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THE MAN WITHOUT A COUNTRY: THE JUST DESERTS OF JOHN DEMJANJUK

I. INTRODUCTION

In 1979 the United States Attorney General, Benjamin R. Civiletti, created the Office of Special Investigations (OSI) and charged it with the sole responsibility of identifying and denaturalizing Nazi war criminals.[1] Of the many cases brought by OSI, few are as emotionally charged as that of John Demjanjuk, a retired auto worker from Cleveland, Ohio. OSI identified Demjanjuk as "Ivan the Terrible,"[2] a notorious Nazi concentration camp guard. This identification led to the revocation of Demjanjuk's United States citizenship.[3] Subsequently, Israel extradited Demjanjuk to prosecute him for his alleged role in the Holocaust.[4] The Israeli prosecution introduced original Nazi documentation that placed Demjanjuk at various concentration camps and offered many eyewitnesses who identified him as Ivan the Terrible.[5] The Israeli trial court found Demjanjuk guilty and sentenced

1. Comment, *Denaturalization of Nazi War Criminals: Is There Sufficient Justice for Those Who Would Not Dispense Justice?*, 40 MD. L. REV. 39, 43 (1981) [hereinafter *Denaturalization of Nazi War Criminals*] (citing Order of the Attorney General, Transfer of Functions of the Special Litigation Unit Within the Immigration and Naturalization Service of the Department of Justice to the Criminal Division of the Department of Justice, No. 851-79, (Sept. 4, 1979)). The OSI replaced the Special Litigation Unit of the Immigration and Naturalization Service as a result of strong congressional pressure stemming from insufficient prosecutions by the Special Litigation Unit. *Id.* at 42-43. In fact, the Special Litigation Unit arose from congressional concern that the U.S. government employed and harbored Nazi war criminals following the Second World War through some time in the mid-1960s. *Alleged Nazi War Criminals: Hearings Before the Subcomm. on Immigration, Citizenship, and International Law of the House Comm. on the Judiciary*, 95th Cong., 2d Sess. 40-52 (1978) (statement of Charles R. Allen, Jr., researcher and author on Nazi war criminals). Prior to the creation of the Special Litigation Unit, the United States made no effort to bring these people to justice. *Id.*

2. Ivan the Terrible is a sadistic Treblinka concentration camp guard. Robert E. Herstein, *The 'Arch Henchmen'*, N.Y. TIMES, Nov. 25, 1990, § 7, at 6. He has been accused of torturing Jewish inmates with a wood drill, operating the gas chambers in which thousands died, and general cruelty to incoming inmates. United States v. Demjanjuk, 518 F. Supp. 1362, 1370 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

3. *Demjanjuk*, 518 F. Supp. at 1386.

4. Demjanjuk v. Petrovsky, 776 F.2d 571, 575 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

5. TOM TEICHOLZ, THE TRIAL OF IVAN THE TERRIBLE: STATE OF ISRAEL VS. JOHN DEMJANJUK 4 (1990).

him to death.[6] On appeal, the Israeli Supreme Court found that a reasonable doubt existed as to whether Demjanjuk was Ivan the Terrible.[7] Accordingly, he was acquitted of all charges.[8] Once acquitted, Demjanjuk returned to the United States where he presently resides in Cleveland while awaiting an appeal of his denaturalization.[9] The Israeli acquittal and pending United States appeal lead to a difficult question: What happens next to John Demjanjuk?

This Comment recounts the evolution of Demjanjuk's legal imbroglio to determine whether the Israeli decision should have any effect on his pending appeal. Part II lays out the mechanics of denaturalization and includes an examination of the immigration procedure under which Demjanjuk entered this country. In Part III this Comment discusses and explains the factual and legal conclusions of Demjanjuk's denaturalization proceeding and his subsequent acquittal in Israel. Part IV presents the case for maintaining Demjanjuk's denaturalization in the aftermath of the Israeli acquittal and argues that Demjanjuk's acquittal in Israel marks the end of foreign prosecutions of Nazi war criminals residing in the United States. This Comment concludes that justice demands Demjanjuk remain stripped of his American citizenship, and despite international reticence, America should continue to denaturalize Nazi war criminals.

II. THE MECHANICS OF DENATURALIZATION

Denaturalization proceedings strip unlawfully naturalized persons of their United States citizenship,[10] which could qualify them as deportable illegal aliens.[11] A denaturalization proceeding is a civil hearing in equity, and, therefore, a defendant has no right to a jury trial.[12]

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6. *Id.* at 296.

7. Demjanjuk v. State of Israel, Israeli Supreme Court Decision 1, 20 (1993) (on file with *Loyola of Los Angeles Law Review*) [hereinafter *Demjanjuk v. Israel*].

8. *Id.* at 41. This English translation repeatedly refers to the court's acquitting Demjanjuk rather than reversing his conviction as would be proper in an American appellate decision. To be consistent with the language employed by the Israeli court, this Comment will characterize the High Court of Justice's decision as an acquittal.

9. Stephen Labaton, *U.S. Recasts Demjanjuk as it Seeks to Oust Him*, N.Y. TIMES, Dec. 31, 1993, at A13.

10. *Denaturalization of Nazi War Criminals*, *supra* note 1, at 44-45.

11. 4 CHARLES GORDON & STANLEY MAILMAN, IMMIGRATION LAW AND PROCEDURE § 100.02(5) (rev. ed. Supp. 1993). Not all denaturalized people are illegal aliens. *Id.*

12. Note, *Denaturalization and the Right to Jury Trial*, 71 J. CRIM. L. & CRIMINOLOGY 46 (1980).

Denial of a jury trial in denaturalization hearings stems from the notion that denaturalization is not a punishment—rather it strives to correct the erroneous granting of citizenship.[13] Nonetheless, the loss of citizenship is traumatic and, regardless of intent, smacks of punishment. Cognizant of this paradox and its potential unfairness, the United States Supreme Court held in *Schneiderman v. United States*[14] that the quantum of proof necessary to denaturalize must be greater than that in ordinary civil suits.[15] The Court decided that denaturalization requires clear, unequivocal, and convincing evidence that the defendant violated American immigration laws.[16]

With respect to suspected Nazi war criminals, denaturalization proceedings result from a defendant's commission of either of two offenses: (1) the illegal procurement of citizenship;[17] or (2) the making of material misrepresentations or omissions during the naturalization process.[18] A positive showing of either offense is sufficient grounds for denaturalization.[19]

A. Illegal Procurement of Citizenship

Citizenship is illegally procured when a defendant fails to satisfy the statutory prerequisites to naturalization.[20] These prerequisites are (1) lawful entry, and (2) lawful residence.[21] Once a person has lawfully resided in the United States for five years, that person may apply for American citizenship.[22] Here, the Displaced Persons Act of 1948 (DPA)[23] and section 316 of the Immigration and Naturalization Act of 1952 (INA)[24] play an important role. The DPA set out immigration standards for the lawful entry of World War II refugees,[25] and INA section 316 establishes the good moral character requirement for nat-

13. *Denaturalization of Nazi War Criminals*, *supra* note 1, at 46-47.
14. 320 U.S. 118 (1943).
15. *Id.* at 125.
16. *Id.*
17. Jeffrey N. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States*, 15 NOVA L. REV. 747, 761 (1991).
18. *Id.*
19. *Id.*
20. *Id.* at 762.
21. Immigration and Nationality Act of 1952 § 318, 8 U.S.C. § 1429 (1988 & Supp. V 1993).
22. *Id.*
23. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended by* Pub. L. No. 81-555, 64 Stat. 219 (1950).
24. 8 U.S.C. § 1427(a)(3) (1989).
25. Displaced Persons Act of 1948 § 2.

uralization.[26] Failure to meet either or both of these requirements has caused Nazi war criminals to lose their American citizenship.[27]

1. The DPA and illegal procurement of citizenship

The DPA established a three-phase procedure to allow a refugee entry into the United States.[28] The first phase mandated the filing of an application for certification as a displaced person with the International Refugee Organization (IRO).[29] To be certified, refugees interviewed with an IRO officer who determined their eligibility for displaced person status.[30] The eligibility provisions of the IRO Constitution specifically excluded the following from qualifying as a displaced person:

1. War criminals, quislings and traitors.
2. Any other persons who can be shown:
   (a) to have assisted the enemy in persecuting civil populations of countries, Members of the United Nations; or
   (b) to have voluntarily assisted the enemy forces since the outbreak of the second world war in their operations against the United Nations.[31]

To determine whether an applicant satisfied the aforementioned eligibility requirements, the IRO interviewer relied upon the applicant's responses to questions concerning family history and wartime activities.[32] Therefore, the accuracy of IRO determinations was largely dependent upon the veracity of the interviewee.[33] Once satisfied with the applicant's responses, the IRO officer certified the applicant as a displaced person.[34]

The next phase of the immigration process required the applicant to obtain displaced person status under the DPA.[35] This step refined

26. 8 U.S.C. § 1427(a)(3).

27. Henry Friedlander & Earlean McCarrick, *Nazi Criminals in the United States: Denaturalization After Fedorenko*, *in* 3 SIMON WIESENTHAL CENTER ANNUAL 48-49 (Henry Friedlander et al. eds., 1986).

28. Displaced Persons Act of 1948 § 9; United States v. Demjanjuk, 518 F. Supp. 1362, 1378 (N.D. Ohio 1981).

29. Displaced Persons Act of 1948 §§ 2(b) & 3(a).

30. *Demjanjuk*, 518 F. Supp. at 1378.

31. Constitution of the International Refugee Organization, *opened for signature* Dec. 16, 1946, annex I, pt. II, 62 Stat. 3037, 3051-52, T.I.A.S. No. 1846 [hereinafter IRO Constitution].

32. *Demjanjuk*, 518 F. Supp. at 1378.

33. *Id.*

34. *Id.*

35. *Id.* at 1379.

the IRO certification process.[36] An official of the Displaced Persons Commission investigated the applicant and made independent inquiries into the applicant's past.[37] If the independent investigation did not raise any negative issues, the commissioner certified the applicant's eligibility as a displaced person and passed the file to the appropriate American Consulate for the final investigation phase.[38]

At the consulate phase, the applicant answered a detailed questionnaire.[39] A vice-consul then reviewed the file and interviewed the applicant, paying particular attention to the visa questionnaire, to determine whether the applicant fulfilled the DPA requirements.[40] If the vice-consul determined that the applicant was honest and had not violated the provisions of the IRO Constitution, the vice-consul granted the applicant an American visa.[41]

As a policing mechanism to ensure compliance with the DPA's immigration procedures, section 10 provided that "[a]ny person who shall wilfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States."[42] In *Fedorenko v. United States*,[43] the United States Supreme Court concluded that the language of section 10 applied to "willful misrepresentations about 'material' facts."[44] In the context of visa applications, a fact is material if, "[a]t the very least, . . . disclosure of the true facts would have made the applicant ineligible for a visa."[45]

Under section 10, if a person gained admission to the United States by misrepresenting facts that would have precluded the issuance of a visa, that person was not lawfully admitted to the United States. Unlawful admission to the United States precludes naturalization for failure to meet the legal entry requirement.[46]

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. Displaced Persons Act of 1948 § 10.
43. 449 U.S. 490 (1981).
44. *Id.* at 508.
45. *Id.* at 509.
46. 8 U.S.C. § 1429 (1989 & Supp. V 1993).

2. The good moral character requirement for naturalization

INA section 316(a) states that applicants for naturalization must be "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."[47] A judicial finding of an applicant's good moral character is a prerequisite to naturalization.[48] To make this finding, a

> court shall not be limited to the petitioner's conduct during the five years preceding the filing of the petition [the minimum American residency required of a naturalization candidate], but may take into consideration as a basis for such determination the petitioner's conduct and acts at any time prior to that period.[49]

By showing that an applicant failed to demonstrate good moral character, a district court can deny citizenship.[50] Furthermore, the INA specifies that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established is, or was . . . one who has given false testimony for the purpose of obtaining any benefits under this chapter."[51] Nazi war criminals fail to satisfy the good moral character requirement because they conceal their involvement in Nazi atrocities.[52]

B. Denaturalization Based on a Material Misrepresentation

INA section 340(a) proscribes the "concealment of a *material* fact or . . . willful misrepresentation"[53] in attaining naturalization.[54] Those

47. *Id.* § 1427(a)(3).
48. *Id.* § 1427(e).
49. *Id.*
50. Mausner, *supra* note 17, at 763-64.
51. 8 U.S.C. § 1101(f)(6).
52. Friedlander & McCarrick, *supra* note 27, at 48. No case has been found to suggest that a Nazi war criminal who accurately depicts his or her participation in the atrocities would qualify as a person of good moral character. The question, however, is moot because any applicant admitting to such participation was prohibited from qualifying as a displaced person under the terms of the IRO Constitution. *See* IRO Constitution, *supra* note 31.
53. 8 U.S.C. § 1451(a) (1989 & Supp. V 1993) (emphasis added).
54. Material misrepresentations generally concern wartime activities, particularly complicity with Nazi atrocities. *See, e.g.*, United States v. Dercacz, 530 F. Supp. 1348, 1352-53 (E.D.N.Y. 1982) (stating that material misrepresentation occurred when defendant declared on his naturalization papers that he spent World War II as dairy farmer when, in actuality, he served as Ukrainian police officer who, under Nazi direction, participated in mass transfers and enslavements of Jews); United States v. Linnas, 527 F. Supp. 426, 439

who obtained citizenship through false or misleading statements may have their citizenship revoked.[55]

At the time of Demjanjuk's denaturalization, *Chaunt v. United States*[56] controlled on the issue of materiality.[57] In *Chaunt*, the United States Supreme Court held that a material misrepresentation occurs when an applicant suppresses facts which, if known, would warrant denial of citizenship, or lead an investigator to discover facts sufficient to deny citizenship.[58] But subsequent to Demjanjuk's denaturalization, the Court revisited the issue of materiality in *Kungys v. United States*.[59] Noting the unworkability of *Chaunt's* materiality standard,[60] the Court held that materiality in the context of denaturalization turns on "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision" to naturalize.[61]

III. DEMJANJUK'S DENATURALIZATION

Demjanjuk entered the United States in 1952 under the DPA.[62] Residing in Cleveland, Ohio, Demjanjuk obtained United States citizenship in 1958,[63] and lived in relative anonymity for the next seventeen years. In 1975 Demjanjuk was identified as a Nazi war criminal in documents the Soviet Union made available to the United States.[64] As a result of this identification, the OSI prosecuted Demjanjuk and a federal district judge ordered his denaturalization on June 23, 1981.[65]

A. The United States District Court's Findings of Fact

The United States District Court made the following findings of fact concerning Demjanjuk's background: In 1940 the Soviet military

(E.D.N.Y. 1981) (stating that defendant made material misrepresentation by claiming that he attended university from 1940 to 1943 when, in fact, he served as chief of concentration camp). Nonmaterial misrepresentations are generally innocuous lies concerning place or date of birth. *See* Kungys v. United States, 485 U.S. 759, 775 (1988).

55. United States v. Demjanjuk, 518 F. Supp. 1362, 1382-83 (N.D. Ohio 1981).
56. 364 U.S. 350 (1960).
57. *Id.* at 353.
58. *Id.* at 352-53.
59. 485 U.S. 759 (1988).
60. *Id.* at 769.
61. *Id.* at 772.
62. United States v. Demjanjuk, 518 F. Supp. 1362, 1380 (N.D. Ohio 1981).
63. *Id.*
64. *Id.* at 1365; *see* TEICHOLZ, *supra* note 5, at 26, 338.
65. *Demjanjuk*, 518 F. Supp. at 1386; TEICHOLZ, *supra* note 5, at 68-69.

drafted Demjanjuk;[66] following the Battle of Kerch in the Crimea in May 1942, the Germans captured Demjanjuk and interned him as a prisoner of war;[67] and Demjanjuk spent time in two prisoner of war camps—first at Rovno, located in the Western Ukraine, and later at Chelm, located in Poland.[68]

By July 19, 1942, the Germans transferred Demjanjuk from Chelm to Trawniki,[69] a training ground for concentration camp guards.[70] At Trawniki, the Germans reclassified Demjanjuk from prisoner to *Wachmann*[71] of the *Schutzstaffel* (SS).[72] Promotion to *Wachmann* entitled Demjanjuk to an SS uniform, identity card, weapons training, and a stipend for his efforts.[73] The goal was to employ Demjanjuk, along with thousands of other Ukrainian prisoners of war, as surrogate Nazis trained to effectuate *Aktion Reinhard*,[74] the precursor to the infamous Final Solution.

Following Demjanjuk's training at Trawniki, German authorities assigned him to the Treblinka death camp—the Third Reich's state of

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66. *Demjanjuk*, 518 F. Supp. at 1364.

67. *Id.* At Crimea, the Germans captured nearly 125,000 Soviet soldiers between May 8 and May 19, 1942. *Id.*

68. *Id.*

69. *Id.* at 1369. The Germans often recruited other people as a means of effecting the annihilation of European Jewry. LUCY S. DAWIDOWICZ, THE WAR AGAINST THE JEWS: 1933-1945, at 400 (1975). The Ukrainians and citizens of the Baltics were particularly willing to volunteer to help the Germans. *Id.*

At trial, Demjanjuk denied any tenure at Trawniki. *Demjanjuk*, 518 F. Supp. at 1364. He claimed that the Germans kept him in Chelm until "about 1943 or 1944." *Id.* at 1377. According to Demjanjuk, the Germans later transferred him to Graz, Austria, where he served in the German military under the authority of General Shandruk. *Id.* While at Graz, Demjanjuk claimed he received a blood group tattoo. *Id.* Demjanjuk further testified that the Germans transferred him from Graz to Oelburg, Austria, in November of 1944 in order to guard a captured Soviet general. *Id.*

The prosecution contradicted this testimony by demonstrating: (1) that the Soviets overran Chelm by July 1944; (2) that General Shandruk was not present in Graz until March 1945; (3) that Oelburg's location could not be identified by either Demjanjuk or any expert witness; and (4) that blood group tattoos were not likely to be given to ordinary prisoners of war because the tattoos indicated the bearer's affiliation with the SS. *Id.* at 1377-78. The government argued that the tattooing demonstrated that Demjanjuk was present in the concentration camps because tattooing was routine for camp personnel. *Id.*

70. *Demjanjuk*, 518 F. Supp. at 1365.

71. *Wachmann* literally translates to "Guardsman." *Demjanjuk v. Israel*, *supra* note 7, at 1.

72. *Demjanjuk*, 518 F. Supp. at 1368. The SS (Defense Corps), an elite German military organization, was the personal army of Adolf Hitler. DAWIDOWICZ, *supra* note 69, at 70. The SS had prime responsibility for annihilating European Jewry. *Id.*

73. *Demjanjuk*, 518 F. Supp. at 1365.

74. *Aktion Reinhard* was the German plan to operate death camps for summary execution of European Jews. DAWIDOWICZ, *supra* note 69, at 134.

the art facility for wholesale slaughter.[75] The court found that Demjanjuk operated the gas chambers at Treblinka, the site of the annihilation of nearly one million Jews.[76] The court further found that Demjanjuk was the infamous Ivan the Terrible, so called for his savage brutality toward Jewish inmates.[77]

In August 1943 Germany closed Treblinka due to a successful inmate uprising.[78] From this point until the end of the war, Demjanjuk apparently served as a guard at a German prisoner of war camp somewhere in Austria.[79] After the war American forces, presumably ignorant of his past, permitted Demjanjuk to live in a displaced persons camp where he worked as a truck driver in an army motor pool from 1947 until 1949.[80]

In 1948 Demjanjuk applied to emigrate to the United States under the DPA.[81] In accordance with the DPA, Demjanjuk filed an

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75. *Demjanjuk*, 518 F. Supp. at 1369. In *United States v. Fedorenko*, the United States District Court for the Southern District of Florida described Treblinka as follows:

> It contained only living facilities for the SS and the persons working there. The thousands who arrived daily on the trains had no need for barracks or mess halls: they would be dead before nightfall. It was operated with a barbarous methodology—brutally efficient—and such camps surely fill one of the darkest chapters in the annals of human existence, certainly the darkest in that which we call Western civilization.

United States v. Fedorenko, 455 F. Supp. 893, 901 n.12 (S.D. Fla. 1978).

76. *Demjanjuk*, 518 F. Supp. at 1369-71.

77. *Id.* To make this finding, the court considered the testimony of five eyewitnesses: Chil Rajchman, Elijahu Rosenberg, George Rajgrodzki, Sonia Lewkowicz, and Pinhas Epstein. *Id.* Rajchman, interned at Treblinka from October 1942, carried corpses from the gas chambers to the burial pits. *Id.* at 1370. He testified that he was in close proximity to Ivan the Terrible and that Demjanjuk was clearly the same man. *Id.* Rosenberg spent most of his time at Treblinka removing corpses from the gas chambers to make room for the next trainload of victims. *Id.* He, too, identified Demjanjuk as Ivan the Terrible. *Id.* at 1372. Rajgrodzki testified that he often saw Demjanjuk herding victims into the gas chambers and then operating the motor which created the lethal gas. *Id.* at 1371. Lewkowicz worked in the laundry next to the gas chambers. *Id.* She testified that a Ukrainian named Ivan worked the gas chambers for the Nazis. *Id.* Likewise, Epstein corroborated the others' testimony that Ivan ran the gas chambers. *Id.* In addition, the court heard testimony from Otto Horn, a former Treblinka guard acquitted by a German court of the war crimes charges against him. *Id.* at 1369-70. Horn testified that Demjanjuk was Ivan the Terrible, the man who was responsible for gassing inmates. *Id.* at 1372. In fact, Horn claimed that Demjanjuk was so proficient at the task that the German officer responsible for supervising the gas chambers considered Demjanjuk his right-hand man. *Id.* at 1370.

78. *Id.* at 1365. For an excellent recounting of the events leading to the revolt, see JEAN-FRANÇOIS STEINER, TREBLINKA (Helen Weaver trans., 1967).

79. This information was gleaned from Demjanjuk's testimony at trial. *Demjanjuk*, 518 F. Supp. at 1376-78. See *supra* note 69 for a discussion of Demjanjuk's testimony concerning his service at a German prisoner of war camp.

80. *Demjanjuk*, 518 F. Supp. at 1378.

81. *Id.* at 1379.

application with the IRO for certification as a displaced person.[82] In his application Demjanjuk failed to disclose his service at either Trawniki or Treblinka.[83] Demjanjuk also failed to state that he had served with the German military in Austria.[84] In fact, Demjanjuk actually stated that he had resided in Sobibor, Poland, where he worked as a farmer from 1936 to 1943, and then in Pilau, Germany, until 1944.[85] Based upon these false statements, the IRO certified Demjanjuk as a displaced person,[86] enabling him to continue his application for entry to America.

Upon his presentation to the Displaced Persons Commission, Demjanjuk continued to conceal and misrepresent his German service.[87] Believing Demjanjuk, the Commissioner certified his eligibility for admission to the United States under the DPA.[88] Demjanjuk applied for an immigration visa on December 27, 1951.[89] In his application and under oath, Demjanjuk maintained the truthfulness of his earlier statements which had enabled him to progress in the immigration process.[90] Unaware of Demjanjuk's true history, the United States granted him a visa which permitted him to enter the United States on February 9, 1952.[91]

After residing in the United States for six years, Demjanjuk applied for citizenship.[92] This process, like that of the DPA, required that the applicant undergo an investigation and an interview to determine whether he had lawfully entered the United States following the war. As part of this process, Demjanjuk testified that his application was truthful and that he had not given "false testimony for the purpose of obtaining any benefits under the immigration and naturaliza-

82. *Id.*

83. *Id.*

84. *Id.* Demjanjuk's testimony at trial demonstrates that he lied on his visa application. At trial he admitted that he worked for the German military as a guard. *Id.* at 1377. In his visa application, Demjanjuk failed to mention any service with the German military preferring, instead, to represent himself as an innocent civilian throughout the war. *See id.* at 1379. For a complete description of Demjanjuk's testimony concerning his wartime whereabouts, see *supra* note 69 and accompanying text.

85. *Demjanjuk*, 518 F. Supp. at 1379.

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 1380.

92. *Id.*

tion laws [of the United States]."[93] Demjanjuk subsequently obtained American citizenship on November 14, 1958.[94]

B. The United States District Court's Legal Conclusions

Chief Judge Battisti of the United States District Court for the Northern District of Ohio denaturalized Demjanjuk on two separate theories: (1) procuring citizenship illegally;[95] and (2) obtaining naturalization by misrepresenting or concealing material facts.[96]

1. Procuring citizenship illegally

The court found that Demjanjuk had illegally procured citizenship by violating section 10 of the DPA,[97] and failing to meet the standard for good moral character under INA section 316(a).[98]

a. section 10 of the DPA: wilful misrepresentation

Employing the materiality standard of *Fedorenko*,[99] the district court concluded that Demjanjuk's failure to disclose his true history was a material misrepresentation.[100] Section 2(b) of the DPA stated that any service as a concentration camp guard automatically disqualified a visa applicant.[101] In addition, the IRO Constitution specifically prevented those who served as concentration camp guards from certification as displaced persons.[102] Not only did Demjanjuk enter the United States under a wrongfully issued visa,[103] but his unlawful entry made his residence unlawful as well.[104] Because lawful residence is a

93. *Id.* (quoting question 23 of Demjanjuk's naturalization application).
94. *Id.*
95. *Id.* at 1380-82.
96. *Id.* at 1382-83.
97. *Id.* at 1380-82.
98. *Id.* at 1382 n.45.
99. See *supra* notes 42-46 for a discussion of materiality under *Fedorenko*.
100. *Demjanjuk*, 518 F. Supp. at 1381-82.
101. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, *amended by* Pub. L. No. 81-555, 64 Stat. 219 (1950). Section 2(b) of the DPA incorporates the definition of displaced person found in the IRO Constitution. See *supra* notes 29-34 for a discussion of the eligibility requirements for attaining displaced person status under the IRO.
102. IRO Constitution *supra* note 31.
103. *Demjanjuk*, 518 F. Supp. at 1381-82. In addition, the court reasoned that a 1950 amendment to § 13 of the DPA precluded granting Demjanjuk permission to enter the United States. *Id.* at 1382 n.43. That amendment precluded issuing a visa " 'to any person who advocated or assisted in the persecution of any person because of race, religion, or national origin.' " *Id.* (quoting the Displaced Persons Act of 1948 § 13, *amended by* Pub. L. No. 81-563, 64 Stat. 227 (1950)).
104. *Id.* at 1383.

prerequisite to naturalization, Demjanjuk had procured his naturalization illegally.[105] Based upon this reasoning, Judge Battisti revoked Demjanjuk's citizenship.[106]

b. lack of good moral character

In addition to finding material misrepresentations, the district court concluded that Demjanjuk had illegally procured citizenship because he lacked good moral character.[107] Giving false testimony for the purpose of deriving benefits under American immigration laws establishes an individual's lack of good moral character.[108] The district court ruled that Demjanjuk intentionally misrepresented his past in order to benefit from United States immigration laws.[109] By doing so, Demjanjuk failed to meet the standard for good moral character.[110] This misrepresentation presented Judge Battisti with a second ground to revoke Demjanjuk's citizenship.

2. Naturalization based upon a material misrepresentation

The district court further justified the revocation of Demjanjuk's citizenship based upon the material misrepresentations in his application.[111] Judge Battisti reasoned that, although the application never addressed the issue of concentration camp service, question 23 of the application specifically inquired as to whether Demjanjuk had offered any false testimony to effect any benefit under American immigration laws.[112] In response to this question, Demjanjuk represented that his application was truthful, despite the fact that he omitted his SS service from his initial visa application and all subsequent disclosures.[113] This point is essential because it demonstrates that Demjanjuk lied on his visa application, regardless of whether or not he is Ivan the Terrible. Therefore, the United States denaturalized Demjanjuk for misrepresenting a material fact—Demjanjuk lied about having lied.

105. *Id.* at 1381.

106. *Id.* at 1382, 1386.

107. *Id.* at 1382 n.45 (citing Immigration and Nationality Act of 1952 § 316(a), 8 U.S.C. § 1427(e) (1989 & Supp. V 1993)).

108. Immigration and Nationality Act of 1952 § 101(F), 8 U.S.C. § 1101(f)(6) (1989 & Supp. V 1993).

109. *Demjanjuk*, 518 F. Supp. at 1382 n.45.

110. *Id.*

111. *Id.* at 1382-83.

112. *Id.* at 1383.

113. *Id.* at 1382 n.43, 1383.

C. *The Israeli Acquittal of Demjanjuk*

Following denaturalization, a defendant suffers one of two fates. The denaturalized person is either deported to his or her native land or another country willing to take that individual,[114] or is extradited to another country for prosecution of past crimes.[115] The United States initially elected to deport Demjanjuk to the Soviet Union, the place of his birth.[116] Prior to his deportation, however, Israel applied for his extradition.[117] As a result, United States Marshals brought Demjanjuk to Israel and placed him in the custody of Israeli police.[118] Israel tried Demjanjuk for a myriad of crimes that he allegedly committed in his role as Ivan the Terrible.[119]

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114. Denaturalized persons are aliens. Those who illegally enter the country are illegal aliens who face either deportation or extradition. GORDON, *supra* note 11, § 100.02(5).

115. International treaties govern extradition. Demjanjuk v. Petrovsky, 776 F.2d 571, 579 (6th Cir. 1985). To be effective, an extradition request must charge the defendant with a crime specified on the face of the treaty. *Id.* The Israeli extradition request was made under a 1950 Israeli statute, the Nazi and Nazi Collaborators (Punishment) Law, Aug. 1, 1950, 4 Laws St. Isr. No. 64, at 154, which punishes defendants for " 'crimes against the Jewish people,' " " 'crimes against humanity,' " and " 'war crimes.' " *Id.*

> "[C]rime against the Jewish people" means any of the following acts, committed with intent to destroy the Jewish people in whole or in part:
>
> 1. killing Jews;
> 2. causing serious bodily or mental harm to Jews;
> 3. placing Jews in living conditions calculated to bring about their physical destruction;
> 4. imposing measures intended to prevent births among Jews;
> 5. forcibly transferring Jewish children to another national or religious group;
> 6. destroying or desecrating Jewish religious or cultural assets or values;
> 7. inciting to hatred of Jews;
>
> "crime against humanity" means any of the following acts:
>
> murder, extermination, enslavement, starvation or deportation and other inhumane acts committed against any civilian population, and persecution on national, racial, religious or political grounds;
>
> "war crime" means any of the following acts:
>
> murder, ill-treatment or deportation to forced labour or for any other purpose, of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.

Id. at 578-79 (quoting Nazi and Nazi Collaborators (Punishment) Law). Demjanjuk fought his extradition, claiming, among other things, that the United States-Israel extradition treaty lacked the three broad categories of crimes for which Israel sought extradition. *Id.* at 579. The Sixth Circuit dismissed this argument by finding that the crimes constituted murder, a crime within the ambit of the extradition treaty. *Id.*

116. *Id.* at 575.

117. *Id.*

118. TEICHOLZ, *supra* note 5, at 77.

119. Israel v. Demjanjuk, Criminal Case (Jerusalem) 373/86 (Dist. Ct. Jerusalem 1988). No official English translation exists for this case. However, for an excellent detailed analysis of the criminal case see TEICHOLZ, *supra* note 5.

At the trial, Israeli prosecutors offered both eyewitness testimony and authenticated documentation which identified Demjanjuk as Ivan the Terrible.[120] The prosecution offered five eyewitness survivors of Treblinka.[121] Each of the eyewitnesses immediately identified Demjanjuk as Ivan the Terrible.[122] Four of the witnesses worked within a few meters of Demjanjuk at Treblinka,[123] and the fifth witness worked in a separate camp facility where he could only observe Demjanjuk from afar.[124] Nonetheless, this witness identified Demjanjuk immediately and unequivocally.[125] In addition, the Israeli court heard testimony regarding identifications made by other witnesses from photographs of Demjanjuk and others.[126] Though the witnesses who identified Demjanjuk through photographs were unavailable at trial, the trial court found their identifications compelling.[127] The prosecution also presented documentation which identified Demjanjuk as a concentration camp guard[128] and expert testimony authenticating the documents,[129] including testimony from fellow guards.[130]

After considering all the evidence, the Israeli District Court concluded that Demjanjuk was indeed Ivan the Terrible.[131] The court ruled that his severe treatment of Jewish inmates amounted to "crimes against the Jewish people," "crimes against humanity," and "war crimes" as defined in the Nazis and Nazi (Punishment) Law of 1950.[132] As a result, the court sentenced Demjanjuk to death by hanging.[133]

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120. *Demjanjuk v. Israel*, *supra* note 7, at 6.

121. *Id.* at 6-8. In addition to Epstein and Rosenberg who testified at Demjanjuk's denaturalization hearing in the United States, *see* United States v. Demjanjuk, 518 F. Supp. 1362, 1369-71 (N.D. Ohio 1981), Yosef Charni, Gustav Bourkas, and Yehiel Reichman also testified at Demjanjuk's criminal trial in Israel. *Demjanjuk v. Israel*, *supra* note 7, at 6.

122. *Demjanjuk v. Israel*, *supra* note 7, at 6.

123. *Id.* These four included Rosenberg, Bourkas, Epstein, and Reichman. *Id.* The charges against Demjanjuk concerned his role in mass deportations, operating the gas chamber at Treblinka, and general cruelty and barbarism toward inmates. TEICHOLZ, *supra* note 5, at 299-300.

124. *Demjanjuk v. Israel*, *supra* note 7, at 6-7.

125. *Id.*

126. *Id.* at 2-5.

127. *Id.* at 3, 8-9.

128. *Id.* at 1.

129. *Id.*

130. *Id.* at 1-2.

131. *Id.* at 10.

132. *See id.*

133. *Id.* For an English translation of the reading of the death sentence, see TEICHOLZ, *supra* note 5, at 298-300.

Demjanjuk appealed his conviction to the Israeli Supreme Court.[134] The court analyzed two aspects of the conviction: First, whether the totality of the evidence demonstrated beyond a reasonable doubt that Demjanjuk was Ivan the Terrible;[135] and second, whether Demjanjuk's conviction for serving as a guard at Trawniki was proper.[136] In an obviously difficult decision,[137] the Israeli Supreme Court acquitted Demjanjuk based on the existence of a reasonable doubt as to whether he was Ivan the Terrible.[138] Despite the court's finding that Demjanjuk was undoubtedly a guardsman at Trawniki,[139] fairness principles of Israeli criminal procedure required his acquittal on all Trawniki charges.[140]

1. A reasonable doubt

During the appeal the Israeli Supreme Court considered new evidence.[141] This evidence, acquired from KGB archives in Kiev, consisted of written statements of Soviet interrogations of other *Wachmanner*.[142] Despite admitting the evidence, the court noted that the documents had not been authenticated and that those who either made or recorded the statements never testified in an Israeli court.[143] The court further noted that the evidence had no clear chain of possession.[144] Despite these shortcomings, the court admitted the new evidence, lamenting that "[w]e do not know how these statements

134. *Demjanjuk v. Israel*, *supra* note 7.

135. *Id.* at 1-20.

136. *Id.* at 20-41.

137. The emotional stress experienced by the justices is best summed up in the conclusion of the opinion:

> *Wachmann* [Guardsman] Ivan Demjanjuk has been acquitted by us, because of doubt, of the terrible charges attributed to Ivan the Terrible of Treblinka. This was the proper course for judges who cannot examine the heart and the mind, but have only what their eyes see and read. The matter is closed—but not complete. The complete truth is not the prerogative of the human judge.

Id. at 41.

138. *Id.* at 20.

139. *Id.*

140. *Id.* at 39-40.

141. *Id.* at 10-11. In fact, the prosecution offered much of the new evidence introduced on appeal. *Id.* at 12. Though one can only speculate, it seems this occurred because the prosecution had far greater resources to obtain the documentation from Russia than did the defense.

142. *Id.* at 11.

143. *See id.* at 12.

144. *Id.*

came into the world and who gave birth to them; but we admitted them by the most lenient application of the law and procedure."[145]

Once admitted, the evidence caused the justices to rethink the identity of Ivan the Terrible. The new evidence provided lists of *Wachmanner* who served at Treblinka.[146] The absence of Demjanjuk's name from these documents created the reasonable doubt that allowed his acquittal,[147] despite the overwhelming weight of eyewitness identifications at trial.[148] This prevented the court from "reaching a rational conclusion, which is close to certain, about the soundness of . . . [Demjanjuk's] conviction as Ivan the Terrible."[149] As a result, the court acquitted Demjanjuk of the charges relating to Ivan the Terrible.[150]

2. Technical limits to conviction

The Israeli Supreme Court next considered the legality of the conviction for Demjanjuk's service at Trawniki. Israeli law permits a conviction for crimes proven at trial even if those crimes were not the focus of that trial if two criteria are satisfied.[151] First, the facts leading to conviction on the new charge must have been contained in the evidence presented to convict for the crimes specified in the original indictment.[152] Second, the defendant must have had a reasonable opportunity to present a defense.[153] To satisfy the second criterion, the defendant must have had the opportunity to manage the defense, including the cross-examination of witnesses and the presentation of evidence.[154] Moreover, the defendant has an absolute right to prepare against an indictment which is textually different from the predicate

145. *Id.* at 41.
146. *Id.* at 14-16.
147. *Id.*
148. *Id.* at 14-16, 19.
149. *Id.*
150. *Id.* at 20, 41.
151. *Id.* at 36 (referring to section 216 of the Israeli Criminal Procedure Law (Consolidated Version), 5742-1982). On appeal, the Israeli Supreme Court quoted section 216 which provides that

> [t]he court may convict the accused of an offence of which he is shown to be guilty by the facts proved, even though it is different from that of which he was convicted by the court below and even though those facts were not alleged in the court below, provided the accused has been given a reasonable opportunity to defend himself.

Id.
152. *Id.*
153. *Id.*
154. *Id.*

prosecution.[155] In the presence of these criteria an appellate court may convict a defendant for crimes that were not mentioned in the original indictment.[156]

In large part, Demjanjuk's prosecution dwelt on the atrocities committed by Ivan the Terrible.[157] The court concluded that the evidence used to convict Demjanjuk for the crimes of Ivan the Terrible satisfied the first criterion.[158] But by focusing on the Ivan the Terrible charge, the court held that Demjanjuk was denied the right to fully defend his case regarding the atrocities at Trawniki.[159] The justices reasoned that the gravamen of the indictment and the prosecution was whether Demjanjuk was Ivan the Terrible, a charge only tangentially related to the crimes committed at Trawniki.[160] Thus, the court acquitted Demjanjuk of the Trawniki charges.[161]

But this does not exonerate Demjanjuk. The justices concluded that Demjanjuk was indeed a guard at Trawniki based on both the evidence presented at the original trial and the new KGB documents.[162] Moreover, the court acknowledged that Trawniki guards participated in mass executions and were vital to carrying out the wholesale slaughter of European Jewry.[163] The acquittal, therefore, does not alter the finding that Demjanjuk was a guard at Trawniki.

IV. THE EFFECT OF THE ISRAELI ACQUITTAL

Israel's decision to acquit Demjanjuk raises two important questions: First, whether Demjanjuk's denaturalization should stand in light of the Israeli acquittal;[164] and second, whether Demjanjuk's acquittal marks the end of prosecutions of Nazi war criminals, domestically and abroad.

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155. *Id.*
156. *Id.*
157. *Id.* at 39.
158. *Id.* at 37-40.
159. *Id.*
160. *Id.* at 37.
161. *Id.* at 40.
162. *Id.* at 11, 20-21.
163. *Id.* at 25-29. The court quoted vivid accounts of life as a *Wachmann* at Trawniki based on experiences of five fellow *Wachmanner*. *Id.*
164. At the time of this writing, the Sixth Circuit had reversed Demjanjuk's extradition order on the grounds that the prosecution committed a fraud upon the court by withholding exculpatory evidence regarding Demjanjuk's service at Treblinka. Demjanjuk v. Petrovsky, 10 F.3d 338 (6th Cir. 1993), *cert. denied*, 1994 U.S. LEXIS 6950 (Oct. 3, 1994). It is impossible to predict whether this ruling will have any impact on Demjanjuk's denaturalization.

A. *The Propriety of Demjanjuk's Denaturalization*

Demjanjuk's acquittal in Israel should have no effect on his American denaturalization. The quantum of proof required to denaturalize is clear, convincing, and unequivocal evidence.[165] A criminal proceeding in both Israel and the United States demands proof beyond a reasonable doubt.[166] As a matter of law, this is a greater standard than that required in a denaturalization proceeding.[167] Therefore, it is possible to find by clear, convincing, and unequivocal evidence that Demjanjuk was Ivan the Terrible and still harbor a reasonable doubt as to this finding. For this reason, the denaturalization findings are consistent with the Israeli Supreme Court decision and should stand.

Nonetheless, even if Demjanjuk was not Ivan the Terrible, the issue of Demjanjuk's participation and service at Trawniki remains. On this issue, the Israeli courts concluded that his presence and complicity at Trawniki was beyond doubt.[168] The acquittal for the Trawniki charges was on purely procedural grounds[169] unrelated to American law. The Israeli acquittal casts no doubt on the American finding that Demjanjuk served as a guard at Trawniki.

What remains to be answered, then, is whether service at Trawniki is sufficient to maintain the denaturalization. To analyze this question it is necessary to reconsider the legal theories that supported Demjanjuk's denaturalization. If service at Trawniki offends American immigration law, then Demjanjuk should have been stripped of his citizenship regardless of whether or not he is the infamous Ivan the Terrible.

1. Illegal procurement of citizenship revisited

Illegal procurement of citizenship can occur in a number of ways.[170] Demjanjuk illegally procured his citizenship by failing to law-

165. See *supra* part II for a discussion of the requisite burden of proof in denaturalization proceedings.

166. *Demjanjuk v. Israel*, *supra* note 7, at 12, 16-17, & 19-20; *see also* BLACK'S LAW DICTIONARY 1265 (6th ed. 1990) (stating that definition of "reasonable doubt" is "[t]he standard used to determine the guilt or innocence of a person criminally charged").

167. GORDON, *supra* note 11, § 100.02(4)(d)(iv).

168. *Demjanjuk v. Israel*, *supra* note 7, at 20.

169. See *supra* part III.C.2 for a discussion of the procedural reasons for Demjanjuk's acquittal on the Trawniki service.

170. See *supra* part II.A.1-2 for a discussion of the ways that Nazi war criminals are deemed to have illegally procured their American citizenship.

fully enter the United States and for lack of good moral character.[171] As demonstrated below, regardless of whether Demjanjuk is Ivan the Terrible, his service at the Trawniki concentration camp provides adequate grounds for his denaturalization.

a. unlawful entry

When Demjanjuk emigrated to the United States, the DPA controlled. Section 10 of the DPA denies an entry visa to any individual who misrepresented a material fact to gain entry to America.[172] At a minimum, material facts are those which, if disclosed, prevent the issuance of a visa.[173]

Under the DPA, an alien had to satisfy a tripartite process to qualify for an entry visa.[174] To obtain a visa, Demjanjuk had to qualify as a displaced person under the IRO Constitution.[175] Concentration camp guards were specifically excluded from this certification.[176] By failing to disclose his tenure at Trawniki, Demjanjuk hid a fact sufficient to deny him an American visa. Because the test of materiality espoused in *Fedorenko*[177] encompasses this type of misrepresentation, Demjanjuk's deception was material. Additionally, because a material misrepresentation violates the DPA, and because violation of section 10 precludes issuing a visa, Demjanjuk's failure to disclose his service at Trawniki was sufficient cause to deny him a visa. Without an entry visa, Demjanjuk could not lawfully enter the United States.[178] Because lawful entry is a prerequisite to naturalization, Demjanjuk's quest for reinstatement should fail.

b. lack of good moral character

Simply put, Demjanjuk lacked the requisite good moral character because he lied regarding his Trawniki service in order to obtain an American visa. The issuance of a visa is one of the many benefits that aliens seek from the immigration laws of the United States. One who lies to gain that visa does so to derive a benefit from those laws. Be-

171. United States v. Demjanjuk, 518 F. Supp. 1362, 1380-83 (N.D. Ohio 1981).

172. See *supra* part II.A.1 for a discussion of the DPA prerequisites for obtaining entry visas.

173. Fedorenko v. United States, 449 U.S. 490, 509 (1981).

174. See *supra* part II.A.1 for a discussion of the tripartite emigration procedure.

175. *Demjanjuk*, 518 F. Supp. at 1379.

176. *Fedorenko*, 449 U.S. at 509.

177. *Id.*; see *supra* part II.A.1 for a discussion of the *Fedorenko* materiality test.

178. *See* Immigration and Nationality Act of 1952 § 316, 8 U.S.C. § 1429 (1988 & Supp. V 1993).

cause section 101(F) prohibits courts from finding that these individuals are of good moral character,[179] it follows that Demjanjuk lacks the character necessary to earn American citizenship. Because good moral character is a condition precedent to naturalization, its failure demands Demjanjuk's denaturalization.

2. Wilful misrepresentation on naturalization application

Demjanjuk's service at Trawniki not only rendered his procurement of citizenship illegal, it served to demonstrate that he made a material misrepresentation on his naturalization application.[180] Demjanjuk's misrepresentation occurred in response to question 23 of his naturalization application. Question 23 asked whether Demjanjuk had made any false statements in an effort to benefit from American immigration laws.[181] A positive answer would have required a further inquiry into the circumstances of the misrepresentation. The *Kungys* court held this to be the proper level of inquiry—the truth would have led to more damaging facts.[182] If Demjanjuk had answered "yes" to question 23, it is likely that the examiner would have discovered that Demjanjuk had lied regarding his whereabouts and activities during World War II.[183] Discovery of Demjanjuk's service at Trawniki would have been sufficient cause to deny him citizenship. This conclusion suggests that the misrepresentation regarding Trawniki rose to the level of materiality sufficient to warrant denaturalization.[184]

B. The Future of Prosecuting Nazi War Criminals Abroad

Demjanjuk's acquittal may prove to be the last war crimes trial of a former Nazi abroad. With respect to Israel, the acquittal creates a precedent that permits the introduction of questionable evidence, thereby increasing the prosecution's burden of proving guilt beyond a reasonable doubt. In Europe[185] both the legal infrastructure and the

179. *Id.* § 101(F), 8 U.S.C. § 1101(f)(6) (1988 & Supp. V 1993).

180. See *supra* notes 42-46 and accompanying text for a discussion of material misrepresentation.

181. *See supra* text accompanying note 93 (quoting portion of text of question 23).

182. Kungys v. United States, 485 U.S. 759, 768-69 (1988).

183. Had Demjanjuk answered question 23 truthfully, the examiner would have had to delve deeper into the circumstances of the lie. This exploration would have required a thorough review of Demjanjuk's history, including a perusal of Nazi documentation seized during the war. This search, in all likelihood, would have revealed Demjanjuk's true past.

184. See *supra* notes 42-46 for a discussion of materiality standards.

185. Nazi war crimes trials began as a result of an agreement signed by the Allies on August 8, 1945, which created the International Military Tribunal. Judah Pilch, *Years of Holocaust: The Factual Story*, *in* THE JEWISH CATASTROPHE IN EUROPE 47, 80 (Judah

political wherewithal necessary to prosecute Nazi war criminals have been seriously eroded by the recent collapse of the Soviet Union and the concomitant redrawing of the eastern European map.[186]

1. The end of Israeli prosecutions of Nazi war criminals

The evidence admitted at Demjanjuk's appellate hearing created a precedent that may prove insurmountable for future Israeli prosecutors. At the trial level, Demjanjuk's conviction rode on the strength of eyewitness identifications.[187] Not a single eyewitness equivocated in his or her testimony or identification of Demjanjuk as Ivan the Terrible.[188] Nonetheless, the Israeli Supreme Court acquitted Demjanjuk on admittedly questionable evidence gleaned from KGB archives.[189]

Demjanjuk's acquittal is likely to end future prosecutions of alleged war criminals in Israel. First, it is difficult to prosecute a fifty-year-old crime. Many witnesses are unavailable, and those who are available may have difficulty recalling events. Second, Demjanjuk's acquittal suggests that even compelling eyewitness testimony may be defeated by weak documentary. In light of this, prosecutors may be discouraged from bringing future cases.

2. The future of European prosecutions

The majority of Nazi war criminals have been prosecuted by European countries and the former Soviet Union.[190] But the collapse of European communism and the ethnic and nationalist strife exper-

Pilch ed., 1968). The first trial conducted by the Tribunal was the Nuremburg War Crimes Trial which resulted in the conviction of 23 high-ranking Nazi officials. *Id.* at 81. The Tribunal subsequently tried hundreds of other Nazi war criminals. *Id.* In addition to the collective Tribunal, individual member states of the Allied forces conducted independent military tribunals in which thousands of Nazi war criminals were prosecuted. *Id.* Moreover, the national courts of Belgium, Czechoslovakia, Germany, Greece, France, the Netherlands, Poland, the Soviet Union, and Yugoslavia prosecuted many other Nazis. *Id.* The largest trial to occur, other than those during the immediate aftermath of the war, was the Auschwitz trial of 1963. *Id.* Germany conducted the Auschwitz trial against 22 former Nazis for their service at the Auschwitz concentration camp. *Id.* These prosecutions are effected for crimes which occurred on the territory of the forum state. Nazi war criminals who violated the law in western European nations are still punished in those countries. These prosecutions, however, are rare because the overwhelming majority of Nazi crimes occurred in the east. *Id.*

186. John E. Mroz, *Russia and Eastern Europe: Will the West Let Them Fall?*, FOREIGN AFF., Winter 1993, at 44.

187. See *supra* note 77 for a recounting of the eyewitness testimony against Demjanjuk.

188. *Demjanjuk v. Israel*, *supra* note 7, at 6.

189. *Id.* at 12-16.

190. See *supra* note 185 for a discussion of European prosecution of Nazi war criminals.

ienced throughout much of central and eastern Europe may signal the end of the prosecution of Nazi war criminals in Europe.

The collapse of the Soviet Union wreaked havoc upon the political and social structures of eastern Europe. In its wake, the former Soviet Union left many fledgling, ethnically divided republics.[191] Although some of these republics were plundered and devastated by Nazi atrocities,[192] they lack the wherewithal and legal infrastructure necessary to effect justice for crimes committed a half-century ago.[193] In addition, recent elections in Russia demonstrate a growing popular embrace of the ultranationalist, anti-Semitic dogma that characterized the Nazi philosophy of the 1930s and 1940s.[194] Given this background, it is doubtful that these countries will continue prosecuting Nazi war criminals.

Like the independent republics created by the breakup of the Soviet Union, Eastern Bloc countries delivered from the yoke of Soviet domination continue to experience tremendous upheaval and poverty.[195] Like the former Soviet republics, these eastern European countries are unable or unwilling to undergo the expense and trauma attendant to a Nazi war crimes trial.[196] In addition, and perhaps more

191. In addition to Russia, the republics most affected by Nazi war crimes are Belarus, Estonia, Latvia, Lithuania, and the Ukraine. DAWIDOWICZ, *supra* note 69, at 400.

192. The Baltic countries of Estonia, Latvia, and Lithuania had a combined Jewish population of roughly 253,000 before German occupation. DAWIDOWICZ, *supra* note 69, at 399-400. The Nazis slaughtered approximately 228,000, or 90% of the total Jewish population in the Baltics. *Id.* at 403. Likewise, the Ukraine lost 900,000 Jews, or 60% of its prewar Jewish population, while Belarus lost 245,000, or 65% of its Jewish population. *Id.* The Russian Jewish population fared quite better, losing 107,000 of its 975,000 people. *Id.* This relatively low loss is due to the fact that the Germans only occupied a small portion of Russia.

193. The emerging countries of eastern Europe are beginning to establish the necessary judicial structure needed in these new democracies. Martin Boutora, *The Delayed Return of Prodigal Sons: Reflections on the Emerging Democracies of Central and Eastern Europe*, 7 AM. U.J. INT'L L. & POL'Y 435, 439-40 (1992); Mathias Hartwig, *The Institutionalization of the Rule of Law: The Establishment of Constitutional Courts in the Eastern European Countries*, 7 AM. U.J. INT'L L. & POL'Y 449 (1992). Additionally, public opinion in many of these countries recognizes former Nazi war criminals as heroes or patriots. Efraim Zuroff, *Nazi Untouchables*, JERUSALEM POST, Apr. 8, 1993, at Opinion.

194. In December 1993 Russian voters cast a plurality vote (23%) for the Liberal Democratic Party, an ultranationalist political party headed by Vladimir V. Zhirinovsky. Sonni Efron, *Zhirinovsky Calls Clinton a 'Coward'*, L.A. TIMES, Jan. 7, 1994, at A1, A11. The vitriolic Zhirinovsky has threatened Japan with naval blockades, denounced German reparations to Jews for Nazi atrocities, and derided Poland for exercising independence. *Id.*

195. *See* Mroz, *supra* note 186; Craig R. Whitney, *Western Europe's Dreams Turning to Nightmares*, N.Y. TIMES, Aug. 8, 1993, § 1, at 1.

196. *See* Efraim Zuroff, *supra* note 193; Fritz Stern, *Freedom and Its Discontents*, FOREIGN AFF., Fall 1993, at 108.

significantly, several of these countries practice similar horrors for which Nazi war criminals are prosecuted.[197] In short, the recent changes in eastern Europe as well as its attendant rise in ethnic and nationalist tensions, may prevent those countries uniquely qualified to prosecute Nazi war criminals from doing so in the future.

C. *America's Moral Imperative*

There are three reasons why the United States should redouble its efforts to strip Nazi war criminals of their American citizenship. First, the actions of Nazi war criminals are anathema to American notions of freedom and democracy. In 1977 Congress provided for the prosecution and denaturalization of Nazi war criminals for the purpose of "reaffirm[ing] . . . this country's commitment to the most basic of human rights—that is, the right to live one's life and practice one's belief without the fear of persecution."[198] Congress has never reversed itself on this matter, and, therefore, the law is enforceable.[199]

197. Presently, Europe abounds with examples of political behavior reminiscent of Nazi atrocities. For example, the former Yugoslavia is undergoing an "ethnic cleansing" in which Serbian forces are systematically eliminating Muslims from Serbia, despite the fact that a war crimes tribunal has been empaneled and is beginning to prosecute. Craig R. Whitney, *Europe's Caution on Bosnia Provokes Growing Criticism*, N.Y. TIMES, Aug. 1, 1992, at A5. Hungary presently teeters on the brink of ethnic civil war in which the various nationalities display a bloodlust similar to the Nazi's attitude towards Jews. *See* Carol J. Williams, *Ethnic Tension Poses Threat to Hungarians*, L.A. TIMES, Jan. 7, 1994, at A4. In Romania the government recently erected a statue of Ion Antonescue, a Fascist dictator responsible for the annihilation of at least 250,000 Jews and 20,000 Gypsies during the Second World War. Andrei Codrescu, *Fascism on a Pedestal*, N.Y. TIMES, Dec. 7, 1993, at A27. In Germany gangs of young neo-Nazi skinheads routinely assault and occasionally murder foreign workers residing in Germany. Stephen Kinzer, *Youths Adrift in a New Germany Turn to Neo-Nazis*, N.Y. TIMES, Sept. 28, 1992, at A3. In response to these attacks, Germany plans to placate the neo-Nazis by stiffening asylum laws and preventing foreign workers from entering Germany. Stephen Kinzer, *German Unrest Expected to Bring Tightening of Law on Immigration*, N.Y. TIMES, Sept. 2, 1992, at A1. In 1986 Austrian voters elected Kurt Waldheim as president despite his service as a Nazi officer during World War II. William Tuohy, *Waldheim Wins Vote in Austria: Elected President Amid Charges of Role in War Crimes*, L.A. TIMES, June 9, 1986, at A7. This list is not meant to be exhaustive; rather it is only representative of a resurgence of Nazi and Fascist ideologies and tactics in central and eastern Europe.

198. 124 CONG. REC. 31,647 (1978) (statement of Rep. Eilberg in support of H.R. 12,509, proposed amendment to Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(a), proscribing against eligibility of Nazi war criminals for American immigration visas).

199. 8 U.S.C. § 1182(a)(33) provides:

> (a) General Classes [of excludable aliens]
>
> Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . .

Until Congress determines that the prosecution of Nazi war criminals is not in the best interests of the United States, America must continue to prosecute them.

Second, these criminals must be punished for their crimes. Roughly six million Jews perished as a result of Nazi atrocities.[200] There is no statute of limitations for murder, so their crimes remain punishable. Denaturalization is the only penalty available in the United States.[201] Though the penalty pales in comparison to the crime, it remains the stiffest America can impose.

Third, there is a frightening rise in Nazi-like ultranationalist racism.[202] America must announce to the world that those who perpetrate crimes against humanity will never find refuge in America. The continued prosecution of Nazi war criminals sends this message. "By taking a forthright stand against allowing [Nazi war criminals] a haven in this country, we will not only reaffirm our commitment to human rights but we will be making it clear that persecution in any form is repugnant to democracy and to our way of life."[203] Regardless of whether denaturalized Nazis find safe haven abroad, America has the moral duty to expel those who reside in the United States.

V. CONCLUSION

John Demjanjuk's American citizenship should not be reinstated. There are two reasons why Israel's decision to acquit should not alter Demjanjuk's denaturalization. First, denaturalization requires clear,

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(33) Any alien who, during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(A) the Nazi government in Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the assistance or cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany, ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion [is excludable].

8 U.S.C. § 1182(a)(33) (1989 & Supp. V 1993).

200. DAWIDOWICZ, *supra* note 69, at 403.

201. As a civil proceeding, denaturalization is not intended as punishment. *Denaturalization of Nazi War Criminals*, *supra* note 1, at 46-47. However, stripping Demjanjuk of his citizenship after nearly 40 years of American residency, deporting him to an unfamiliar country, and causing him to lose daily contact with his family and friends seems retributive enough to be considered punishment, albeit insufficient compared to the crimes.

202. See *supra* note 197 for examples of renewed Nazi-like practices in central and eastern Europe.

203. 124 CONG. REC. 31,647 (1978) (statement of Rep. Holtzman in support of H.R. 12,509).

unequivocal and convincing evidence, a lower standard than the beyond a reasonable doubt requirement for an Israeli criminal prosecution. Second, Demjanjuk's past service at the Trawniki concentration camp violates American immigration laws. By law, Demjanjuk must remain *persona non grata* in the United States.

John Demjanjuk is a symbol. He wantonly participated in one of history's darkest moments and sought American refuge to live out his life. His discovery presented America with an opportunity to punish him and, symbolically, punish his cohorts. Demjanjuk's denaturalization demonstrates American abhorrence of those who commit crimes against humanity and sends a message that America will never let their evil deeds pass. Demjanjuk received his just deserts—let him live out his life as a man without a country, and let America continue to punish those of Demjanjuk's ilk.

*Jay L. Chavkin**

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