

FORUM ON HISTORIANS AND THE COURTS

1.

HISTORY, MEMORY, AND THE LAW:
THE HISTORIAN AS EXPERT WITNESS

A Review Essay of *THE HAUNTING PAST: HISTORY, MEMORY, AND JUSTICE IN CONTEMPORARY FRANCE*. By Henry Rousso. Translated by Ralph Schoolcraft. Foreword by Ora Avni. Philadelphia: University of Pennsylvania Press, 2002. Pp. xxii, 96. (First published as *La hantise du passé: entretien avec Philippe Petit* [Paris: Editions Textuel, 1998].)

ABSTRACT

There has been a widespread recovery of public memory of the events of the Second World War since the end of the 1980s, with war crimes trials, restitution actions, monuments and memorials to the victims of Nazism appearing in many countries. This has inevitably involved historians being called upon to act as expert witnesses in legal actions, yet there has been little discussion of the problems that this poses for them. The French historian Henry Rousso has argued that this confuses memory with history. In the aftermath of the Second World War, judicial investigations unearthed a mass of historical documentation. Historians used this, and further researches, from the 1960s onwards to develop their own ideas and interpretations. But since the early 1990s there has been a judicialization of history, in which historians and their work have been forced into the service of moral and legal forms of judgment which are alien to the historical enterprise and do violence to the subtleties and nuances of the historian's search for truth. This reflects Rousso's perhaps rather simplistically scientific view of the historian's enterprise; yet his arguments are powerful and should be taken seriously by any historian considering involvement in a law case; they also have a wider implication for the moralization of the history of the Second World War, which is now dominated by categories such as "perpetrator," "victim," and "bystander" that are legal rather than historical in origin. The article concludes by suggesting that while historians who testify in war crimes trials should confine themselves to elucidating the historical context, and not become involved in judging whether an individual was guilty or otherwise of a crime, it remains legitimate to offer expert opinion, as the author of the article has done, in a legal action that turns on the research and writing of history itself.

I

Since the beginning of the 1990s, there has been a widespread recovery of public memory about the Second World War and the Nazi era in Europe, particularly with regard to the Holocaust. A cult of the memory of the extermination of the Jews has emerged, commemorated in Holocaust Memorial Museums; in movies such as *Schindler's List*; in memoirs, conferences, lectures, radio and television broadcasts, websites; and, last but by no means least, the creation of research institutes and endowed chairs devoted to the subject. But the recovery of memory has not been confined to the Holocaust. It has also been directed at the suffer-

ings of other minorities such as gypsies, homosexuals, and the millions of slave laborers forcibly deported by the Nazis to work under appalling conditions in war production, bomb-damage clearance, and other occupations inside "Greater Germany" during the war.¹

The cult of memory has had practical effects. Committees and commissions have been established to investigate claims for the restitution of cultural objects unjustly alienated from their (mostly Jewish) owners under Nazi rule.² Serious attempts have belatedly been made to trace the involvement of major companies such as German, Swiss, and Austrian banks in profiteering from the extermination of the Jews, among other things by processing and selling gold extracted from the dental fillings of people gassed in Auschwitz and other concentration camps.³ Official histories have been commissioned by a variety of companies ranging from the Deutsche Bank and the Allianz Insurance Company to the Volkswagen motor manufacturing concern, with a view to determining the extent of these companies' complicity in the crime of Nazism and thereby demonstrating their commitment to an open confrontation with their own past.⁴ Massive class actions for compensation launched on behalf of the slave laborers so cruelly exploited by the Nazis and the companies to whom they were supplied have gained wide publicity and met with some success, limited though it is in many respects. A whole series of now very elderly men has been put on trial for alleged war crimes committed during the Nazi era, in criminal courts scattered across a variety of countries, including Israel, France, and even the United Kingdom.⁵

1. Amidst a growing literature, see especially Peter Novick, *The Holocaust and Collective Memory: The American Experience* (London: Bloomsbury, 2000); Tim Cole, *Images of the Holocaust: The Myth of the "Shoah-Business"* (London: Duckworth, 1999); *The Politics of Retribution in Europe: World War II and Its Aftermath*, ed. István Deák, Jan T. Gross, and Tony Judt (Princeton: Princeton University Press, 2000), particularly the stimulating contribution by Tony Judt, "The Past is Another Country: Myth and Memory in Postwar Europe," 291-324; Pieter Lagrou, *The Legacy of Nazi Occupation: Patriotic Memory and National Recovery in Western Europe, 1945-1965* (Cambridge, Eng.: Cambridge University Press, 2000); Peter Reichel, *Politik mit der Erinnerung: Gedächtnisorte im Streit um die nationalsozialistische Vergangenheit* (Munich: Hanser, 1995); Bill Niven, *Facing the Nazi Past: United Germany and the Legacy of the Third Reich* (London: Routledge, 2002); Mary Fulbrook, *German National Identity after the Holocaust* (Cambridge, Eng.: Polity Press, 1999); and Nancy Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (New York: Berg, 1999).

2. For the legal issues, see Norman Palmer, *Museums and the Holocaust: Law, Principles and Practice* (London: Institute of Art and Law, 2000); for the background, Lynn H. Nicholas, *The Rape of Europa: The Fate of Europe's Treasures in the Third Reich and the Second World War* (London: Macmillan, 1994).

3. Harold James, *The Deutsche Bank and the Nazi Economic War Against the Jews: The Expropriation of Jewish-Owned Property* (Cambridge, Eng.: Cambridge University Press, 2001); Jonathan Steinberg, *The Deutsche Bank and its Gold Transactions during the Second World War* (Munich: Beck, 1999).

4. *The Deutsche Bank 1870-1995*, ed. Lothar Gall et al. (London: Weidenfeld & Nicolson, 1995); Gerald D. Feldman, *Allianz and the German Insurance Business 1933-1945* (Cambridge, Eng.: Cambridge University Press, 2001); Hans Mommsen and Manfred Griefner, *Das Volkswagenwerk und seine Arbeiter im Dritten Reich* (Düsseldorf: ECON, 1996).

5. Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven and London: Yale University Press, 2001); Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001).

And the events of the Second World War have been brought once more before the courts in a variety of civil actions, including high-profile defamation cases.⁶

In all of this, historians have become increasingly involved in court battles, judicial reviews, and publicly or privately commissioned investigations of legally-related issues as expert witnesses and advisers. This involvement has taken a variety of forms, reflecting the variety of issues at stake. In my own case, for example, I have acted in two such instances in the last three years. In the libel action brought by the writer David Irving against Professor Deborah Lipstadt and her publisher Penguin Books UK, I was asked by the defense to write an expert report dealing with the defamatory allegations made in Lipstadt's book *Denying the Holocaust: The Growing Assault on Truth and Memory*, published in Britain in 1994, that Irving had manipulated and falsified historical documents; invented statistics; and mistranslated, misconstrued, and misused historical sources and historical works in his own publications in order to serve the cause of "Holocaust denial," his own, extreme right-wing and anti-Semitic political views, and his ardent admiration for Adolf Hitler. I agreed to do this, I wrote a 740-page report based on a minute examination of Irving's writings, and I was cross-examined at length on my report by Irving, who was representing himself in the courtroom proceedings. My report was backed up by the written evidence of other historians, most notably Christopher Browning, Peter Longerich, and Robert Jan Van Pelt, who presented an account of the evidence which, in essence, Irving and the Holocaust deniers were accused by Lipstadt and others of falsifying. The court accepted all our major findings, and Irving lost his libel action in a judgment confirmed by the Court of Appeal just over a year later.⁷

Shortly after the trial verdict was delivered, in April 2000, I took part in a rather different set of proceedings, as a member of a Spoliation Advisory Panel appointed by the British Government to act in a non-judicial capacity advising on claims made for the restitution of, or compensation for, cultural objects in British state museums, libraries, and art galleries which the claimants alleged had been unjustly or immorally alienated from them during the Nazi era. The panel had no formal powers; it was conceived as an alternative to expensive legal actions and sought to reach solutions which would satisfy both sides; and indeed in the first case we dealt with, concerning a painting in the Tate Gallery in London which the claimants alleged their family—emigré German Jews—had been forced to sell well below its market value during the German occupation of Belgium, we made a recommendation that was willingly accepted by all the parties involved. There were experts on painting, on the art market, on the legal aspects of spoliation, even on moral philosophy, on the panel; my role as a his-

6. For an exemplary collection of studies on these various problems within the context of a single country, see *Switzerland and the Second World War*, ed. Georg Kreis (London: F. Cass, 2000).

7. Richard J. Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial* (New York: Basic Books, 2001); Eva Menasse, *Der Holocaust vor Gericht: Der Prozess um David Irving* (Berlin: Siedler, 2000); D. D. Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: Granta, 2001). Trial reports, documents and transcripts can be found on the website devoted to the case, at www.holocaustdenialontrial.com (accessed March 28, 2002).

torian was to advise on the historical context, in this case the situation of Jewish emigrés in wartime Belgium, which I did. This had some effect in helping the panel to reach its conclusion that the claimants had a strong moral case, even though their legal entitlement to the painting had long since expired.⁸

My experience has been far from unique. Besides those involved as expert witnesses in the Irving trial, professional academic historians have also been drawn in to testifying in other legal actions, such as the two trials in Canada of Ernst Zündel in Canada for “Holocaust denial” (under an archaic Canadian statute, later ruled unconstitutional, criminalizing the “spreading of false news”), or the trial in Britain of Anthony Sawoniuk for alleged war crimes.⁹ On the whole, it seems fair to say, the role of historians in providing expert testimony in court proceedings has been widely accepted. Courts sitting in judgment in the late twentieth or early twenty-first century on issues that turn on evidence for events that happened half a century or more before, in other countries, where other languages were written and spoken, clearly need some background information to help them reach their decisions. In the case of the Irving libel trial, neither an English court nor the English lawyers who prepared the defense for Lipstadt and Penguin Books could be expected to possess the expertise to examine Irving’s books and speeches and trace the statements he made in them back to the original sources on which they claimed to be based.

In these instances, historians were performing the kind of role assigned to, say, a pathologist or a ballistics expert commissioned by the police or the prosecution in a murder case, where an informed conclusion about the angle and shape of a wound may establish the kind of weapon which caused it, the way in which the blow was inflicted, and even some of the physical attributes of the murderer. Of course, it is open to both sides to call experts, and this indeed is what often happens. In the second trial of Ernst Zündel in Canada, for instance, the prosecution called the leading specialist on Nazi policymaking in the “Jewish question” during the Second World War, Christopher Browning, while the defense called Robert Faurisson, a leading “Holocaust denier,” and David Irving, who in taking the stand revealed himself for the first time also to be a “Holocaust denier.” The aim of the prosecution was to establish that the clumsy “Holocaust denial” pamphlet Zündel was accused of distributing was filled with falsifications, and it did so by getting Browning to present the evidence which it falsified. The defense sought in contrast to establish that the operation of the gas chambers and the mass murder of the Jews was a matter of opinion, and that anyone, including Zündel, could believe in good faith that these things had not happened. History, in the defense’s presentation, was an unending debate in which nothing could ever be proven for certain.¹⁰

8. *Report of the Spoliation Advisory Panel in Respect of a Painting Now in the Possession of the Tate Gallery* (HC 111, House of Commons Papers, London, 18 January 2001).

9. Douglas, *The Memory of Judgment*, 226-256.

10. Christopher Browning, “Historians and Holocaust Denial in the Courtroom,” in *Remembering for the Future: The Holocaust in an Age of Genocide*, ed. John K. Roth and Elisabeth Maxwell, 3 vols. (New York: Palgrave, 2001), I, 773-778. Volume II of the same collection contains a variety of studies of legal actions relating to art looting, Holocaust denial, and other subjects.

In such a situation, the jury did not find it difficult to decide that Zündel knew that the information he was disseminating was false, and it was clearly helped in reaching this conclusion by the well-attested and correct evidence presented by Browning. In carrying out this task, however, an expert witness such as Browning helps the court by giving it information on which to base its decision, information which is only available to experts; it is not the expert's role to engage in advocacy, or to try to persuade the court to reach one particular verdict rather than another. Of course, the expert is aware that his or her testimony will probably influence the outcome of the trial, but the crucial point is that if there is information which may run counter to the case argued by the side commissioning the expert, the expert is not at liberty to suppress it. An expert has to tell the truth, has to certify that this has been done in any written evidence he or she supplies to the court, and swears an oath to tell the truth on entering the witness box.

This can make it difficult for the historian when subjected to hostile cross-examination by the attorney for the opposing side. Historians are accustomed, for instance, to qualifying their statements in various ways to indicate the varying degrees of certainty or conjecture with which they are made; yet the law demands clear-cut, definite, and unambiguous statements of a kind with which historians often feel uncomfortable. For the historian, it can be disconcerting to see carefully researched historical material ripped out of its context by clever lawyers and used as a bludgeon to beat the other side. Legal rules of evidence are also often very different from their historical equivalents. In the trial of Anthony Sawoniuk, for instance, the judge refused to admit in evidence the accused man's SS registration form from the Second World War because the SS officer who had signed it could not be brought before the court to testify that it was actually his signature on the document. Standards of proof are often rather different in law and in history, and historians may find it difficult to argue that their conclusions put any matter with which they deal "beyond reasonable doubt," as is required in the criminal law before a conviction can be reached. The criminal law tackles historical problems on a narrow front, focusing on the attempt to prove a case beyond reasonable doubt rather than dealing in the broader frame of probabilities, as historians habitually do. The law frequently cannot take for granted what in history would count as common knowledge. In convicting a killer, the law does not need to prove that he committed a thousand murders if it can prove he committed a hundred. Thus the carefully defined and circumscribed purposes of a trial often fail to satisfy the wider remit of history.¹¹ Above all, perhaps, in criminal trials the central issue is that of guilt or innocence, concepts which are not only far from central to the historian's enterprise but also, some would argue, entirely alien to it; for what historians are, or should be, engaged in, is explanation and interpretation, not moral judgment. Historians are simply not trained to make moral judgments or findings of guilt and innocence; they have no expertise in these things, and so should not be asked to engage in them, or to serve their purposes, by a court of law.

11. Bloxham, *Genocide on Trial*, 221-228.

In what other area of the law, after all, are old crimes committed half a century ago suddenly disinterred and subjected to massively expensive and time-consuming trial proceedings? How often in the normal course of events in civil society do we see aged men and women hauled before the criminal courts to face charges relating to alleged offenses committed in the long-distant days of their youth? How certain can we be of the details of a case after so long a period of time has elapsed?¹² In many branches of the law, such as the law governing the illegal spoliation of cultural objects, for example, tightly defined statutes of limitation apply, making it impossible to bring lawsuits after a certain number of years.¹³ In 1968, however, the United Nations passed a Convention declaring the "Non-Applicability of Statutes of Limitations to War Crimes and Crimes Against Humanity," a convention mirrored in legislation passed in a variety of individual countries both before and since.¹⁴ Such has been the resistance to the resumption of war crimes trials in Britain, however, that it proved extremely difficult to steer a War Crimes Bill through Parliament, and the whole machinery of investigation and prosecution that cranked into action after the bill passed into law managed to produce no more than a single conviction, that of Sawoniuk, despite all the millions of pounds sterling and thousands of hours of work thrown at it.¹⁵

The proponents of such trials do not, on the whole, see them primarily as instruments of justice or retribution—for how much can the prosecution of a single individual weigh in the balance of these things, when the vast majority of those responsible either escaped prosecution, or if they did not, served sentences that were relatively brief in duration, or in any case are long since dead? The major purpose of such trials is educational. Robert Kempner, a German prosecutor at the Nuremberg War Crimes trials held immediately after the end of the Second World War, described them as "the greatest history seminar ever held in the history of the world." The trial in Jerusalem in 1961 of Adolf Eichmann, the SS official who organized the logistics of the extermination of Europe's Jews, was intended, as the Israeli prosecutor said, to bring young people closer to the nation's past, and to create a historical consciousness for the nation.¹⁶ Similarly,

12. For one striking example of the perils of such delayed proceedings, see Gitta Sereny, *The German Trauma: Experiences and Reflections 1938–2000* (London: Allen Lane, 2000), chapter 18, "The Case of John Demjanjuk," 309–357.

13. Palmer, *Museums and the Holocaust*.

14. M. C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (Dordrecht: M. Nijhoff Publishers, 1992).

15. David Cesarani, *Justice Delayed: How Britain Became a Refuge for Nazi War Criminals* (London: Phoenix Press, 1992).

16. Douglas, *The Memory of Judgment*, 2–3. On the Nuremberg trials there is now a considerable literature. See among many other studies, Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (London: Bloomsbury, 1993); Bradley Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), and the coverage in Bloxham, *Genocide on Trial*. For Eichmann, see Douglas, *The Memory of Judgment*, Part II; Gideon Hausner, *Justice in Jerusalem* (New York: Harper & Row, 1966); Hannah Arendt, *Eichmann in Jerusalem: A Study in the Banality of Evil* (New York: Viking Press, 1963); and the attack on Arendt's book in Jacob Robinson, *And the Crooked Shall be Made Straight* (Philadelphia: Jewish Publication Society of America, 1965); see also Walter Laqueur, "Footnotes to the Holocaust in Hannah Arendt," in *The Jew as Pariah*, ed. Ron H. Feldman (New York: Grove Press, 1979), 252–259.

the Zündel trials were clearly intended by the Canadian government to provide evidence against the claims of the "Holocaust deniers"; in a way, they were a substitute for a statute outlawing "Holocaust denial" of the kind that now exists in some European countries, most notably Germany.

This aspect of these various trials aroused particular criticism. The Canadian historian Michael Marrus, author of *The Holocaust in History*, argued for instance that "we should not look to trials to validate our general understanding of the Holocaust or to provide a special platform for historical interpretations." The writer Ian Buruma noted that a trial could "only be concerned with individual crimes." In criminal proceedings, he wrote, "history is reduced to criminal pathology and legal argument." Wider issues of interpretation, central to the historical enterprise, were simply not relevant. "When the court of law is used for history lessons," Buruma declared, "then the risk of show trials cannot be far off." Commenting on the Eichmann trial, Hannah Arendt insisted that the purpose of a trial was "to render justice, and nothing else"; ulterior purposes got in the way and distorted the judicial process, making it more difficult to dispense justice impartially.¹⁷ In this view, the encounter between history and the law in trials of this kind does violence to the principles of both. Knowledge has a different meaning and a different purpose for historians and lawyers; but beyond this, too, both approaches to knowledge could find themselves gripped and instrumentalized by political imperatives dictated from outside when they became involved in such proceedings.

In agreeing to serve as expert witnesses in these circumstances, therefore, historians are taking a tremendous risk. Yet the need to bring historians into court has increased with time, since the camp survivors whose testimony provided the basis for the prosecution case in the Eichmann trial in 1961 are now either very old, or no longer with us. The risks historians run were graphically demonstrated in the two Zündel trials. In the first, Raul Hilberg, author of a standard multi-volume work on *The Destruction of the European Jews*, was so frustrated by the insistent attempts of the defense counsel to undermine his testimony and his inability to broaden out his evidence beyond the responses he was required to give to the tightly circumscribed questions to which he was subjected, that he was moved to protest: "This is the problem of teaching complex history in such a small setting." The law's demand for precise evidence allowed the defense to pour scorn on the idea that Hitler had ordered the extermination of the Jews ("So you say there is an order," counsel asked Hilberg sarcastically, "to exterminate the Jews from Adolf Hitler that was oral, the content of which you don't know, and apparently nobody knows"). The defense made much of the law regarding hearsay—testimony has to come directly from participants, not via a third party such as a historian—and although in the end the court ruled that it was admissible in this case because there was no alternative, those responsible for formulating Nazi policy towards the Jews all being long since dead, the legal arguments

17. All quoted in Douglas, *The Memory of Judgment*, 2-4; see also Arendt, *Eichmann in Jerusalem* and Ian Buruma, *The Wages of Guilt: Memories of War in Germany and Japan* (New York: Farrar, Straus, Giroux, 1994).

did illustrate once more that what the law regards as evidence, and what historians treat as such, are in some respects two very different things.¹⁸

II

Historians have not really given enough consideration to problems such as these, which they are likely to run into when agreeing to serve as expert witnesses. So it is particularly welcome that the French historian Henry Rousso, in three interviews with the journalist Philippe Petit, puts them on the spot by outlining the reasons why he refused to act as an expert witness in Holocaust-related trials conducted in France in the 1990s, despite the fact that his previous work had been on the Vichy regime and its subsequent reputation, and he was therefore eminently qualified as an expert on the period.¹⁹ The interviews have been fluently translated by Ralph Schoolcraft and provided with a lengthy foreword by Ora Avni, Professor of French at Yale University, who may or may not be responsible for the jacket description which puts the apparently postmodernist point that Rousso's principal reason for refusing to testify was that "history is constantly changing and being rewritten and therefore should not be taken into consideration as judicial evidence." But I have read the book very carefully and I cannot find this argument in it at all. Of course, it depends on what one means by "history," but if history simply means the factual record of past events, then the same principle of indeterminacy would also have to be applied to normal judicial evidence, which after all very frequently refers to past events. If we cannot know for sure about anything in the past, then we cannot know for sure about whether the person in the dock committed a murder, and whether the alleged crime was committed a year ago or fifty years ago really makes no difference.

It is neither necessary nor possible here to go over all the—by now, rather tired—epistemological controversies about the possibility of historical knowledge to recognize that if this were really what Rousso had said, then he would not be able to write history either; nor, since the epistemological principles governing the writing of books about memory are the same as those governing the writing of books about history, would he have been able to write *The Vichy Syndrome*. In fact, Rousso's arguments are a lot more intelligent than their description on the dust-jacket, and epistemologically a lot more conservative. Essentially, he argues that a distinction has to be made between memory on the one hand, and history on the other. Trials are "vectors of memory" whose purpose is redressing the wrongs of the past (xi). In the last few years, he thinks, there has been a "boiling over of our past," until memory has become obsessive, and everywhere we are confronted with an aggressive insistence on the "duty to

18. Douglas, *The Memory of Judgment*, 236-244.

19. Henry Rousso, *Le Syndrome de Vichy* (Paris: Editions du Seuil, 1987), translated as *The Vichy Syndrome: History and Memory in France since 1944* (Cambridge, Mass.: Harvard University Press, 1991); see also the "Forum" on the book in *French Historical Studies* 19, no. 2 (1995), and Éric Conan and Henry Rousso, *Vichy: An Ever-Present Past* (Hanover, N.H.: University Press of New England, 1998).

remember," backed by physical monuments such as museums and memorials that try to ensure we cannot escape this duty even if we want to (12). Despite such pressures, however, Rousso believes, the historian should not be an "agitator of collective memory" (2). By doing this, the historian falls prey to political instrumentalization. The historian's duty is to discover the truth, irrespective of its social or political implications (47). History is possible only after a lengthy period of time has elapsed, whereas justice is best dispensed as quickly as possible (30). To be sure, the fact that war crimes trials relate to events that happened a long time ago is a source of confusion between the two. Yet this confusion, declares Rousso, should be resisted.

Memory is really a form of propaganda; history is concerned with the truth (38). Memory emphasizes the indistinguishable sameness of past and present; as far as the law is concerned, the man in the dock might have committed the crime yesterday, rather than fifty years ago; the principles and objects of knowledge are the same in both instances. History, by contrast, emphasizes change and so maximizes the gulf between the present and the past (8). History, indeed, often focuses on the forgotten rather than the remembered past. Historical narratives invariably deliver a partial account of the past, but this account, argues Rousso, is or should be concerned with explanation and understanding, not with judgment. Memory idealizes or demonizes; history should do neither (7). "Moralism does not mix well with historical truth. In order to maintain its edifying power, it ends up cutting corners with the facts and slipping into a narrative divorced from reality" (22). The moral imperative means that factual accuracy is secondary, and misinformation might even be used deliberately. History's primary concern is with the truth. The instrumentalization of history in the service of memory can easily lead to its exploitation in the interests of redressing the wrongs of the past and dividing people into simplistic categories of perpetrators and victims. Yet in the past, most people's moral and political position was more complex, more ambiguous, more compromised than such categories allow, and Rousso believes that employing labels such as these does violence to the historian's aim of understanding and explaining their behavior, rather than of judging it (xi).

Rousso is concerned that, since the Eichmann trial, judicial process has become the primary means of judging the past. History as a whole, or at least the history of the Nazi and Vichy regimes, is tried through individuals whose status is regarded as representative. The choice of individuals is in some respects arbitrary; what they stand for is not. This leads to "judicial readings of history." Individual trials might be regarded as an opportunity for national catharsis; yet it has to be remembered that historians have been investigating the Nazi and Vichy regimes for decades, whatever the status of these regimes in the public memory might have been (57). And there is no knowing where this "judicialization of the past" might end (49-50). Following the fall of the Berlin wall, hundreds of thousands of claimants flooded into the archives and law courts to demand the return of property confiscated by the Communist regime in the four decades since 1949. The principle of restitution or compensation soon extended to slave laborers and

others who had been exploited by the Nazis. Within a few years, claims were being advanced for compensation for the descendants of Africans forcibly taken to America and made to work as slaves over two hundred years ago (48-49).

Yet the aim of all this, Rousso points out, is not to achieve closure, nor to forgive and forget; on the contrary, its purpose is to reopen the past and to keep it open. Claimants call for reparation while asserting that the crime in question is irreparable (23). The past has constantly to be kept open, constantly retried (50). Some, indeed, have argued that the Holocaust cannot be understood, only condemned. Yet, Rousso declares:

One cannot surrender to the claim that it is impossible to gain and transmit knowledge about this event, particularly if one is a historian. Asserting in a repetitive and mechanical manner that the event belongs to the domain of the indescribable is to fall back into the register of faith or, worse still, offer an unconscious alibi for not listening. . . . The Holocaust was committed by humans—it can be explained by humans—even if the explanation will undoubtedly fall short of the reality of the event. (20)

Historians, says Rousso, should not prosecute the past. “Be it as judge, prosecutor or advocate, historians are no longer in their proper element once they don courtroom robes” (49). They should resist the lure of the media spotlight and refrain from “judicial posturing” in lawsuits against negationists as in trials of alleged war criminals (49).

Rousso’s concept of history and the historian’s *métier* therefore is rigorously value-neutral and scientific (82). It is these principles that, in essence, led him to refuse to testify as an expert witness. Here he makes some important points that every historian who is a potential expert witness should carefully note. Freedom of speech, he says, is impossible once you take the stand in a court case (58). That is because the evidence the historian gives is provided within the explanatory model set up by the court and the lawyers. The historian’s contribution can only be made in response to questions from counsel; there is no freedom to put one’s own questions in the way to which historians are accustomed. “No historical truth could be stated outside of an interpretive framework and a prior line of questioning” (63). Moreover, the historian is bound to be aware that any evidence he or she gives is going to have implications for the guilt or innocence of the accused person in the dock, however neutral or factual it might at first sight appear to be. This is another alienation of the historian’s vocation and a further restriction on freedom of speech (60). Finally, trials impose pressures of time, which deny the historian the proper leisure needed for mature reflection on the issues under discussion. Confronted with questions in the witness box, the historian cannot go away to the archives for a month before giving a response; the questions have to be answered on the spot (69).

Rousso thinks that the Holocaust-related court cases of the 1990s mark a real step back in terms of historical understanding. In the immediate postwar era, the Nuremberg trials generated a huge mass of historical evidence that has proved invaluable for later historians. Similarly, the Auschwitz trials of 1964 and the Eichmann trial of 1961 gave considerable assistance to historical research.

Lawyers and historians were generating evidence together. Nuremberg framed the historical interpretations of the 1950s, in which the war, and war-related crimes, were at the center of attention, while the Holocaust remained at best peripheral.²⁰ In the later 1960s and 1970s, however, historians broke away from the legacy of Nuremberg and developed their own lines of interpretation that had little or nothing to do with judicial categories. Arguments over the nature of Nazi decision-making between “intentionalists” and “functionalists” had few implications for war crimes trials; indeed the whole concept of war crimes was more or less ignored in this research. The work of Robert Paxton on Vichy France bypassed the judicial notion of collaboration with the enemy and showed how the Pétain regime operated very much under its own dynamic, irrespective of the demands of the Nazis. When a fresh wave of trials broke in upon public memory in the 1990s, therefore, the historians’ interpretations were already established. Indeed, in a sense they actually made the French trials possible, since the issue was no longer one of collaboration—Paxton had shown that the Vichy ministers and civil servants had not been directly complicit—but of crimes committed by such people as *French* officials acting for a *French* government and not as German puppets; hence the function of the trials in enabling the French public to come to terms with the Vichy past.²¹ By the same token, however, the new trials brought about a return of the judicial mode of appropriating the recent past, and so they obscured, and in the end distorted, the elaborate edifice of interpretation that had been built up by scholars in the intervening years. Thus they marked a step back in understanding. And they added nothing to historical knowledge; on the contrary, while the earlier trials had seen a collaboration between historians and lawyers in generating historical documentation, the new trials showed that the lawyers expected the historians simply to provide it, and to provide the documentation in the service of their own purposes, not in the service of historical scholarship (66-71).

III

It helps us understand Rouso’s point of view if we consider in more concrete terms the nature of the actual trials around which he is building his arguments. The first of these trials was that of Paul Touvier, a former Vichy official who was charged with the execution of seven Jews, a crime against humanity. Touvier was found guilty in 1994, and sentenced to prison, where he died in 1996. He was not a very senior figure, however, and though obviously anti-Semitic, he had not committed the kind of mass crime that lived up to the expectation of national catharsis invested in his trial.²² A second trial had more potential in this regard: that of Maurice Papon, who had been a senior civil servant not only under Vichy

20. For these points, see also Bloxham, *Genocide on Trial*, esp. the conclusion.

21. Robert O. Paxton, *Vichy France: Old Guard and New Order, 1940–1944* (London: Barrie & Jenkins, 1972).

22. *Memory, the Holocaust, and French Justice: The Bousquet and Touvier Affairs*, ed. Richard J. Goslan (Hanover, N.H.: University Press of New England, 1996).

but also under a series of postwar governments. Indeed, he had served as Prefect of Police in Paris under De Gaulle, and Finance Minister under Giscard d'Estaing. As a senior official in the occupied area of the Gironde during the war he had ordered the imprisonment of a substantial number of Jews and their deportation to the death camps in the East. Brought to trial in 1997, Papon symbolized what many saw as postwar France's failure to come to terms with the crimes committed by the Vichy regime.²³

Public expectations of a general condemnation of Vichy's anti-Semitism through the medium of the Papon trial were high. Henry Rousso was invited to testify by the defense. The purpose of calling him, he notes, was to lend academic respectability to a case that had already been formulated (58). Even where historians were called to provide the general historical context for the detailed recounting of Papon's wartime actions, therefore, it seemed to serve the primary function of lending legitimacy to a preconceived case. One question put to the experts, for example, was whether Papon could have been aware that the Jews whose deportation he was ordering would be killed when they reached their destination in the East. Any historian engaging in such contextual speculation must have been aware that it would have a direct bearing on the court's assessment of Papon's actions, even though the actual fact of whether he really was aware was not the subject of the expert testimony (63). Rousso obviously feels there was something very amiss with the Papon trial from the outset. Public opinion was already extremely hostile to Vichy, so that the trial would have no real effect in influencing it on this score. And if Papon had been acquitted, this would not have acquitted Vichy in any sense. Everything therefore, was preconceived (72-74). In a sense, although the historians were only asked to provide broad generalizations about the historical context, they were by implication acting as witnesses on the character of the accused. A slippage from context to person was unavoidable, even though the historians were not presenting formal evidence on the latter at all (65).

The conditions under which expert historical testimony was solicited at the Papon trial seem according to Rousso to have been extremely restrictive. The experts were not, for example, allowed to study the documents on the basis of which the case against Papon was being formulated. They did not take part in the preliminary investigation as they had in the Touvier case. They were not allowed to paint a broader picture of the context than the questions posed by the trial lawyers permitted; thus they could not point out, for example, that many civil servants began to distance themselves from the Vichy regime from 1943 onwards, as indeed François Mitterand had done (61-63, 73, 79). Under such circumstances, a professional historian testifying as an expert witness would not have been able to speak freely, nor have been permitted to provide contextual material that was not regarded by the court as having a direct bearing on the case

23. Éric Conan, *Le procès Papon: un journal d'audience* (Paris: Gallimard, 1998); Richard J. Goslan, *The Papon Affair: Memory and Justice on Trial* (New York: Routledge, 2000).

and in particular on the person and actions of the accused. As Rousso wrote to the court explaining his refusal to testify:

In my soul and conscience, I believe that historians cannot be “witnesses” and that a role as “expert witness” rather poorly suits the rules and objectives of a court trial. It is one thing to try to understand history in the context of a research project or course lesson, with the intellectual freedom that such activities presuppose; it is quite another to try to do so under oath when an individual’s fate hangs in the balance. . . . I very much fear that my “testimony” is only a pretext for an instrumentalization of scientific research and historical interpretations, elaborated and formulated in contexts other than that of the court of assizes. Once again, the argumentation developed in a trial is not of the same nature as that produced by scholars. (86)

This statement, described by Rousso as a personal view, was accepted by the court, and Rousso did not testify. Papon was found guilty in 1998 and sentenced to ten years’ imprisonment. He was 88 years of age.²⁴

The law is an intimidating institution with wide-ranging powers over witnesses and fixed procedures, which it is difficult to challenge or circumvent. Yet it should be noted that Rousso was objecting not just to the historian’s instrumentalization by the law, but also to the law’s instrumentalization by the politics of public memory. In a sense, too, his choice was morally unproblematic. It would have been much more difficult to refuse to testify had he been asked to appear for the prosecution rather than for the defense. Rousso did not decline another invitation, to participate in a lengthy round-table discussion in May 1997 with the former Resistance heroes Raymond and Lucie Aubrac, authors of various works about their wartime experiences. Outraged by a journalist’s claim that Raymond Aubrac had betrayed the Resistance leader Jean Moulin to the Gestapo, the couple demanded a debate with historians in order to clear their name. The historians accepted that the document on which the claim of betrayal was based was a forgery. But the discussion became controversial when the historians nonetheless closely questioned the Aubracs about the events in which they had been involved. After the publication of the record of the discussion in a daily newspaper, the historians were accused of acting like inquisitors and having engaged in a “deplorable history lesson” by exposing contradictions and inaccuracies in the Aubracs’ account (74-76). The Aubracs were a legend of the Resistance, and there was a widespread feeling that the historians’ critical attitude was tarnishing the legend.²⁵

How does Rousso justify his taking part in these proceedings? First of all, he points out that this was not a trial. His concern, along with the other historians present, was with the truth, not with a verdict of guilty or innocent. Here he insists bravely that historians should not allow themselves to be intimidated by eyewitnesses of the events with which they are dealing:

24. For the general background, see “A Time to Remember,” ed. Nathan Bracher, in *Contemporary French Civilization* 19, no. 2 (special issue) (1995); Richard J. Goslan, *Vichy’s Afterlife: History and Counterhistory in Postwar France* (Lincoln: University of Nebraska Press, 2000).

25. The printed and edited version of the discussion is in a series of special supplements to the newspaper *Libération*, on 9-13 July, 1997.

Although Lucie Aubrac deserves all of our respect for her activities in 1943, she cannot refuse to allow a historian to disagree with her current conception of the memory of the Resistance, especially since she has never stopped stating that the witnesses alone possess the historical truth and that historians can never understand anything about the experiences of the Resistance. It is a natural tendency for some agents of history to adopt this attitude toward historians of the present, and it is one of the risks of the craft. Historians must resist it, whatever the price may be. (79)

Many historians working on Nazi Germany have had the experience, as I have had, of being confronted by a survivor of Auschwitz and being told that we could never understand what they went through. One sympathizes with this point of view. But it must indeed be rejected, however difficult the assertion may be; otherwise we have no business calling ourselves historians.

There are two main reasons for this. First of all, if historians can never understand what prisoners experienced at Auschwitz, then they can never understand anything else in history either. History is not the same as autobiography. The whole discipline of history has grown up as an elaborate attempt to bridge the gap in experience through the exercise of the historical imagination, and there is no difference in principle between bridging this gap in the case of Auschwitz and bridging it in other any historical subject. And second—a point which must be put to camp survivors every time they advance this argument—do they really believe that the knowledge of Auschwitz and what went on there will die with them? Is this not a counsel of despair? Surely they must work with historians in providing the materials with which their experiences can be represented and analyzed long after they are dead. This indeed was a central point in the David Irving libel trial, in which survivors were not called, and the evidence, presented by professional historians, showed that empirical knowledge is possible without the direct involvement of the survivor generation, even though the written testimony of survivors was used in evidence along with many other kinds of historical source material.

If Rousso justifies his determination to arrive at the truth and asserts his right to question the Aubracs' account, however, then how does he justify his decision to take part in the round-table in the first place, given his simultaneous refusal to participate in the Papon trial? His answer is subtle but convincing:

I reject the argument that historians should not allow themselves to judge agents of history. . . . If these agents, themselves witnesses as well, are my contemporaries, and if my judgment addresses *not their past acts but their statements made today*, then I do not see any reason why I should consider them as not responsible and possessing a right to do and say as they please, simply because they are genuine heroes of the Resistance. I never put forth any judgment whatsoever concerning the behavior of Lucie or Raymond Aubrac *during* the war, and any judgments of their remarks should be open to disagreement and offered *outside of any tribunal or grand jury* (and the roundtable was not a tribunal, even if the Resistance veterans who requested it may have imagined it in those terms). After all, studying the fragile nature of witnesses' accounts as a historian does not prevent me from contesting, as a citizen, *current* statements from a Resistance veteran who claims to be defending a duty to remember while at the same time explaining that she reserves the right to take liberties with historical truth. (78-79)

In the end, after all, the roundtable was not a trial, and the historians were free to say anything they liked. They were not being asked to make statements implying guilt or innocence, nor to issue judgments on the Aubracs' actions, nor did they do so. What the Aubrac debate became, in the end, was a confrontation between history and memory. As a historian, Rousso felt bound to champion the former against the latter.

IV

As Ora Avni remarks in the foreword to this short but extremely thought-provoking, intelligent, and morally courageous book, it would be a mistake to regard what it has to say as bearing only upon the peculiarities of French justice and French history. The book "is also about the methods by which we attempt to reach and frame different perspectives on knowledge and truth, the ways an open society can or should manage information, and the moral and civic responsibilities of the intellectual elite in a democracy" (xvii). What, then, finally, are the wider lessons of what Rousso has to say? Does it apply to other cases in other jurisdictions? Should I conclude from his book, for example, that I was wrong to testify in the David Irving libel trial? Should historians follow his injunction and refuse to get tangled up in court cases?

To begin with, it seems to me that much of what Rousso reports of the Papon and Touvier trials does not really apply to the trial in which I was involved. The Irving trial was not a criminal but a civil action, in which the outcome rested not on proof of guilt beyond reasonable doubt, but—as in history—the establishment of a case on the balance of probabilities. Second, and perhaps crucially, it did not concern the past. The Holocaust, despite the misapprehension of one journalist who wrote about it,²⁶ was not on trial. Like the Aubrac affair, the Irving trial was about how the past was represented in the present, in this case in the writings and speeches of David Irving. Third, the expert witnesses were not confined to supplying more or less spur-of-the-moment oral testimony in the witness box. They made their contribution primarily through submitting lengthy and considered written reports before the trial began, reports which ran to two thousand pages in all and took eighteen months to prepare and write. Cross-examination was on the basis of these reports, and of necessity stuck closely to them. The experts were given a brief—to write about whether Irving falsified the historical record, or to supply documentation on Hitler's role in the extermination of the Jews, for example—but we were not told what to say, and we had a free hand in painting in the historical context as fully and with as much nuance as we wished. Mature reflection on the issues was therefore a given. Even in the courtroom, we had as much time as we wished to discuss the issues we had raised in our reports.

In the witness box, it was not difficult to insist, if an attempt was made by the cross-examiner to cut inconvenient testimony short, that one had sworn an oath to tell the whole truth as well as nothing but the truth, and the judge was invari-

26. Guttenplan, *The Holocaust on Trial*.

ably sympathetic to this argument, however lengthy the answers to which it led. There was no question of any moral judgment being demanded of the court. The issue centered on an empirical question. Inserting a word into a quotation from a contemporary document that is not present in the original, leaving words or passages out of contemporary documents in order to support a preconceived case, using misreadings or mistranslations of German documents that are convenient to a particular argument, inventing statistics for which there is no contemporary or any other documentary foundation in order to bolster an inflated or a deflated claim (of the numbers killed, respectively, in the Allied bombing of Dresden and the Nazi extermination of the Jews)—these and much more besides would count as misrepresentations and falsifications in the eyes of historians as they did in the eyes of the court.²⁷

And quite apart from all this, the origins of the Irving trial lay in an attempt by Irving himself to force Deborah Lipstadt and her publisher Penguin Books to withdraw her allegations against him of falsifying the historical record, to undertake not to repeat them, and to pay a substantial sum of money in damages and costs. The interests of free speech lay therefore in contesting the writ, and in upholding the right of historians such as Lipstadt to criticize Holocaust deniers such as Irving for their manipulation of the documents. Had Irving won, such criticism would no longer have been possible in Britain. It has been argued that the decision to fight Irving was made in the name of the memorialization of the Holocaust, but while this may have been a motive in the eyes of some of Lipstadt's supporters, it was not the primary motive in the eyes of the defense; indeed, as I have already noted, the trial had little to do with memory, and everything to do with history. In truth, Lipstadt and her publishers had no real option but to fight. The costs of not doing so, in terms of freedom of speech, the freedom of historians to say what they like, and the freedom of publishers to publish it, would have been unacceptably high.

Just as important, at issue was not the interpretation or meaning of the Nazi extermination of the Jews, but the evidence for its factuality. Of course, the likelihood of the existence and operation of the gas chambers at Auschwitz had to be established by a series of evidence-based historical arguments, resting on a convergence of indications between the physical remains of the camp, the contemporary documentation, and the memories of survivors, including camp officials. The degree of probability established by this convergence was overwhelmingly high; the arguments put forward by Irving, by contrast, lacked conviction when confronted with the evidence. Similarly with other issues in the trial. The presentation to the public through the mass media of a mass of evidence about the extermination of the Jews was merely an incidental, though far from unimportant, educational by-product of these processes, one of which the defense team only gradually became aware of as the trial progressed. As a result of the trial, too, open debate among historians about the Nazi extermination of the Jews could continue more or less unchecked by legal interference.

27. *The Irving Judgment: David Irving v. Penguin Books and Professor Deborah Lipstadt* (London: Penguin Books, 2000).

The restriction of such debate through legislation outlawing Holocaust denial is another matter. In a sense, of course there is no “debate” between those who rationally accept the evidence of past events and those who twist it, manipulate it, or deny it without any reasoned grounds for doing so. Holocaust denial legislation has been passed in a number of countries, but not so far in the United Kingdom, and with reason; it would make martyrs of the tiny band of extremists who would fall foul of it, it would give them publicity they do not normally receive, and it would be difficult to enforce. Once the law starts dictating what may and what may not be said about the past, who knows where the process of interference with history and historians may end? As the American lawyer Alan Dershowitz has said, “I don’t want the government to tell me that it [the Holocaust] occurred because I don’t want any government ever to tell me that it didn’t occur.”²⁸

It may well be that the era of high-profile trials involving crimes against humanity committed in the Second World War is already over. The age of the few men convicted certainly suggests it has not long to go. But there will be other trials relating to other human rights violations, and not all of them will deal with history that is recent enough to be fresh in the memory. How should historians act in such circumstances if they are called to the witness box and asked to provide expert testimony? As Rousso suggests, we have to be careful to preserve our scholarship and to provide information that is compatible with the standards of historical research we are committed to uphold. This means in the first place, I think, that historians should provide evidence in the form of written affidavits or reports. Writing at length and with due time for preparation allows the historian to give a considered view and to take into account every relevant aspect of the subject in a way that is not necessarily possible in the heat of forensic debate under quick-fire questioning in the witness box. The model for this kind of contribution is perhaps provided by the affidavits supplied by professional historians from the Munich Institute for Contemporary History to the Auschwitz trials in 1964. These provided background information on matters such as the history and structure of the concentration camps, the chronology of anti-Semitic policies in the Third Reich, and the nature of command and compliance in the SS. If a defendant claimed, for example, that he had no alternative but to obey orders, the court could refer to the expert affidavit for information on how far and in what circumstances it was possible to disobey orders, and what would be the consequences of doing so. So informative and well-founded were the affidavits that they were subsequently published as a scholarly book, and are still used by historians forty years after they were written.²⁹

That it is still possible for historians to gain from their work for the courts, contrary to Rousso’s gloomy view, can be illustrated by the case of Peter Longerich’s expert report for the Irving trial. The author of a massive history of Nazi anti-

28. Quoted in Douglas, *The Memory of Judgment*, 215.

29. Helmut Krausnick, Hans Buchheim, Martin Broszat, and Hans-Adolf Jacobsen, *Anatomy of the SS State* (London: Collins, 1968).

Semitic policies from 1933 to 1945, Longerich was asked by the defense to present to the court the evidence on Hitler's role in the formulation and execution of these policies. As Longerich has noted, rather to his surprise, he discovered that the materials on this topic were scattered across a whole range of European archives and were often rather difficult to come by; some documents indeed were supplied by archivists on short notice in the course of the trial. Rather than looking for the elusive "Hitler order" commanding the extermination of the Jews, Longerich pieced together a mass of documentary evidence which traced Hitler's continual public and private advocacy and legitimization of anti-Semitic policies of growing radicalism, and demonstrated his knowledge of what was going on. Contrary to his initial expectations, therefore, Longerich found himself engaged in a task of research, synthesis, documentation, and interpretation that constituted a genuine contribution to scholarship on the subject and went some way beyond the massive treatment of the topic that he had published only a few years before.³⁰ Similarly, the cultural and architectural historian Robert Jan Van Pelt, charged with providing evidence on the gas chambers at Auschwitz, produced a massive report that presented a large quantity of new evidence, not only refuting the claims of those who—like Irving—denied that the gas chambers were used to kill human beings, but also marking a major step forward in our understanding of the way they were designed and put into operation.³¹

But not all court cases can produce genuine contributions to knowledge, and the historian cannot make such a prospect the touchstone for whether to become involved. If this had been so, then Peter Longerich would never have agreed to testify in the Irving case, to the detriment of history as well as the law. All that we can do is to insist that we are not placed in circumstances in which we are forced to betray our calling. This means that as far as possible we should restrict ourselves to providing contextual information, at least where criminal cases are involved. It ought, at least in theory, to be possible to do this in a way that leaves the decision on the guilt or innocence of an individual up to the court. For example, there is no real reason why a historian should not provide a court with information about the nature and extent and chronology of information percolating back to various levels of officialdom in France during the war about the fate of Jews deported to the East, without drawing any specific conclusions as to what a particular individual either knew or did not know at a particular moment in time. Historians simply have to resist being pushed into a situation in which they act as advocates or judges. If this means refusing to testify when the circumstances are clearly going to force them to do this, then that is surely a justified course of action to take.

Nevertheless, there are some serious intellectual problems involved in justifying such a stance. In declining to take the stand in the Papon case, Henry Rousso was proclaiming his ideal of history as scientific and value-free, and of course

30. Peter Longerich, *Der ungeschriebene Befehl: Hitler und der Weg zur "Endlösung"* (Munich: Piper, 2001).

31. Robert Jan Van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial* (Bloomington: Indiana University Press, 2002).

there are many who believe that it is neither. It is understandable that someone who specializes in contemporary history should be particularly concerned to distance himself from the polemics of the present and the very recent past. Yet committed history is not necessarily bad history, and all our writing and research is informed by a degree of moral, intellectual, and political purpose formulated in the present. No doubt Rousso's own writing on Vichy is far from value-neutral either in inspiration or in effect. What has to be said, however, is that historians have to be prepared to see their initial hypotheses and purposes challenged by the material they come across, they have to be self-critical and self-aware, and they have to be willing to draw conclusions framed by the sources irrespective of the political and legal consequences that might ensue. When we allow our appropriation and representation of the sources to be framed by a knowledge or estimation of these political and legal consequences, then we are no longer acting as historians.

Rousso's arguments are also informed by a very strong sense of the autonomy of the discipline of history. Historians in his view should not let their agendas be set by questions asked from another discipline such as the law. Historians have borrowed their hypotheses and arguments from many other disciplines over the decades, so why not the law? The answer is that the law is not primarily interested in explaining human behavior, as Rousso repeatedly points out throughout this book; its main aim is to judge it. Perhaps the most powerful plea in this book is for historians to get away from moral judgment and back to explanation. For there has indeed been a strong judicialization of history, above all the history of twentieth-century Europe, in the last ten or fifteen years. Historians of Nazi Germany now habitually deal in moral and judgmental categories rather than analytical and explanatory ones: people are classified as "perpetrators," "victims," or "bystanders," and much effort goes into establishing who should go where, and whether or how far it might have been possible for the people in one category to move themselves out of it. There is a whole literature on how far ordinary Germans knew and approved of the extermination of the Jews and the other policies of the Third Reich, but behind this literature lies the attempt not to explain, but the intention in varying degrees to condemn.³² A similar literature of moral judgment and condemnation has grown up, as Rousso points out, in the history of Communism.³³ A recent, large-scale history of Nazi Germany concentrates almost exclusively on moral judgment, eschewing analysis because the author appears to believe in the old maxim that to explain is to excuse.³⁴ The very term "Holocaust," with its heavy baggage of religious and mystical significance, is an invitation to engage in moral judgment rather than in explanation.

This re-moralization of history is not unconnected with the view of some post-modernists that since history cannot deliver dependable factual knowledge or empirically grounded and convincing explanations, it should become the only

32. At its most extreme in Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (London: Little, Brown and Company, 1996).

33. Stéphane Courtois *et al.*, *The Black Book of Communism: Crimes, Terror, Repression* (Cambridge, Mass.: Harvard University Press, 1999).

34. Michael Burleigh, *The Third Reich: A New History* (London: Macmillan, 2000).

thing it is capable of being, namely a form of moral rhetoric. The developments that Rousso describes in terms of the growing influence of public memory and legal process on history can also be seen in connection with changing intellectual trends during the same period, trends which Rousso does not even allude to, let alone attempt to explore. This is a pity; for if it were simply a matter of a self-assured discipline of history, confident in its own ability to engage in the scientific pursuit of objective knowledge, resisting the siren calls of media fame and public exposure that come with the invitation to become involved in high-profile legal proceedings, the problems that Rousso addresses would be easy enough to solve.

In fact, however, the problems go much deeper; for just as the law was beginning to enmesh historians in its nets, so historians were becoming more susceptible to its blandishments through the growing recognition of their own subjectivity that postmodernism has brought about. That subjectivity is real enough, but it also has its limits. Rousso's timely intervention in the debate is a clarion call to acknowledge those limits and to reassert history's primary purpose of explaining and understanding the past rather than judging it.

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