Douglas Christie's "usual bag of preposterous defense counsel tricks," Mandel did not focus on the actual reasons the trial was so painful.[68] He also downplayed McLachlin's stated reason for dismissing the charges against Zundel—that the public interest provision of the False News Law was vague and overbroad.[69] Instead, Mandel focused on relatively peripheral remarks to build a shadow argument that turned McLachlin into a Canadian Orlet, a judge who used the law to cover her sympathy toward Holocaust deniers.

What had Justice McLachlin said to merit such a reaction? Mandel objected to her opinion because it expressed "the idea that lying had a social value worth constitutionally protecting."[70] In addition, Mandel charged McLachlin with "radical historical relativism" in her treatment of truth and falsity. The Supreme Court justice accomplished this by putting scare quotes around words such as "false," "truth," and "fact," by insisting that the False News Law could be imposed by a judge and twelve jurors without regard for the truth, and by blaming the problems of the False News Law on " 'concepts as vague as fact versus opinion or truth versus falsity in the context of history.' "[71] Mandel took special exception to the last statement asking: "If you were a Nazi Holocaust denier, is there anything more you could have asked for from the Supreme Court of Canada than this?"

While Zundel heartily approved of the result of McLachlin's ruling, there was little in her opinion to sustain his views about the Holocaust. To be sure,

McLachlin did mention three socially acceptable uses of lies—animal rights activists citing false statistics; doctors exaggerating the dangers of disease during a vaccination campaign; and artists who "may make a statement that a particular society considers both an assertion of fact and a manifestly deliberate lie."[72] But none of these examples related to Holocaust denial. Rather, they demonstrated what McLachlin saw as the "fatal flaw" of the False News Law. McLachlin was not concerned that the law limited the expression of racists. She agreed that such speech could be criminalized. Her complaint was that provisions restricting hate speech "must be drafted with sufficient particularity to offer assurance that they cannot be abused so as to stifle a broad range of legitimate and valuable speech."[73] The examples cited by Mandel—the animal rights activist, the doctor, and Salman Rushdie—were speech acts she feared might be prosecuted under the False News Law. She used them to point out the wide scope of a law that penalizes any false statement "likely to cause injury or mischief to a public interest."

Nor was McLachlin a closet Holocaust denier. She did observe "the difficulty of ascertaining what actually occurred in the past, given the difficulty of verification and the selective and sometimes revisionist versions of different witnesses and historians may accord to the same events."[74] But she also called Zundel's beliefs "offensive" and described *Did Six Million Really Die?* as "crude."[75] This was no ambiguity here. McLachlin did not base her decision on the difference between "International Jewry" and "Jews generally," nor were there references to "Jewish pretensions about the Holocaust." It was perfectly clear that Justice McLachlin opposed Holocaust denial. Nonetheless, Mandel called her decision "Holocaust denial literature."

Mandel's real target was Justice McLachlin. Elsewhere he referred to her as "a judge known for her tender concern for the rights of the accused when they are corporations, rapists, racists, or even Nazis, but not it appears, when they are unions."[76] That he could use the *Zundel* case to support his argument demonstrates the persistent sense of injustice from that case seven years after the initial trial. That Judge Locke, directly involved in the trial, did not face the same sort of attack shows us the boundaries of acceptable criticism. Like McLachlin, Locke did not simply question the feasibility of prosecuting Holocaust deniers, he repeatedly ruled in their favor. Yet he escaped blame. This reflects the uncertain position of the Charter of Rights and Freedoms in Canada. Mandel's book, an extensive review of Charter jurisprudence, was meant to show "the dishonest nature of legalized politics."[77] Similarly, Bakan began his book by asking: "Why has the Charter failed to protect or advance social justice in Canada?"[78] The answer was clear—the conservative, authoritarian nature of Canadian Supreme Court justices.[79] What might otherwise be an assault on the integrity of a trial court judge becomes—as applied to the Supreme Court—an acceptable critique of the Charter.

The ease with which Mandel criticized McLachlin also reflects the place of the Supreme Court in the structure of the Canadian legal system. Like the German written verdict, the Supreme Court opinion is a public document that invites critique. There are no restrictions on media coverage or criticism

of such decisions. By contrast, had McLachlin been a juror in the *Zundel* case, Mandel would not have been allowed to ask her name, let alone criticize her conclusions about the case. The legal rules that protected Locke from criticism exposed McLachlin.

CONCLUSION

While Ernst Zundel was able to turn his prosecution under an obscure thirteenth-century law into a public debate over whether the Holocaust happened, the real causes of his success went unmentioned. Critics did not question the wisdom of prosecuting Zundel or the legitimacy of a legal system that allows a criminal defendant to hijack a trial for his own purposes. Instead, they turned to blaming. But whereas Germans blamed the scandals on judges, who as state officials implicated the state in repairing the harm done by Holocaust denial, Canadians blamed legal outsiders. They did so because a direct indictment of Judge Locke, or of Canada's adversarial legal system would have undermined support for prosecutions.

In taking these steps, Holocaust survivors and the CJC understood that public support for Holocaust-denial litigation was provisional. If forced to choose between respecting Canada's adversarial legal system and respecting the Holocaust, most Canadians would choose the former. Therefore, it was essential for the Canadian Jewish community to express its outrage in a way that did not force the general public to make this choice. By blaming the news media, prosecutor Griffiths, and defense counsel Christie, the CJC and its allies held out the idea that a scandal-free trial was possible if only the prosecutor were more skilled, the defense counsel more ethical, and the press more restrained. Meanwhile, the Supreme Court of Canada could be criticized because its position in Canadian society was less certain. Here the causation was reversed. Instead of the Jewish community blaming the trial on the Supreme Court, critics of the Court seized on the *Zundel* case as an example of the high court's malfeasance.

The inability of critics to focus blame for the *Zundel* case on the legal insiders reflects the relatively minor role the Holocaust plays in Canadian society. When Budde, Orlet, and Kob issued rulings that showed (or were seen to show) disrespect for the Holocaust the public demanded corrective action to show themselves and the world that Germans cared about the Holocaust. These concerns were largely absent in Canada. While the Canadian public was scandalized by the *Zundel* trial, the trial did not threaten Canada's national image. If pollsters wondered if the trial would make more Canadians anti-Semitic, few saw it as evidence that Canada itself was anti-Semitic.

The *Zundel* scandal was not about Canada, it was about specific groups of Canadians. The victims were Holocaust survivors questioned by Christie, and Canadian Jews who were forced to tolerate offensive headlines. Likewise, those held responsible for the trial were one particularly incompetent prosecutor, one particularly unethical defense attorney, and an insensitive news media.

If the reporters for the *Toronto Star*, Peter Griffiths, Douglas Christie, and Justice McLachlin failed, they failed as individuals—not as representatives of Canada. Zundel's propaganda successes, and the pain they caused the Jewish community, were not the responsibility of the state. They were a risk inherent in litigation between private parties. This reduced the pressure on Canada (as opposed to the Canadian Jewish community) to respond to the scandal and this, along with Canada's adversarial evidentiary norms, explains why the *Zundel* case remains the only Canadian Holocaust-denial prosecution.

This page intentionally left blank

Chapter 5

The Limits of Symbolic Legislation—The Gayssot Law

As noted in the introduction to part II, acts taken in the wake of a scandal have two purposes: (i) to reassure public that—whatever the legal ruling—the society as a whole repudiates Holocaust denial; and (ii) to make future scandals impossible. Most responses to scandal focus on the first goal. Apologies, blaming, and even the removal of judges will do little to stop a future court from issuing a ruling that gives aid and comfort to Holocaust deniers. Most restorative efforts implicitly accept the premise that trials will remain fair, and therefore uncertain, which is why judges and lawyers so readily go along with them.

Occasionally, however, an act meant to restore public confidence strikes at the source of legal uncertainty itself—the legal norms meant to protect the accused. Such was the case with the 1990 French Gayssot Law, which outlawed Holocaust denial. The law was passed in the wake of concern about racism, the growing political strength of Jean Marie Le Pen, and Robert Faurisson's increasingly successful efforts to put Holocaust denial into the political limelight. Like the restorative measures taken in Canada and Germany, the Gayssot Law's primary goal was symbolic. By linking Le Pen to Holocaust denial, the law's supporters hoped to tarnish both.

At the same time, the Gayssot Law had a legal impact. After two trials in which French courts refused to condemn Robert Faurisson's work in sufficiently strong language, the new law took the task of evaluating Faurisson's work out of the judges' hands by making Holocaust denial itself a crime. At first, the new law appeared to work wonders. Faurisson, the first defendant tried under the new law, was convicted and roundly condemned by the judges.

Over time, however, the law began to break down. Under pressure from the law, French deniers learned to express their messages in coded language. Because survivor groups continued to prosecute these cases French judges were forced to decide whether these coded messages, in fact, denied the Holocaust. Some defendants were acquitted, while others were convicted for statements that bore only a tangential relationship to Holocaust denial.

As a result, the French were returned to the dilemma of trial uncertainty, albeit in a different form.

HOLOCAUST DENIAL, IMMIGRATION, AND THE NATIONAL FRONT

In 1983 the Paris Court of Appeals upheld the civil lawsuit against Robert Faurisson, but did so in a way that seemed to give Holocaust denial credibility. This was how Faurisson viewed the verdict:

> It seems permissible henceforth, basing oneself on revisionist works, to say that the Germans' homicidal gas chambers had no existence in reality and to be suspicious of all the testimonies given to the contrary for forty years; however, those opinions contrary to the official truth can be expressed on the condition that one shows, even better than I have done, respect for the victims of the persecutions and deportations, and on condition of taking care, even more care than I have exercised, not to appear insulting or offensive to anyone.[1]

In succeeding years, Faurisson and his supporters did their best to take advantage of the atmosphere created by the 1983 ruling. In 1985 the University of Nantes awarded a doctorate to Henri Roques for a thesis that questioned the confession of SS Officer Kurt Gerstein in a revisionist manner.[2] Two years later, during the trial of former SS Officer Klaus Barbie for crimes against humanity, Faurisson's *Annales d'Histoire Révisionniste* appeared in newsstands just as Barbie's attorney, Jacques Vergès, argued that the Holocaust was a relatively unimportant event compared to Western imperialism and French atrocities in Algeria.[3]

In response, the local prefect removed the *Annales d'Histoire Révisionniste* from newsstands and the press campaigned against Holocaust denial. After a Holocaust denier placed a letter in the Left-leaning *Libération*, the paper ordered the removal of the offending copies from the newsstands.[4] The tougher attitude against denial was captured in a French Press Agency statement in July 1987: "In the midst of the Barbie trial, and when Revisionist activities are increasing, it is urgent that the judicial authorities in the name of respect for free inquiry and the Rights of Man punish such unspeakable tracts and their authors, while at the same time preventing them from doing it again."[5]

Later that year French National Front leader Jean-Marie Le Pen made his infamous remark about the gas chambers as "a detail of history." Le Pen had long been suspected of Holocaust denial. During a September 1987 interview Le Pen, when asked what he thought about revisionism, replied: "I don't say that the gas chambers did not exist. I wasn't able to see them myself. But I believe that it is a point of detail in the history of the Second World War."[6] He also claimed that "there were many dead, hundreds of thousands, perhaps millions of dead Jews and perhaps people who were not Jews" and defended freedom of expression for revisionists.[7]

Le Pen's comments were roundly condemned. Not only had he minimized the Holocaust by referring to it as a detail, he failed to condemn Holocaust denial. Le Pen was charged with inciting racial hatred.[8] Interestingly, Le Pen's remarks were not particularly well received by the deniers themselves. Faurisson rejected Le Pen's characterization of the gas chambers as trivial: "Without a system of destruction there is no systematic destruction. Without the gas chambers, there is no Jewish Holocaust. The gas chambers are therefore not a footnote."[9] On balance, however, Faurisson thought the Le Pen scandal was "positive" because it gave Holocaust deniers name recognition.

In response to Barbie's trial and Le Pen's remarks, Interior Minister Charles Pasqua of the Center–Right RPR (Rally for the Republic) party called for a law aimed directly at Faurisson and Le Pen.[10] At the time nothing came of it. Instead, the legislature expanded the 1972 antidiscrimination law to allow civil rights organizations standing in cases involving apology of crimes against humanity. The mainstream Right, which had a parliamentary majority, preferred to compete with Le Pen by stealing his issues, most notably immigration. As a result, a Holocaust denial law would have to wait until the Socialists regained power or the conservatives changed their electoral strategy.

Meanwhile, the vigorous advocacy of Faurisson earned French deniers a public profile unparalleled elsewhere. They were assisted in this by the National Front. While the Front's leaders were careful not to endorse Holocaust denial explicitly, they shared the deniers' goal of lifting the post-1945 taboo against racism and anti-Semitism. Under these circumstances, fear of the National Front could easily become fear of Holocaust denial. As Faurisson put it: "In France, the Revisionists play a sort of devil role; people hear very much said about them, but people never see them."[11] It is one thing to identify the devil, quite another to haul the devil into court. The time must be ripe.

The 1988 elections returned the Socialists to power in the National Assembly. But their hold on power was precarious because it depended on implicit support from the Communists. The traditional Right was in the minority. Meanwhile, the National Front, which had been well represented in the previous assembly because of proportional representation, lost all its seats after the return winner-take-all elections. Still, the National Front did quite well, garnering 14.4 percent of the vote in the 1988 presidential elections. In late 1989 the Front returned to the National Assembly following Marie-France Stirbois's by-election victory in the city of Dreux, where she had captured a surprisingly large 61.3 percent of the vote.

The Front appealed to opponents of immigration. The mainstream Right parties had taken a hard line to co-opt Le Pen's voters, but after Dreux, the success of this strategy was in doubt. Le Pen's intervention in the 1989 debate over whether Islamic girls could wear headscarves in public schools enabled him to package his anti-immigrant message in the French tradition of secularism; in fact, he was joined by some on the Left in defending the school that expelled the girls. The headscarve debate illustrated the problem faced by the Front's opponents. It was difficult to isolate Le Pen when

mainstream politicians were echoing his comments about immigration. If Le Pen described immigration as a "peaceful invasion" of France, former president Valery Giscard d'Estaing also described immigration as an "invasion."[12] If Le Pen argued that immigrants created crime and unemployment, Francois Mitterrand agreed that there was a "limit" to France's toleration of migration.

One response to the Front's anti-immigrant politics was to call them racist. This is precisely what antiracist groups like SOS Racisme and LICRA did. The president of LICRA worried about the Front's "normalization of racist rhetoric."[13] Under this new strategy, anti-immigrant statements would be prosecuted as racist, at least when uttered by municipal leaders of the National Front. A number of Front officials were prosecuted for stating that immigrants were unwelcome in their towns. The problem with the prosecutions was their transparently political motivation, a point not lost on assembly member Stirbois.

Another possibility was to link Le Pen with Faurisson and the Holocaust deniers. This was made easier by Le Pen, who continued to make distasteful remarks about the Holocaust. In September 1988 he rhymed Durafor, the name of the Socialist Minister of Public Services who happened to be Jewish, with *crematoire*. This pun reminded the public of Le Pen's anti-Semitic background. The rhyme led François Bachelot, formerly a Le Pen supporter, to complain that "[t]he aim of the National Front is to bring about the revival of racism and anti-Semitism."[14] The Front's anti-Semitism was a major reason why the mainstream Right refused to make a deal with the Front in the 1988 legislative elections.

The following year saw the Notin affair. In December 1989 the journal *Economies et Sociétés*, funded by the CNRS (Centre Nationale de la Recherche Scientifique), published an article by Bernard Notin that questioned the gas chambers. The result was a furor against Notin, his article, and the journal. The CNRS withdrew its funding from *Economies et Sociétés*. Gerard Destanne de Bernis, editor of the embattled journal, asked readers to tear out the offending article and Notin, then a lecturer at Lyons-III university, had his classes cancelled. Madeline Rebérioux, vice president of the League for the Rights of Man, complained of the growing strength of the National Front at French universities.[15]

By 1990 Holocaust denial and the National Front were fast becoming fixtures of French social and political life. This created great unease among the mainstream parties, the civil rights organizations, and the Jewish community. Racism and anti-Semitism were invading the body politic. The election of Marie-France Stirbois showed that the National Front was no passing fancy; the Notin affair demonstrated the staying power of revisionism. Against this background the National Assembly and Senate took up the proposal submitted by the French Communist Party to "repress all racist, anti-Semitic and xenophobic acts." The proposed law targeted both Le Pen and Holocaust deniers, a linkage that highlighted Le Pen's flirtation with revisionism and the high level of public concern over Holocaust denial.

The Passage of the Gayssot Law

The *Faurisson* decisions, the growing strength of Le Pen, and fears of racism created an atmosphere of scandal in which Holocaust denial played a major part. In response, the French passed the Gayssot Law, which made it illegal to deny the Holocaust. As a restorative act, the Gayssot Law showed the French public that political establishment rejected denial, racism, and the National Front. Supporters of the law stressed this point during the legislative debates. The law's opponents sought to taint it as a Communist-inspired attempt to establish an official truth. But even as legislators grappled over the proposed law's symbolic meaning, there was very little discussion of how the new law would operate in practice.

In March 1990 the Socialist government issued a report on racism in France. The following month a legal commission met to study the problem. The Socialists promised a round table in May to discuss a wide range of issues related to racism, including immigration. It was rumored that the Socialists would tighten immigration to take away a campaign issue from the National Front. Instead, the legal commission adopted a proposal by Communist deputy Jean-Claude Gayssot for a new, tougher antiracism law. The mainstream Right objected; accusing the Socialists of using the antiracist law to turn the political debate away from immigration. Opponents also pointed out that the Communists had recently supported the Socialists on a vote of confidence related to electoral fraud. The Gayssot Law was seen as a *quid pro quo*.[16]

The proposed law against racism consisted of fourteen articles. Some of the proposed changes were relatively minor. The law would make March 21 a national antiracist day, change the French newspaper "right of response law" to allow antiracist organizations to respond to group defamation, and expand the power of judges to order the publication of verdicts in the national press. These generated little controversy. Instead, public debate focused on two proposals. First, the new law would strip persons found guilty of racial discrimination of their civil rights. Second, the new law would make it illegal to question the Holocaust.

The first proposal split the Assembly and Senate into two factions. The Communists and Socialists supported the provision concerning the deprivation of civil rights. The bill's rapporteur and Communist party member François Asensi challenged the Assembly to "fill out the repressive arsenal" necessary for the fight against racism by targeting those who use racism to "prosper electorally."[17] On the other side, the parties of the mainstream Right compared the deprivation of civil rights to the Vichy laws against the Jews.[18] The sole National Front deputy, Marie-France Stirbois, objected to the law as an *ad hominem* attack on Le Pen.[19] Opponents of the law also attacked its origins in the Communist party. When Asensi introduced the law he was repeatedly interrupted by hecklers who shouted: "Goulag," "Katyn," "Bucharest," and "Vitry-sur-Seine."[20]

The same general themes dominated the debate over the proposed ban on Holocaust denial. The proposed law would punish "[w]hosoever . . . contests

the existence of crimes against humanity sanctioned by a French or international jurisdiction" with up to a year in prison and a fine of up to 300,000 francs.[21]

In support of the ban, François Asensi referred to the "growth of racism in France," specifically mentioning increasing numbers of attacks on North Africans, the revival of anti-Semitism, and the banalization of racism in the media. He spoke of denial as a "university pseudo-thesis," a reference to the doctorate awarded Roques in 1985, and as a "revisionist machine" that sought to rehabilitate the extreme Right by denying the gas chambers.[22] To show that the proposed law did not violate freedom of expression, Asensi chronicled past antiracist laws. In 1936, under the shadow of Nazi Germany the French banned private militias and outlawed racial incitement. In 1972 the French outlawed group libel as part of a more general antidiscrimination law. But it was hard to prosecute deniers under the 1972 law because Faurisson usually avoided statements that were explicitly anti-Semitic. Therefore, it was necessary to introduce a new crime of revisionism.

Socialist justice minister Pierre Arpaillange concurred: "Racism is not an opinion, it is an aggression." He agreed that this new form of aggression was on the rise in France. Those who denied the Holocaust were returning to the nineteenth century. Like Gobineau before them, the deniers gave fear a "scientific justification." However carefully they covered it up, the arguments of the deniers carried a "racist resonance." Therefore, it was futile to demonstrate the historical truth "one more time" to those who deny the Holocaust: "It is not a question of history that is in play for them."[23]

Deputy Jean-Claude Boulard took the connection between racism and Holocaust denial a step further by invoking Jean-Marie Le Pen. Given that "the bearers of racist ideology depend upon the loss of memory by the people to make their ideas prosper anew . . . the law—and here I don't understand the opposition of my colleagues—is right to punish those who, by their writings or their discourse, aim to deny the reality of crimes which have been committed against humanity." Boulard added that the concentration camps "will never be a 'detail' of human history."[24]

Boulard's phrase, "and here as well I don't understand the opposition of my colleagues," points to a second strategy used by the Holocaust-denial ban. Not content to castigate denial as racism, supporters of the ban played on the revulsion that mainstream conservatives were supposed to show toward the Nazis, the Vichy regime, and, by extension, Holocaust deniers. Asensi reminded the opposition of the "crimes and atrocities" the country had suffered, "about which silence and forgetting are impossible[.]"[25] Jean-Claude Gayssot called the "university pseudo-thesis" of the revisionists, "odious."[26] But it was Boulard who drove home the point.

> No, the concentration camps were never a detail of human history. No, the deportation of the infants from Isieux is not a page of history it is necessary to forget. No, the descent into barbarism of people considered up to then as civilized can not be effaced. Terrible project of the revisionists who want to make disappear the memories of the victims themselves![27]

When conservative Jacques Toubon complained that Boulard had falsified the position of the mainstream Right, Boulard replied that he understood Toubon's "embarrassment." It was hard to explain why the Right would not criminalize those who aimed, by denial, "to efface the most dramatic pages of human history."[28]

The supporters use of the Holocaust, and by extension Holocaust denial, as a symbol of human evil put opponents of the ban in a tough position. How does one oppose a law targeting the denial of an "odious" crime, without becoming "odious" oneself? Most opponents of the ban protected themselves by stressing their personal outrage against Holocaust denial and, where possible, establishing a personal status as a victim and/or opponent of the Nazis. Thus Alain Griotteray described himself as a member of the Resistance.[29] Marie-France Stirbois repeatedly described herself as the daughter of a member of the Resistance and explained that the National Front respected Holocaust victims: "A single deported Jewish child is already one too many." Along the same lines, Stirbois read a series of quotes from prominent Jewish leaders, including famed Nazi-hunter Serge Klarsfeld, all of whom were satisfied with the current (pre-Gayssot) state of the law.[30]

This last strategy had some impact. Although Socialist deputy Michel Suchod found the comments of Stirbois distasteful,[31] when the ban on Holocaust denial came before the Senate, Asensi began his remarks by stating that the deportee and civil rights groups favored the new law.[32] That Stirbois could not afford to leave the charge of odiousness unanswered, however, demonstrates the symbolic power of the Holocaust. The best response to an appeal to symbolism is a counter appeal. So the right-wing not only condemned revisionism and stated their *bona fides* regarding the resistance; they also took the symbolic offensive, branding the new law a Communist attempt to establish an official truth.

Just as opponents of the proposed law used Jean-Claude Gayssot's Communist origins to discredit it, they also used Communism as an ideology to suggest that the new law established a Stalinist official truth. They made this point in two ways. First, the Communists, having lied about their own Soviet past, were in no position to lecture anyone about historical falsification. This line of questioning was reinforced by references to the French Communist support for the 1939 Nazi–Soviet Pact and the failure of the party to be forthright about the crimes of the Soviet Union.[33] Second, the very idea of an official truth was derided as a communistic, or totalitarian, form of governance. Alain Griotterey told his colleagues that "at a moment the people liberate themselves from one such tyranny" it is "an insult" to adopt tyrannical methods.[34] Likewise, Senator Cartingy spoke of "official truth" as carrying within it "the germ of all tyrannies," which eventually pose "great danger" to liberty of expression and of the press.[35]

If the debate over the proposed ban, like the debate over the law as a whole, was a symbolic battle—the Holocaust against the Goulag, the National Front against the Communists—the bill's outcome turned on practical politics. In the National Assembly, where the Socialists and Communists formed a small, but stable majority, the bill passed three times. The Senate, which had a large

right-wing majority rejected it three times. Eventually the Assembly passed the law a fourth time, which under France's bicameral legislative system, broke the deadlock. On July 13, 1990 the Gayssot Law went into effect.

Absent from the debate was any reference to the activities of Faurisson and the 1983 ruling of the Paris Court of Appeals. Nor were the legislators any clearer about how the Holocaust denial ban would operate in the future. To be sure, a few opposition members worried that the new law would backfire by turning deniers into martyrs,[36] while supporters hoped the new law would curtail the spread of revisionism.[37] But neither side explained why they thought this would be the case.

After the law passed critics accused the legislature of trying to regiment history. These criticisms largely followed the course of the debate. Tzvetan Todorov, who found the law "grotesque," echoed the mainstream conservatives who argued that the law would aggravate the evils it was meant to combat. But, like them, Todorov did not go into specifics.[38] Likewise, Alfred Grosser worried about giving judges the power to declare historical truths, but his comments centered on the Gayssot Law's failure to cover French wartime atrocities in Algeria, a rhetorical strategy harkening back to the Barbie trial, but not a substantive critique of the law itself.[39]

Neither the legislators nor the critics assessed the ban on Holocaust denial from the perspective of litigation. Deborah Lipstadt's fears about trying Holocaust deniers and the potentially sobering experiences of *R. v. Zundel* were passed over. The debate over the Gayssot Law had been couched in symbolic terms—the Left saw it as a rejection of racism; the Right saw it as official history. For this very reason there was little debate over practicalities and no one knew how often it would be used or how effective it would be. The 1991 prosecution of Robert Faurisson would be the new law's first test.

THE 1991 FAURISSON TRIAL

Any hope that the Gayssot Law would intimidate Holocaust deniers, and thus make prosecutions unnecessary, were dashed in September 1990 when Robert Faurisson gave an interview carried by the right-wing newspaper *Le Choc du Mois*. His comments directly challenged the new law:

> One will not make me say that two and two are five, that the earth is flat and that the Nuremburg Tribunal is infallible. I have excellent reasons for not believing in the policy of extermination of the Jews or in the magical gas chambers…
>
> I do not seek to evade the new law, I face it in the front….
>
> I wish that 100% of the French would recognize that the myth of the gas chambers is a fairy-tale, ratified in 1945–46 by the victors of Nuremburg and made official by the current government of the French republic, with the approval of the court historians.[40]

Shortly thereafter eleven deportee organizations joined forces to sue Faurisson under the Gayssot Law. The editor of *Le Choc du Mois* was named as a codefendant.

There was great anticipation when the case came to trial in March 1991. One of the lawyers for the civil plaintiffs, Bernard Jouanneau, had participated in the first Faurisson trial. Several Holocaust survivors attended the trial. Many of the civil plaintiff's feared that Faurisson would use the trial to cast doubt upon the Holocaust as he had done at his first trial. They worried that the judges would find a way to praise his work as they had earlier. But the deportee organizations had grounds for optimism. The first trial turned on a statute, § 1382 of the civil code, that had required the plaintiffs to show that Faurisson was wrong about the Holocaust, a requirement that facilitated Faurisson's efforts to gain a hearing for his views. By contrast, the Gayssot Law did not require proof that the Holocaust happened. Faurisson's act of questioning the Holocaust constituted the offense. In other words, the civil plaintiffs only had to show that Faurisson denied the Holocaust; they did not have to show that he was wrong to do so.

Faurisson, however, would not give up so easily. He would defend himself as he had in his earlier trials, by arguing that gas chambers were a myth. If this strategy did not seem likely to stave off a conviction, at least it would help Faurisson publicize Holocaust denial. The lawyers for the civil plaintiffs objected vigorously. Letting Faurisson question the gas chambers was to let him "commit again, live, the crime of which he is accused."[41] Eric Delcroix, Faurisson's lawyer, responded that an accused had immunity from prosecution for statements made during a defense. This argument offended the civil prosecutors, who threatened to walk out of the courtroom if the judge permitted Faurisson to speak. Alternatively, they suggested that the judge close the trial to the public, advice the judge rejected. Eventually the judge let Faurisson testify. The lawyers for the deportees, true to their word, walked out.

On the witness stand Faurisson declared: "Immunity or no, I say today what I said yesterday, and what I will say tomorrow. We are in the presence of a lie of history, of an atrocious calumny, an abominable defamation."[42] This was not all. Faurisson sought to enter the forty-two volumes of the Nuremburg tribunal into the record, challenging the judge to find in those volumes the proof that there were gas chambers. When a Holocaust survivor told Faurisson that she was a witness, he responded: "If there's proof, let it be brought to me." Another audience member called Faurisson "filth."[43] Meanwhile, Delcroix called the prosecution "a witch hunt" and the Holocaust a "primitive taboo."[44]

Waiting for the verdict, the lawyers for the deportees wondered aloud if the case had been a trap. While most of the lawyers answered the question in the negative, and so defended the decision to prosecute, Bernard Jouanneau was not so sure. A long-time opponent of Holocaust denial, Jouanneau expressed doubts about the prosecution and the Gayssot Law. Had not the trial given credibility to revisionism and made Faurisson a martyr? He concluded that the new law was a good one, but one with a bad press among clerics, intellectuals, and the media.[45]

The doubts expressed by Jouanneau about the trial echoed the fears of the mainstream conservatives who warned that the ban on Holocaust denial

would make Faurisson a martyr. It also casts light on the French response to the scandals generated by Holocaust-denial litigation. After the *Deckert* case, Germans accused the judges of far-right sympathies. In Canada, Holocaust survivors and the Canadian Jewish Congress blamed the *Zundel* case on the lawyers and news media. The French response to the Faurisson trials was remarkable for its willingness to trace the problem to the law itself. Jouanneau did not blame the judge for allowing Faurisson to speak; nor did *Le Monde* and the other papers that covered the trial engage in soul-searching as the Canadian media had done. Jouanneau saw scandal and martyrdom as a natural consequence of the use of legal sanctions. A few in Germany made similar arguments, but they were marginal. In France, these points were acknowledged by central players in the debate.

A frank acknowledgment of the risks of litigation in no way lessened the obligation to go forward. Joe Nordmann, who represented "The National Federation of Deportees and Interns, Resistants and Patriots," saw the trial as necessary to protect French society from the "social pyromaniacs" of revisionism. Charles Libman made a similar point: "our silence before the affirmations of Faurisson would appear as consent."[46] The public prosecutor, Edith Dubreuil, also insisted on the legitimacy of prosecuting revisionists: "We do not have the right to contest the Nuremburg decisions, no more than we have the right to say that Klaus Barbie was not guilty."[47] The Faurisson trial might be a trap, but it was still necessary to prosecute.

However the question remained—Would the civil prosecutors avoid the trap set for them by Faurisson? Up to this point, the Gayssot prosecution had followed the same course as Faurisson's earlier trial. Fears now turned to the written decision of the judges. Once again, Faurisson had asserted that he should be acquitted because there were no gas chambers. This line of argument had given Faurisson's judges pause. How could a court judge history? Even the Paris trial court—which had been more favorably disposed to the civil rights organizations than the Court of Appeals—hesitated at suggestions that it could make historical judgments. Would Faurisson's new judges praise his work as the Court of Appeals had appeared to do in 1983?

The April 18, 1991 decision broke with the earlier rulings. There was no discussion of Faurisson's theories about the gas chambers, only a clear denunciation of Faurisson's actions:

> [It is clear that] the legislator is at liberty to lay out the conditions of a public liberty in order to stop excesses or abuses . . . [In this case] the necessary limits to liberty of opinion and expression are respect for the memory of the victims of Nazism and the total rejection of all racial discrimination which Nazism made one of its fundamental principles.[48]

The court found Faurisson guilty and fined him 100,000 francs, which it suspended. The magazine that carried the interview, *Le Choc du Mois*, was fined 30,000 francs. The court ordered that its decision be published in *Le Monde*, *Le Figaro, Libération*, and *Le Quotidien de Paris* at the expense of the accused.[49]

For all the fears of falling into a trap, it was Faurisson who was ensnared. The court did not look at Faurisson's evidence, instead it asked if the Gayssot Law was "properly elaborated and promulgated" by the legislature. Once this was established, the defense had no legal basis. Because the law penalized the "contestation of genocide" there was no room for evaluation of historical evidence. Worries about judge-made history disappeared. The legislature made history, the judges simply applied the law. This result greatly favored the civil plaintiffs. They could bring more cases without worrying that the courts would assess the merits of Holocaust denial as history. The stage of symbolic prosecution was over. Henceforth, or so it appeared, Gayssot cases would end in guilty verdicts. The stage was set for a new round of routine prosecutions aimed less at discrediting Faurisson and other revisionist leaders than at using the Gayssot Law to drive Holocaust denial from public life. It is to these that cases we now turn.

The Gayssot Law Becomes Routine

After a series of emotionally charged confrontations with Holocaust deniers during the 1980s the French enacted the Gayssot Law. The 1991 retrial of Faurisson was the capstone. Writing in *Patterns of Prejudice*, James Shields hailed the ruling. "Since the implementation of the Gayssot law, however, it is clear that the French revisionist 'school' may no longer ply their trade with the impunity they once enjoyed."[50] This had been the goal of the Gayssot Law's sponsors. But embarrassing Faurisson was one thing, to make a serious dent in the scope of revisionist activity required a shift from high-profile political trials to routine prosecutions.

Between 1991 and 1996 there were at least ten prosecutions mounted under the Gayssot Law.[51] Some of the accused were well known. Others were not. Typically, the defendant stood accused of writing a magazine article, distributing a leaflet, or affixing a sticker. Most of the defendants were represented by Eric Delcroix, Faurisson's attorney. The trials consisted of a few short hearings at which the lawyers presented their arguments after which the court retired and, several weeks later, issued a written decision, which in addition to justifying the chosen legal outcome, summarized the arguments made by the parties. Two other points are worth notice. First, for a group to bring a prosecution under the Gayssot Law it should have the preservation of the Holocaust as one of its stated goals. This requirement made the deportee groups the principal prosecutors of the deniers. Second, the Gayssot Law was incorporated as part of the Law of the Press of 1881 and so was subject to the stringent procedural requirements encapsulated in that law.[52] As we shall see, Gayssot defendants would make good use of these defenses.[53]

So, how did the Gayssot prosecutions operate in practice? The trial of Marie-France Wacquez and Françoise Pichard was fairly representative.[54] Madame Wacquez edited *Rivarol*, a magazine catering to the extreme Right. The July 2, 1993 edition of *Rivarol* ran a review by Madeleine Pichard of

a film documentary appearing on the ARTE television network describing the liberation of Buchenwald by the African American soldiers of Patton's 761st battalion. In her review of the program, Pichard wrote the following: "Now, it is finally established there have never been homicidal gas chambers on the territory of the Third Reich." Accompanying the article was a cartoon that showed several persons in prison garb. They are approached by a military officer who asks: "Where are the gas chambers?" Each of the inmates points in a different direction.

Five civil plaintiffs filed suit against Pichard and Wacquez for violating the ban on questioning the Holocaust. Among the civil plaintiffs numbered LICRA, which had played a prominent role in the prosecution of Faurisson for falsifying history. Hearings were held in late 1993. At these hearings Maitre Wagner, appearing for the defense, argued that the case should be dismissed because it was filed on October 8, 1993, just after the three-month statute of limitations ran out. The three-month time limit, derived from the 1881 Press Law, is an important protection of freedom of speech in a society with limited judicial review of constitutional rights.

The civil plaintiffs did not challenge the statute of limitations. Instead, they relied on a letter they sent the accused. The letter, mailed before the deadline, described the civil plaintiffs' intent to sue. Therefore, the civil plaintiffs argued, the letter tolled the statute of limitations.[55]

Second, Maitre Wagner argued that Pichard's article did not violate the Gayssot Law because it did not deny the Holocaust. According to Wagner, Pichard's assertion that there were no gas chambers "within the territory of the Third Reich" was not a blanket denial of the gas chambers. It was a description of their location. She denied there were "homicidal" gas chambers in Germany. She did not deny that they existed in Poland. Pichard and Wagner's position reflected a major revisionist "attack" on the Holocaust. Holocaust deniers treat the 1960 statement by German historian Martin Brozat that there were no gas chambers within pre-1937 Germany as a major concession.[56] If Brozat showed there were no gas chambers in Germany, could the same be true of Poland?[57]

From this perspective Pichard's formulation—"territory of the Third Reich"—was usefully vague. Did she mean, as Brozat had, the pre-1937 boundaries in which most historians agree there were no mass gassings? Or did she mean the administrative boundaries of the Third Reich at their greatest extent, boundaries that encompassed Alsace-Lorraine, Silesia, and Austria? Here some gassings occurred but the major death camps were all located outside the administrative boundaries of the Reich. Or, finally, did Pichard use the term "territory of the Third Reich" to include all the lands occupied by Hitler's armies, including Poland where the extermination camps were located? On the first interpretation Pichard was innocent. On the second and third interpretations she clearly violated the Gayssot Law.

The defense strategy raised the quandary that faced Judge Hugh Locke in *R. v. Zundel* and the French courts in the first Faurisson litigation. Acquitting on the basis that there were no gas chambers in pre-1937 Nazi

Germany would give the defense a propaganda victory. Convicting Pichard and Wacquez on the basis of the post-1937 administrative boundaries of the Third Reich would lead to a debate over the extent of mass gassings in Austria, Silesia, and Alsace-Lorraine, precisely the type of historical confrontation the Gayssot Law was enacted to prevent. If, on the other hand, "territory of the Third Reich" included Poland, a guilty verdict would be easy to sustain. But it would come at the cost of putting words in the mouth of the defendant.

In the end the court had little difficulty rejecting Wagner's argument.[58] The judges refused to interpret the phrase "territorial extent of the Third Reich" because this would involve the court in the analysis of history, a realm that fell outside its authority. Instead, the court examined the phrase in the context of the entire article. Both the article and cartoon extrapolated from the absence of gas chambers at Buchenwald, contest "the existence of gas chambers in the entire territory of the Hitlerian empire." To do this was to "slide insidiously toward a general negation of this mode of extermination." Even if the defendants were factually correct in saying there were no gas chambers in the Third Reich, they violated the law because their statement paved the way for more general forms of denial. Finally, the court emphasized Pichard's words themselves rather than Pichard's subjective intent in writing them. For "uninformed readers" the phrase "territory of the Third Reich" could have included Auschwitz. Rather than risk the embarrassment of an acquittal, the Paris trial court convicted Wacquez and Pichard on the basis of what they might have said, rather than what they did say.

The *Wacquez–Pichard* case demonstrated the power and the weakness of the Gayssot Law as a weapon against Holocaust denial. On the one hand, once free from the burden of judging history, French judges were quite comfortable ruling against deniers. The objection to judging history, so pivotal in the 1981 *Faurisson* case, no longer was an issue. On the other hand, Holocaust deniers were resourceful defendants, who saw in every technical defense the chance to put the Holocaust on trial. Not only that, the deniers were learning to speak in coded language. Rather than straightforwardly denying the Holocaust as Faurisson had done in 1991, new and more sophisticated deniers like Pichard and Wacquez challenged the Holocaust under the cover of vagueness. Holocaust deniers knew what the statement "there have never been homicidal gas chambers on the territory of the Third Reich" meant. Proving this in court was another matter. While Wacquez and Pichard were found guilty, this was not always the result.

Over the years a general pattern emerged in Gayssot cases. As deportee organizations scored victories against defendants, Holocaust deniers became more careful in how they spoke about the Holocaust. As this happened, the civil plaintiffs brought new prosecutions. On one level this is perfectly understandable. Everyone knew what the code meant. But, over time, the cycle of prosecutions, convictions, retrenchments, and new prosecutions led to a situation where the Gayssot Law, increasingly stretched to cover speech only marginally related to the Holocaust, became less and less defensible.

This had three consequences. First, Gayssot defendants began to win cases. And these victories turned on more than procedural technicalities like the statute of limitations. Second, as deniers spoke in increasingly coded language, courts were drawn deeper and deeper into the particulars of the Holocaust. This historical investigation was no longer to rebut fact-based defenses of the deniers, but to prove that the defendants denied the Holocaust in the first place. Third, the Gayssot Law became increasingly unpopular.

Let us begin with the problem of acquittal. To be sure, some defendants continued to openly state their positions. Faurisson was prosecuted in 1993 for an article that described proof that Auschwitz and Birkenau were not "camps of extermination."[59] But most defendants were not so forthcoming. In the *Guionnet* case, the leaflet at issue said simply "Auschwitz, 125,000 deaths."[60] The offending article in the *Larrieu* case described Faurisson's work in a neutral language, related this to the work of Paul Rassinier, an earlier French Holocaust denier, and then added: "Since 1953 the Federal Government of Germany has sent more than 60 million marks to the state of Israel and the supposed Jewish victims of National Socialism."[61] While Faurisson and Larrieu were convicted, Guionnet was acquitted. Although the court concluded that at least 800,000 people died at Auschwitz, simply stating a number could not trigger the Gayssot Law.[62]

Even more troublesome was the prosecution of Eric Delcroix, Robert Faurisson's lawyer who had written a book critical of the Gayssot Law.[63] The prosecution turned on six quotes from the book. The local Paris court acquitted Delcroix on three of the quotes. These included a statement that Hitler and Himmler had the right to a trial on war crime charges, and statements about the beliefs of Holocaust deniers. The acquittals demonstrated how deniers could preserve revisionist content in the face of the Gayssot Law. Instead of saying "The Holocaust never happened" they could follow Delcroix and say "The revisionists contest that Germany had a policy of physical extermination."[64] Equally troubling were the passages that led to Delcroix's conviction. In one passage, Delcroix was found guilty because he charged that the Gayssot Law protected a "belief" that was "less and less scientific and more and more religious." In another, he was convicted for describing the Holocaust as "a real or supposed" event.[65] These narrow rulings demonstrated the extent to which the Gayssot Law had become a sponge that expanded as continued prosecutions forced judges to choose between free speech and respecting the memory of the Holocaust.

Meanwhile, the Gayssot cases increasingly drew the courts into historical debate. In the *Guionnet* case the court determined that at least 800,000 people were killed at Auschwitz. Another source of the French courts' increasing engagement with Holocaust history came from the ingenious arguments of the Gayssot defendants, arguments that at first glance appeared procedural but actually worked to interject Holocaust denial into the trials. For example, French law requires that all statutes be read into the official record. Holocaust deniers argue that the Gayssot Law was improperly promulgated because the

forty-two volumes of the Nuremberg trials were not read into the *Journal Officiel*. Likewise, Article 6 of the European Convention on Human Rights provides for the presumption of innocence. Deniers argued that this meant Gayssot defendants must have an opportunity to raise the truth as a defense. Tested and rejected in the 1991 *Faurisson* case, these claims were raised by subsequent Gayssot defendants. Because the French legal system places limited weight on precedent, courts facing these defenses had to rebut them in full. As a result, each Gayssot trial became an opportunity to relitigate the Holocaust.

By 1996 the Gayssot Law had swelled far beyond its original boundaries. To see this, one need only compare the *Delcroix* case to the German *Auschwitz-Myth* case. In the latter case Judge Albrecht Kob refused to uphold a prosecution of two right-wing extremists who had used the phrase "Auschwitz-myth," because the same words could be used in contexts that did not deny the Holocaust. Judge Kob reached this conclusion despite his awareness that the phrase was coded language. Despite some popular criticism Kob weathered the storm and his verdict was upheld on appeal. By contrast, in the *Delcroix* case a French court held that it was illegal to use the phrase "real or supposed" to describe the extermination of the Jews. In a sense, the Gayssot Law became a victim of its own success. With no one willing to contest the Holocaust, civil plaintiffs prosecuted the slightest hint of denial. This was a mixed blessing. In the short run, the court's expansive interpretation of the Gayssot Law helped France avoid scandal. In the long run, however, that same policy fed a growing impatience with the law.

The Return of Controversy

While there had been widespread opposition to the Gayssot Law since its passage in 1990, this was muted—outside of revisionist circles—after the *Faurisson* trial in 1991. The prosecutions described in the previous section took place out of the limelight. While right-wing deputies spoke of repealing the law, the large conservative majority that took over following the 1993 legislative elections refused to take any action. Yet under this calm surface, resentment to the law was brewing. The first outward sign of this resentment arose in an unexpected place. In 1994 a French court refused to extend the Gayssot Law to cover an interview in *Le Monde* in which American historian Bernard Lewis cast doubt on the Armenian Genocide.[66] This, however, proved to be the tip of the iceberg. Popular animosity against the law finally reached the surface with the 1996 Abbé Pierre affair.

The affair began in late 1995 when Roger Gaurady published a book entitled *Les Mythes Fondateurs de la Politique Israéliene* [The Founding Myths of Israeli Politics].[67] During the 1970s Gaurady had been the leading theoretician of the French Communist Party. Since then he changed faiths, first adopting Catholicism, later Islam. He also became a fervent anti-Zionist. His book was published by *La Vielle Taupe*, the same press that published Faurisson's work. In it Gaurady devoted a chapter to "The Myth of the Holocaust."

He described the Holocaust as a "myth" which later became "a dogma" that "justified and sacralized all the exactions of the state of Israel in Palestine." He also denied the Holocaust repeatedly.[68] Nor were these passing references. Gaurady spent two pages describing the research of Fred Leuchter on the scientific impossibility of mass gassing. At one point, Gaurady stated bluntly that "there has never been any text produced attesting that the 'final solution' of the Jewish problem was, for the Nazis, extermination." In this regard, Gaurady differed from most French deniers who, by 1996, had learned to speak in coded language.

Initially, Gaurady's book drew little publicity. This changed early in 1996 when two deportee groups sued Gaurady under the Gayssot Law. A February 1996 hearing attracted little notice. The silence was broken when, two months later, Gaurady's attorney held a press conference. That the attorney was Jacques Vergès, who had represented Barbie a decade earlier, guaranteed some publicity. But the true shock was yet to come. Vergès came to the conference armed with three attestations of support for the embattled author. One of these was from Abbé Pierre, a Catholic priest who, because of his work on behalf of the poor during the 1950s, was widely regarded as one of the most popular persons in France.[69] While Pierre admitted that he had not read Gaurady's book, he called for an open debate on Holocaust revisionism.[70]

Pierre's comments drew sharp criticism. There were calls for the priest to retract his statement. In an interview in *Libération*, however, Pierre held fast to his earlier position. He defended Gaurady who, he said, did not "deny the fate of the Jewish people. [He said] that the Nazis used all of the modern means of elimination. But that is a subject about which the debate is not closed."[71] In the same interview Pierre denied any connection with Holocaust deniers but questioned the taboo against it: "I think the average Frenchman will say with relief, the taboo is over. . . . You will no longer be called anti-Jewish or anti-Semitic for saying a Jew sings out of tune."[72] This led to further criticism. The Grand Rabbi Joseph Sitruk refused to debate revisionism with Pierre. Catholic leaders also criticized the priest.

Finally, on April 30, 1996 Pierre modified his position. He withdrew his support for Gaurady and his call for a new debate over whether the Holocaust happened. He stressed that he did not question the Holocaust and attacked those who would deny this "indelible stain of shame" on European history. The tendency was to trace Pierre's support for Gaurady to poor advisors who, it was reputed, were anti-Semites.[73] Writing several months after the event, Klaus Holz and Elfriede Müller located the problem closer to home; since the early 1990s, the priest's support for Palestinian causes had led to anti-Semitic pronouncements. The affidavit for Gaurady was simply the latest manifestation of this change in Pierre's attitudes.[74]

At the same time, however, the controversy over Abbé Pierre brought the Gayssot Law back into the public's attention. The result was a spate of criticism of the law during May 1996. Writing in *Le Figaro*, just after Pierre

retracted his support for Gaurady, Alan Gérard Slama described the law as a "manifest error" that "has allowed men such as Mr. Gaurady to invoke liberty of expression in their favor."[75] The same edition of *Le Figaro* carried an article by the historian René Rémond who said that, despite the "good intention" of the legislators, "the intervention of the state to say where the truth is to be found is in error."[76] Jean-Louis Masson, who as a mainstream conservative had voted against the law in 1990, called the law "worthy of totalitarian regimes."[77]

Bernard Poulet, writing in *L'Eventement du Jeudi*, joined in the criticism:

> There remains a final question, is it necessary, in the name of the uniqueness of the Jewish genocide to prosecute . . . those who deny the Holocaust. Few dare question the Gayssot Law . . . because, one says, that could water the engines of the negationists and Le Pen. Yet, this law . . . has just demonstrated its perverse effects.
>
> Perhaps it is not possible to abrogate the Gayssot Law. It would at least be desirable that no one any longer uses it.[78]

Some of this criticism can be written off as political. Ever since the Gayssot Law was proposed, members of the mainstream Right joined historians, civil libertarians, and revisionists in opposing it. The angry newspaper articles expressed an opposition normally kept under the surface. Upset over seeing a popular figure enmeshed in controversy, right-wing journalists blamed the Gayssot Law. They did so even though Pierre's remarks expressed a general anti-Zionism that had been developing for years. Pierre did not use the *Gaurady* case to rail against the inequities of the Gayssot Law. Rather, the press, the academics, and the mainstream Right used the Pierre affair to bring their own long-standing opposition to the Gayssot Law before the broader public. After six years of repressive litigation, most of which went unreported, there was finally an opportunity to speak out.

In one sense, this was a tempest in a teapot. The controversy did not lead to the repeal of the Gayssot Law, nor was there any tempering of the judicial application of the law. The *Delcroix* case was decided in October 1996, several months after the Pierre affair. But, at the same time, the Pierre scandal demonstrated not only the growing unpopularity of the Gayssot Law, but also its ineffectiveness in removing denial from French public life. That, after five years of prosecutions, sometimes over very marginal offenses, Holocaust denial would again become a cause of controversy demonstrated the limits of the Gayssot Law. The deportee groups could prosecute deniers and usually win, but they could not stamp out Holocaust denial. As soon as a suitable occasion arose the deniers seized the moment. As a weapon to gain a symbolic victory against Robert Faurisson in 1991, the Gayssot Law was successful; as an instrument of censorship, it failed. It resolved the dilemma of trial uncertainty, without resolving the dilemma of how the French might come to terms with the deniers in their midst.

Conclusion

Acts passed in the wake of a scandal have two goals—to restore faith in the system and to make future lapses impossible. While the Gayssot Law was conceived largely in terms of symbolic reassurance, the new law had practical legal effects that, over time, undermined whatever symbolic benefits attached to the law. As such, the French experience with the Gayssot Law is a story of unforeseen consequences, and the limits of symbolic legislation.

From a legal perspective, the Gayssot Law was an attempt to create the perfect trial, a trial that ends with a guilty verdict, punishment for the accused, and a clear statement that the society in question does not tolerate denial. It floundered on the reality of trial uncertainty. Trials are unpredictable, human events that sometimes turn out somewhat less than perfectly. To be sure, the 1991 retrial of Robert Faurisson was a success, especially when compared to the German and Canadian cases. But problems mounted as the law was applied to more marginal instances of Holocaust denial. As Holocaust deniers reacted to the Gayssot Law by speaking in coded language, the scope of the law expanded and defendants became increasingly adept at turning procedural defenses into opportunities to put the Holocaust on trial.

In a sense, the Gayssot Law was the worst of both worlds. On the one hand, the removal of the truth defense made the French courts look like arbiters of history, especially when they addressed the more marginal cases. On the other hand, the Gayssot Law did absolutely nothing to stop the accused from raising defenses inspired by Holocaust denial. In fact, the incorporation of the ban on Holocaust denial into the 1881 Press Law expanded the procedural defenses available to the deniers.

In the end, the French were no more successful than their German and Canadian counterparts in guaranteeing scandal-free trials. The willingness of the deportee organizations to prosecute any statement—no matter how guarded—forced French judges into investigating Holocaust history, the very situation the Gayssot Law was meant to avoid. The expanding scope of the prosecutions also raised serious questions about freedom of speech. Yet, as the Pierre affair showed, the Gayssot Law was powerless to root out Holocaust denial from a small but vocal fringe of French society. The French experience with the Gayssot Law shows that even the perfect law can be imperfect when it is put into practice.

Part III

The Dilemma of Toleration

Part III looks at a dilemma of denial that has arisen in the United States. Americans who have addressed the subject oppose prosecutions of Holocaust deniers. In part, this is for pragmatic reasons. Deborah Lipstadt counsels that, "legal maneuvers . . . are often difficult to sustain or carry through."[1] Alan Dershowitz concurs, calling *R. v. Zundel* "a total victory for Holocaust deniers and a total disaster for Holocaust survivors and the Jewish people."[2] But the American opposition to prosecutions rests on more than pragmatism. Lipstadt, no friend of the deniers, nevertheless defends their "absolute right to stand on any street comer and spread their calumnies."[3] Dershowitz also declares his fealty to free-speech norms. After expressing thanks that America has not adopted European-style laws that explicitly outlaw the Holocaust, he warns potential prosecutors that the focus of such trials is never the "truth of the Holocaust" but rather "freedom of speech."[4]

But their emphasis on freedom of speech does not make Lipstadt and Dershowitz indifferent to the possibility that American society will condone Holocaust denial. To the contrary, they seek to combine American free-speech absolutism with a social repudiation of denial. This can be seen in Dershowitz and Lipstadt's response to college editors who ran paid advertisements denying the Holocaust. Lipstadt accused the deniers of using freedom of speech as a "sword" rather than as a "shield," adding "that there is a qualitative difference between barring someone's right to speech and providing him or her with a platform from which to deliver a message."[5] She harshly criticized the student editors for their failure to understand "the implications of Holocaust denial" and "the true implications of the First Amendment."[6] Dershowitz agreed with this assessment, noting "an appalling lack of sensitivity among many editors, students, faculty, and administrators about how newspapers should deal with Holocaust denial."[7]

In other words, Lipstadt and Dershowitz want a society that refuses to prosecute Holocaust deniers, but at the same time, censors them through informal means. While the law permits this—most college newspapers are under no First Amendment obligation to run every ad they recieve[8]—the real question is cultural. Can a society combine formal toleration and informal censorship? Or do the libertarian norms encapsulated in the First Amendment

also extend to the broader culture? Or at least to a segment of it—college newspaper editors—for whom the First Amendment is a professional norm? Behind this stands a larger debate about the nature of law. Are legal norms self-contained? Or are legal norms "packaged" with surrounding culture to such an extent that it is impossible to separate the two?[9]

Chapter 6 looks at four campuses (Michigan, Ohio State, Brandeis, and Queens College) where student editors ran the Holocaust denial ads. The chapter focuses on the motivations of the editors and the response of the campus community to the ads. As we shall see, in three out of the four campuses the decision to run the ad led to the type of scandal we saw in part II. If the purpose of American-style toleration was to avoid the clash between professionally held norms of fairness and a community concerned with the representative function of social institutions, it failed (at least in those cases where the ads were run).

Chapter 7 takes a comparative approach. One way to determine whether First Amendment norms led the student editors to run the denial ads is to compare their experience with counterparts from countries more open to prosecution of Holocaust deniers. The expansive protection of political speech in the United States is unique in the modern democratic world. Most other democracies accept the general principle that the state can prosecute hate speech and group libel. How do the more communitarian norms prevalent in Canada, France, and Germany affect the process of informal censorship?

Taken together, chapters 6 and 7 raise questions about America's legal toleration of Holocaust deniers. Is toleration pure gain? Or does it come at the cost of creating a society that finds it very difficult to informally censor Holocaust deniers?

Chapter 6

A Panacea of Toleration?

During the early 1990s Bradley Smith sent ads denying the Holocaust to student newspapers across the country. While most papers rejected the ads, a sizable minority ran them. This chapter looks at four campuses where the campus paper ran an ad denying the Holocaust. The first two cases come from 1991, the first year of Smith's campaign. At the University of Michigan, the college newspaper ran the ad by mistake but then defended itself on free-speech grounds. At Ohio State, the paper's decision to run the Smith ad touched off a pitched battle between pro- and anticensorship factions. The next two cases come from the 1993–94 academic year. In December 1993 the Smith ad ran at Brandeis University, a traditionally Jewish institution. Once again, there was controversy. By contrast, when the same ad ran at Queens College, which also has a large Jewish population, there was less furor.

Why did the students run the ads? The campus debates gave the editors a chance to explain themselves to an angry campus community. By and large, the editors defended themselves on First Amendment grounds. The campus debates (and the scandals that followed) also attest to the ubiquity of the pattern of norm-based behavior, scandal, and restorative act found in part II. In Germany, France, and Canada, scandal swirled around high-profile trials, in the United States the debate centered on the press and its obligation to run or censor controversial ads. While the scenery changed, the debate followed the pattern established in the *Deckert, Zundel*, and *Faurisson* cases. On one side stood a group of professionals (here student editors, rather than judges) who were determined to follow their principles, whatever the consequences. On the other was a campus community accustomed to viewing the school newspaper as the voice of the community.

The Bradley Smith Ad Campaign

Bradley Smith was especially effective at provoking scandal because his ads were ideally tailored for a libertarian American audience. In short, Smith was a new type of denier. He refrained from open anti-Semitism and relied heavily on free-speech rhetoric. This can be seen both in the name of his

organization, the Committee for Open Debate on the Holocaust and in the title of his first ad—"The Holocaust Controversy: The Case for Open Debate."[1] During the 1991–92 academic year, Smith sent the ad to thirty-five newspapers at some of the most prestigious colleges and universities in the country. Approximately 40 percent of the papers ran the ad including those at Cornell, Michigan, Duke, and Ohio State.[2] After a year's hiatus, Smith returned full steam in the 1993–94 academic year with an ad questioning the newly opened Holocaust Museum.[3] During that year over thirty colleges accepted the Smith ad, including Brandeis University and Queens College.

Smith's combination of moderate language and anticensorship rhetoric appealed to student journalists socialized to believe that censorship of ideas was wrong. The ad opened by placing Holocaust denial in the context of political correctness: "No subject enrages campus Thought Police more than Holocaust revisionism." Smith outlined a "moderate" revisionism, which conceded that Jews "were stripped of their rights, forced to live in ghettos, conscripted for labor, deprived of their property, deported from their countries of birth and otherwise mistreated." Smith also refused to blame the Jews for denial: "Revisionists do not claim Jewish leaders or organizations did anything in the war and postwar era which the Allied governments themselves did not do." Likewise, the ad largely refrained from anti-Semitic invective. Isolated references to "the Holocaust Lobby" and "Jewish propaganda agencies" did not alter the general tone of moderate discourse. His factual statements, such as his assertion that "*tens of thousands* of relatively healthy internees were liberated" from Buchenwald, Dachau, and Bergen-Belsen (emphasis in original), are clearly false and insulting. But Smith's sedate language blunted the outrageousness of his assertions.

The final third of the ad addressed censorship directly. For Smith the Holocaust was a form of political correctness. To draw this out, Smith described what happened when a Holocaust denier spoke out on campus. First, the "Revisionist heretic" was called a racist or an anti-Semite. Then, the person who invited the speaker was accused of being "insensitive." Meanwhile, "[c]ampus libraries and bookstores face intimidation when they consider handling Holocaust revisionist materials."[4] Finally, "the majority of faculty and university administrators sit idly by allowing political activists to determine what can be said and what can be read on their campus."[5]

In equating the Holocaust with political correctness, Smith targeted his audience carefully. His reference to "cowardly administrator" who "finds it much easier to rid the campus of controversial ideas than to face down a group of screaming and snarling students" tapped into a widespread questioning of authority common among college students. The same was true of Smith's declaration that "[i]t is the duty of university administrators to insure that the university remains a free marketplace of ideas." The "marketplace of ideas" is a central symbol of free speech. Smith's rhetoric turned Holocaust denial into a test case for student rights and civil liberties.

Smith succeeded beyond his wildest dreams. The furor over the papers that ran the ads fueled a national debate over Holocaust denial, censorship

and the First Amendment. Articles about Smith appeared in the *New York Times*, *Time*, and the *National Review*.[6] Most of the participants in the debate attacked the student journalists who ran the ads. Deborah Lipstadt accused them of trivializing Holocaust denial and misapplying the First Amendment.[7] Her criticism was picked up by neoconservatives who used the Smith controversy to charge the 1990s generation of students and faculty with nihilism.[8]

It is possible, however, to argue that the students who ran the ad did not misunderstand the First Amendment, but understood it too well. As newspaper editors, they took their cues about when to censor offensive material from the legal system, a system highly protective of political speech. In so doing, they applied America's libertarian speech norms to the Smith's ads, balancing their disgust at Smith's message with a moral obligation to promote a lively exchange of views. When Lipstadt, the Anti-Defamation League, and campus Hillel chapters took them to task for running the ads, the newspapers wrapped themselves in the mantle of the First Amendment.

A First Amendment Mistake?

One of the earliest battles over the Smith ad took place at the University of Michigan, where the business department of the student newspaper ran the ad by mistake. When the editorial board nonetheless defended the ad on First Amendment grounds, it triggered a campus-wide debate over censorship, a debate that gave Bradley Smith a hitherto unseen level of notoriety and set the tone for future debates.

In October 1991 Bradley Smith sent his ad with a check for $1,052.10 to Beth Warber, the business manager of the *Michigan Daily*.[9] The ad, which ran on October 24, sent shockwaves through Michigan's 6,000-strong Jewish community. Phones rang off the hook at the *Michigan Daily* and at the local Hillel chapter, which planned a rally for noon on Friday, October 25. At this time, the organizers had no plans to protest the *Daily* itself. The rally was simply to give members of the Jewish community a chance to express their outrage at Holocaust denial.[10]

The next day the business department published a "retraction" in which the paper explained that the ad had run "due to an error" and offered its sincere apologies to those the ad had offended.[11] According to Warber, the ad ran by mistake. Because the ad was "camera ready," it "slipped through without being read."[12] Whether the business department's apology would have forestalled the controversy had it stood alone is an interesting question, but one that must remain unanswered. For the same day Warber apologized for the ad, the Daily's editorial board defended it on free-speech grounds:

> The advertisement titled "The Holocaust Controversy: The Case For Open Debate" that appeared in yesterday's paper did not necessarily reflect the views of the Daily editorial staff. We, the editors of the paper, believe the ideas expressed in the advertisement were offensive and inaccurate.

> Nonetheless, as a newspaper committed to upholding the principles of the First Amendment and the unrestricted exchange of ideas, we cannot justifiably condone the censorship of unpopular ideas from our pages merely because they are offensive or because we disagree with them.[13]

The editorial board's *post facto* justification of the ad changed the dynamics of the controversy. The next week saw a cascade of angry letters to the editor, the vast majority of which criticized the *Daily* for running the ad.[14] While some letters took issue with the business department, especially for keeping Smith's money after realizing their "mistake," most of the ire was reserved for the editorial board. Some letters criticized what they saw as the hypocrisy and incompetence of the paper. Thus, a leader of the student rally scolded the *Daily* for cloaking its mistake in the First Amendment.[15] Another letter writer called the contradictory statements of the business and editorial departments an example of "indecision in print."[16]

Most letters, however, focused on the *Daily*'s decision to run the ad, which was seen as irresponsible and insensitive. The writers used terms such as "absolutely disgusted" and "appalled."[17] Several spoke of lost family members, one person said he cried when he read the ad.[18] Others mentioned the long-term consequences of running the ad. On the one hand, the board's decision to run the Smith ad "legitimized this group's twisted propaganda."[19] On the other hand, it damaged the reputation of the *Daily*. According to one letter, the paper "does not have any journalistic standards."[20] Another letter writer called on the administration to "remove those responsible for allowing this trash to be printed."[21]

Most of the *Daily*'s critics did not refer to the editorial board's stated reason for defending the ad—freedom of speech.[22] Like the judges and prosecutors in Europe and Canada, who ruled in favor of Holocaust deniers, the *Daily*'s editors took the heat for a decision which, in their minds, reflected a principled commitment to legal fairness. This commitment runs through the arguments of those who favored publishing the ad.

Thus, the editorial board, while finding the ad "offensive and inaccurate," refused to "condone the censorship of unpopular ideas . . . merely because they are offensive or because we disagree with them."[23] This conclusion reflects the American free-speech doctrine of content neutrality, which prevents courts from discriminating against speech based on its content. The board further demonstrated its commitment to the First Amendment by carrying a quote from Justice Hugo Black on the masthead, in which the Supreme Court Justice said: "My view is, without deviation, without exception, without any ifs, buts, or whereases, that freedom of speech means that you shall not do something to people either for the views they have or for the views they express or the words they speak or write."[24] Andrew Gottesman, who became *de facto* spokesperson for the editorial board, brought up another First Amendment theme when he told a local reporter that Holocaust denial is "an idea that's going to be quickly destroyed in the market place."[25]

Nor was Gottesman alone. The minority of the letter writers who defended the *Daily* applauded the paper for its libertarian stance. For instance, one supporter wrote: "[N]o one on this campus has a right to be mad at the *Daily* for doing its job."[26] These writers saw the Smith affair in terms of free speech rather than Holocaust denial.

> The last week has been excellent for the health of the First Amendment at the University of Michigan . . . Why is this good for the First Amendment? Because complete idiots were given a forum to spread their views and the campus got to see what kind of distortions exist on the Holocaust . . . The ad said some terrible things, and some ugly memories came to the minds of many, but what transpired on this campus for the last week is exactly what the founding fathers had in mind when they wrote the First Amendment.[27]

Others were more pessimistic. One letter began: "I weep for the future of the free press in this country."[28]

One need only recall the letter writer who cried while reading the ad to see how an emphasis on free speech could redefine the controversy. When the focus was on Holocaust denial, the "irresponsibility" of the *Daily* captured attention. When, however, the editorial board recast the exclusion of the Smith ad as censorship, the calculus shifted. Now the charge of moral weakness fell upon the censors. As another supporter of the *Daily* put it: "How credible is conventional Holocaust history if it merely suppresses the insults of its opponents instead of refuting them with fact?"[29]

The power of free-speech rhetoric in American society was also reflected in a third group of letters by persons who either took no position on the ad or opposed publication. What distinguishes them is a perceived need to discuss the First Amendment. For instance, a letter writer who had felt the *Daily* used free speech to cover its own error in running the ad was careful to add that she did not challenge the paper's " 'right' to print" whatever it desired.[30] Freedom of speech also figured in those letters that blamed Holocaust deniers for "debas[ing] the liberties they pretend to champion."[31]

A similar concern led Michigan President James Duderstadt to condemn the ad while defending the paper's right to free speech. The letter describes the injury the ad inflicted "on our friends and colleagues who personally endured the suffering of the Holocaust."[32] Thus, the scholarly community must speak out against Holocaust denial. Duderstadt described the ad's moral agenda in stark terms: "To deny the reality of the Holocaust, is to deny our human potential for evil and to invite its resurgence." At this point, Duderstadt's tone changes markedly.

> I share the outrage people feel about this incident, but I believe it should be directed to the author of the advertisement and not at the publication he chose to exploit for his sick purposes. The Daily is run by and for students. It has a long history of editorial freedom that we must protect even when we disagree with particular opinions, decisions, or actions. Surely, the best protection against tyranny such as that which brought the Holocaust is the free expression of ideas through the free press.

The last sentence is especially noteworthy. Duderstadt has become the administrator in the Bradley Smith ad, the person who must defend the university against the tyranny of censorship. But where Smith invokes the tyranny of censorship to tarnish the Holocaust, Duderstadt posits the Holocaust as the end result of censorship.

By invoking free speech, the *Daily*'s editors shifted the debate from the offensive nature of Holocaust denial to censorship. To an extent, then, Deborah Lipstadt was right to complain that student editors trivialized the Holocaust. She was, however, mistaken in arguing that the student journalists who ran the ads did not understand the First Amendment. While a college newspaper need not run every ad it is legally allowed to print, the *Daily*'s editors took their cue from the First Amendment. This does not mean that the rest of the campus shared this view. In the end, the legal and moral responsibility of the student editors was a political question, just as the responsibility of judges was in the *Deckert*, *Zundel*, and *Faurisson* cases. On some campuses, such as Ohio State, this question was sharply contested.

BATTLING OVER CENSORSHIP

In January 1992, *Ohio State Lantern* ran the Bradley Smith ad. This was not a mistake, but rather a deliberate act by the *Lantern*'s editorial board. The board defended its decision with the following words: "It is repulsive to think that the quality, or total lack thereof, of any idea or opinion has any bearing on whether it should be heard."[33] If this sounds like a student reformulation of First Amendment case law, Deborah Lipstadt was harshly critical:

> Most disturbing was the contention voiced by students, faculty and university presidents that however ugly, the ad constituted an idea, opinion, or viewpoint—part of the broad range of scholarly ideas. However much they disassociated themselves from the content of the ad, the minute they categorized it as a "view," they advanced the cause of Holocaust denial. That students failed to grasp that the ad contravened all canons of evidence and scholarship was distressing.[34]

Was the *Lantern* defending the First Amendment or coddling Holocaust deniers? These were the terms of the debate carried out in the battle between *Lantern* and the local Hillel.

Positions were well defined because both sides had advance warning. As the 1991–92 academic year progressed, the Smith ad and Holocaust denial became national news. A December 1991 *New York Times* article noted that the Smith ads had "touched off a nationwide debate."[35] A few weeks later the *Times* carried several letters to the editor about the Smith controversy.[36] So when, in early January, the *Lantern* received the Smith ad Holocaust denial had become a public issue.

The *Lantern* did not immediately publish the Smith ad. Instead it contacted the Jewish community. The editors hoped that by contacting the

Jewish community in advance, it would "cushion the blow" in the event the paper decided to run the ad.[37] Over the next two weeks there were informal discussions between *Lantern* editors, the campus Jewish community, and the publications committee of the Journalism School that oversaw the *Lantern*. On January 23, 1991 the publications committee held a hearing and voted 5:4 not to accept the ad.[38] The following day the editorial board, disregarding the vote, ran the ad along with an editorial and an article from Ohio State President E. Gordon Gee.[39]

Campus Jewish organizations used the two weeks before the ad ran to mobilize opposition. The key player was Judith Skolnik, an OSU student and chair of Children of Holocaust Survivors. Speaking at the publications committee hearing, Skolnik called the ad a personal attack on herself and the Jewish community: "To say the holocaust is a lie is to say that I'm a liar, it is a direct attack on the Jewish people . . . How can I feel comfortable as a student when the (student) paper prints hate and lies[?]"[40] Campus Hillel director Rabbi Steven Abrams made a similar point. "The Holocaust is not the real issue of the ad; the real issue is incitement to anti-Semitism."[41]

At the hearing Abrams repeatedly referred to the ad as "classical anti-Semitism," while Skolnik warned that the ad, if published, would lead to attacks against Jews.[42] Both Abrams and Skolnik focused on the *Lantern*'s advertising policy, which prevented the paper from accepting advertising that "attacks an individual race, nationality, ethnic group, religion or sex."[43] By stressing the ad's potential to cause violence, Abrams and Skolnik made the tacit concession that the ad's "insensitivity" would not, by itself, be enough to balance the free-speech rhetoric of the *Lantern*'s editors.

This rhetoric was in strong evidence among the *Lantern* staff in the days before the paper ran the ad. At a meeting with Mary Carran Webster, the paper's faculty adviser, none of the fourteen *Lantern* reporters present voiced any objection to the ad. One student said that the constitution also protected "loons."[44] Another stressed the importance of reminding students about the Holocaust. Indeed, the two student members of the publications committee voted in favor of running the ad.

The *Lantern* editorial explaining the decision to run the ad expressed similar sentiments.[45] The editors agreed with Skolnik and Abrams that Bradley Smith and his associates were "racists. Pure and simple." But they could not come up with a principled reason for rejecting the ad. If the ad was "a blatant lie," so were some of the ads, columns, and letters that ran in the paper on a daily basis. As for the argument that the ad would "hurt[ ] people," the editors asked the readers "what kind of paper" the *Lantern* would be if it only printed harmless items that offended no one. Against this, the paper weighed a single argument—rejecting the ad "would be tantamount to censorship." Accepting this argument, the paper ran the ad.

That the *Lantern* ran the ad shows the depth of anticensorship attitudes in America. It also demonstrates how free speech is ultimately a question of fairness. The *Lantern* asked itself: Has the paper accepted false and misleading materials in the past? Once answered in the affirmative, the paper had

no choice but to run the ad. To do otherwise, the editors argued, would be unfair. The paper's statement about not judging ideas on their "quality" expresses the same sentiment. Free speech means treating ideas fairly regardless of their "quality or total lack thereof."

This, however, was not the end of the story. In the aftermath of the *Deckert*, *Zundel*, and *Faurission* cases the aggrieved community took restorative acts; the same dynamic developed at Ohio State. To protest the ad and the paper, Skolnik and the campus Hillel organized a sit-in at the *Lantern* staff offices.[46] Skolnik demanded the resignation of the *Lantern* editor and business manager. At a rally attended by 150 students she expressed her determination to see the matter through: "Nothing like this should have ever taken place or should ever happen again. We're not letting this die in no way, shape or form."[47]

The Hillel scored some successes. President Gee, who had earlier criticized the paper for running the ad, now met with *Lantern* staff to communicate this message personally. Stressing the overwhelmingly negative response the ad received on campus, Gee called the decision to run the ad "dumb to the extreme." He charged the paper with harming its credibility and warned the editors: "If the Board (of Trustees) met today it would shut (the Lantern) down."[48]

Lantern staff members did not need Gee to tell them this. On the day the ad ran, a man assaulted a staff photographer. The man, who was not connected with the sit-in, referred to the ad as "crap."[49] Meanwhile, students burned copies of the *Lantern*.[50] The *Lantern*'s opponents succeeded in making their position known to the *Lantern* and the Ohio State community. In contrast to Michigan, where opposition was confined largely to letter writing, Skolnik and Abrams created an activist opposition to the paper that included mass demonstrations and civil disobedience.

While the protests generated solidarity within the Jewish community, its impact on the rest of the campus was more equivocal. Far from isolating the *Lantern* as a promoter of Bradley Smith and anti-Semitism, Skolnik's campaign generated sympathy for the paper while raising questions about the Jewish community. This is clear from letters and student op-ed pieces that ran in the *Lantern* in the week following the publication of the ad. While most of the Michigan letter writers faulted the *Daily* for running the ad, half of the Ohio State letter writers supported the *Lantern*.[51]

Typical of the supporters was Ron Solomon, a math professor. He lost his grandparents in the Holocaust but agreed with the decision to run the ad. In fact he found it unfortunate that it was Smith and not the faculty and administrators who adopted the "Voltairean" position of defending speech one detests.[52] David Werber went further. As a Jew "he was horrified at the irrational response of the Jewish community." Werber defended the *Lantern* in the Jewish liberal tradition: In the past Jews were silenced as an unpopular minority. Failure to respect the First Amendment could lead to the same result in the future.[53] In a similar vein Klaus Thiers warned that "censorship leads to tyranny" and called book burning the way of the Nazis.[54]

Perhaps the strongest evidence that the protests were counterproductive, however, came from a student op-ed piece that ran on January 31, 1992.[55] The author explained how, given the spirited debate over whether to run the ad, he had expected to see blatant anti-Semitism. Instead he found "a very calm, reasonably presented set of factual claims" that far from attacking a racial or religious group called for critical thinking. He was upset that even the *Lantern* had "stigmatized the ad as a second-class point of view."

The op-ed piece illustrates the risk taken by the Hillel when it opposed the Smith ad as anti-Semitic. While the ad offended the memory of the Holocaust, Smith's moderate language made the charge of anti-Semitism a hard sell. Once this could be seen, a backlash was inevitable. The militant tactics of the Hillel after publication only reinforced this effect. The sit-ins, calls for resignation, paper burning, and threats from the university president made the *Lantern* a "free speech martyr." No one knew this better than Bradley Smith who, in an interview with the *Lantern*, said of the protesters: "They don't protest anything that's in the article, but its publication. Those who protest the ad stand for suppression and censorship."[56]

In the end, opponents of the Smith ad fought a losing battle. The *Lantern*'s decision to publish the ad placed the Hillel activists in a quandary. The more they ostracized the paper, the more they looked like censors. Even if most of the faculty and students doubted Bradley Smith's First Amendment right to publish in the *Ohio State Lantern*, few doubted the *Lantern*'s First Amendment right to decide what it saw fit to publish. In the end, the free-speech rhetoric proved too powerful to shake.

A Community Divided

Despite the experiences at Michigan and Ohio State, the 1991–92 academic year was not a complete loss for opponents of the Smith ad. Most college papers refused to run the ad. For example, the *Harvard Crimson* defended its rejection of the ad in a strongly worded editorial: "By choosing not to run an ad, or an editorial for that matter, we are not imposing censorship; we are simply refusing to offer our privately-owned assets—our printing press, our circulation network, our readership, our limited number of pages, and the name of *The Harvard Crimson*, for that matter."[57] Furthermore, American Jews could take solace in the fact that Smith and the deniers remained relatively unknown outside of campuses that ran the ad. By contrast, Bradley Smith's 1993–94 campaign put Holocaust denial on the national map.

There were three reasons for this. First, in the early 1990s the Jewish community took a more active approach to Holocaust denial. In addition to Lipstadt's 1993 book *Denying the Holocaust*, the American Jewish Committee, the Anti-Defamation League, and the Simon Wiesenthal Center all published books and/or pamphlets on denial.[58] Second, the Smith ad attacked the new Holocaust Museum in Washington D.C.[59] This gave the new ad a topical appeal. Third, Smith's new ad ran in the Brandeis University *Justice*. That a revisionist ad would appear in the student newspaper of a well-known Jewish

institution fueled the national interest. By early 1994 Holocaust denial was widely debated in the national press.

The Brandeis controversy followed the course set at Michigan and Ohio State. The Holocaust Museum ad, however offensive, stopped short of outright anti-Semitism. Its major argument was that the Holocaust Museum contained no evidence of the gas chambers. While this is one of the more outlandish revisionist claims, Smith's tone in making it remained restrained.[60] Like its predecessor, the Museum ad wrapped itself in free speech, stressing "America's old civil virtues of free inquiry and open debate."[61]

Like those papers that ran the ad in 1991–92, the *Justice* editorial board refused to censor an ad that used moderate language and appealed to free inquiry. As at Ohio State, the publication of the ad met with a militant response, especially since the *Justice*, unlike the *Lantern*, ran the ad without a supporting editorial.[62] There were protests and teach-ins. Two thousand copies of the *Justice* were removed, presumably by students. A second shipment of 4,000 copies arrived under police protection. Editorial board members received threatening phone calls. Like his counterpart at Ohio State, Brandeis University President Thier criticized the paper for running the ad.[63]

But there was an important difference. Brandeis was a Jewish institution with a predominantly Jewish student body.[64] The Jewish connection may explain why the national press picked up the Brandeis story. Wendy Cole, writing in *Time*, spoke of the "outcry on this largely Jewish campus," which she felt was "understandable."[65] Kenneth Stern, in a letter to the *New York Times*, spoke of the "bonus" visibility this gave to Smith and the deniers.[66] It also made for an exceptionally heated debate, especially since David Turner, the editor-in-chief of the *Justice* (who, as it turned out, played no role in the decision to run the ad), was not Jewish. Turner was constantly harassed and left school the following semester. Turner and his fellow editors received little sympathy. In the words of American studies professor Jacob Cohen: "Let them suffer. I am not here to protect them against my own people."[67]

Meanwhile, the Jewish community debated the question represented by Howard Jeruchimowitz, the Jewish editor of the *Justice* who had played a key role in running the ad. Jeffrey Ross called the editors who ran the ad "marginal" Jews, who were "afraid people will say their journalistic instincts are being given a lower priority than their Jewish ones."[68] In response, Jeruchimowitz stressed the ad's function as a warning to the community: "It is important to show this generation that anti-Semitism and neo-Nazism still exist."[69]

The Brandeis debate illustrated the continuing attraction of liberalism for some American Jews. When forced to chose between Jewish values and free speech, Jewish editors opted for the latter. Strong opponents of denial like Ross and Lipstadt have been highly critical of this choice. (According to Lipstadt, Jews "are the only people who will demand a forum for their worst enemies.")[70] Bradley Smith exploited this value preference. Or did he? The critique of Jews as liberals assumed that the best approach to Smith ads was

exclusion. It failed to take seriously Jeruchimowitz's argument that the best Jewish response to the Smith ads was not censorship, but publication and exposure. Early in 1994 Queens College, which had a large Jewish student body, put the exposure approach to the test.

Letting in the Sunlight

On February 24, 1994 Bradley Smith's Holocaust Museum ad ran on the front page of the Queens College *Quad*. That was not all the *Quad* published. Taking to heart the famous quote from Justice Louis Brandeis that "Sunlight is the best disinfectant," the editors devoted the first six pages of the paper to Holocaust denial. In addition to the ad, the paper ran two editorials, a statement from the Queens College Council of Jewish Organizations, a statement from Shirley Strum Kenney, president of Queens College, an article on Deborah Lipstadt's then current *Denying the Holocaust*, an article on a panel on Holocaust revisionism held the previous week, and a student question section titled "On the Spot: What is the Extent of Your Holocaust Education?"[71]

The lead editorial "Revising Revisionism" set forth the editorial board's strategy.[72] Running alongside the Smith ad, it was divided in two by a large block quote reading: "The *Quad* wants to warn you that the adjoining material is hazardous to your head." The text of the ad warns students: "Don't be fooled by Smith." It described the decision to run the ad as "a preventive and educational measure," while proclaiming in bold print that the Smith ad was not a paid advertisement. The *Quad* returned Smith's $230 check. At the same time, the Quad told the community that its decision to run the ad had "absolutely nothing to do with the First Amendment, or free speech, and rightfully so." After lecturing other publications on the scope of the First Amendment, the paper argued that excluding the Smith ad would be an "ineffective" means of exposing the danger of Holocaust denial to the public.

This was a novel argument. In justifying its position that running the ad was the most "effective" way to deal with Smith, the *Quad* raised a series of points normally thought of as free-speech arguments. It quoted Thomas Jefferson to the effect that there was nothing "to fear from the demoralizing reasons of some, if others are free to demonstrate their errors." Here was the classic libertarian argument that free speech is the surest way to the truth. The editors then introduced a second free-speech idiom: "Printing the ad doesn't legitimate its content; it legitimates the threat his words carry. We dignify the ad so that we may condemn it. We introduce it to the 'marketplace of ideas' to dismiss it as the stale rot that it is." Toward the end of the editorial the *Quad* turned to its third and final free-speech theme, the Brandeis quote that "Sunshine is the best disinfectant."[73]

The *Quad*'s usage illustrates two roles free-speech rhetoric plays in American society. On the one hand, the editors' "sunshine" language reflected a genuine interest in exposing Holocaust deniers. In this effort, the editors share much with Deborah Lipstadt. This may be why the *Quad* reviewed

Lipstadt's book in the same issue that it ran the Smith ad.[74] On the other hand, the language used in the editorial had a second, negative purpose. The *Quad* did not want to be seen as a censor in a culture that deplores censorship. Having read Lipstadt on the First Amendment obligations of college newspapers, the *Quad* did not want to base its decision to run the ad on free speech directly. Instead, it did so covertly.

Did the *Quad*'s strategy of covert free speech work? On campus it was quite successful. In contrast to the vandalism, protests, and angry letters that characterized the campus response at Michigan, Ohio State, and Brandeis, the Queens College community criticism of the *Quad* was extremely mild. The statement from the Council of Jewish Organizations confined itself to a refutation of the Smith ad; it did not mention the *Quad* at all. President Kenney did take issue with the paper. But the tone she used was one of disappointment, not confrontation. She was "saddened" that the paper "after long, earnest, and well-meaning consideration" decided to print the ad.[75] This was a far cry from E. Gordon Gee's description of the Lantern's decision to publish as "dumb to the extreme."[76] None of the letters to the editor appearing in the March 7, 1994 *Quad* criticized the editorial board's decision.[77]

The *Quad* escaped criticism for two reasons. First, by not flaunting the First Amendment, it forced potential critics to take seriously its stated reason for running the ad—public education. Second, the paper did an excellent job in providing that education. The second editorial "A Man and His Lies" relied on the expertise of Michael Berenbaum, research director of the Holocaust museum and 1967 Queens College graduate, to rebut Smith's assertions. The article reviewing Lipstadt's *Denying the Holocaust* used that opportunity to warn students of the right-wing origins and suspicious methods of the deniers.[78]

While the *Quad*'s educational efforts helped calm the atmosphere on campus—and led the *Journal of Historical Review* to complain of the "barrage of smears and bigoted commentary" published by the Queens paper—it did nothing to silence the other voices in the Jewish community who were upset that the ad ran at all. Lipstadt had especially harsh words for Andrew Wallenstein, then-editor of the *Quad*. She complained that Wallenstein had "managed to twist himself around to come out on the side of angels." Speaking of editors who ran the ad in general she said: "Their minds are so open I think their brains will fall out."[79]

Wallenstein responded to the criticism by charging the older anti-revisionists with hypocrisy: "What I did in the Quad was no different than Lipstadt writing a book on Holocaust denial, or the ADL running their own ad with the speech by Khalid Muhammad. We are all in the same game."[80] This may go too far. Lipstadt and Wallenstein take different approaches on the crucial question of censorship. Where there is censorship, the result is a pitched battle between student journalists and segments of the Jewish community. The outcome of these battles is martyrdom for the newspaper, publicity for the deniers, and a loss of prestige for the Jewish community. Wallenstein's

approach, involving the disinfecting sunshine of exposure, avoided the martyrdom, publicity, and prestige. It had worked at a predominantly Jewish campus in Queens. Would it work when deniers started to appear on national television?

Toward a Revisionist Breakthrough?

The 1993–94 ad campaign appeared to offer Smith and the Holocaust deniers a real chance for a public relations breakthrough. During the first six months of 1994 deniers appeared on *Donahue* and *60 Minutes*.[81] According to the *Journal of Historical Review*, Smith was succeeding, as no one before him, "in making skeptical discussion of the Holocaust story an established part of America's social-cultural landscape."[82] The fears of Stern and Lipstadt that Holocaust denial would become "the other side of the story" were coming home to roost.

Or were they? The very theme that brought Holocaust deniers publicity in the first place—freedom of speech—limited the effectiveness of that publicity. The article that praised Smith's publicity efforts also noted that "[n]one of the student editors who made the decision to run Smith's ad have expressed public support for his skeptical view of the Holocaust gas chamber story."[83] Publicity for Holocaust deniers meant joining a cast of misfits and outcasts made into household names by the First Amendment. Gaining a serious hearing for Holocaust denial as a set of claims about history was another story. Phil Donahue explained his decision to air a program on Holocaust deniers in First Amendment terms: "I believe there should be intellectual freedom on this issue. That's why you're on the program."[84] Lipstadt and Stern may wince, but that very language told the audience not to expect any serious content.

The limits free speech places on revisionist publicity were further demonstrated by a column written by William F. Buckley on Holocaust deniers for the *National Review*.[85] Initially, this might appear to be a serious breakthrough for Smith, the IHR, and other deniers. The *National Review* is a conservative publication with a broad readership. But from the very title of the piece—"First Amendmentitis"—it becomes clear that Holocaust deniers are simply an occasion for Buckley to talk about something else, in his words "the epistemological pessimism of academic freedom." To be sure, Buckely questions whether the deniers are anti-Semites: "That isn't necessarily the case: the historical revisionist is not necessarily pro-Communist any more than Charles Beard was pro-Kaiser, or Charles Tansill was pro-Tojo."[86] Still, the important point for Buckely remains the First Amendment: "just as it guarantees the freedom to pursue the truth, it guarantees others the right to deny the truth."[87]

Perhaps more important for the long term, the brief burst of revisionist publicity did not last. In the years that followed Bradley Smith has continued to send ads to college newspapers and each year a substantial number print them.[88] But there has not been the same level of national media coverage.

Simply put, the Bradley Smith ads have now become old news. An ad can still spark campus controversy, but that is the extent of it. Attention is now focused on the World Wide Web, which provides on-line users with direct access to revisionist materials.

Even on the campuses the debate over the Smith ads has become "rationalized." Presently two schools of opinion exist. On the one hand, many still follow Lipstadt's argument that the student papers that run revisionist ads misunderstand the First Amendment. This is the view taken by Katherine Bischoping who undertook a content analysis of student reactions to the *Michigan Daily*'s 1991 decision to run the Smith.[89] After informing her readers that "the Daily's editor is not *required* by any constitutional argument to allow Holocaust deniers to advertise," Bischoping concluded that the strong student support she found for civil liberties in her survey—approximately two-thirds of those asked supported the *Daily*—rested on "a weak grasp of certain civil liberties principles and their applications" (emphasis in original). Not surprisingly, she called for "better education about civil liberties."

For others, eight years of First Amendment "education" has had surprisingly little effect. In 1999 the paper at Connecticut College, the *College Voice*, ran a Smith ad. The editors explained that the First Amendment means "having an advertising policy for ideas we like, as well as ideas we may despise."[90] The editors cited *Cohen v. California* and *New York Times v. Sullivan*, the latter case for the proposition that "political advertising" deserves First Amendment protection.[91] Even if these students were wrong about the letter of the law, they expressed its spirit. Americans detest censorship. To avoid the role of censor, student editors fashioned the principles underlying the First Amendment for their own purposes. But the underlying principles are shared even by Lipstadt and Dershowitz, both of whom oppose prosecutions of Holocaust deniers on principled as well as pragmatic grounds. It is, therefore, naïve to expect idealistic college students to disregard the same values.

CONCLUSION

In the United States free speech is not only a legal norm, but also a powerful cultural norm, especially for aspiring student journalists. As a result, debates about whether the Smith ads (and the papers that ran them) disrespected Holocaust quickly became debates over censorship and freedom of speech. It was not just the student journalists who relied on First Amendment themes; supporters and even some opponents of the paper put a First Amendment twist on their arguments. For example, the accusation that the Jewish editorial board member of the Brandeis *Justice* chose to be a good liberal rather than a good Jew, starts from the presupposition that liberalism and anticensorship are the same thing. The influence of First Amendment values has so permeated the culture that they influence how Americans view the Holocaust itself. In Germany (and to a lesser extent in France) opponents of denial deploy the fear of a Nazi return to power to

defend laws against Holocaust denial. By contrast, University of Michigan President James Duderstadt used fear of Nazism as a reason *not* to censor denial. Using the familiar slippery slope argument, he saw censorship as being the first step toward tyranny and, ultimately, another Holocaust.

So much for the causes, what about the consequences? While Americans were not able to avoid the Holocaust denial scandals that accompanied flawed prosecutions in Canada, France, and Germany, the significance of the scandals depends on one's perspective. To the extent that one takes the position that any publicity about Holocaust denial is bad because it gives the deniers an opportunity to promote their views, then the scandals at Michigan, Ohio State, and Brandeis were counterproductive. If, however, one starts from the perspective of Justice Brandeis and the Queens College *Quad*, and say the more we know about denial the better, the less serious the scandals appear. This, too, reflects a distinctly American tradition of minimizing extremists by exposing them, a tradition Lipstadt herself epitomizes in her book *Denying the Holocaust.*

The problem with the scandals lay elsewhere. For Holocaust survivors and the Jewish community on campus, the Smith ads came as both a shock and an insult, especially in those cases where the newspaper simply ran the ad without explanation. Under these circumstances, outrage was to be expected, as were restorative acts. These acts demonstrated that the campus would not tolerate Holocaust denial. To the extent these acts were targeted against Holocaust denial itself, they did little harm. But when, as often occurred, survivors and the campus Hillel chapters vented their rage on the student papers, they encountered a backlash based on the libertarian leanings of their fellow students. This was most noticeable at Ohio State University but was present on the other campuses as well.

The marketplace of ideas, the disinfecting power of sunshine, the utter futility of censorship: these ideas and not insensitivity to the Holocaust, explain why the student editors ran ads denying the Holocaust and why others on campus supported them. But the libertarian values behind these ideas were distinctly American. Most modern democracies recognize the right of the state to punish hateful and insulting speech. These communitarian norms enabled Canadians, French, and Germans to prosecute Holocaust deniers—prosecutions most Americans abhor. But, as we shall see, these same norms also made it easier to censor Holocaust deniers informally.

This page intentionally left blank

Chapter 7

The Hidden Benefit of Criminal Sanctions

So far we have discussed the dilemma of toleration from an American perspective. The strongly libertarian ethos of the United States led some student journalists to run ads denying the Holocaust, lest they be accused of censorship. By contrast, Canada, France, and Germany take a less absolutist approach toward the regulation of hate speech in general and Holocaust denial in particular. In these countries, the debate is over how far the restrictions should go, not whether restrictions are justifiable in the first place. In turn, Canadians, French, and Germans have proven far more willing than their American counterparts to exclude Holocaust denial from the public stage.

In telling the story of informal censorship in Canada, France, and Germany, this chapter has two purposes, (i) to show via indirect proof that the American student journalists were influenced by distinctly American cultural norms; and (ii) to begin to map out how other cultures approach speech questions. Both of these purposes are part of a larger effort to relate the libertarian attitudes toward speech in the United States to the more communitarian norms that prevail in the rest of the world.

Free Speech Versus Hate Speech

Canadian attitudes toward the regulation of hate speech stand midway between the strong libertarian ethos of the United States and the greater toleration for speech regulation we find in Continental Europe.[1] Accordingly, informal censors in Canada faced some of the same problems faced by the American student journalists. But the weight of the debate shifted. The student journalists who ran the Smith ads stood their ground—and were respected for it. Canadians in the same position faced withering criticism to which they occasionally succumbed.

Canadian support for free speech has a long pedigree. In the 1938 *Alberta Press* case, the Canadian Supreme Court held that an Alberta law regulating the press was beyond the constitutional powers of the province. The concurring

opinion of Judge Cannon stressed the Canadian citizen's right "to express freely his untrammeled opinion about government policies and discuss matters of public concern."[2] Nor was the *Alberta Press* case exceptional. During the 1950s the Supreme Court used the same rationale to protect Jehovah's Witnesses against Quebec's efforts to silence them.[3]

At the same time, free speech is not unlimited in Canada. Rather it is, as Judge Cannon stated in the *Alberta Press* case, subject to "the limits set by the criminal code and the common law."[4] One important limit is § 1 of the Charter of Rights and Freedoms, which subjects the exercise of several fundamental rights, including freedom of expression, "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This section, which recalls the French Declaration of Rights of Man, the German Basic Law, and the European Charter of Human Rights, has been used to uphold restrictions on pornography and hate speech.[5]

This brings us to a second distinguishing feature of Canadian speech regulation. Canada is a consciously multicultural society, as is reflected in the Charter of Rights and Freedoms, which is interpreted "in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."[6] This heritage comes from Canada's founding as a bicultural community (English and French) and the long struggle of the French community for equal cultural standing with the English majority. This experience made Canadians sensitive to group differences.[7] The resulting emphasis on group rights shaped Canada's policy toward hate speech.

Nonetheless, it took time for group libel legislation to emerge. In the 1930s, when official Canada was bicultural at best, the Canadian Jewish community tried without success to fight anti-Semites in the courts.[8] The decisive change came only in the 1960s as immigration shattered the bicultural model of Canada and a wave of racist and neo-Nazi activity pushed Canadians to rethink their attitude toward group libel. The new thinking bore fruit in 1969 when the Cohen Committee, which had spent four years surveying "the nature and scope of the hate propaganda problem in Canada," released a report advocating the passage of hate speech legislation.[9]

In reaching this conclusion, the Committee stressed the threat that hate propaganda posed to Canadian society as a whole:

> The number of organizations involved and the numbers of persons hurt is not the test of the issue; the arithmetic of a free society will not be satisfied with over-simplified statistics demonstrating that few are casting stones and not many are receiving hurts. What matters is that incipient malevolence and violence, all of which are inherent in "hate" activity, deserves national attention. However small the actors may be in number, the individuals and groups promoting hate in Canada constitute "a clear and present danger" to the functioning of a democratic society. For in times of social stress such "hate" could mushroom into a real and monstrous threat to our way of life.[10]

Acting on this "clear and present danger," parliament passed laws against advocating genocide and inciting racial hatred in 1970. While procedural

formalities that made prosecutions under the new laws extremely rare, the laws expressed a societal consensus against hate propaganda. This anti-hate consensus was also reflected in human rights legislation, immigration and customs policy, and public opposition to hatemongers.

The public opposition to hate speech is extremely deep seated. Even those who oppose the hate speech laws on civil liberties grounds are careful to distance themselves from the hatemongers. An example will illustrate this. In 1986 Alan Borovoy, president of the Canadian Civil Liberties Association (CCLA, the Canadian equivalent of the American Civil Liberties Union, ACLU), wrote a letter to Douglas Christie, Ernst Zundel's attorney. At this point Zundel had already been convicted and the case was on appeal. One of the questions was whether the False News Law violated freedom of expression. The CCLA wanted to join the case as an intervener.[11]

In America this would be unexceptional. The ACLU routinely defends the rights of racists and anti-Semites without being identified as racist or anti-Semitic. But Canada is not the United States. Borovoy's letter chastised Christie for appearing to condone the views of his client, explaining that the CCLA was "especially concerned that its reputation and resources" could be subject to "misuse" if it became involved "in a case of this kind." He conceded that lawyers often espoused the views of their clients, but the ideology of Christie's client was "so unwarrantedly malevolent that it would behove anyone, whether their counsel or otherwise to keep at arm's length from them or what they represent."[12]

As this example shows, in Canada even civil libertarians temper their free-speech ideology with a nod to the social consensus against hatemongering. To see how this consensus promoted the informal censorship of Holocaust denial, this section considers two cases involving public libraries. In 1988 the Edmonton Public Library refused to remove revisionist materials from its shelves. Seven years later, the Calgary Public Library acceded to the same request. Although the two cases ended differently, they both reflected a public unease with free speech as applied to Holocaust deniers.

The Edmonton case arose in the aftermath of Ernst Zundel's second trial for spreading false news.[13] In May 1988, as a Toronto jury found Zundel guilty for a second time in three years, Wojciech Buczynski, secretary of the Polish Culture Society of Edmonton, discovered that the Edmonton Public Library carried ten books from the Institute of Historical Review, including *Is the Diary of Anne Frank Really Genuine?* and *The Dissolution of Eastern European Jewry.*[14] When he asked library president Vincent Richards to remove the books he touched off a controversy over the rights and responsibilities of libraries.

To an American eye the Edmonton debate looks familiar. Like the college editors who ran Bradley Smith's ads, Richards chose exposure over exclusion. He refused to bow to pressure to restrict the "intellectual freedom" of the 300,000 readers who used the library.[15] Like the campuses where the Smith ad ran, the larger community was split down the middle. Of ten letter writers to the *Edmonton Journal*, four favored removal, four defended

Richards, and two argued that the books should be kept but segregated from other books on the Holocaust.[16]

A closer analysis, however, reveals a major difference. Both supporters and critics of the library used Canada's hate speech laws as a fulcrum for their arguments. For those favoring removal, the jury verdict in *Zundel* proved that Holocaust denial literature was beyond the pale of acceptability in Canada.[17] What the courts outlawed, libraries must exclude. For those, like Richards, who were opposed to removal, the failure of the courts to censor precluded the library from doing the same.

> If the courts prohibit books or other material for being hate literature or pornographic, then no library should circulate it. If some people are of the opinion that certain books may be hate literature or pornographic material, then they can certainly allege that and try to prove it. However, if they state that it is so, and imply that others are guilty of circulating something when it is illegal to do so, then many would consider that defamatory.[18]

Nor was Richards alone. John Flemming, another opponent of "censorship," said that the status of "anti-Holocaust books" was "for the courts to decide[.]"[19]

The focus on legality changed the debate. The editors at Michigan, Ohio State, Brandeis, and Queens College defended free speech on principle. By contrast, Richards and Flemming make what is, in effect, a separation of powers argument: censorship is a task for the courts, not libraries. While this argument shielded the Edmonton Public Library from criticism, it undercut the ground for such resistance. When Richards dares Buczynski to sue Holocaust deniers under the hate speech laws, he concedes the legitimacy of such laws.

Richards' language was notable for a second reason. He accused his critics of defaming librarians. Nor is this the only example of a defender of "intellectual freedom" invoking sanctions against the intolerant. For Tom Taylor the "attempts to throttle freedom of thought and speech are foreign to our British heritage." Taylor closed his letter with a warning: "Let it be made clear to all such that their offensive attitudes and actions are not to be tolerated in Canada."[20] Taylor and Richards concede the power of the state to restrict speech, they simply oppose censorship in this particular setting.

Although the Polish Culture Society failed to rid the library of Holocaust-denial books, it won the ideological debate. No one argued that deniers had a right to be heard or defended denial as an "idea" or "viewpoint." Only the legal system's failure to act made Richards' refusal to censor justifiable. Conversely, when the legal system does act, when it censors Holocaust denial materials, the public will rally to its defense. This occurred in our second case study, involving the Calgary Public Library. In 1983 the library acquired a copy of Arthur R. Butz's *The Hoax of the Twentieth Century*.[21] Eleven years later Yvonne Dick, an Alberta high school student, signed out the book for a research project. She showed the book to her teacher, who said it was

banned in Canada. Dick turned the book over to the local branch of the Royal Canadian Mounted Police who then destroyed it.

The Mounties destroyed the book under an April 1984 order by the Canadian Customs Office that placed Butz's book on a blacklist. It was illegal to import these books; possession was not illegal. Thus, in destroying the book, the Mounties went beyond the scope of the law. In addition, they violated procedural formalities by obtaining the book without a search warrant and destroying the book without a formal hearing.

Nevertheless, the response to the Mounties' action was muted. A local librarian thought the Mounties' decision was "rushed," but added they had not acted "out of malice." Gerry Meek, director of the Calgary library, criticized the police for "retroactively legislat[ing] what can or can't be held in the library," but became defensive when discussing the Butz book itself. He said the library "attempts to acquire material on as broad as possible range of viewpoints." The Jewish community was just as tentative. Public relations director of the Calgary Jewish Community Council, Riki Heilik, said that book burning always concerned Jews, but noted that many in the community were upset about the book. Therefore, the Council favored leaving the book in the library on a noncirculating basis.

There were no ringing defenses of freedom of speech. No one felt that Holocaust denial deserved a hearing. To the extent anyone complained, it was because the Mounties acted too hastily. The incident demonstrates how legal norms shape what the public finds acceptable. The Canadian constitution allows "reasonable" limits of speech. Parliament determined that hate laws represented one such reasonable limit. Once parliament spoke, the debate was over. Abstract, absolutist defenses of hate speech were rare.

Meanwhile, administrative censorship of Holocaust deniers is on the rise. Dissatisfied with criminal prosecutions, Canadian Jewish organizations have brought deniers before federal and provincial human rights commissions. The commissions are state agencies with the power to mediate disputes through informal hearings and, in appropriate cases, administrative sanctions such as dismissal from office and fines.[22] In 1988 the New Brunswick Human Rights Commission removed Malcolm Ross, a school teacher who wrote about Holocaust denial in his spare time, from the classroom.[23] In 1998, the British Columbia Human Rights Commission began proceedings against Doug Collins, a Vancouver reporter, for an article entitled "Hollywood Propaganda," that described the Steven Spielberg film *Schindler's List* as "hate propaganda" and estimated the total number of Jews killed in the Holocaust in the "hundreds of thousands."[24]

Attention has also turned to the Internet. New computer technology, especially the World Wide Web, has enabled Holocaust deniers to escape the network of formal and informal censorship. According to Sol Littman, director of the Simon Wiesenthal Center in Toronto, revisionist websites "constitute a clear threat to our multicultural, multi-racial and multi-religious society[.]"[25] To meet the threat, the federal government formed the Information Highway Advisory Counsel, which released a series of

proposals, including a plan to make all logs of internet user activity available for police investigations.[26]

The new administrative forms of censorship enabled the CJC to finally score a victory over their old foe. In 1997 the CJC and the City of Toronto began a human rights action against Ernst Zundel.[27] At issue was the Zundelsite, a revisionist website charged with promoting hate. The complainants relied on § 13 of the Canadian Human Rights Act, which covers those who "telephonically transmit hate." After four years of contentious litigation, Zundel left for the United States, where he could run his website without worry of regulation. Zundel's lawyers continued to contest the charges in Canada. But this was to no avail. In January 2002 the Ontario Human Rights Commission held that § 13 applied to the Internet, that the Zundelsite spread hate, and that § 13 did not run afoul of the Charter of Rights and Freedoms.[28]

Yet the complainants' victory was hollow. As the Commission itself recognized, its ruling could not stop Zundel from running his website from the United States. Nor could it prevent the citizens of Ontario accessing the site.[29] Just as the invention of the printing press greatly complicated the task of medieval censors, the World Wide Web has curtailed the power of the nation-state to censor.[30] The Zundel saga, however, took an odd twist when, in February 2003, immigration authorities in the United States deported Zundel to Canada for overstaying a visa. Canada, in turn, has sought to deport Zundel to Germany, where he faces charges for denying the Holocaust.[31] While this may shut down the Zundelsite, it will not resolve the larger question the Internet poses about the enforceability to national Holocaust-denial laws.[32]

At the same time, the ruling reflected Canada's commitment to using the law against hatemongers. Warren Kinsella, the author of the 1994 exposè on right-wing extremism, *Web of Hate*, calls the law "our best instrument in restricting—and eventually stopping—the dramatic growth of racist ideologies in Canada."[33] In this atmosphere, absolutist civil libertarianism is suspect. Thus Kinsella reports that "[i]n Canada, regrettably, some of the most stirring defences of unbridled free expression come, ironically, not from civil libertarians but from this country's far right."[34] This stands in contrast to the United States, where prominent opponents of denial, such as Deborah Lipstadt and Alan Dershowitz, also oppose prosecutions.

In general Canadians trust in state authorities to police Holocaust denial (and other forms of hate speech) without overstepping its bounds. When the state goes too far—as some Canadians felt it did in the Edmonton and Calgary cases—charges of censorship will emerge. But the resulting controversies will be less serious than their counterparts in the United States. In our next case study, France, these controversies barely surface at all.

FRANCE: THE POWER OF THE STATE

Vincent Richards of the Edmonton Public Library made a separation of powers argument against removing revisionist books. Censorship is the job

of the state, not the libraries. In this section we look at an example of academic censorship that illustrates a different division of power. In 1985 Henri Roques received a doctorate from the University of Nantes for a revisionist thesis. In 1986 Alan Devaquet, Deputy Minister for Research and Higher Education, revoked the degree on a technicality. This revocation was affirmed by the Conseil d'Etat, France's highest administrative court.[35] The Conseil did not address free speech, nor was there great outcry over censorship at the time. When viewed from a comparative perspective, the Roques affair demonstrates the power of the French state in setting the bounds of censorship.

French attitudes toward protection of speech and administrative censorship go back to the French Revolution. On the one hand, the Revolution established free speech as an important societal value. Article II of the Declaration of Rights of Man states that: "Every citizen may henceforward speak, write, and publish freely, except to answer for the abuse of this liberty in those cases determined by law." Yet this liberty was always limited. Over the next century French speakers were frequently called to answer for "abuse" of liberty. The Jacobins restricted the freedom of the press, as did Napoleon. Even the more liberal press law of 1819 still criminalized speech acts directed at offenses against royal and religious authority.[36]

The ambivalence toward speech continued in the Third Republic. The Press Law of July 29, 1881 replaced specific crimes of opinion with general press offenses. At the time this marked an expansion of press freedom.[37] As the period wore on, however, the Press Law was expanded to include, "anarchist propaganda," "the apology of crimes," and, much later, the Gayssot Law. At the same time, however, the Press Law prosecutions offered French citizens a ritualized opportunity to challenge the state. According to Jerome King:

> It is not simply a matter of defending certain *droits acquis*, although of course every publisher has a strong financial interest in the works he publishes. More important is the principle involved, which is the citizen's right to take an irresponsible position in the face of the State's tutelage. The citizen's relations with the state are defined in the public temples, and for those whose business is the dissemination of ideas, the rituals to which they have become devoted by usage are those of the Press Law and its amendments, while the altar at which they sacrifice is the Bar, with the aid of the priests of the law.[38]

This opportunity to take "an irresponsible position" existed because press law violations were tried in criminal courts, where judges (and the public) took the ideological content of the speech seriously.

Prosecutions, however, do not exhaust the possibilities for restricting speech. A second option is administrative censorship—typically the seizure of books, pamphlets, or newspapers by a local prefect. Administrative acts of censorship are tried not in criminal courts, but in administrative tribunals. The administrative tribunal, reviewing the seizure of a paper by a local prefect, restricts its questioning to the necessity of the seizure. Here, according

to King, the "utilitarian or expediential" concerns of "order" are paramount: "Order is thus in the French view properly protected by police action, whose appropriate mode is preventative and therefore, in the realm of speech, necessarily a matter of prior restraint. It is up to the State as administrative apparatus to keep the fences up."[39]

"Keeping the fences up" does not require a libertarian ethos. The French administrative hearing is not a contest between two parties, still less a test of how far the society will tolerate extremist or unpopular ideas. It is simply a limit on state power. A French administrative court will not protect freedom of speech; it will, however, stop those acts of censorship that involve a prefect overstepping his or her powers.

An example of state censorship during the Algerian War (1954–62) demonstrates this. On June 19, 1959 French police seized copies of *La Gangrène* from French bookstores.[40] The book, released three days earlier, described in grisly detail how the French tortured Algerian rebels, not in Algeria, but in Paris itself. After a series of reviews that roundly criticized the government, the state seized the book. Because this was an administrative action, opponents of censorship were unable to force the government to defend itself in a court of law. In late June, Jerome Lindon complained that since the seizure "neither Les Editions de Minuit nor the authors of the book have been given a hearing by the police or by the judge."[41] Even if Lindon had received a hearing, he would have been limited to debating the circumstances of the seizure, not the book itself.

This restrictive approach to administrative censorship was on display in the *Roques* affair. At first, the revocation of Henri Roques' doctoral thesis by the University of Nantes seemed to afford the deniers a golden opportunity for propaganda, much like the Faurission trials of the early 1980s. But like the author of *La Gangrène*, Roques was unable to generate a public debate over his claim of censorship. The Roques affair is also interesting in the context of the American student editors. The student editors who ran the Bradley Smith ads did so because they did not want to be seen as censors. In doing so they were following legal norms enshrined in the First Amendment. In France, the legal system accepted censorship, so long as it was administratively proper. Therefore, censorship played a far smaller role.

Roques, a retired agronomist, began his thesis in 1981. Its subject was Kurt Gerstein, an SS Officer. Following his capture by the French Army in 1945, Gerstein wrote a lengthy confession highlighted by a harrowing account of a mass gassing he witnessed at Treblinka. Roques' thesis, "The 'Confessions' of Kurt Gerstein. A Comparative Study of Different Versions," compared and contrasted six different versions of Gerstein's confession. Four were in French and the other two were in German. He concluded that the German versions were not authentic.[42] Were this all Roques said, his thesis might have passed without controversy.

Roques, however, used Gerstein's account to support Holocaust denial. In addition to dismissing the German texts, Roques identified twenty-nine "improbabilities and unrealistic assertions" that cast doubt on the validity of

Gerstein's story.[43] Thus Roques drew attention to Gerstein's claim that the gassing he witnessed at Treblinka involved 700–800 persons. The gas chamber, however, was only 25 meters square. Roques noted: "A simple mathematical division permits us to question the possibility of packing thirty persons or thereabouts into one square meter."[44]

Instead, however, of concluding that Gerstein had mistakenly overestimated the number of victims, or perhaps even rejecting his entire account on that basis, Roques used this "unrealistic assertion" to raise doubts as to the gassings themselves. To that end, he concluded his thesis with the following question: "Why have the Exterminationists considered a text so extravagant and crammed with improbabilities one of their best proofs of the existence of the gas chambers?"[45]

In April 1984 Roques completed his thesis. His adviser, Jacques Rougeout, looked for a jury before whom Roques could defend the thesis in the 1983–84 academic year. Given the "explosive character" of the work, Rougeout sought a committee "above all suspicion."[46] Rougeout, however, could not find enough professors to form a jury.[47] Rather than give up, Roques looked for another adviser and in early 1985 Jean-Claude Rivière, a professor of medieval literature at the University of Nantes, took up his offer.

Unlike Rougeout, Rivière was able to form a jury. The two other members of the jury were Jean-Paul Allard who taught German language and literature at Lyons-III, and Pierre Zind, a professor of religious history at Lyons-II. In addition Theiry Buron, an assistant to Rivière was scheduled to serve as rapporteur.[48] On June 15, 1985 Roques defended his thesis. In France these events are public, as a result several friends of Roques attended the defense. Absent, however, was Buron, who had to attend a family function.[49]

At the time, no one noticed Buron's absence. The jury approved Roques' thesis, giving it a grade of "*tres bien*."[50] Had Roques been content to remain quiet, it is entirely possible that he would have his doctorate today.[51] This, however, was probably never Roques' intent. Well-connected in right-wing circles, Roques immediately used his university thesis to publicize Holocaust denial. In October 1985 Roques communicated the results of the thesis defense in a press release to 150 journalists and historians.[52] The following January *La Vieille Taupe*, a revisionist publishing house, advertised Roques work: "This thesis, which destroys the credit accorded up to now to that witness to the origin of the myth of the gas chambers, received a mention of very good."[53]

Despite these efforts, nothing much happened until May 1986. On the May 15 a report by Phillipe Bouglé, an investigative journalist, entitled "*Une 'affaire Faurisson' à Nantes?* (A 'Faurisson affair' in Nantes?)," appeared in *La Tribune*, a left-wing Nantes weekly. Bouglé reported on a petition circulated by fifteen members of the Nantes faculty. They complained that the good name of the university had been "thoughtlessly" attributed to a work that, "under the cover of a pseudo-critique of texts," contributed to a "systematic campaign of disinformation" undertaken by "the extreme neo-Nazi right."[54]

News of Roques' thesis soon reached the national stage, where the reaction was overwhelmingly negative. On May 22 the radio network Europe 1 did a show on "the scandalous thesis of Nantes." The following day the television program "*Découverte* (Discovery)," aired a debate in which Roques and his attorney Eric Delcroix stood opposed to a cross-section of the French elite including Claude Lanzmann, George Wellers, Jean-Claude Pressac, and Bernard Jouhanneau. Appearing via telephone were Simone Veil and Alain Devaquet, Deputy Minister for Research and Higher Education.[55] The exchanges became heated; Lanzmann called Roques "a dirty rat-face." Meanwhile, the national press harshly criticized Roques' work, often, according to his defenders, without reading it.

On May 25 Devaquet took action. He announced the formation of an investigation into how Roques could have defended his thesis.[56] The press and general public were also raising their own questions. Most of the attention focused on the political background of the jury members. The same day Devaquet announced his investigation, *Le Monde* reported that Jean-Claude Rivière "was known for his extreme right-wing opinions."[57] Critics also noted that the jury lacked modern historians. Rivière and Zind were medievalists, Allard studied German. Roques defended his thesis in the French Language and Literature department. This was interpreted as an attempt to sneak the thesis through. Thus, the petition of Nantes professors, which had grown by June to include over eighty signatories, spoke of a "clandestine defense."[58]

There was also a question about Theiry Buron, the rapporteur. As noted, Buron did not attend the defense. Yet his name appeared on a list of those present. Roques and his supporters tried to dismiss the importance of the falsified signature as an oversight, which was not necessary for the thesis defense to be valid.[59] For Roques' opponents, however, the false signature was a way out of the embarrassment caused by the doctorate.

On July 3, 1986 the chief administrator of the University, P. Malvy, annulled Rocques' thesis in a one-page memorandum. He said that the thesis had been "tainted by irregularity."[60] There was no discussion of what that irregularity was—although the falsified signature and the absence of a historian on the panel were possibilities.

Outside revisionist circles there was little protest over the revocation of Roques' thesis. No one called Malvy a censor. No one protested in the name of free speech. In this context one should recall not only the support for free speech in the United States and Canada, but also the substantial body of French opponents of denial who would later oppose the Gayssot Law on free-speech grounds. For instance, Pierre Vidal-Naquet, recalling his suspension from school in 1960 for opposing the Algerian war, thought the court should have questioned the jury before reaching a decision. As for the ruling itself, Vidal-Naquet called this "an administrative act" adding that he now considered Roques' thesis "null."[61]

Not only was Vidal-Naquet's criticism of Malvy and Devaquet lukewarm, it was narrow in scope. Vidal-Naquet did not accuse Malvy and Devaquet of

censorship (still less did he defend Roques' right to freedom of speech). Instead, Vidal-Naquet limited his complaints to a procedural issue—the thesis had been annulled without a hearing from the jury. In short, he took the perspective of administrative law; the question was not whether the French state censored Roques' thesis, it was whether they had followed the proper procedures in doing so. The American college campus, where student editors defended Bradley Smith's right to have his views heard, could not be further away.

The stress on administrative formality also surfaced during Roques's appeal. After an administrative tribunal affirmed the annulment in 1988, the case reached the Conseil d'Etat in 1992.[62] The Conseil went over the circumstances of the thesis defense in detail. In affirming the annulment, it noted that more than half the jury members were "strangers" to Nantes and that the professor who oversaw Roques dissertation was not present as the law required.[63] Totally absent from the ruling was any reference to free speech or intellectual freedom. This is striking when one recalls that the Conseil is the highest French administrative court. While one could imagine the U.S. Supreme Court using a technical ground to avoid invoking the First Amendment, it is harder to envision it ruling on a case like this without even raising free speech as a possible concern.

In a French context, however, the ruling made perfect sense; the Conseil's role is to make sure that administrators follow the rules, not to use intellectual freedom or some other normative principle to undermine them. This does not mean that free speech has no place in French legal culture. Rather it points to where free speech and legal fairness are located. When the French refer to censorship, they think of the criminal context, a context where speech is protected by the 1881 press law. On the other hand, it would be wrong to overstate the institutional protection of free expression in France. While objections to particular acts of censorship have been plentiful, principled rejections of censorship have been harder to find. The silence that followed the annulment of Roques' thesis reflects a tradition of administrative censorship as much as it does the unpopularity of the revisionists. Germany, to which we now turn, presents a mirror image: In a society that prides itself on protecting speech, Holocaust deniers are one group that is beyond the pale.

Militant Democracy and the Limits of Free Speech

In November 1993 *Beruf Neonazi* (Profession: Neo-Nazi) appeared in German cinemas. The film was an expose of neo-Nazis. It was funded by four state governments (Brandenburg, Hamburg, Hesse, and Mecklenberg-Vorpommern) and featured a director, Winifred Bonengel, who had solid anti-fascist credentials. Bonenegel intended the film as a warning about the dangers of neo-Nazism; instead, his documentary was accused of promoting this very danger. A coalition of politicians, prosecutors, and anti-fascist activists protested the film, which was soon withdrawn from distribution.

The *Beruf Neonazi* case raises informal censorship to new heights. The examples drawn from America, Canada, and France involved the exclusion of explicitly revisionist material. Here, by contrast, the target is a documentary filmmaker who opposed Holocaust denial.

What motivated Germans to censor *Beruf Neonazi?* One possible answer, that Germans do not respect free speech, will not hold. In contrast to France, free speech has considerable institutional and cultural support. It is protected by Article 5 of the Basic Law.[64] Nor is this a paper protection. In a series of notable cases the Federal Constitutional Court has interpreted Article 5 expansively.[65] Instead, Germany is closer to the Canadian pattern, where a commitment to free speech is balanced by countervailing values. But whereas in Canada free speech and multiculturalism are evenly matched, in Germany the competing values are stronger. Foremost among these is militant democracy, the idea that the state must defend itself against internal enemies. When one adds to this a national preoccupation with the Holocaust, the pressure for censorship outweighs free speech. The 1994 *Holocaust Denial* case demonstrated that the Federal Constitutional Court saw no free speech problem with laws against Holocaust denial. In the controversy over *Beruf Neonazi*, which unfolded in late 1993 and early 1994, a similar balance of forces led to the same result.

While militant democracy is often described as a reaction to the Weimar republic's failure to contain Nazism, its historical roots date back to the nineteenth century, if not earlier. The idea that the state can and must protect itself against internal foes was present in the 1819 Karlsbad decrees, which were aimed at protecting the post-Napoleonic German Confederation from student radicals.[66] Sixty years later Bismarck used Penal Code §130, the section that currently outlaws Holocaust denial, to ban the Social Democratic Party. Nor did Weimar lack defenses against extremists. While the rather light six-month sentence given Hitler following the 1923 Munich putsch is well known, less well known is the fact that Bavaria banned Hitler from speaking in public in the 1920s.

In the postwar era, the Federal Republic of Germany has continued in the tradition of militant democracy. The Basic Law gave the Federal Republic the power to ban parties, restrict extremist speech, and otherwise fight its enemies.[67] More often than not, these enemies have been on the Left. The postwar era has seen two major purges. The 1956 Federal Constitutional Court ruling banning the German Communist Party (KPD) unleashed a series of prosecutions and surveillance measures aimed at those with communist associations. During the 1950s and 1960s approximately 200,000 people were involved in judicial proceedings, 10,000 of whom were fined or sentenced to jail time.[68] The 1970s also saw the enactment of the antiradical decree. This decree gave the Federal Republic the power to dismiss public officials who belonged to extremist groups.[69]

The Federal Republic did not ignore the extreme Right. In 1952 the Federal Constitutional Court banned the Socialist Reich Party on the ground that it was a successor to the NSDAP.[70] But there were few prosecutions of right-wing

extremists, continuing the Weimar-era pattern of treating the right-wing more leniently. Following a wave of antiforeigner violence in the early 1990s, however, the government changed its policy. In 1992 it banned four small right-wing organizations. By the time *Beruf Neonazi* appeared, the focus of militant democracy had turned decidedly rightward.

While the willingness of the Federal Republic to pursue right-wing extremists has varied over the years, militant democracy has always had a special role to play in the fight against anti-Semitism. The wave of anti-Semitic incidents that swept across West Germany in the late 1950s led many in the Federal Republic to interpret the basic law in a more communitarian fashion—opposing anti-Semitism took precedence over protecting speech. Hans Gathmann, writing in the Christian Democratic monthly *Die Politische Meinung* (Political Opinion), stated the dominant view:

> Article 5 of the basic law of the Federal Republic gives every citizen the right to express and spread freely their opinion in words, writings and pictures, so long as they do not violate the standing paragraphs of the criminal code (Insult, Defamation, Endangering the State). Even opponents of democracy, have this right, so long as they operate within the legally determined boundaries. Even anti-Semitic remarks are not entirely prohibited. They are, despite cultural or political considerations, as possible with us as in other lands.[71]

Gathmann's discussion of anti-Semitism also illustrates the role of the state in setting the limits of toleration, an important feature of militant democracy. What the state tolerates, society will tolerate. What the state proscribes, society proscribes.

The combination of militant democracy, the role of the state in setting cultural norms, and a concern about anti-Semitism, help explain why the German public had such a hostile reaction to *Beruf Neonazi*, a film that was widely praised outside of Germany.[72] Added to this were the film's sympathetic protagonist and his violation of German taboos about the Holocaust. Ewald Althans was a well-spoken, well-dressed, young neo-Nazi. The film follows Althans as he goes about his business. One moment he is in Canada, meeting with Ernst Zundel; later he addresses a youth rally at Cottbus, in the former East Germany. To force the viewer to confront the reality of neo-Nazism, Bonenegel eschewed narration. The film's most controversial scene takes place at the Auschwitz gas chamber. As the camera rolls, Althans explains to anyone who will listen that the Holocaust is "a complete enormous lie." While a German-speaking tour group remains mute, a young American engages Althans in a heated discussion (in English with German subtitles). At one point, Althans tells his interlocutor: "No, we didn't exterminate them [the Jews], because they have all survived and they're all taking money now from Germany." At another, he calls Auschwitz the "disneyland of Eastern Europe."[73]

The picture of a German denying the Holocaust at Auschwitz was disturbing for many viewers. Equally disturbing was the failure of the German-speaking

tour group to say anything in response. These images challenged the picture of a reformed, post-Holocaust Germany that has come to terms with its past and, thus, is on the road to rehabilitation. We have already seen the German sensitivity to the Holocaust on display in the *Deckert* case, where Ranier Orlet and Wolfgang Müller were placed on medical leave after writing an opinion that complained about Jewish Holocaust-related demands on Germany. That case demonstrated the power of the Nazi past to shape the German present. Germans (and the world) constantly put the Federal Republic under a microscope, ever alert for new signs of backsliding. A film, even a well-intentioned one, that shows a German denying the Holocaust risked sending the wrong signal, especially when the lack of narration left it for the audience to condemn Althans. Many found it easier to condemn the film.

And so they did from the very beginning. When the film premiered at the June 1993 Potsdam film festival a critic from the Berlin-based *Tagesspiegel* warned that the documentary could become a neo-Nazi cult film. Worse still, one filmgoer was shocked because she found Althans "somewhat sympathetic."[74] *Der Spiegel*, which carried an expose about the film just prior to its general release, expressed the same fear. After quoting a scene where Althans calls film "the best method to spread fascist sayings," the magazine warned that the film could be used as right-wing propaganda.[75]

Ignatz Bubis, president of the Central Board of German Jews, had similar concerns about *Beruf Neonazi:* "If I knew that only people like myself, like you, like the Jews who work together, would be confronted with this film there would be no overall problem. But there are millions who see this for the first time as value-free, and besides who already have a curiosity for this type of ideology."[76] He did not call the film outrageous, he called it dangerous. Deborah Lipstadt made a similar argument about the Bradley Smith ads. But while Lipstadt's argument went against the grain of a culture steeped in the First Amendment, a culture very wary in identifying "clear and present dangers" that justify censorship, Bubis was not alone. To the contrary, his fears about the film's potential propaganda impact resonated in a culture of militant democracy that expected the state to take the lead in protecting society against political extremists.

Thus almost everyone who discussed the film addressed its dangerousness. The reaction of Hessian Culture Minister Evelies Mayer (SPD) was typical: "We must be vigilant and oppose every effort that can give right-wing extremism a platform."[77] Supporters of the film had to counter these arguments. Thomas Rothschild pointed out that while everyone feared that Althans would convince others, no one admitted being convinced by him.[78] In its advertising for the film, a Berlin cinema made the same point more humorously. "In Kreuzberg the film has already made 500 people into Nazis against their will," the ad warned, "because he expresses what they are thinking in good German."[79] Alternatively, supporters argued that it was dangerous *not* to show the film. The threat was not *Beruf Neonazi* but the underlying reality the film documented. Explaining why the film should appear on television, the film distributor did not mention free speech or

censorship. Instead, it praised the documentary for "dispos[ing] of the cliches of the backwoods, beer-drinking Nazi with the Hitler mustache and shaved head. It shows the modern face of right-wing extremism: intelligent, good looking, inoffensive and scrupulous."[80]

That even supporters of *Beruf Neonazi* couched their defense of the film in a framework of threat and danger, rather than censorship and free speech, illustrates the power of militant democracy. Another illustration is provided by the public response to the un-narrated quality of the film. Most observers agreed that the film must not be shown without narration or commentary. This consensus included anarchist protestors who picketed the film when it opened in Berlin as well as Brandenburg Culture Minister Hindrich Enderlien (FDP) and Berlin Culture Senator Ulrich Roloff-Momin (SPD), both of whom supported the film.[81] The breadth of the consensus reflected a fear of the film's potential as right-wing propaganda and the sensitive nature of the film's subject matter. The call for narration was a call to reduce ambiguity. Narration would make it absolutely clear on whose side the producers stood.

It is not clear that the danger posed by the film or its un-narrated quality, by themselves, would have led the distributors to pull the film. For that to happen a third factor was necessary, the threat of legal action. On Monday December 6 Ignatz Bubis filed a complaint with the Frankfurter prosecutor's office asking that they ban the film. Bubis identified at least ten passages that were "criminally relevant" including the part of the film in which Althans denies the Holocaust.[82] The following day the prosecutor issued a temporary ban on showing the film without commentary in the state of Hesse. Because the ban was temporary and did not apply outside of Hesse, the distributors had the option of fighting the ban. Instead, they withdrew the film.[83] Perhaps the distributors made the right decision. In the wake of the ban other potential venues edged toward excluding the film. Two days after the ban was announced the national railway cancelled a showing of the film scheduled for its cinema at the Frankfurt train station.[84] Shortly thereafter the four states that financed the film sued the distributors for the return of their money.[85]

Legal action against the film was the trigger that led informal groups to censor *Beruf Neonazi*. There were two reasons for this. First, the criminal law gave opponents of the documentary a legal basis. The phrase "criminally relevant" dominated the debate. Whatever its other problems, *Beruf Neonazi* now had the added strike against it of violating the law. Second, the legal violations made it nearly impossible for the film's supporters to invoke freedom of speech. To be sure, the ban in Hesse left cinemas in other German states free to show the film. Indeed, courts in Berlin and Saxony refused to ban the film.[86] But once the film was banned, no one raised free speech as a defense. At most, supporters protested the "mingling of the state in artistic freedom."[87] By banning the film, the Frankfurt prosecutor sent a signal to the rest of society. *Beruf Neonazi* violated the law. After this, nobody cried censorship.

The connection between legal action and informal censorship, so notable in the debate over *Beruf Neonazi*, is a function of militant democracy. Where the state's right to self-defense is highly prized, the law plays a critical signaling role: what the law tolerates, society also tolerates. This is not true everywhere. In Canada official toleration did not stop a trend toward informal censorship. Pressure to marginalize Holocaust deniers grew during the mid-1990s—in other words, after the *Zundel* case. Nor is France entirely comparable. There is a difference between a generalized acceptance of state censorship, and acceptance of the state's role in protecting society from political extremism. Militant democracy is as uniquely German as the distinction between administrative tribunals and criminal courts is specifically French.

In addition, it is hard to understand the severity of the reaction against *Beruf Neonazi* without reference to the Holocaust. The scene in which Althans denies the Holocaust drew the attention of all the participants in the debate. The symbolic importance of this scene was too great to leave audiences to their own devices. Hence the desire for narration or some other form of commentary. This demonstrates the importance of subject matter in determining when acts of exclusion become censorship. The German legal system is relatively liberal. Not all "dangerous" speech is censored, formally or informally. But the Holocaust was different. Other critical-realistic documentaries about neo-Nazis faced criticism, but not censorship. The Auschwitz scene pushed *Beruf Neonazi* over the edge.

CONCLUSION

At the same time, however, it would be a mistake to overlook an important similarity between Germany, France, and Canada. In all three countries informal and/or administrative censorship of Holocaust deniers went forward without the debates that unfolded on college campuses in the United States. This suggests that the reluctance of student journalists to censor the revisionist ads was neither a function of student naïvete, nor an unalterable fact of human nature. It was a reflection of a legal culture highly tolerant of speech. To put it another way, the comparative survey of Canada, France, and Germany illustrates how, by not prosecuting Holocaust deniers, Americans made a trade-off. On the one hand, Americans are spared the traumas of a *Zundel* or *Deckert* case. On the other hand, the absence of hate-speech laws made it extremely hard to marginalize Holocaust deniers. In the end, toleration is not a panacea, but a choice.

Conclusion

The Dilemmas of Holocaust-Denial Litigation

Holocaust denial poses a challenge for the legal systems and societies of Western Europe and North America. The rise of a small, vocal minority willing to use any means necessary to claim the Nazi murder of the Jews was a hoax, or, at a minimum, a falsehood, calls for action. Anything less insults the memory of the Holocaust. Yet, to take action, to use the law to prosecute Holocaust deniers, raises the Orwellian image of the state policing the official truth. Either path—toleration or prosecution—is fraught with difficulty. The conclusion takes a final look at dilemmas that Holocaust denial poses for the legal system, shows how each of the four countries handled these dilemmas, explains why these dilemmas were largely absent in the *Irving v. Lipstadt* case from 2000, and closes with some general comments on the competing expectations modern societies place on the law.

The Dilemma of the Unpopular Accused

The three dilemmas discussed in the book (the dilemma of proof, the dilemma of trial uncertainty, and the dilemma of toleration) form part of a larger phenomenon that arises whenever a legal system faces an unpopular accused. The dilemma of the unpopular accused pits the law's emphasis on calculable rules, procedural fairness, and sympathy for the accused against society, which views the law as its representative, and, therefore, expects the legal system to condemn unpopular defendants. Just as Holocaust denial poses a dilemma for societies at large, the dilemma of the unpopular accused poses a dilemma for legal systems forced to process Holocaust-denial cases.

From this general picture we can isolate six more specific patterns that, taken together, give the dilemma of the unpopular accused its special character. The first of these is the broad acceptance of norms of legal fairness among professionals. While many judges expressed outrage at Holocaust denial, few acted on their feelings. Instead, they held prosecutions of Holocaust deniers to the rule of law. Despite a highly tinged atmosphere, few judges chose the path of the political show-trial. The one substantial contraction of the rights

of the accused—the French Gayssot Law—came from legislators, not judges. As a result of their commitment to abstract fairness, the judges routinely rendered decisions that gave aid and comfort to Holocaust deniers. In Canada, Judge Hugh Locke refused to take judicial notice of the Holocaust and allowed Holocaust deniers to testify as experts. In France, first the trial court and later the Court of Appeals refused to call Robert Faurisson's view of history wrong. Meanwhile, in Germany, Judge Albrecht Kob acquitted two suspects by distinguishing the phrase "Auschwitz-myth," which was legal, from the phrase, the "Auschwitz-lie," which was not. It was also a German judge, Ranier Orlet, whose explosive comments about Jewish pretensions about the Holocaust touched off a massive scandal.

The *Deckert* case brings us to a question and a second pattern. Why did judges make pro-revisionist rulings? By and large, the judges were motivated by legal fairness and not anti-Semitic or pro-denial sympathies. The *Deckert* case is the exception that proves the rule. If it is impossible to trace Orlet's remarks to legal fairness, in most other examples the pro-defense ruling has a fairness-based justification. Judge Locke refused to take judicial notice because he feared it would unduly prejudice the jury against the accused. In not taking a position on the Holocaust, the French courts followed a well-established tradition against judicial interpretation of history. Albrecht Kob based his acquittal on the civil law principle of *in dubio pro reo* ("in doubt for the defense"). It was the application of broad legal principles, and not the biases of specific judges, that led to most of the Holocaust deniers' courtroom victories (be they legal or symbolic).

Third, norms of legal fairness are created by legal professionals outside the public view. The public is not generally familiar with the precise legal norms at issue when judges rule on behalf of Holocaust deniers and, therefore, is critical of the judges. Thus, Irwin Cotler suggested that Judge Locke's judicial notice decision raised "disturbing implications" about the Holocaust, Pierre Vidal-Naquet found the decision of the Paris Court of Appeals ruling "quite outrageous," and Michael Friedman complained that Albrecht Kob sent the wrong signal. What these responses have in common is that they evaluate the legal rulings in strictly political terms. They assume judges had complete flexibility, when, in fact, the judges were constrained in their rulings by norms of legal fairness.

Fourth, sometimes these conflicting forces expressed themselves in a justice scandal. But not every pro-defense ruling triggered a scandal. The ruling must be public (Judge Locke was shielded from criticism because many of his rulings were made in private) and the timing must be right. Even in Germany, concern about Holocaust denial was episodic. For example, the appearance of *Beruf Neonazi* in 1993 initiated a two-year period when Holocaust denial dominated German public life. By February 1995, when the *Auschwitz-Myth* case was tried, tensions were at a fever pitch. As a result, Judge Kob's acquittal of Goertz and Sieffert, which might have been passed over in quieter times, became the focus of public attention. Likewise, the second round of Bradley Smith ads (1993–94) gained more notoriety than his

first round (1991–92), because American Jewish organizations paid more attention to Holocaust denial in the interim.

Fifth, these scandals often involved blaming and restorative acts. The parties blamed and the acts taken depended on the legal and political context. In Germany, a tradition of judicial leniency toward the extreme Right combined with the written verdict made the judge the obvious target, as the *Nieland*, *Deckert*, and *Auschwitz-Myth* cases illustrated. In Canada, a different set of institutional factors, including laws restricting media reporting of motion practice, and a political tradition of deference to the judiciary shifted the blame from the judges to legal outsiders, most notably the news media. In both cases the true culprit—the competing societal values of fairness to the accused and respect for the memory of the Holocaust—went unrecognized.

The final pattern involves censorship. In countries where the protection of free speech was strong enough to stop prosecutions of Holocaust deniers—the United States, and to a lesser extent Canada—informal censors were likely to adopt free speech as a reason for running ads and shelving books denying the Holocaust. In effect, free speech became a norm of legal fairness held by informal censors. This led to scandal when, as with the early Bradley Smith ad campaigns, the decision to run the ads took place during a period of heightened concern over Holocaust denial. Once again, the general public was largely baffled by the behavior of the newspaper editors or librarians who were then accused of insensitivity to the Holocaust. By contrast, in societies, such as France and Germany, that criminalized Holocaust denial informal censorship was not a problem.

National Patterns of Holocaust-Denial Litigation

A general analysis of the dilemma of the unpopular accused can take us only so far. To understand how Holocaust-denial litigation (or debates over censorship) unfolded in different countries, it is necessary to look at the distinctive mix of legal-institutional norms and political imperatives at work in each of the four countries. These differences help explain why prosecutions were more likely in some countries than others. They also demonstrate the peril of treating legal norms in the abstract, as if they were the same for all times and places. The split between inquisitorial (civil law) and adversarial (common law) legal procedures shaped how a legal system responded to Holocaust deniers; so, too, did the difference between libertarian and communitarian approaches to speech protection.

In Germany, legal-institutional norms posed few real obstacles to the prosecution of Holocaust deniers. Germany is a civil law country. The task of collecting the evidence rests with the judge. This foreclosed defense motions to present material that the Holocaust never happened and, over time, made taking of judicial notice of the Holocaust routine. The German legal system was, therefore, spared the dilemma of proof that troubled the French and Canadian courts. To a lesser extent, they were spared the problem of

justifying prosecutions against charges of censorship. Although the German Basic Law protects expression, since the 1950s this protection has not been extended to anti-Semitic utterances. The 1994 Federal Constitutional Court decision in the *Holocaust Denial* case only confirmed this point. This does not mean, however, that all prosecutions resulted in conviction. Judges have been quite willing to acquit, especially where the accused denies any intent to offend Jews or deny the Holocaust. Acquittals have led to scandal and further prosecutions. Nevertheless, the German political and legal atmosphere is strongly favorable to prosecutions.

Like Germany, France is a civil law country. But compared to Germany, French criminal procedure has had a combative, adversarial tinge. As a result, Holocaust-denial litigation has been somewhat more problematic. This was true in the early 1980s when deportee groups sued Robert Faurisson under § 1382 of the Civil Code for falsifying history. The reluctance of the French courts to commit themselves on questions of history led to politically unpalatable verdicts, at least from the perspective of the prosecutors. In theory, the 1990 Gayssot Law changed this. By taking history out of the picture—the only question for the court was whether the accused contested the Holocaust—the new law led to more favorable verdicts. In practice, however, this led to a game of cat and mouse. As French deniers learned to speak in code, the deportee organizations prosecuted more and more questionable cases and, generally, gained convictions. The only limits on the process were the procedural protections of the 1881 press law, which led to a few acquittals, and a rising discontent with the law itself. In this process freedom of speech played at most a minor role. Overall, the atmosphere in France favored prosecutions, though not as much as in Germany.

Owing to its enhanced protection of free speech and its common law tradition, Canada presented a distinctly less friendly atmosphere for Holocaust-denial prosecutions. Freedom of speech did not directly forestall prosecutions, as was the case in the United States, but it did limit the type of laws that could be considered. In particular, any law that passed constitutional muster had to give the defense an opportunity to raise truth as a defense. In other words, a Canadian Gayssot Law was extremely unlikely. Meanwhile, the common law complicated proving the Holocaust in court. It did so in two ways. First, the rule against hearsay greatly hampered prosecutions. Second, the adversarial tradition, where the parties present the evidence, allowed Zundel and Christie to turn the trial into a debate over the Holocaust. If the prospects for a reprise of *R. v. Zundel* are rather poor, the use of administrative human rights proceedings against deniers is on the rise. These proceedings allow some measure of pressure to be put on deniers, without offering the Holocaust denier the protections of the criminal defendant.

In the United States the First Amendment played the dominant role, foreclosing all prosecutions. The *Mermelstein* case, the sole civil litigation, arose out of a particular set of circumstances that are unlikely to repeat themselves. The real drama of the American debate over Holocaust denial lies elsewhere. Germany, France, and Canada each made Holocaust denial illegal,

either directly or indirectly; as a consequence, none of these countries faced a serious problem with informal censorship. By contrast the American libertarian ethos of toleration led student journalists in the United States to run ads denying the Holocaust. While student journalists were roundly criticized by Alan Dershowitz and Deborah Lipstadt, the fact these critics opposed prosecutions for the very same reasons made these criticisms harder to sustain.

Together these country outlines illustrate three points. First, there is a strong connection between inquisitorial procedures and the frequency of Holocaust-denial litigation. Where the judge is in charge of collecting evidence, the prosecution will not turn into a trial of the Holocaust. Conversely, where adversarial procedure dominates, and this includes Canada, the United States, and (to a lesser extent) France, prosecutions will prove much more difficult. In fact, the only way to prosecute deniers in an adversarial legal system is to remove the historical question from the case. The French did this with the Gayssot Law, but constitutional protection of free expression made it impossible for the Americans and Canadians to follow suit.[1]

Second, countries with strong anticensorship norms did not avoid controversy. Instead, scandals arose from the refusal to censor. This has been the experience in the United States, not only with Holocaust denial, but with racist and anti-Semitic speech generally. In *The Tolerant Society*, Lee Bollinger holds out the hope that the American experience of tolerating extremist speech will develop a social habit of "extraordinary self-restraint," through which Americans learn to accept speech they despise.[2] The conflicts that broke out on the campuses that ran the Bradley Smith ad (especially at Ohio State) suggest that this self-restraint—however well entrenched among some of the populace—is far from carrying the day. Still, the libertarian ethos is stronger in the United States than in Germany, France, or Canada.

Third, broad generalizations about legal systems provide only part of the story. To fully explain the course of Holocaust-denial litigation in a given society, it is necessary to add two additional factors: (i) idiosyncrasies in national legal systems; and (ii) the matrix of social forces concerned about the Holocaust. The first factor explains why, although France is a civil law country with generally inquisitorial procedure, the French judges in the Faurisson case refused to reject Robert Faurisson's historical views as false. The second factor provides an additional reason why Holocaust-denial litigation was more prevalent in France and Germany than in Canada and the United States.

The Exception that Proves the Rule: *Irving v. Lipstadt*

The importance of viewing a case in its legal, political, and procedural context is highlighted by a recent British case that, at first blush, appears to have avoided the dilemmas described in this book.[3] The *Irving v. Lipstadt* case arose out of Deborah Lipstadt's book *Denying the Holocaust*. In the book, she called David Irving a "Holocaust denier," whereupon Irving sued Deborah Lipstadt for libel. After a two-month trial at which several noted

academic experts testified on Lipstadt's behalf, Mr. Justice Charles Grey held for Lipstadt a 300-page opinion that blasted Irving's methods, motives, and conclusions. The British have a common law (adversarial) legal system and British libel law strongly favors the plaintiff. One might have expected Lipstadt to face the dilemma of proof that bedeviled the prosecution in the *Zundel* case. But she did not. How was this possible?

Deborah Lipstadt avoided a replay of *R. v. Zundel* for four reasons. The first concerned the procedural posture of the case. With the exception of the *Mermelstein* case (which has much in common with *Irving v. Lipstadt*), all of the cases described in this book feature a denier who stands accused of defaming or denying the Holocaust. By contrast, when David Irving accused Deborah Lipstadt of libel, he placed her as the accused and gave her the benefit of the doubt. Even if British libel laws normally favored the plaintiff and Lipstadt carried the burden of showing that Irving lied about the Holocaust, Irving was not a criminal defendant and, therefore, the judicial sympathy that attaches to a person accused by the state of a crime was absent. Alan Dershowitz recognized this. Writing in 1996, before Irving filed his lawsuit, Dershowitz welcomed the prospect of a libel case because "it pits them [the deniers] against freedom of speech and exposes their hypocrisy."[4]

Second, for reasons that are hard to fathom, David Irving decided to try his case before a judge rather than a jury.[5] The absence of a jury shifted the focus of the trial from oral to written evidence. As D.D. Guttenplan pointed out: "The heart of the case—the ground on which the trial will quite likely be won or lost—are the expert reports whose thousands of pages the judge has read before the first witness is sworn in."[6] While this did not prevent the case from being tried in what Guttenplan called, "the jury of public opinion" it did allow the case to proceed without the complex evidentiary rules that complicated the prosecution's task in the *Zundel* case. Furthermore, the fact that a judge rather than a jury heard the case shifted the courtroom debate from the emotional to the intellectual plane. Free from the need to convince a jury, Lipstadt could dispense with emotionally compelling but often unpredictable survivor testimony. She could rely instead on experts who hammered away at the weak points in Irving's position.

Third, the Jewish community learned from previous cases. The decision to exclude survivors' testimony was not simply taken because the case would be tried before a judge; the defense also did so because of the experience of *R. v. Zundel*, where defense counsel Christie subjected the survivors to harsh cross-examination.[7] The defense team also learned from John Pearson, the prosecutor in the second *Zundel* trial. Like Pearson, Lipstadt's lawyers tried to focus on David Irving rather than the Holocaust. Finally, Lipstadt used five expert witnesses (Christopher Browning, Richard Evans, Hajo Funke, Peter Longerich, and Robert Jan Van Pelt)—an academic dream team—to confront Irving. If one witness failed to perform as expected, another might do better.

Fourth, *Irving v. Lipstadt* had two pivotal turning points, each of which highlights the case's specific legal context. The first came when the defense made a motion during discovery for full access to Irving's records.[8]

As Guttenplan noted, this information was vital to the defense case.[9] So, too, therefore, were the liberal discovery laws that made the defense motion possible. The second turning point came when Irving offered to settle the case with *Penguin*, Lipstadt's publisher, leaving Lipstadt to defend the lawsuit on her own.[10] *Penguin* refused to do this for the same reasons it decided to defend the suit in the first place. While standing behind Lipstadt on principled grounds, the publishing house also feared that abandoning Lipstadt would make the publishing house less attractive to future authors.[11] But the latter consideration was a function of the British legal system, a system in which libels were easy to prosecute and expensive to defend.

Holocaust Denial and the Duality of Legal Norms

Irving v. Lipstadt was an exceptional case. In most Holocaust-denial cases the denier stands accused of a crime and the dilemma of the unpopular accused operates in full force. Courts may then have to choose between professional norms and respecting the Holocaust.

The dilemma of the unpopular accused, in turn, reflects the dual nature of the legal norms used in criminal cases. In *Division of Labor in Modern Society*, Emile Durkheim stressed the representative function of the criminal law.[12] The laws mark what society stands for and against at a time of moral confusion. When law fails, society fails. But to have the power to set boundaries, the law must be legitimate. To be legitimate, the law must be fair. Legal fairness, in turn, requires what Max Weber has referred to as "calculable rules."[13] The dilemma of the unpopular accused arises when the rules interfere with the representative function of the law. The same law that shields the unpopular accused cannot possibly represent the public. Someone must have misapplied the law. The blame game begins and restorative acts soon follow.

This phenomenon is not unique to Holocaust-denial litigation.[14] It arises when any unpopular accused sits in the witness box. The prosecution of child molesters, rapists, and drug dealers follows a similar dynamic. The pressure for a clear moral condemnation stands opposed to the practice in ordinary cases, a practice that often leads to a less clear condemnation than the public demands. All of which is to suggest that prosecution of Holocaust deniers will not yield didactic lessons about the Holocaust.[15] At best, the prosecutions will be uneventful. At worst, they will produce a series of scandals in which a particular judge, lawyer, or representative of the news media is accused of insensitivity to the Holocaust. The few exceptions prove the rule. The December 1994 Federal Supreme Court ruling overturning Orlet in the *Deckert* case and the harsh rebuke of Faurisson by his judges in the March 1991 Gayssot Law trial at first blush look like ideal denunciations of Holocaust denial. But, in reality, both rulings represent a response to earlier scandals fueled by insensitive legal rulings.

Here, then, is the true dilemma of Holocaust-denial litigation. If law represents society, then what better way to demonstrate society's repudiation

of Holocaust deniers than with a guilty verdict? But this goal has proven more elusive. Instead of gaining the law's prestige for the struggle against Holocaust denial, more often than not prosecutions reduce the prestige of the law by making a mockery of the legal system. This does not happen in every case, but there is always a risk that litigation will, in the end, put the Holocaust and the legal system on trial. Nor is American-style toleration any more of a panacea, at least when it comes with the expectation that the legal toleration of Holocaust denial can be combined with a high degree of informal censorship.

In the end, the only long-term solution to the problem of Holocaust denial is general acceptance that deniers will be part of the landscape for some time to come. This does not necessarily mean toleration. In societies like France and Germany that prosecute hate speech, there is no reason to treat Holocaust denial any differently. The type of acceptance I am referring to lies in another direction. It is an acceptance of the uncertainty of the law and of the occasional trial that fails to end in a clear repudiation of Holocaust denial. There are signs this acceptance is growing. Holocaust denial remains as entrenched as ever, but the scandals are on the wane. As Western European and North American societies become more accustomed to Holocaust denial, its power to shock is decreasing. To put it another way, Holocaust denial is slowly becoming old news. If this leaves major questions unresolved—especially as regards the relationship between Holocaust denial and a future right-wing revival—at least it offers hope that the era of free publicity for the deniers is rapidly coming to an end.

Notes

Preface

1. John Langbein, *Comparative Criminal Procedure: Germany* (St. Paul: West Publishing Co., 1978).
2. Sybille Bedford, *The Faces of Justice* (London: Collins, 1961).
3. Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).
4. Ibid., 243.
5. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983).
6. Emile Durkheim, *The Division of Labor in Modern Society* (New York: Free Press, 1968).

Introduction

1. A comparative example bears this out. Like the Holocaust, the Armenian genocide—during which 1.5 million people were killed as part of a systematic campaign by the Ottoman Turkish government—has been subject to denial. However, none of the four countries taken up in this study bans denial of the Armenian genocide (although France has seen some litigation initiated by the Armenian community living there). By contrast, Turkey—the modern day successor state of the Ottoman Empire—bans assertions of the Armenian genocide for the same reason France and Germany ban Holocaust denial—the speech in question threatens to raise sensitive issues about the nation's identity. The only difference is that with France and Germany censorship comes as part of an effort to accept the past, while in Turkey censorship is used to avoid it. For a fascinating discussion of comparative genocide denial, see Colin Tatz, *With Intent to Destroy: Reflecting on Genocide* (London: Verso, 2003), 122–70.
2. More specifically, they argue that (i) there was no Nazi plan to deliberately exterminate the Jews; (ii) far fewer than six million Jews were killed by the Nazis (most say less than one million Jews died, other estimates far lower); and (iii) there were no mass gassings of Jews in the concentration camps. Michael Shermer, *Why People Believe Weird Things: Pseudoscience, Superstition, and Other Confusions of Our Time* (New York: W.H. Freeman & Co., 1997), 188–89.

3. Tom W. Smith, *Holocaust Denial: What the Survey Data Reveal* (New York: American Jewish Committee, 1995).
4. For an excellent overview of the role of the Holocaust in Germany, see Wilfried von Bredow, *Tückische Geschichte: Kollective Errinerung an den Holocaust* (Stutgart: Verlag W. Kohlhammer GmbH, 1996); see also Ranier Erb, "Public Responses to Antisemitism and Right-Wing Extremism," in Hermann Kurthen, Werner Bergmann, and Ranier Erb eds., *Antisemitism and Xenophobia in Germany after Unification* (New York: Oxford University Press, 1997).
5. See Henry Rousso, *The Vichy Syndrome: History and Memory in France Since 1944*, Arthur Goldhammer trans. (Cambridge: Harvard University Press, 1991).
6. Le Pen made his remarks in a televised interview. For more on the connection between Le Pen and Holocaust denial, see Harvey G. Simmons, *The French National Front: The Extremist Challenge to Democracy* (Boulder, Colo.: Westview, 1996), 123–41.
7. See Harold Troper and Irving Abella, *None is Too Many: Canada and the Jews of Europe 1933–1948* (Toronto: University of Toronto Press, 1982).
8. David Wyman, *Abandonment of the Jews: America and the Holocaust, 1941–1945* (New York: Pantheon, 1984).
9. For the United States, see Leonard Dinnerstein, *Anti-Semitism in America* (New York: Oxford University Press, 1994), chs. 8, 10. For Canada, see Irving Abella, "Anti-Semitism in Canada in the Interwar Years," in Moses Rischin ed., *The Jews of North America* (Detroit: Wayne State University Press, 1987), 235–46. Because the Canadian Jewish community was far smaller than its American counterpart, anti-Semitism was felt far more intimately.
10. See Benjamin Ginsberg, *The Fatal Embrace: Jews and the State* (Chicago: University of Chicago Press, 1994). Ginsberg traces Jewish history to suggest that strong political connections between Jews and the state fuel populist anti-Semitism.
11. The *Protocols of the Elders of Zion* was a Czarist forgery about a world Jewish conspiracy that circulated in the early twentieth century and is widely seen as fomenting anti-Semitism. Both Deborah Lipstadt and Alan Dershowitz make the comparison between the *Protocols* and Holocaust denial. Lipstadt, *Denying the Holocaust*, 136; Dershowitz, *The Vanishing American Jew*, 105–06. For a more extended comparison between the two, see C.C. Aronsfeld, *The Text of the Holocaust: A Study of the Nazis' Extermination Propaganda: 1919–1945* (Marblehead, Mass.: Micah Publications, 1985), 90–97.
12. Lipstadt, *Denying the Holocaust*, 221–22.
13. For example, Jens Ohlin, the editor of the *Skidmore Daily News* received an ad denying the Holocaust. After meeting with Holocaust survivors, he refused to run the ad and called anyone who would run such an ad "simply… not human." This story is recounted in Kenneth S. Stern, "Denial of the Holocaust: An Antisemitic Political Assault," in Jerome R. Chanes ed., *Antisemitism in America Today: Outspoken Experts Explode the Myths* (New York: Carol Publishing Group), 242–57, 256, n. 8.
14. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983), 218.

15. I discuss this problem at length in Robert A. Kahn, "Imagining Legal Fairness: A Comparative Perspective," in Jennifer Holmes ed., *New Approaches to Comparative Politics: Insights from Political Theory* (Lanham, Md.: Lexington Books, 2003).
16. The impact of these rules on jury behavior is subject to some dispute. Mirijan Damaska suggests that exclusionary rules do not necessarily limit the evidence jurors hear, but restrict the arguments those jurors make from the evidence in the jury room. Damaska, *Evidence Law Adrift* (Yale University Press, 1996).
17. In other words, the hearsay rule will exclude all written documents. While there are exceptions to the rule to let in business records and official documents, these exceptions are relatively narrow.
18. See Dershowitz, *The Vanishing American Jew*, 115.
19. See John Langbein, *Comparative Criminal Procedure: Germany* (St. Paul: West Publishing Co., 1978), 3–60.
20. Mirijan Damaska, "Of Hearsay and Its Analogues," *Minnesota Law Review* 76 (1992): 425–58.
21. The only exception is speech that carries an imminent threat of lawless action. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969). Although *Brandenburg* established the legal test, the Supreme Court ruled in favor of the protecting the speech act—a Ku Klux Klan rally—at issue in the case. Every time the Supreme Court has ruled on the issue since *Brandenburg*, it has voted to protect speech.
22. The best work on this subject remains Frede Castberg, *Freedom of Speech in the West: A Comparative Study of Public Law in France, The United States and Germany* (Oslo: Oceana, 1960).
23. *R. v. Keegstra*, [1990] 3 S.C.R. 697.
24. Jerome King, *Law v. Order: Legal Process and Free Speech in Contemporary France* (Hamden, Conn.: Archon Books, 1975), 12, 50–73.
25. For an excellent, if dated, treatment of the southern campaign against abolitionist speech, see Clement Eaton, *The Freedom-of-Thought Struggle in the Old South* (New York: Harper & Row, 1964).
26. In the *Abrams* case, the accused stood charged with distributing pro-Bolshevik leaflets. Dissenting in the case, Justice Oliver Wendell Holmes referred to the accused as "puny anonymities" and put his faith in "the marketplace of ideas." *Abrams v. United* States, 250 U.S. 616 (1919).
27. 343 U.S. 250 (1952).
28. This is the position of Samuel Walker. See Walker *Hate Speech: The History of an American Controversy* (Lincoln, Neb.: University of Nebraska Press, 1994). American norms against censorship can also be seen as a reaction to the McCarthyite excesses of the 1950s.

PART I THE DILEMMA OF PROOF

1. Deborah Lipstadt, *Denying the Holocaust, The Growing Assault on Truth and Memory* (New York: Free Press, 1993), vii–viii.
2. Ibid., 217.
3. Hannah Arendt, "Truth and Politics," ch. 7, in *Between Past and Future, Eight Exercises in Political Thought*, enl. ed. (New York: Penguin, 1968), 262–63.
4. Paul Kuttner, *The Holocaust: Hoax or History? The Book of Answers to Those Who Would Deny the Holocaust* (New York: Dawnwood Press, 1996); Michael

Shermer, *Why People Believe Weird Things: Pseudoscience, Superstition, and Other Confusions of Our Time* (New York: W.H. Freeman & Co., 1996), 173–242. More significantly, American Jewish organizations have released pamphlets that in part rebut the factual claims of Holocaust deniers. Anti-Defamation League, *Holocaust Denial: A Pocket Guide* (New York: Anti-Defamation League, 1994); Simon Wiesenthal Center, *Holocaust Denial: Bigotry in the Guise of Scholarship* (Los Angeles: Simon Wiesenthal Center, 1994). See also Kenneth S. Stern, *Holocaust Denial* (New York: American Jewish Committee, 1992).

5. Stern, *Holocaust Denial*, 60.
6. Lipstadt, *Denying the Holocaust*, 220. She also opposes prosecutions on free speech grounds. Ibid. 17.

CHAPTER 1 ADVERSARIALISM, INQUISITORIALISM, AND JUDICIAL NOTICE

1. For an overview of the civil law world, see John Henry Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (Stanford: Stanford University Press, 2nd ed., 1985).
2. Mirijan Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal System* (New Haven: Yale University Press, 1986), 3–6.
3. To be sure, defenders of adversarial procedures such as Steven Landsman also take the view of John Stuart Mill that the truth will most likely emerge from a clash of ideas presented by the prosecutor and defense counsel, but they do not rest their defense of the system on this alone. Stephan Landsman, *The Adversary System: A Description and Defense* (Washington, D.C.: American Enterprise Institute, 1984); John Stuart Mill, *On Liberty* (Indianapolis: Hackett Publishing Company, 1978), 50.
4. Edward Peters, *Torture* (Philadelphia: University of Pennsylvania Press, 1985), 1.
5. Max Weber, *Economy and Society*, vol. 2 (Berkeley: University of California Press, 1978), 813: "Modern trial by jury, too, is frequently khadi justice in actual practice although not according to formal law; even in this highly formalized type of limited popular adjudication one can observe a tendency to be bound by formal legal rules only to the extent directly required by procedural technique." He contrasts this to Continental Europe, where "the degree of legal rationality" is higher (890).
6. John Langbein, "The German Advantage in Civil Procedure," *Northwestern Law Review* 61 (1986): 823–66.
7. See Ellen E. Sward, "Values, Ideology, and the Evolution of the Adversary System," *Indiana Law Journal* 64 (1989): 301–55. While not calling for reforms outright, Mirijan Damaska believes that with the increasing scientization of litigation the days of adversarial fact-gathering are numbered. Mirijan Damaska, *Evidence Law Adrift*, 143–52.
8. Lawrence Douglas, "Policing the Past: Holocaust Denial and the Law," in Robert C. Post ed., *Censorship and Silencing: Practices of Cultural Recognition* (Los Angeles: Getty Institute, 1998), 78.
9. Ranier Erb, "Public Responses to Antisemitism and Right-Wing Extremism," in Hermann Kurhten, Werner Bergman and Ranier Erb eds., *Antisemitism and Xenophobia in Germany after Unification* (Oxford: Oxford University Press, 1997), 218.

10. For a description of this period, known by Germans as the *Schwelle* (wave), see Kurt Sontheimer, *Die Adenaurer Ära: Grundlegung der Bundesrepublik* (München: Deutscher Taschenbuch Verlag, 1991), 175–88; for a good, if sensationalistic account of the same period in English, see T.H. Teetens, *The New Germany and the Old Nazis* (New York: Marzani & Munsel, 1961).
11. Criminal Procedure Code § 244(3).
12. Ibid.
13. Ranier Keller, "Offenkundigkeit und Beweisbedürftigkeit im Strafprozeß," in *Zeitschrift für die gesamte Stafrechtwissenschaft* 39 (1989): 380–418, 383.
14. Werner Beulke, *Strafprozeßrecht* (Heidelberg: C.F. Müller, 1996), 172 (quoting from the Federal Supreme Court).
15. Keller, "Offenkundigkeit und Beweisbedürftigkeit im Strafprozeß," 398, 402.
16. Graham C. Lilly, *An Introduction to the Law of Evidence*, 3rd ed. (St. Paul: West Publishing Co., 1996), 13.
17. Keller, "Offenkundigkeit und Beweisbedürftigkeit im Strafprozeß," 400 (citing Federal Constitutional Court decision from 1957).
18. Germany has two courts of final review. The Federal Supreme Court (*Bundesgerichtshof*) handles routine appeals in civil and criminal cases. The Federal Constitutional Court (*Bundesverfassungsgericht*) is a specialized court that only hears constitutional matters. Holocaust-denial cases have come up in both courts.
19. Federal Supreme Court decision of November 11, 1976 (2 StR 508/76) (cited in Sebastian Cobler, "Die Gesetz gegen die 'Auschwitz Lüge,' Amerkungen zu einem rechtspolitischen Ablaßhandel," *Kritische Justiz (KJ)* 18 (1985): 159–70, 166); see Eric Stein, "History against Free Speech: The New German Law against the 'Auschwitz' and Other—'Lies,'" in *Michigan Law Review* 85 (1986): 277–324, 290.
20. These facts come from the opinion of the Mainz District Court, which first handled the case. *KJ* (1978): 189–91.
21. Johannes Wessels, *Stafrecht: Besonderer Teil/1* (Heidelberg: C.F. Müller, 1996), 93–94. The protection of human honor or worth from insult is a wide-ranging principle with a long tradition. Insults against police officers, NATO, Franz Josef Strauss, and the pope have been brought under § 185.
22. *KJ* (1978): 191.
23. Ibid., 193 (OLG Koblenz, May 2, 1978). The complainant himself was not Jewish, but of Jewish origins, a distinction seized upon by the Appeals Court.
24. Thomas Blanke, "Comment," *KJ* 12 (1979): 198.
25. *BGHZ (Entscheidungen des Bundesgerichthofes in Zivilsachen)* 75 (1979): 160, 161 (BGH, September 18, 1979).
26. The Supreme Court then held that the complainant could sue, even though he was not Jewish, because he would have been persecuted as someone of mixed race under the Nuremberg laws. This part of the decision attracted controversy. Lower courts used this test to deny claims under § 185. In 1985 the legislature ended this practice by allowing the state to bring § 185 cases without a complainant. Penal Code § 194. On the passage of the law see Stein, "History Against Free Speech."
27. Dr. Erwin Deutsch, "Comment," *Neue Juristische Wochenscshrift (NJW)* (1980): 1100.
28. *NJW* (1981): 1280–81.

29. Decision of July 23, 1980 (quoted from Stein, "History Against Free Speech," 290). The Bochum decision was not published.
30. *NJW* (1982): 1203. The case arose from an unpublished prosecution of German neo-Nazi leader Michael Kuhnen. The court dismissed his complaint as unlikely to succeed.
31. *Strafverteidiger (StV)* (1992): 314 (OLG Dusseldorf, August 27, 1991).
32. Ibid.
33. Ibid.
34. *NJW* (1994): 1421 (BGH, March 13, 1994).
35. Ibid.
36. In one of the cases cited by Supreme Court the only link to judicial notice was the fact that the accused happened to be a Holocaust denier. The accused, however, was neither charged with denying the Holocaust, nor did the court take up the issue of judicial notice. See *Monatschrift Deutsches Recht (MDR)* (1978), 333.
37. The 1982 case involved only the screening committee. There was no decision on the merits.
38. *NJW* (1994): 1781.
39. Ibid. In addition, the court held that even if Holocaust denial were an opinion, it had to be balanced with the protection of personal dignity provided in Basic Law Art. 5(2). To make this point the court discussed previous case law, especially the 1979 Supreme Court decision.
40. Helmuth Schulze-Fielitz, "Anmerkung," *Juristen Zeitung (JZ)* 49 (1994): 904.
41. Claus Leggewie and Horst Meier, *Republikschutz: Maßstäbe für die Verteidigung der Demokratie* (Hamburg: Rowholt, 1995), 139–51.
42. See Günter Bertram, "Entrüstungsstürme im Medienzeitalter—de BGH und die 'Auschwitzlüge,'" in *NJW* (1994): 2003.
43. See *By Bread Alone: The Story of A-4685 Mel Mermelstein A Survivor of the Nazi Holocaust*, rev. ed. (Huntington Beach: Auschwitz Study Foundation, 1993), 276–78.
44. Melvin Mermelstein, "Revising the History of the Holocaust," Letter to the Editor, *The Jerusalem Post* (Weekly Ed.) August 24–30, 1980, reprinted in Mermelstein, *By Bread Alone*, 270.
45. Dr. William Vicar, "Psychological Evaluation of Melvin Mermelstein," *Mermelstein v. IHR*, Case No. 356542 (L.A. County Sup. Ct., filed February 19, 1981), 8.
46. Letter from Lewis Brandon to Melvin Mermelstein, November 20, 1980, reprinted in Mermelstein, *By Bread Alone*, 272.
47. Letter from William Cox to David Brandon, December 18, 1980, reprinted in Mermelstein, *By Bread Alone*, 273–74.
48. Letter from Lewis Brandon to William Cox, January 26, 1981, reprinted in Mermelstein, *By Bread Alone*, 281. Wiesenthal had responded to an Institute contest about the authenticity of Anne Frank's diary.
49. Original Complaint in *Mermelstein v. Institute for Historical Review*, filed February 19, 1981, ¶ 35. The libel charges related to an inflammatory letter Mermelstein received from Dietlieb Felderer after his dispute with the Institute became public.
50. These arguments are summarized in Declaration of Richard Fusilier in Opposition to Motion for Summary Judgment in *Mermelstein v. IHR*, filed August 26, 1981.

51. Pretrial Ruling of Judge Thomas T. Johnson in *Mermelstein v. IHR*, October 9, 1981.
52. Settlement in *Mermelstein v. IHR*, filed July 22, 1985.
53. Pretrial Ruling of Judge Thomas T. Johnson, October 9, 1981.
54. Beulke, *Strafprozeßrecht*, 172.
55. Keller, "Offenkundigkeit und Beweisbedürfigkeit im Strafprozeß," 398.
56. Edward W. Cleary ed., *McCormick on Evidence*, Lawyers ed. (St. Paul: West Publishing Co., 1984), § 332, 932–33.
57. Ibid., § 330, 925.
58. Ibid., § 330, 926.
59. William Cox, Review of Literature, Plaintiff's Summary Judgment Motion, *Mermelstein v. IHR*, filed August 26, 1981.
60. Ibid.
61. These included Robert A. Taft, who called the trials "a blot on American constitutional history," and Judge Learned Hand, who referred to the prosecutions as "a great step backward in international law[.]" Declaration of Richard Fusilier in Opposition to Motion for Summary Judgment in *Mermelstein v. IHR*, filed August 26, 1981, 8.
62. 20 C.2d 536, 546 (Superior Court, Los Angeles County, 1942).
63. Fusilier, "Facts, Allegations and Judicial Notice," *Journal of Historical Review* 3(1) (1982): 48–51.
64. Ibid.
65. Pretrial Ruling of Judge Thomas T. Johnson in *Mermelstein v. IHR*, October 9, 1981.
66. Transcript of Pretrial Hearing, *Mermelstein v. IHR*, October 9, 1991, reprinted in Mermelstein, *By Bread Alone*, 288.
67. The motion grew out of renewed litigation between Mermelstein and the Institute. After the 1985 settlement, Mermelstein claimed that the Institute had conceded the Holocaust happened. The Institute then sued Mermelstein for libel, who countersued for malicious prosecution. The case dragged on for years.
68. Quoted in Mermelstein, *By Bread Alone*, 295.
69. Statement of Gloria Allred and Michael Maroko, July 24, 1985.
70. *Ligue internationale contre le racisme et l'antisemitisme et autres C. Faurisson, Recueil Dalloz Sirey: Jurisprudence* (1982), 59.
71. Ibid. Faurisson's articles appeared in *Le Matin de Paris* (November 16, 1978) and *Le Monde* (December 16, 1978, December 29, 1978, and January 16, 1979).
72. Robert Faurisson, "Revisionism on Trial: Developments in France, 1979–1983," *Journal of Historical Review* 6(2) (1985): 64.
73. According to Gill Seidel between 1974 and 1978 Faurisson wrote 22 times to Le Monde without success. See Seidel, *The Holocaust Denial* (Leeds: Beyond The Pale Collective, 1987), 101.
74. Henry Rousso, *The Vichy Syndrome: History and Memory in France Since 1944*, Arthur Goldhammer trans. (Cambridge: Harvard University Press, 1991), 10.
75. Paul Rassinier was one of the earliest Holocaust deniers. Most of his books were published in the 1950s and early 1960s. Compared to Faurisson he aroused relatively little attention.
76. This is the conclusion drawn by Henri Rousso. See Rousso, *The Vichy Syndrome*, 133.

77. Quoted in Seidel, *The Holocaust Denial*, 98.
78. Rousso, *The Vichy Syndrome*, 143.
79. Henry H. Weinberg, *The Myth of the Jew in France 1967–1982* (Oakville, Ont.: Mosaic Press, 1987), 63–65.
80. The legal arguments raised by Faurisson and the civil plaintiffs are summarized in Laurence Rubenstein, "Faussaire de l'histoire du génocide hitlérien Robert Faurisson est confoundu par les avocats," *Le Droit de Vivre*, June 1981.
81. George Wellers, "Qui est Robert Faurisson?" *Le Monde Juif*, No. 127 (1987): 93.
82. See Faurisson, "Revisionism on Trial," 179.
83. The next four paragraphs rely on Rubenstein's summary of the trial, "Faussaire de l'histoire[.]"
84. *Ligue internationale contre le racisme et l'antisemitisme et autres C. Faurisson*, *Recueil Dalloz Sirey: Jurisprudence* (1982).
85. Ibid.
86. Ibid. (emphasis added).
87. There is no good English translation of the term. *Contradictoire* means to contradict. See Rémy Cabrillac, *Introduction général au droit* (Paris: Dalloz, 1995), 34.
88. New Civil Procedure Code, Art. 16.
89. Bernard Edelman, "Note," *Recuil Dalloz Sirey: Jurisprudence* (1982): 60–64.
90. Edelman took issue with the court's conclusion that lies about ancient history matter less than those about the recent past: What indignation would sweep France if someone doubted that Roland died at Ronceveaux or insisted that Joan of Arc was really a man disguised as a woman? Ibid.
91. Cour D'Appel, Paris, Decision of April 26, 1983, 9.
92. Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust*, Jeffrey Mehlman trans. (New York: Columbia University Press, 1992), 137.
93. Wellers, "Qui est Robert Faurisson?" 96.
94. Gerald Tishler, Alan M. Dershowitz, Arthur Berney et al., "When Academic Freedom and Freedom of Speech Confront Holocaust Denial and Group Libel: Comparative Perspectives," *Cardozo L.Rev* 5 (1987): 559–94.
95. Richard Harwood [pseud.], *Did Six Million Really Die?* (Toronto: Samisdat Publications, [1980?]). The real author is Richard Verall, a British National Front activist who wrote the pamphlet in 1974.
96. *Did Six Million Really Die?* 30.
97. Canadian Criminal Code, § 181.
98. *R. v. Zundel*, Trial transcript (Tr.), 190. Unless otherwise noted, all references are to the 1985 trial.
99. Graham C. Lilly, *An Introduction to the Law of Evidence*, 3rd ed. (St. Paul: West Publishing Co., 1996), 15.
100. Ibid., 14 (emphasis in original).
101. *R. v. Zundel*, 35 D.L.R. (4th) 338 (1987). In the interim the jury found Zundel guilty of spreading false news. The Court of Appeals addressed the question of judicial notice because it reversed the guilty verdict because of other errors.
102. Ibid., 391 (quoting *R. v. Potts*).
103. Ibid., 393.
104. Ibid.
105. *R. v. Zundel (No. 2)*, 53 C.C.C. 3d 161 (1990).

CHAPTER 2 THE HOLOCAUST AS HEARSAY?

1. *R. v. Zundel*, 35 D.L.R. (4th) 338 (1987).
2. John H. Wigmore, *Wigmore on Evidence* (Chicago: Foundation Press, 1935), 238.
3. The most common exceptions cover statements where the out-of-court declarant had no motivation to lie (excited utterances, declarations against interest) or where the temptation to lie is counterbalanced by other factors (dying declarations, business records).
4. In his opening address Christie told the jury: "When it says 'Did Six Million Really Die?', the position of the defense is, did six million Jewish people really die" (Tr.: 2336). All references are to the 1985 trial transcripts in *R. v. Zundel*.
5. See Claude Adams, "Through the Fingers," *Canadian Lawyer*, April 1985, 17.
6. This exchange is actually a bit more complex. Urstein was repeating an order. Like a threat, orders may often be relevant for reasons having little to do with truth or falsity. In this instance, however, the order is of interest for its implied statement that there were Jewish bodies in the gas chamber. Therefore, the hearsay rule would apply.
7. Richard Harwood [pseud.], *Did Six Million Really Die?* (Toronto: Samisdat Publications, [1980?]), 30.
8. Quoted in Tr.: 1971.
9. Canada Evidence Act, § 30 (1).
10. Canada Law Book Inc., *Martin's Annual Criminal Code*, annotated by Edward L. Greenspan (Aurora, On.: Canada Law Book Inc., 1993), CE 28.
11. Graham C. Lilly, *An Introduction to the Law of Evidence*, 3rd. ed. (St. Paul: West Publishing Co., 1996), 301.
12. Canada Evidence Act, § 30(12).
13. *R. v. Zundel*, 35 D.L.R. (4th) 338, 404 (1987).
14. *Did Six Million Really Die?* 24–25.
15. For more about the film's history, see Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), 11–37.
16. See Leonidas E. Hill, "The Trial of Ernst Zundel, Revisionism and the Law in Canada," *Simon Wiesenthal Annual* 6 (1989): 165–219, 183.
17. The Ontario Court of Appeals quotes extensively from the narrative. See *R. v. Zundel*, 35 D.L.R. (4th) 338, 406 (1987).
18. *Finestone v. The Queen*, 107 C.C.C. 93 (1953).
19. *R. v. Zundel*, 35 D.L.R. (4th) 367, 409 (1987).
20. Ibid.
21. Lilly, *An Introduction to the Law of Evidence*, 554.
22. Ibid., 555.
23. Ibid., 556.
24. *R. v. Abbey*, 68 C.C.C. (2d) 394 (1982).
25. *The Federal Republic of Germany v. Rauca*, 141 D.L.R. (3d) 412, affirmed 145 D.L.R. 638 (1982), involved the extradition of Helmut Rauca, who was accused of being a Nazi war criminal. The Ontario Court of Appeals affirmed the extradition order.
26. Locke's quotation is from *McCormick on Evidence*, 2nd ed., § 13, 29.
27. This time the Court of Appeals affirmed Judge Locke. *R. v. Zundel*, 35 D.L.R. (4th) 384.

28. Christie used the same strategy at other moments of the trial. For instance, when Dietlieb Felderer sought to introduce photos taken of Auschwitz in the 1970s, Christie had Zundel testify *voir dire* about how he relied on the photos in forming his opinion. Judge Locke rejected this argument, but the Ontario Court of Appeals reversed, noting that Zundel had flown to Sweden to see these photos. *R. v. Zundel*, 35 D.L.R. (4th) 338, 411.
29. Barton's testimony was not necessarily a boon to the defense. On direct examination he testified that he believed the Holocaust happened.
30. With some reservation, Locke allowed Weber to testify as to his experiences working for the Nuremburg prosecution team.
31. *Toronto Star*, February 12, 1985.
32. The one exception, of course, was Zundel's 1988 retrial. The evidentiary rulings followed the same pattern as in the first *Zundel* case, but were less contentious because the prosecution, defense, and trial judge had the first trial to guide them.

PART II THE DILEMMA OF TRIAL UNCERTAINTY

1. Otto Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton: Princeton University Press, 1961), 47.
2. For an earlier study that uses "symbolic" in the way intended here, see Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (Urbana: University of Illinois Press, 1963). Although Gusfield contrasted the "symbolic" goals of status groups such as the temperance movement from its "instrumental" goals (21), he did not mean to suggest that the former were ephemeral. Rather the "symbolic" goals were connected with prestige, rather than material economic interests. Likewise, this work uses "symbolic" to distinguish those events that cause Holocaust denial to gain or lose prestige from events with more narrowly legal consequences.
3. How do we know when a Holocaust denier has won a symbolic victory? While legal victory is a matter of law that depends on a judge, symbolic victory is a matter of interpretation. What one person might take as disrespect for the Holocaust, another will see as the application of straight legal doctrine. Ultimately, thus, symbolic victory is in the eyes of the beholder. This is not a problem for the book, which is concerned with those symbolic victories that develop into full-fledged scandals (which are measured by the public response to the legal ruling).
4. See Erich Goode and Nachman Ben-Yehuda, *Moral Panics: The Social Construction of Deviance* (Oxford: Blackwell, 1994). Without adopting the label "moral panic," which calls into question the genuineness of the source of the panic, one can argue that (like moral panics) societal responses to Holocaust denial have been episodic. Thus, an egregious court ruling will not by itself ignite a scandal; the time must also be ripe.
5. Max Weber, "Bureaucracy," in H.H. Gerth and C. Wright Mills eds., *From Max Weber: Essays in Sociology* (Oxford University Press, 1981), 215 (emphasis in original).
6. According to Michael Oakeshott: "The expression 'fair play' does not evoke considerations of 'justice'; it means neither more nor less than to play *this* game conscientiously according to its authentic rules." Oakeshott, "The Rule of Law," in *On History and Other Essays* (Totowa, N.J.: Barnes and Noble Books, 1983), 119–64, 127 (emphasis added).

7. See Emile Durkheim, *The Division of Labor in Modern Society* (New York: Free Press, 1968); Kai T. Erikson, *Wayward Puritans: A Study in the Sociology of Deviance* (New York: John Wiley & Sons Inc., 1966).

CHAPTER 3 HOLOCAUST DENIAL, GERMAN JUDGES, AND POLITICAL SCANDAL

1. *Der Spiegel*, "Nieland: Reich des Zwistbringers," January 21, 1959, 20. The contents of the pamphlet were described in Judge Budde's ruling and briefs filed by state prosecutors objecting to the dismissal of charges. These were reprinted in *Juristen Zeitung* (*JZ*) 1959: 176–80.
2. For more on the *Zind* case, see T.H. Teetens, *The New Germany and the Old Nazis* (New York: Marzani & Munsel, 1961), 9–19.
3. *London Times*, January 24, 1959.
4. As critics pointed out, ordering an investigation into the fitness of a suspect to stand trial presumes that there is sufficient proof to warrant a trial. The implication is that Judge Budde used the psychological evaluation to either dispose of the case quietly, or to buy time in the hope that when he finally dismissed the charges the political atmosphere would be less turbulent. See "Politik in der Justiz, Der Fall des Hamburger Holzkaufmann es gibt Anlaß zu wichtigen Überlegungen," *Die Zeit*, February 6, 1959, 3.
5. Nieland's statement is quoted in Judge Budde's decision, see *JZ* (1959): 177.
6. At the time, § 130 outlawed incitement to class warfare. The proposal became law in 1960.
7. *Der Spiegel*, "Nieland," 22.
8. Ibid.
9. Globke denied having been a party member. Teetens, *The New Germany*, 38–40.
10. The language was taken from the parliamentary debates over Nieland. Deutscher Bundestag, 3. Wahlperiode, 56 Sitzung, January 22, 1959, 3088–90.
11. Letter of Erich Kinzer, *Die Zeit*, January 30, 1959, 16.
12. "Immediate Complaint of the Lead Attorney to the Hanseatic Appellate Court," reprinted in *JZ* (1959): 176–77; "Complaint of the General Prosecuting Attorney to the Hanseatic Appellate Court" reprinted in *JZ* (1959): 177–78.
13. *Der Spiegel*, "Nieland," 22.
14. *JZ* (1959): 176.
15. Hans Gathmann, "Der Latente Antisemitismus," *Die Politische Meinung* (Köln), April 1959, 67.
16. *Entscheidungen des Bundesgerichtshofes in Strafsachen (BGHSt)* 13, 32 (February 28, 1959).
17. Ibid., 36.
18. The material in the next several paragraphs is drawn from the Opinion of the Mannheim District Court, June 22, 1994 (6) KLs 2\92. Parts of the verdict were reprinted in *Neue Juristiche Wochenscrift* (NJW) (1994): 2494. The verdict contains three versions of Leuchter's speech: the English text; the court's translation into German; and, where it differs from the court, Deckert's translation. Unless otherwise noted, quotations of Leuchter's speech are from the English text.

19. Deckert's first verdict is described in Antifaschistisches Aktionsbündnis *Das Skandalurteil des Mannheimer Landgerichts gegen den Neonazi Günter Deckert* (Weinheim: Antifaschistisches Aktionsbündnis, 1994), 34.
20. *NJW* (1994), 1421.
21. For a sharp critique of the refusal of the courts to apply the racial incitement law, see Monika Frommel, "Das Rechtsgut der Volksverhetzung oder ein Ablaß in Drei Akten," *Kritische Justiz* 14 (1995): 402–11.
22. Michael Christie, "German Court's Nazi Apologist Ruling Angers Jews," *Reuters*, March 16, 1994. The revised § 130 specifically outlaws "the denial, approval, or trivialization of the Holocaust."
23. The material for the next several paragraphs is drawn from the *Deckert* verdict. *NJW* (1994): 2494.
24. H. Reinke-Nobbe and F. Siering, "Das Urteil geht so in Ordnung," *Focus*, August 8, 1994, 25.
25. Peter Henkel, "Was für Richter waren da am Werk," *Frankfurter Rundschau*, August 11, 1994.
26. "Schlag ins Gesicht," *Der Spiegel*, August 15, 1994.
27. Patrick Bahners, "Objective Selbstzerstörung," *Frankfurter Allgemeine Zeitung*, August 15, 1994.
28. Reinke-Nobbe and Siering, "Das Urteil geht so in Ordnung," 25.
29. "Urteilsbegründung wird auf strafbare Äußerung geprüft," *Süddeutsche Zeitung*, August 12, 1994.
30. Michela Wiegel, "Deckert-Urteil macht Schlagzeilen in aller Welt," *Tagesspiegel*, August 12, 1994.
31. *Der Spiegel*, August 15, 1994.
32. Bernd Siegler, "Ah Deutschland, deine Richter," *Tageszeitung*, August 12, 1994.
33. Henkel, "Was für Richter waren da am Werk," *Frankfurter Rundschau*, August 11, 1994.
34. Friedrich Karl Fromme, "Der Bundesgerichtshof hat wieder das Wort," *Frankfurter Allgemeine Zeitung*, August 13, 1994.
35. Michael Christie, "German Holocaust Row Judges Replaced," *Reuters*, August 15, 1994.
36. " 'Wir müssen ein Klima der Ächtung herbeiführen,' " *Süddeutsche Zeitung*, August 18, 1994.
37. Kühnert, "Lehren aus dem zweiten Mannheimer Deckert-Urteil," *Deutsche Richterzeitung (DRiZ)* (October 1994): 393.
38. Kurt Rudolph, "Der Preis der richterlichen Unabhängigkeit," *DRiZ* (October 1994): 392.
39. R. Ross, "In Mannheim hat die Justiz Versagt," *DRiZ* (September 1994): 348.
40. Quoted in Siegler, "Ah Deutschland," *Tageszeitung*, August 12, 1994.
41. Kühnert, "Lehren aus dem zweiten Mannheimer Deckert-Urteil," 393; Reinke-Nobbe and Siering, "Das Urteil geht so in Ordnung," *Focus*, August 8, 1994, 25.
42. Rudolph, "Der Preis der richterlichen Unabhängigkeit," 392.
43. Heribert Prantl, "Das Preis der Unabhängigkeit," *Stuttgarter Zeitung*, August 17, 1994.
44. Rudolf Wassermann, "Einäugige Justiz?" *Recht und Politik* (1994), 228.

45. *NJW* (1995): 340.
46. Michael Christie, "Germany: German Courts get Tough on 'Auschwitz-Lie,'" *Reuters*, December 15, 1994.
47. Quoted in "Deckert-Urteil: 'Gefährliche geistige Brandstiftung,'" *Die Welt*, April 23, 1995.
48. "Richter Müller bedauert 'einige Formulierungen,'" *Frankfurter Rundschau*, August 16, 1994.
49. The juror strike is described in Rolf Lamprecht, *Vom Mythos der Unabhängigkeit: Über das Dasein und Sosein der deutschen Richter* (Baden-Baden: Nomos, 1995), 36–38; the criminal case is reported at *NJW* (1995): 2503 (Appeals Court Karlsruhe, April 19, 1995).
50. "Viel zu schwamming," *Der Spiegel*, March 13, 1995.
51. "Orlet distanziert sich von Rechtsextremismus," *Reuters*, May 5, 1995.
52. "Deckert Richter Orlet Geht in dem Ruhestand," *Reuters*, May 10, 1995.
53. Kühnert, "Lehren aus dem zweiten Mannheimer Deckert-Urteil," 393.
54. The court reprinted the message in its decision. *NJW* (1995): 1038 (Administrative Court (*Amtsgericht*) Hamburg, February 3, 1995).
55. Annette Rogalla, "Ein Freispruch, der rechte Mythen bildet," *Tageszeitung* (Hamburg), February 4, 1995.
56. Vornbäumen and Plog, "Auf dem rechten Auge erstinstanzlich blind," *Frankfurter Rundschau*, February 4, 1995.
57. "Besonders perfide," *Der Spiegel*, February 6, 1995.
58. The statement ran in the local and national press. "Einhellige Kritik an Urteil zu 'Auschwitz-Mythos,'" *Süddeutsche Zeitung*, February 4, 1995.
59. Ibid.
60. Quoted in Meier, "Ein Justizskandal, der keiner ist," *Tageszeitung* (Hamburg), February 10, 1995.
61. Vornbäumen and Plog, "Auf dem rechten Auge erstinstanzlich blind," *Frankfurter Rundschau*, February 4, 1995.
62. "Empörung über Freispruch von Neo-Nazis," *Hamburger Abendblatt*, February 3, 1995.
63. Klingst, "Ein Fehlurteil, kein Skandal," *Die Zeit*, February 10, 1995.
64. Ibid.
65. Horst Meier, "Ein Justizskandal, der keiner ist," *Tageszeitung* (Hamburg), February 10, 1995.
66. Ibid.
67. L.G. Bertram, "Vergangenheit, die nicht vergeht," *NJW* (1995): 1270.
68. *NJW* (1995): 1039.
69. Ibid. (quoting *Der Spiegel*, January 30, 1995, and *Tageszeitung* (Hamburg) December 23, 1994).
70. Cornelia Bolesch, "Richter: 'Auschwitz-Mythos' ist mehrdeutig," *Süddeutsche Zeitung*, February 23, 1995.
71. "Der Begriff 'Auschwitz-Mythos' ist für sich gesehen neutral," *Frankfurter Rundschau*, March 4, 1995.
72. "Freispruch für zwei Neonazis," *Hamburger Abendblatt*, September 9, 1995.
73. Ibid.
74. Ibid.
75. Ibid.

76. Bettina Muttelacher, "Der Kommentar," *Hamburger Abendblatt*, September 9, 1995.
77. Opinion of Berlin District Court dated August 29, 1995 (the *Althans* verdict), 51.

CHAPTER 4 TAKING THE BLAME FOR *R. V. ZUNDEL*

1. Irwin Cotler, "Response to the Deschênes Commission of Inquiry on War Criminals: An Emergent Mythology and Its Antidote," in Irwin Colter ed., *Nuremberg Forty Years Later: The Struggle Against Injustice in Our Time* (Montreal: McGill-Queen's University Press, 1995), 73–86, 83. The headline appeared in the *Globe and Mail* on February 13, 1985.
2. Mary Douglas has spoke of the impossibility of a society "founded on a resolute refusal to blame anyone[.]" See Douglas, *Risk and Blame: Essays on Cultural Theory* (New York: Routledge, 1992), 6.
3. Harold Troper, "The Queen v. Zundel: Holocaust Trial in Toronto," *Congress Monthly*, July–August 1985, 9.
4. At the trial there was a dispute over whether Zundel authored the book. Zundel claimed he only supplied the photographs but admitted he did not "see much wrong with the content," 1985, Transcript in *R. v. Zundel*, Tr. 4231.
5. The jury acquitted Zundel on a second count relating to *The West, War and Islam*, a four-page pamphlet that blamed tensions in the Middle East on an international conspiracy directed by Zionists, international bankers, freemasons, and Communists.
6. *R. v. Zundel*, 35 D.L.R. (4th) 338.
7. *R. v. Zundel (No. 2)*, 53 C.C.C. (3d) 161 (1990).
8. *R. v. Zundel*, 95 D.L.R. (4th) 209 (1992). Section 2(b) guarantees freedom of expression.
9. Gabriel Weimann and Conrad Winn, *Hate on Trial: The Zundel Affair, The Media, Public Opinion in Canada* (Oakville, Ont.: Mosaic Press, 1986).
10. Evelyn Kallen and Lawrence Lam, "Target for Hate: The Impact of the Zundel and Keegstra Trials on a Jewish-Canadian Audience," in *Canadian Ethnic Studies* 25(1) (1993): 9–24.
11. Manuel Prutschi, Zundel Trial, Canadian Jewish Congress Overall Report, March 8, 1985, 9–10.
12. *R. v. Zundel*, 35 D.L.R. (4th) 338, 373.
13. Ibid., 396–400.
14. Jim Emmerson, "Appeal Court's Ruling Outrages Jews Who Say New Trial Will Restage Circus," *Toronto Star*, January 24, 1987; Manuel Prutschi, Summary and Analysis of 125-page Ontario Supreme Court Judgement re. Zundel Appeal, January 29, 1987.
15. *R. v. Zundel*, 35 D.L.R. (4th) 338, 368.
16. Prutschi, Summary and Analysis of 125-page Ontario Supreme Court Judgement re. Zundel Appeal, 2.
17. See Canadian Criminal Code §§ 647–48. The Code also prohibits the post-trial questioning of jurors about their deliberations. Ibid.
18. H. Silverman, "The Trial Judge, Pilot, Participant, or Umpire," *Alberta Law Review* 11 (1973): 40–64, 64.

19. Peter Russell, "Judicial Power in Canada's Political Culture," in M.L. Friedland ed., *Courts and Trials: A Multidisciplinary Approach* (Toronto: University of Toronto Press, 1975), 75–88, 84.
20. Editorial, "Bad Ideas, Bad Law," *Globe and Mail*, January 27, 1987.
21. Manuel Prutschi, Media response to upcoming Supreme Court decision on the Crown's Leave Application to the Supreme Court in the Zundel case, April 8, 1987, 2.
22. Manuel Prutschi, "Antisemitism on Trial: Zundel Convicted, Media Indicted," *The Bulletin of the Centre for Investigative Journalism* 27 (1985): 30.
23. "Expert's Admission: Some Gas Death 'Facts' Nonsense," *Toronto Sun*, January 17, 1985.
24. Kirk Makin, "Lawyer Challenges Crematoria Theory," *Globe and Mail*, January 12, 1985.
25. Wendy Darroch, "Prisoners at Auschwitz Dined, Danced to Bands Zundel Witness Testifies," *Globe and Mail*, February 13, 1985.
26. Kirk Makin, "Camp Gas Chambers Fake, Holocaust Revisionist Says," *Globe and Mail*, February 12, 1985.
27. Colter, "Response to the Deschênes Commission of Inquiry on War Criminals," 83.
28. Robert Fulford, "Speak No Evil," *Saturday Night*, June 1985, 8.
29. Prutschi, "Antisemitism on Trial: Zundel Convicted, Media Indicted," 13, 30.
30. Letter from Shirley Sharzer to Mrs. Rose Wolf, May 23, 1985.
31. Joseph J. Wilder, Zundel retrial update, December 10, 1987.
32. Kerry Irwin, "Yesterday's Papers, Yesterday's News: Media Coverage of the 'New' Zundel Trial" (Undergraduate honors thesis, Carleton University, 1988), 27.
33. Darroch, "Prisoners at Auschwitz Dined, Danced to Bands Zundel Witness Testifies."
34. Ken McQueen, "News Media Wary of Zundel," *Calgary Sun*, January 8, 1988.
35. See Kirk Makin, "Moral Stance Against Nazis Assailed at Publisher's Trial," *Globe and Mail*, February 7, 1985.
36. Wendy Darroch, "Victims Stripped in Dark and Were Gassed, Trial Told," *Toronto Star*, January 24, 1985.
37. Kirk Makin, "Escaper Tells of Arrivals in Auschwitz," *Globe and Mail*, January 22, 1985. The continuation headline read, "Escaper Tells of Camp Horror." Ibid.
38. Wendy Darroch, "Zundel Tape Reveals Plan to Rescue Aryans Court is Told," *Toronto Star*, February 22, 1985.
39. Kirk Makin, "Zundel Boosted Aryan Tracts," *Globe and Mail*, February 22, 1985.
40. Kirk Makin, "Gun-Barrel Justice for 'Traitors': Zundel," *Globe and Mail*, February 23, 1985.
41. Wilder, Zundel retrial update.
42. Irwin, "Yesterday's Papers, Yesterday's News," 38.
43. Ibid., 36–37.
44. Ibid., 40.
45. George Bain, "The Public's Right to Know," *MacLean's*, May 23, 1988.
46. Paul Bilodeau, "Gas Chambers Just Used for Storage Witness Says," *Toronto Star*, March 3, 1988.

47. Irwin, "Yesterday's Papers, Yesterday's News," 42.
48. Prutschi, "Antisemitism on Trial," 30.
49. Prutschi, Zundel Trial, Canadian Jewish Congress Overall Report, 12.
50. Gerald Tishler, Alan M. Dershowitz, Arthur Berney et al., "When Academic Freedom and Freedom of Speech Confront Holocaust Denial and Group Libel: Comparative Perspectives," *Cardozo Law Review* 5 (1987), reprinted in *Boston College Third World Law Journal* 8 (1988): 69.
51. Ibid., 68.
52. Leonidas E. Hill, "Revisionism and the Law in Canada," *Simon Wiesenthal Center Annual* 6 (1989): 214, n.46
53. Interview with Peter Griffiths, August 22, 1996.
54. Keegstra had been dismissed from his teaching post in 1983 after a well-publicized controversy. David Bercuson and Douglas Wertheimer, *A Trust Betrayed: The Keegstra Affair* (Toronto: Doubleday Canada Limited, 1985).
55. 1985, Tr.: 2148 (arguing against judicial notice motion).
56. Claude Adams, "Through the Fingers," *Canadian Lawyer*, April 1985, 18.
57. Ibid.
58. Leonidas E. Hill, "Revisionism and the Law in Canada," 177.
59. Nor is Adams' criticism of Christie's trial strategy as bad lawyering any more convincing. In challenging the Holocaust, Christie followed the wishes of his client, who cared less about the legal verdict and more about making full use of the propaganda opportunities raised by the trial. Under these circumstances, Christie's lawyering was "good" to the extent it succeeded in forcing the court to focus attention on Holocaust denial. Nor is this rare. During the late 1960s Americans protesting against the war in Vietnam used similar tactics. See Steven E. Barkan, *Protesters on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements* (New Brunswick, N.J.: Rutgers University Press, 1985).
60. *R. v. Zundel (No. 2)*, 53 C.C.C. (3d), 161, 207.
61. Law Society of Upper Canada, In the Matter of Douglas Christie, February 22, 1993, 9.
62. Ibid., 13.
63. Editorial, "The Right to be Wrong," *Globe and Mail*, August 31, 1992.
64. Bram D. Eisenthal, "Canadian High Court Strikes Down Law Banning Revisionist Material," *Jewish Telegraphic Agency*, August 28, 1992.
65. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing Inc., 1994), 369.
66. Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997), 96.
67. Mandel, *The Charter of Rights*, 376.
68. Ibid., 372–73. Mandel also attacked the Ontario Court of Appeals. Describing its 1987 reversal for improper jury selection, Mandel wrote: "Furthermore, they felt the trial judge should have gone out of his way to help Zundel choose his jury, even though the racist questions he proposed to ask were improper." Ibid., 371. In fact, the appellate court objected to Judge Locke's refusal to let the defense ask the jurors if they could be impartial. *R. v. Zundel*, 35 D.L.R. (4th) 338, 375 (1987).
69. *R. v. Zundel*, 95 D.L.R. (4th) 202, 275.
70. Mandel, *The Charter of Rights*, 372.
71. Ibid., 374 (quoting McLachlin in *Zundel*, 95 D.L.R. (4th) 202, 259).

72. *R. v. Zundel*, 95 D.L.R. (4th) at 262. As an example of the last category she cited Salman Rushdie's *Satanic Verses*. Mandel objected vehemently to the Rushdie example: "What a shameful insult to Rushdie to put him in the same category with Zundel!" According to Mandel, Rushdie's book was condemned because it expressed an attitude, not a fact. Mandel, *The Charter of Rights*, 372. But McLachlin's did not say the *Satanic Verses* contained factual assertions, merely that society might view it that way. *R. v. Zundel*, 95 D.L.R. (4th), at 262.
73. Ibid., 253–54.
74. Ibid., 257.
75. Ibid., 253, 263.
76. Mandel, *The Charter of Rights*, 281 (citing the *Alberta Nurses* case in which McLachlin upheld a criminal contempt order used to break a strike).
77. Ibid., 455.
78. Bakan, *Just Words*, 3.
79. "The education, socialization, and selection of judges ensure that they are likely to value and support existing social arrangements and to stay within the bounds of society's 'dominant views' when deciding cases." Ibid., 103. Mandel also had hard words for lawyers. Lawyers, he wrote, are not "a group known for integrity." Mandel, *The Charter of Rights*, 3.

CHAPTER 5 THE LIMITS OF SYMBOLIC LEGISLATION—THE GAYSSOT LAW

1. Robert Faurisson, "Revisionism on Trial: Developments in France, 1979–1983," *Journal of Historical Review* 6(2) (1985): 133–81, 164.
2. Robert Faurisson, "My Life as a Revisionist (September 1983 to September 1987)," *Journal of Historical Review* 9(1) (1989): 5–63. The Roques affair is taken up at length in chapter 7.
3. Guyora Binder, "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie," *Yale Law Journal* 98 (1989): 1321–83, 1357–60.
4. The incident is described in Faurisson, "My Life as a Revisionist," 30.
5. Ibid. (quoting French Press Agency communique).
6. The interview is recounted in Geoffrey Harris, *The Dark Side of Europe: The Extreme Right Today*, new ed. (Edinburgh: Edinburgh University Press, 1994), 64–65.
7. Ibid.
8. Le Pen was sued by some of the same deportee groups that brought the litigation against Faurisson in 1979. On December 18, 1991 the Versailles Court of Appeals condemned him to damages of 100,000 francs. See Roger Errera, "French Law and Racial Incitement: On the Necessity and Limits of the Legal Responses," in Louis Greenspan and Cyril Levitt eds., *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries* (Westport, Conn.: Praeger, 1993), 39–62.
9. Faurisson, "My Life as a Revisionist," 39 (emphasis in original).
10. Ibid., 33
11. Ibid., 40.
12. For Valery Giscard d'Estaing, see Jonathan Marcus, *The National Front in French Politics: The Resistible Rise of Jean-Marie Le Pen* (New York: New York University Press, 1995), 94.

13. Ibid., 92.
14. Henry G. Simmons, *The French National Front, The Extremist Challenge to Democracy* (Boulder, Colo.: Westview, 1996), 123.
15. "The Notin Affair," *Journal of Historical Review* 10(3) (1990): 367–70.
16. Paul Webster, "France: Furore at Racism Debate," *Manchester Guardian*, May 4, 1990.
17. *Journal Officiel de la Assemblée Nationale*, 1re Séance, May 2, 1990, 890.
18. Ibid., 922.
19. Ibid., 908–09.
20. Ibid., 889–92. Vitry-sur-Seine is a town where in 1980 the Communist mayor demolished an immigrant hostel. Similar comments were made whenever communists spoke. For their part the Left heckled opposition delegates, especially Marie-France Stirbois, with references to Nazism, Vichy, Petain, and the German *Republikaner* party. Ibid., 930–34 (speech of Marie-France Stirbois).
21. Ibid., 954.
22. Ibid, 889.
23. *Journal Officiel de la Assemblée Nationale*, 2e Séance, May 2, 1990, 902, 905.
24. Ibid., 929.
25. Ibid., 889.
26. Ibid., 919.
27. Ibid., 929. The reference is to Klaus Barbie's 1944 order deporting forty-four Jewish children who had been hiding in the town of Isieux to Auschwitz. The deportation order played a major role in Barbie's trial. See Henry Rousso, *The Vichy Syndrome: History and Memory in France Since 1944* (Cambridge: Harvard University Press, 1991), 204.
28. Ibid.
29. Ibid., 918, 920.
30. Ibid., 931–34.
31. Ibid., 935.
32. *Journal Officiel du Senat*, June 11, 1990, 1445.
33. *Journal Officiel de la Assemblée Nationale*, 1re Séance, May 2, 1990, 921–23 (Speech of Robert Pandraud).
34. Ibid., 921–22.
35. *Journal Officiel du Senat*, June 11, 1990, 1456.
36. *Journal Officiel de la Assemblée Officiel*, 2e Séance, June 28, 1990, 3123.
37. *Journal Officiel du Senat*, 2e Séance, June 11, 1990, 1447.
38. Tzvetan Todorov, "A Letter from Paris," in *Salmagundi*, No. 88–89 (Fall 1990–Winter 1991), 49.
39. Alfred Grosser, "La Memoire des Crimes," *Le Monde*, September 13, 1990.
40. Quoted in *L'Union Departementale des Deportes, Internes et Victimes de Guerre de la Seine (UDIVG) et al. c. Robert Faurisson et Patrice Boizeau*, Cour d'Appel de Paris, December 9, 1992, 5–6.
41. Quoted in "Paris Revisionist is Defiant at Trial," *Jewish Daily Forward*, March 29, 1991.
42. Ibid.
43. Ibid.
44. Quoted in Laurent Greilsamer, "Au tribunal de Paris M. Robert Faurisson face a l'authorite de la chose jugee," *Le Monde*, March 25, 1991.
45. Ibid.

46. Ibid.
47. Quoted in Paul Webster, "France: Trial of Nazi Apologist Seen as Self-Defeating," *Manchester Guardian*, March 25, 1991.
48. "Pour 'contestation de crimes contre l'humanite' M. Robert Faurisson est condemn a 100,000 francs d'amende avec sursis," *Le Monde*, April 20, 1991.
49. *UDIVG c. Faurisson*, TGI Paris, April 18, 1991. The Paris Court of Appeals affirmed the trial court in December 1992. *UDIVG c. Faurisson*, Cour d'Appel Paris, December 9, 1992. Faurisson appealed his conviction to the European Court of Human Rights, which upheld the Gayssot Law as applied to him. *Faurisson v. France*, ECHR 550/1993 (November 19, 1996).
50. James G. Shields, "French Revisionism on Trial: The Case of Robert Faurisson," *Patterns of Prejudice* 25(1) (1991): 88.
51. Because most Gayssot cases are unreported, the exact number is unknown. I must acknowledge a great debt to Mr. Jean-Serge Lorrach, attorney for FNDIR (Federation National des Deportees, Interns et Resistants), for supplying me with judicial decisions, legal briefs, and other papers related to several Gayssot prosecutions.
52. Perhaps the most important of these is a three-month statue of limitations, which forces potential prosecutors to move quickly or lose their right to sue.
53. For more, see Robert A. Kahn, "Holocaust Denial Prosecutions in a Liberal Society: France Under the Gayssot Law" (paper presented to the 2000 Law and Society Meetings, Miami, Florida, May 2000).
54. *LICRA et al. c. Marie-Luce Wacquez et Françoise Pichard*, TGI Paris, January 10, 1994. The details in the following paragraph come from *Wacquez/Pichard*, 4–5.
55. Ibid., 3–4.
56. Brozat said there was no mass gassing at Dachau or at any other concentration camps in the old Reich. The statement was made in *Die Zeit* on August 19, 1960. The statement has importance because immediate postwar accounts of the Nazi crimes included references to a gas chamber at Dachau. The gas chamber was present, but not used for mass executions. Paul Kuttner, *The Holocaust or History? The Book of Answers to Those Who Would Deny the Holocaust* (New York: Dawnwood Press, 1996), 90.
57. Robert Faurisson frequently makes this point. See Kuttner, *The Holocaust or History?* 91.
58. *Wacquez/Pichard*, 4–5.
59. *Wacquez/Faurisson*, 2.
60. *Guionnet*, Cour d'Appel Paris, 3.
61. Quoted in *Larrieu*, 2. In *Larrieu* the use of the word "supposed" was the basis of the court's guilty verdict.
62. *Guionnet*, Paris Cour d'Appel, 8–9.
63. *Federation National des Deportes et Internes Resistants et Politiques (F.N.D.I.R.) c. Eric Delcroix*, TGI Paris, October 22, 1996.
64. Ibid. (the quotes from Delcroix's book are cited in the court's opinion).
65. Ibid.
66. Yves Ternon, "Freedom and Responsibility of the Historian: The 'Lewis Affair,'" in Richard G. Hovannisian ed., *Remembrance and Denial: The Case of the Armenian Genocide* (Detroit: Wayne State University Press, 1998), 237–48. In the end, French Armenians fell back on § 1382 and charged Lewis with falsifying history. See Yves Ternon, *Les Arméniens: Histoire d'un génocide*, rev. ed. (Paris: Èditions du Seuil, 1996), 350–55.

67. For an overview of the affair see Klaus Holz and Elfriede Müller, "Die Affäre Roger Gaurady/Abbé Pierre," in Wolfgang Benz ed., *Jahrbuch für Antisemitismus Forschung*, (Frankfurt am Main: Campus Verlag, 1997), 148–59.
68. *Plainte Avec Constitution de Parte Civile* filed by UNADIF and FNDIR in the *Gaurady* case, TGI Paris, February 22, 1996.
69. Pierre's campaign to provide shelter to the homeless in the 1950s is described in Boris Simon, *Abbé Pierre and the Ragpickers of Emmaus* (New York: P.J. Kennedy & Sons, 1955). Since then Pierre had been an active campaigner against anti-Arab racism. Holz and Müller, "Die Affäre Roger Gaurady/Abbé Pierre," 150.
70. Alan Riding, "French Icon Stumbles in Debate on Holocaust," *New York Times*, May 1, 1996.
71. "La hiérarchie catholique ne veut pas être entraînée dans la polémique suscitée par l'abbé Pierre," *Le Monde*, April 30, 1996 (quoting interview).
72. Riding, "French Icon Stumbles," *New York Times*, May 1, 1996 (quoting interview).
73. Ibid.
74. Holz and Müller, "Die Affäre Roger Gaurady/Abbé Pierre," 150–51.
75. Alan-Gérard Slama, "Les casualitiés diaboliques," *Le Figaro*, May 3, 1996.
76. René Rémond, "Débat autour de le loi Gayssot," *Le Figaro*, May 3, 1996.
77. Jean-Louis Masson, "Une loi néfaste," *Le Figaro*, May 3, 1996.
78. Bernard Poulet, "Fallait-il jeter toutes les pierres a l'abbé," *L'eventement du Jeudi*, May 9–15, 1996.

PART III THE DILEMMA OF TOLERATION

1. Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York: Free Press, 1993), 220.
2. Alan Dershowitz, *The Vanishing American Jew: In Search of Jewish Identity for the Next Century* (Boston: Little, Brown and Company, 1996), 115.
3. Lipstadt, *Denying the Holocaust*, 17.
4. Dershowitz, *The Vanishing American Jew*, 114–15. Ronald Dworkin also has spoken out against Holocaust-denial prosecutions, primarily on grounds of freedom of speech. See Dworkin, "The Unbearable Cost of Libert," *Index on Censorship* 3 (1995): 43–46.
5. Lipstadt, *Denying the Holocaust*, 26.
6. Ibid., 184,208.
7. Dershowitz, *The Vanishing American Jew*, 112.
8. Newspapers at private colleges and universities have no obligation to follow the First Amendment. As for papers at public schools, the First Amendment will not apply so long as the paper maintains editorial independence from the school. *Sinn v. Daily Nebraskan*, 829 F.2d. 662 (8th Cir. 1987); for more, see Robert M. O'Neil, *Free Speech in the College Community* (Bloomington: Indiana University Press, 1987), 123–43. Most of the cases involve the right of a campus paper to reject ads from lesbian and gay student groups.
9. David Nelken, "Towards a Sociology of Legal Adaptation," in David Nelken and Johannes Feest eds., *Adapting Legal Cultures* (Oxford: Hart Publishing, 2001), 7–54, 25.

CHAPTER 6 A PANACEA OF TOLERATION?

1. For a text of the add see, Bradley Smith, "The Holocaust Controversy: The Case for Open Debate," taken from a copy of the ad running in the *Montana Kaimin*, April 28, 1992.
2. Simon Wiesenthal Center, Press Release, dated July 21, 1992.
3. Simon Wiesenthal Center, Press Release, dated June 29, 1994. During 1992–93 Smith sent an ad to a few schools, without much success. This had much to do with the content of the ad, which was more openly revisionist than Smith's other ads.
4. Ibid.
5. Ibid.
6. The papers ran articles, letters, or editorials about Holocaust denial on the following dates: *New York Times*: December 23, 1991; December 30, 1991; February 7, 1992; December 11, 1993; December 23, 1993; January 1, 1994. *Time*: December 27, 1993. *National Review*: January 24, 1994.
7. Lipstadt accused the student editors of a "variety of failures" including a "failure to understand the true implications of the First Amendment." Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York: Free Press, 1993), 208.
8. For instance, Daniel Farber and Suzanna Sherry charge the students who ran the ads with "misuse of anti-objectivism." See Daniel Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford: Oxford University Press, 1997), 109.
9. Maryanne George, "Ad Challenging Holocaust Stirs Protest at U-M," *Detroit Free Press*, October 25, 1991.
10. Kim Clarke, "Anti-Semitic Ad Published at U-M," *Ann Arbor News*, October 25, 1991.
11. *Michigan Daily*, October 25, 1991.
12. George, "Ad Challenging Holocaust Stirs Protest at U-M."
13. *Michigan Daily*, October 25, 1991.
14. From October 25–31 the *Daily* published twenty-seven letters on the Smith controversy. Of these eighteen opposed the decision to run the ad, four favored it, and five did not take a clear position.
15. Quoted in Melissa Peerless and Bethany Robertson, "Rally Protests Revisionism, Daily Policies," *Michigan Daily*, October 28, 1991.
16. Letter of Ira Azulay, *Michigan Daily*, October 28, 1991.
17. See, e.g., letters of Erica Michael and Wendy Walsh, *Michigan Daily*, October 28, 1991.
18. Letter of Michael Blum, *Michigan Daily*, October 30, 1991.
19. Letter of Jessica Landaw, Jennie Grossberg, and Beatriz Gonzalez, *Michigan Daily*, October 30, 1991.
20. Letter of Larry Bublick, *Michigan Daily*, October 30, 1991.
21. Letter of Jeffrey Martin, *Michigan Daily*, October 28, 1991.
22. Only six of the eighteen letters opposing the *Daily*'s decision to run the ad referred to freedom of speech. Most of these were passing references.
23. "Editorial: Holocaust Revisionism," *Michigan Daily*, October 28, 1991.
24. Ibid.
25. Clarke, "Anti-Semitic Ad Published at U-M."
26. Letter of Chris Foote, *Michigan Daily*, October 30, 1991.

27. Letter of Michael Barron Jr., *Michigan Daily*, October 31, 1991.
28. Letter of Chris Foote, *Michigan Daily.*
29. Letter of Chad Allen, *Michigan Daily*, October 30, 1991.
30. Letter of Daniella HarPaz, *Michigan Daily*, October 28, 1991.
31. Letter of Hank Greenspan, *Michigan Daily*, October 30, 1991.
32. Letter of James Duderstadt, *Michigan Daily*, October 28, 1991.
33. "Editorial: Controversy—Holocaust Revisionist Piece Denying Atrocities," *Ohio State Lantern*, January 24, 1992.
34. Lipstadt, *Denying the Holocaust*, 207.
35. Katherine Bishop, "Hoping to Change Minds of Young on Holocaust," *New York Times*, December 23, 1991.
36. These appeared in the *New York Times*, December 31, 1991.
37. See "Editorial: Was the Lantern Decision to Run Controversial Text Really Big News?" *Ohio State Lantern*, January 27, 1992.
38. Mike Stepanski, "Board Votes 5–4 Against Running Ad," *Ohio State Lantern*, January 23, 1992.
39. See "Editorial: Controversy—Holocaust Revisionist Piece Denying Atrocities" and E. Gordon Gee, "Bradley's Propaganda Not Honest Revisionism," *Ohio State Lantern*, January 24, 1992.
40. Stepanski, "Board Votes 5–4 Against Running Ad."
41. Tracey Hublak, "Possible Ad Placement Controversial," *Ohio State Lantern*, January 23, 1992.
42. Stepanski, "Board Votes 5–4 Against Running Ad."; Tom McKee, "Hillel Plans Sit-In," *Ohio State Lantern*, January 23, 1992.
43. Tracey Hublak, "Possible Ad Placement Controversial." The policy also restricts ads that advocate "sedition or other illegal actions" or "violate[] normal standards of morality and tastes."
44. Hublak, "Possible Ad Placement Controversial."
45. "Editorial: Controversy—Holocaust Revisionist Piece Denying Atrocities," *Ohio State Lantern.*
46. McKee, "Hillel Plans Sit-In."
47. "No Lantern Resignations After 'Teach-In,'" *Ohio State Lantern*, January 28, 1992.
48. Robert Hanseman, "Gee Chastises Lantern," *Ohio State Lantern*, January 28, 1992.
49. J. Crawford, "Arrested Student Not Part of Sit-In," *Ohio State Lantern*, January 27, 1992.
50. "No Lantern Resignations After 'Teach-In,'" *Ohio State Lantern.*
51. Six of the twelve letters supported the *Lantern*, while six were opposed.
52. Letter of Ron Solomon, *Ohio State Lantern*, January 31, 1992.
53. Letter of David Werber, *Ohio State Lantern*, January 31, 1992.
54. Letter of R. Klaus Thiers, *Ohio State Lantern*, January 31, 1992.
55. Gary Rogers, "Elitist Thinking Can Destroy Freedom," *Ohio State Lantern*, January 31, 1992.
56. "No Lantern Resignations After 'Teach-In.'" *Ohio State Lantern.*
57. *Harvard Crimson*, "Editorial," December 10, 1991.
58. See Kenneth S. Stern, *Holocaust Denial* (New York: American Jewish Committee, 1993); *Holocaust Denial: Bigotry in the Guise of Scholarship* (Los Angeles: Simon Wiesenthal Center, 1994); *Hitler's Apologists: The*

Anti-Semitic Propaganda of Holocaust Revisionism (New York: Anti-Defamation League, 1993).

59. Bradley Smith, "A Revisionist's View of the U.S. Holocaust Museum," reprinted in "Bradley Smith's 'Campus Project' Generates Nationwide Publicity for Holocaust Revisionism," *Journal of Historical Review* 14(4) (1994): 20.
60. For example: "The Museum's 'proof' for a gas chamber at Birkenau is a plastic model created by a Polish *artiste*. A plastic copy of a metal door is displayed as 'proof' of a homicidal gas chamber at Maidanek." This language, if a little silly, is not deliberately offensive.
61. Ibid.
62. According to Howard Jeruchimowitz, one of the *Justice* editors, it was journalistically irresponsible to critique an ad on the day of publication. Walter Ruby, "Denying the Holocaust by Column Inch," *Jewish World*, March 4–10, 1994.
63. Thier charged the paper with having "confused the principle of free and open expression as it applies to discussions on campus and the policies and procedures associated with the acceptance of paid advertising." Statement of President Samuel O. Thier, M.D., dated December 23, 1993.
64. Approximately 65 percent of the student body at Brandeis is Jewish.
65. Wendy Cole, "Debating the Holocaust," *Time*, December 27, 1993.
66. Letter of Kenneth S. Stern, *New York Times*, December 23, 1993. Stern also added that this would also inoculate Smith from charges of anti-Semitism: " 'If we were anti-Semites,' they will say, 'a Jewish school would not have accepted our ad.' "
67. Ruby, "Denying the Holocaust by Column Inch."
68. Ibid.
69. Ibid.
70. Ibid.
71. See *Queens College Quad*, February 22, 1994, 1–6.
72. "Editorial: Revising Revisionism," *Queens College Quad*, February 22, 1994.
73. Brandeis made this statement in *Other People's Money and How the Bankers Use It* (New York: F.A. Stokes, 1914).
74. Batsheva Dreisinger, "Dealing with Denial, the Book Behind the Fight to Expose Revisionism," *Queens College Quad*, February 22, 1994.
75. Statement of Queens College President Shirley Strum Kenney, *Queens College Quad*, February 22, 1994.
76. Not only that, at the bottom of Kenny's statement was an addendum, stating that she only later learned that the Quad had not accepted the ad as a paid advertisement. She "commended" the editors for this decision.
77. The *Quad* is a weekly. I have been unable to locate the issue appearing the week immediately after the Smith ad ran.
78. Dreisinger, "Dealing with Denial," *Queens College Quad*, February 22, 1994.
79. Ruby, "Denying the Holocaust by Column Inch."
80. Ibid.
81. "Smith and Cole Appear on 'Donahue' Show in Major Media Breakthrough for Revisionism," *Journal of Historical Review* 14(3) (1994): 18–20; " '60 Minutes' Takes Aim at Holocaust Revisionism," *Journal of Historical Review* 14(3) (1994): 16–18.

82. "Bradley Smith's 'Campus Project' Generates Nationwide Publicity for Holocaust Revisionism," *Journal of Historical Review* 14(4) (1994): 24.
83. Ibid.
84. "Smith and Cole Appear on 'Donahue' Show," *Journal of Historical Review*, 8.
85. William F. Buckley Jr., "First Amendmentitis," *National Review*, January 24, 1994.
86. Ibid. The analogy is strained at best when applied to Bradley Smith and lacks all credibility with regard to Ernst Zundel.
87. Ibid.
88. For instance in 1997–98, ads ran at fifteen colleges and universities including Nebraska, Colgate, MIT, Rice, and Villanova. Anti-Defamation League, "ADL Reports Holocaust Denial Ad Campaign Targets College Newspapers," Press Release, dated December 10, 1997.
89. Katherine Bischoping, "Responses to Holocaust Denial: A Case Study at the University of Michigan," *Contemporary Jewry* 18 (1997): 44–59.
90. See "Editorial: Combat Poor Speech with More Speech, Not Restriction," *College Voice* (Connecticut College), March 5, 1999.
91. Ibid. *Cohen* held that a jacket inscribed with the words "Fuck the Draft" was protected political speech; 403 U.S. 15 (1971). *Sullivan* held that libels against public figures are permissible so long as the material was not deliberately false; 376 U.S. 254 (1964).

CHAPTER 7 THE HIDDEN BENEFIT OF CRIMINAL SANCTIONS

1. I discuss Canadian attitudes on hate speech at greater length in Robert A. Kahn, "How Americans and Canadians Justify Their Positions on Hate Speech" (paper presented at the Law and Society annual meeting, Vancouver, Canada, May 2002).
2. *Alberta Press Case* (1938) S.C.R. 10, quoted in D.A. Schmeiser, *Civil Liberties in Canada* (Oxford: Oxford University Press, 1964), 201.
3. See Schmeiser, *Civil Liberties in Canada*, 209–11.
4. *Alberta Press Case* (1938) S.C.R. 100.
5. *R. v. Butler*, 70 C.C.C. (3d) 129 (1992) (pornography); *R. v. Keegstra*, 61 C.C.C. (3d) 1 (1990) (hate speech).
6. Charter of Rights and Freedoms, § 27.
7. Allan Smith, "Metaphor and Nationality in North America," ch. 6 in *Canada: An American Nation? Essays on Continentalism, Identity and the Canadian Frame of Mind* (Montreal: McGill-Queen's University Press, 1994), 128–59, 133–34.
8. Lita-Rose Betcherman, *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties* (Toronto: Fitzhenry & Whiteside, 1975).
9. Matrine Valois, "Hate Propaganda: Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma," *Thémis: la revue juridique* 26 (1992): 379.
10. Ibid. (citing Cohen Committee).
11. This is the equivalent of writing an *amicus* brief.
12. Letter of Alan Borovoy to Douglas Christie, July 28, 1986.
13. Albertans were also focused on Eckville teacher James Keegstra. For over a decade Keegstra taught his social studies class that a Jewish conspiracy ruled

the world. In 1983, after lengthy protests, the Alberta school board fired him. In 1985 Keegstra was convicted of publicly inciting hatred. See David Bercuson and Douglas Wertheimer, *A Trust Betrayed: The Keegstra Affair* (Toronto: Doubleday Canada Limited, 1985).

14. Sherry Aikenhead, "Library Rejects Call to Pull Anti-Holocaust Books," *Edmonton Journal*, May, 17, 1988.
15. Letter of Vincent Richards to *Edmonton Journal*, May 28, 1988.
16. The letters appeared in the *Edmonton Journal* on May 24, 26, and 28, 1988.
17. Aikenhead, "Library Rejects Call to Pull Anti-Holocaust Books."
18. Letter of Vincent Richards to *Edmonton Journal.*
19. Letter of John Flemming, *Edmonton Journal*, May 26, 1988.
20. Letter of Tom H. Taylor, *Edmonton Journal*, May 28, 1988.
21. The quotes from the following three paragraphs are drawn from Dave Pommer, "Libraries possess banned book," *Calgary Herald*, February 9, 1995, and the *Montreal Gazette*, January 24, 1995.
22. Warren Kinsella, *Web of Hate: Inside Canada's Far Right Network* (Toronto: HarperCollins, 1995), 421.
23. The removal of Ross was upheld by the Canadian Supreme Court in *Attis v. School Board of Trustees, District No. 15 et. al.*, 133 D.L.R. (4th) 1 (April 3, 1996).
24. Bill Gladstone, "Holocaust Denial Case Tests Canadian Province's Hate Law," *Jewish Telegraphic Agency*, May 14, 1998. The following year the Commission found against Collins. See "Human Rights Commission Applauds Tribunal Decision in Hate Publication Case," Press Release, B.C. Human Rights Commission, February 3, 1999.
25. Sol Littman, "Lawlessness on the Internet," *Montreal Gazette*, August 5, 1995.
26. K.K. Campbell, "Censorship and the Net. Does the State Belong in the Hard Drives of the Nation?" *Toronto Star*, September 28, 1995.
27. For a brief overview, see Marvin Perry and Fredirck M. Schweitzer, *Antisemitism: Myth and Hate from Antiquity to the Present* (New York: Palgrave Macmillan, 2003), 269–77. The authors, one of whom testified as an expert at the human rights proceedings, have included extended excerpts from the January 2002 ruling.
28. Ibid., 271–72.
29. Ibid., 276 (quoting ¶ 296 of the ruling).
30. See David Capitanchik and Michael Whine, "The Governance of Cyberspace: Racism on the Internet," in *Liberating Cyberspace: Civil Liberties, Human Rights & the Internet* (London: Pluto Press, 1999), 237–57, 243. One of the greatest practical problems concerns a central theme in this book—the diversity of approaches nation-states take to Holocaust denial (and hate speech generally). Given this diversity, prosecuting a foreign national for spreading hate over the Internet will pose difficult choice-of-law problems. Should a French denier who sends denial material to Germany over the Internet be tried under German law or the more stringent Gayssot Law? See Adam Newey, "Freedom of Expression: Censorship in Private Hands," in *Liberating Cyberspace*, 13–44, 19, 23.
31. See Colin Freeze, "Zundel Headed Back to Canada," *Globe and Mail*, February 14, 2003. Upon arriving in Canada, Zundel was put into detention as a security risk under a recently passed antiterrorism law. See Bruce Cheadle,

"Documents Show Zundel Considered Security Threat," *Canadian Press*, May 7, 2003.

32. Zundel's experiences suggest that immigration law may become an important adjunct to censorship in the Internet age. If a nation-state cannot defend itself from offensive speech transmitted from beyond its frontiers through cyberspace, it retains the power to prevent those responsible for the offensive material from entering its territory. Whether a nation-state should use its immigration power in this way is another question.
33. Kinsella, *Web of Hate*, 413.
34. Ibid.
35. *Requête de M. Roques*, Conseil d'Etat, February 10, 1992, 54.
36. See Barton L. Ingraham, *Political Crime in Europe: A Comparative Study of France, Germany, and England* (Berkeley: Univeristy of California Press, 1979), 68–69.
37. Jerome B. King, *Law v. Order: Legal Process and Free Speech in Contemporary France* (Archon Books, 1975), 50–72.
38. Ibid., 71.
39. Ibid., 47.
40. See Jerome Lindon, introduction to *The Gangrene* (New York: Lyle Stewart, 1960), 17–30.
41. Nor is this an isolated example. Henry Alleg, whose 1957 condemnation of torture, this time in Algeria, in *La Question* (The Question), also faced state censorship and also found himself unable to get a hearing in a legal forum. In this case, the government, fearing a political trial over its Algeria policy, refused to charge Alleg with press law violations. See Lindon, introduction to *The Gangrene*, 30.
42. Henri Roques, "From the Gerstein Affair to the Roques Affair," *Journal of Historical Review* 58(1) (1987): 6–24, 9.
43. Ibid., 10.
44. Ibid., 10.
45. Ibid., 11.
46. Quoted. in André Chelain, "L' 'Affaire Roques,' " in *Faut-Il Fusiller Henri Roques?* (Paris: Ogmios, 1986), 7–16, 9. This volume was put out by Ogmios, a right-wing publishing house, and contains the thesis, Chelain's introduction, and a series of press clippings and other public documents relating to the thesis and the decision of the French government to annul it.
47. According to Chelain, only one professor was "brave" enough to take on this task, François-Georges Dreyfus, professor of contemporary history at Strasbourg. Ibid., 10.
48. Pierre Bridonneau, *Oui, Il Faut Parler Des Négationnistes* (Paris: Les Editions du Cerf, 1997), 23.
49. Chelain, "L' 'Affaire Roques,' " 11.
50. Bridonneau, *Oui, Il Faut Parler Des Négationnistes*, 19.
51. In an unkind twist of fate, the scandal over his thesis broke just before Roques was scheduled to receive his formal diploma. Chelain, "L' 'Affaire Roques,' " 11.
52. Ibid., 12.
53. Bridonneau, *Oui, Il Faut Parler Des Négationnistes*, 21.
54. Phillipe Bouglé, "Une 'affaire Faurisson' à Nantes?" *La Tribune*, May 15, 1986.
55. Chelain, "L' 'Affaire Roques,' " 13.

56. Jean Planchais, "La thése insoutenable," *Le Monde*, May 25, 1986.
57. Phillipe Bernard, *Le Monde*, May 25, 1986.
58. "Une déclaration des universitaires nantais," reprinted in *Le Monde Juif*, No. 122, April–June 1986, 67.
59. See Chelain, "L' 'Affaire Roques,' " 12; Roques, "From the Gerstein Affair to the Roques Affair," 14. On the other hand, Buron was a historian. Bridonneau suggests his connection with the thesis made it appear more credible. Bridonneau, *Oui, Il Faut Parler Des Négationnistes*, 24.
60. Memorandum of P. Malvy dated July 3, 1986, reprinted in André Chelain, *Faut-Il Fusiller Henri Roques?* (Paris: Ogimos, 1986), xviii.
61. "Un ministre face à l'affiare Roques," *Le Quotiden de Paris*, July 4, 1986.
62. *Requête de M. Roques*, Conseil d'Etat, February 10, 1992, 54.
63. In other words, the *Conseil* objected to the absence of Jacques Rougeout, Roques' first advisor, from the jury.
64. Article 5(1) reads: "Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and film are guaranteed. There shall be no censorship." Article 5(2) is a limiting provision, similar to the § 1 of the Canadian Charter of Rights and Freedoms: "These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor." Quoted from Ulrich Karpen, "Freedom of Expression," in Ulrich Karpen ed., *The Constitution of the Federal Republic of Germany* (Baden-Baden: Nomos, 1988), 91–106, 92.
65. Perhaps the most notable is the *Lüth* case, where the Federal Constitutional Court held that calls for a boycott against the showing of an anti-Semitic were protected expression. *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* 7 (1958): 158.
66. Frede Castberg, *Freedom of Speech in the West: A Comparative Study of Public Law in France, The United States and Germany* (Oslo: Oceana, 1960), 318.
67. Article 21 allows the banning of extremist political parties. Article 18 states that those who abuse their freedom (including freedom of speech) by opposing the "free democratic order" forfeit their rights.
68. Rolf Gössner, "Politische Justiz gegen Rechts: Zwischen Verharmlosung und Überreaktion," Axel Görlitz ed., in *Politische Justiz* (Baden-Baden: Nomos, 1996), 139–69, 141.
69. Gerard Braunthal, *Political Loyalty & Public Service in West Germany: The 1972 Decree Against Radicals and Its Consequences* (Amherst: University of Massachusetts, 1990).
70. Juliane Wetzel, "The Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany," in Louis Greenspan and Cyril Levitt eds., *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries* (Westport, Conn.: Praeger, 1993), 83–107.
71. Hans Gathmann, "Berichte und Analysen: Der Latente Antisemitismus, Prozesse und Falle in Der Bundesrepublik," *Die Politische Meinung* (Köln) (April 1959), 68.
72. In Canada the reaction focused on the parts of the film featuring Ernst Zundel. Tony Aherton, "Zundel Story Ugly, But Worth Telling," *Ottawa Citizen*, March 29, 1995. Gerald Perry, writing in the November 22, 1995

edition of *The Improper Bostonian* conceded that the film was "creepy" and "ultimately frightening" but gave the film three stars. Within Germany other critical-realistic portrayals of right-wing extremism failed to generate the same reaction. Stefan Reinecke, "Wie darf man Nazis zeigen?" in Sabine Jungk ed., *Zwischen Skandal und Routine: Rechtsextremismus in Film und Fernsehen* (Marburg; Schüren, 1996), 44–55.

73. A transcript of this scene appeared in the *Frankfurter Rundschau*, February 18, 1994.
74. Harold Mortenstein, "Heil dir im Hauptmenu," *Tagesspiegel*, June 23, 1993.
75. "Riesiges Gelachter," *Der Spiegel*, November 15, 1995.
76. "Die Deutschen sind nicht reif dafur," *Berliner Zeitung*, December 11, 1993.
77. *Neues Deutschland*, December 1, 1993.
78. Thomas Rothschild, "Aus Mangel an Gewissheit," *Freitag*, September 16, 1994.
79. "Schingensief und Droste kommentieren "Neonazi," *Tagesspiegel*, January 24, 1994. The comment is ironic because Kreuzberg, long an anarchist stronghold, is the last place one would expect to see neo-Nazis.
80. "Proteste kippen Filmausstrahlung," *Frankfurter Rundschau*, February 18, 1994.
81. *Berliner Morgenpost*, November 30, 1993.
82. "Man kann Jugendliche mit solch ein Inhalt nicht allein lassen," *Tagesspiegel*, December 6, 1993. The main violations were racial incitement, for the Auschwitz scene, and the display of prohibited Nazi symbols throughout the film.
83. The film was rereleased in January 1994 with commentary, but only in a few locations.
84. "'Beruf Neonazi' zurückgezogen," *Frankfurter Rundschau*, December 9, 1993.
85. "'Beruf: Neonazi' darf in Hessen nur mit Diskussion gezeigt werden," *Frankfurter Rundschau*, December 8, 1993.
86. Like other supporters of the film, the courts did not rely on free speech. Instead, they defended the documentary on the merits. Thus the Berlin District Court dismissed charges against what it called "a critical-realistic portrayal of current neo-Nazi activities. 'BNN' Keine Propaganda," *Suddeutsche Zeitung*, December 23, 1993. The court in Saxony reached the same conclusion: *Beruf Neonazi* was not propaganda but a "stimulation of the audience to a critical confrontation." "Dresdener Landgericht gibt Film frei," *Frankfurter Rundschau*, January 13, 1994.
87. "Filmjournalisten zu 'Beruf Neonazi,'" *Tagesspiegel*, December 19, 1993.

CONCLUSION THE DILEMMAS OF HOLOCAUST-DENIAL LITIGATION

1. The type of justice system and attitudes toward censorship are correlated. In other words, the two countries with inquisitorial systems of legal procedure (France and Germany) are also more willing to prosecute unpopular speech. Likewise, the two adversarial countries (Canada and the United States) are more tolerant of speech. It would be interesting to determine whether these two variables are linked.

2. Lee Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (Oxford: Clarendon Press, 1985), 243.
3. My account of *Irving v. Lipstadt* follows D.D. Guttenplan, *The Holocaust on Trial* (New York: W.W. Norton & Company, 2001).
4. Alan Dershowitz, *The Vanishing American Jew: In Search of Jewish Identity for the Next Century* (Boston: Little, Brown and Company, 1996), 115.
5. According to D.D. Guttenplan, Lipstadt's lawyer, Anthony Julius, considered this such a coup that he requested that Irving confirm his request in writing. Guttenplan, *The Holocaust on Trial*, 102–03. At the same time Irving's reluctance to use a jury reflects a dilemma facing British libel plaintiffs. While British libel law assumes a plaintiff will prefer a jury, the decision to use a jury necessitates the hearsay rule and, thus, drastically limit the scope of the debate presented at trial. This could pose a serious problem for a libel plaintiff who, like Irving, wants to use a libel trial to present his view of a complex matter.
6. Ibid., 36.
7. According to Guttenplan, Lipstadt's lawyers James Libson and Anthony Julius thought it would be "obscene" to let Holocaust survivors face a hostile cross-examination like Christie's. Ibid., 95.
8. Ibid., 100–02.
9. Ibid., 91.
10. Ibid., 104–05.
11. Ibid., 80–82.
12. Emile Durkheim, *The Division of Labor in Modern Society* (New York: Free Press, 1968).
13. Max Weber, "Bureaucracy," in H.H. Gerth and C. Wright Mills eds., *From Max Weber: Essays in Sociology* (Oxford University Press, 1946/1981), 215.
14. For example, Lawrence Friedman has distinguished between the norms of legal professionals ("internal legal culture") and the demands the larger society places on these norms ("external legal culture"). Friedman, *The Legal System: A Social Science Perspective* (New York: Russell Sage, 1975), 223–24.
15. For an example of this claim, see Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), 114. Part of the problem is that Douglas does not take "the rules-based theory of law" seriously enough. It is one thing to point out that legal realists have "challenged both . . . [the] descriptive and normative adequacy" of legal rules, but quite another to show that this critique has shaped how judges and other legal professionals apply such rules in practice. At least in the Holocaust-denial context, judges and lawyers have stayed close to the formal rules of law, whatever the didactic consequences.

This page intentionally left blank

Bibliography

Abella, Irving. "Anti-Semitism in Canada in the Interwar Years." In *The Jews of North America*. Edited by Moses Rischin, 235–46. Detroit: Wayne State University Press, 1987.

Adams, Claude. "Through the Fingers." *Canadian Lawyer* April 1985.

Anti-Defamation League. *Hitler's Apologists: The Anti-Semitic Propaganda of Holocaust Revisionism*. New York: Anti-Defamation League, 1994.

——. *Holocaust Denial: A Pocket Guide*. New York: Anti-Defamation League, 1994.

Antifaschistisches Aktionsbündnis. *Das Skandalurteil des Mannheimer Landgerichts gegen den Neonazi Günter Deckert*. Weinheim: Antifaschistisches Aktionsbündnis, 1994.

Arendt, Hannah. "Truth and Politics," chap. 7. In *Between Past and Future: Eight Exercises in Political Thought*. Enlarged edition, 227–64. New York: Penguin, 1968.

Aronsfeld, C.C. *The Text of the Holocaust: A Study of the Nazis' Extermination Propaganda: 1919–1945*. Marblehead, Mass.: Micah Publications, 1985.

Bakan, Joel. *Just Words: Constitutional Rights and Social Wrongs*. Toronto: University of Toronto Press, 1997.

Barkan, Steven E. *Protesters on Trial: Criminal Justice in the Southern Civil Rights and Vietnam Antiwar Movements*. New Brunswick, N.J.: Rutgers University Press, 1985.

Barrett, Stanley. *Is God a Racist? The Right Wing in Canada*. Toronto: University of Toronto Press, 1987.

Bastian, Till. *Auschwitz und die "Auschwitz-Lüge": Massenmord und Geschichtsfälschung*. Munich: C.H. Beck, 1994.

Bedford, Sybille. *The Faces of Justice*. London: Collins, 1961.

Benz, Wolfgang. "Realitätsverweigergung als antisemitisches Prinzip: Die Leugnung des Völkermords." In *Antisemitismus in Deutschland: Zur Aktualität eines Vorurteils*. Edited by Wolfgang Benz, 121–39. Munich: DTV, 1995.

——. "'Revisionismus' in Deutschland." In *Die Auschwitzleugner: "Revisionistische" Geschichtslüge und historische Wahrheit*. Edited by Brigitte Bailer-Galanda, Wolfgang Benz, and Wolfgang Neugebauer, 38–51. Berlin: Elefanten Press, 1996.

Bercuson, David and Douglas Wertheimer. *A Trust Betrayed: The Keegstra Affair*. Toronto: Doubleday Canada Limited, 1985.

Bergman, Werner. "Antisemitismus in öffentlichen Konflikten 1949–1994." In *Antisemitismus in Deutschland Zur Aktualität eines Vorurteils*. Edited by Wolfgang Benz, 64–88. Munich: DTV, 1995.

Bertram, Günter. "Entrüstungsstürme im Medienzeitalter—de BGH und die 'Auschwitzlüge.'" *Neue Juristische Wochenschrift* (1994): 2002–03.

Bertram, L.G. "Vergangenheit, die nicht vergeht." *Neue Juristiche Wochenschrift* (1995): 1270.

Betcherman, Lita-Rose. *The Swastika and the Maple Leaf: Fascist Movements in Canada in the Thirties*. Toronto: Fitzhenry & Whiteside, 1975.

Beulke, Werner. *Strafprozeßrecht*. Heidelberg: C.F. Müller, 1996.
Binder, Guyora. "Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie." *Yale Law Journal* 98 (1989): 1321–83.
Bischoping, Katherine. "Responses to Holocaust Denial: A Case Study at the University of Michigan." *Contemporary Jewry* 18 (1997): 44–59.
Blanke, Thomas. "Comment." *Kritische Justiz* 12 (1979): 197–201.
Bollinger, Lee. *The Tolerant Society: Freedom of Speech and Extremist Speech in America*. Oxford: Clarendon Press, 1985.
Bracken, Harry M. *Freedom of Speech: Words are not Deeds*. Westport, Conn.: Praeger, 1994.
"Bradley Smith's 'Campus Project' Generates Nationwide Publicity for Holocaust Revisionism." *Journal of Historical Review* 14(4) (1994): 18–24.
Braunthal, Gerard. *Political Loyalty & Public Service in West Germany: The 1972 Decree Against Radicals and Its Consequences*. Amherst: University of Massachusetts, 1990.
Bridonneau, Pierre. *Oui, il faut parler des nègationnistes*. Paris: Les Éditions de CERF, 1997.
Brockelman, Kurt. "§ 130 StGB und antisemitische Schriften." *Deutsche Richterzeutung* (1976): 213–15.
Cabrillac, Rémy. *Introduction général au droit*. Paris: Dalloz, 1995.
Canada Law Book Inc. *Martin's Annual Criminal Code*. Annotated by Edward L. Greenspan. Aurora, Ont.: Canada Law Book Inc., 1993.
Capitanchik, David and Michael Whine. "The Governance of Cyberspace: Racism on the Internet," in *Liberating Cyberspace: Civil Liberties, Human Rights & the Internet*. Edited by National Council for Civil Liberties, 233–57. London: Pluto Press, 1999.
Castberg, Frede. *Freedom of Speech in the West: A Comparative Study of Public Law in France, the United States and Germany*. Oslo: Oceana, 1960.
Chelain, André. "L' 'Affaire Roques.' " In *Faut-Il Fusiller Henri Roques?* Edited by André Chelain, 7–16. Paris: Ogmios, 1986.
Cleary, Edward W. editor. *McCormick on Evidence*. Lawyers edition. St. Paul: West Publishing Co., 1984.
Cobler, Sebastian. "Die Gesetz gegen die 'Auschwitz Lüge,' Amerkungen zu einem rechtspolitischen Ablaßhandel." *Kritische Justiz* 18 (1985): 159–70.
Cohn, Werner. *Partners in Hate: Noam Chomsky and the Holocaust Deniers*. Cambridge, Mass.: Avukah Press, 1995.
Cotler, Irwin. "Response to the Deschênes Commission of Inquiry on War Criminals: An Emergent Mythology and Its Antidote." In *Nuremberg Forty Years Later: The Struggle against Injustice in Our Time*. Edited by Irwin Colter, 73–86. Montreal: McGill-Queens University Press, 1995.
Côté-Harper, Gisèle, Ram Jethmalani, Maxwell Cohen et al. "Panel Four: 'Words that Maim,' Freedom of Expression and Freedom from Expression." In *Nuremberg Forty Years Later, The Struggle against Injustice in Our Time*. Edited by Irwin Colter, 115–53. Montreal: McGill, 1993.
Damaksa, Mirijan. *The Faces of Justice and State Authority: A Comparative Approach to the Legal System*. New Haven: Yale University Press, 1986.
——. *Evidence Law Adrift*. Yale University Press, 1996.
Davies, Alan. "A Tale of Two Trials: Antisemitism in Canada 1985." *Holocaust and Genocide Studies* 4 (1994): 77–88.
Dawidowicz, Lucy. "Lies About the Holocaust." *Commentary* (December 1980): 31–37.

Dershowitz, Alan. *The Vanishing American Jew: In Search of Jewish Identity for the Next Century*. Boston: Little, Brown and Company, 1996.

Deutsch, Dr. Erwin. "Comment." *Neue Juristische Wochenschrift* (1980): 1100.

Dinnerstein, Leonard. *Anti-Semitism in America*. New York: Oxford University Press, 1994.

Douglas, Lawrence. "Policing the Past: Holocaust Denial and the Law." In *Censorship and Silencing: Practices of Cultural Recognition*. Edited by Robert C. Post, 67–89. Los Angeles: Getty Institute, 1998.

——. *Memory of Judgment: Making Law and History in the Trials of the Holocaust*. New Haven: Yale University Press, 2001.

Douglas, Mary. *Risk and Blame: Essays on Cultural Theory*. New York: Routledge, 1992.

Durkheim, Emile. *The Division of Labor in Modern Society*. New York: Free Press, 1968.

Dworkin, Ronald. "The Unbearable Cost of Liberty." *Index on Censorship* 3 (1995): 43–46.

Edelman, Bernard. "Note." *Recuil Dalloz Sirey: Jurisprudence* (1982): 60–64.

Erb, Ranier. "Public Responses to Antisemitism and Right-Wing Extremism." In *Antisemitism and Xenophobia in Germany after Unification*. Edited by Hermann Kurhten, Werner Bergman, and Ranier Erb, 211–23. Oxford: Oxford University Press, 1997.

Erikson, Kai T. *Wayward Puritans: A Study in the Sociology of Deviance*. New York: John Wiley & Sons Inc., 1966.

Errera, Roger. "In Defense of Civility: Racial Incitement and Group Libel in French Law." In *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination*. Edited by Sandra Coliver, 144–58. Essex: Article 19, 1992.

——. "French Law and Racial Incitement: On the Necessity and Limits of the Legal Responses." In *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries*. Edited by Louis Greenspan and Cyril Levitt, 39–62. Westport, Conn.: Praeger, 1993.

Farber, Daniel and Suzanna Sherry. *Beyond All Reason: The Radical Assault on Truth in American Law*. Oxford: Oxford University Press, 1997.

Faurisson, Robert. "Revisionism on Trial: Developments in France, 1979–1983." *Journal of Historical Review* 6(2) (1985): 133–81.

——. "My Life as a Revisionist (September 1983 to September 1987)." *Journal of Historical Review* 9(1) (1989): 5–63.

Fresco, Nadine. "Negating the Dead." Trans. Alan Sheridan. In *Holocaust Remembrance: The Shapes of Memory*. Edited by Geoffrey H. Hartman, 191–203. Oxford: Basil Blackwell, 1994.

Friedman, Lawrence. *The Legal System: A Social Science Perspective*. New York: Russell Sage, 1975.

Frommel, Monika. "Das Rechtsgut der Volksverhetzung oder ein Ablaß in Drei Akten." *Kritische Justiz* 28 (1995): 402–11.

Fulford, Robert. "Speak No Evil." *Saturday Night* (June 1985): 5–9.

Fusilier, Richard. "Facts, Allegations and Judicial Notice." *Journal of Historical Review* 3(1) (1982): 48–51.

Gathmann, Hans. "Der Latente Antisemitismus." *Die Politische Meinung* (Köln), April 1959.

Geertz, Clifford. *Local Knowledge: Further Essays in Interpretive Anthropology*. New York: Basic Books, 1983.

Ginsberg, Benjamin. *The Fatal Embrace: Jews and the State*. Chicago: University of Chicago Press, 1993.

Goode, Erich and Nachman Ben-Yehuda. *Moral Panics: The Social Construction of Deviance*. Oxford: Blackwell, 1994.

Gössner, Rolf. "Politische Justiz gegen Rechts: Zwischen Verharmlosung und Überreaktion." In *Politische Justiz*. Edited by Axel Görlitz, 139–69. Baden-Baden: Nomos, 1996.

Gusfield, Joseph R. *Symbolic Crusade: Status Politics and the American Temperance Movement*. Urbana: University of Illinois Press, 1963.

Guttenplan, D.D. *The Holocaust on Trial*. New York: W.W. Norton & Company, 2001.

Hamlin, David. *The Nazi/Skokie Conflict: A Civil Liberties Battle*. Boston: Beacon Press, 1978.

Harris, Geoffrey. *The Dark Side of Europe: The Extreme Right Today*. New edition. Edinburgh: Edinburgh University Press, 1994.

Hilberg, Raul. *The Destruction of the European Jews*. Chicago: Quadrangle Books, 1961.

——. "The Statistic." In *Unanswered Questions: Nazi Germany and the Genocide of the Jews*. Edited by François Furet. New York: Schocken Books, 1989.

Hill, Leonidas. "The Trial of Ernst Zundel: Revisionism and the Law in Canada." *Simon Wiesenthal Center Annual* 6 (1990): 165–219.

Holz, Klaus and Elfriede Müller. "Die Affäre Roger Gaurady/Abbé Pierre." In *Jahrbuch für Antisemitismus Forschung*. Edited by Wolfgang Benz, 148–59. Frankfurt am Main: Campus Verlag, 1997.

Hovannisian, Richard G. *Remembrance and Denial: The Case of the Armenian Genocide*. Detroit: Wayne State University Press, 1998.

Ingraham, Barton L. *Political Crime in Europe: A Comparative Study of France, Germany, and England*. Berkeley: University of California Press, 1979.

Irwin, Kerry. "Yesterday's Papers, Yesterday's News: Media Coverage of the 'New' Zundel Trial." Honors thesis, Carleton University, 1988.

Jansen, Sue Curry. *Censorship: The Knot that Binds Power and Knowledge*. Oxford: Oxford University Press, 1991.

Kahn, Robert A. "How Americans and Canadians Justify Their Positions on Hate Speech." Paper presented at the Law and Society annual meeting, Vancouver, Canada, May 2002.

——. "Imagining Legal Fairness: A Comparative Perspective." In *New Approaches to Comparative Politics: Insights from Political Theory*. Edited by Jennifer Holmes. Lanham, Md.: Lexington Books, 2003.

Kallen, Evelyn and Lawrence Lam. "Target for Hate: The Impact of the Zundel and Keegstra Trials on A Jewish-Canadian Audience." *Canadian Ethnic Studies* 25(1) (1993): 9–24.

Karpen, Ulrich. "Freedom of Expression." In *The Constitution of the Federal Republic of Germany*. Edited by Ulrich Karpen, 91–106. Baden-Baden: Nomos, 1988.

Keller, Dr. Ranier. "Offenkundigkeit und Beweisbedürfigkeit im Strafprozeß." *Zeitschrift für die gesamte Strafrechtwissenschaft* 39 (1989): 380–418.

King, Jerome B. *Law v. Order: Legal Process and Free Speech in Contemporary France*. Hamden, Conn.: Archon Books, 1975.

Kinsella, Warren. *Web of Hate: Inside Canada's Far Right Network*. Toronto: HarperCollins, 1994.

Kirchheimer, Otto. *Political Justice: The Use of Legal Procedure for Political Ends*. Princeton: Princeton University Press, 1961.

Kühnert, Hanno. "Lehren aus dem zweiten Mannheimer Deckert-Urteil." *Deutsche Richterzeitung* (October 1994): 393.

Kuttner, Paul. *The Holocaust: Hoax or History? The Book of Answers to Those Who Would Deny the Holocaust*. New York: Dawnwood Press, 1996.

Lamprecht, Rolf. *Vom Mythos der Unabhängigkeit: Über das Dasein und Sosein der deutschen Richter*. Baden-Baden: Nomos, 1995.

Landsman, Stephan. *The Adversary System: A Description and Defense*. Washington, D.C.: American Enterprise Institute, 1984.

Langbein, John. *Comparative Criminal Procedure: Germany*. St. Paul: West Publishing Co., 1978.

——. "The German Advantage in Civil Procedure." *Northwestern Law Review* 61 (1986): 823–66.

Leggewie, Claus and Horst Meier. *Republikschutz: Maßstäbe für die Verteidigung der Demokratie*. Hamburg: Rowholt, 1995.

Levitt, Cyril. "Under the Shadow of Weimar: What Are the Lessons for the Modern Democracies." In *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries*. Edited by Louis Greenspan and Cyril Levitt, 16–37. Westport, Conn.: Praeger, 1993.

Lilly, Graham C. *An Introduction to the Law of Evidence*. Third edition. St. Paul: West Publishing Co., 1996.

Lindon, Jerome. Introduction to *The Gangrene*. New York: Lyle Stewart, 1960.

Lipstadt, Deborah. *Denying the Holocaust: The Growing Assault on Truth and Memory*. New York: Free Press, 1993.

Magnet, Joseph. "Hate Propaganda in Canada." In *Free Expression: Essays in Law and Philosophy*. Edited by W.J. Waluchow, 224–50. Oxford: Clarendon Press, 1994.

Mandel, Michael. *The Charter of Rights and the Legalization of Politics in Canada*. Revised edition. Toronto: Thompson Educational Publishing Inc., 1994.

Marcus, Jonathan. *The National Front in French Politics: The Resistible Rise of Jean-Marie Le Pen*. New York: New York University Press, 1995.

Mermelstein, Mel. *By Bread Alone: The Story of A-4685 Mel Mermelstein A Survivor of the Nazi Holocaust*. Revised edition. Huntington Beach: Auschwitz Study Foundation, 1993.

Merryman, John Henry. *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*. Second edition. Stanford: Stanford University Press, 1985.

Mill, John Stuart. *On Liberty*. Indianapolis: Hackett Publishing Company, Inc., 1978.

Müller, Ingo. *Hitler's Justice: The Courts of the Third Reich*. Translated by Deborah Schneider. Cambridge: Harvard University Press, 1987.

Neier, Aryeh. *Defending My Enemy: American Nazis, The Skokie Case, and Risks of Freedom*. New York: Dutton, 1979.

Nelken, David. "Towards a Sociology of Legal Adaptation." In *Adapting Legal Cultures*. Edited by David Nelken and Johannes Feest, 7–54. Oxford: Hart Publishing, 2001.

Newey, Adam. "Freedom of Expression: Censorship in Private Hands," in *Liberating Cyberspace: Civil Liberties, Human Rights & the Internet*. Edited by National Council for Civil Liberties, 233–57. London: Pluto Press, 1999.

"The Notin Affair." *Journal of Historical Review* 10(3) (1990): 367–70.
Oakeshott, Michael. "The Rule of Law." In *On History and Other Essays*. 119–64. Totowa, N.J.: Barnes and Noble Books, 1983.
O'Neil, Robert M. *Free Speech in the College Community*. Bloomington: University of Indiana Press, 1997.
O'Keefe, Thomas. " 'Best Witness,' Mel Mermelstein, Auschwitz and the IHR." *Journal of Historical Review* (January/February 1994): 25–32.
Perry, Marvin and Frederick M. Schweitzer. *Antisemitism: Myth and Hate from Antiquity to the Present*. New York: Palgrave-Macmillan, 2003.
Peters, Edward. *Torture*. Philadelphia: University of Pennsylvania Press, 1985.
Poliakov, Léon. *Harvest of Hate: The Nazi Program for the Destruction of the Jews of Europe*. New York: Holocaust Library, 1954/1986.
Prutschi, Manuel. "Antisemitism on Trial: Zundel Convicted, Media Indicted." *The Bulletin of the Centre for Investigative Journalism* 27 (1985): 13, 30.
Reinecke, Stefan. "Wie Darf man Nazis zeigen?" In *Zwischen Skandal und Routine: Rechtsextremismus in Film und Fernsehen*. Edited by Sabine Jungk, 44–55. Marburg; Schüren, 1996.
Roques, Henri. "From the Gerstein Affair to the Roques Affair." *Journal of Historical Review* 8(1) (1987): 6–24.
Ross, R. "In Mannheim hat die Justiz Versagt." *Deutsche Richterzeitung* (September 1994): 348.
Roth, Stephen J. "The Laws of Six Countries: An Analytical Comparison." In *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries*. Edited by Louis Greenspan and Cyril Levitt, 177–212. Westport, Conn.: Praeger, 1993.
Rousso, Henry. *The Vichy Syndrome, History and Memory in France since 1944*. Translated by Arthur Goldhammer. Cambridge: Harvard University Press, 1991.
Rubenstein, Laurence. "Faussaire de l'histoire du génocide hitlérien Robert Faurisson est confoundu par les avocats." *Le Droit de Vivre* June 1981.
Rudolph, Kurt. "Der Preis der richterlichen Unabhängigkeit." *Deutsche Richterzeitung* (October 1994): 392.
Russell, Peter. "Judicial Power in Canada's Political Culture." In *Courts and Trials: A Multidisciplinary Approach*. Edited by M.L. Friedland, 75–88. Toronto: University of Toronto Press, 1975.
Schmeiser, D.A. *Civil Liberties in Canada*. Oxford: Oxford University Press, 1964.
Schulze-Fielitz, Helmuth. "Anmerkung." *Juristen Zeitung* 49 (1994): 902–05.
Scott, F.R. "Publishing False News." *Canadian Bar Review* 30 (1952): 37–47.
Seidel, Gill. *The Holocaust Denial*. Leeds: Beyond The Pale Collective, 1987.
Shermer, Michael. *Why People Believe Strange Things: Pseudoscience, Superstition and Other Confusions of Our Time*. New York: W.H. Freeman & Co., 1997.
Shermer, Michael and Alex Grobman. *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?* Berkeley: University of California Press, 2000.
Shields, James G. "French Revisionism on Trial: The Case of Robert Faurisson." *Patterns of Prejudice* 25(1) (1991): 86–88.
Silverman, H. "The Trial Judge, Pilot, Participant, or Umpire." *Alberta Law Review* 11 (1973): 40–64.
Simmons, Henry G. *The French National Front: The Extremist Challenge to Democracy*. Boulder, Colo.: Westview, 1996.
Simon, Boris. *Abbé Pierre and the Ragpickers of Emmaus*. New York: P.J. Kennedy & Sons, 1955.

Simon, Nicholas. "Thunder on the Right." *The Jerusalem Report* (February 27, 1992): 25–28.

Simon Wiesenthal Center. *Holocaust Denial: Bigotry in the Guise of Scholarship.* Los Angeles: Simon Wiesenthal Center, 1994.

"'60 Minutes' Takes Aim at Holocaust Revisionism." *Journal of Historical Review* 14(3) (1994): 16–18.

"Smith and Cole Appear on 'Donahue' Show in Major Media Breakthrough for Revisionism." *Journal of Historical Review* 14(3) (1994): 18–20.

Smith, Allan. "Metaphor and Nationality in North America," chap. 6. In *Canada: An American Nation? Essays on Continentalism, Identity and the Canadian Frame of Mind*, 127–58. Montreal: McGill-Queen's University Press, 1994.

Smith, Tom. *Holocaust Denial: What the Survey Data Reveal.* New York: American Jewish Congress, 1995.

Sontheimer, Kurt. *Die Adenauer-Ära: Grundlegung der Bundesrepublik.* Munich: Deutsche Taschen-Verlag, 1991.

Stannard, David E. "Uniqueness as Denial: The Politics of Genocide Scholarship." In *Is the Holocaust Unique? Perspectives on Comparative Genocide.* Edited by Alan S. Rosenbaum, 163–208. Boulder, Colo.: Westview Press, 1996.

Stein, Eric. "History against Free Speech: The New German Law against the 'Auschwitz' and Other—'Lies.'" *Michigan Law Review* 85 (1986): 277–324.

Stern, Kenneth S. "Denial of the Holocaust: An Antisemitic Political Assault." In *Antisemitism in America Today: Outspoken Experts Explode the Myths.* Edited by Jerome R. Chanes, 242–57. New York: Carol Publishing Group, 1992.

——. *Holocaust Denial.* New York: American Jewish Congress, 1992.

Sward, Ellen E. "Values, Ideology, and the Evolution of the Adversary System." *Indiana Law Journal* 64 (1989): 301–55.

Tatz, Colin. *With Intent to Destroy: Reflecting on Genocide.* London: Verso, 2003.

Teetens, T.H. *The New Germany and the Old Nazis.* New York: Marzani & Munsel, 1961.

Ternon, Yves. *Les Arméniens: Histoire d'un génocide.* Revised edition. Paris: Editions du Seiul, 1997.

——. "Freedom and Responsibility of the Historian: The 'Lewis Affair.'" In *Remembrance and Denial: The Case of the Armenian Genocide.* Edited by Richard G. Hovannisian, 237–48. Detroit: Wayne State University Press, 1998.

Tishler, Gerald, Alan M. Dershowitz, Arthur Berney et al. "When Academic Freedom and Freedom of Speech Confront Holocaust Denial and Group Libel: Comparative Perspectives." *Cardozo Law Review* 5 (1987): 559–94. Reprinted in *Boston College Third World Law Journal* 8 (1988): 69–90.

Tobin, Gary A. and Sharon L. Sassler. *Jewish Perceptions of Antisemitism.* New York: Plenum Press, 1988.

Todorov, Tzvetan. "A Letter from Paris." *Salmagundi* No. 88–89 (Fall 1990–Winter 1991): 47–53.

Troper, Harold. "The Queen v. Zundel: Holocaust Trial in Toronto." *Congress Monthly* July–August (1985): 7–10.

Troper, Harold and Irving Abella. *None is Too Many: Canada and the Jews of Europe 1933–1948.* Toronto: University of Toronto Press, 1982.

Valois, Matrine. "Hate Propaganda: Section 2(b) and Section 1 of the Charter: A Canadian Constitutional Dilemma." *Thémis: la revue juridique* 26 (1992): 373–433.

Vidal-Naquet, Pierre. *Assassins of Memory, Essays on the Denial of the Holocaust.* Translated by Jeffrey Mehlman. New York: Columbia University Press, 1992.

Vidal-Naquet, Pierre. "The Power of a Word," chap. 12. In *The Jews: History, Memory, and the Present*, 163–71. New York: Columbia University Press, 1996.

Von Bredow, Wilfried. *Tückische Geschichte: Kollektive Errinerung an den Holocaust.* Stuttgart: Verlag Kohlhammer, 1996.

Walker, Samuel. *Hate Speech: The History of An American Controversy.* Lincoln: University of Nebraska Press, 1994.

Wassermann, Rudolf. "Einäugige Justiz?" *Recht und Politik* (1994): 228.

——. "Meinungsfreiheit als Beschimpfungsfreiheit," chap. 7. In *Gestörtes Gleichgewicht, Kritische Essays zu Politik und Recht*, 133–47. Asendorf: MUT-Verlag, 1995.

——. "Richteranklage im Fall Orlet." *Neue Juristiche Wochenschrift* (1995): 303.

Weber, Max. *Economy and Society.* Vols. 1–2. Berkeley: University of California Press, 1978.

——. "Bureaucracy." In *From Max Weber: Essays in Sociology.* Edited by H.H. Gerth and C. Wright Mills. Oxford University Press, 1981.

Weimann, Gabriel and Conrad Winn. *Hate on Trial: The Zundel Affair, The Media, Public Opinion in Canada.* Oakville, Ont.: Mosaic Press, 1986.

——. "The Misperception of Public Opinion." *PS* 10 (1986): 641–45.

Weinberg, Henry H. *The Myth of the Jew in France 1967–1982.* Oakville, Ont.: Mosaic Press, 1987.

Weinstein, James. "An American's View of the Canadian Hate Speech Decisions." In *Free Expression: Essays in Law and Philosophy.* Edited by W.J. Waluchow, 175–221. Oxford: Clarendon Press, 1994.

Wellers, George. "Qui est Robert Faurisson?" *Le Monde Juif* No. 127 (1987): 93–97.

Wessels, Johannes. *Stafrecht: Besonderer Teil/1.* Heidelberg: C.F. Müller, 1996.

Wetzel, Juliane. "The Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany." In *Under the Shadow of Weimar: Democracy, Law, and Racial Incitement in Six Countries.* Edited by Louis Greenspan and Cyril Levitt, 83–107. Westport, Conn.: Praeger, 1993.

Weusthoff, Anja. "Endlich geregelt? Zur Ahndung der Holocaust Leugnung durch die deutsche Justiz." In *Die Auschwitzleugner: "Revisionistische" Geschichtslüge und historische Wahrheit.* Edited by Brigitte Bailer-Galanda, Wolfgang Benz, and Wolfgang Neugebauer, 252–72. Berlin: Elefanten Press, 1996.

Wigmore, John H. *Wigmore on Evidence.* Chicago: Foundation Press, 1935.

Wood, Nancy. "Crimes or Misdemeanors? Memory on Trial in Contemporary France." *French Cultural Studies* 13(4) (1994): 1–21.

Wyman, David. *Abandonment of the Jews: America and the Holocaust, 1941–1945.* New York: Pantheon, 1984.

Index