

The case of Ivan Demjanjuk.

SANHEDRIN II

By Alex Kozinski

"He who is kind to the cruel is cruel to the kind." —Midrash

It is a brilliant opinion: powerful in its understatement, painfully thorough yet written in words a lay reader can easily understand. As it is reviewed and analyzed, the Israeli Supreme Court's decision in the *Demjanjuk* case will surely become a model of judicial craftsmanship, a luminous example of how a court confronting a difficult and painful subject ought to comport itself. Jews can take pride that Judaism's age-old commitment to the rule of law did not waver.

But is it right? That's a tougher question. Evaluated by American legal principles, the opinion is hard to defend; our own Supreme Court—even in the heyday of Warren, Brennan and Marshall—likely would have reached a different result. The Israeli Supreme Court, however, is not just another common law court. It stands heir to a much older tradition, that of the Sanhedrin, the body of sages who served as the supreme tribunal of the Jews in ancient times. In deciding cases, the Sanhedrin had to reconcile two cross-currents in Jewish law: on the one hand, a surpassing reverence for human life; on the other, the ferocious cruelty of the biblical codes that prescribed the death penalty for a host of offenses—including even being a "rebellious son." In resolving this tension, the Sanhedrin developed rules and practices that were remarkably favorable to the accused. All inferences consistent with innocence were to be indulged; the accused was given the benefit of every doubt, reasonable or not. As a consequence, the Talmud tells us, a Sanhedrin that upheld an execution in seven years or even in *seventy* years was scorned as a bloody court. It is to this tradition that Ivan Demjanjuk owes his life and freedom.

The Israeli Supreme Court's decision to free Demjanjuk rests on two key rulings. The first concerns the sufficiency of the evidence that Demjanjuk was Ivan the Terrible—the operator of the Treblinka gas chamber where thousands, perhaps hundreds of thousands, of Jewish men, women and children perished. This, the court held, was not proved beyond a reasonable doubt. Second, the court decided not to pursue the lesser charges that Demjanjuk served as a guard at the extermination camp at Sobibor and the concentration camps at Flossenbuerg and Regensbuerg—charges the court found were proved beyond a reasonable doubt, indeed beyond all doubt. An American court would probably

have ruled otherwise on both issues.

The Israeli Supreme Court's summary of the evidence discloses that, despite the passage of almost fifty years, the attorney general of Israel was able to construct a remarkably powerful case against Demjanjuk. No fewer than thirteen witnesses picked him out from among contemporary photographs of guards dressed in Nazi uniforms. Five witnesses identified him in court as Ivan the Terrible and remained unshaken despite extensive cross-examination. Nor were these people who saw Ivan fleetingly or from a distance:

The identification evidence of the survivors Rosenberg, Bourkas, Epstein and Reichman were the statements of persons who claim that they worked near the appellant, saw him for days, weeks and months from a distance of a few meters and lived under fear of his deeds. . . . Reichman was a witness to the abuse of the appellant when he drilled with a drill through the body of the prisoner Finkelstein. Everyone gave detailed descriptions, far in excess of the facial identification alone, which provided an objective and logical basis for the weight of the identification.

Reichman backed up his in-court description with excerpts from his Treblinka diary.

Demjanjuk was identified as Ivan the Terrible by six others who did not appear in court, having died before the trial. The most important of these was Turovsky, who spontaneously plucked Demjanjuk's photograph from an album when no one had any suspicion that he might be Ivan the Terrible; his identification was "immediate from the first look and with complete confidence." Goldfarb was equally certain, and his identification was also spontaneous. Significantly, Goldfarb's identification was inconsistent with what his questioner knew, neutralizing any risk that the prosecution might have influenced Goldfarb's choice. Lindwasser "responded when he was shown eight photographs by pointing immediately to the photograph of the appellant and saying: 'This is Ivan here. I recognize him with complete certainty.'" Charny and Bourkas had similar reactions, shouting, "That's Ivan," when they first saw Demjanjuk's picture.

More tentative—but nonetheless consistent—was the testimony of s.s. guard Otto Horn. According to Tom Teicholz's *The Trial of Ivan the Terrible*, Horn "spoke dispassionately of the events at Treblinka as though he were a bank clerk talking about a bad check." "This is Ivan probably," Horn said, pointing to Demjanjuk's 1951 visa photo; when shown [Demjanjuk's] Trawniki photo, he said, 'As far as I can recall, Ivan looked like this.'"

The most interesting piece of evidence, particularly in light of the court's ultimate conclusion, came from Dudek, who gave a sworn statement to Polish investigators in 1986. According to Teicholz:

Dudek explained that he lived in the nearby village of Wolga Okralnik where he ran a tavern Ivan visited regularly. He . . . said the gas-chamber operator's name was known to be Ivan Marshenko. But there was an interesting addendum. The police then placed eight pictures of Ukrainian

guards before him. He pointed to Demjanjuk's Trawniki photo and positively identified it as Ivan Marshenko, the one who was known as Ivan the Terrible.

Obviously we are dealing here with statements drawn from memories decades old. But the number of them, their certainty, spontaneity and sources—persons who had ample opportunity to observe Ivan the Terrible at close quarters—point strongly to the conclusion that Demjanjuk had indeed operated the gas chamber at Treblinka.

What then troubled the court? Long after the trial, documents were obtained from the KGB's files that contained statements of other Treblinka guards referring to the operator of the gas chamber as Marchenko; some gave a physical description that did not fit Demjanjuk; one noted that this person was known as Ivan the Terrible. The Israeli Supreme Court recognized that these documents were far less reliable than the proof the attorney general offered. The statements were taken by the KGB, never famous for adhering to Western notions of procedural regularity; the declarants were not subject to cross-examination or impeachment; there was no way of knowing how these statements were produced or whether they were authentic, making it hard "to rule out theoretical possibilities of tampering with the evidence in full or in part." It is highly doubtful an American court would have admitted the statements had they been presented at trial, much less on appeal.

Even if the statements were admitted and believed, the Israeli Supreme Court recognized that nothing in them foreclosed the possibility of successive operators of the gas chamber named Ivan—one Demjanjuk, the other Marchenko. Nor was it out of the question that Demjanjuk, for whatever reason, called himself Marchenko at the time. The court noted that the statement of Dudek, the tavern-keeper, supports this hypothesis, as does the fact that Demjanjuk falsely listed his mother's maiden name as Marchenko in his U.S. visa application. The court nevertheless felt it could not dismiss the KGB statements and could not come up with a satisfactory explanation for their existence. These statements, the court concluded, established a reasonable doubt about whether Demjanjuk was Ivan the Terrible.

In reaching this conclusion, the court adopted a standard much more rigorous than that normally employed in the United States. An appellate court here would look at the evidence in the light most favorable to the prosecution and ask itself whether a rational jury *could* have convicted; it would reverse only if the evidence absolutely required acquittal. This standard recognizes that not all the evidence presented in a criminal trial will fit into a neat, consistent pattern. In figuring out what happened, juries often discard pieces of the puzzle that don't match up, such as testimony from the defendant's mother that they were home together watching T.V. on the night of the crime. Such evidence certainly *can* create a reasonable doubt, but it can also be rejected as too improbable.

What the Israeli Supreme Court looked for here—and did not find—was "an additional layer of evidence," something to explain away or refute the statements from the KGB files. Because the statements came into the record with none of the tethers that normally tie proof to the real world—no opportunity to cross-examine, no proof of authenticity, nothing at all that would make them reliable enough to be admitted under ordinary circumstances—it became virtually impossible for the prosecution to deal with them. Their very unreliability made them immune to attack.

Subtly woven into the common law woof of the Israeli Court's opinion are the warp threads of talmudic law. The willingness to admit any evidence—even that of highly doubtful reliability—so long as it helps the accused, while demanding that the prosecution come up with a concrete, rational explanation to dissipate the doubt so created, is far more consistent with the processes of the Sanhedrin than those of the common law.

The Israeli Court's decision to exonerate Demjanjuk of the Ivan the Terrible charge may also have been based on practical considerations. Israel does not have a death penalty for crimes other than those relating to the Holocaust or treason, and the only person executed in the nation's history was Adolf Eichmann more than thirty years ago. Even then, there was opposition to the execution. The court might have thought it wise to avoid the upheaval that would surround another death sentence.

More puzzling is the court's decision to let Demjanjuk walk away a free man. For, while the opinion finds reasonable doubt that Demjanjuk was Ivan the Terrible, it leaves no doubt at all that he was a guard in a Nazi death camp and, as such, played an essential role in snuffing out hundreds of thousands of Jewish lives.

The story in the court's opinion is a fascinating one, not well known even to those familiar with the Holocaust. As the Germans marched east through Poland, Hungary, Romania and the Soviet Union, they found themselves in control of the large Jewish populations in those areas. At first they used *Einsatzgruppen* s.s. units, whose business it was to round up Jews, shoot them and bury them in mass graves. Impatient with the piecemeal nature of this process, the Germans deployed Operation Reinhard. "Operation Reinhard was designed for one purpose and one purpose only," the Supreme Court noted, "namely in order to make the physical destruction quicker and more efficient" by rounding up Jews for extermination in Treblinka, Sobibor and Lodz. Because the Germans could spare only a few people for this task, they recruited large numbers of helpers from among the Soviet prisoners of war, a small fraction of whom volunteered to serve in the s.s. as *Wachmann* (prison guards).

As related by Jakob Engelhardt, himself a *Wachmann*, the Russian prisoners of war were not forced to serve in the s.s. unit—they all volunteered and were sent to a camp at Trawniki to be trained. As part of this training, Engelhardt recounted, mass executions were carried out to teach the *Wachmann* "to execute and extermi-

nate members of the Jewish race." According to another *Wachmann*, Dimitri Borodin, "[T]he procedures in the camp were such that not one of the *Wachmann* serving there could have avoided taking part."

The Israeli Supreme Court dryly summed up the function of the *Wachmann*:

The Trawniki unit was set up in order to aid the objective of murder, and nothing else. The Trawniki was an organization whose purpose was to carry out actions of the Nazi administration . . . that were directed against persecuted persons. . . . Its assignment was monolithic, namely aiding the personnel of the 's.s.' of the rank to which they had been assigned (some from the Extermination Unit T-4) to round up the Jews from the cities, towns and villages and to transport them to their death, to aid in carrying out the murder and to cover up, after the event, all traces of the murder. This was, therefore, a unit for aiding murder, in the plain meaning of the expression.

Whatever doubts the court might have had about whether Demjanjuk was Ivan the Terrible, it had none about the fact that he volunteered and served as a Nazi *Wachmann* in the Trawniki unit. The evidence on this score included a certificate from Trawniki bearing Demjanjuk's picture and his exact personal information. There were also German documents that referred to *Wachmann* Demjanjuk and mentioned his date and place of birth. Statements of another *Wachmann* by the name of Denilchenko, both in 1949 and again in 1979, identified Demjanjuk as a *Wachmann* who served with him at Sobibor. Demjanjuk's Trawniki certificate also reflects that he served at Sobibor, as do the German orders of March 1943 posting the Trawniki unit. The court considered Demjanjuk's contention that the certificates—including those bearing his photograph—were forgeries; in light of the expert testimony and other corroborating evidence, it concluded that the likelihood of this was "reduced to zero."

The court was troubled, however, that the trial had dealt primarily with the Ivan the Terrible charge, while the *Wachmann* charge was somewhat of an afterthought. It recognized that Demjanjuk "brought witnesses with whose help he tried to refute any connection between himself and the service in the Trawniki unit," but concluded that Demjanjuk did not have a "reasonable opportunity of defending himself properly, in the full meaning of the word." To give Demjanjuk such an opportunity "would mean today, *de facto*, starting the proceedings again, i.e., further continuation of the proceedings beyond the proper measure." Finding this unreasonable, the court simply terminated the case and let Demjanjuk go.

The court's reasoning on this point is not clear. A defendant is surely prejudiced when he is prosecuted for a crime committed decades earlier; one might well understand if the court had said Demjanjuk shouldn't have been tried at all because human memory couldn't be trusted to go back that far. But the court clearly considered the testimony of the eyewitnesses reliable, and it's hard to believe that a few years beyond the decades that had already passed would make the difference. The court might also have precluded a retrial if the prosecu-

tion had caused the delay. But it noted that "the trial was drawn out almost entirely because of numerous applications for postponements by the defense counsel." The court does refer to precedents that caution against a retrial where there is "a shadow of suspicion" that the accused's right to defend himself has been impaired by the passage of time, but it doesn't explain in what conceivable way Demjanjuk was prejudiced. Once again, it's highly unlikely a court in this country would have rejected the verdict on the *Wachmann* charge or, having done so, precluded a retrial simply because of the passage of time, particularly where the defendant himself caused much of the delay.

Why then did the Israeli Supreme Court set Demjanjuk free? It may well have felt that the eyes of the world were on it and on Israel, and that to retry Demjanjuk on the lesser charge would be perceived as petty and vindictive. The Court might also have felt there was no reason to single out Demjanjuk from among the many thousands who served as concentration camp guards. Then again, it might have thought that continuing to stir up memories of the Holocaust was not entirely a kindness to the survivors in the waning years of their lives.

But it is also possible that the court (consciously or not) hewed to the great tradition of the Sanhedrin, a body whose concern with fairness to one accused of crime—even the most heinous of crimes—is unsurpassed in human history. As Houston University Law School scholars Irene and Yale Rosenberg explain in a 1991 *Michigan Law Review* article, "That we sometimes free guilty people is not significant. What is critical is preserving the character of the court." Justice, the Rosenbergs tell us, citing the brilliant sixteenth-century rabbi known as the MaHaRaL of Prague,

is of such transcending importance that we demand perfection in its pursuit. Perfection, however, can come only from God. Because no human court can do what God does, the Jewish court does not claim that it can get to the bottom of the matter and discern factual guilt. Rather, Jewish law embodies a more limited conception of the function of the courts, which is not to determine the absolute truth, but simply to lift the cloud of guilt from the accused. . . . [T]he court's main function is to find the defendant innocent.

Why the emphasis on innocence from a judicial system that serves the severe God of the Old Testament? It is because guilt, the Torah teaches, is God's prerogative. "The underlying assumption is that ultimately God will deal appropriately with all who are guilty." A human court therefore should "stick to its business of finding merit in the defendant's cause." That the *Demjanjuk* court saw itself as the steward of this venerable tradition is revealed most clearly in the last line of its opinion: "The matter is closed—but not complete," the court said. "The complete truth is not the prerogative of the human judge."

ALEX KOZINSKI, a federal judge in California, is the son of Holocaust survivors.