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# Review Article: Law, Memory, and History in the Trials of Nazis

DONALD BLOXHAM. *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory.* New York, NY: Oxford University Press, 2001. Pp. xix, 272. $120.00 (CDN); MICHAEL S. BRYANT. *Confronting the 'Good Death': Nazi Euthanasia on Trial, 1945-1953.* Boulder, CO: University Press of Colorado, 2005. Pp. x, 269. $34.95 (US); LAWRENCE DOUGLAS. *The Memory of Judgment: Making Law and History in the Trials of the Holocaust.* New Haven, CT and London: Yale University Press, 2001. Pp. xiii, 318. $22.00 (US), paper; ROBERT GELLATELY, ed. and intro. *The Nuremberg Interviews: Conducted by Leon Goldensohn.* New York, NY: Alfred A. Knopf, 2005; dist. Toronto, ON: Random House of Canada. Pp. xxix, 490. $50.00 (CDN); STEPHEN LANDSMAN. *Crimes of the Holocaust: The Law Confronts Hard Cases.* Philadelphia, PA: University of Pennsylvania Press, 2005; dist. Toronto, ON: Scholarly Book Services. Pp. xi, 304. $49.95 (US); CLAUDIA MOISEL. *Frankreich und die deutschen Kriegsverbrecher: Politik und Praxis der Strafverfolgung nach dem Zweiten Weltkrieg.* Göttingen: Wallstein, 2004. Pp. 287. €42.00; DEVIN O. PENDAS. *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law.* New York, NY: Cambridge University Press, 2006. Pp. xii, 340. $65.00 (US); PAUL JULIAN WEINDLING. *Nazi Medicine and the Nuremberg Trials: From Medical War Crimes to Informed Consent.* Basingstoke and New York, NY: Palgrave Macmillan, 2005. Pp. xii, 482. $80.00 (US); ANNETTE WEINKE. *Die Verfolgung von NS-Tätern im geteilten Deutschland: Vergangenheitsbewältigungen 1949-1969: oder: Eine deutsch-deutsche Beziehungsgeschichte im Kalten Krieg.* Paderborn: Verlag Ferdinand Schöningh, 2002. Pp. 514. €49.80; REBECCA WITTMANN. *Beyond Justice: The Auschwitz Trial.* Cambridge, MA and London: Harvard University Press, 2005. Pp. 336. $35.00 (US).

FASCINATION WITH WAR crimes trials dates from the Trial of the Major War Criminals at Nuremberg and continues today with the trial of Saddam Hussein in Baghdad. It is unfortunate that for decades the discourse has been dominated by lawyers, as war crimes trials are political as well as legal exercises that divide groups along national and ideological lines in an international struggle over

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memory. It is thus a welcome development that, in the past ten years, historians have re-examined war crimes trials in an attempt to gauge their political effects as well as their influence on transnational historical understanding.

Historians of Nazi Germany have taken the lead. Their interest arises not only from the vast research on the Holocaust, but also from the more recent wave of literature examining how Germans, their former enemies, and their many victims tried – or did not try – to master a terrible past dominated by history's worst state-sponsored mass murder. Such work discusses the release of German perpetrators – generals, industrialists, and SS officers – from Allied prisons in the 1950s owing to West German ambivalence towards foreign trials and the political pressures of the cold war. Yet if the imprisonment of men like Alfried Krupp and Erich von Manstein angered groups within Germany, their release infuriated Allied veterans, former resistors, East Bloc governments, and Jewish groups.[1] The acrimony showed that there had been something wrong – or perhaps something right – with the trials themselves. Had they accurately represented or misrepresented recent events and the roles in them of German perpetrators? If Germans resented trials held by foreigners, would they accept trials held by their own authorities? Can nations recognize the terrible pictures of themselves that emerge from the post-war trials? Or was Winston Churchill right when he advocated the summary shooting of the Nazi leaders to avoid the politics of trials? Definitive answers are hard to come by, as the books under review show. All of them try to measure the degree to which trials captured the worst of Nazi crimes and the extent to which they provided historical meaning to diverse audiences.

The Trial of the Major War Criminals by the International Military Tribunal at Nuremberg in 1945-6 is post-war justice's landmark. Despite the large number of works written about it, there remains much to consider.[2] Robert Gellately's edition of the hitherto lost collection of discussions in 1946 between the US psychiatrist Leon Goldensohn and senior Nuremberg defendants reminds us – as did older such accounts by G. M. Gilbert and the recent collection of interrogations by Richard Overy – that perpetrators work on their stories early in the hope not only of escaping the noose but also of justifying themselves to history.[3] Most defendants at Nuremberg, in rejecting the tribunal's authority, solidified what became the standard criticism of victor's justice most recently deployed by Slobodan Milošević and Saddam Hussein. But Goldensohn's notes also reveal the early stages of historical corruption. All of the defendants blamed the war on the treaty of Ver-

1 On the Federal Republic of Germany, see, e.g., N. Frei, *Vergangenheitspolitik: Die Anfänge der Bundesrepublik und die NS-Vergangenheit* (Munich, 1996); U. Brochhagen, *Nach Nürnberg: Vergangenheitsbewältigung und Westintegration in der Ära Adenauer* (Hamburg, 1994).

2 Beginning with B. F. Smith, *Reaching Judgment at Nuremberg* (New York, 1977); T. Taylor, *Anatomy of the Nuremberg Trials: A Personal Memoir* (New York, 1992); M. Marrus, *The Nuremberg War Crimes Trial, 1945-6: A Documentary History* (Boston, 1997).

3 G. M. Gilbert, *Nuremberg Diary* (New York, 1947); R. Overy, *Interrogations: The Nazi Elite in Allied Hands, 1945* (New York, 2001).

sailles rather than Germany's evasion of it. And none fretted much about German crimes: Hermann Göring insisted that the Jews were too alien to remain in Germany; Alfred Rosenberg insisted that they 'spat at German culture'; Joachim von Ribbentrop blamed the Holocaust on Jewish wire-pullers in the United States. German victimhood was another dominant theme. Adolf Hitler's economics minister, Walther Funk, insisted that the Soviets 'did worse things when they entered Pomerania than we ever did in Russia', and Einsatzgruppe commander Otto Ohlendorf, who admitted that his unit killed 90,000 Jews, insisted that 'the treatment of the Germans by the Allies was at least as bad as the shooting of those Jews.' Recent scholarship on German memory demonstrates that such claims, though rarely voiced in public and though never embracing leading Nazis, have their appeal.[1]

Therein lies the problem. Trials, which give legal judgements, also reach historical conclusions enhanced by the collection of documents and testimony. The latter can be distorted by the need to secure convictions in a reasonable time within established law while allowing the defence a chance to defend. Should the law be paramount, violence is done to history. Should history be paramount, violence is done to the law. Hannah Arendt, who wrestled with the conundrum at Nuremberg, concluded that Nazi crimes had transcended the boundaries of the law. Yet she criticized the trial of Adolf Eichmann in Jerusalem in 1961, which tried to capture the Holocaust's enormity in a trial-based narrative, by comparing the proceedings to a show trial.

Donald Bloxham and Lawrence Douglas take up the suggestion by Michael Marrus that perhaps the Nuremberg trials were not didactic enough in dealing with Nazi Germany's signature crime, the killing of Europe's Jews.[2] To Bloxham, the trials in the US and British occupation zones distorted the world's understanding of the Holocaust for decades. The problem was partly legal. The relevant charge for Holocaust-related crimes was the new one of crimes against humanity, which criminalized the persecution or killing of persons on grounds of religion, race, or politics even when committed against one's own population. The law, applied retroactively, theoretically threatened the principle of national sovereignty. To anticipate the threat, the prosecution rolled crimes against humanity into charges of traditional war crimes against foreign nationals and, in turn, rolled war crimes into broader charges of conspiracy and crimes against peace: the planning and launching of a war of aggression and conquest during which war crimes and crimes against humanity were committed. Thus, the wholesale killing of Europe's Jews, though mentioned at Nuremberg, was misrepresented as a subtext of Nazi aggression that turned the Holocaust into one crime among many. Later trials,

1 See R. G. Moeller, *War Stories: The Search for a Usable Past in the Federal Republic of Germany* (Berkeley, 2001); M. Nolan, 'Germans as Victims during the Second World War: Air Wars, Memory Wars', *Central European History*, xxxviii (2005), 7-40.

2 M. Marrus, 'The Holocaust at Nuremberg', *Yad Vashem Studies*, xxvi (1998), 5-41.

held by the United States on behalf of the German professions that had supported Nazism (medicine, the law, industry, and the military) also emphasized Germany's aggression while fragmenting the narrative of genocide to the point where scholars took decades to reconstruct it notwithstanding the vast documentation the trials produced. Other countries sustained the trend. Britain was reluctant to hold trials that could give impetus to Jewish statehood in Palestine. European countries had their own post-war stories to tell, and Jews, a minority in each, were at the centre of none of them. According to Bloxham, far from forcing Germans to face up to the worst of their Nazi past, Nuremberg buried genocide within the tangled shrubbery of the Second World War.

Though Bloxham is correct, one must be charitable. The Nuremberg trials were held in the rubble of war: historical context was lacking and the victors, shaken by the extent of their own sacrifices, tried to muster as much of Nazism as possible under the single rubric of the war. It made sense in light of the long war-guilt controversy after 1919. Lawrence Douglas, who sees the Nuremberg glass as half full, argues that as the Trial of the Major War Criminals progressed, the prosecutors introduced the Holocaust as best they could without jeopardizing the trial's legal integrity. Thus the prosecution screened the film *Nazi Concentration Camps* despite its problematic evidentiary nature and introduced hearsay evidence of Nazi crimes in the east. Yet the centrepiece of Douglas's book is the Eichmann trial. He argues, in opposition to Arendt, that such trials must do justice to history as well as to the defendant: in Jerusalem, the victims of the Holocaust took centre stage. There is much to criticize about the trial: the defendant was kidnapped; he was tried under Israel's *ex post facto* Nazi and Nazi Collaborators Punishment Law of 1950; and the prosecutor, Gideon Hausner, introduced heart-wrenching oral survivor testimony not directly relevant to Eichmann's individual guilt. Nonetheless, Douglas bristles at Arendt's suggestion that such events made the trial a show trial. As plenty of evidence tied Eichmann to specific crimes such as the deportation of Hungary's Jews to Auschwitz in 1944, the trial could legitimately expand to fit the crime; and it occurred at a unique moment in which the needs of history brought something approaching global consensus. Conversely, Klaus Barbie's trial in Lyons in 1987 was a failure thanks to former French resistors' efforts, by manipulating the law, to shift the focus to their status as victims, and away from Barbie's deportations of Jewish children, and thanks to the post-modern defence by Barbie's lawyers according to which all Westerners are inherently guilty of genocide. Holocaust-denier trials in Canada gave similar demonstrations of the limits to the law by giving deniers and their attorneys a forum in which to attack survivors, scholars, and ultimately history itself.

Legal scholars such as Stephen Landsman will always lament the use of trials to raise international historical consciousness. A tort lawyer himself, he is irritated by hearsay evidence, the examination of defendants' dark characters as well as their crimes, and the introduction of decades-old survivor memories in what are to him

exercises in political didacticism rather than good law. He is on solid ground in recounting the saga of John Demjanjuk, the Ukrainian whom US and Israeli prosecutors in the 1980s placed at the wrong death camp (Treblinka rather than Sobibor) because of over-reliance on eyewitness testimony. Yet the Demjanjuk case, though a tragicomedy of errors, is atypical. Landsman's criticism of the Nuremberg and Eichmann trials does not consider what the trials would have been like without legal flexibility. Most of the victims were dead, most of the documents spoke in euphemism, and there had been no cable news to broadcast the terrible images. Landsman also overlooks the fact that defendants and their sympathizers vent their spleens at the trial itself rather than its rules of evidence. His superficial understanding of earlier trials – he argues that arch-liar and document-hider Albert Speer was honest and forthright at Nuremberg – is an object lesson in why history exists as a discipline.

The need of disciplined history is especially evident in light of recent work on the lesser known trials that, like Bloxham's work, points to the difficulty in creating an accurate historical narrative out of legal proceedings. The twelve trials held by the United States in Nuremberg after the Trial of the Major War Criminals are finally receiving scholarly attention.[1] The first of these, the medical case, is the subject of Paul Julian Weindling's well-researched book that weighs the tension between the Allies' interest in Nazi medical research (particularly relating to high-altitude aviation) and their revulsion at the use of concentration camp prisoners for murderous experiments. Morality (and camp survivors) demanded a trial, and twenty doctors, seven of whom were SS officers, sat in the dock. Again, the US prosecutors folded the defendants' individual crimes into the blanket of post-1939 German aggression. The trial treated eugenics, sterilization, and euthanasia – all in the service of genocide – as experimentation geared to the war effort. Thus, no effort was made to examine the perversion of German medicine or the medical profession. Hitler's personal surgeon, Karl Brandt, and his fellow defendants, meanwhile, justified the use of human subjects – the victims were volunteers or they had been condemned to death – while pointing to the utility of their research. A second medical trial with broader historical aims never took place; Dr Josef Mengele was not seriously sought, though his crimes were notorious; and altitude specialists who should have been prosecuted were offered employment by the US Air Force. The trial exposed German medical crimes and promulgated the Nuremberg code of informed consent, but it was not what it might have been.

Nor were other national efforts perfect. Claudia Moisel's work fills a gap in the history of post-war justice and diplomacy, as the French, who handed down 2,345 judgements (1,314 of them *in absentia*) resisted the release of German criminals

1 Aside from the work reviewed here, see H. Earl, 'Accidental Justice: The Trial of Otto Ohlendorf and the Einsatzgruppen Leaders in the American Zone of Occupation, Germany, 1945-58' (Ph.D. dissertation, Toronto, 2002).

more strongly than the British and the Americans. French trials, like those in other formerly occupied countries, were about the killings of nationals and the historical validation of the resistance. But the timing of the most important French trials was especially bad, just as West Germany was joining the Atlantic alliance and as momentum was gathering towards the release of imprisoned Germans. Thus, the Oradour Trial in 1953, which examined the destruction of the village of that name by the Waffen-SS Division *Das Reich*, was held while France's ratification of the European Defence Community treaty hung in the balance. It delivered harsh sentences on six German and lenient ones on thirteen Alsatian members of the division. West German authorities, who smelled cynicism arising from France's need to re-integrate its eastern provinces, ignored requests from France that the division's commanders should be extradited from West Germany.

The trial in 1958 of Carl-Albrecht Oberg and Helmut Knochen, the senior SS officials in Paris responsible for the deportation of roughly 80,000 people, resulted in death sentences when only a handful of Germans were left in French prisons and Western solidarity was at a premium. The sentences were quietly commuted and Charles de Gaulle released both men in 1963 upon the signature of the Franco-German treaty of friendship. Ever the pragmatist, de Gaulle did not allow the past to cripple the present. The past that returned in 1987 with the trial of Barbie, which forced the French to face up to the extent of their collaboration with the Nazis, brought far greater trauma.

Above all, the Germans had to reckon with their past, and the degree to which this task could be accomplished through trials was limited. If the Israelis were willing to distort the law in the interests of reaching the broader truth, the West Germans were willing to distort the truth in the interests of the law. The Federal Republic, partly thanks to its ambivalence towards Nuremberg, declared trial by *ex post facto* law to be unconstitutional: if the state were to punish Nazis, it would apply laws extant when the crimes were committed, namely the still-valid penal code of 1871. The charge would have to be murder, as the statute on lesser crimes ran out ten years after their commission. A murder conviction, as defined by the code, requires not only proof of the act itself, but also the more subjective demonstration of bloodlust on the part of the killer. If the bloodlust is attributed to someone else, the killer, even if he understands the illegality of his act, is an accomplice to murder rather than the murderer, and his sentence will be comparatively lenient. This problem was enunciated in 1996 by Dick de Mildt's work on West German trials for crimes relating to Nazi Germany's euthanasia programme and its *Aktion Reinhard* camps in Poland, based on the published collection of post-war German trial judgements.[1]

[1] D. de Mildt, *In the Name of the People: Perpetrators of Genocide in Their Reflection of Their Post-War Prosecution in West Germany – The 'Euthanasia' and 'Aktion Reinhard' Trial Cases* (The Hague, 1996). For the judgements, see *Justiz und NS-Verbrechen*, ed. D. de Mildt and C. F. Rüter (Amsterdam, 1968- ).

Several new works examine the problem in more detail. Michael S. Bryant's comparison of US with West German euthanasia-related trials is less fruitful than it could be. Bryant correctly notes that West German courts became lenient with euthanasia doctors between 1947 and 1953 (why he ends in 1953 is unclear), but he provides little context beyond the judgements themselves, which tended to find bloodlust lacking on the defendants' part. Bryant blames the leniency on cold war geopolitics after 1947, but does not show how global tensions affected the trials of a handful of doctors who argued, apparently without contradiction, that they had disapproved of the killing of the handicapped and had saved those who could be saved. Press accounts of the trial may have shown whether the defendants' testimonies were viable, but Bryant does not do the investigative legwork. Nor does he mention the names or explain the histories of the German judges involved, an important omission when so many judges who had served under the Nazis returned to the bench after the war.

A better approach to West German justice may be to set single cases in a broader context, as Rebecca Wittmann and Devin O. Pendas do in two superb studies of the most important post-war trial in either Germany, the Frankfurt Auschwitz case of 1963-5, which tried twenty members of the Auschwitz complex from adjutants to camp guards. The trial's fortieth anniversary led to several German documentary publications including the nine-hundred-page judgement and reprints of contemporary comment.[1] That transcripts of the proceedings exist is good fortune: transcription was prohibited by law at the time to ensure the privacy of acquitted defendants, but the audio tapes of the trial made to help the judges' memories were not destroyed afterwards as they were supposed to have been.

The two books should be read in tandem for their complementary approaches. Wittmann, who focuses on legal themes, painstakingly analyses questioning, testimony, and judgement. The irony was this. The attorney general of Hesse, Fritz Bauer, had hoped to put 'Auschwitz' on trial so that Germans would have to look into the mirror. The court indeed gave a wide latitude to the prosecution. Eminent historians including Martin Broszat and Helmut Krausnick testified to provide the context and the court admitted the testimony of 359 eyewitnesses, mostly Polish and Jewish survivors. Nonetheless, individual convictions for murder demanded proof of bloodlust as well as acts. Survivor testimony was most reliable in the cases against lower-level functionaries who moved among the prisoners. As their behaviour at Auschwitz was determined by orders and rules that were cruel by nature, bloodlust could only be defined as cruelty above and beyond the SS regulations. Thus, Robert Mulka, the former adjutant to Auschwitz's first kommandant, Rudolf Höss, was only convicted as an accessory to 3,000 murders and

[1] F-M. Balzer and W. Renz, *Das Urteil im Frankfurter Auschwitz-Prozess (1963-5): Erste selbständige Veröffentlichung* (Bonn, 2004); C. Taler, *Asche auf vereisten Wegen: Eine Chronik des Grauens – Berichte vom Auschwitz-Prozesse* (Cologne, 2003); B. Naumann, *Auschwitz: Bericht über die Strafsache gegen Mulka u. a. vor dem Schwurgericht Frankfurt* (Berlin, 2004).

given the lenient sentence of fourteen years, on the grounds that he knew his actions were illegal but neither gave orders to kill nor was proved to have killed anyone himself. On the other hand, Josef Klehr, a lowly medical orderly who amused himself by giving coronary phenol injections to hospital patients, was proved to have murdered 475 people and received a life sentence plus fifteen years. Wittmann echoes Martin Walser's contemporary criticism that the Auschwitz that emerged at the trials was a diorama of individual sadistic acts rather than a place of collective systematic suffering at the hands of banal perpetrators. Men like Klehr became monsters from whom most Germans could safely distance themselves.

Pendas, who covers much of the same ground, is less pessimistic about the outcome of what he calls 'the brutal struggle between memory and legality' (p. 251). Even if the constant media reporting led to morbid fascination among some and ambivalence among others, Auschwitz was indelibly etched thereafter in the German imagination. And if the press displayed freak-show images of the most sadistic defendants, it also noted that they looked surprisingly normal in the dock. Pendas also adds an international perspective. The trial relied on witnesses and evidence from Poland and court officials travelled to inspect Auschwitz itself. The trial thus spanned the cold war divide and foreshadowed West Germany's *Ostpolitik*. While the court acknowledged Nazi crimes in the East and the Poles let it do so without polemicizing, the East Germans viewed the trial as an opportunity to explain Nazism in Marxist terms (IG Farben was behind Auschwitz) while demonstrating the unreconstructed character of West Germany. Defence attorneys also played the cold war game, issuing apologias for their clients while dismissing witnesses as Communist agents.

Annette Weinke's deeply researched comparative study of West and East German justice and the political background argues that the complex of issues must be understood as a whole. The two Germanies' contest for legitimacy, Communism's claim to be Fascism's only enemy, and the relentless East German propaganda about former Nazis holding judicial and political positions in West Germany all had their effects on both Germanies' legal confrontation with the past. Weinke argues that the formation of the Central Office for the Investigation of Nazi Crimes in Ludwigsburg in 1958, and the wide-ranging prosecutions with multiple defendants that followed, were more political than moral, because West Germany constantly worried that East Germany's 'defamation campaigns' would jeopardize its ties with the West. Weinke's study is also not without irony, as similar cold war pressures induced West Germany's allies in the early 1950s to release high-level perpetrators while fuelling West German scepticism of any trial that took account of evidence from the East. This perspective is invaluable, even though Weinke may sell short the dedication of West Germany's prosecutors and historians. Most scholars accept that the Ulm trial of eight Einsatzkommando troops in 1958 triggered the streamlining of hitherto disjointed West German criminal investigations

and trials.[1] And if West German trials delivered the Nazi past to a disconnected public, lenient punishments and acquittals only provided additional rhetorical ammunition in the Eastern Bloc.

Recent studies on Nazi trials remind us of the importance of such proceedings. The trials give judgement on the recent past after gathering mountains of evidence that might not otherwise have been gathered, evidence historians study and refine long after it serves its legal purposes. Yet the trials have also been both highly charged political affairs with international consequences and vehicles designed to serve the evidentiary needs of prosecutors whose aims and scope are less broad. If the trials of Nazis have evolved since Nuremberg to include greater historical perspective in the courtroom, the more recent trials of Milošević and Saddam remind us that the process will always leave a bitter taste in many mouths. Such is the burden to be borne at the busy crossroads where history, justice, memory, and diplomacy meet.

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1 See, most recently, E. Haberer, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes', *Holocaust and Genocide Studies*, xix (2005), 487-519.