

# BEST WITNESS

**The Mel Mermelstein Affair and the Triumph of Historical Revisionism**

**By Michael Collins Piper**

**With an Introduction by Mark Lane and an Afterword by W. A. Carto**



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## DEDICATION

To my late father, T. M. Piper.

A proud Marine, my father survived bloody combat in World War II, convinced he was fighting for his country. Many years later, as a result of his careful study of the works of revisionist historians, he came to realize that he was a survivor of a war that need not – and should not – have been fought.

Along with his three brothers and a host of friends, my father marched off to war. He was one of the lucky ones who came home again, having fought to destroy what he then believed to be the perpetrators of what we now call "The Holocaust."

In my final conversation with my father – just three hours before he died on July 21, 1990 – he and I discussed a recently revealed "detail" from the history of the Holocaust: the intriguing determination by the Polish authorities that contrary to everything we had been told by the "official" histories – four million people were not "gassed" at Auschwitz.

In fact, the Polish authorities had finally decided, "only" some 1.5 million died there. Just a detail, of course, but one of many that, taken together, cast a grim light on "the facts" about "The Holocaust."

To Dr. Marie Zittel.

A proud German-American, "Aunt Marie" is one of the growing number of grass-roots revisionists across America and around the globe who are helping many others learn the real truth about the events of our past, the efforts of the Establishment truth-distorters notwithstanding.

And to Willis and Elisabeth Carto.

Without them, there simply would be no historical revisionist movement of any consequence in the world today. They have struggled – against sometimes incredible obstacles – to keep historical revisionism alive. And it is very much alive.

A NOTE TO THE READER FROM THE PUBLISHER:

You hold in your hands a "burned book" that was not supposed to have ever been published. It miraculously survived a series of events that could only have been orchestrated by forces with a great interest in keeping highly significant news from the public – the news that in a court of law one of the world's most famous "Holocaust survivors" was proven a fraud. This was the greatest victory, in spite of all the obstacles, that the Institute for Historical Review and perhaps the cause of holocaust revisionism, had ever had, following a protracted legal struggle that lasted over ten years.

An author commissioned to write the book immediately after the victory, September 19, 1991, repeatedly reported "progress" in the task although after more than a year and a half not a line was written. Then, when it was finally written by another author, and readied for the printer, a second duplicitous employee of the Institute, although directed to get the book into print as soon as possible and agreeing to do it, figuratively if not literally "burned" the book.

This edition was pieced together from the odds and ends remaining in the possession of the three authors, Mark Lane, Michael Collins Piper and Willis Carto, and is substantially the same book suppressed by the perfidious employees of the Institute for Historical Review.

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## Introduction

by Mark Lane

For almost five decades I have attempted to set the record straight in any number of matters and thus I have become entangled in controversy. Some of those efforts have had international ramifications; responding to the false assertion by the United States government beginning in 1963 that its president had been murdered by a solitary madman. Some had but local consequences; exposing the unjust imprisonment and brutal treatment imposed upon children by the state at a "school" for "mental defectives" at a place called Wassaic, New York, a decade earlier.

Not being prescient I was never armed before tilting at each windmill of the state with knowledge as to my chance for success, even measuring victory by the minimal standard of convincing a few that there might be some substance in my argument worthy of examination – or at least that although I said those things I was almost certainly certifiably sane. In early 1964 a happy ending predicated upon even so cleverly biased a barometer, seemed illusory. There I stood alone proclaiming the troubling facts, shouting the mandatory questions almost silently into a government and media created windstorm of abuse, ridicule and disinformation. Some years later almost everyone agreed with me and added that they always had.

For some many years publishers would not print my books, colleges canceled contracts for me to lecture, radio and television stations excluded me from their interview programs, some issued an edict "barring" me "for life." In time those loyal executives have left, some voluntarily seeking the good life elsewhere, some have been ousted in a coup others in a less violent manner simply died. I have surfaced once again on their stations and programs with still more inconvenient matters to place on the agenda resulting in further executive proclamations of fealty to the throne and my subsequent, but almost immediate, dismissal from the debate.

Therefore, wounded, scarred, a little tired, but neither exhausted nor discouraged and still eager both to see things as they are and dream of how they might be changed, I learned to

[ii] approach with some care each new potential conflict against an enemy possessing the seemingly mutually exclusive attributes of quasi-omnipotence and invisibility.

This latest chapter begins in 1945 when Willis Carto and I both worked in an organization committed to the overthrow of governments by the use of force and violence. It was the United States Army, World War II was raging, and Willis and I were not to meet, or even know of each other until four more decades had passed. We each served honorably in the military, each were discharged honorably; Willis having served with a bit more distinction, was awarded the Purple Heart, a decoration originating with George Washington. He was in the Far East theater, while I served in the European theater. How entertaining our euphemistically inclined generals made it all seem at the time.

During 1946 on furlough from the Army of Occupation while stationed near Hitler's hometown, Linz, Austria, I drove to Dachau. The curator of the establishment showed me some cells, pointed to the gas chambers where hundreds of thousands had been executed, and explained that a debt was owed by the democracies to the few Jews who had survived.

I brought no engineering degree to the concentration camp. I was still a teenager who had entered the army immediately after having been graduated from high school and my skepticism regarding official pronouncements in general had not as yet been finely honed upon the stone of repeated government falsification.

I left Germany to return to my headquarters outfit in Austria, a pilgrim, one more witness to the fact that hundreds of thousands of prisoners had been gassed to death in Dachau.

Through the time machine known as the writer's prerogative we move swiftly forward into the mid 1980's. Do not scoff at this device; if applied appropriately it can save you countless hours of tiresome plodding.

Readers of *Plausible Denial* will know the details surrounding my meeting with Willis Carto and Liberty Lobby. It will suffice for others to know that I was retained to represent that organization when E. Howard Hunt brought an action against it for defamation. It seemed

he denied that he had been involved in the assassination of President Kennedy

[iii] and thought the allegation written by a former CIA official and printed in *The Spotlight*, published by Liberty Lobby, might be demeaning. We won the case before a jury which tried the issue in the United States District Court for the Southern District of Florida in Miami.

At about that time a lawyer named Fleming Lee was working for Liberty Lobby. He told me that a man named Mel Mermelstein was suing the Institute for Historical Review (IHR), a group of which I had never heard, and also Liberty Lobby. As Mr. Lee explained, Mr. Mermelstein was a concentration camp survivor who was alleging that the holocaust had occurred, that he could prove it and that those who denied it had occurred, such as the IHR and Liberty Lobby, were both incorrect and villains.

I had met Mr. Mermelstein at a party in Orange County, California, some time before. Before the social event had ended I knew him well enough to call him Mel. As you may observe I now call him Mr. Mermelstein. I now know him even better.

The night I met Mr. Mermelstein, I remember it well. I had recently returned from my first visit to Beirut and a journey through the displaced person's camps in southern Lebanon where Palestinians, barred from returning to their homeland by the Israeli government, were concentrated in substandard conditions but surviving due to the efforts of the Palestine Liberation Organization.

I spent hours with Yasir Arafat hearing positions presented on behalf of the PLO with which most Americans were unfamiliar. Upon my return I spoke with Rabbi Elmer Berger, Alfred Lilienthal, Haviv Schieber and others in an attempt to aid in the process of encouraging a peaceful solution before the U. S. supported settlements on the West Bank created a *fait accompli* and the conditions for war without a foreseeable end.

Mr. Arafat showed me a sculpture which he kept on his desk. He said, "Mr. Lane, this is a Red Indian. Do you know why I have it on my desk?"

The question seemed rhetorical. I remained silent. He continued. "To remind us that we Palestinians must never become the Red Indians of America. We must resist. Only then

[iv] can we survive. We will resist against every odd, like the Jews in the – what is the word – ghetto – yes, the ghetto in Warsaw."

I recounted that exchange to Mr. Mermelstein. He seemed to be listening intently – awaiting the proposal that was certain to arrive.

I suggested that he, a survivor of a concentration camp, together with a leader of the American Indian Movement, accompany me to Beirut, meet with Arafat, observe the conditions under which the Palestinian refugees were compelled to exist, and then perhaps feel called upon to enter the peace process as honest brokers and new voices to and for America.

Mr. Mermelstein seemed genuinely interested. I did not know then if he was motivated by the desire to do a good work or his eye was upon the public relations aspect of the proposed enterprise. In either event he was on the verge of committing himself to the first stage of the process when his wife, hearing of the conversation, walked over and told him that the idea was preposterous, out of the question. She then indignantly led him away from me.

I next saw him years later when I took his deposition, portions of which are presented in this book.

When Mr. Lee told me a little about the Mermelstein case he also asked if I would like to get involved on behalf of Liberty Lobby. My response was no less firm than had Mrs. Mermelstein's been to the suggestion, as she appraised it, that her husband consort with the enemy.

I said that I knew Mel slightly, was not antagonistic toward him, indeed was sympathetic in view of his suffering, that I also knew there had been a holocaust, and that Mel had survived it. I added, as a historic touch, that I had seen the gas chambers at Dachau some forty years before.

Although Mr. Lee suggested a substantial fee to defend Liberty Lobby against the Mermelstein suit, I demonstrated, I thought as I rejected that offer that there are some things lawyers should not do.

The result of that first contest between Mr. Mermelstein and Liberty Lobby is set forth in this book. I played no part in it.

I was never informed as to how the matter progressed. I did not even know who was representing Liberty Lobby at the time.

The final contest began much later. For me it started when

[v] I realized that the charge that Liberty Lobby denied that the holocaust had occurred was a myth. By that time almost every Jewish organization established to document the details of the holocaust had agreed, albeit reluctantly and belatedly, that there had been two types of camps – concentration camps and death camps. The death camps had been equipped with gas chambers. They agreed as well that there never had been any gas chambers in any camps located in Germany – a position which Liberty Lobby had proffered years before it was acceptable to do so, years before the truth became the conventional wisdom. Dachau was located in Germany. My eyewitness testimony was revealed for what it had been all along – hearsay at best, the result of cleverly manipulated political propaganda at worst.

It was only after Mr. Mermelstein had brought another lawsuit, this time for defamation against the IHR and Willis Carto, that I became interested. The article, published by the IHR, which formed the basis for the action, acknowledged that the holocaust had occurred, that Mr. Mermelstein had likely survived it and that he personally exaggerated what he had seen and experienced in an ever-growing series of articles, lectures, books and interviews which more than superseded each other and in some instances repudiated claims he had previously asserted. The IHR article concluded that exaggerated stories tended to discredit the truthful accounts of other holocaust survivors.

Since the article had not been defamatory, was in fact truthful, and since Mr. Mermelstein and his high-powered Los Angeles law firms added Liberty Lobby as a defendant, an organization which played no part in the publication of the article, I decided to look into the matter. When it became clear that Mr. Mermelstein and his by then numerous giant law firms were predicating their defamation suit upon the prejudice they might engender by claiming that the defendants had insisted that the holocaust had never taken place (although the evidence upon which they relied for proof of defamation found the IHR saying just the opposite) I began to view the lawsuit and the demands for huge sums of money from Liberty Lobby, an organization in no way responsible for publishing the nondefamatory article, – as little more than attempted extortion.

[vi]

It was at that point that I advised my client, Liberty Lobby, not to settle the case, to offer no money to Mr. Mermelstein and his law firms and instead to aggressively defend against the false claims. I then agreed to represent Liberty Lobby in what became the last battle of the Mermelstein war.

For me the truth, the First Amendment and the appropriate response of our judicial system to a difficult case were considerations which overcame my distaste for grappling with out-of-control Zionists who considered their cause so worthy that it might best be served by falsification of the record, deceit and character assassination.

After the discovery period, documented in this book, had been completed, I entered into a courtroom presided over by Hon. Stephen Lachs, a judge of the Superior Court of the State of California.

In a more perfect society it would be irrelevant to disclose that Judge Lachs is of the Jewish faith and that Mr. Mermelstein's Jewish lawyers almost openly threatened him with unspoken consequences flowing from the Jewish community in Los Angeles if he failed to find for Mr. Mermelstein. Indeed it is irrelevant because Judge Lachs turned his courtroom into a perfect judicial chamber over which he presided with fairness, candor and resources of patience rarely seen since the passing of Job.

He made it clear that he did not like the defendants and that he despised some of their earlier writings. Having said that he made it even more apparent that justice was to prevail and that Mr. Mermelstein's lawyers would not be permitted to lie to the jury in his courtroom. You will not, he asserted to them, tell the jurors that the defendants ever denied that the holocaust had occurred, simply because they have never said that.

In the end, after Mr. Mermelstein testified and the law had been argued, digested, reargued and summarized, Judge Lachs threw the case out, leaving but a few crumbs to be litigated. Mr. Mermelstein's lawyers then voluntarily dismissed what little was left of the case.

Mr. Mermelstein appealed and the California Court of Appeals unanimously affirmed the wisdom of Judge Lachs' rulings. That ruling together with the decision by Mr.

[vii] Mermelstein and his many lawyers that it would be useless to attempt to seek further review by a court concluded the legal contest.



And that was the end of the matter as far as I was concerned. I had prepared a case, taken depositions, argued the matter and together with a California lawyer, William Hulsy, who represented the IHR, had won the case.

Even if Liberty Lobby had published the article in question, which it did not, and even if the article had been defamatory, which it was not, and even if the defendants had argued that the holocaust had not occurred, which they did not, I was counsel, not a defendant, and my work was accomplished in the courtroom, not elsewhere. In that courtroom I assured Judge Lachs that Liberty Lobby had never denied the existence of the holocaust, invited him to read the thousands of pages of evidence on the question, which he did with almost unprecedented judicial dedication and I asserted for myself that if Liberty Lobby had ever denied the existence of the holocaust I would not have represented it in that trial.

In spite of my meticulous efforts in this case I learned in 1993 that Deborah Lipstadt, who calls herself a historian, listed me as a "holocaust denier" due to my participation at the trial.

That Ms. Lipstadt has no respect for the truth is abundantly evident in her book *Denying the Holocaust*. Her cavalier attitude toward the facts is also apparent as she attempts to publicize her book through false and defamatory claims. Since she claims that Mr. Carto and Liberty Lobby are the leading holocaust deniers in the United States in her book, it is instructive to discover how she deals with Judge Lachs, the only jurist ever to issue a finding on the question. This "historian" never mentions him. How does she approach the Mermelstein v. Liberty Lobby trial? With equal honesty. She pretends that there was no ruling, no decision, no dismissal of all charges, no legal victory for Mr. Carto and Liberty Lobby and no opinion by the California Court of Appeals. She writes only:

[viii]

Mermelstein has subsequently filed action against the IHR and Carto for malicious prosecution. That case remains in litigation. Despite the financial loss and public ridicule the Mermelstein case caused the IHR, there were those in the organization's leadership who continued to maintain that, given the press coverage generated by the contest, it succeeded. <sup>(1)</sup>

Since it is apparent that Ms. Lipstadt cannot be trusted to recount with any degree of accuracy the facts which comprise a recent judicial proceeding held in the United States, for which there exists a verbatim transcript which comprises an unquestioned record of what transpired, it is clear that she cannot be trusted to present the truth about the disputed details surrounding events which occurred more than half a century ago, thousands of miles from here for which no certified record is available.

However, even Ms. Lipstadt, in presenting the current conventional wisdom of those "experts" and organizations upon which she relies for the "actual truth" about the holocaust, concedes that there were no death camps and no gas chambers located anywhere in Germany, before, during or after World War II. Had revisionists made the same claims before the "authorities" were constrained by the undeniable facts to reach the same conclusion, they would have been pilloried, abused and ridiculed. They did and they were.

Now Ms. Lipstadt concedes, in relying upon her authorized historians, "there had been no homicidal gas chambers in German concentration camps." <sup>(2)</sup>

She writes:

After the war there had been persistent confusion about the difference between concentration camps and death camps. The latter, located outside Germany, had facilities for the express purpose of murdering people, primarily Jews. While there were no death camps in Germany, there were many concentration camps, in which multitudes died from overwork, disease, starvation, beatings, and severe [ix] mistreatment. Much of the confusion centered around the idea that there was a functioning homicidal gas chamber in Dachau." <sup>(3)</sup>

Ms. Lipstadt complains that "[e]very time historians who study the Holocaust correct a mistake in the record, deniers immediately claim that they do so because their previous lies were about to be exposed." <sup>(4)</sup> To demonstrate the accuracy of her assertion she publishes a footnote which reads :

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<sup>1</sup> / Deborah Lipstadt, *Denying the Holocaust* (New York: The Free Press, 1993) p. 141.

<sup>2</sup> / *Ibid.*, p. 78.

<sup>3</sup> / *Ibid.*

<sup>4</sup> / *Ibid.*

"This is what they have done in relation to the charge that Nazis used Jewish cadavers for the production of soap. When scholars of the Holocaust corrected this notion, the deniers were quick to charge they did so in order to avoid being exposed as willful liars." (1)

Based exclusively upon her recently published false allegations Ms. Lipstadt has become a minor media celebrity, a source for America to look to when the truth is sought in difficult and related matters. For example, *USA Today* consulted her regarding the misconduct of U.S. and Israeli government zealots who suppressed evidence in an effort to convict John Demjanjuk.

Mr. Demjanjuk is innocent; the facts, the law and finally the Supreme Court of Israel have so decreed. A United States Circuit Court of Appeals, just one step from the U.S. Supreme Court, held that U.S. government officials hid the evidence from it and from Mr. Demjanjuk's attorneys and may have deliberately attempted to deceive the court. That matter is now under investigation.

What sense of outrage does Ms. Lipstadt express against the officials who framed Mr. Demjanjuk, what does compassion dictate must be done to compensate him for his agony? She says, "the Demjanjuk case was **apparently** bungled." (2) She laments the "chilling effect" (3) which may prevent the prosecution of other Demjanjuks. As for her approach, "I'd prosecute them if they had to be wheeled into the courtroom on a stretcher." (4) So much for compassion to say nothing of the presumption of innocence which in the past in other matters has been thought of as the cornerstone of our judicial system.

The Demjanjuk case, contrived by Neal Sher, director of

[x] the Office of Special Investigations of the Department of Justice and his colleagues, was offered as a gift to Israel to prove that the holocaust occurred. In fact both Israeli and U.S. officials stated before the shameful show trial began that the prosecution and a conviction were necessary to demonstrate the existence of the holocaust. Mr. Demjanjuk's acquittal cannot alter a rational view of history any more than his conviction and execution might have. It does demonstrate, however, that unworthy politicians, prosecutors, reporters and historians continue to avoid the truth regarding this matter while they dominate the American news media.

The statement published in *The New York Times* attributed to a leader of the Likud Party and a member of the Israeli parliament perhaps put it most succinctly and blatantly: "The judges [the Supreme Court of Israel] may have acted according to the way of the law, but they have not done historical justice." (5) Never, he warns us, should the facts be permitted to shape or modify our view of events.

You should read Mike Piper's account of the Mermelstein-Liberty Lobby wars. You certainly will find neither the details nor the truth published elsewhere as Ms. Lipstadt has so eloquently demonstrated.

As for me this introduction will serve as sufficient proof by those insufficiently concerned with the truth that I too have become a "denier." Please Ms. Lipstadt, *The New York Times*, *The Washington Post*, *National Public Radio*, and *The Washington Times*, please – do not throw me into the briar patch.

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1 / *Ibid.*

2 / *USA Today*, August 18, 1993.

3 / *Ibid.*

4 / *Ibid.*

5 / *The New York Times*, August 19, 1993.

## Preface

### The Cult of Death

Every schoolchild has been instructed time and again that "Six Million Jews were gassed by Adolf Hitler." Every schoolchild "knows" that the Germans turned the bodies of dead Jews into soap. Every schoolchild has heard about the lampshades made out of human skin. Every schoolchild ... The list goes on and on.

Yet, as Hans Schmidt, one of the most respected researchers into the truth about the Holocaust has pointed out, if you ask an American schoolboy how many American soldiers died fighting in World War II, he won't be able to answer the question. "Why?" asks Schmidt. (The number of Americans who died in World War II, by the way, is 407,316. An additional 786,301 were wounded – including this author's own father – but survived.)

The Holocaust – however defined – and the remarkable legends which surround that period in history have become an enduring part of the public consciousness as a result – largely – of the constant media focus on the subject. Yet, a number of very real holocausts – including several substantially larger than the Holocaust which is said to have happened to the Jews during World War II – are virtually unknown and certainly ignored.

How many Americans know that a minimum of some 70 million people – probably many more – died during Communist rule in the U.S.S.R? Or that 63 million Chinese died under communist rule ?

What about the massive and ongoing genocide in Africa by a series of tinhorn dictators who have ruled over the beleaguered nations on that continent since the end of the colonial period ?

What about the 200,000 German civilians who were killed during the Allied firebombing of Dresden during World War II ?

Or, as Black historians are now asking, what about the holocaust of millions of Blacks who died en route to America during the slave trade and under slavery ?

[2]

All of these "holocausts" really happened, but knowledge of their place in history is scant, at best. And, ironically, the list appearing here is by no means complete.

The alleged mass extermination of the Jewish people has taken on a life of its own and has also, in its own way, become a focal point – the defining factor – in the rich history of the Jewish people, much to the distress of many Jews in particular who are concerned that their own heritage and accomplishments have been lost in the shuffle.

"The centrality of the Holocaust for American Jews," wrote one Jewish dissenter, Leon Wieseltier, "amounts virtually to a cult of death ... How many American Jews," he asks, "know anything about the Jewish medieval poets, the wealth of the culture, the Jewish philosophers?" (1)

"The Holocaust" has also been the linchpin upon which the powerful Israeli lobby in the United States has brow-beaten Congress into soaking the American taxpayers for U.S. foreign aid giveaways to Israel, not to mention requiring unswerving congressional support for any and all actions by the state of Israel.

The direct result of this, of course, has been that virtually the entire Arab world – and, indeed, the entire Islamic world – is now steadfastly allied against the United States, putting Americans at risk wherever they go throughout the world – not to mention their risk to being victims of terrorism at home. This all a consequence of the focus on the Holocaust.

Dr. Alfred Lilienthal, an American Jewish historian who was perhaps the earliest

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<sup>1</sup> / Quoted in the *Washington Post* Book World, April 22, 1990.

prominent critic of America's biased U.S. Middle East policy, has scored what he has called "Holocaustomania" on the part of those exploiting the Holocaust as a political tool to advance Israel's demands upon the taxpayers. The Holocaust, he says, "is a cult, and the reigning cult" (1) among those obsessed with Israel.

When Congress was debating an arms sale to Saudi Arabia, the Israeli lobby flooded Capitol Hill with copies of a fiction book entitled "Holocaust," based on a much-ballyhooed television presentation by the same name. The point being made was that "another Holocaust" could happen – this time in the Middle East – if Israel's perceived enemies received U.S. arms.

[3]

It was perhaps inevitable that the repeated re-telling of the events of the Holocaust would invite inquiry – inquiry into the specific details of the specific stories that had been told time and again. And as time passed, the old adage that "truth will out" proved correct. Much of what had been said about the Holocaust proved simply not true.

Over a period of years, a small but growing group of intrepid researchers and historians from around the world began delving into the legends of the Holocaust and publishing their findings, much to the dismay of those who had so much to gain – and who did indeed gain – from their exploitation of the Holocaust.

The driving force behind the research into the real facts – not the legends – about the Holocaust was the Institute for Historical Review, the IHR. It was the IHR that emerged as the driving force behind this new endeavor by serious historians to bring the historical record into accord with the facts.

The IHR agreed with the thinking of Yehuda Bauer, the scholar of Holocaust studies at the Hebrew University in Jerusalem : according to Bauer, "It's the historian's task to examine myths," (2) and, if necessary, to explode them. Bauer himself upset many of his fellow Israelis and Jews everywhere when he said that the number of Jewish victims at Auschwitz was, in fact, far less than the officially accepted figures.

Bringing the historical record into accord with the facts could be an unpleasant task, as Bauer found out. Many Holocaust survivors, it seemed, were incapable – or unwilling – to accept the facts as the historians (such as those the IHR) were uncovering them.

It was one Holocaust survivor in particular who made it his virtual life mission to extinguish the work of the IHR and the very existence of the IHR itself. This was Mel Mermelstein.

Mermelstein, in his heyday, achieved much fame and glory – and immense financial gain – from his clever and calculating exploitation of his own experiences (and non experiences, so to speak) during the Holocaust. He proclaimed himself to be his own "best witness" as to what happened during the Holocaust, but, as the IHR discovered, that was not the case at all.

[4]

That the American public is now beginning to recognize, according to one controversial poll, that the tales of the Holocaust are indeed a matter of controversy – subject to question – is a tribute to the work of the IHR and its associates in the historical revisionist movement. (3)

This new skepticism, likewise, is also a direct consequence of the false tale spinning and vainglorious prevarication by people such as Mel Mermelstein, whom, the IHR had concluded, was a demonstrable fraud.

It is ironic, indeed, that one such as Mermelstein – a man who placed the Holocaust as the central defining experience in his own existence – would have been the one person who, in his own fashion, helped bring about the ultimate triumph of historical revisionism.

1 / *The Spotlight*, August 9, 1993.

2 / *The New York Times*, November 12, 1989.

3 / A poll conducted on behalf of the American Jewish Committee by the Roper Organization found that 22 percent of the adult Americans surveyed in November of 1992 said that it was possible that Nazi Germany's extermination of the Jews never took place. An additional 12 percent said that, frankly, they did not know if it was possible or impossible that the extermination of the Jews happened. The results were hailed by advocates of so-called "Holocaust studies" that more such studies were needed in the schools. Some, however, were upset by the findings and contended that the poll was inaccurate and that the results inflated the influence of Holocaust revisionism. (See *Forward*, January 28, 1994). Whatever the case, as we shall see in the pages of this volume, the growth of Holocaust revisionism did indeed spark a widespread national and international campaign on the part of those who sought to dispute the documented findings of those who have disputed details of the Holocaust legend as it has been laid forth in textbooks, official government reports, in the media and elsewhere.

This volume is a history of the strange events that took place over a twelve year period in which Mel Mermelstein sought, unsuccessfully, to bring the Institute for Historical Review to its knees and deal a mortal blow to Holocaust revisionism. It is a story that needs to be told.

## Chapter One

### A Shy and Retiring Fellow?

It was a sunny morning in downtown Los Angeles, nerve center of the entertainment industry. However, important business kept a handful of people – including at least one Hollywood celebrity – inside on that beautiful late summer day, September 12, 1991.

Those unfortunate souls were confined between the windowless paneled walls of a courtroom high up on the seventeenth floor of the state superior court building towering above the surrounding city. The parties in question were involved in a legal battle, a proverbial fight to the finish, following nearly eleven years of contentious and sometimes nasty litigation.

Judge Stephen Lachs of the California State Superior Court for the County of Los Angeles was presiding, and not with any particular pleasure. A no-nonsense jurist, Lachs had earlier tried to get the parties – including the aforementioned Hollywood celebrity – to settle their dispute. It was to no avail. That's why the proceedings were underway.

On the witness stand was a graying, somewhat ruffled older gentleman. His haggard appearance, however, belied the fact that this man was very much a celebrity – a glamorous figure in his own peculiar right. In fact, his life story had been dramatized in a widely-publicized made-for-television film. Portraying him had been a popular star of television and the cinema whose face was known round the world.

This celebrated senior citizen, whose life and times had been memorialized on film, had also published his own autobiography. On the title page he billed himself as an "author and lecturer."

His numerous public pronouncements addressed one of the great controversies of the 20th century: the Holocaust of World War II, the endlessly reported genocide of some six million Jews (some said even more) by the National Socialist regime of Adolf Hitler in Germany.

A self-described "survivor" of the Holocaust, this lecturer had spoken at scores of schools, colleges and public forums [6] during the last two decades – he was later to admit to roughly 350 orations in all – his speeches publicized both in the United States and abroad. What's more, he was also the founder of a tax-exempt foundation that sponsored a traveling Holocaust museum, a house of horrors, some said, that belonged in a circus sideshow.

Banquets had been held in his honor. A prominent veteran member of the United States Senate had urged that the celebrity be appointed to a high-profile government commission post overseeing the creation of a taxpayer-financed "Holocaust Memorial Museum" in Washington, D.C. A foreign government had invited this celebrity – the lone American – to participate in an international forum on the Holocaust.

The wire services had publicized his doings across the nation – and around the world – and he'd been a guest on more than a few radio chat shows. His story had been featured in the *New York Times* and in the *Washington Post*, among other places. *Newsweek* magazine had even devoted a full page feature to his story complete with a large photo – ten years previously.

Our witness, in short, was very much a celebrity indeed, very much a public figure, leading a multi-faceted life in the public eye. And he'd reaped benefits – in more ways than one.

In his private life he was a reasonably happily married father of four children living in Long Beach, California. He wasn't a gambling kingpin, or an arms dealer or even a charter boat captain. He was a simple pallet manufacturer. His name was Melvin Mermelstein – Mel for short.

However, it was Mel's misdeeds – or misfortune – or mistakes – in his role as a Hollywood celebrity (perhaps even as a worldwide celebrity) – that brought him to that Los Angeles courtroom that sunny September morning.

Mel was suing a publishing concern based in Southern California known as the Institute for Historical Review (IHR). Among other things Mel had charged the IHR with libel (i.e. having published a false, malicious and defamatory statement about him). In one of its publications the IHR had called Mel a "demonstrable fraud."

Mel also took umbrage at references in the IHR publication to a particular group of people being "vainglorious

[7] prevaricators" and "false tale spinners," although the references had not even referred specifically to Mel. (So wrapped up in his own celebrity, Mel assumed, apparently, that he himself could logically be included among the vainglorious prevaricators that the IHR had been describing.)

Now in a libel case, a public figure – as Mel clearly was – has a greater burden in proving that he's been libeled. Under the law, as required by the Supreme Court, a so-called "public figure" is required to show "actual malice" and "reckless disregard for the truth."

Thus, Mel was claiming to be a private citizen– not a "public figure" under the law. He said, in his lawsuit, that he had been defamed and had suffered emotional distress as a consequence. And he wanted \$11 million in damages.

The IHR didn't relish the thought of giving Mel \$11 million that it certainly didn't have. That's why the IHR had brought in a celebrity of its own to tangle with Mel in the courtroom. The IHR's chief attorney was indeed a celebrated personage, even better known than Mel. The attorney's name was Mark Lane.

Although both men were celebrities in every sense of the word, the contrast between the two couldn't be greater.

Lane was tall and broad shouldered, athletically-built, his glowing California tan framed by a flowing mane of salt-and-pepper hair accented with a close-cropped beard and mustache. Dressed to the nines in a flawlessly-tailored European-style gray double-breasted suit, Lane cut quite a figure. He dominated the tableau.

Not so with Mermelstein – actually and ironically the central figure of this drama. Both ill-at-ease and yet still pompous, self-righteous and ready for combat, Mermelstein was a remarkably unremarkable fellow for one who had created so much controversy.

Although he had been under oath before in this case – several times before, in fact, during depositions – this was the first time in a public arena, the first time before a judge. And he had sworn to tell the truth, the whole truth, and nothing but the truth. If he tried to tell a lie – and Lane caught him – Mermelstein might well face perjury charges and prison time.

So it was that the questioning began. Mel's purpose was

[8] to maintain that he was not a public figure. Just a shy and retiring fellow who had – against his wishes, of course – been dragged into the public arena kicking and screaming. But, he insisted, he was not, not, not a public figure. Absolutely not.

Lane began the questioning. Lane's quiet tone little indicated the sharp questioning that lay ahead. After Lane guided Mermelstein through a discussion of his self-published autobiography, *By Bread Alone*, he asked him if he had identified himself on the book's title page as an "Author and Lecturer."

"But not for the money," interjected Mermelstein. "I am a lecturer and I authored this-book, yes, but not as an occupation." (')

He told Lane that there was a "tremendous amount of interest in that barbaric event" (i.e. the Holocaust) and that people "were looking for some sort of answers to what had happened during that period." That, said Mermelstein, was why he wrote the book.

Under Lane's prodding, Mermelstein admitted that in the "acknowledgments" to his book that he expressed his gratitude to many students, teachers, professors and others at numerous high schools, colleges and universities who had urged him to publish his life story after hearing his lectures.

How had Mermelstein come into contact with these learning centers, asked Lane. "They contacted me," answered Mermelstein. And when did Mermelstein first begin his tour on the

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<sup>1</sup> / All direct quotations which follow in this chapter are taken from the reporter's transcript of the proceedings (Dated September 12, 1991) *Mel Mermelstein vs. Legion for the Survival of Freedom, et al.* Case # C-62-92-24. Superior Court of the State of California for the County of Los Angeles.

lecture circuit, asked Lane. It was in 1967, said Mermelstein – some twenty four years before – a long time, indeed, on the public hustings.

And at how many high schools, colleges and universities had Mermelstein lectured ? "I think you can count them on your fingers ... No more than ten."

Mermelstein went on to declare that in some instances he had to turn down invitations, for one reason or another. Lane pressed him. "How many calls would you get in a year, Mr. Mermelstein?"

"It is again you can count them on your fingers," responded Mermelstein. But Lane was persistent, as only Mark Lane could be, his in-depth, probing, detail-oriented cross-examinations having become legend among those who had watched him in the courtrooms over the years.

[9]

Mermelstein's attorney, Lawrence Heller, himself hailed as a hard-driving Los Angeles trial lawyer, began to bristle. "He has said you could count on one hand those high schools, colleges, universities," interrupted Heller.

At that point, Judge Lachs broke in. "He didn't say 'one hand.' He said on fingers."

Heller acknowledged his error. "Fingers," he agreed.

But Lane wasn't satisfied. He brought forth an exhibit that Mermelstein himself had submitted in court papers. Addressing Mermelstein he pointed out that the witness had listed "35 different appearances for a year and a half, beginning in January 1980." (This, of course, being a far cry from the number of appearances he could list on his "fingers.")

"I don't remember that," said Mermelstein but, slowly but surely, under questioning by Lane, Mermelstein finally – but only grudgingly – conceded that he had been a speaker at a minimum of 35 different locations during a period of a year and a half.

Mermelstein also admitted that he had talked to newspaper reporters. "They called me and asked me for information," he announced to the court.

This prompted Lane to ask if Mermelstein, in his memoirs, had thanked "the many newspaper reporters and radio and television announcers who have interviewed me."

When Lane asked Mermelstein – who was still insisting that he was in a sense, a shy and retiring kind of guy – if he had ever been appointed by then-Sen. Alan Cranston (D-Calif.) to any committee, the witness declared. "No, I was not." But, however, Mermelstein volunteered, "I think he requested that I be appointed to the United States Holocaust Memorial Commission."

What's more, according to private figure Mermelstein, "As a matter of fact, I was honored by a number of city councils ..." and, he noted, also honored by the California state assembly.

How was it, asked Lane, that a Los Angeles City Councilman had learned about Mermelstein and decided that he deserved to be honored by the city ? According to Mermelstein: "He said he was somewhere in the Far East ..." when he read about Mermelstein in a newspaper there.

[10]

"Japan or someplace?" asked an intrigued Lane, who saw, clearly, that Mermelstein was walking right into the trap.

"Maybe Hong Kong," said Mermelstein, almost conversationally.

"So," said Lane, with a hint of a smile, "you are internationally known, are you?"

There was a stirring between the two attorneys representing Mermelstein, but they had no grounds to interrupt. Their client had gone too far and there was nothing – absolutely nothing – they could do. Maybe a stern glance. That's all.

Mermelstein may not have fully understood the law of libel, but he was not stupid. He responded – knowing he'd been caught. His response was classic prevarication. Was he, as Lane asked, internationally known?

"No," said Mermelstein, "because the newspapers reported that. I did not report that ... I had nothing to do with that." The incident involving himself that had reached the media's attention was not, declared Mermelstein, "a publicity gimmick of some sort."

In short, Mermelstein insisted, he was not a public figure even though his activities (in this case a previous legal bout with the IHR) had reached the media around the world, bringing high honors at home. Not a public figure ? Not Mel.

And then, as the questioning continued – as Lane burrowed further into the depths of Mermelstein's public relations triumphs, here and abroad – Mermelstein revealed that his own



lecturing was international in scope. In Poland, he revealed, "there was a conference on the Holocaust and I was invited by the Polish authorities to come there."

"How many Americans were there?" asked Lane. Proudly, almost defiantly, but matter of factly, said Mermelstein, "I was the only one."

The only American – out of some 230 million Americans – invited to Poland to a conference on the Holocaust was Mel Mermelstein. Not a public figure, of course. Hardly known. A shy and retiring kind of fellow. Not a celebrity.

Lane's questioning of Mermelstein continued. The point had been made clear, but Mermelstein and his attorneys were not yet ready to admit it.

[11]

Soon enough – but perhaps not soon enough for Mermelstein – the judge dismissed the court for a brief lunch break. This proved, in the end, quite pivotal.

During the lunch break, an IHR staffer had been busy doing some research. As the staffer watched Mermelstein squirming on the stand earlier that morning, he recalled that Mermelstein had once estimated, during a deposition, that he had given an average of 20 lectures a year since 1967.

The statement was unearthed in a deposition that Mermelstein had given in 1985 – some six years previously. Mark Lane realized that he now had the final hard fact he needed to trip up Mermelstein on his very own words.

Once court resumed, Mermelstein returned to the stand. There is no doubt Mermelstein was surprised when Lane began to re-examine something that had been discussed earlier – the number of lectures given by Mermelstein over the years.

Lane reminded Mermelstein of his previous testimony and walked him through the details of his tour on the lecture circuit. Finally, in summation, Lane asked, "Did you give approximately 20 lectures a year on the subject 'The Holocaust' from 1967 to 1985?"

Mermelstein, by now very much worn down by the questioning, answered. "I would probably go along with that because I can't pin it down exactly whether it was 15, 12, 19, 20, 22. I don't know..."

"That is well over 300 lectures, isn't it, Mr. Mermelstein?" prompted Lane.

After a moment, Mermelstein agreed. "Well, according to your figure, I would go along with that."

It was then that Mark Lane went in for the kill...

"Why did you tell us this morning that you could count on your fingers the number of lectures you have given?" he asked.

"I meant hands and fingers," said Mermelstein, his voice stumbling. "I mean hands and feet, is probably what I meant, not hands and fingers."

One of Mermelstein's attorneys, junior counsel Peter Bersin, buried his head in his arms on the desk before him. Judge Lachs himself rolled his eyes heavenward.

However, Lane pressed forward. He was determined to

[12] continue. It was some moments later that Bersin interrupted Mermelstein, who was responding to one of Lane's continuing inquiries.

"Your honor, excuse me," said Bersin. "I think at this time the plaintiff would accept the offer of proof being made on this issue of 'public figure.'"

"By that, in other words," asked Judge Lachs, "you will put to rest the issue of whether or not Mr. Mermelstein is a public figure?"

"Yes," sighed Bersin.

So there. Mel Mermelstein was a public figure. A celebrity. Mel's libel case had been effectively eviscerated. As a public figure he would be hard pressed to claim he had been libeled.

In short, one might say, Mark Lane had proven that – by virtue of Mermelstein's claim to be a private citizen, not a public figure – Mel Mermelstein was, actually, in at least one sense, after all, a demonstrable fraud.

So it was that the first major courtroom battle in Mel Mermelstein's second legal offensive against the Institute for Historical Review within a decade had come to an end. But this was just one chapter in a long and drawn out story.

There had been much drama that preceded this battle – and much more that lay ahead. The whole series of events that led to this courtroom conflict had begun nearly eleven years previously – actually even longer before. History was being made, but not in the way that Mel Mermelstein and his cheerleaders initially thought it would be.



## Chapter Two

### What is Revisionism ?

In 1980 Long Beach, California family man, pallet manufacturer, Holocaust survivor and author and lecturer Mel Mermelstein launched what evolved into a twelve year campaign to destroy the Institute for Historical Review (IHR) specifically, and the historical revisionist movement in general.

In a series of lawsuits Mermelstein sought to bring the IHR to its knees and to wipe the slate clean of any semblance of organized leadership and scholarly historical research in the field of holocaust revisionism.

Mermelstein's campaign against the IHR and the historical revisionists for the first time brought to widespread public attention the very fact that there was indeed a revisionist movement. Until that time, largely, the research and writing by the revisionist historians was known to relatively limited circles, particularly their highly controversial work examining what did and didn't happen during the period known as the Holocaust.

Although revisionism is controversial by its very nature, it is the revisionist research into the Holocaust that has provoked so much public outrage. So then, who are the historical revisionists ? What is historical revisionism ?

Do the historical revisionists really say that the Holocaust never happened, that there were no German-run concentration camps for Jews during World War II, that there were no gas chambers, that it was all a big lie – the hoax of the 20th century ?

Where are these people coming from ? What motivates them ? Are they admirers of Hitler, people trying to revive the Third Reich ? Are they legitimate historians or are they frauds with a poisonous secret agenda ?

Just exactly what is the Institute for Historical Review – and why did Mel Mermelstein decide that destruction of the IHR was his number one priority – a decade-long endeavor that he undertook with intensity and with obvious relish, the financial rewards and the fame and the international glory he reaped notwithstanding ?

To understand how the IHR emerged as the focal point of

[14] Mermelstein's rage against the revisionist movement, it is important to understand the initial thrusts of revisionism in America – in particular, revisionist writings and research regarding the Holocaust.

The IHR itself was established in 1978. Its first headquarters were located in Torrance, California, just south of Los Angeles.

The founder of the institute was Willis A. Carto, a veteran writer and political organizer who was best known as the founder of Liberty Lobby, a populist and nationalist lobby institution based on Capitol Hill in Washington, D.C.

The IHR, however, was totally independent of Liberty Lobby. The lobby focused on precisely what its name implied: lobbying Congress on issues – foreign and domestic – that affected America's consumers, taxpayers and voters. The IHR, on the other hand, was interested in precisely what its name implied : the review of history.

Carto had long-standing personal interest in historical trends and over a period of years recognized that there was a growing interest in historical revisionism. What's more, he felt that the court historians of the Establishment had re-written – and were re-writing – historical truth for their own purposes.

Consequently, Carto perceived that the time was ripe for organizing a forum that could serve as a contact point and publishing outlet for revisionists and their growing movement worldwide.

Thus it was that Carto and his wife, Elisabeth, and a number of associates, including

LaVonne and Lewis Furr and an attorney, Peter Kuetzing, set up the body now known as the institute for Historical Review. It was within a few short years that the IHR emerged as the world's leading organization carrying on the tradition of historical revisionism, evolving as a "spark plug" for revisionist research around the world.

What, though, is revisionism ? What place does it have in historical research ? What is the basis on which the IHR conducts its own study of history ? How did the revisionist movement evolve, particularly in America, so that the birth of the IHR was possible ?

Let us address these questions so that the full circumstances of how and why the IHR became the number one target

[15] of Holocaust celebrity Mel Mermelstein can be made clear. This is vital to understanding why, indeed, Mel Mermelstein is the "best witness" to the Holocaust and why, in the end, he played a major role in the triumph of historical revisionism.

The IHR has been guided by the words of the late revisionist historian, Dr. Harry Elmer Barnes, one of the towering figures among historians – revisionist and nonrevisionist alike. Barnes said that Revisionism meant "nothing more or less than the effort to correct the historical record in the light of a more complete collection of historical facts, a more calm political atmosphere, and a more objective attitude." (1)

In a short essay the institute succinctly summarized the thrust of modern-day revisionism – what it was, and from where it came :

"The term originated with a group of scholars (French, British, American, German and others) whose researches undermined the presumption of unique German responsibility for the outbreak of the First World War in 1914. Although the term Revisionist originally was used to apply only to the question of guilt for World War I, it has subsequently come to include all historical findings at odds with the Establishment version. Revisionism is freedom of speech in history.

"Those early Revisionists and those who followed the tradition recognized a fact of life pertaining to the writing of history: in the case of wars, historians of the victorious nations tend to write historical accounts that ignore relevant facts not favorable to the victor while, at the same time, misrepresenting or inventing other facts in order to cast the loser in an unfavorable light. Most of these historians had played an active role in World War I, many in propaganda and intelligence; after the Second World War, it was not uncommon for them to continue to have links with intelligence agencies.

"When history is written by partisan historians from a victor nation, the winning side emerges simplistically as the 'good guys.' The losers, of course, are the 'bad guys.' It is the Revisionists' aim to understand wars, not to continue to fight them in endless polemical battles. Revisionists search for the underlying causes of wars, hold the self-serving claims of all parties to those struggles to critical review, and investigate the

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role of often shadowy third parties that sought to profit from wars waged ostensibly on behalf of nation states.

"The Revisionists have challenged, in particular, some of the most sacrosanct dogmas of World War II propaganda, from the unmitigated evil and aggressiveness of Germany, Japan and their allies, to the unquestioning acceptance of the so-called Holocaust in all its improbable details.

"The whole point of Historical Revisionism is to bring the historical record into accord with the facts. Its purpose is to understand the origins and consequences of wars in order to prevent future wars.

"Historical Revisionism is non-ideological and non-political. Revisionists come from across the political spectrum. Historical Revisionism is neither anti-Jewish nor pro-German. Revisionists do not seek to rehabilitate this or that regime. They seek to rehabilitate the truth." (2)

Publishing a quarterly academic journal, the *Journal of Historical Review*, and, until 1993 also a monthly newsletter, the IHR also coordinated first publication of a wide variety of revisionist historical works, along with the republication of prior, out-of-print works by well-known (and newly-emerging) revisionist historians.

The IHR sponsored regular international conferences attended by historians and other interested parties literally from around the world – Latin America, Western Europe, and Japan – people representing all races, creeds, colors and political thought. Through 1993 there had been eleven conferences.

The lecturers, over the years, included some of the world's most widely read and respected historians-among them Pulitzer Prize-winning writer John Toland (author of, among other works, *The Rising Sun*) and David Irving, the outspoken British author who is generally ranked to be the most widely-read popular historian writing in the English language.

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<sup>1</sup> / Quoted in *The Tradition of Historical Revisionism*, Institute for Historical Review, Newport Beach, California.

<sup>2</sup> / *Ibid.*

Irving's best-seller, *Hitler's War*, created international controversy when Irving suggested – in writing – that there was no documentary evidence linking Hitler to the systematic slaughter of some six million Jews by the Germans during World War II. It was later that Irving himself came to doubt –

[17] and publicly said so – the actual existence even of homicidal gas chambers at Auschwitz.

As a direct consequence Irving himself published (and wrote an introductory foreword for) a forensic study, known as *The Leuchter Report*, that questioned the authenticity of the Auschwitz gas chambers story.

(As it so happens, it was the very story of the gas chambers at Auschwitz that played a central role in the longstanding controversy between Mel Mermelstein and the IHR, the affair that we are about to examine in detail in these pages.)

Irving, however, was a relative (although very welcome) latecomer in terms of being a revisionist insofar as the Holocaust was concerned. Holocaust revisionism had a steady history of research and development – ever-growing, ever-expanding – beginning in the post-World War II era.

It was the early flowering of Holocaust revisionism, in fact, that set the stage for the birth of the IHR and, ultimately, the advent of the Mermelstein affair.

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### Chapter Three

## Doubting "History"

One of America's greatest historians, the aforementioned Harry Elmer Barnes, often described as the founding father of the revisionist school of historical research, was a "quiet revisionist," so to speak, at least as far as the matter of the Holocaust is concerned.

Although he published some 40 different books, many of which were standard college texts in their time, Barnes became *persona non grata* in the academic Establishment when he began emerging as a critic of America's globalist, internationalist, profiteering foreign policy between the two world wars.

Despite the very public controversy over his foreign policy views, Barnes' opinions about the Holocaust remained hidden in his private papers (now lodged in the University of Wyoming Library). Within those papers, which include Barnes' correspondence with some of the most distinguished historians of the century, there are repeated sneering references by Barnes to what he called "the Genocide Legend," "6MM" (Six Million Myth), etc.

(One of Barnes' close colleagues, Dr. Frank H. Hankins, a rather well-known historian based at prestigious Smith College, assembled a demographic study in the mid-1950's in which he took issue with the "six million" legend, but he didn't affix his name to it.)

Although there was much debate about the question of whether or not six million Jews did indeed die at the hands of Nazi Germany, even many of those who disputed the numbers did not dispute that long-propagated story that poison gas was utilized in the commission of the crime in "gas ovens" at the concentration camp known as Auschwitz.

In short, while some were willing to dispute the numbers of those who died – or didn't die – there was virtually no debate over the question of how those who died did die. The theory that Nazi Germany had carried out a deliberate program of extermination was accepted as absolute, unarguable fact, not to be denied, freedom of speech to the contrary notwithstanding.

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One French writer, however, upset the apple cart in the late 1940's when he began publishing a series of books challenging the stories about the Holocaust that were becoming a staple of the history textbooks, popular films and fiction, and a veritable article of faith among millions of educated people. This controversial Frenchman came to the conclusion that the story of the gas chambers and exterminations was, in his words, "a historic lie: the most tragic and the most macabre imposture of all time." (<sup>1</sup>)

Strong words indeed, particularly since this French writer, Paul Rassinier, a socialist academic, had himself been arrested by the Nazi Gestapo in 1943 and interned at the concentration camps at Buchenwald and Dora. Having been a prisoner in the "death camps," Rassinier was surprised, following the war, to hear so many widely-publicized and widely conflicting stories that were often wildly inconsistent with what he had experienced in the camps. As a consequence he put his thoughts – and the results of his research into the matter – on paper.

A valiant and leading member of the French (anti-Nazi) Resistance, Rassinier survived the camps – he was not Jewish, but he was indeed a "survivor" – and went on to serve in the French parliament. He was also decorated for his war-time heroics against the Nazi invaders.

Yet, his crusade for truth brought down the wrath of those who were determined to make the legend of the Six Million an indisputable historical fact. Ironically, it was not a

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<sup>1</sup> / Quoted in *The Tradition of Historical Revisionism*, Institute for Historical Review, Newport Beach, California.

German apologist, an "old Nazi of the Hitlerite regime," or even a "neo-Nazi" who first brought the controversy over the details of the Holocaust to widespread attention. Instead, it was a French pacifist and socialist who had fought the Nazis and spent time interned in the concentration camps for his troubles.

Despite all of the quiet, behind-the-scenes discussion (in Europe and in America) of what Barnes called "the Genocide Legend," it was not until about 1966 that the first book-length study on the issue of what really happened during the Holocaust was written in English. It was by Dr. David L. Hoggan, a Harvard man, who quietly circulated a few copies, in mimeographed form, to other scholars. It was anonymous. The Noontide Press published it under the title, *The Myth of the Six Million*, in 1969.

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One English author, Colin Wilson, surprisingly spoke favorably of this little work, describing it as "devoid of hysteria or emotional anti-Semitism. It quotes figures and lists sources, and the tone is generally rather pedantic. But [the author] points out that there are no eyewitness accounts of extermination in Auschwitz, one of the main 'death camps,' and many other similar strange anomalies." (1)

In 1973 retired English professor Dr. Austin J. App, a German -American, published a volume entitled, *The Six Million Swindle*, charging that the government of Israel had made billions of marks in profit off the West German government in "reparations" payments based on what App claimed was a wildly inflated figure of "six million" Jews exterminated by Nazi Germany.

It was in 1976 that Holocaust revisionism exploded on the scene in a genuinely international way. Published in England was a 300-page study entitled *The Hoax of The Twentieth Century* – an all-out, thoroughly-researched, carefully-written assault on "the Case Against the Presumed Extermination of European Jewry."

The book rocked the literate world. It received international publicity almost overnight. The author was no "neo-Nazi crank" or "professional anti-Semite" – instead, he was a thoroughly reputable, thoroughly respectable American university professor : Dr. Arthur R. Butz.

New York City born and raised, Butz received a bachelor of science and a master of science degree in the field of electrical engineering from the prestigious Massachusetts Institute of Technology. In 1965 he received a doctorate in control sciences from the University of Minnesota. In 1966 he joined the faculty of the highly-regarded Northwestern University in Evanston, Illinois, where he today (1994) is an associate professor of electrical engineering and computer sciences.

Butz's academic credentials, particularly in light of his published work, confounded many otherwise unbiased people who could not believe that an obviously intelligent, educated and rational man could have researched and written and then publicly affixed his name to a book presenting a thesis so sensational – a theory that contradicted everything that they had been taught as unquestionable facts of history.

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Having spent several years scrutinizing the broad-ranging subject in detail, Butz clinically and rationally dissected the Holocaust legend. His work was a devastating critique of the gas chamber legend and a landmark historical refutation of well-known "facts" – myths, that is – that had become part of the public consciousness.

An enraged Jewish community demanded Butz's head on a platter, but he was a tenured professor – and, what's more, like it or not, there was (and is) still freedom of expression in America, efforts to censor and ban it notwithstanding.

The following year The Noontide Press published the first American edition of Butz's controversial and ground-breaking holocaust revisionist study. The Noontide Press was the publishing arm of the parent body that legally established the loose association of academics, researchers and others that ultimately emerged in 1978 as the Institute for Historical Review.

So it was that holocaust revisionism (and historical revisionism in general) had come full circle. Revisionism now not only had an audience which was growing in number, but it had more and more full-fledged historians and other academics who were willing to put their reputations on the public chopping block.

The revisionists were ready and willing to face the hysteria and the defamation that

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<sup>1</sup> / *Worldwide Growth and Impact of 'Holocaust' Revisionism*. Institute for Historical Review, 1987, p. 30.

hitherto had been reserved only for the most heinous of criminals (if even that, considering the media's friendly and long-standing fascination and promotion of roguery).

Revisionists, now out in the open, had the mighty task of presenting scholarly, reasoned, carefully documented and crafted arguments that could withstand the media assault and dissection by their critics.

The subject of Holocaust revisionism was no longer the stuff of photocopied flyers furtively shoved inside mail slots by dead of night and placed behind windshield wipers in supermarket parking lots on Saturday mornings. It was a serious scholarly venture – and one, in the end, that could prove dangerous, which indeed many of those affiliated with the IHR were to learn in years to come.

The Holocaust revisionists were forced, by circumstance,

[23] to begin to refine their arguments, to polish them, to determine just exactly where they stood on the big issues, particularly in reference to the facts and details about what did – and didn't – happen in the concentration camps.

Unfortunately some people, not understanding the issues, actually believed the media's claims that the revisionists said that "there was no Holocaust." For that reason the IHR took the stand that it was vital for the historical revisionists to, frankly, get their act together. This was a major task, in many ways, particularly because the revisionist movement was spreading worldwide.

In many countries revisionists who were, in some cases, not yet even affiliated with the IHR, were engaged in their own research: France, Germany, Sweden, England and elsewhere. It truly was global in scope. However, it was the IHR that gave historical revisionism the leadership that the movement needed to keep it energized and dynamic and reaching out to more and more people in the world at large.

By the time that historical revisionism became a part of the historical debate (perhaps largely, ironically, because of publicity arising from the Mermelstein Affair, which we will examine in these pages), Establishment historians were becoming obsessed with combating revisionism.

In their effort to combat revisionism, in the end, they were forced to address its contentions – something they had, in the past, refused to do. Now to fight the revisionists they had to tell the public just what it was the revisionists were thinking.

In early 1993, historian Paul Johnson, no friend of revisionism, described revisionism in a critical – and not necessarily accurate – review as follows:

"It takes many forms. Some deniers say that the Holocaust was a complete fabrication from start to finish. Others, such as President Tudjman of Croatia, claim that the numbers of Jews killed has been hugely and deliberately exaggerated: Tudjman insists that only 900,000 Jews died." [Tudjman has since recanted under pressure, however.]

"Another approach is to produce 'scientific evidence' that Jews who died in the death camps could not have been killed in the way historians and war-crimes tribunals have asserted. In particular, deniers claim that Zyklon-B gas was totally

[24]

inappropriate as a homicidal agent. A Boston engineer called Fred A. Leuchter, who specialized in construction [of] execution apparatuses, was sent out to Auschwitz and Madjanek to collect 'forensic samples' and on his return produced a report that concluded there had never been homicidal gasings at these sites.

"Yet another common tactic is to attack the authenticity of *The Diary* of Anne Frank, which has sold over 20 million copies in scores of countries as well as being made into a prize-winning play and movie. For countless people, it personifies the tragedy and horror of the Holocaust. But deniers claim that the *Diary* is a post-war invention, written by a professional New York playwright in collaboration with Anne Frank's father." (1)

Contrary to Johnson's often-inaccurate assessment of what historical revisionism is all about, here, according to a survey of historical revisionism by the IHR, are the things the revisionists don't deny and have never denied:

- The existence of a vast network of concentration camps throughout Germany and Nazi-occupied Europe.
- The existence of a forced-labor program for inmates of these camps.
- The fact that the Nazi regime was anti-Jewish and sought to physically remove the Jews first from Germany and then from all of Europe under its control.

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<sup>1</sup> / Paul Johnson, writing in the *Washington Post Book World*, July 11, 1993, p. 14.



- The fact that in order to accomplish this segregation, a vast program called the "Endlösung" or ("Final Solution") was developed and implemented, which involved, first, the segregation of Jews in ghettos, and then their mass transport (the "combing through of Europe from West to East") to concentration camps and other labor centers in the Eastern occupied territories.

- The fact that Jewish, and other, practitioners of illegal behind-the-lines partisan warfare were executed by German *Einsatzgruppen* (Action Group) units in rear security operations which were basically of a "preventative guerrilla warfare" character. And the fact that in these round-up operations **some innocent people were indeed killed.** (In a bitter and desperate war situation it was difficult to separate the innocent from the guilty, especially in partisan warfare

[25] where combatants hid behind civilian clothes.)

- The fact that many Jews perished among the more than 40 million Europeans who perished during the Second World War, and that their casualties from all causes — including natural attrition, disease, malnutrition, bombings, military actions, pogroms conducted by indigenous Eastern European populations, *Einsatzgruppen* actions, nameless *ad hoc* atrocities, and general wartime havoc – numbered unquestionably in the hundreds of thousands.

- The fact that many Jews in concentration camps were separated from and lost contact with their relatives or friends and that many of these people indeed perished during this time.

- The existence of crematorium ovens in the larger concentration camps, for the purpose of efficiently and sanitarily disposing of the corpses of inmates who died from the periodic raging epidemics of typhus.

- The [existence of gas chambers] in the camps using the disinfectant cyanic gas Zyklon-B to disinfect clothing, bedding, etc.

- The fact that British and American troops at the liberation of the camps in Germany (Dachau, Bergen-Belsen, Buchenwald, etc) encountered horrible scenes of strewn and piled corpses, as well as many inmates who were in terrible physical condition, barely alive.

- The fact that some atrocities did occur, above and beyond the scope of legitimate martial or judicial punishment, on an *ad-hoc* basis and perpetrated by the types of persons that are unleashed by all wars, and found on all sides in a war.

None of this is denied. **What is denied is that there was a deliberate Germany policy of systematic extermination of Jews, such policy implemented mainly by mass murder in gas chambers in extermination camps, with the total numbers of dead in the area of six million or even more.** The "Holocaust," **if defined in these terms**, is a myth. It never happened.

It is important to understand, further, that it is no mere "numbers game" the revisionists are playing. They are not just saying: "Well, it wasn't as many as six million." **They are saying that there was no German "extermination program."** <sup>(1)</sup>

Regardless of what "The Holocaust" actually was, it is the

[26] common perception or image of that word which is important, exactly as perception, not reality is the stock in trade of all salesmen, advertisers and promoters.

While one Holocaust survivor, Mel Mermelstein – whom we have already met – was to describe himself as the "best witness" to the events we mean when we speak of the Holocaust, then the alleged events themselves come into question. So the question of "What is 'The Holocaust'?" must be explored. This is precisely what the IHR has done.

What, then, is the Holocaust? The answer, of course, depends on the definition. To the average American, the phrase "The Holocaust" has a very clear meaning: the cold-blooded killing of six million Jews in "gas ovens."

This definition, in light of all scholarship today (particularly that by the IHR and its associates), is ludicrous. Most Jewish historians today will admit that the six million figure is impossible to sustain and forensic evidence, hundreds of articles printed in the IHR's *Journal of Historical Review* as well as dozens of papers presented to the IHR's international revisionist conferences confirm this.

However, there may have been a "Holocaust" in the sense that many Jews were killed in cold blood on their Eastern front by the German *Einsatzgruppen*, although there is no

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<sup>1</sup> / *Worldwide Growth and Impact of 'Holocaust' Revisionism*. Institute for Historical Review, 1987, p. 19.

evidence this happened on Germany's Western front. To explore this further it is important to remember the Geneva Conventions, the terms of which attempted to define what was permissible and what was impermissible during war.

The Geneva Conventions were ratified by most of the great powers by 1929. The one major power which refused to sign was the Soviet Union due to the fact that at that time its leader, Josef Stalin, a beloved favorite of the Anglo-American press, such as the *New York Times*, was engaged in the task of eliminating millions of Russians, Ukrainians, Balts and others whom he found ill-fitting as the "New Communist Man" which enamored Western and Jewish intellectuals.

The Geneva Conventions, among other things, prescribed rules for the treatment of military prisoners. And, contrary to popular misconception, the record shows that much-reviled National Socialist Germany observed these rules incomparably better than the U.S. or Great Britain.

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On Germany's Eastern Front it was different. Not being a signatory to the convention, Stalin ignored it and the war sank to the lowest level of barbarism. As a matter of Soviet policy, German prisoners were either shot or marched off to work in Siberian mines. Out of approximately 3,000,000 Germans taken prisoner, only some 300,000 returned to Germany after the war.

The Germans had no option but to conduct war with equal savagery. As a matter of policy the German troops on the Eastern Front would simply shoot all Communist political commissars they captured. These commissars – many of them, in fact, Jewish – were assigned to Red Army combat units to see that abject obedience to Stalin's Communist Party was observed.

Since the Germans, rightly or wrongly, believed that the Jews were the backbone of Soviet Communism, they were often shot on sight while Russians and others were spared.

In fact, in the latter days of the war the Germans formed many divisions out of non-Jewish Soviet soldiers the German forces captured. Many of these captives had actually deserted the Red Army. And there are stories of German units, and other units allied with the Germans, such as the Hungarians, shooting the entire Jewish population of some villages.

(The idea that the Jews, as a people, were a driving force behind international communism was, however, not unique to the Germans or their Eastern European collaborators.

(None other than Winston Churchill himself-later British prime minister-wrote an article published in the February 8, 1920 edition of the *Illustrated Sunday Herald* of London in which he declared that the issue of what he called "Zionism vs. Bolshevism" constituted nothing less than "a struggle for the soul of the Jewish people.")

In short, war was indeed – as the old adage goes – Hell. So if there was a "Holocaust," this is what the Holocaust really was – a far cry from the "cold-blooded killing of six million Jews in 'gas ovens.'"

Having reached these determinations, and having defined what was – and what wasn't – "The Holocaust," the IHR and its associates struggled for an effective method to make their revisionist research known to the general public which had

[28] been conditioned to accept the standard definition of "The Holocaust."

It was, in fact, the IHR's first major public relations effort – critics called it a "gimmick" – that ultimately brought Holocaust revisionism to perhaps more people than even the IHR ever thought possible.

## Chapter Four

### The Reward Offer

It was during the IHR's first international revisionist conference, conducted in 1979, that the IHR first offered its controversial \$50,000 reward offer for proof that Jews had been gassed at Auschwitz.

Although the offer was completely serious and legitimate, its primary purpose was to attract public attention to the revisionist movement. However, the IHR did intend to accept the evidence presented by any who came forward to claim the reward and to place their evidence before an adjudicating panel which would determine if the evidence was valid.

In the end this offer certainly had an impact, although of an unexpected nature. It was this offer that, ultimately, through a tangled series of circumstances, brought Mel Mermelstein into combat with the IHR.

This reward offer, according to David Lehrer of the Anti Defamation League (ADL) of B'nai B'rith, which devoted much of its energy to attacking the burgeoning revisionist movement, was, "the master stroke of the [IHR's 1979 revisionist] convention." <sup>(1)</sup>

It would also prove to be a critical event in the history of the IHR and would ultimately spark its legal entanglement with Mel Mermelstein. It would also prove to be the catalyst for what resulted in a major triumph for historical revisionism.

The details of the reward offer were as follows: "In order for a claim to reach the stage of presentation before the adjudicating panel, certain conditions had to be met: the claimant should describe fully his evidence, providing specific names, dates, and locations of incidents, and the names of any other witnesses to such. If a former inmate of a concentration camp, he should state precisely in what camps he was held and for what period(s) of time, and whether he himself was an eyewitness to a gassing.

"He should provide supporting documentary evidence such as diaries, photographs, film, official or unofficial documents, and also some forensic evidence.

"This was an important condition: if murder is to be

[30] proved, there must be the body or parts thereof of a victim or victims, called a corpus delicti. The Second World War on both fighting and home fronts saw no lack of victims and bodies, and concentration camp inmates – devastated particularly by typhus epidemics because of the conditions inherent in the camps – were no exception." <sup>(2)</sup>

However, the IHR was looking specifically for forensic evidence of victims of gassing in a gas chamber. As the IHR noted, "if some six million (or eleven million, or even forty million, as variations on the story have it) were murdered that way, there must be extant at least one such body, or at the very least genuine autopsy records of an examination of one such body." <sup>(3)</sup>

Holocaust museums, around the globe, the IHR pointed out, displayed various body parts, bones and ashes of purported "gas chamber victims." What's more, mass graves at or near concentration camp sites in Europe could be exhumed for forensic examination of human remains. In short, if there were homicidal gassings, forensic evidence could prove it. That's what the IHR was asking for: forensic evidence – scientific proof that could stand up in an American court of law.

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<sup>1</sup> / Quoted in *IHR Newsletter* April 16, 1981.

<sup>2</sup> / Institute for Historical Review. *Worldwide Growth and Impact of Holocaust Revisionism* 1987. p. 1.

<sup>3</sup> / *Ibid.* p. 2.

The IHR had made it clear that the standard for considering all evidence of the claimants would have been the rules set forth in the Federal Rules of Evidence of the United States as interpreted by the Federal courts in criminal prosecutions.

If the IHR's adjudicating panel determined that a claimant or claimants had met the standards, it would certify the claim or claims having proved the point in question and the IHR would have been legally bound to make good on its \$50,000 reward offer. <sup>(1)</sup>

By July 31, 1980, there had been no claimants for the offer of proof that there had been lethal gassings at Auschwitz and so, the offer was closed.

However, the IHR did have a new offer: \$25,000 for anyone who could prove that Anne Frank's famous Holocaust-era diary was genuine. There was a second prize of \$25,000 to anyone who could prove that the Nazi concentration camp terror-masters had turned Jewish prisoners into bars of soap.

It was after the initial offer of \$50,000 (for proof of Jews being gassed at Auschwitz) had expired that world-famous professional "Nazi Hunter" (and self-proclaimed Holocaust

[31] survivor) Simon Wiesenthal did enter a claim for the still-open \$25,000 offer to anyone who could prove the authenticity of the *Diary* of Anne Frank. He also indicated that he had proof of Nazi gassings at Auschwitz (although, of course, the reward time had expired). Wiesenthal did not, however, choose to debate the hackneyed "Jews-turned-into-soap" story.

The Nazi hunter was fully aware of the precise terms and conditions under which his claim was going to be considered. However, at the last minute, but prior to his actual filing of a claim, he began to haggle with the IHR over the rules of the offer.

Wiesenthal wanted the controversial "diary" to be "authenticated" by an appointee of the Dutch Ministry of Justice (Anne Frank had spent her final days in Holland prior to being deported to a German relocation camp). What's more, Wiesenthal wanted the final adjudication of the diary's authenticity – and thus, Wiesenthal's claim for the reward – to be handled by a judge from California's state supreme court.

This was not just bending the rules of the initial claim offer. It was a revision of the rules. As a consequence, the IHR advised Wiesenthal that his counter-offer was being rejected. <sup>(2)</sup>

In the meantime, the IHR received yet another claim for the \$50,000 reward for forensic and documentary proof that Jews had indeed been fatally gassed at Auschwitz. The reward claimant was an Orange County, California businessman named Mel Mermelstein. He had been told by an employee of the IHR – who did so without authorization – that the \$50,000 reward would be re-opened just for him. However, as we shall see, the circumstances were a bit more complex than that.

The IHR noted Mermelstein's emergence as a reward claimant in its February, 1981 newsletter, advising its readers that the IHR was first going to deal with Wiesenthal's Anne Frank *Diary* claim at its 1981 convention and then, when that matter was resolved, with both Wiesenthal's and Mermelstein's "gas chamber" claims. <sup>(3)</sup>

On March 4, 1981 Wiesenthal wrote a letter to the IHR announcing that "With this letter I wish to wind up the fruitless correspondence with the Institute for Historical Review. However, it was important for me to get to know the policy of your Institute." <sup>(4)</sup>

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There may have been another consideration in Wiesenthal's mind, however: On October 9, 1980 the *New York Post* (certainly no voice of historical revisionism) published an article headlined "Anne Frank may not have inked that famous diary." <sup>(5)</sup>

The article reported a disclosure made by the German news weekly *Der Spiegel* which stated that "A report by the German Federal Criminal Investigation Bureau indicates that portions of the diary had been altered or added after 1951, casting doubt over the authenticity of the entire work." <sup>(6)</sup>

Whatever the case, the famed Nazi hunter (who had devoted his career to unmasking Nazis in hiding) was unable to meet even the simplest prerequisites of the IHR's reward offer.

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1 / *Ibid.*

2 / *IHR Newsletter*, June 1981.

3 / *Ibid.* February 15, 1981.

4 / Letter from Simon Wiesenthal to IHR (March 4, 1981).

5 / Quoted in *IHR Newsletter*, June 1981.

6 / *Ibid.*

And the facts about the Anne Frank affair were making things a bit too uncomfortable for Anne Frank enthusiasts.

However, in the meantime, Mel Mermelstein had suddenly emerged as a very big figure in the world of the Institute for Historical Review. In fact, Mermelstein was laying the groundwork for a multi-million dollar lawsuit against the IHR.

This lawsuit and its aftermath would, in the end, spell the triumph of historical revisionism, although, in its earliest stages, that never would have seemed possible.

Let us now begin to examine the strange series of events that led Mel Mermelstein into legal combat with the Institute for Historical Review and the even more bizarre events that would follow.

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## Chapter Five

### Who Is Mel Mermelstein?

Who was this simple pallet maker who, in his own way (unwittingly and certainly without intent) gave new impetus – perhaps even helped give birth – to a new era in historical revisionist research?

Mermelstein's life story – as he has told it in various places and in various contexts – has been rife with contradictions, but several basic facts – just a few – are fairly well established. Otherwise, the contradictions remain.

A resident of Long Beach, California, Mermelstein was – and is today (1993) – the owner of Ideal Pallet Manufacturing based in nearby Huntington Beach. He was also founder of the Auschwitz Study Foundation, a non-profit educational foundation which he said was "dedicated to the preservation of the memory of the millions who died in the Holocaust."

The author of his own memoirs, entitled *By Bread Alone*, Mermelstein, as we have seen, had gained international fame as a celebrity survivor of the Holocaust. He was also, in his own fashion, a collector of Holocaust memorabilia which he displayed in his own traveling museum, a veritable circus sideshow indeed.

He was born September 25, 1926 in the Carpathian region of Czechoslovakia to Bernat and Fany Mermelstein, both of whom were of what Mermelstein described as "Jewish/Hebrew ethnic origin." He had two sisters and a brother. Mermelstein's father was a wine maker and his mother a seamstress.

In 1944, Mermelstein said, he and his entire family were deported to the Auschwitz labor camp in Poland. Mermelstein himself was later transferred to the camp at Buchenwald. He was among those who were liberated by Allied forces on April 11, 1945.

Upon his release, Mermelstein said, he learned that his father and brother had died as prisoners of the Germans; likewise with his mother and sisters.

The actual circumstances of their deaths – how they did die, and if indeed they did die at that time – have not yet been determined.

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As IHR researchers ultimately determined, Mermelstein himself told often wildly conflicting stories about these matters and many others. (These contradictions – indeed – could fill an entire book.)

Mermelstein apparently decided to strike out for America and arrived in the states on August 31, 1946. He attended school to learn English, and between 1947 to 1950 attended City College of New York.

In 1950 Mermelstein was drafted into the United States Army and says he served as an instructor at a military intelligence school. He then returned to college and then later worked at the United Nations.

Mermelstein then married his wife Emma Jane and they became the parents of four children. Mermelstein himself then established his Auschwitz Study Foundation and launched a career on the lecture circuit, talking about the Holocaust and his experiences during that period. In 1979 he published his memoirs.

Mermelstein claimed that since 1945 he made ten trips to the Nazi concentration camp at Auschwitz-Birkenau in the following years: 1967, 1969, 1970, 1971, 1972, 1974, 1976,

1978, 1979, 1980. (1)

It was then, according to Mermelstein, on November 22, 1980, he first received a letter from the Institute for Historical Review, inviting him to participate in the \$50,000 reward contest for proof that Jews had been homicidally gassed at Auschwitz.

Although Mel Mermelstein would re-write history to suggest that it was first the IHR that sought out Mermelstein – singled him out – for the purpose of harassing him, it was, if truth be told, Mermelstein who first challenged the IHR.

Mermelstein's first published attack on the IHR appeared as early as July 29, 1980 in a letter to the editor of the Long Beach *Independent/Press Telegram*, although in this version one of the newspaper's editors, showing obvious discretion, chose to delete the name of the IHR and its editorial advisors whom Mermelstein had named.

Evidently, as it was later discovered, Mermelstein had sent similar letters to several publications. It was a similar attack on the IHR (mentioning it by name) that appeared as a

[35] letter to the editor published in the International Edition of the *Jerusalem Post* for the week of August 24-30, 1980. This time, however, the letters editor was not so discreet. Here's what Mermelstein told his readers:

"By now you may have heard of the so-called "prestigious" names:

- 1) Dr. Austin J. App (retired) La Salle College, Philadelphia
- 2) John Bennett, Victoria Council for Civil Liberties, Australia
- 3) Dr. Reinhard K. Buchner, California State University, Long Beach
- 4) Dr. Arthur R. Butz, Northwestern University, Illinois
- 5) James E. Egoft, Duquesne University, Pennsylvania
- 6) Dr. Robert Faurisson, University of Lyon-2, France
- 7) Ditlieb Felderer, Bible Research, Sweden
- 8) Dr. James J. Martin, Institute of [sic] Historical Review
- 9) Udo Walendy, Verlag Fur Volkstum & Zeitgeschichte Forschung.

"You may have read about a recent publication of the so-called '*Journal of Historical Review*' which originated in Torrance, California. If by chance you have not heard of these gentlemen, nor read about the so-called '*Journal of Historical Review*,' allow me to inform you that these university professors, some of them former Nazis of the old Hitlerite regime, have taken upon themselves to use and abuse our colleges and universities throughout the western world, in particular the United States, to spread lies, hatred and bigotry vis-a-vis the subject known as the 'Holocaust' ...

"As one who survived the infernos of Auschwitz-Birkenau and Buchenwald, my eyes are still burning from the vision of that nightmare and my ears are still ringing with the agonizing sounds of men, women and little children who were lured and driven into the gas chambers, disguised as shower rooms, solely and exclusively because they were Jewish.

"These 'prestigious' gentlemen ... as well as the bigoted organizations they represent, have the gall to offer any survivor of the Holocaust a \$50,000, and possibly \$100,000 award if he or she can prove that indeed gassings of men, women and little children had actually taken place during that [36] awesome period known as the 'Holocaust.'

"I shall be leaving for the 10th time to a survivors' conference in October to be held at Auschwitz. Perhaps some of those 'prestigious' gentlemen would like to accompany me, at which time, I could physically point out the places from where I saw the actual gassings of men, women and little children in gas chambers disguised as shower rooms." (2)

So wrote Mel Mermelstein, clearly looking for a fight. It was, obviously, Mermelstein who had singled out the IHR for abuse and not vice-versa, as Mermelstein would later claim.

(It might be noted, to set the historical record straight, that the so-called "former Nazis of the old Hitlerite regime" that Mermelstein had discovered among the ranks of the IHR advisors was a former soldier in the German Army during World War II. Dr. Reinhard K. Buchner. He had served in his nation's armed forces as did millions of other young Germans.

(During a legal deposition, much later, Mermelstein refused to acknowledge that there was a difference between common fighting men and "former Nazis of the old Hitlerite regime.")

Needless to say, Mermelstein's letter came to the attention of the IHR. Then-IHR Director David McCalden, felt compelled to respond. In a letter dated November 20, McCalden (using his pen name, Lewis Brandon) wrote Mermelstein.

At this juncture, it is critical to note that McCalden's response to Mermelstein was, completely unilateral. It was, essentially, a personal letter written by McCalden. His letter,

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<sup>1</sup> / Declaration of Mel Mermelstein as appended to the Plaintiffs Mandatory Settlement Conference Brief in *Mel Mermelstein v. Institute for Historical Review, et al*, Case No. C- 356-542. Superior Court of the State of California for the County of Los Angeles, July 19, 1985.

<sup>2</sup> / Reproduced in Mel Mermelstein, *By Bread Alone* (Huntington Beach, California: Auschwitz Study Foundation, Second Printing, 1981), p. 270.

particularly the offer made therein, was not authorized by the IHR's advisory board. <sup>(1)</sup> Here's what McCalden advised Mermelstein in that letter:

"At our 1979 Revisionist Convention we announced a \$50,000 reward for proof of [the allegation that Jews were fatally gassed in gas chambers at Auschwitz]. To date, no one has stepped forward, and at the 1980 Revisionist Convention we suspended the reward and replaced it with a \$25,000 reward for proof that *The Diary* of Anne Frank is authentic, and another \$25,000 reward for proof that Jews were turned into bars of soap by the Nazis.

"In the circumstances, we will re-open the \$50,000

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reward so that you can apply. I enclose the necessary application forms. Please note that the evidence will be judged along the same standards as evidence in a U.S. criminal court; not the standards of the Nuremberg [War Crimes] Trials.

"If we do not hear from you, we will be obliged to draw our own conclusions, and publicize this fact to the mass media, including the *Jerusalem Post*." <sup>(2)</sup>

McCalden concluded his letter with a standard suggestion that he looked forward to hearing from Mermelstein "very soon."

As noted, McCalden had erred in sending this letter of offer to Mermelstein. He had not first cleared this letter with the IHR's board, inasmuch as the initial \$50,000 reward offer had already been formally withdrawn.

It was approximately one month later that the IHR received a letter from William J. Cox, an attorney hired by Mermelstein. Cox wrote the IHR advising that Mermelstein had accepted the offer in McCalden's letter of November 20.

It was, incidentally, only at this time that the IHR's board learned that McCalden had written the unauthorized letter reopening the reward to Mermelstein. <sup>(3)</sup> This presented a problem, of course, but the offer had been made and the IHR was fully equipped to respond to any "evidence" that Mermelstein might present.

As "evidence" of gassings of Jews at Auschwitz supplied by Mermelstein, Cox attached a sworn declaration by Mermelstein outlining, briefly, an overview of Mermelstein's experiences in the World War II concentration camps, including his claim that he saw women and children being driven into a tunnel that led into the gas chambers at Auschwitz. Mermelstein also supplied a copy of his book *By Bread Alone* as further supplementary "evidence."

"Inasmuch as your offer letter established that the standard of proof shall be that which prevails in United States Criminal Courts," wrote Cox, "Mr. Mermelstein assumes that the sufficiency of his evidence will be judged by an impartial fact finder, that all proceedings will be open to public and media observation, and that the matter will be resolved in a timely manner.

"It is suggested that the proceeding be televised under a

[38] system which allows viewers to vote on the outcome and which ensures to all parties a just and fair basis for determining whether the contract now entered into has been satisfied. Such a program is available through Warner Communications, State QUBE, in Columbus, Ohio." <sup>(4)</sup>

It was then that Mermelstein, through his attorney, made it clear that he meant business: Mermelstein was clearly aiming to get the IHR tangled up in court. He was already anticipating trouble.

"The final paragraph of your letter emphasizes that you wish to resolve this matter 'very soon,'" wrote Cox. "Since Mr. Mermelstein agrees with that premise, and shows a similar desire, it seems not unreasonable to demand that review and validation be completed in an equally timely manner as he has responded to your offer.

"Therefore, if no response is heard by January 20, 1981, civil proceedings to enforce the contract will be instituted, naming the Institute for Historical Review and yourself personally as defendants." <sup>(5)</sup>

Mermelstein's attorney included with his letter an "additional offer of proof" which featured a list of "eyewitnesses" (led by Mermelstein himself), along with a host of other former concentration camp inmates who would testify "to prove that gas chambers [were] used

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<sup>1</sup> / Letter from IHR to attorney Karen Magid. (October 24, 1990).

<sup>2</sup> / Mermelstein, p. 272.

<sup>3</sup> / Letter from IHR to attorney Karen Magid. (October 24, 1990).

<sup>4</sup> / Mermelstein, pp. 273-274.

<sup>5</sup> / *Ibid*.



to execute Jewish prisoners during World War II at Auschwitz-Birkenau." <sup>(1)</sup>

Among those listed as a potential witness who "will testify" was Dr. Miklos Nysili, a former Auschwitz prisoner who had advertised himself, in promoting his own memoirs, as having been what Mermelstein described as an "inmate assistant" to the infamous Dr. Josef Mengele, the so-called "Angel of Death" and perhaps one of the now best-known figures in Holocaust lore.

Mengele, in post-war years, emerged as one of the great villains of history, perhaps ranking just second to Hitler and slightly ahead of the devil himself. The only problem with Nysili's potential testimony was this: the former prisoner had been dead some 25 years. Mermelstein's attorney also promised that he would provide physical evidence to back up the claims made by his client.

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The "evidence" listed included: a) photographs of Mermelstein's family; b) Zyklon-B gas crystals recovered at Auschwitz; c) ashes of cremated prisoners recovered at Auschwitz with authentication of the source; d) human hair recovered at Auschwitz (with authentication, of course); and, of all things, e) "other physical, scientific and documentary evidence from the Auschwitz Museum, the exact nature title description and contents... as yet unknown" to Mermelstein. <sup>(2)</sup>

(Note, however, as the IHR's officers and staff noted at the time, **none** of this constituted **hard, forensic, scientific evidence** that Jews had indeed been homicidally gassed at Auschwitz as told in the standard histories of the Holocaust.)

Responding on behalf of the IHR to Mermelstein's submissions, McCalden advised Cox in a letter dated January 20 that the IHR was considering Mermelstein's offer of "proof" and that the IHR would get back to them "as soon as we have arrived at some concrete decisions." <sup>(3)</sup>

Six days later Cox again wrote, saying that "We continue to consider a speedy resolution of this matter quite important in that," he added, a bit melodramatically, "it is the honor of Mr. Mermelstein that is daily put into question by your delay."

"Therefore," Cox reiterated, "unless you perform in accordance with the contract in which you have now entered by February 6, 1981 we shall be forced to file an action in the Superior Court to enforce his rights." <sup>(4)</sup>

Still faced with Simon Wiesenthal's claims (not yet withdrawn, although soon to be), but fully intending to respond to Mermelstein's prodding, McCalden responded by letter, just one day later, on January 27.

"I have now discussed your client's claim with my colleagues," McCalden told Cox. "We also had another claim from Mr. Simon Wiesenthal. He wishes to claim the \$50,000 for proof of gassings and the \$25,000 for proof that Anne Frank's *Diary* is authentic. He declined to claim the \$25,000 for proof that Jews were turned into soap.

"In the circumstances, we have decided to deal with Mr. Wiesenthal's claim for the Anne Frank *Diary* authenticity, and then deal simultaneously with both his and your client's claim for the \$50,000 later.

[40]

"I do hope," noted McCalden, "that this will not inconvenience you or your client. Please assure him that we intend to deal fully and correctly with his claim." <sup>(5)</sup>

The first passing mention of Mermelstein in the pages of the IHR's newsletter – in February, 1981 – suggested that Mermelstein really wasn't taken seriously. With good reason: Mermelstein's "evidence" just didn't constitute evidence that there had been gas chambers utilized in the murder of Jews – or anybody else – in the concentration camps in Europe.

The *IHR Newsletter* later commented that while what Mermelstein had submitted might have been sufficient to convict a prisoner at the bar in one of the post-World War II "show trials" of alleged Nazi war criminals, it would not have been enough to prove the point in a U.S. court of law. <sup>(6)</sup> The IHR had been specific on that point, but it seemed to have

<sup>1</sup> / Reproduced in the Plaintiffs Mandatory Settlement Conference Brief in *Mel Mermelstein v. Institute for Historical Review, et al.*, Case No. C-356-542, Superior Court of the State of California/County of Los Angeles, July 19, 1985.

<sup>2</sup> / *Ibid.*

<sup>3</sup> / Mermelstein, p. 279.

<sup>4</sup> / *Ibid.*, p. 280.

<sup>5</sup> / *Ibid.*, p. 281.

<sup>6</sup> / *IHR Newsletter*, June, 1981.

gone beyond Mermelstein's comprehension.

However, Mermelstein was evidently determined to prevent the IHR from ever actually pursuing his claim along the lines initially laid forth in the reward offer. Instead, Mermelstein and Cox decided to bring legal action.

## Chapter Six

### A Nuisance Suit

It was on February 19, 1981 that Mermelstein filed suit against the IHR in the Superior Court of the State of California for Los Angeles County.

His suit caught the IHR by surprise. It was totally unexpected. The IHR still fully intended to address his claims. However, Mermelstein had never really given the IHR a chance to proceed under the terms it had outlined. Mermelstein's case was based on the following claims:

- Breach of contract. Mermelstein claimed that he had entered into a contract with the IHR by responding to its reward offer and that the IHR had failed to make payment when he provided his "proof" that the Holocaust had indeed happened.

- Anticipatory breach of contract. Mermelstein claimed that the IHR had repudiated Mermelstein's stated intent to complete his performance of all conditions required of him at the time he presumably entered into a contract with the IHR.

- Libel. Mermelstein claimed that a November, 1980 bulletin entitled *Jewish Information* (published in Sweden by revisionist researcher Ditlieb Felderer) had published defamatory material about him. (In fact, the bulletin in question was an independent publication not issued by the IHR; nor did the IHR have any advance knowledge that the bulletin had been sent to Mermelstein by its publisher.)

(Mermelstein claimed that Felderer's bulletin coupled with David McCalden's initial letter from the IHR – constituted a "two tiered response" (1) from the IHR. This, of course, was simply not true.)

- Injurious Denial of Established Fact. Mermelstein alleged that the very act of the IHR questioning details about the "Holocaust" was somehow injurious to Mermelstein because it was an "attempt [by the IHR] to rewrite a part of accepted history [in which Mermelstein], by virtue of his birth, was forced to play an agonizing role.

[42]

"The IHR knew or should have known that their denial of the Holocaust, in which 6,000,000 persons of Jewish ethnic origin were murdered, would cause grave mental anguish to one who was the sole survivor of his family and, who would by implication, be labeled a liar for writing and speaking about its effect." (?)

(It should be noted that this is perhaps the first – and only – time in recorded history that such a charge of "injurious denial of established fact" has ever been incorporated in a civil – or criminal – action of any kind, at least in the duly recorded legal annals of the Western, non-communist world. There is no known precedent for such an allegation. In short, it was a wholly concocted tort not legally recognized anywhere among civilized peoples.)

- Intentional Infliction of Emotional Distress. Mermelstein complained that because he was a Jewish survivor of the Holocaust that the IHR and the other defendants should have known that the initial reward offer addressed to Mermelstein would cause emotional distress

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<sup>1</sup> / Declaration of Mel Mermelstein, as appended to the Plaintiffs Mandatory Settlement Conference Brief in *Mel Mermelstein vs. Institute for Historical Review, et al.*

<sup>2</sup> / *Mel Mermelstein vs. Institute for Historical Review, et al.* Superior Court of the State of California for the County of Los Angeles. Case No. 0356512. February 19, 1981.

to Mermelstein.

According to Mermelstein's complaint, he "suffered and continues to suffer great mental anguish, severe emotional and physical distress and has been injured in mind and body to wit: he has suffered from loss of sleep; his nightmares of the suffering and torment endured in Nazi Concentration Camps have recurred; and he has experienced other severe nervous shock ... " <sup>(1)</sup>

(Oddly, however, Mermelstein never explained why, if he was so emotionally distraught, he had chosen to engage in repeated give-and-take with the IHR in a continuing exchange of letters, even accepting the reward offer in the first place. One might think he would be inclined to avoid his perceived tormentors.)

• Declaratory relief. Mermelstein sought declaratory relief, demanding that he be permitted to further engage the IHR so that the terms of the alleged contract could be fulfilled: i.e. that Mermelstein would be permitted to present his evidence to a tribunal; that the IHR be required to hear his evidence first (rather than first hear the evidence presented by Nazi-hunter Simon Wiesenthal), and that a "fair and impartial" <sup>(2)</sup> tribunal hear his evidence in an attempt to claim the \$50,000 reward for proof that Jews were gassed at

[43] Auschwitz. Mermelstein claimed that he would suffer "further infliction of mental and physical distress" <sup>(3)</sup> until the matter could be resolved.

All in all, Mermelstein demanded \$17,000,000, including general damages and punitive damages (the latter being assessed against a party as punishment for infliction of the general damages.)

In his complaint, Mermelstein alleged that "As a direct and proximate result of the conduct of defendants... [Mermelstein] has undergone and continues to undergo treatment with a psychiatrist for emotional distress, pain and suffering, reluctance [sic] of nightmares, and anxiety arising out of defendants' conduct including the denial that [Mermelstein's] mother and two sisters were murdered by the Nazis in Auschwitz by method of gassing.

"The evidence will reveal that plaintiff had seen Dr. Borenstein, a psychiatrist, from approximately 1969 to 1975 to deal mostly with post-traumatic stress disorder associated with his horrendous experience as a concentration camp survivor during his internment. Dr. Borenstein will further testify that in approximately 1975 [Mermelstein] was better able to deal with his war experience and the post-traumatic stress disorder and was able to channel his emotions associated with that period in a largely constructive manner. At the end of his treatment in 1975, his nightmares, anxieties, pain and suffering had substantially decreased.

"Dr. Borenstein will further testify that when plaintiff received the direct challenge by defendants IHR in the letter addressed to him of November 20, 1980 and was the recipient of the subsequent conduct of defendants... directed at [Mermelstein], he regressed substantially with reference to the severe emotional distress, nightmares and related emotional experiences and flashbacks pertaining to the loss of his entire immediate family at the hands of the Nazis in concentration camps.

"Dr. Borenstein and other expert witnesses will testify that plaintiff suffers from post-traumatic stress disorder and severe emotional distress at the present time proximately caused by defendants." <sup>(4)</sup>

Not content with emphasizing his own previous long-term

[44] mental instability that had flared up again as a consequence so he said-of his engagement with the IHR, Mermelstein went on to complain that the IHR's outrageous conduct included "their concerted conduct of picking on" <sup>(5)</sup> Mermelstein (who had first attacked the IHR in print in an internationally-circulated newspaper, not vice versa).

Mermelstein also claimed to "still be suffering the effects of observing and **being the victim** of the most heinous acts of atrocities and genocide committed in history." <sup>(6)</sup> (emphasis added.) Was Mermelstein now claiming to be a victim of genocide?

(To prove "intentional infliction of emotional distress" one must prove not only outrageous conduct on the part of the individual accused of committing that misdeed, but also the intention of causing such distress or reckless disregard of the probability of causing such distress. What's more, one must prove that actual and identifiable emotional distress did

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1 / *Ibid.*

2 / *Ibid.*

3 / *Ibid.*

4 / Plaintiffs Mandatory Settlement Conference Brief in *Mel Mermelstein vs. Institute for Historical Review, et al.*

5 / *Ibid.*

6 / *Ibid.*

indeed result and that the actions of the accused were indeed, the actual and proximate cause of that distress.)

Named as defendants – the parties who had done so much damage to Mermelstein's bank account and his psyche – were :

- The Institute for Historical Review;
- The Legion for the Survival of Freedom (the non-profit corporation which is the parent company of the institute);
- The Noontide Press (an independent publishing subsidiary of the legion);
- Lewis Brandon (the pseudonym used by IHR director David McCalden);
- Three directors of the Legion for the Survival of Freedom: Bruce Holman (then deceased), LaVonne Furr and Elisabeth Carto, wife of IHR founder Willis A. Carto; and
- The totally independent *Jewish Information Bulletin* (published in Sweden by Ditleb Felderer).

After the dust had settled and the IHR was able to assess the situation, the IHR summarized the real nature of Mermelstein's complaint in a special report on the case for its readers: "Mermelstein's obvious intention is to put the IHR out of business once and for all. What else could be concluded ?

"Here is a man who authored a book on his Holocaust experiences and travels the country lecturing about it, yet he

[45] claims that [the IHR has] 'revived those terrible memories' and caused him sleepless nights and a failing business ; he claims [the IHR] 'breached a contract' with him when his end of the 'contract' was in fact **an unaccepted counter-offer** (emphasis supplied) ;

"He claims [the IHR] injured him by 'denying established fact'; he accuses the IHR of libel because he received from Sweden an angry letter from someone who took offense at a letter in which Mermelstein had published previously in the *Jerusalem Post* in which he called those associated with the *Journal of Historical Review*, 'bigots.'

"Here is a man who flew to Tel Aviv along with his lawyer to 'brief' Prime Minister Menachem Begin on the lawsuit, to inform the chief Israeli official that they are pursuing this action 'for the public good' and to get Begin's personal stamp of approval 'for the work [being done] to fight anti-Semitism.'

"Mermelstein's action against [the IHR] has nothing really to do with the \$50,000 reward. He is evading that in an attempt to manipulate the courts." (1)

Serving as Mermelstein's attorney in this legal assault on the IHR was William Cox, a quirky and somewhat eccentric Texas-born gadfly who had once run for president as an independent candidate.

In a touch of irony, Cox happened to show up at an IHR conference to serve legal papers on the IHR. When the meeting organizers became aware of Cox's uninvited presence, they no doubt surprised Cox when they agreed with his suggestion that he be permitted to address the gathering. Explaining his "idealism" and the fact that he was handling Mermelstein's case *pro bono* – Mermelstein was picking up the expenses – Cox chided the IHR for its interest in historical revisionism.

The *IHR Newsletter* noted that "Before Cox was invited in, a vote was taken and the overwhelming majority of attendees agreed that he should be granted the privilege of speaking simply because he was there and willing. Can you imagine," commented the newsletter, "such a privilege being extended to a known revisionist at a meeting sponsored by extermination theorists?" (2)

[46]

Initially the IHR did not take Mermelstein's apparent nuisance suit that seriously, it being so obviously frivolous in nature. The IHR's director commented (incorrectly), at the time, that the suit "will not be too difficult to dispose of." (3)

However, the media onslaught that accompanied the filing of Mermelstein's suit – a nationwide barrage of misinformation, coupled with media cheerleading on Mermelstein's behalf – made it all too clear that the work of the IHR – indeed its very survival – was at stake.

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1 / *IHR Newsletter*, April, 1982.

2 / *Ibid.*, December 1981/January 1982.

3 / *Ibid.*, March, 1981.

Fast rushing to Mermelstein's side was the International Auschwitz Committee (IAC), an agency of the Polish communist government [then still in power]. In its February, 1981 bulletin, the IAC hailed the lawsuit by "Comrade Mel Mermelstein" and pointed out that in a letter to the IAC (of which Mermelstein's own Auschwitz Study Foundation was a member organization) the comrade "asked for moral support." <sup>(1)</sup>

The *New York Times*, which brags that it prints "all the news that's fit to print," found Mermelstein's nuisance suit newsworthy. "Auschwitz survivor sues for prize for proving Germans gassed Jews" <sup>(2)</sup> declared a headline in the *Times*.

Remarkably, the *Times* account of the lawsuit was relatively straightforward and factual. The *Times* even took several paragraphs to either quote IHR spokesmen directly or otherwise summarize, in its own fashion, the IHR's views.

For example, reported the *Times*:

"According to the institute version of World War II history, large numbers of Jews were arrested and mistreated by the Nazis and herded to concentration camps, and many died from malnutrition, typhus and other diseases. But it contends that gas chambers were not used to murder the Jews and that there was no campaign of genocide.

"The Zyklon-B gas found at Auschwitz and other camps, it says, was used only to delouse the clothing of inmates, and what have been described as gas chambers were really 'mortuaries' where bodies were taken after deaths occurred before they were buried." <sup>(3)</sup>

The *Times* report was remarkable, perhaps, because of its relative objectivity. What's more, this was probably the first time that the work of the IHR was publicized on a national

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[47] even international – basis in the pages of an Establishment news organ.

The media reports about the case suggested Mermelstein was mis-stating the facts (as indeed his lawsuit certainly did). In other instances, it may have either been confusion in regard to Mermelstein's very bizarre allegations or, perhaps, outright distortion, by the media.

Whatever the reason, media misinformation (deliberate or otherwise) coupled with Mermelstein's misstatements of the truth would continue to be a hallmark of the ten year battle between the IHR and the professional Holocaust survivor and courtroom veteran.

Obviously, the IHR had never refused to consider his claim. The IHR had advised Mermelstein that it would consider Nazi hunter Simon Wiesenthal's claim first. Since Wiesenthal had withdrawn his claim, the IHR advised Mermelstein that his claim would then be considered. <sup>(4)</sup>

What's more, as noted previously, the IHR had no responsibility whatsoever for the publication by Ditlieb Felderer that Mermelstein claimed had been libelous and defamatory. First of all, the IHR had absolutely no control over or financial stake in the publication, entitled *Jewish Information*, which originated in Sweden and had been sent to Mermelstein from the faraway address. Secondly, the IHR had no idea that the allegedly defamatory material had been sent to Mermelstein until well after the fact. <sup>(5)</sup>

Confronted with the reality of a \$17 million action – no matter how frivolous in fact – the IHR, with great difficulty, finally found an attorney willing to take the case and defend the IHR. Lawyers, including a self-styled "civil liberties" lawyer, did not relish the prospect of defending such a controversial case in the face of a heavy-handed national media onslaught against such a controversial client.

Ultimately, Richard Fusilier, a former police officer, came aboard as the IHR's attorney after telling the IHR that if the institute couldn't find another attorney that he would, with very serious reservations, take the case.

Fusilier wrote Mermelstein's attorney, Cox, submitting a detailed recapitulation of the original \$50,000 offer which – if accepted – would have ultimately resulted in the very type of

[48] forum that the IHR had in mind in the first place: a panel or tribunal which would have publicly considered the evidence that Mermelstein had submitted in order to claim the reward.

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<sup>1</sup> / *Ibid.*, October/November, 1981.

<sup>2</sup> / *New York Times*, March 11, 1981.

<sup>3</sup> / *Ibid.*

<sup>4</sup> / *Ibid.*

<sup>5</sup> / *Ibid.*, June, 1981.

Yet, Mermelstein's attorney failed to respond. <sup>(1)</sup>

"All we asked," the IHR advised its supporters, "was that [Mermelstein] follow the written claim procedure and be prepared to submit his evidence and testimony before a tribunal. He decided instead to stick with his lawsuit in the hope that the court would somehow try to enforce a contract that, indeed, never existed between the IHR and Mermelstein in the first place.

"That way, instead of having to present his evidence before experts who would judge the evidence on its own merits, he could mask and bypass the central issue by claiming 'libel' and 'injurious denial of established fact,' and destroy the IHR in the process." <sup>(2)</sup>

Mermelstein ultimately made his intentions toward the IHR very clear. "I'm going to get them if I have to spend the rest of my life..." he vowed. <sup>(3)</sup>

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<sup>1</sup> / *Ibid.*, July, 1981.

<sup>2</sup> / *Ibid.*, April, 1982.

<sup>3</sup> / Associated Press story, published in the *Rocky Mountain News*, March 13, 1981, cited in the *IHR Newsletter*, June 1985.

## Chapter Seven

### The Offensive Escalates

In the meantime, at IHR headquarters, there were some major changes underway. David McCalden (AKA Lewis Brandon) who had injudiciously – and without prior authorization – reopened the reward offer to Mermelstein was fired in mid-April of 1981.

McCalden's actions in the Mermelstein affair were the last straw in what seemed like an ever-growing laundry list of reckless and ill-advised behavior, coupled with general mismanagement. The IHR's board determined that the institute could best proceed, particularly in light of the Mermelstein lawsuit, without McCalden being "inside" where he could do further damage.

However, the Mermelstein lawsuit proved to be a major preoccupation as it proceeded in the courts.

On June 3, 1981 Mermelstein expanded his assault on the IHR. Superior Court Judge Edward M. Ross allowed the professional survivor to add a new defendant: Willis A. Carto, the founder of both the IHR and Liberty Lobby, the Washington-based populist institution established in 1955.

Mermelstein's decision to add Liberty Lobby as a defendant was hogwash, at best.

Liberty Lobby was totally independent in every way, shape and form from the IHR and certainly had nothing whatsoever to do with Mel Mermelstein or his problems with the IHR. The only connection between Liberty Lobby and the IHR, in fact, was that Carto was the founder of both institutions.

Mermelstein, however, had concocted a gigantic conspiracy theory in which Carto and the wide assortment of organizations and institutions had somehow targeted him (Mermelstein) for special treatment – or mistreatment as the case may be.

At this juncture Liberty Lobby retained the services of Fullerton, California attorney Mark Von Esch to represent its interests in what was clearly a nuisance suit in which Liberty Lobby really and truly had no part.

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On August 26, 1981, however, Cox did file a motion for summary judgment against the IHR in the amount of \$1,000,000, some \$16,000,000 less than the original complaint demanded.

Summary judgment is granted when a judge determines that there are no questions of fact in the case that must be decided by a jury; that the case can be determined simply on the legal questions presented and there are no issues of substantial controversy. As it was, the court rejected the motion for summary judgment and the case was ordered to proceed.

(Ultimately, because Ditleb Felderer, publisher of the *Jewish Information Bulletin*, failed to respond to Mermelstein's suit, Felderer was found in default to Mermelstein to the tune of \$5.25 million.)

Mermelstein's attorney also asked for the court, by judicial notice, to declare that the Holocaust was a historical fact not subject to dispute. This was, in effect, asking the court to rule out any discussion or debate over details of the Holocaust during the forthcoming litigation. <sup>(1)</sup>

Attorney Cox had also concocted a strange theory alleging that his client had been

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<sup>1</sup> / IHR Newsletter, September, 1981.



"selected as the first specific American Jewish victim" <sup>(1)</sup> of the IHR and that the institute had "conspiratorially, secretly, single-mindedly, skillfully – at great cost to our democratic society and with immense financial reward" <sup>(2)</sup> launched this campaign against Mermelstein.

Cox, in the meantime, was busy feeding such nonsense to the media, including, among other things, that the IHR was issuing publications "devoted to a long-term process of persuading Americans of the validity of Hitlerian racial theories." <sup>(3)</sup> Of course, the media – virtually without question – trumpeted Cox's outrageous (perhaps even libelous) claims.

In the midst of all of this, the silliness of Mermelstein's claim that the IHR's reward offer had somehow "forced" Mermelstein to relive the horrors of life during World War II became apparent. IHR researchers had discovered that Mermelstein had, in fact, become a minor – maybe even major – icon in the business of lecturing in Southern California about his experiences during the Holocaust.

[51]

Mermelstein, the IHR learned, had given as many as 30 formally arranged lectures in the Los Angeles area, sometimes as many as two or three times a week, evidently relishing the opportunity to discuss publicly, time and again, what he claimed in his lawsuit had caused him so much distress. <sup>(4)</sup>

Despite Cox's motion, the court ordered a continuance on the case until October 9, giving the IHR the opportunity to look into Mermelstein's past and present activities further, a difficult task – needless to say – because of what proved to be many conflicting stories told by Mermelstein about his experiences during World War II.

It was during this period that attorney Cox found his role in the Mermelstein case being overshadowed by the entry into the case of a hard-driving and publicity-hungry law firm that had eagerly stepped in and volunteered its services to Mermelstein.

By that time, as we have seen, Mermelstein had begun to attract not only additional media attention as a result of his campaign against the IHR, but also growing support in the Jewish community which, hitherto, had not taken Mermelstein seriously.

The law firm in question was that of Allred, Maroko, Goldberg and Ribakoff. Its most prominent partner was feminist attorney, Gloria Allred, a talented, flamboyant, tough-talking and sometimes shrill advocate for whatever cause (usually feminist concerns) she latched upon. It was Maroko who stepped in as chief counsel for Mermelstein, declaring that he was donating his legal services on Mermelstein's behalf.

The 34-year-old son of a Polish-born father and a Hungarian mother (both of whom had been incarcerated at Auschwitz), Maroko had been born in Sweden where his parents had emigrated following World War II.

His parents – who had clearly "survived the Holocaust," later settled in Los Angeles where the younger Maroko ultimately ended up in the practice of law. <sup>(5)</sup>

(Maroko is said to have donated the 4000 hours of legal time he reported to have spent on the Mermelstein case during the 4 and half year period that his firm handled Mermelstein's

[52] campaign against the IHR. At \$200 per hour Maroko's gift amounted to \$400,000. <sup>(6)</sup>

With high powered, high-profile support such as this, Mermelstein was very much riding high in the saddle. He had the endorsement of influential people and organizations with a lot of money behind them, and they were determined to help Mermelstein destroy the IHR and the whole revisionist movement.

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1 / *Ibid.*

2 / *Ibid.*

3 / *Ibid.*

4 / *Ibid.*

5 / *Israel Today*, August 23, 1985, p. 7.

6 / *IHR Newsletter*, January 1983.

## Chapter Eight

### Not Reasonably Subject to Dispute?

Mermelstein's new attorneys had an agenda: they were determined to destroy the IHR pure and simple. They swung into action, preparing to bombard the court with the details they wanted before the court as Judge Thomas Johnson (to whom the case had been assigned) considered their request to take judicial notice of the "fact" that Jews had been homicidally gassed at Auschwitz.

In California, the doctrine of "permissive" judicial notice is set forth in the Evidence Code Section 452 which states that: "Judicial notice may be taken of the following matters... : (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

In short, a fact may be judicially noticed only if it is not reasonably subject to dispute, and is capable of immediate and accurate verification by resorting to an authority of indisputable accuracy. (1)

The IHR, in the meantime, was busy preparing its own response to Mermelstein's motion for judicial notice, preparing the evidence it hoped would persuade the judge to reject Mermelstein's motion.

In a declaration the IHR sought to provide an overview of the controversy surrounding the alleged Nazi genocide of Jews during World War II and to prove that, yes, there was a matter of debate involving the very subject addressed in the motion for judicial notice.

The IHR's declaration stated: "A proposition cannot be proven merely by assembling an extensive collection of material in its support. The character of the evidence is decisive, not its magnitude. The evidence must be reliable, self-consistent and accurate.

"For example, numerous affidavits and statements from 'eyewitnesses,' as well as extensive published material from books could be presented in support of the proposition that 'flying saucers' piloted by alien beings from other planets have landed on earth, and that humans have communicated and

[54] traveled with the aliens. But such evidence, while very extensive, would not be sufficient to have a court take judicial notice of the existence of 'flying saucers.'" (2)

The IHR pointed out that while the question of whether Jews were gassed at Auschwitz might have political implications, the revisionist historians who have disputed the claim that Jews were gassed at the camp in Poland have come from a broad range of political viewpoints.

The first major dissenter, the IHR noted, was French pacifist and socialist Paul Rassinier who was himself interned by the German Gestapo at the Buchenwald and Dora concentration camps during the war and, in post-war years, was elected to the French National Assembly and decorated for his anti-Nazi resistance activities. (3)

Further, according to the IHR, "Not just the 'gas chamber' issue, but the whole question of what actually happened to the Jews of Europe during the Second World War is the subject of growing controversy and dispute." (4)

As a specific example, the IHR cited the massive 760 page work, *The History of the Germans*, published in German by the prestigious Propylaeen publishing house. The author was Dr. Helmut Diwald, a widely-praised historian with senior status at the University of

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1 / *Journal of Historical Review*, Spring 1982, p. 31.

2 / *Ibid.*, p. 33.

3 / *Ibid.*, p. 34.

4 / *Ibid.*, p. 35.

Erlangen.

The IHR quoted extensively from a portion of Diwald's book entitled "The Final Solution" in which Diwald pointed out:

"Countless works have been published and claims made since 1945 which cannot be proven and which cynically add to the infamy. The most horrible events of modern times have been exploited through the use of distortions, deceptions and exaggerations for the purpose of totally disqualifying a people." (1)

The IHR also cited, as an example, a statement in a letter to the *Los Angeles Times* of May 16, 1981 from a teacher of modern Jewish history at the University of California at Los Angeles. The letter read in part:

"The fact is that the Nazis never used the bodies of Jews, or for that matter anyone else, for the production of soap. The soap rumor was prevalent both during and after the war. It may have had its origin in the cadaver factory atrocity story that

[55]

came out of World War I ... The soap rumor was thoroughly investigated after the war and proved to be untrue." (2)

Ironically, the author of this statement was Professor Deborah Lipstadt, who ultimately emerged as the most widely-quoted critic of revisionist historians after she published her error ridden study of the holocaust revisionist movement, *Denying the Holocaust*, in the spring of 1993.

However, as the IHR pointed out, "Actually, Deborah Lipstadt is not quite accurate. The soap rumor has never been 'thoroughly investigated.' To the contrary, the story was widely circulated as part of the official 'historical verdict' of the Nuremberg trials. Once again, the 'evidence' for gassing at Auschwitz is just as reliable as the 'evidence' for the baseless allegation that the Germans used Jewish bodies to manufacture soap." (3)

"In conclusion, the material submitted by [Mermelstein's attorneys] in support of the contention that Jews were killed by gassing at Auschwitz during the Second World War is unreliable, contradictory and, in some cases, demonstrably false. It is not compelling evidence. Indeed, the very evidence submitted by plaintiff casts doubt on the contention that Jews were gassed at Auschwitz ...

"Furthermore, the arguments and evidence brought forward by those who disagree with the contention that Jews were gassed at Auschwitz are reasonable and worthy of consideration. The contention that Jews were gassed at Auschwitz may reasonably be the subject of dispute." (4)

The IHR's attorney, Richard Fusilier, argued that Mermelstein's request for the taking of judicial notice should be denied because it concerned a subject which was uncertain and disputable. Weber's declaration backed that contention.

So it was that the issue finally came before Judge Johnson. Brushing aside a request by Fusilier, asking for specific examples of what exactly constituted "evidence" of the Holocaust, Judge Johnson said, "Any number of sources. Many books. Sources of reasonably undisputed accuracy." (5)

On October 9, 1981 Johnson ruled that "The court does take judicial notice that Jews were gassed to death in Poland at Auschwitz in the summer of 1944... It is not reasonably subject to dispute." (6)

[56]

In a special report to IHR supporters, the *IHR Newsletter* commented:

"The court has done the almost inconceivable in setting itself up as the final say on what is, and what is not, history. It has ruled – as historical fact – on an issue which has been a matter of controversy among historians for years.

"Never before in the U.S. has a court taken upon itself the mis-assigned responsibility to render a judgment on a question of a purely historical aspect as this has never been within the scope, purpose or authority of our legal/judicial system.

"What is more, this ruling has nothing whatever to do with the issue at controversy. The issue is

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1 / *Ibid.*

2 / *Ibid.*, p. 40.

3 / *Ibid.*

4 / *Ibid.*, p. 45

5 / *Los Angeles Times*, October 10, 1981, p. 20.

6 / *Washington Post*, October 10, 1981, p. A3.

supposed to be: **Did Mermelstein have a binding contract with the IHR when he submitted what he contends to be his proof of gassings at Auschwitz – and, if so, did the IHR breach the contract by postponing its handling of the claim?**

"But this ruling is another whole ball game, and the ramifications are ominous to say the least; for if the court has the power to rule on and enforce a historical opinion, then it follows that the court has the power to prevent actions which dispute this opinion – and the door is thrown wide open for people like Mermelstein to easily win in court against anyone who voices or publishes disagreement with orthodox Holocaust notions.

"In the USSR, if you criticize Establishment history, they put you away. In France ... if you dispute Holocaust claims, you are found guilty of 'incitement to discrimination and racial hatred' and ruined financially. In West Germany, over 400 people have been jailed or fined for the same reasons.

"But up until now, U.S. courts have left these matters to the academics, i.e. private parties, where they rightly belong, in the recognition that the law is way outside its constituted domain in passing formal judgments on matters of historical significance.

"Mermelstein, of course, has a right to take us to court if he feels we breached a contract with him, libeled him, or caused him undue emotional stress. But just consider the dangers inherent in a judicial system that proclaims itself morally and legally **constituted to authenticate** a version of history – for here we have the trappings of an inquisition, a kangaroo judicial system operating not on the principles of justice and truth, but on flat and legalistic abstractionism.

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"One of Mermelstein's 'causes of action,' as indicated in his complaint, was 'Injurious Denial of Established Fact.' Every attorney with whom we consulted pointed out the utter absurdity of **this** becoming an issue, for it was **unheard of in U.S. law**. But it has, in fact, become the issue. Imagine, suing someone for damages for having published a revised historical account. [Emphasis IHR's.]

"The whole point is this: the IHR's reward offer stated specifically that all claims would be subject to evaluation by a tribunal of experts to be named by the IHR, and Mermelstein knew it. But by the time we responded to his claim – which was only a preliminary step in the claim procedure, as outlined in the rules – he had already filed his \$17 million lawsuit and was on his way to getting a court to decide on a question on which a court had no business ruling.

"Leaving aside the fact that Mermelstein's 'proof' was no proof at all, it is incredible that he and Cox (and who knows who else) could convince a court of law to authenticate his 'proof' and pass a ruling of such implicitly dangerous magnitude." (1)

Mermelstein's own notions about freedom of speech in America were made very clear when, in several press interviews, the professional survivor commented favorably on foreign restrictions upon freedom of expression.

According to one columnist, Mermelstein "would have preferred redress" against the IHR "through a Canadian-style government prosecution," but, alas, "Mr. Mermelstein didn't have that option because of the free-speech provisions of the First Amendment to the U.S. Constitution." (2)

What's more, appearing on the popular Ray Briem radio call-in show, Mermelstein commented favorably on a West German law making it a federal offense to insult "Holocaust survivors." Declared Mermelstein, his voice trembling in resentment: "We don't even have a law like that in this country." (3)

Mermelstein had already made affirmative noises advocating restrictions on freedom of speech in this country. In a letter to then-Sen. S. I. Hayakawa (R-Calif.), Mermelstein advocated passage of a federal law declaring that "Jews can be

[58] criminally libeled if a defendant claims that the murder of Jews has been a Zionist swindle." (4)

To his credit, however, Hayakawa responded to Mermelstein's demand by suggesting that "While I can appreciate your call for such a law, it might have First Amendment problems." (5)

Essentially, courts are permitted to take judicial notice of indisputable facts to avoid frivolous time-wasting in proving them; in law school, students are told that a court can take judicial notice of the fact that the sun rises in the east and sets in the west.

However, a search of the legal history of judicial notice, covering 400 cases, turned up four precedents involving historical issues, for example, a court took judicial notice of the fact there had been a Spanish-American War.

In another case, the court took judicial notice of the law of gravity. However, never

1 / Special Supplement (dated October 15, 1981) to the *IHR Revisionist Newsletter* (October/November 1981 issue).

2 / Alan Bayliss, writing in the *Wall Street Journal*, April 9, 1985, cited in the *IHR Newsletter*, June, 1985.

3 / *IHR Newsletter*, June, 1985.

4 / *Ibid.*

5 / *Ibid.*

before had a court taken judicial notice of an alleged event or events in history in which there was any consequential dissent, such as, for example, in the history of what has come to be called "the Holocaust."<sup>1</sup>

The affirmation of judicial notice was a victory for Mermelstein, but not, in fact, material to the legal issue of the case – the alleged breach of contract. However, the media was ready to proclaim Holocaust celebrity Mel Mermelstein a "winner," and he was eager to bask in the glory.

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<sup>1</sup> / *The Spotlight*, October 26, 1981, p. 8.

## Chapter Nine

### A Media Victory

The media, of course, was quick to jump on Judge Johnson's judicial notice that Jews had been gassed at Auschwitz in 1944. The media hyped the theme that those who doubted any aspect of the Holocaust had been dealt a resounding courtroom defeat.

The *Washington Post*, somewhat circumspect, reported in a rather cryptic headline that "Assertion is dismissed in no Holocaust matter," and told its readers that "A right-wing group's assertion that the Holocaust never happened was dismissed..." <sup>(1)</sup> a summary, which, needless to say, was not precisely the case.

The *Post* did note that Johnson's decision had, effectively, eviscerated the issue of the Holocaust – and what did or didn't happen – from the core of the Mermelstein case.

In an interesting nod to the revisionist argument, however, the *Post* said that the IHR "has argued that, although millions of Jews were arrested by the Nazis before and during World War II, they died of disease, malnutrition and Allied bombing, not through any planned extermination campaign." <sup>(2)</sup>

The *Post* also admitted that "eleven persons holding doctorate degrees" <sup>(3)</sup> served on the IHR's advisory board, an inadvertent admission, perhaps, that the IHR's scholars were not, as some would have suggested, semi-literate (even illiterate) cranks.

The *Los Angeles Times* headlined the story, declaring "Holocaust given legal recognition;" However, even the *Times* described Johnson's ruling as "a strange legal pronouncement," <sup>(4)</sup> pointing out that "the mere acknowledgment of the gassings delighted Mermelstein and a courtroom packed with his supporters." <sup>(5)</sup>

Richard Fusilier, the IHR's attorney, correctly observed that the judge's decision was "political" <sup>(6)</sup> in nature. Unfortunately, though, Fusilier went on to declare, to the dismay of IHR officials and supporters, that although he was representing the IHR he tended to believe Mermelstein inasmuch as he had been among the American soldiers who helped liberate Dachau

[60] (and therefore, presumably, had seen emaciated corpses that he believed were Jewish victims "gassed" by the Nazis). <sup>(7)</sup>

The October 19, 1981 edition of *Newsweek* magazine featured a full-page story on the Mermelstein affair under the title "Footnote to the holocaust" with a large picture of Mermelstein staring out at the reader from the center of the page. The Holocaust survivor was shown displaying an oversized framed picture of Buchenwald inmates in their bunks following the liberation by Allied soldiers. Mermelstein contended for years – as did his fellow survivor, Elie Wiesel – that his visage appeared in that photo.

Mermelstein and his attorneys and supporters, of course, were hailing the decision as a victory. Dr. Jack Rabin, a national officer of the Zionist Organization of America, was among those devoting himself to fund-raising on behalf of Mermelstein. Rabin expressed his confidence not only that Mermelstein was guaranteed victory in the forthcoming trial, but that the case would be history-making insofar as combating holocaust revisionism was concerned.

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1 / *Washington Post*, October 10, 1981, p. A3.

2 / *Ibid.*

3 / *Ibid.*

4 / *Los Angeles Times*, October 10, 1981, p. 20.

5 / *Ibid.*

6 / *Ibid.*

7 / *Washington Post*, *Ibid*

According to Rabin, Judge Johnson's ruling taking judicial notice of the Holocaust as a fact, virtually conceded the essential point to Mermelstein. However, said Rabin, the case went far beyond the issue of Mermelstein's individual complaint against the IHR. (1)

"The case," said Rabin, "will probably establish new law in California and throughout the United States. This case will then become the basis for class action lawsuits of survivors of the Holocaust against the organized Jew-baiters who allege the Holocaust did not occur.

"The case is probably the most important case involving our people fighting anti-Semitism that has ever occurred in the United States. It is a case with immense legal, social and historical significance for the United States and the world. It certainly will affect every Jew, not only Holocaust survivors, in the fighting against Jew-baiting and anti-semitism." (2)

The case, however, continued to lay in the courts. The legal process has never been known for its speed. By the spring of 1982, Mermelstein's first attorney, the quirky William Cox, had faded from the scene. Gloria Allred and Michael Maroko were handling Mermelstein's offensive.

[61]

Meanwhile, also, the IHR'S attorney, Richard Fusilier, had also left the case. Hired on as the IHR's counsel was G. G. Baumen, a conscientious, conservative and hard-working attorney.

Although no partisan of the IHR's point of view, Baumen was willing to serve as the IHR's courtroom representative.

The IHR was undaunted, despite even Judge Johnson's judicial notice. Effective April 1, 1982 the IHR announced a new reward offer of \$50,000 payable "to any person who can prove that gas chambers for the purpose of killing human beings existed at or in Auschwitz Concentration Camp during World War II." (3)

The new reward offer terminated at midnight, December 31, 1982. Funds from IHR supporters to back up the \$50,000 claim were put in a trust earmarked specifically for the reward offer payment, if indeed someone were to come up with the evidence required.

Commenting on the judge's judicial notice, the IHR said, "There is every reason to believe that Judge Johnson never even read the books which he claimed were 'reliable sources' and which were not 'reasonably subject to dispute.' For if he had done so with an eye toward establishing the truth, the errors, glaring contradictions, physical impossibilities, overwhelming emotionalism and lack of real evidence should have caused him the same critical doubt that established in its own way the springboard of Holocaust revisionism." (4)

There was an interesting development during the course of the litigation: Mel Mermelstein, thinly disguised, made his first nationally-broadcast television appearance. Actually, however, it wasn't Mermelstein. It was an actor playing him.

On March 17, 1982 NBC television's popular night-time drama, "Quincy," devoted its air time to a passion play which was nothing more than a bizarre *roman à clefs* – albeit severely inaccurate and frenzied to boot – about the conflict between Mermelstein and the IHR.

The program, featuring actor Jack Klugman as "Quincy," a happy-go-lucky medical examiner who managed to resolve various and sundry crimes within an hour's time each week, was thoroughly dissected in an article appearing in *The Spotlight*, the weekly newspaper published by the IHR's co-

[62] defendant in the Mermelstein case, Liberty Lobby, the Washington, D.C.-based populist institution.

According to *The Spotlight*: "Mermelstein's counterpart on 'Quincy' was 'Chaim Zagursky,' likewise a former Auschwitz inmate, played by veteran actor Martin Balsam. 'Zagursky' is portrayed as a deeply sensitive man who runs his own 'Holocaust' museum in southern California. In real life, Mermelstein heads something called the 'Auschwitz Study Foundation' and runs a private museum of 'Holocaust horrors' in a warehouse behind his suburban Los Angeles business.

"The 'Quincy' counterpart to the Institute for Historical Review is given the absurd name 'Committee for Truth and Purity,' in an awkward effort to make historical revisionism

1 / *B'nai B'rith Messenger*, April 12, 1985, p. 7.

2 / *Ibid.*

3 / *IHR Newsletter*, April, 1982.

4 / *Ibid.*

look ridiculous.

"The head of the 'committee' is 'Cornelius Sumner,' a pompous bigot who makes his case with superficially plausible but simplistic arguments. But 'Sumner' is portrayed as a dangerous man because the 'climate' and the 'world situation' are such that many gullible people are readily taken in by his smooth assertions. He is a bombastic television straw man whom the righteous 'Zagursky' has little trouble topping.

"Of course," noted *The Spotlight*, "this media production totally ignores the reasoning of real life revisionist historians... A genuine debate between Establishment and revisionist historians over the 'Holocaust' has so far never been permitted on American television."

"Meanwhile, two unsolved murders bring the star of 'Quincy' [Jack Klugman] into the story. It seems that a former Auschwitz SS guard known as *der Teufel* (the 'Devil') is on the loose. 'Otto Rademacher' enjoyed killing Jews so much that he's coming to California to track down and kill those like 'Zagursky' who survived the 'death camp.'

"When 'Zagursky' denounces 'Sumner' as a vicious liar and bigot over the radio, 'Sumner' brings a \$1.5 million suit for slander. The high point of this ridiculous drama comes in court, where 'Zagursky' must prove that 'Sumner' actually is a liar, or lose the suit.

"Quincy himself testifies as expert witness about the 'Holocaust' by explaining how the Germans made lampshades

[63] from human skin. This 'evidence establishes a pattern of atrocities,' he tells the court." (1)

The denouement of the "Quincy" episode, however, is probably one of the most bizarre ever seen on network television. The *Spotlight*' account continues:

"'Rademacher' emerges from hiding to appear in court as a witness for 'Zagursky. The 'Devil' denounces 'Sumner' [who disputes the 'Holocaust'] as a liar. The former Auschwitz guard proudly boasts of his part in killing 6 million Jews – 'the most courageous act in modern history.'

"He only regrets that so many Jews escaped death and he denounces 'Sumner' [the TV counterpart to a Holocaust revisionist] because 'you [the revisionists] have tried to cheat us of our glory.'" (2)

So it was that Mel Mermelstein and his story became grist for the media which, from the very beginning, had a difficult time – like Mel Mermelstein himself – in getting the story straight. There was more to come, however.

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<sup>1</sup> / *The Spotlight*, May 3, 1982.

<sup>2</sup> / *Ibid.*



[65]

## Chapter Ten

### Another Reward Offer

While all of this Hollywood-style "Holocaustomania" was blaring across the airwaves giving a new twist to the Mermelstein affair, there were some down-to-earth debates between the IHR and several apparently sincere persons about what really happened during the Holocaust.

The IHR's second offer of a \$50,000 reward offer for proof of gassings at Auschwitz had attracted three formal claimants (Mel Mermelstein, incidentally, not being among them), aside from several vague letters and missives that failed to state a formal claim.

The first of the three formal claims submitted was from Hugh Foster of Mason, Michigan. Foster did not assert to be a Holocaust survivor, nor did he indicate that he had seen military service during World War II.

What constituted Foster's sole evidence for the gas chambers consisted of two photocopied pages from an old issue of *Life* magazine. The pages contained part of an article by Jean- Francois Steiner on the internment camp Treblinka.

Interestingly, the book from which the article was excerpted, Steiner's *Treblinka*, was described by anti-Revisionist writer Gitta Sereny, as one of the "partial or complete fakes ... a hodgepodge of truth and falsehood ...." (<sup>1</sup>)

Clearly, Mr. Foster had been taken in by yet another professional Holocaust prevaricator (one who had actually been exposed by his fellow supporters of the "official" story that Jews had been indeed gassed at Auschwitz).

Needless to say, Mr. Foster's claim ignored entirely the official rules for evidence as set forth in the IHR's reward offer and his claim was promptly rejected.

The next claim which arrived came from a well-known Holocaust survivor, Kitty Hart of Birmingham, England. Miss Hart, like Mel Mermelstein, had written a book about her experiences, had gone on the rubber-chicken circuit, lecturing on the Holocaust, and starred in a BBC television documentary entitled *Kitty: Return to Auschwitz*.

Inasmuch as Miss Hart was a "Holocaust Star" as big and

[66] as bright as Mel Mermelstein, the IHR was eager to review her claim. It proved to be a disappointment.

Miss Hart submitted a statement describing how she witnessed an SS man place canisters of gas into the opening at the top of a "crematorium" (not a gas chamber) where fellow Auschwitz inmates had been taken. This was followed by screams she heard coming out of this "crematorium," after which she saw "smokes and flames" belching out of the chimneys. Then she saw "ash deposited at the rear of this building." This allegedly took place over a period of just about 30 minutes. Miss Hart also said that "supporting documentation is housed in the Auschwitz archives."

(Interestingly, in her film, Miss Hart claimed that the combination gassing-burning procedure, apparently conducted in just one structure, in her version of history – involving the mass slaughter of perhaps several hundred people at a time – took just 10 minutes: "I could see that people were being sent in one end and that there were ashes at the other end 10 minutes later." Even the most modern crematorium oven takes more than an hour to incinerate just one corpse, so the very nature of Miss Hart's claim was ridiculous on its face

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<sup>1</sup> / *Worldwide Growth and Impact of 'Holocaust' Revisionism*. Institute for Historical Review, 1987. All quotations and details which follow in this chapter are from pages 3-8 of this report.

and was recognized as such by the IHR.

(For the record, incidentally, it might be worth noting that in her film she claims to have watched the gassing-cremation while "sunbathing" on the grass at Auschwitz, quite an extraordinary way, to say the very least, to while away the time as you watch your fellow inmates being exterminated practically before your very eyes.)

The IHR responded to Miss Hart, pointing out that the institute could not submit her claim to an adjudicating panel until and unless she complied with the terms of the offer; that she include some forensic and documentary evidence besides testimony. Miss Hart never responded.

The third and final claimant was Alexander Leja of Chicago who submitted evidence – an International Red Cross Certificate of Incarceration – that he had been interned at Auschwitz and Buchenwald and survived both "death camps" over a five-year period. Leja submitted an impressive and detailed typed statement describing what happened at Auschwitz before his very eyes.

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The big problem was this: major portions of his submission were clearly lifted from a previously published work, *Commandant of Auschwitz*, a purported memoir of Rudolf Hoess, who was commandant at the camp from 1940 to 1943.

Hoess's own purported post-war "confessions" to his Communist jailers – made under duress and torture – neither jibed with what he testified to his British interrogators (also under duress), nor with what he said during the Nuremberg trials (prior to his ultimate hanging for war crimes).

What's more, claimant Leja seemed to have mixed his own reality (whatever that may have been) with imaginary events. In one instance he described, as an alleged eyewitness, events at Auschwitz which occurred months before the date he gave as his entry there. There was a further discrepancy between that date and the date shown on the document accompanying his claim.

The IHR, however, gave Leja the opportunity to submit the required forensic and documentary evidence and also asked him to explain a number of the highly questionable portions of his statement. However, as in the case of Kitty Hart, nothing more was heard from Leja.

On December 31, 1982 the IHR finally withdrew its \$50,000 reward for proof of Auschwitz gas chambers. However, as the IHR announced at the time of withdrawing the reward offer: "No adjudicating panel will meet to consider the three claims which were received, since these were self-evidently not serious and did not conform to the rules of evidence outlined in the claim form. Every opportunity was given to these claimants to expand upon their claims so that they could conform to the evidentiary rules. None responded further." <sup>(1)</sup>

Now although the Mermelstein case was still in the Courts, a new – and unexpected – twist in the history of the IHR was coming up. It was a tragedy that may have been inevitable.

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<sup>1</sup> / *The Spotlight*, January 31, 1983.

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## Chapter Eleven

### Terror

Amidst its day-to-day work, fending off the Mermelstein case and in its publishing and research ventures, the IHR was having a tough time in more ways than one. Harassing phone calls and letters were all part and parcel of what the IHR had come to expect.

However, just prior to the first appearance of Mel Mermelstein in the world of the IHR and its work, the institute and those associated with it had been subjected to violent physical attacks.

It began, ironically enough, on Thanksgiving Day, November 28, 1980, when the home of IHR founder Willis A. Carto was vandalized. The nature of the slogans and other graffiti painted on the scene made it clear that it was Carto's affiliation with the IHR which motivated the vandals – members of the violent and terroristic Jewish Defense League.

In January of 1981 – precisely when Mermelstein's complaint against the IHR was taking form – Carto's home was firebombed, although, fortunately, no one was home at the time and there were no injuries.

Just about one month later, in February of 1981, angry, shouting, sign-wielding demonstrators appeared outside the Torrance, California office of the IHR.

On March 19, 1981 there was yet another JDL-orchestrated demonstration outside the home of Willis Carto. Then, on April 5, during another demonstration outside IHR headquarters, an observer reported spotting Mel Mermelstein himself in the JDL mob.

It was during this demonstration that Carto, who made the mistake of going outside to better view the demonstrators and take license plate numbers, was physically attacked by the screaming agitators. On June 25 the IHR offices were firebombed, although it took place during the dead of night and no one was injured. Large windows were broken and the incendiary device burned the carpet and furniture.

The violence ended for a time, perhaps as a result of Mermelstein's widely-hailed "judicial notice victory," but not

[70] the threats over the telephone nor the letters. The threat of violence was very real.

Then it happened again. On April 25, 1982 there was a second firebombing at the IHR. Some months later, there was yet a third firebombing on September 5. This was supplemented by bullets being fired through the office windows.

One of Mermelstein's chief co-conspirators in stirring up trouble was Mermelstein's attorney, William Cox, whose inflammatory remarks to the press about the IHR – and Carto, in particular – had created so much controversy.

Cox had even run to Washington, D.C. to chat with a henchman of scandal-mongering journalist Jack Anderson who, over the years, had made a cottage industry out of publishing attacks on Carto and Liberty Lobby. Anderson had admitted publicly that he relied upon the Anti-Defamation League of B'nai B'rith as a "source" for much of the information he used.

(Liberty Lobby ultimately filed a multi-million dollar libel action against Anderson for his defamatory publication of a magazine article which included comments from the publicity hungry Cox, although Cox's statements were not part of that actual libel action. The case ultimately went all the way to the Supreme Court where the justices ruled in Liberty Lobby's favor. In 1991, when Anderson was facing a trial by jury, the columnist threw in the towel and was forced to settle with Liberty Lobby.)

As a consequence of the actions of Cox and his co-conspirators, Carto and his wife had been forced to abandon their home after the attack by the Jewish Defense League and suffered much emotional distress as a result of the threats against them.

So it was that Carto filed a \$200,000 action against Cox, charging him with abuse of process, emotional distress, invasion of privacy and defamation. The action was filed in the U.S. District Court for the District of Columbia in the summer of 1983 and Cox was served with a summons and complaint in July of 1983 in California. However, the attorney never answered Carto's complaint. On September 15, 1983 Carto won a default judgment against Cox.

After several subsequent motions and counter-motions,

[71] including an attempt by Cox to have the judgment thrown out, U.S. District Judge Norma Holloway Johnson of the U.S. District Court in Washington concluded that Carto had been defamed by Cox and was injured and had indeed suffered damages.

Judge Johnson found in Carto's favor and on June 28, 1985 granted judgment for compensatory damages in the amount of \$2,000 and punitive damages in the amount of \$500. As of early 1994, however, Cox had managed to avoid payment of the damages which now are in excess of \$5,000, including interest.

Anyone knowing Cox's whereabouts is urged to contact the author. Cox was last heard from in a little-noticed business venture promoting a cartoon character of his creation – one "Dolphin Boy" – who was said to be designed to advance better ecological awareness among the public.

Carto's lawsuit, unfortunately, did nothing to curtail the activities of the other foes of the IHR and revisionism. The threat letters and phone calls continued. There was no additional violence, but in May of 1984, tires were slashed outside the IHR headquarters and a car belonging to an employee, Jean Scott, was spray painted.

But the ultimate attack took place just a few minutes after midnight July 4, 1984. The IHR office and warehouse in Torrance, California were totally destroyed by a chemically induced arson attack.

Thousands of books, estimated at a retail value of more than \$400,000, were destroyed, as well as additional tens of thousands of dollars' worth of typewriters, desks, chairs, typesetting equipment and supplies. All of this not to mention the IHR's own revisionist library which included irreplaceable records, documents, translations, manuscripts and files – many of them one-of-a-kind.

Unfortunately, although IHR Director Tom Marcellus had been specifically instructed, weeks before the arson, to increase the fire insurance from \$50,000 to \$200,000, he had failed to do so. Later, Marcellus explained he had "forgotten" to carry out the instructions.

"The criminals who perpetrated this atrocity chose the date well," said Willis Carto, "The Fourth of July has always

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had a happy and proud significance for Americans. Until today it has been a celebration of the birth of freedom. Today we mourn its death. Of all our traditional freedoms," he said, "the First Amendment is the most important – our guarantee of the freedom of speech and religion. Without these, the others are meaningless. Our crime has been to tell the truth as we see it, and this is our punishment." (!)

It was not that the IHR wasn't prepared. On the contrary. The IHR was aware of the dangers and tried to protect itself. All windows had been replaced by bullet-resistant Lexan, or tempered glass, resistant to very hard knocks. The windows, in fact, were now so hard to break that only a sledgehammer or similar heavy battering tool could have broken through. The building was also protected by electronic fire and entrance devices. Often, someone slept in the office with a gun at hand. (Fortunately, no one was in the office on the night of the arson attack.)

Yet, however impregnable the IHR might have appeared, well-armed terrorists who knew their job were able to accomplish their aim – destroying the headquarters of the institute. However, neither the Torrance Police Department nor the Federal Bureau of Investigation showed any real desire to probe this criminal action, this obvious act of terrorism.

One Torrance police officer, Lt. Jim Pabst, told the press that the blaze was triggered by someone who hurled a Molotov cocktail into the building or doused the offices with gasoline and set them on fire.

This was impossible. No human being could have thrown a Molotov cocktail through

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<sup>1</sup> / 100 *Special Report Issued by Institute for Historical Review, 1984.*

Lexan. What's more, there was an interior door, fifteen feet from the main entrance, which was closed. A firebomb couldn't have been thrown through the front window and into the rear warehouse area (where the fire started) unless illegal entrance had already been gained.

Gasoline was most definitely not used in the commission in the crime. Had gasoline been used, it would have exploded, blowing out the rear door and probably killing the terrorists themselves. Additionally, it would not have burned as hot as the substance used. A security expert retained by the IHR to investigate the arson – independent of the Torrance authorities who had no apparent interest in the matter – concluded the

[73] flame propellant used was probably either thermite (a substance used during World War II to kill German civilians in mass bombing raids) or a post-war jelly-like chemical incendiary substance (best known as a weapon used by the Israeli defense forces).

The inaction of the authorities in Torrance, frankly, might be attributed to pure politics. Torrance Mayor James Armstrong had publicly attacked the IHR sometime shortly before the last and most destructive terrorist attack. His remarks – in his official capacity as mayor – came at an award ceremony held under the auspices of the B'nai B'rith organization, parent entity of the Anti-Defamation League, the U.S. intelligence, propaganda and spying arm of Israel's Mossad.

Clearly, those who perpetrated the attack knew that they could do so with the implicit support of the local authorities. In the past the city of Torrance had failed to take any affirmative action after the attacks on the IHR. The final, devastating attack was the almost inevitable culmination.

Needless to say, the shock and dismay of revisionists at this violent assault on the First Amendment reverberated worldwide.

Prominent and respected British historian David Irving, himself not then a Holocaust revisionist (as he is today), was among those to speak out. "I was deeply shocked to hear of the firebomb attack on your premises... The inaction of the Torrance police department since then is also disturbing." (1)

Pulitzer Prize-winning historian John Toland also registered his disgust. "When I learned of the torching of the office-warehouse of the Institute for Historical Review I was shocked. And when I heard no condemnation of this act of terrorism on television and read no protests in the editorial pages of our leading newspapers or from the halls of academe I was dismayed and incensed.

"Where are those defenders of democracy who over the years have so vigorously protested the burning of books by Hitler? Are they only summer soldiers of democracy, selective in their outrage? Apparently they have forgotten the great battle cry of liberalism attributed to Voltaire: 'I disapprove of what you say but I will defend to the death your right to say it.'

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"I call on all true believers in democracy to join me in public denunciation of the recent burning of books in Torrance, California." (2)

Irv Rubin, head of the Los Angeles branch of the violence-prone Jewish Defense League, took a different tack. Rubin called a press conference at the site of this genuine holocaust immediately after the tragedy. Climbing on top of the mountain of waterlogged books that had been taken out of the ruins, Rubin said he was delighted by the attack but that, of course, the JDL had nothing to do with the incident. (3) (Interestingly, Rubin had earlier revealed that Mel Mermelstein "supported" the JDL in its own efforts.)

"For the record," said Rubin, "we had nothing to do with it," and then handed out a press release which said, "The Jewish Defense League wholeheartedly applauds the recent devastation of the office of the Institute for Historical Review." (4)

The timing of the attack, in the midst of the controversial and potentially devastating Mermelstein lawsuit seemed just too coincidental.

That Mel Mermelstein himself may have had ties to the JDL is interesting, if only from the point of mentioning it for the historical record of events surrounding the Mermelstein Affair.

After the devastating attack, the future of the IHR was in question. However, people across the United States (and from around the world as well), urged that it continue its work. With their support, the institute was able to relocate. One generous revisionist even lent the

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1 / *IHR Newsletter*, October 1984.

2 / *Ibid.*

3 / *Special Report* (cited above).

4 / Torrance, *California Daily Breeze*, July 7, 1984, p. A6.

IHR \$50,000 to help in the recovery effort. So it was that after only a short publishing delay, the IHR resumed its efforts in a new and much safer locale.

Adding to the burden was the responsibility of dealing with the Mermelstein lawsuit. Although it had been dragging through the court system, the case was very much alive.

This was the IHR's low point. It had barely survived the total destruction of its facilities and now had to deal with Mel Mermelstein's vendetta.

## Chapter Twelve

### The Settlement

After what seemed like much delay, at long last, a trial date was set, scheduled for February 21, 1985 beginning at 9:00 a.m. in the California State Superior Court in Los Angeles. Mermelstein's final claim was \$1,000,000 – not just the \$50,000 reward offer he had initially sought. "His aim, simply," commented the IHR at the time, "is not merely to collect the reward or to punish the IHR, but to completely wipe it out." (1)

The IHR recognized the emotional impact such a trial could have: "We have to be ready for the possibility that the judge and jury, under tremendous pressure to bring in a verdict against those wicked 'revisionists,' could, conceivably, do just that. It is an undeniable fact that Holocaust revisionism does disturb certain people. It is also a fact that wherever one finds a trial like this going on, 'survivors' from all over the world are called in to 'testify' and the courtrooms are packed with pro-plaintiff bodies, voices, staring eyes and sputters. Which is to say that Mermelstein, despite the lack of merits of his case, could still obtain a judgment." (2)

As the trial date approached, a number of big names had come out in support of Mermelstein, lending their prestige to the professional survivor's campaign against the IHR. At one shindig, held in the elegant Beverly Hills home of Mermelstein's friend, Irving Scott, a host of Mermelstein supporters gathered to pay homage to the celebrity-survivor. According to Mermelstein cheerleader, Herb Brin, publisher of the sometimes-hysterical *Heritage* newspaper, "There were three judges in attendance, a sprinkling of lawyers, a doctor or two, a public relations person, an actress [and] a film producer, Abbe Mann." (3)

This was just the beginning, however. Among others who gave aid and comfort to Mermelstein in one fashion or another were, to name just a few: Neal Sher of the Justice Department's "Nazi-hunting" Office of Special Investigations; Gerald Margolies, director of the Simon Wiesenthal Center; Sen. Howard M. Metzenbaum (D-Ohio), who doubled as one of the leading Zionists and as one of the leading "liberals" in the U.S. Congress; former Rep. Robert Drinan (D-Mass.), a Jesuit

[76] priest with a holy obsession for promoting Zionist causes; and Israel's Menachem Begin who had met personally with Mermelstein. Another big name also took time out to write a friendly letter to Mermelstein: President Ronald Reagan. (4)

Herb Brin crowed in the pages of *Heritage* that "The defendants in the case are all on the run. This is the first time in recent memory that the perpetrators of infamy against our people will have to face the consequence of their defamation." (5) The Mermelstein case, shrieked Brin, "will be part of the literature of the Holocaust forever," (6) he said (not knowing how very correct, in the end, he would be).

However, just when things were set to begin, the trial was rescheduled for August 5, 1985. Yet, as time approached, there was one thing remaining: a mandatory pre-trial settlement conference as demanded under California law. This procedure followed at the state superior court level is designed to lighten the case load in the trial courts in the hope that many cases can be resolved prior to trial.

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1 / *IHR Newsletter*, October, 1984.

2 / *Ibid.*

3 / *Heritage*, February 4, 1983 (Cited in *IHR Newsletter*, June, 1985).

4 / *IHR Newsletter*, June, 1984.

5 / *Heritage*, January 21, 1983.

6 / *Ibid.*

Sitting in as adjudicator at the settlement conference which began on July 19 was Judge Robert L. Wenke. If Wenke were unable to settle the case, however, he would not be the trial judge. That judge would be selected prior to trial. IHR attorney G. G. Baumen, actually, was pleased by the selection of Wenke for the settlement conference. Wenke had a reputation for being a conscientious and practical jurist.

As a consequence, the IHR was, in a sense, under the gun to settle. Pressure to settle cases prior to trial is intense and the parties that choose not to cooperate are often looked upon with some disdain in the caseload-heavy court system. What's more, Judge Wenke intended going on vacation on the upcoming date of August 22. He demanded an immediate decision.

Facing the reality of the situation – the prospect of an emotional courtroom "Holocaust" with a sobbing Mel Mermelstein, the beleaguered "survivor" pouring out his troubles to a sympathetic jury – the IHR's and Liberty Lobby's attorneys began to see the wisdom of a pretrial settlement. Such a settlement would undoubtedly be considerably less than Mermelstein was asking and would cost far less in terms of legal resources, time expended, etc.

Judge Wenke himself told the attorneys for the IHR and

[77] Liberty Lobby that, in his candid view, there was a significant danger that the IHR would lose if the trial went on before a jury. What's more, he pointed out that Los Angeles juries were notorious for giving large awards to plaintiffs with a real or imagined grievance.

Obviously, the IHR was taking a gamble if it refused to settle and went to trial. There was another major consideration. As a consequence of Judge Johnson's judicial notice that there had indeed been gassings at Auschwitz, the IHR was effectively barred from introducing any evidence to support its contention that no gassings actually took place.

What's more, the ruling had the effect of denying the IHR from questioning Mermelstein, under oath, about his first-hand knowledge (so stated by Mermelstein) of alleged gassings.

The case, essentially, had been reduced to one of a civil matter of "intentional infliction of emotional distress." (Judge Wenke himself had said that Mermelstein's breach of contract claim was weak at best.)

The judge believed that the case was so emotionally charged that the IHR would almost assuredly suffer a guilty verdict and a consequent punitive damage liability. Additionally, Wenke pointed out, if the jury granted Mermelstein so much as \$1 in damages, the IHR would then be liable for all of Mermelstein's costs and court costs as well. These costs, in themselves, would be considerable.

What were those expected costs? It would have resulted, as the *IHR Newsletter* put it, in a "financial debacle" (1) for the IHR. Here was the situation, as noted by the IHR:

"Up to July 22 (1985) Mermelstein, if he can be believed, estimated that he had spent \$150,000 and the Allred firm claims to have done \$400,000 worth of unpaid work – 2,000 hours at \$200 per hour.

"The trial, which was expected to last 35 days, would cost about \$1,000 per day for the transcript, which [Mermelstein's attorneys] would have done every night, ready for use the following day, and another \$3,000 or so per day for Mermelstein's attorneys, not to mention their cost of preparation prior to the trial.

"In addition, there would be the expenses of Mermelstein's witnesses to be brought in and the cost of the jurors at \$350 per day. The total cost to Mermelstein of a 35-day trial

[78] would have been at least \$150,000. Add to that his claimed costs as of July 22 of \$150,000 and the total is \$300,000. **The IHR would be liable for at least this much if Mermelstein had been awarded only a dollar.**" (2) [Emphasis added.]

All of this doesn't include the IHR's own costs: approximately \$1,000 per day for the two attorneys, expenses for witnesses to be flown in from across the country, including the costs of meals and hotel fare, not to mention a virtual shutdown of the IHR's day-to-day activities, including its subscription renewals, fund-raising and general publishing activities that relied on a skeleton staff.

There would be no real historical impact for the case or any revelatory value insofar as

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<sup>1</sup> / *Ibid.*

<sup>2</sup> / *Ibid.*



research into the Holocaust was concerned if the case were to continue. The decision to settle was a hard-nosed business determination. (1) It had nothing to do – nothing whatsoever – with an abandonment of the IHR's principled positions regarding the Holocaust, or, in particular, the issue of whether or not there had been the homicidal gassings of Jews at Auschwitz, the earlier judicial notice by Judge Thomas Johnson notwithstanding.

As a direct result of all of these considerations, the IHR came into the settlement procedure willing to make a cash payment to settle the matter once and for all and to get back to the business of historical revisionist research.

However, the IHR's top offer – at that point – was no more than \$5,000. Mermelstein was not asking his initial top offer, either. Mermelstein – who started out demanding \$17,000,000 – was now asking \$500,000, \$16,500,000 less than he initially dreamed of winning – and perhaps might have in a jury trial.

By late afternoon on July 19, under heavy prodding from the judge, the two parties were able to reach a cash settlement agreement in the amount of \$90,000. Mermelstein, still obstinate, had one final demand: a letter of apology. This forced the matter to be put on hold until the morning of Monday, July 22. It was then that the matter was concluded – this after some four years of contentious – and expensive (for the IHR) – litigation. (2)

In announcing its decision to settle the case out of court, the IHR told its supporters: "The decision of the IHR to pay \$90,000 was purely and simply a business decision designed to save the IHR from protracted litigation, the expenditure of

[79] hundreds of hours of time, the likely probability of being forced to pay far more than \$90,000 in costs, the likelihood of receiving a damage judgment in the millions, a possible appeal, more years spent in appeal, ultimate expenditure of many hundreds of thousands of dollars and the bankruptcy of the institute. The decision to pay the amount had nothing whatsoever to do with any 'reward' payment..." (3)

The actual wording of the so-called "letter of apology" demanded by Mermelstein read as follows:

"Whereas, the Legion for Survival of Freedom, and the institute for Historical Review, sent by letter dated November 20, 1985, directly to Mel Mermelstein, a survivor of Auschwitz- Birkenau and Buchenwald, an exclusive reward offer in a letter marked 'personal' dated November 20, 1980, offering Mr. Mermelstein a \$50,000 exclusive reward for 'proof that Jews were gassed in gas chambers at Auschwitz and further stating that if Mr. Mermelstein did not respond to the reward offer 'very soon' the Institute for Historical Review would 'publicize that fact to the mass media'...

"Whereas, Mr. Mermelstein formally applied for said \$50,000 reward on December 18, 1980; and

"Whereas, Mr. Mermelstein now contends that the Institute for Historical Review knew, or should have known, from Mr. Mermelstein's letter to the editor of the *Jerusalem Post* dated August 17, 1980, that Mr. Mermelstein contended he was a survivor of Auschwitz-Birkenau and Buchenwald; knew, or should have known, that Mr. Mermelstein contended that his mother and two sisters were gassed to death at Auschwitz; and knew, or should have known, of his contention that at dawn on May 22, 1944, he observed his mother and two sisters, among other women and children, being lured and driven into the gas chambers at Auschwitz-Birkenau, which he later discovered to be Gas Chamber No. 5; and

"Whereas, on October 9, 1981, the parties in dispute in the litigation filed cross-motions for summary judgment resulting in the court, per the Honorable Thomas T. Johnson, taking judicial notice as follows:

'Under Evidence Code Section 452(h), this Court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944,' and 'It just simply is a fact that falls within the definition of Evidence Code Section 452(h). It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact.'

[80]

"Whereas, Mr. Mermelstein and other survivors of Auschwitz contend that they suffered severe emotional distress resulting from said reward offer and subsequent conduct of the Institute for Historical Review; and

"Whereas, the Institute for Historical Review and Legion for Survival of Freedom now contend that in offering such reward there was no intent to offend, embarrass or cause emotional strain to anyone, including Mr. Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald Concentration Camps in World War II, and a person who lost his father, mother and two sisters who also were inmates of Auschwitz;

1 / Letter from IHR to attorney Karen Magid (October 24, 1990).

2 / *IHR Newsletter*, August, 1985.

3 / *Ibid*.

"Whereas, the Institute for Historical Review and Legion for Survival of Freedom should have been aware that the reward offer would cause Mr. Mermelstein and other survivors of Auschwitz to suffer severe emotional distress which the Institute for Historical Review and Legion for Survival of Freedom, now recognize is regrettable and abusive to survivors of Auschwitz.

"Each of the answering defendants do hereby officially and formally apologize to Mr. Mel Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald, and all other survivors of Auschwitz for the pain, anguish and suffering he and all other Auschwitz survivors have sustained relating to the \$50,000 reward offer for proof that 'Jews were gassed in gas chambers at Auschwitz.'"<sup>(1)</sup>

This letter was signed by the attorneys, G. G. Baumen, representing the IHR, the Legion, the Noontide Press and Elisabeth Carto, and Mark F. Von Esch, representing Liberty Lobby and Willis Carto.

While this letter was essential to the final settlement, the IHR also recognized the propagandist value of the statement to Mermelstein. As a consequence, the IHR advised its supporters that:

[81]

"The statement in no way compromises the fact that the IHR categorically states the clear historical fact that homicidal gas chambers never existed although it has and it will continue to be used by the enemies of revisionism to imply the opposite.

"It is undeniable," noted the IHR, "that people like Mermelstein, who has been under the care of psychiatrists, suffer 'pain, anguish and suffering' that normal people cannot imagine. The recognition of this fact does not weaken the IHR's position in any way."<sup>(2)</sup> What's more, the IHR later pointed out, "Neither the \$90,000, nor any part of it, constituted payment of any reward offer, and it was so noted on the checks paid to Mermelstein and his attorney.

"Furthermore, the terms under which the reward offer was made were never satisfied; Mermelstein did not submit proof of gassings at Auschwitz, and the adjudication of his claim on the reward was, of course, prevented from proceeding due to the litigation ... The settlement with Mermelstein was an out of court settlement that was strongly urged by the settlement conference judge and was not the payment of any reward offer."<sup>(3)</sup>

Ultimately, the IHR was forced, by circumstance, to issue an official statement about the true nature of the Mermelstein settlement. As published in the September, 1985 issue of the *IHR Newsletter*, the statement read as follows:

"With so many wild rumors still being circulated about the IHR/Mermelstein settlement, we want to remind our readers that, contrary to what has gone out through the press and media:

"1) The settlement agreement did not include any provision for payment of any reward offer, and in fact was not such a payment.

"2) The IHR did not accept or in any way agree with Judge Johnson's ridiculous 1981 'judicial notice' that Jews were 'in fact' exterminated in 'gas chambers' at Auschwitz.

"3) The IHR has not retreated one inch from its well known position that there is no credible evidence to support the theory that Germans allegedly used homicidal poison gas chambers to exterminate the Jews of Europe.

"4) The letter of apology addressed the 'suffering' some Jews said they experienced around the \$50,000 award offer. It did not apologize for revisionist theory or revisionist literature in any way."<sup>(4)</sup>

[82]

The statement by the IHR then cited the complete text of the letter that the IHR's lawyers signed in reaching the settlement with Mermelstein.

The IHR spokesman added, "Any person or organization that claims our lawyers signed any apology other than these few lines is either mistaken or knowingly distributing false information."<sup>(5)</sup>

One interesting thing that some IHR supporters may have missed in the wake of the controversy over the IHR's decision to settle with Mermelstein is that Mermelstein himself was evidently eager to avoid litigating the issue of the Holocaust (and his alleged role therein) in open court.

In their brief submitted prior to the settlement conference, Mermelstein's attorneys made much of the fact of Judge Johnson's judicial notice that Jews had been homicidally dispatched with the use of poison gas at Auschwitz during the year 1944.

"Based on Judge Johnson's ruling," proclaimed Mermelstein's brief, "there will not be

<sup>1</sup> / Statement of Record and Letter of Apology to Mel Mermelstein, July 24, 1985.

<sup>2</sup> / *IHR Newsletter*, August, 1985.

<sup>3</sup> / Letter from IHR to attorney Karen Magid (October 26, 1990).

<sup>4</sup> / *IHR Newsletter*, September, 1984.

<sup>5</sup> / *Ibid.*

any need for the presentation of any factual evidence as to the fact that Jews were gassed to death in Auschwitz, which was the subject of defendants' initial reward offer made directly to [Mermelstein]." <sup>(1)</sup>

Although, in a legal sense, this was entirely correct, this peculiar and particular emphasis in Mermelstein's brief ran contrary to Mermelstein's repeated public proclamations (and those of his supporters and his attorneys) that resolution of this case in Mermelstein's favor would "prove" that the Holocaust had happened and that it would silence the IHR and Historical Revisionism forever.

Mermelstein, frankly, was determined to pursue the case on the merits of a contractual dispute. He clearly had no desire to engage with the IHR on the historical (or factual) details of his own experiences during World War II or of the events of the so-called Holocaust in general.

Ironically, it was Mel Mermelstein's very triumph – in this first legal bout with the IHR – that set the stage for his own ultimate defeat. However, that was a long time down the road. Many more events were about to take place in the wake of Mermelstein's controversial (and indeed misunderstood) settlement with the IHR.

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<sup>1</sup> / Plaintiffs Mandatory Settlement Conference Brief in *Mel Mermelstein vs. Institute for Historical Review, et al.*

## Chapter Thirteen

### Damage Control

It was the *New York Times* – perhaps the governing voice of the media Establishment – that set the tone for the media coverage of the IHR-Mermelstein settlement which followed. "Lawsuit over proof of Holocaust ends with payment to a survivor," declared the *Times*.<sup>(1)</sup>

Mermelstein's counsel, the headline-hunting Gloria Allred, announced – incorrectly – that the IHR, as a consequence of the settlement, had to acknowledge that "the fact that Jews were gassed at Auschwitz is indisputable."<sup>(2)</sup>

This was just the beginning of a host of outright lies and mis-statements that characterized the coverage of the settlement between the IHR and Mel Mermelstein – many of those false impressions left by Mermelstein himself. It was also something that the IHR would have to contend with, whether it liked it or not.

Mermelstein's other attorney, Allred's partner, Michael Maroko, was quick to claim a historic import for the Mermelstein decision. In dramatic words, he proclaimed:

"The judgment will forever provide a written judicial record to forestall and stop any future persons or groups that will ever again claim that the most atrocious and barbaric crimes against humanity never occurred. This judgment will be a permanent record and will have an uplifting effect on Jews for all time."<sup>(3)</sup>

In discussing the Mermelstein case, Maroko made an interesting observation, "Survivors' memory is not all that accurate," he opined (perhaps hinting that maybe even Mermelstein's – or his own parents' – detailed "memories" might not be so sharp). What's more, he said, "Experts have to be summoned to prove that the Holocaust happened and there is always the downside risk of a trial becoming a circus."<sup>(4)</sup>

Maroko's partner, Allred, called the Mermelstein victory "an unconditional surrender"<sup>(5)</sup> on the part of the IHR, but that, of course, was not the truth. She went on to declare that "we have brought these formerly influential and powerful defendants to their knees."<sup>(6)</sup>

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The IHR was undaunted. "It's the best outcome we could have had," an IHR spokesman told the press. "We did not have to compromise any of our positions. All we're doing is apologizing to Auschwitz survivors for the pain which may have been associated with our reward offer."<sup>(7)</sup> Mermelstein, the IHR pointed out, didn't have "any kind of evidence"<sup>(8)</sup> that Jews had been gassed at Auschwitz.

Bradley Smith, editor of the *IHR Newsletter*, was not pleased with the final result, but he was able to take a pragmatic look at the bright side of things when he commented:

"For my own part, I was as stunned as everyone else when I found out a settlement was in the works, but it was quite clear to me that I felt no disappointment.

"From the beginning I had understood the Mermelstein suit to be legal garbage. It had been instituted with sincerity as a ploy to corrupt the First Amendment through litigation and to destroy the

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<sup>1</sup> /*New York Times*, July 25, 1985.

<sup>2</sup> / *Ibid.*.

<sup>3</sup> / *Israel Today*, August 23, 1985, p. 7.

<sup>4</sup> / *Ibid.*.

<sup>5</sup> / *Ibid.*, p. 8.

<sup>6</sup> / *Ibid.*.

<sup>7</sup> / *New York Times*, July 25, 1985.

<sup>8</sup> / *Ibid*

IHR with a multi-million dollar settlement award, and now it was ending with a legally manufactured, insincere apology.

"I feel compromised by the apology as many others do because I know how it is going to be used to ridicule my writings and my association with the Institute, but I don't feel betrayed. So long as we live in a society that encourages intellectual suppression, those who speak out in the interest of historical truth are going to be attacked in the courts and slandered by the press.

"I feel no qualms about the Institute having used garbage rhetoric to relieve itself of a very dangerous garbage prosecution, if that is what was called for in this specific situation. So far as Mel Mermelstein goes, he sued the IHR for garbage reasons, he won a garbage victory, and it has earned him garbage publicity."

Smith recognized that in terms of public relations, the IHR had been dealt a considerable setback, among not only its supporters, but in the eyes of the public as a whole. There was another side to the coin, however, as Smith noted:

[85]

"The terrible drain on the IHR of resources, of time, money and attention that were being sucked up with this litigation hanging over everybody's head month after month after month has come to a stop. Staff can now concentrate on its primary function, which is publishing. The IHR was not founded as a public relations firm and it is not organized to act as one. This should be clear to everyone now.

"In any event it can be argued, and I do argue, that the best public relations possible will be generated by publishing sound revisionist literature that is widely distributed and widely read. That's what the IHR was organized to do, and it is what the IHR does – far better than any other organization extant. The time has come to concentrate on those particular efforts." (1)

The IHR took great comfort in the encouraging words of its editorial advisor, the esteemed French revisionist, Dr. Robert Faurisson, who had undergone his own repeated trials by fire in the French courts as a consequence of his own research and writing. In a letter regarding the Mermelstein settlement, Faurisson said:

"Although I fear, as well as anybody, certain consequences or sequels of this decision, **I do agree with what you did.** We know that the Exterminationists are going to act by any judiciary means which will be possible for them in the future. They fear free historical debate, so they have no choice: they will continue to attempt to obtain more and more of those fallacious judiciary debates ... These court cases are a waste of time, or nerves, of life, of money, of **work.**" (2) [Emphasis Faurisson's.]

According to the *B'nai B'rith Messenger*, Neal M. Sher, director of the Nazi-hunting Office of Special Investigations, remarked that one of the most significant outcomes of Mermelstein's court triumph was "that 'the Holocaust is a fact' is now recorded in national legal annals and can no longer be debated." (3)

*The New York Times* chimed in, declaring in an editorial entitled "The holocaust, proved," that "In America, courts are asked to settle questions about almost everything, even history, and now a Los Angeles case has in effect determined that yes, the Holocaust did take place." (4)

The *Times* went on to declare that "For anyone to deny [the Holocaust] is a transcendent obscenity of our time." (5) Choosing to ignore reality, the *Times* remarked that "yet that's just the position" of the IHR. (6)

[86]

However, to its credit, the *Times* was honest enough to acknowledge that the IHR had not surrendered its position (at least as the *Times* perceived that position). The *Times* informed its readers, "In settling the suit, the [IHR] has finally agreed to pay, but not to accept." (7)

In the meantime, the very Jewish groups and Zionist organizations that had initially steered clear of Mermelstein were rushing to the media with great hosannas of triumph.

David Lehrer, a spokesman for the Anti-Defamation League (ADL) of B'nai B'rith, announced,

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1 / *IHR Newsletter*, August, 1985.

2 / *Ibid.*, September, 1985.

3 / *B'nai B'rith Messenger*, June 13, 1986, p. 19.

4 / *New York Times*, July 29, 1985, p. 16.

5 / *Ibid*

6 / *Ibid*

7 / *Ibid*

"We at the Anti-Defamation League have taken a special interest in this case because of our having initially exposed the tawdry Institute for Historical Review.

"We are pleased to have been a part of the Mermelstein litigation, providing financial, logistical and research support for Mr. Mermelstein and his attorneys." (1)

(Mermelstein's attorney, Michael Maroko, however, bemoaned the actual extent of the ADL's support for his client. "In the last six months," he complained, "ADL gave us moral support. That was the extent of their involvement." (2) )

The Simon Wiesenthal Center also sang out in praise of Mermelstein. Rabbi Marvin Hier and Rabbi Abraham Cooper declared:

"We applaud Mel Mermelstein's efforts and the historic achievement which was won through the inspired efforts of many people, including Atty. William Cox, Atty. Michael Maroko, Dr. Jack Rabin and especially Herb Brin.

"The Wiesenthal Center will continue its work in closely monitoring and combating the multi-fanged threat that Holocaust revisionism poses to the Jewish community and to historical truth." (3)

Mermelstein's lawyer, Gloria Allred, was quoted by the *Los Angeles Times* as having said that "the agreement [between the IHR and Mermelstein] includes the unpaid \$50,000 prize and \$50,000 damages." (4) This, of course, was not true. Either Allred was deliberately misstating the facts of the settlement, or the *Times* was either misstating the facts deliberately itself or misquoting Allred. In either case, the truth wasn't being told.

Likewise with the *Times'* reference to the ruling (issued

[87] four years previously) in which Judge Thomas Johnson had taken his controversial judicial notice that there had been Jews gassed at Auschwitz. The *Times* reported that "The defendants also agreed to formally acknowledge the October 9, 1981 judicial recognition by [Johnson] that [Jews were gassed to death at Auschwitz]." (5)

The *Times* was skirting a very fine line as far as the truth was concerned. Although the formal statement of record and apology did include a passing reference to the judicial notice, the *Times* report implicitly suggested that the IHR had agreed to the conclusion reached by Johnson's judicial notice, which, of course, the IHR did not.

*The Spotlight*, published by the IHR's co-defendant, Liberty Lobby, took it upon itself to highlight much of the misinformation about the judgment that appeared in the Establishment media. According to *The Spotlight* many of the "news" stories regarding the case were anything but true.

"A case in point," reported *The Spotlight's* analysis, "is the United Press International report datelined Los Angeles, July 24. The report states that the IHR must pay Mermelstein not only the \$50,000 reward that was the subject of controversy, but "an additional \$100,000 for the pain and suffering caused by the reward offer." (6)

Obviously, this was simply not true. The sum total of the monetary damages paid to Mermelstein was \$90,000 – not \$150,000. And no "reward" of any kind was paid. *The Spotlight* also pointed out other falsehoods in the UPI story:

"The UPI report also falsely alleged that the IHR had agreed to apologize in writing to Mermelstein and other Auschwitz survivors for saying the 'holocaust' of Jews in World War II Germany was a myth. Further, the UPI report claimed that the institute must acknowledge 'the fact that Jews were gassed at Auschwitz is indisputable.' Again, needless to say, this is not true." (7)

Herb Brin, fanatic publisher of the revisionist-hating and Mermelstein-boosting *Heritage* newspaper, was quite adamant about the results of the Mermelstein settlement, the facts of the matter notwithstanding. "Liberty Lobby," he announced in a fiery headline, "is in shambles after big defeat." (8)

Brin went on to advise his readers that the apology that

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1 / *Heritage*, August 2, 1985, p. B.

2 / *Ibid.*

3 / *Ibid.*

4 / *Los Angeles Times*, July 25, 1985, p. 1.

5 / *Ibid.*

6 / *The Spotlight*, August 5, 1985, p. 22.

7 / *Ibid.*

8 / *Heritage*, August 2, 1985, p. 1.

[88] the IHR and its co-defendants had issued to Mermelstein "almost stuck in the throats of the right-wing gaggle" who had tangled with Mermelstein and who, he said, "clearly were hoping to revive the spirit of Hitler in the world." (1)

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<sup>1</sup> / *Ibid.*, p. B.

## Chapter Fourteen

### Explaining the Facts

On September 24, 1985, California's senior U.S. Senator, Alan Cranston, took to the floor of the Senate to attack Liberty Lobby, by name, and the IHR (by implication) when he hailed Mel Mermelstein's settlement. Under the title "Denial of Holocaust rejected," Cranston's comments were published in the *Congressional Record* as follows:

"Mr. President, one of the most vicious and repugnant campaigns by some of the far-right groups in this country over the years has been an attempt to deny the Holocaust. It is extraordinarily difficult to comprehend what has motivated this effort." (Cranston apparently failed to comprehend that revisionists are motivated by truth.)

"It is too easy to say simply that certain individuals still admire Hitler and his fanatic brand of fascism," said Cranston. "But for whatever reason, these groups have persisted. Particularly harrowing," declared Cranston, "has been their effect on survivors of Hitler's war against the Jewish people and other minorities.

"For this reason, it is heartening to note the recent decision by a California court to levy fines and mandate a court-ordered apology against one of these extremist organizations which has continued to publish 'the Holocaust was a lie' stories while offering monetary rewards – which they have then refused to pay – to anyone who produces proof the Holocaust occurred.

"This California court decision is a victory for all who care about the truth and who oppose the efforts of these wacko groups to slander, pain and impugn Holocaust survivors," said the California senator.

Cranston then submitted into the *Congressional Record* the statement of record and letter of apology to Mermelstein, his basic mis-statement of the general facts of the case notwithstanding. Cranston noted that the letter came from "attorneys for the Liberty Lobby and other defendants in this case." (1)

First of all, obviously, the \$50,000 reward offer had

[90] nothing to do – nothing whatsoever – with the question of whether or not anyone had any admiration of Adolf Hitler. A question of historical – and scientific – fact was at stake.

Secondly, Cranston presented the IHR-Mermelstein settlement as nothing less than an independent declaration by the courts that the IHR was totally wrong. In fact, of course, the IHR had agreed to settle out of court with Mermelstein in order to avoid a court trial.

Thirdly, Cranston again misrepresented the facts when he said that the IHR had "refused to pay" the reward to "anyone who produces proof." Mermelstein had never produced the proof required, and never, of course, gave the IHR the time to present his "proof" to any tribunal, whether that proof would have stood up under the federal rules of evidence or not.

Of course, Cranston's decision to hail Mermelstein in the official *Congressional Record* was a combination of several elements at work: the senator had long been a shameless proponent of the Israeli lobby and this was a sop to his supporters in the highly-influential and well-heeled Jewish community which had rallied around Mermelstein.

Cranston himself had a little background in litigation involving Adolf Hitler, in particular. Many years before – prior to the war – none other than the German Führer had successfully sued Cranston (in an American court of law, no less) for plagiarism. The future California lawmaker (then evidently a law-breaker) had pirated Hitler's tome, *Mein Kampf*, and republished it in the United States, presumably as a warning to America what Hitler was all about. Cranston no doubt made a profit, too. Hitler showed Cranston what he was all

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<sup>1</sup> / *Congressional Record*, September 24, 1985.



about and won a judgment against the California plagiarist and politician-to-be.

Much later, in 1992 – after 24 years in the Senate – Cranston left Congress in shame, having been caught redhanded in the notorious and highly sensational Keating Five savings and loan scandal. Cranston was one of a handful of senators who had done the bidding of corrupt S&L bigwig, Charles Keating, in return for generous cash favors. Slapped on the wrist, Cranston was never prosecuted, although he and his fellow miscreants faced what essentially amounted to a

[91] highly embarrassing televised public trial before the Senate ethics committee.

In any event, Cranston's propagandizing on behalf of Mermelstein and his supporters was not a positive development. There was indeed much misinformation circulating as a result of the IHR's settlement with the celebrity Holocaust survivor.

An IHR spokesman later summarized the situation at hand.

"The IHR had two tasks: first, to explain the settlement to its subscribers and supporters around the world, to reassure them that IHR had accepted a compromise to avoid the expense and uncertainty of trial but – and in spite of what Mel Mermelstein and our other enemies were saying – had not abandoned its skepticism on the gas chambers, and had not accepted the judicial notice. Second, to show the flag, to proclaim our defiance, to fight back." (1)

Mermelstein was not content with his much-vaunted "victory," however. He made one last-ditch effort to harass the IHR. Through his attorneys, Mermelstein filed a motion with the Los Angeles Superior Court asking that the IHR be ordered to pay him another \$60,000 as "penalty" for a failure by the IHR to pay, on time, any of the three court-ordered payments in the settlement of the case.

The IHR had mailed its final payment by certified mail. However, it took ten days to travel the sixteen miles between Torrance, California and Los Angeles, arriving six days late. As a consequence, Mermelstein's attorneys beat a fast path to the courthouse to try to win an additional judgment for their client.

Judge Charles Jones, however, was not impressed or amused when attorney John West, an associate of the Allred-Maroko firm, intoned as follows: "It comes as no surprise to your honor that this case is a blood feud between the parties. The defendants," declared West, "have rewritten the life of Mr. Mermelstein, and ... " (2)

West got no further. The judge cut Mermelstein's attorney off in mid-sentence, advising him that the court was fully familiar with the case and that he didn't particularly appreciate attorney West presuming to explain to him (the judge) his own state of mind.

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The judge told Mermelstein's attorney that the motion was ludicrous and petty and a waste of the court's time: the payment had been mailed in good time and in an appropriate manner. He ruled that the IHR would pay interest only on the delayed receipt for six days – a total of \$39.36. (That was exactly \$59,961.64 less than Mermelstein and his attorney were confident they would receive.) (3)

In the meantime, the IHR was stepping back and reviewing the situation in retrospect. In the September, 1985 edition of the *IHR Newsletter*, its editor, Bradley Smith, commented on the fallout from the Mermelstein settlement and related matters. Little did Smith know that his innocen remarks would spark the beginning of yet another costly encounter between the IHR and Mel Mermelstein. Here's what Smith had to say:

"Except for the shouting and some recriminations, the Mermelstein caper against the IHR is finished. Mermelstein doesn't seem to be the man he thought he was. He initiated a suit against the Institute for \$17 million and settled for \$90,000. He said he would pursue the case all the way to the Supreme Court but settled before it even went to trial. He vowed to destroy the IHR, and the Institute is now stronger than it has ever been." (4)

Smith commented on news articles such as that which appeared in the August 2, 1995 issue of *Israel Today*. That journal declared in a headline story that Mermelstein stood virtually alone during the trial, and noted that Mermelstein complained that the organized

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1 / Statement presented to the 11th International Revisionist Conference (October 10-12, 1992).

2 / *IHR Newsletter*, November, 1985.

3 / *Ibid.*

4 / *Ibid.*

Jewish community took a hands off attitude when he filed suit against the IHR. Smith wrote:

"Mermelstein is making speeches and giving statements to the press about how he was not supported by the Jewish community in his suit against the IHR in the manner in which he believes he should have been. He feels disappointed and betrayed, but appears to be at a loss as to why this should be so. Being a foolish man, he is unable to discern that he is perceived as a fool by those organizations in the Jewish community from which he expected help." (1)

Smith cited numerous comments by Jewish leaders from groups as diverse as the Anti-Defamation League (ADL) of B'nai B'rith to the American Jewish Congress to the Simon

[93] Wiesenthal Center – all well-established Jewish community organizations – that had not been interested in signing on alongside Mermelstein when he launched his assault on the IHR. Although the organizations in question cited a variety of reasons, *Israel Today*, in particular, noted that "Some members of the Jewish community, who asked not to be identified, criticized Mermelstein for being a difficult, moody man. Even his close friend [Jack] Rabin says, 'Mel is his own worst enemy.'" (2)

Mermelstein, for his own part, was quoted extensively by *Israel Today*, attacking these very groups that, when he won his victory, rushed to hail his triumph over the IHR, claiming that they hadn't given him the support that he needed.

In that same edition of the *IHR Newsletter*, Bradley Smith made reference, once again – albeit in passing – to the role of Mel Mermelstein and other self-proclaimed Holocaust survivors – both genuine and fraudulent – in the process of divining historical truth about the events which took place during World War II. Here, in pertinent part, is what Smith had to say:

"No Holocaust survivor and no Holocaust revisionist is wrong about everything. We urge news journalists to recognize the obvious. When we criticize the 'eye-witness' testimony, or ridicule the pretentiousness of this or that Holocaust survivor, we are not dismissing all survivors as frauds and liars. We are addressing a certain statement by one person as reported in a specific manner.

"If we ridicule an individual survivor, charge him or her with fraud or hypocrisy, we are not dismissing even that survivor as a human being. We understand perfectly well that the survivor has **survived** something, that he has seen sights and experienced events that have been unique and have affected him deeply.

"But we know something too about how the vast majority of survivors, those whose names you seldom, perhaps never, see in the press or hear on television, how they are being compromised by the dishonesty and obsession with notoriety that some among them have fallen prey to,

"We believe that many survivors must recognize the falsehoods being spread by these vainglorious prevaricators. We believe that many survivors feel personally shamed by

[94]

these false-tale spinners who claim to speak for the survivor 'community' and that in their hearts they understand that the highest ideals of the Jewish community are being betrayed.

"Such demonstrable frauds as Melvin Mermelstein and Elie Wiesel are egged on in the press, and by individual journalists, who participate in the craven assumption that no survivor story should ever be doubted and no revisionist criticism of those stories should be tolerated. These are the journalists then, who, by compromising the ideals of their own profession, aid those individuals who are compromising the ideals of the Jewish community..." (3)

In calling Mel Mermelstein a "demonstrable fraud" Smith was saying that Mermelstein was doing a disservice to other Holocaust survivors by telling tales of his adventures during the war that led historical researchers to question his veracity. Smith was relying upon his own study of Mermelstein's published comments and the study of Mermelstein's stories by others in the historical revisionist movement. Smith truly believed that Mermelstein was a "demonstrable fraud" as he said.

When this was published, Mel Mermelstein, a man who clearly relished reviewing his own press clippings, was certainly aware of what the IHR had said. However, Mermelstein said nothing. Mermelstein did nothing. Not then. Smith's remarks were published in September of 1985. It was later that Smith's published comments would come back to haunt him and the IHR.

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1 / *Ibid.*

2 / *Israel Today*, August 2, 1985.

3 / *IHR Newsletter*, *Ibid.*

## Chapter Fifteen

### Mel Strikes Again

In an interview on August 7, 1985 broadcast over WMCA Radio based in New York City with talk show host, Carol Hemingway, Mel Mermelstein crowed about his "victory" over the IHR.

Actually, his summary of what had happened was – to understate the matter – not quite on point. Here, in part, is what Mermelstein had to say. Speaking to the host of the show, Mermelstein said:

"You referred to this as a settlement. I would like to set the record straight because it's very important that it be identified properly. It's a judgment. It's a judgment, not a settlement [as in] 'Mel Mermelstein shook hands with them and so on and so forth and everything is hunky dory.' That's not what it is, a judgment entered and not only was it entered on August 5, which was only two days ago and signed by Judge Robert A. Wenke of the Superior Court, but they have already delivered a \$50,000 check personally made out to me, and delivered one day ahead which was July 31st. And of course, the apology. You couldn't give me twenty million dollars for that apology. That apology was unconditional and we sort of struggled over this for four days.

"What is more significant is that they signed the judicial notice which is very clear and concise, that in 1981 a Superior Court Judge ruled as follows: that 'this court does take judicial notice of the fact that Jews were gassed to death at Auschwitz Concentration Camp and that the Holocaust is not subject to dispute.' That is a very important ruling. 'It is capable of immediate and accurate determination by reasonable sources of reasonably indisputable accuracy,' and then before the judge laid down his gavel he said, 'It is simply a fact.' They had to sign that, too... " (1)

This was too much for the IHR to take. They had not signed the judicial notice. They didn't agree with the judicial notice. Mermelstein's description of what had happened not only presented the IHR's actions in a false light, but it also suggested to the public (and to IHR supporters who may have

[96] been listening or later heard about the broadcast) that the IHR had repudiated their past stands on the issue of the Holocaust.

What's more, Mermelstein's statements suggested, implicitly, that the IHR's past actions were, at the very least, fraudulent in nature and that the IHR was never sincere – or serious – about its research in the field of holocaust revisionism. All of this was clearly damaging.

Mermelstein had made these false charges over one of the largest radio stations in the nation's largest city, in a metropolitan area where the IHR had many supporters. What's more, Mermelstein was making similar statements other places and word of his charges began to spread among IHR supporters. The damage done from the initial settlement with Mermelstein, while not ruinous to the IHR, was now being magnified by Mermelstein's false allegations.

The IHR was cautious about filing any legal action. They had spent the last five years engaged in contentious – and costly – courtroom drama and were not eager for it to continue, although Mermelstein's actions were of serious concern. However, it soon became apparent that Mel Mermelstein was not finished with the IHR.

In the meantime, the IHR had other work ahead. The IHR was, for all intents and purposes, well on the road to recovery after the tragic holocaust of July 4, 1984 and was

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<sup>1</sup> / Transcript of Mermelstein Radio Comments. Attached as "Exhibit A" to Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Alternatively for Summary Adjudication of Issues prepared by defendants in *Mel Mermelstein vs. the Legion for the Survival of Freedom, et al.* Case No. C-629224, Superior Court of the State of California for the County of Los Angeles, Memorandum dated: January 16, 1990.

making great inroads.

But Mel Mermelstein was lurking in the background. He no doubt realized that he had failed to destroy the IHR as he had intended. If anything the IHR was now stronger than ever. In fact, more and more people had actually become aware of the work of the IHR as a consequence of the glare of publicity (mostly negative, needless to say) that had been shed on the IHR as a direct result of Mermelstein's litigious attack on the institute – something, obviously, that Mermelstein never intended.

It was sometime in May of 1996, nearly eight months after the *IHR Newsletter* had dubbed him a "demonstrable fraud" that the IHR learned that, once again, Mel Mermelstein was planning to sue the IHR.

This time Mermelstein was alleging he had been libeled and that the IHR had intentionally inflicted emotional distress upon him as part of the act of libeling him. It was on Friday,

[97] June 6 (the anniversary of D-Day, the Allied invasion of Europe during World War II) that Mermelstein formally showed up in federal court in Los Angeles filing his action against the Institute.

Two days later, on Sunday, June 8 at the international ballroom of the exclusive Beverly Hilton Hotel, there was held what was billed as "A Victory Celebration in Honor of Mel Mermelstein."

Hosting the event were the biggest names in the American Jewish Community: the American Jewish Committee, the American Jewish Congress, the American Zionist Federation, the Zionist Organization of America, the Simon Wiesenthal Center, and, of course, the Anti-Defamation League (ADL) of B'nai B'rith, among others.

"You are invited," said the invitation, "to participate in a community-wide celebration dedicated to the victory of Mel Mermelstein over the infamous Institute for Historical Review and the Liberty Lobby." Serving as honorary chairman of the event was none other than another Holocaust survivor-celebrity, Elie Wiesel.

Special guests included, among others, film star Leonard Nimoy (who, as we shall see, was producing and starring in a television docu-drama about none other than Mel Mermelstein), Neal M. Sher, director of the Nazi-hunting Office of Special Investigations at the U.S. Department of Justice, and attorney Bruce I. Hochman, president of the Jewish Federation Council. <sup>(1)</sup>

(In the spring of 1993 Hochman would be revealed as a money launderer for the Anti-Defamation League for at least one of its covert operatives, a San Francisco art dealer, Roy Edward Bullock who had, in fact, been deployed by the ADL to spy on the IHR on more than one occasion, only later to be unmasked.

(Through Hochman – over a period of more than 25 years – the ADL issued payments to Bullock for his spying activities conducted on behalf of the ADL. Hochman's name surfaced as the consequence of an investigation of the ADL by the San Francisco Police Department and the Federal Bureau of Investigation for the ADL's illegal domestic spying and the theft of confidential police and FBI intelligence data.

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(Initially, Hochman's ADL-related activities were thought to be in violation of state and possibly federal income tax laws. This was especially ironic in light of the fact that Hochman was one of California's best known tax lawyers. A criminal investigation of the ADL and its collaborators was ultimately resolved before actual indictments were leveled.

(However, critics contended that the San Francisco authorities who were conducting the investigation had buckled under political pressure not to bring criminal charges against the self-styled "civil rights" group. But more about this later.)

Clearly, Mermelstein's case was now a cause celebre in the powerful West Coast Jewish community and Mermelstein could be assured of heavy-handed support. The Allred-Maroko legal combine, along with other major law firms, were again lining up behind Mermelstein. It was indeed going to be a fight to the finish.

The notice of the celebration in Mermelstein's honor included, interestingly enough, a quotation taken from a resolution adopted in January, 1981 by the Council of Post-War Jewish Organizations: "His struggle against the Institute for Historical Review is our

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<sup>1</sup> / Details taken from advertising appearing in *Heritage* newspaper prior to event.

struggle. His victory is going to be a victory for all of us." (1) The IHR was being put on notice that Mermelstein and his supporters were armed and ready for battle.

At this point, as a defensive measure, the IHR was prepared to move forward and file its own libel action against Mermelstein for his own false, malicious and defamatory statements made over WMCA radio the previous August (prior, in fact, to the IHR's own charge that Mermelstein was a demonstrable fraud.)

Following consultation with their attorneys at Robert Von Esch & Associates, Mark Von Esch in particular, the IHR and Carto decided that action was necessary to curtail Mermelstein's apparently unending campaign against the IHR.

There was no question, in the attorneys' minds (and certainly no question in the mind of the IHR) that Mermelstein had mis-stated the nature of his settlement with the IHR. What's more, the IHR was still being forced to explain what the settlement was all about, largely because the media publicity Mermelstein continued to receive (and bask in) gave him the opportunity to repeatedly crow about his triumph.

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There was also apparent damage to the IHR as a consequence of Mermelstein's media publicity: it was during this period that there had been a parallel decline in financial contributions to the IHR.

On this basis, the IHR and Willis Carto decided to file a libel action in August of 1986, against Mermelstein. This put Mermelstein on notice that his continuing false, malicious and defamatory statements would not be tolerated, and gave the plaintiffs the opportunity to seek redress for the damages that Mermelstein was inflicting upon them as a consequence of those statements.

However, Mermelstein was never formally served with legal papers advising him that he was indeed being sued by the IHR. (In the end, this proved to be a critical point.)

The IHR was also busy fending off Mermelstein's libel and emotional distress claim made against the institute. The IHR's attorneys were asking that Mermelstein's suit in the federal court be dismissed.

On September 3, 1986 Judge Lawrence T. Lydick of the U.S. District Court for the Central District of California ruled in favor of the IHR and dismissed Mermelstein's suit. This action was taken on the basis of the insufficiency of Mermelstein's complaint insofar as proving federal jurisdiction was concerned.

However, the court gave Mermelstein 30 days to refile an amended complaint, which, in fact, he did on October 1, 1986. But, this case, too, was thrown out of the federal court. The litigiously aggressive Mermelstein was undaunted.

On December 17, 1986 he refiled his case in the Superior Court of the State of California for Los Angeles County, where the matter would rest for some time. As with most legal ventures, even Mel Mermelstein's lawsuits took time to wind their way through the courts.

In the meantime, the IHR's own lawsuit for libel against Mermelstein was lying dormant. The IHR had not pushed the matter, hoping that Mermelstein would eventually drop his own litigation. The IHR's real work was far too important to be side-tracked with litigation.

However, on January 12, 1988 Mel Mermelstein finally decided to respond to the IHR's libel suit – the suit which had

[100] originally been filed on August 6, 1986 – well over a year before. His attorney, Jeffrey Mausner, filed a response in the California State Superior Court on that date.

It was at this juncture that Willis Carto and the board of the IHR reached a critical point. They wanted to end the litigation once and for all. They did not want to expend additional funds to pursue the action against Mermelstein.

The IHR and Carto had better and more important and more productive things to do. They hoped that if they would withdraw what was essentially a defensive measure that Mermelstein would consider dropping his own litigation. They were, in their own minds, being "gentlemen" about the matter.

So it was that on February 29, 1988 attorney Mark F. Von Esch, representing the IHR and Carto, wrote Mermelstein's attorney, Jeffrey Mausner, advising him:

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<sup>1</sup> / *Ibid.*

"Our clients have instructed our office to dismiss [the action against Mermelstein]. This decision is necessitated in part by our clients' desire to avoid the time and expense involved in pursuing this matter as well as the difficulty of ascertaining damages.

"As I previously indicated, this matter was never served upon your client and was filed merely to avoid the running of the statute of limitations ... [Now] our clients have elected not to pursue this matter." (1)

However, once the IHR had decided to drop the lawsuit against Mermelstein, he took advantage of the situation. On October 17, 1988, he concocted a "malicious prosecution" complaint against the IHR and filed it in the state superior court alongside his previous libel and intentional infliction of emotional distress complaint.

What's more, Mermelstein not only included the IHR and its parent company, the Legion for the Survival of Freedom, as defendants, but also Willis Carto and, once again, the Washington-based Liberty Lobby. Also named were attorneys Robert A. Von Esch, Jr., his son, Mark Von Esch and their firm, Robert A. Von Esch, Jr. and Associates.

Obviously, once again, Liberty Lobby had nothing to do with the fight between Mermelstein and the IHR, but Mermelstein was determined, once again, to bring the populist institution into the battle.

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His decision to bring in the Von Esch family and their firm as defendants was also astounding inasmuch as in his complaint he alleged that they were anti-Semites and Nazi sympathizers and members and supporters of the IHR and Liberty Lobby – none of which was true. In fact, Robert A. Von Esch, Jr. had lost a leg fighting the Nazis as an American soldier during World War II.

For judicial convenience, Mermelstein's previous libel and intentional infliction of emotional distress complaint was consolidated with the new malicious prosecution action.

Upon learning that Mermelstein had once again included Liberty Lobby as a co-defendant in his second assault upon the IHR and Liberty Lobby, among the other defendants, Vince Ryan, chairman of the populist institution's Board of Policy, responded, "It just sounds like Mermelstein is after more publicity." (2)

One minor setback for the IHR took place at this time, amidst a rather amusing incident that left Mermelstein's attorneys with egg on their faces. In attempting to serve Willis Carto with legal papers in the newly-reinvigorated case, Mermelstein's process servers had accidentally served another individual with a passing resemblance to Carto. Mermelstein and company were bragging of their triumph and when Carto, on advice of counsel, did not file an answer to the complaint they claimed a judgment by default.

However, it was only then that they learned that it was not Carto who had actually been served. The judge who heard the matter ruled that Carto had not been served and therefore was not in default. Nonetheless, he levied sanctions of \$3,500 against Carto for not having advised Mermelstein that it was not Carto had not received the papers.

It was at this juncture that a new counsel for the IHR entered the case, replacing the Von Esches, who were, of course, now co-defendants alongside the IHR. The new IHR counsel was a veteran Southern California attorney based in Irvine, William S. Hulsey.

Although not a revisionist himself, Hulsey was a wily attorney who was willing to take on any client who could afford to pay his bills. So it was that Hulsey signed on as the attorney who would represent the IHR and Willis Carto in the

[102] fight against Mermelstein.

Most of the research and legal legwork required to build a strong defense, was prepared by Hulsey's co-counsel, attorney Charles (Chip) Purdy, who had represented Liberty Lobby in the past.

A diligent behind-the-scenes legal whiz, Purdy was very much an asset to the IHR-Liberty Lobby defense. Purdy served as Liberty Lobby's counsel of record in the case, but, in the end, it was Washington, D.C.-based attorney Mark Lane who emerged as chief counsel for the defense.

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<sup>1</sup> / Letter attached as "Exhibit E" to *Memorandum of Points/Authorities in Support of Motion for Summary Judgment...* prepared by defendants in *Mel Mermelstein v. Legion et al.* Case No. C-6292224. etc.

<sup>2</sup> / *Los Angeles Times* (Orange County Edition), Nov. 12, 1988. Part 11, page 4.

## Chapter Sixteen

### Mel's Biggest Mistake

Perhaps Mel Mermelstein's biggest mistake when all was said and done was dragging Liberty Lobby into his conflict with the IHR. In so doing, Mermelstein, the Hollywood celebrity, had decided to engage in a legal battle with the Washington-based institution that had as its counsel one of the best lawyers in the country.

Liberty Lobby's counsel, Mark Lane, was a fierce, harddriving and skilled veteran trial attorney who not only didn't like to lose a case but who absolutely loved to win. And he knew how to do that well.

It was Lane who would ultimately begin working with IHR attorney William Hulsy and Liberty Lobby's California attorney-of-record, Chip Purdy, and in the end, serve as chief counsel for the IHR-Liberty Lobby defense team.

A New York State Assemblyman from 1960 to 1962, Lane was the author of several books, including *Rush to Judgment*. This volume, translated into multiple languages, became an international best-seller during the mid-1960's, bringing Lane into the forefront of a growing controversy: the question of who really killed John F. Kennedy.

Lane's book was a sharp critique of the Warren Commission Report that alleged that the president was the victim of a lone assassin named Lee Harvey Oswald. After *Rush to Judgment*, the doubts about the Warren Report ran rampant. Scores of similar books on the JFK controversy followed. Things would never be the same for Mark Lane who had become a worldwide celebrity, to be sure.

In the years that followed Lane found himself in the midst of the continuing, ever-growing controversy over the JFK assassination that didn't end – and hasn't, until this day. Then, following the assassination in 1968 of his long-time friend and fellow civil rights activist, Dr. Martin Luther King, Lane took on the case of King's alleged assassin, James Earl Ray. This was at the urging of King's widow. Ray said he was not guilty of the crime; he had been coerced into confessing. Seeking a new trial to make his case heard, he turned to Lane for help.

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Ultimately, under Lane's leadership and as a consequence of his nationwide lecturing, hectoring, and badgering – assisted by thousands of grass-roots supporters around the country – Congress buckled and re-opened the investigations into the assassinations of President Kennedy, his brother, Senator Robert Kennedy, and Dr. King. The ultimate conclusion: Lane had been right. There had been a conspiracy.

This was among a number of high-profile cases that fell into Lane's lap virtually all of which led him into direct confrontation with the powers-that-be: the Establishment media; the FBI; the CIA. With a fervor-and a talent-for defending the underdog, Lane didn't mind being on the "outs" with the "insiders." He relished it.

Lane also found himself, as time went by, running into conflict with one special interest group that had carved out a unique niche for itself in public policy-making in America: the pro-Israel lobby. Although Jewish himself, Lane did not believe that bound him to a peculiar devotion to the world's only Jewish state.

Unlike many Jewish and Christian Zionists (Zionists being defined as those devoted to the concept of perpetuating an exclusively Jewish state) Lane believed that the displaced Palestinian Arabs had rights, too, and he took up their cause, much to the consternation of the powerful Israeli lobby. Lane's meeting with Palestine Liberation Organization leader Yassir Arafat did nothing to endear him to Israel and its adherents.

So it was that Mark Lane, like Mel Mermelstein, was very much a public figure,

engaged in public debate over public controversies of the day.

It was a strange admixture of – believe it or not – the Middle East controversy and the Kennedy assassination that ultimately – through a tangled web of circumstances – brought Mark Lane into courtroom combat with his fellow public figure, Mel Mermelstein.

One of Lane's casual associates was a Polish-born and highly colorful former Israeli, a flamboyant figure named Haviv Schieber who had, in his later years, become a virulent critic of the state of Israel.

Among Schieber's other contacts was Liberty Lobby, founded by Willis Carto in 1955. Liberty Lobby, through its

[105] weekly newspaper, *The Spotlight*, had been critical of American taxpayer financed giveaways to Israel. That mutual concern had brought Schieber into Liberty Lobby's sphere.

However, it was the JFK assassination that brought Lane – through his contact with Schieber – into association with Liberty Lobby. The Lobby's weekly newspaper had published an article linking former CIA man (and Watergate scandal celebrity) E. Howard Hunt to the JFK assassination. Hunt sued for libel and won a \$650,000 judgment.

It appeared as though the end was near for Liberty Lobby, until an appeals court overturned the verdict and ordered the case back to the district court for re-trial. At that point Haviv Schieber had a bright idea: Why shouldn't Mark Lane – whose own area of expertise was the JFK affair – take on the defense of Liberty Lobby? Lane met with Liberty Lobby's founder and treasurer, Willis A. Carto, and agreed to take on the case.

In the end, under Lane's skillful legal representation, Liberty Lobby prevailed. A jury rejected Hunt's libel case, concluded that the CIA had indeed been involved in the assassination of John F. Kennedy, and handed Mark Lane the subject matter for an exciting new best-seller, *Plausible Denial* (released in 1991, just shortly after his courtroom encounter with Mel Mermelstein, described in these pages). (1)

When Mark Lane took on Liberty Lobby's defense in the Hunt case, he didn't know that Liberty Lobby's founder, Willis A. Carto, was also the founder of the Costa Mesa, California-based Institute for Historical Review – the IHR – the very organization that Mel Mermelstein had been engaging in court since early 1981.

On occasion Liberty Lobby's weekly newspaper, *The Spotlight*, would report on newsworthy events concerning historical revisionism, but no more than any honest newspaper should. Today, revisionism is a subject that has been widely publicized in newspapers around the globe. However, when *The Spotlight* first reported on revisionist findings, few Americans knew of the controversy.

Mark Lane's legal work in the Hunt case – among others – kept him busy. He had no interest in the activities of the Institute for Historical Review and little, if any, knowledge of Mel Mermelstein's first California-based lawsuit against

[106] both Liberty Lobby and the IHR which had been resolved in August of 1985. That case, as noted previously, was being handled by attorneys on the West Coast.

However, when Mermelstein once again filed a legal action combining both the IHR and Liberty Lobby as co-defendants, and other cases involving Liberty Lobby had been resolved, Lane agreed to represent Liberty Lobby in the Mermelstein case.

Lane had expertise in libel. In fact, in one of Liberty Lobby's own libel cases against another celebrity of television, radio and newspapers, columnist Jack Anderson, Lane had successfully argued Liberty Lobby's case before the U.S. Supreme Court, establishing a precedent in libel law.

Having also derailed a potentially devastating libel action against Liberty Lobby by yet another celebrity: columnist, radio commentator, TV chat show host and yachtsman, William F. Buckley, Jr., Lane looked forward to taking on Mel Mermelstein. Lane was quite amused, frankly, that Mermelstein was presenting himself as a private citizen – not a public figure, all of his own widespread international publicity notwithstanding.

Lane was looking forward to questioning Mermelstein under oath. He was ready to prove that Mel Mermelstein was not a shy and retiring fellow. Mel Mermelstein, instead, was very much a public figure in the legal sense of the word, a real celebrity. Lane was confident that he could demolish Mermelstein's libel case in a heartbeat. But that was only a portion of a very complex case.

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<sup>1</sup> / For details regarding Mark Lane's involvement in the controversy over the JFK assassination and his subsequent work for Liberty Lobby in the Hunt libel case, see Lane's book *Plausible Denial*, published by Thunder's Mouth Press, New York, 1991.



There was much work ahead in preparation for the courtroom bout with Mel Mermelstein. And Mermelstem himself was still not finished in filing charges against the IHR and Liberty Lobby. There was more to be seen.

## Chapter Seventeen

### A Prevaricator Under Oath

Upon entering the case, Mark Lane sought out the opportunity to question Mermelstein under oath in deposition. It didn't prove to be such a simple matter. Mel Mermelstein proved to be a less than cooperative witness, to say the very least. Deposing Mel, Lane commented later, proved to be "quite a remarkable experience." <sup>(1)</sup>

Lane's first deposition of Mermelstein, conducted at the law offices of Robert A. Von Esch, Jr. in Fullerton, California on December 15, 1989, was a contentious affair.

Lane's initial effort was to determine the basis upon which Mermelstein and his attorneys had concocted what essentially was a grand conspiracy theory linking the IHR to Liberty Lobby, the Washington-based institution that Lane was representing.

Mermelstein's complaint alleged that the IHR and Liberty Lobby were essentially one and the same entity (which they were not) with an interlocking directorate (which did not exist) controlled solely by Willis A. Carto – that the IHR, Liberty Lobby and Carto were essentially, under a twisted case of legal generalization, alter egos of one another.

The questioning in regard to this issue went on at some length, with Mermelstein unable to cite any hard evidence of his charge, and his attorneys continually objecting to Lane's probing inquiries.

Finally, at one point, Mermelstein cried out, "Who are you kidding ? Who do you think you're dealing with ? You're dealing with anti-Semitic groups, is what it is. Believe me, I have no problem with that, people who love to Jew-bait. Okay ? And they can Jew-bait all they want. They're going to leave this Jew alone, you understand that ? That's what I'm trying to tell you." <sup>(2)</sup>

Lane was unflappable: "My question, Mr. Mermelstein – perhaps you can recall it –" he began again, after Mermelstein had quieted down, once again asking Mermelstein for evidence to support his claims.

In the end, it seemed, Mermelstein was simply relying on his attorneys for the veracity of the claims he was making in

[108] his malicious prosecution action. Mermelstein was unable to prove that, contrary to his allegations, there was any "interlocking directorate" or "commingling of funds" or any such relationship between the IHR and Liberty Lobby.

At one point during his questioning he made a lame attempt – never completed – to allege that the two separate organizations used the same U.S. postal mailing permit – or something (he wasn't quite sure what he was referring to, saying, half to himself, "What the hell is that?") but he abandoned that effort mid-sentence.

(Lane later remarked, not altogether facetiously, that "If Willis Carto had been a member of the U.S. Marine Corps, it's altogether conceivable that Mermelstein might have brought the Marine Corps in as defendants." <sup>(3)</sup>)

When Lane finally – perhaps with a bit of frustration at the deponent's non-responses – asked Mermelstein if he would be willing to waive his attorney-client privilege so that Lane

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<sup>1</sup> / Recorded comments by Mark Lane (unpublished).

<sup>2</sup> / Quotations which follow, until otherwise noted in the text, are taken directly from the official transcripts of the depositions of Mel Mermelstein by Mark Lane on November 1, 1989 and December 15, 1989 in the case of *Mel Mermelstein vs. the Legion for the Survival of Freedom, et al.* Case No. C629224. Superior Court for the State of California for the County of Los Angeles.

<sup>3</sup> / Recorded comments by Mark Lane (unpublished).

could depose Mermelstein's attorneys to find out what information they had regarding the alleged relationship between the IHR and Liberty Lobby, Mermelstein gave what was perhaps his most candid and forthright response of the day: "You've got to be kidding."

When he is conducting a deposition or cross-examining a witness, Mark Lane is no shrinking violet. He can be tough. His questions direct. His tone sharp. That unnerved Mermelstein who was accustomed to fawning and friendly questions from an admiring media. At one juncture Mermelstein's attorney objected to what he called Lane's "tone of voice." With some exasperation Lane pointed out, "My tone of voice is one of pleading to get one responsive answer before night falls."

As the deposition dragged on, Mermelstein apparently became aware that he was under the gun. He was facing tough questions in this case, probably for the first time, and it was, undoubtedly, causing him genuine emotional distress – perhaps for the first time since 1981 when he'd filed his first lawsuit against the IHR alleging that he had suffered emotional distress.

In a moment of passion he cried out at Lane, "What's you're making me here is look like a schmuck, and it ain't going to work, my friend," (although, by that time, Lane had succeeded, whether intentionally or not).

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It was mid-way through the deposition that Mermelstein lost control. When Lane was pressing Mermelstein on the suffering that he claimed he had suffered as a result of the IHR's libel suit being filed against him, Mermelstein said simply: "Sorry you haven't been in Auschwitz."

Lane was taken aback, but asked, "You're sorry I wasn't there?" (He wanted to clarify that Mermelstein had indeed said what he thought the deponent had said.)

Mermelstein didn't back down. "Yes," he acknowledged. "I wish you had been and lost a mother and father, a brother and sister, aunts and uncles, then you would know—"

It was then that Mermelstein's attorney, Mausner, broke in – or attempted to – saying, "Mel—" but Mermelstein pushed on. "Then you'll know," he told Lane, "what suffering means in relation to this barbaric event."

But Lane wasn't asking about the Holocaust. He was asking about the libel suit. He turned to Mausner and addressed the attorney directly. "I'm going to take a recess now," he said. "During that recess I'm going to ask you to talk with your client. I have practiced law for 38 years. No one, however emotionally upset or distressed, has ever said to me 'I'm sorry that your parents weren't killed.' Nobody ever said that to me during a deposition.

"I'd like you to meet with your client and see if you can control him so that he can conduct himself as a normal human being and a plaintiff in this case in California." With that the deposition went into recess, but it was far from over.

Upon returning, Mermelstein had composed himself somewhat and made a feeble attempt to explain himself for the record, undoubtedly at the prodding of his attorney. The pain and suffering from the Holocaust that he had endured, he said, was "part and parcel" of the suffering he had undergone as a consequence of the IHR's libel suit. Mermelstein suggested that this was his apology. Lane said simply, "If in fact that is an apology, I accept it."

However, Lane was ready to continue the deposition and Mermelstein quickly reverted to his previous, unapologetic behavior. In a short while, in fact, in response to a question from Lane, Mermelstein snapped, "Are you calling me a liar?" Mermelstein's own lawyer, at one point – and this was not the

[110] first time during the deposition – said to Mermelstein, "Don't argue."

When Lane began questioning Mermelstein about a variety of public statements he had made regarding his experiences in Auschwitz, Mermelstein told Lane that, as a consequence of what he was about to tell him, "I can tell you your hair is going to get grayer than it is now."

Lane responded, "It's getting grayer during this deposition," and then pushed on. He began to ask Mermelstein to address the issue of whether or not he believed his reputation had been damaged among the readers of the IHR's publications – the primary recipients of a publication that did not generally reach the public, at large.

(This was part of what proved to be the IHR's "privileged communication" defense to the libel charge; that is, that the IHR's published comments about Mermelstein appeared in a newsletter that was essentially a privileged communication to a well-defined and limited

audience with a special interest in its subject matter, rather than a publication offered to a broad audience with various interests. If this defense prevailed, Mermelstein's ability to recover meaningful damages would be severely limited.)

When Lane asked Mermelstein if it was his position that "the people who edit and publish the *IHR Newsletter* are neo-Nazis," Mermelstein answered, "They're Jew-haters, they're Jew-baiters, they're anti-Semites, you know, they're all sorts of things that have been quoted, not only in documents, but I know, I know from my own self when they hurt, use, and abuse a guy like me, they're no more, no less than Jew-baiters, Jew-haters, and call them neo-Nazis, old Nazis, whatever you like."

Ultimately Mermelstein described the IHR's publications as "garbage." So, in that vein, Lane asked Mermelstein, "Are you concerned about your reputation among the people who read that 'garbage'?"

Mermelstein responded, not exactly answering the question, by saying, "There's no question that everybody in my position or rather anyone who lived through what I lived through would be concerned with it. But just a minute."

Lane asked finally, "Just answer yes or no." However,

[111] Mermelstein's lawyer jumped in, saying, "I think he answered it. He answered it." Mermelstein concurred.

At that point Lane said, "Now, don't you take the position, Mr. Mermelstein, that when these Jew-baiters publish this 'garbage' about you that it's a badge of honor for you, considering the source? Don't you take that position?" Mermelstein's attorney objected, but Mermelstein replied, "You're twisting it into that."

In the end Mermelstein was unable to cite anyone – *IHR Newsletter* readers included – who had told him that their opinion of him declined as a consequence of reading in the IHR publication that he was a "demonstrable fraud."

What's more, Mermelstein was unable to remember precisely how or when he had learned that he was the defendant in the IHR's libel suit against him – the very libel suit he claimed had caused him so much emotional distress.

So it was that Mel Mermelstein's first deposition at the hands of Mark Lane left him reeling. But Lane wasn't finished questioning Mermelstein by any means.

When Lane returned to California on December 15, 1989 to once again depose Mermelstein, the situation had not changed for the better.

Mermelstein's answers were often argumentative, vague, imprecise, even misleading. Mermelstein's lawyer, Jeffrey Mausner, did little to help move the situation along, continually interrupting with objections.

For example, when Lane asked Mermelstein, "Do you know an organization known as the Auschwitz Study Foundation?" (referring to Mermelstein's own tax-exempt foundation), Mausner cried out, "Objection. Irrelevant."

After much struggle and repeated efforts to address the question in a way satisfactory to Mermelstein's lawyers, Lane finally got an answer. Mermelstein responded, saying, "I have – know a lot of organizations that have to do with Auschwitz."

Lane pressed on and asked again, "Do you know of any organization called Auschwitz Study Foundation?" Mermelstein acknowledged that he did. However, when Lane asked "What is that organization?" Mermelstein responded, "I don't know."

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Again, after much struggle and repeated efforts by Lane to elicit a solid answer, Mermelstein admitted, albeit reluctantly, that he, indeed, was the founder of the Auschwitz Study Foundation.

When, in questioning Mermelstein about the suffering he alleged as a consequence of the IHR filing its libel suit against him, Lane asked, "Why did the filing of the lawsuit make you suffer, Mr. Mermelstein?" the witness had an interesting answer. He answered with a question: "You mean to tell me a three and a half million dollar lawsuit that you slap on a death camp survivor like me for no reason will just leave him completely and totally unaffected?"

The legal merits of Mermelstein's comments regarding the lawsuit notwithstanding, it is nonetheless interesting that Mermelstein once again reverted to his "Holocaust survivor" status – as though, in effect, one is not permitted to bring a legal action against a Holocaust survivor.

When Lane pressed Mermelstein as to why he did not take immediate action – why it

took him and his lawyers some fifteen months to file claim against the IHR for filing the allegedly malicious libel suit against him – Mermelstein's attorney objected. But Mermelstein finally said, "You're going to have to ask [the lawyers]. I don't know."

When Lane asked Mermelstein if he could give him the names of people that he (Mermelstein) socialized with, Mermelstein said he couldn't. Why couldn't he? Because, said Mermelstein, "I don't know."

One of the reasons Mermelstein was so resistant in naming his friends and associates, he told Lane, was that "I am just telling you here and now, once again, that you are a group of dangerous individuals, and I'm not going to expose any one of my people, colleagues, who lived through the death camps, to your brutal characterization and to your brutalizing them."

What's more, he told Lane, "You're one of my enemies, because [your clients] filed that frivolous lawsuit against me... And I'm telling you here and now," he vowed, "you will have to answer for it."

Lane later described his overall impression of his encounters with Mermelstein: "Here was a man who, in his public statements and lectures and in interviews with the press,

[113] had a lot to say about the Holocaust and his personal experiences. But under oath, it was 'I never said that... I don't know how those statements of mine got in the press. Why they said that, I'll never know... Holocaust ? What Holocaust ? What do I know about those things ?' (1)

Mermelstein had clearly not enjoyed his encounters with Mark Lane, but there were more ahead. And so the case dragged on.

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<sup>1</sup> / *Ibid.*

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## Chapter Eighteen

### A Vexatious Litigant

It was on April 30, 1990 that Mel Mermelstein discovered that he had suffered additional damages and distress as a result of the actions of the IHR, Liberty Lobby and Willis Carto. On that date Mermelstein expanded his libel complaint against the defendants. Until this time Mermelstein's only charge of libel against the IHR stemmed against the *IHR Newsletter's* allegation (in September, 1985) that he was a "demonstrable fraud."

Now, almost five years after that issue of the *IHR Newsletter* (declaring Mermelstein to be a "demonstrable fraud") had been published and distributed, Mermelstein was claiming that other statements made in that same newsletter were also libelous. This apparently was a recent discovery albeit a bit late, to say the least.

What's more, this emendation to Mermelstein's libel complaint was coming fully four years after he had first included the alleged libels from the September 1985 *IHR Newsletter* in his initial lawsuit.

The first recently-discovered alleged libel was the statement in the newsletter which declared Mermelstein to be "perceived as a fool" by the Jewish community.

There were two other allegedly libelous statements, descriptions of some Holocaust survivors being "false tale spinners" and "vainglorious prevaricators." However, in fact, these descriptions were not specifically describing Mermelstein (whether or not Mermelstein actually perceived them to be).

To complicate matters, Mermelstein and his attorneys had decided to amend their initial complaint to allege a new cause of action: conspiracy. He alleged that the IHR and its parent company, the Legion for the Survival of Freedom, in conjunction with Liberty Lobby, and Willis Carto, had conspired to inflict emotional distress upon him.

In the months that followed, the IHR began looking further and further into the affairs of Mel Mermelstein. It turned out that Mermelstein, in fact, was involved in other litigation, until then unbeknownst to the IHR, which involved

[116] the IHR. Mermelstein, you see, had filed a lawsuit against an insurance company in a bizarre complaint that stemmed directly from his legal bout with the IHR. Thus, the IHR moved to find out precisely what was happening.

It was on August 7, 1990 attorney Mark Lane took the deposition of Mermelstein's attorney, Jeffrey Mausner, who was one of the battery of attorneys who had lined up behind Mermelstein.

(Mausner himself had a special interest in the Holocaust, inasmuch as he had been a former prosecutor at the Justice Department's controversial – and later-to-be-scandal-ridden –, Office of Special Investigations, the so-called "Nazi hunting division" financed by American taxpayers.)

It was at that time that the IHR learned, for the first time, that the Hartford Insurance Company had paid Mermelstein what ultimately proved to be some \$60,000 in damages (and an additional \$22,000 in legal fees to Mausner) resulting from Mausner's defense of Mermelstein against the IHR's libel suit that had never been served on Mermelstein and which, in any case, had been dismissed long before – on February 29, 1988.

At that point, the IHR served a subpoena on the Hartford Insurance Company and obtained its records of the company's dealings with Mermelstein (through his attorney, Mausner). This proved to be a treasure trove of material that could potentially blow

Mermelstein's lawsuit right out of the water.

Among the interesting things discovered in that file was a 21 -page letter (dated February 25, 1988) sent by Mausner to Hartford. In that letter Mausner insisted to Mermelstein's insurer that the libel suit by the IHR was not frivolous – that it was indeed a serious matter. (This letter, of course, was sent just four days before the IHR advised that it was planning to drop the libel suit in question.)

This, of course, belied Mermelstein's claim, in his lawsuit against the IHR for malicious prosecution, that the since-dismissed libel suit had been frivolous to begin with, that there had not been probable cause on the part of the IHR and its attorneys to file the suit against him.

(In short, when he and Mausner wanted Hartford to pay for Mausner's legal fees, the two alleged that the libel action was a very serious matter. However, at the same time before

[117] the court in the malicious prosecution case against the IHR – hoping to win additional cash pay-offs – the two were alleging that the same libel action was frivolous, and therefore the basis for a malicious prosecution claim. They were trying to have it both ways.)

Records also revealed that because Hartford had refused to pay Mausner's legal fees – precisely because of the fact that Mermelstein had never been served in the IHR's libel suit – Mermelstein sued Hartford in federal court in Los Angeles on June 7, 1987. Here was yet another legal action – demanding money – by the litigious Mel Mermelstein.

The allegation put forth by Mausner on Mermelstein's behalf, interestingly enough, was that Mermelstein suffered emotional distress as a result of Hartford's refusal to pay. That same period in which the Hartford was supposedly inflicting emotional distress upon Mermelstein, it just so happened, was the same period in which the IHR was allegedly causing so much distress for the poor man. (1)

To the IHR, Mermelstein's suit against Hartford sounded vaguely familiar. It charged Hartford with: 1) Breach of statutory duties; 2) Bad faith denial of insurance benefits; 3) Breach of fiduciary duties; 4) Breach of written contract; 5) Declaratory relief; 6) Intentional infliction of emotional distress; and 7) Negligent infliction of emotional distress. (2)

So, the big question was, if Mermelstein was undergoing so much emotional distress during this time – who was responsible: the IHR or the Hartford or both? And if he was undergoing this difficulty, who bore the most responsibility for that alleged distress ? This was a question that the IHR's attorneys wanted to answer.

What's more, it appeared as though Mermelstein (and Mausner, too) were trying to engage in the proverbial "double dip." They demanded – and got – a sizable cash pay-off from the Hartford for the defense of the libel action against Mermelstein by the IHR.

Yet, they were demanding more, going back to the trough and asking the IHR to pay damages for the alleged malicious prosecution (the never-served and since-dismissed libel suit) and Mermelstein's alleged emotional distress that supposedly accompanied the lawsuit.

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As it was, Hartford had agreed to settle with Mermelstein for \$60,000 although he had initially demanded \$100,000 for the pain and suffering he claimed to have suffered as a consequence of Hartford's initial reluctance to pay his legal fees.

Mausner himself was given what was essentially a blank check and permitted to present a bill to the Hartford for his work in representing Mermelstein. In the end, Mausner himself received \$22,000 from the Hartford.

Attorney Joseph Andrews who represented Hartford in the settlement negotiations (following the filing of Mermelstein's lawsuit against the insurance company) had advised his clients exactly the kind of approach that Mermelstein's attorneys intended to take if the case ever went to a jury:

"[Mausner, representing Mermelstein] argued that this case would be dangerous in front of a jury. He argues a jury will be sympathetic to a man who survived a Nazi concentration camp, was sued by 'the Nazis,' and was denied a defense by his insurance carrier where the duty to defend was clear." (3)

<sup>1</sup> / Declaration by Attorney Charles Purdy. November 6, 1990. *Mel Mermelstein v Legion for the Survival of Freedom, et al.* Case No. C629224. Superior Court for the State of California for the County of Los Angeles.

<sup>2</sup> / First Amended Complaint in *Mel Mermelstein vs. Hartford, et al.* U.S. District Court for the Central District of California. Case No. 8703977 AWT (Kx). July 7, 1987.

<sup>3</sup> / Letter from Attorney Joseph Andrews (dated Nov. 17, 19-7) to The Hartford in recommending settlement of *Mel Mermelstein vs. Hartford, et al.*

In other words, the clever Mausner and his professional Holocaust survivor client, Mermelstein, were ready to dredge up the Holocaust and sympathy to its survivors to force a cash settlement in yet another breach of contract case, although the Holocaust had nothing whatsoever to do with Mermelstein's claim against the insurance company. If Hartford didn't surrender, Mausner threatened in essence, it would be flayed as a supporter of the Nazis and an enemy of suffering Holocaust survivors.

So, needless to say, Hartford settled on January 13, 1988 and Mel Mermelstein's attorney picked up \$22,000 in attorney's fees for his defense of Mermelstein against the never-served and subsequently-dismissed IHR libel suit. And Mermelstein himself, of course, walked away with \$60,000 in "damages" for his "suffering" – a princely sum indeed. <sup>(1)</sup>

As a consequence of all of these revelations, the IHR wanted to pursue Mermelstein's dealings with his attorneys further and asked for the opportunity to depose Mausner once again – a prospect that neither Mausner nor Mermelstein savored.

In fact, in a legal declaration prepared for the court, IHR

[119] co-counsel Chip Purdy went so far as to charge that, "the subject records [from the Hartford] indicate that Mausner, who appears to be the driving force behind [Mermelstein's] unceasing litigation efforts, committed insurance fraud." <sup>(2)</sup>

Purdy noted that because an insurance company, such as Hartford, is never required to provide legal defense for an insured party (in this case, Mermelstein) until the insured has been served with a summons in a case, "Mausner must have told [representatives of Hartford] that Mermelstein was at some time in fact served. However, [Mermelstein] never was, according to Mark and Robert Von Esch [attorneys for the IHR]." <sup>(3)</sup>

(In fact, records from the Hartford indicate that when Mausner wrote the Hartford on December 2, 1986 asking for the company to provide Mermelstein's legal defense fees, the Hartford advised Mausner in a letter dated December 15, 1986 that "apparently the suit had not been served on [Mermelstein] at the time of your letter." <sup>(4)</sup> And, of course, this suit was never served.)

There was other evidence of possible insurance fraud. An attorney representing Hartford in the Mausner-Mermelstein lawsuit against the insurance company had written Hartford advising them that Mausner sought to charge Hartford \$5,000 for preparing a legal document. The legal document described by Mausner purported to be a letter responding to matters ostensibly put before him by the IHR's attorneys. However, according to Purdy, "none of the attorneys... so negotiated with Mausner," <sup>(5)</sup> in this particular matter.

Yet, this was not the only "Holocaust" litigation that Mel Mermelstein was engaged in. The IHR discovered that on April 7, 1989 the Hollywood celebrity had filed suit against the National Broadcasting Company (NBC) in the Los Angeles County Superior Court.

Yes, more litigation from Mermelstein, a vexatious litigant if ever there was one. Representing him, once again, was none other than William Cox who had launched Mermelstein's first nuisance suit against the IHR eight years previously, but who had otherwise disappeared from the scene. What's more, Cox was also a co-plaintiff himself as was Mermelstein's wife, Jane.

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(As noted earlier, IHR founder Willis Carto had won a federal defamation action against Cox in 1983, but Cox had "disappeared," escaping the sheriff. He has not paid Carto the \$2,500 in damages due to this day.)

Essentially, Mermelstein was angry that NBC had produced a television drama on the issue of the Holocaust and the story of someone who was fighting Holocaust revisionism.

He claimed that his story had been appropriated by NBC and that he, his wife, and Cox "were deprived of payment for the use of their life stories in a production televised by [NBC] and have received no profit or other compensation for their time and energy spent in the furtherance of the project and for the invasion of their privacy and personal lives, by which

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<sup>1</sup> / Photocopy of \$60,000 check from Hartford to Mermelstein and attorneys.

<sup>2</sup> / Declaration of attorney Charles Purdy.

<sup>3</sup> / *Ibid.*

<sup>4</sup> / Letter from I. Herrera, Jr., representing Hartford to Jeffrey Mausner (dated December 15, 1990).

<sup>5</sup> / Declaration of attorney Charles Purdy.



[they had] each been damaged in the amount of \$100,000." <sup>(1)</sup>

What had happened was that actor/producer Leonard Nimoy and a colleague had contracted with Mermelstein, his wife and Cox to do a dramatic presentation of their first legal encounter with the IHR. Nimoy and NBC likewise reached an agreement that the television giant would broadcast the film.

In the meantime, however, NBC broadcast another Holocaust revisionism-related drama and then, ultimately, declined to go ahead with the production of the Mermelstein film. This sparked Mermelstein's case against NBC.

Ultimately, however, as we shall see, Nimoy's film was indeed produced and broadcast on national television – time and again – with much fanfare.

Nonetheless, Mermelstein's complaint against NBC was sheer fantasy in every way, shape and form.

NBC had indeed broadcast a story about someone fighting Holocaust revisionism – on the night of April 10, 1988 – about one year prior to the filing of Mermelstein's suit against NBC. The title of the film was *Scandal in a Small Town*. Contrary to Mermelstein's claim that this drama was "based upon the same facts," <sup>(2)</sup> as his story, nothing could be further from the truth.

Starring as the foe of revisionism – presumably in Mel Mermelstein's mind, his film land counterpart – was glamorous movie queen Raquel Welch.

In advertising for the heavily-promoted drama, Miss Welch was pictured in a low-cut, tight-fitting halter top,

[121] standing in front of a bar-balancing a tray of beer mugs in her right hand, her left hand provocatively draped upon her shapely mid-section.

Here was the plot of "Mel's life story" (at least as he perceived it) as described in *TV Guide*: "A 'scandal in a small town' erupts over the confrontation between a cocktail waitress (Raquel Welch) with a shady past and a well-respected high school history instructor (Ronny Cox) she accuses of teaching anti-Semitism." <sup>(3)</sup>

Obviously, this story had nothing to do with the Mermelstein case although Mermelstein and Cox complained that NBC had failed to present "their lives... in a dignified and respectful manner." <sup>(4)</sup> The only actual similarity, obviously, was a vague relationship to Holocaust revisionism which was apparently part of the "anti-Semitism" detected by the character played by Miss Welch.

Perhaps Mermelstein was mixing reality with fantasy, something which he has been accused of doing in other matters. Perhaps he was confused by the fact that the actor who played the troublesome high school teacher had the same name – Cox – as his eccentric attorney. Whatever the case, it was clearly an outrageous piece of litigation with no basis in reality. NBC had clearly not stolen Mel Mermelstein's life story.

However, in his complaint here is how Mermelstein described the NBC production: "*Scandal in a Small Town* was based upon a story line involving a defense against a denial of the Holocaust, and except for changing the sex of the principal roles and location, was based most entirely upon the life stories of the plaintiffs. The presentation misrepresented the true life story, however, by depicting tragic and profound moments in [Mermelstein's life] in a cheap and tawdry fashion." <sup>(5)</sup> Obviously, *chutzpah* is a word with real meaning to Mel Mermelstein.

What's more, NBC's *Scandal* was a revamp of a previous television drama broadcast over the ABC network much earlier in 1988. This film was entitled *Evil in Clear River* (ostensibly a small town in Western Canada), and, according to *TV Guide*, "covered much the same ground – with better performances and a more cogent script" <sup>(6)</sup> than *Scandal*.

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In this romp, the anti-revisionist heroine, once again fighting a high school teacher who said that the Holocaust didn't happen, was played by veteran television star, Lindsay Wagner, who, incidentally, did not bare her bosom in advertising for the docu-drama.

<sup>1</sup> / *Mel Mermelstein vs National Broadcasting Company*. Case SOC97699, Superior Court of the State of California for the County of Los Angeles. April 7, 1989.

<sup>2</sup> / *Ibid.*

<sup>3</sup> / *TV Guide*, April 9-15, 1988.

<sup>4</sup> / *Mermelstein vs. NBC*.

<sup>5</sup> / *Ibid.*

<sup>6</sup> / *TV Guide, Ibid.*

The high school teacher, seemingly a wonderful man popular among his students and popular enough among his neighbors to be mayor of Clear River, turns out to be a raving revisionist madman. In the end, Wagner brings him down.

Now this film's producers were very frank about the origin of their idea for the script. In a small town, Eckville, in Alberta, Canada, in the mid-1980's, a high school teacher, one James Keegstra (who was also mayor) became the subject of controversy because of his views on the Holocaust, which views he was teaching in the classroom.

After being fired for his views, and after being convicted in 1985 under Canada's restrictive "hate crimes" laws – the first such prosecution brought – Keegstra's story – or a variation thereof – became, very clearly, the subject matter for not only ABC's production but that of NBC as well.

(Keegstra's conviction, incidentally, was overturned in 1991. Keegstra served as his own attorney during his retrial and was convicted again, and fined \$2,640 for his "hate crime." Needless to say, this case did attract the attention of the IHR and revisionists worldwide and Keegstra himself spoke at an IHR conference.)

Despite all of these cold, hard facts, Mel Mermelstein still saw in the Keegstra story (or at least NBC's version) an opportunity for a lawsuit. This vexatious litigant simply could not resist the courtroom drama and the potential profit and publicity arising from this clearly frivolous suit. However, for whatever reason, the case never went any further. On August 30, 1991 the judge assigned to the case made a motion that Mermelstein should move to dismiss his action. On October 22, 1991 Mermelstein's motion to dismiss was granted. Mermelstein and his wife and Cox, as a consequence, were unable to collect any money from NBC.

As Mark Lane later remarked, "Mel Mermelstein was very much a public figure. Not only was he peddling his story all around to the TV networks, but he had decided that he had

[123] some sort of proprietary interest in the Holocaust. That's what he was suggesting when he brought this suit against NBC." <sup>(1)</sup>

What's more, Mermelstein should have been happy. Hollywood hotshot Leonard Nimoy, as noted earlier, was already in the process of bringing Mermelstein's story to television land. Mermelstein's story, in fact, was tentatively scheduled for release in the summer of 1991 – and in the scheme of things this was not so very far away.

As of late 1993, Mermelstein's nuisance suit against NBC lay dormant in the courts. No substantial affirmative action had been taken. Could it be, perhaps, that Mermelstein and his attorneys realized that they had gone just a bit too far – that a jury might not be pleased to learn that Mel and company were making lots of money filing lawsuits, especially one so frivolous and nonsensical as the complaint against NBC ?

All of this was a clearly interesting twist in Mel Mermelstein's trail of litigation launched some ten years before and obviously damaging, in more ways than one. It appeared as though Mermelstein and his attorneys were campaigning to get every penny they could from every possible source – and to use whatever means possible.

In the meantime, however, Mermelstein and his attorneys were keeping the IHR and its attorneys busy. The battle was far from over. It had only just begun.

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<sup>1</sup> / Recorded comments by Mark Lane (unpublished).

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## Chapter Nineteen

### Judicial Notice, Again

Mermelstein and his attorneys were determined to have the court reaffirm Judge Johnson's controversial 1981 judicial notice that Jews had been gassed at Auschwitz. The IHR and its attorneys were prepared to fight that reaffirmation. Nonetheless, it was obvious from the beginning that it would, once again, be tough sledding for the IHR.

The reaffirmation of the judicial notice was essentially a public relations and propaganda ploy by Mermelstein who wanted to focus on the trial being about "the Holocaust." However, as the IHR's attorneys argued to the court, even the allegedly libelous remark about Mermelstein being a "demonstrable fraud" had nothing to do with the Holocaust. It had simply to do with Mermelstein's personal claims about his own experiences – again, not about the Holocaust.

Judge Stephen O'Neil, who was to hear the arguments and make the decision regarding reaffirmation of the judicial notice was clearly no friend of the IHR. The IHR's attorney Bill Hulsy later slammed the judge, commenting that "never before" <sup>(1)</sup> in his 23 years of practicing law had he experienced what he described as the "rude" <sup>(2)</sup> behavior on the part of the judge.

It was obvious to everyone on the IHR team that O'Neil simply did not like the IHR. In fact, according to Hulsy, the judge took advantage of every opportunity he could to make snide remarks to the IHR's attorneys. The atmosphere, Hulsy said, was "hostile." <sup>(3)</sup>

It was Judge O'Neil who prevented the IHR from derailing Mermelstein's libel case in the earliest procedural stages of the litigation. Although a California statute permitted a newspaper to retract items that litigants claimed were libelous – and the IHR was willing to retract the allegedly libelous statements about Mermelstein to put an end to the litigation – Judge O'Neil said that the IHR newsletter did not qualify under the statute to be treated as a newspaper, contradictory case law notwithstanding.

Be that as it may, the IHR was before Judge O'Neil on the

[126] matter of the reaffirmation of the ten year old judicial notice, and it threw all of its resources behind the effort to put up at least this one roadblock in Mermelstein's drive toward another trial.

On January 10, 1991 the editor of the IHR's *Journal of Historical Review* submitted a declaration in opposition to Mermelstein's request for judicial notice in which he outlined a considerable body of new evidence which had come forth since the first IHR encounter with Mermelstein.

The declaration provided the court additional facts which would contradict the theory that the gassing of Jews was a fact not subject to dispute. The declaration read in part:

"Proving that Jews were not gassed at Auschwitz is not essential to sustain that Mr. Mermelstein is a demonstrable fraud. The numerous contradictions in Mr. Mermelstein's public statements regarding his alleged witnessing of the gassing of his relatives and the wide divergence from generally established fact about Auschwitz in Mr. Mermelstein's public statements are sufficient

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<sup>1</sup> / Recorded comments by William Hulsy (unpublished).

<sup>2</sup> / *Ibid.*

<sup>3</sup> / *Ibid.*

to show that Mr. Mermelstein cannot have proved his parents or anyone else were gassed at Auschwitz, and that his repeated claims to have done so to the detriment of the scholarly reputation of the IHR are fraudulent.

"Judicial notice should not be taken of the claim that Jews were gassed to death at the Auschwitz concentration camp in Poland in 1944. A substantial body of writing and research, much of it carried out since 1981, has disputed precisely that contention.

"Since the mid-1970's especially, a growing number of researchers, generally referred to as revisionists, has used the methods of scholarly historical inquiry to investigate the question of whether the National Socialist regime attempted to physically annihilate the Jews of Europe during the Second World War. A particular focus of revisionist inquiry has been the examination of the evidence for the existence of homicidal gas chambers at various concentration camps, including Auschwitz.

"Consideration of a recent authoritative study of the purported gas chambers of Auschwitz, *Auschwitz: Technique and Operation of the Gas Chambers*, written by Jean-Claude Pressac, a recognized researcher, and published by Beate and

[127]

Serge Klarsfeld, well-known proponents of the contention that Jews were gassed at Auschwitz during 1944, suffices to demonstrate that precisely that contention is subject to reasonable debate. As [a review of the book by an IHR staffer] indicates, Pressac's book provides evidence of intense controversy over the question of gassing at Auschwitz, and can validly be interpreted as strengthening revisionist arguments on that question.

"In 1988 a landed German immigrant in Canada, Ernst Zündel, engaged an American expert in the design, fabrication, and maintenance of execution hardware, including gas chambers, to travel to Auschwitz and conduct an on-site examination of each of the four buildings alleged to have been used for homicidal gassings in 1944, as well as other structures alleged to have been used for that purpose in earlier years. Analyzing the physical remains as well as blueprints, and securing samples from the sites, which he later submitted to chemical analysis for traces of the alleged poison, hydrocyanic acid, that expert, Fred Leuchter, found that the sites were not and could not have been used for homicidal gassing, and gave expert testimony to that effect before a Canadian court.

"David Irving, a leading historian of the Second World War who had previously accepted the thesis that gas chambers were used to kill persons at Auschwitz and elsewhere, changed his mind and became a public proponent of the revisionist theory that there were no homicidal gassings at Auschwitz in response to Leuchter's findings, testifying to that effect before the court in Canada. Subsequently Leuchter's findings were published as *The Leuchter Report*, the first expert study of the gas chambers at Auschwitz to be published since the Second World War, with a foreword by David Irving.

"Researchers who have studied the question of whether persons were killed by gassing at Auschwitz have not restricted their investigations to physical inspection of the alleged gas chambers proper. They have gathered, evaluated, and criticized primary historical sources, including purported eyewitness testimonies and confessions of alleged perpetrators; German and Allied documents; photographs and films; contemporary press accounts; and memoirs.

"Revisionists have conducted sustained investigation into

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the function and purpose of the crematory buildings purported to house the gas chambers of Auschwitz. [An IHR report] *Auschwitz: Myths and Facts*, written in 1990, provides a brief introduction to the scope and methods of this investigation into the question of gassings at Auschwitz.

"Revisionist researchers have devoted careful study to the confessions of alleged Auschwitz perpetrators, often advanced as proof beyond reasonable question that homicidal gassings were carried out at Auschwitz, in particular the statements of Rudolf Höss and Johann Paul Kremer. Robert Faurisson has studied Höss's confessions made while in British custody in 1946, and produced important evidence to show that Höss's statements were obtained by physical and emotional pressure, and are consequently of dubious historical value.

"One consequence of the methods used to extract Höss's 1946 testimony is his claim that 3 million persons were gassed at Auschwitz while he was commandant was one source for the figure of 4 million wartime dead at Auschwitz, long maintained by the Auschwitz State Museum, and recently discarded, according to Israeli historian Yehuda Bauer, due to the Revisionist threat: as Bauer told the *New York Times*, "They [Revisionists] can add, you know," raising important doubts as to the credibility and competence of the authorities relied on by Mr. Mermelstein [in his "evidence" in favor of a second judicial notice that gassing of Jews had occurred at Auschwitz].

"Revisionists have also studied the questions raised by Höss's so-called 'Autobiography,' produced while in the custody of the Communist regime in Poland before his execution in 1947. Judge Wilhelm Stäglich and other revisionists have extensively analyzed published versions of the 'Autobiography,' remarking on the coercion regularly employed to obtain politically useful confessions during the Stalin era, on suspicions that the published text is incomplete and defective, and on anomalies contained therein regarding information about Auschwitz ascertainable from other sources.

"Judge Stäglich's suspicions as to the Höss confessions are shown to have ample foundations by the investigations of J. C. Pressac, as mentioned [in the IHR study of Pressac's book, which was attached as a supplement to the declaration].

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"Robert Faurisson has carefully analyzed the wartime diary of Dr. Johann Paul Kremer to show that Kremer's remarks therein do not offer strong evidence of homicidal gassings at Auschwitz.

"Revisionists have carefully studied the claims of Serge Klarsfeld to have documented gassings of Jews at Auschwitz. Robert Faurisson argues that Klarsfeld's lists, admittedly compiled by him from records of Jews deported from France, constitute no proof that Jews were gassed at Auschwitz, but only that many were transported there, a fact not disputed by Revisionists.

"Since 1980, in the United States alone, the Institute for Historical Review has published

numerous books and pamphlets dealing directly with the gassing and extermination theses, in particular the question of gassing at Auschwitz; distributed many more; and to date published 39 issues, comprising some 4,700 pages of its scholarly quarterly, the *Journal of Historical Review*, including numerous articles and reviews devoted to the study of whether homicidal gassings were carried out at Auschwitz during the Second World War.

"The academic enterprise devoted to researching and contesting the question of whether persons were gassed at Auschwitz during 1944, and the fevered controversy it has given rise to, cannot be dismissed by a citation from one general reference book such as the *Encyclopaedia Britannica* [as cited by Mermelstein], any more than the citation of any other *Britannica* reference would suffice to demonstrate an absence of doubt on the subject treated." (1)

As part of their effort to derail the IHR's opposition to their second demand for judicial notice, Mermelstein and his attorneys restated many of their same arguments used some ten years before. In a memorandum from their 1981 request for judicial notice, reproduced in their 1991 request, they cited an academic, Dr. Mary Brennan, whom they described as "an expert in the English language." (2) They had asked Dr. Brennan to analyze the published works of the Institute for Historical Review.

Here is what Dr. Brennan had to say in somewhat stilted English which causes one to question where she gained her vaunted expertise in that language:

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"The writers represented here are, almost without exception, ill fitted for the task of presenting complex problems in constructive and coherent essays. Many of them, like [Arthur] Butz, are dealing in matters outside their acknowledged field of expertise. They would be considered unfitted [sic] for inclusion in any highly-respected historical journal of reputation. In the present case, they seem to feed upon each other's neuroses. From [Johann Paul] Kremer to Butz, they are characterized by an overwhelming preoccupation minutiae [sic]. In the case of Kremer, it was stumptailed cats. With Butz et alia it is using suspect information obtained from questionable [sic] sources as a foundation for yet another, one-sided attack on Zionism and its proponents.

"Ultimately, the *Journal of Historical Review* is a highly propagandistic organ used for voicing the views of a handful of propagandists. It is equally as damaging as much of the anti-Semitic literature disseminated by the Nazi-Regime [sic] of Germany before and during World War II and used to promulgate racial and ethnic hatred.

"As such, the *Journal*, coated in its innocent-seeming cover of artificial slickness, appeals to minds already made up; it reaches those who seek in its pages corroboration, not enlightenment; and, fosters in those whose outlets for creative thinking are plugged up by prejudice, narrow-mindedness, and the basest of all emotions: hatred, fear, and violence." (3)

Unfortunately, Judge O'Neil, already predisposed to be biased against the IHR and Liberty Lobby, sided with Mermelstein. Once again the court formally took judicial notice of the alleged gassings at Auschwitz. No real surprise, of course, but an unpleasant ruling nonetheless.

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<sup>1</sup> / Declaration dated January 10, 1991. *Mel Mermelstein v Legion for Survival of Freedom, et al.* Case No. C629224. Superior Court for the State of California for the County of Los Angeles.

<sup>2</sup> / *Analysis of Defendant's Literature* (August 16, 1981) as appended to *Memorandum of Information Regarding Request for the Court to Take Judicial Notice, Mel Mermelstein v. Institute for Historical Review, et al.* Case No. 356 542. Superior Court for the State of California for the County of Los Angeles.

<sup>3</sup> / *Ibid.*

## Chapter Twenty

### An "Expert" Witness

Although, as previously noted, the IHR and Liberty Lobby were very much (and remain) independent entities, Mermelstein hoped to prove that the two institutions were, essentially, one and the same.

Mermelstein's argument in favor of that contention was, of course, the fact that Liberty Lobby's founder and treasurer, Willis A. Carto, not an officer, director or employee of the IHR, served as an unpaid advisor to the institute. By alleging that Liberty Lobby and the IHR were one and the same and both under the direct control of Carto, Mermelstein used that as a basis to include Liberty Lobby as a co-defendant alongside Carto and the IHR.

As proof of his contention that Carto and these independent entities were part of a conspiracy against him, Mermelstein called in a designated "expert witness" to testify on his behalf – to testify that Carto essentially "controlled" both the IHR and Liberty Lobby and that the two institutions were basically one and the same – alter egos of one another and of Willis Carto.

Mermelstein's expert witness was one Alan M. Schwartz, a high-level functionary in the national office of the Anti-Defamation League (ADL) of B'nai B'rith. Functioning as an illegally unregistered foreign agent for the nation of Israel, and as an intelligence and propaganda arm for Israel's Mossad, the ADL had focused its spying operations against Liberty Lobby.

The ADL's primary complaint against Liberty Lobby stemmed from the fact that the populist institution had long taken a forthright stance against U.S. taxpayer-financed foreign aid since its inception in 1955. In Israel's eyes (and therefore in the eyes of the ADL), this was opposition to foreign aid to Israel and therefore was "anti-Semitic."

Because of its intense interest in Liberty Lobby's activities, the ADL had devoted much time and energy to harassing Liberty Lobby and its work, publishing false, malicious and defamatory attacks on the institution, invading the personal privacy of its officers and employees, sending its

[132] agents into Liberty Lobby functions for disruptive activities and generally conducting other covert (and illegal) activities aimed at destroying Liberty Lobby. Clearly, the ADL was indeed "expert" on the subject.

So it was that ADL official Alan Schwartz was called in by Mermelstein and his attorneys to swear, under oath, that everything Mermelstein said about Liberty Lobby and the IHR was the truth, the whole truth and nothing but the truth.

Liberty Lobby took advantage of the inclusion of the ADL man as an expert witness to take a deposition from Schwartz. Conducting the deposition would be Mark Lane who had already succeeded in making life under oath difficult for Mel Mermelstein.

Since Mermelstein's attorneys had already declared that Schwartz was to be their "expert," this put Schwartz under the legal obligation to subject himself (and, indirectly, the ADL) to scrutiny under oath. Just as in an actual trial, Schwartz was obliged to answer Lane's questions to the best of his knowledge – under penalty of perjury.

The deposition was conducted in Manhattan in the office of a high-powered Park Avenue law firm, Eckhaus and Olson, which represented Mermelstein's interests during this deposition. The four-hour deposition was conducted before a video camera. (This author, representing Liberty Lobby, witnessed the deposition, quite an interesting experience, to say the least.)

Although, throughout the deposition, Schwartz was clearly uncomfortable, he managed (just barely) to maintain his dour – perhaps arrogant – demeanor, even when hard pressed to answer questions being put to him by Lane.

During the deposition Schwartz bragged openly about secret meetings held at ADL headquarters at United Nations Plaza in Manhattan where he and ADL bigwigs plotted against Liberty Lobby and the IHR.

Lane covered a broad array of issues and pinned Schwartz down. He forced the ADL representative to explain how his organization determines who is "anti-Israel" or "anti-Semitic," two of the favorite epithets leveled by the ADL against its targets.

All in all there were several hundred questions addressed to Schwartz, whose answers – and non-answers – were, at times, revealing. Schwartz admitted the use of spies, clandestine

[133] intelligence and other unpleasant methods of operation by the ADL aimed against not only Liberty Lobby and the IHR but against any and all perceived critics of Israel. Yet, nonetheless, even while under oath, Schwartz declined to provide specifics.

Under questioning, Schwartz did deny knowing the name "Roy Bullock" which Lane spelled out to him. In early 1993, Bullock was nationally and internationally revealed to be a veteran undercover operative for the ADL who had targeted both the IHR and Liberty Lobby as part of his spying. Bullock's exposure resulted in a scandal unlike anything the ADL had ever seen throughout its sordid history.

The spy scandal erupted in San Francisco in early 1993, but evidence indicated that what happened there was "just the tip of the iceberg in a nationwide network of domestic spying and security leaks," according to Phillip Matier and Andrew Ross, columnists for the *San Francisco Chronicle*. Matier and Ross reported that "Authorities believe that cops from at least a half dozen other federal and big-city police departments were also involved in trading or selling confidential police files" to a national spy network set up by the ADL.

In San Francisco, a former police officer, Tom Gerard, stole police intelligence files and then sold them to ADL informant Roy Bullock. After Bullock turned the stolen documents over to his superiors at the ADL's so-called "fact finding division," headed nationally by an "ex-Marxist" named Irwin Suall, the information would then, in turn, be channelled to the ADL's foreign principal, Israel's Mossad.

The *San Francisco Examiner* reported on March 9, 1993 that an official close to the investigation, speaking on condition of anonymity, told the *Examiner* that "There's probably six or eight Roy Bullocks" operating around the country on behalf of the ADL. Bullock himself – although based in San Francisco – is also known to have operated in Washington, D.C. where he unsuccessfully attempted to penetrate Liberty Lobby.

On several occasions Bullock showed up at the offices of Liberty Lobby, where this writer is employed, portraying himself as a supporter of the populist Institution. After a period of time, however, it became apparent that Bullock, instead, had an entirely different agenda. As a consequence Bullock was

[134] exposed in the June 30, 1986 issue of Liberty Lobby's weekly newspaper, *The Spotlight*, as an ADL operative.

Bullock heatedly denied the charge and even threatened to bring legal action, but, for reasons now quite obvious, never did so. It was not until nearly seven years later that *The Spotlight's* allegation was proven correct.

At the time the Bullock spy scandal erupted in San Francisco, dragging the ADL into an untidy controversy, the *San Francisco Examiner* noted that investigating authorities confirmed that, "a small group of undercover operatives throughout the nation" is being paid by the ADL to spy on ADL targets. According to the *Examiner*, "The operatives rely on local police and sheriff's deputies to provide access to confidential law enforcement and motor vehicle information, in probable violation of criminal law."

It was not until the advent of the San Francisco spy scandal that the ADL's criminal activities received in-depth public scrutiny. This followed an FBI and San Francisco police raid on ADL offices in Los Angeles and San Francisco, as well as the homes of the aforementioned Gerard and Bullock.

Discovered during the raids were not only classified intelligence files stolen from the Los Angeles and San Francisco police departments, but also files purloined from the Portland, Oregon police department.

(Interestingly, the FBI first took notice of Bullock's activities as a consequence of his covert dealings with agents of the South African government. In fact, Bullock's first dealings

with the South Africans arose from an attempt by Bullock to disrupt a meeting that he mistakenly believed was sponsored by Liberty Lobby. A South African diplomatic official was scheduled to speak at the meeting and Bullock arranged for the diplomat to be "warned" that Liberty Lobby was behind the meeting and that his appearance there would not be considered appropriate (by the ADL, that is.)

Bullock's intervention launched an ongoing relationship with South African intelligence that ultimately sparked the interest of the FBI and then the San Francisco authorities. This resulted in the raids on the ADL offices that brought the ADL's illicit spying activities to the public's attention. (1)

Evidence indicates that there were files from up to 20 police

[135] departments and other law enforcement agencies throughout California alone. What's more, additional information had been illegally intercepted from national police computer intelligence networks. All of this had then been turned over to the ADL and then, through the ADL, to Israeli intelligence. Investigators were astounded to discover names and personal information about some 12,000 people, largely from California, but from all across the country, all of whom, for whatever reason, the ADL had determined belonged on its own "watch list."

In light of the fact that the ADL maintains some 30 regional headquarters in virtually all of the major cities, it is not an exaggeration to extrapolate and suggest that there may well be the names of perhaps millions of Americans listed in the ADL's files, based on the figures discovered on the West Coast.

In the end, after much widespread negative international publicity, even including a major article appearing in the *Washington Post*, the ADL essentially got off scot-free. Although the San Francisco district attorney's office appeared to be on the verge of indicting the ADL and its top officials, immense pressure by the ADL and its supporters resulted in a strange settlement between the ADL and the San Francisco authorities.

The ADL agreed not to carry out any illegal spying activities – although it repeatedly denied having done so, the evidence notwithstanding – and also paid a piddling \$50,000 "fine" to the San Francisco District Attorney's office. Ironically the money was to be applied toward a special "hate crimes" unit in the district attorney's office which would investigate and prosecute "hate crimes."

In effect, the DA's office was asking the ADL to finance a taxpayer-sponsored investigative division that would, essentially, give official sanction to the very thing which got the ADL in trouble to begin with: searching out alleged "hate crimes."

Despite this, a wide variety of groups and individuals who learned that their names and personal information about them were found in the ADL's secret files began bringing legal actions against the ADL for invasion of privacy and civil rights violations. Liberty Lobby now can be counted among those bringing actions against the ADL.

What was, in the end, perhaps most interesting about the deposition in the Mermelstein case of ADL official Alan

[136] Schwartz by Liberty Lobby's attorney, Mark Lane, was that it essentially forced Mermelstein's attorneys to decline to list Schwartz among the intended "expert" witnesses during the intended forthcoming trial.

Although Mermelstein's attorneys never explained why they had decided to withdraw Schwartz (or anyone from the ADL) as an expert witness, IHR and Liberty Lobby officials generally agreed upon reviewing the transcript of the deposition that Lane, representing Liberty Lobby, had left the ADL "expert" reeling.

Lane generally made the ADL man uncomfortable, forcing him, in at least one instance, to admit that the U.S. Commission on Civil Rights (USCCR) had repudiated inflammatory language by the ADL that appeared in a draft report of a document prepared by the ADL on commission by the USCCR. Not only that, but a USCCR official had questioned the ADL's reliability, referring to its "liberal use of hyperbolic epithets." (2)

As an ultimate consequence, the USCCR declined to give its imprimatur to the ADL report. The ADL, incidentally, then chose to publish the document under its own auspices in

<sup>1</sup> / For details on the ADL spy scandal, see *The Garbage Man: The Strange World of Roy Edward Bullock*. (Washington, D.C.: Liberty Lobby, 1993).

<sup>2</sup> / Deposition of Alan Schwartz. *Mel Mermelstein vs. Legion for the Survival of Freedom, et al.* Case # C-629224 SOC 95211, Superior Court of the State of California, County of Los Angeles, Central District. (NOTE: Deposition conducted in New York City on January 16, 1991 by Mark Lane).



1982 under the title, *Hate Groups in America: A Record of Bigotry and Violence*. The ADL enthusiastically noted that the report had been prepared at the behest of the Justice Department. The ADL, however, failed to note that Justice had repudiated the report and refused to publish the document with its own imprimatur.

If the ADL had come forth purporting to be "expert" on the subject of Liberty Lobby and/or its alleged relationship with the IHR, its expertise could, conceivably, have come under heavy fire. The decimation of Alan Schwartz by Mark Lane during deposition had, essentially, put an end to that and probably did crippling damage to Mermelstein's plan of attack.

Mermelstein hoped to rely upon – presumed, but nonexistent – "damaging" evidence relating the IHR to Liberty Lobby and vice-versa and then present the two independent entities to the jury (should the case ever go to a jury) as being "racist" and "anti-Semitic."

But a jury trial was down the road. In the meantime, Mel was going to be getting much more media publicity than he had ever dreamed about.

## Chapter Twenty-One

### The Movie Star

In the midst of all of the legal tangling with Mermelstein, the IHR discovered that Mel was truly going Hollywood. He was going big time. Mel's story – the whole sordid tale of his very public fight with the IHR – was being made into a movie for television.

The brains behind the venture was long-time television and film star Leonard Nimoy, practically a household name as a consequence of his short-lived (but wildly popular) jaunt as "Mr. Spock" of televised science fiction's *Star Trek* fame.

Although Nimoy's jaunt into outer space (via the magic of television) lasted just a few seasons, a proverbial cult following for the show evolved, making the program (and its star) more popular than ever before: fan clubs, annual conventions, syndicated re-runs across the country, and several full-length multi-million dollar budget motion pictures made the talented Nimoy and his *Star Trek* colleagues international celebrities.

Casting himself as Mermelstein, Nimoy opted to abandon his pointed outer-space ears (*à la* Spock) for the Mermelstein film, but, once the venture hit the airwaves, there were more than a few revisionists who suggested that, portraying Mermelstein, Nimoy should have adopted Pinocchio's nose.

The *Hollywood Reporter*, the movie industry's in-house daily newspaper, even went so far as to describe the film as "the true story of an Auschwitz survivor who proved in court there had been a holocaust" (!) (this perhaps being Hollywood fantasy at its most fantastic).

(Initially the film was pompously titled *The Mermelstein Story* and then, later, *The Promise*. Ultimately when production was finished, it was entitled *Never Forget* – the promise that Mel Mermelstein presumably made to his father: that he would "never forget" what happened during the Holocaust.

During the developmental stages of the film the IHR learned – as a consequence of all the friendly publicity surrounding the upcoming melodrama – that the film was indeed in production. As a consequence, through its attorneys,

[138] the IHR advised Nimoy's film production company that there were serious concerns about the film, particularly in light of the fact that the film was being so widely publicized and was scheduled for debut just prior to the scheduled time of the impending trial.

"This movie and its attendant publicity may jeopardize our ability to receive a fair and impartial hearing when the case comes up for trial so soon after it is broadcast," stated a letter from the IHR sent by the IHR's attorneys to Mermelstein and Nimoy's legal advisors.

"With regard to the current lawsuit against the Institute by Mermelstein," the letter added, "we can, and fully intend, to prove that Mr. Mermelstein is demonstrably neither an eyewitness nor an expert with regard to a number of things he has written in his book, *By Bread Alone*, statements he has made in depositions, and what he has told the press on numerous occasions ...

"We believe that Mermelstein is a publicity seeker who deliberately and opportunistically changes his stories to suit current events and his audience. His wartime experiences do not make him an expert on Auschwitz nor do they qualify him to distort historical facts and invent new testimony...

"We urge you to rely on our representations of the facts in this matter, not Mermelstein's. Please consider what part self-aggrandizement and a desire for notoriety may play in the Mermelstein account ...

"It is clear to anyone who is aware of the facts," concluded the IHR, "that it is we who have

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<sup>1</sup> / *Hollywood Reporter*, August, 28, 1987, p. 3.

been harassed and persecuted, not Mermelstein." (1)

In any case, Mermelstein himself — apparently able to suspend his pain and suffering and emotional distress from reliving the Holocaust — jumped into the film action and actually portrayed his own father.

Mermelstein Sr. (played by Mel) is shown enthusiastically kicking a ball about with the Mermelstein children (a young actor playing "Little Mel" among them). This in the happy days before the Holocaust. Mel Mermelstein was truly now a Hollywood star — a bigger celebrity than ever before.

Prior to the network-debut of the film, which, of course, was being hyped by the media, Mermelstein and his co-star,

[139] Nimoy, even popped up in Fairfax, Virginia where they videotaped a one-hour special, called an "electronic field trip," broadcast to 4,000 schools across the nation.

A joint venture between Turner Educational Services, a subsidiary of Turner Broadcasting, and the Fairfax County school system, the program was supplemented with curricular guides on the Holocaust that were supplied to the school districts.

The telecast featured the two stars gabbing about the Holocaust along with one Ron Axelrod, a Fairfax teacher whose specialty was — you guessed it — that same Holocaust. To top off the affair, a half-hour synopsis of Mermelstein's silver screen saga was included in the broadcast. (Those who wanted to see the whole glorious production would simply have to wait.) Cassettes of the entire film, however, were rushed off to 20 select schools for special viewing of this latest entry into the never-ending series of Holocaust-related media presentations.

This Holocaust extravaganza was not over, however. A week later, Mermelstein and his fellow Holocaust enthusiasts — Nimoy and Axelrod — met again for a "teleconference" broadcast and accepted telephone calls from high school students from the 20 selected schools across the country that had been privileged to see the film in advance of the nationwide audience on the Turner network.

*TV Guide*, the bible of television addicts, outdid itself reviewing the Turner-Nimoy-Mermelstein Holocaust horror story. According to the television weekly, "Ted Turner's we-can-change-the-world films shown periodically on his channels have been mostly noble but dull. *Never Forget* changes that." (2) Describing the film as "both admirable in content and engrossing in content," (3) the magazine repudiated Nimoy's glory days as the pointy-eared space alien, Mr. Spock (which brought Nimoy worldwide fame and untold fortune) and declared his role as the Holocaust promoter-turned-revisionist fighter "the best thing he's ever done." (4)

The *Washington Post* advised the power-brokers in the nation's capital (along with anyone else who happened to follow the *Post's* lead in the Holocaust entertainment arena) that this latest offer was "not to be dismissed as just another

[140] Holocaust film," (5) (perhaps unintentionally reminding its readers that there were indeed so many such productions to choose from).

*The New York Times* — the ultimate arbiter of "Holocaust news-and-views" — gave *Never Forget* a reverential blessing, calling it a well-framed production that presented Nimoy giving Mermelstein "a wide and impressive range of personality colors" (6) (suggesting, perhaps, that this is precisely what the real-life Mel was lacking, his long time on the psychiatrist's couch and his flamboyant tale-spinning notwithstanding).

In what was perhaps a flight of fancy, maybe wishful thinking, the *Times* described Judge Johnson's highly debatable judicial notice as a "highly significant result" (7) that it found that "the Holocaust did indeed occur." (8) However, of course, this was not specifically in fact the finding of the judicial notice being hailed by the *Times*. Johnson ruled only on the specific point as to whether or not there were homicidal gassings at Auschwitz in 1944. He

1 / Letter from IHR to Karen Magid, attorney for Radnitz/Nimoy Productions, Oct. 24, 1990.

2 / *TV Guide* (Week of April 6- 12), p. 38.

3 / *Ibid.*

4 / *Ibid.*

5 / Cited in the *Los Angeles Times* [Orange County Edition] April 5, 1991, p. F- 1.

6 / *New York Times*, April 8, 1991.

7 / *Ibid.*

8 / *Ibid.*

said that there had been.

Referring to the impact of the judicial notice, the *Times* declared (again, not exactly correctly) that "the setback for neo-Nazis and former Nazis was stunning." <sup>(1)</sup> (Whatever the meaning of the *Times's* peculiar undefined distinction between "neo-Nazis" and "former Nazis" presumably the revisionists – the ruling was not a "stunning setback.")

Significantly, not knowing what would be the final result of the long-standing battle between Mel Mermelstein and the IHR, the *Times* avowed that "the Holocaust, and how it will be remembered, is at the very core of this story." <sup>(2)</sup>

In the wake of this fawning media hype, *Never Forget* finally debuted over the TNT cable network on April 8, 1981. Unfortunately, that wasn't the end of it. The enraptured Ted Turner was so determined that his cable audience would never forget Mel Mermelstein that he broadcast the film at least seven additional times during the week that followed.

Needless to say, *Never Forget* came under scrutiny by revisionists, those at the IHR in particular.

A review published in the *Journal of Historical Review* was probably the most objective review published anywhere in the country, the IHR's own obvious biases notwithstanding.

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Calling the film "a forgettable, but survivable hatchet job on the IHR," <sup>(3)</sup> the IHR pointed out one singular irony about the film that perhaps says a lot about its factual content in general: although the film was entitled *Never Forget* – supposedly the last words Mel heard from his father who implored him to "never forget" – Mermelstein never once reported this dramatic entreaty from his father in his alleged autobiography, *By Bread Alone*.

Be that as it may, noted the IHR, "The drama fell short of both poetry and truth." <sup>(4)</sup> (the media plaudits notwithstanding). "Nevertheless, *Never Forget* did serve as a timely reminder to many – and an introduction to many more – that there is a Revisionist movement, and an Institute for Historical Review, which challenge a version of the Second World War, and its sacrosanct 'Holocaust,' that until the appearance of *Never Forget* were presented as uncontested truth on America's most influential mass medium." <sup>(5)</sup>

In the film, an actor portraying the talkative, strident and bombastic Rabbi Marvin Hier of the Simon Wiesenthal Center, is shown telling Mermelstein that Holocaust revisionism "is cropping up every place" and that "we see this sort of thing all the time." <sup>(6)</sup> (This perhaps an inadvertent salute to the growth of revisionism.)

However, the scriptwriters delved into what one might call a bit of dramatic license, complimenting (although not factually) the outreach of the IHR. Rabbi Hier is heard to tell Mermelstein that the IHR is "well-funded, spread out all over the country, with newspapers, radio and television outlets ... just the tip of the iceberg." <sup>(7)</sup>

Hier also is heard to tell Mermelstein that the IHR "is the largest racist and anti-Semitic group in the country," <sup>(8)</sup> a statement patently untrue in several obvious respects, but necessary to the plot of the film presenting Mermelstein as a single man fighting against one of the nation's most powerful (if not most dangerous) institutions.

The film presented Mermelstein, prior to his conflict with the IHR, as a happy family man and community leader, despite the fact that, as the IHR's review noted, members of the Jewish community and friends of Mermelstein had described him as "a difficult, moody man" and "his own worst enemy."

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- Mermelstein's happy home life was disrupted – at least on film – with the appearance of a dead pig on the doorstep, presumably a gift from the staff and supporters of the IHR. This never happened – or at least there's no record of it having happened, except in the movie.

- Mermelstein is shown disrupting a public meeting of a revisionist group – presumably the IHR. There is no record of Mermelstein ever publicly challenging any

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1 / *Ibid.*

2 / *Ibid.*

3 / *Journal of Historical Review*, Summer 1991.

4 / *Ibid.*

5 / *Ibid.*

6 / *Ibid.*

7 / *Ibid.*

8 / *Ibid.*

revisionists until after he began writing his taunting letters to the editors of various newspapers, one of which finally came to the attention of the IHR, sparking the series of circumstances that led to the first courtroom bout between Mermelstein and the IHR.

(There is evidence, however, that Mermelstein did join the violence-prone Jewish Defense League – of which the JDL leader said Mermelstein was a supporter – in picketing IHR headquarters in Torrance, California.)

- Although the film presented Mermelstein as essentially a man alone, the fact is that by the time the film of his saga was in production, a battery of top-notch law firms had come to Mermelstein's rescue. What's more, powerful forces in the American Jewish community, most notably the Anti-Defamation League (ADL) of B'nai B'rith, had rushed to Mermelstein's side, despite their initial refusal to engage in combat with the IHR on Mermelstein's behalf.

- The film conveniently failed to mention Mermelstein's long-standing mental distress which forced him to undergo psychiatric treatment well before he ever met up with the likes of the IHR and the historical revisionist movement in general.

- While Mermelstein is presented – in the film – as being emotionally distraught during a deposition when forced to come to grips with his memories of the "Holocaust," an IHR employee who was present for the actual deposition, had quite different recollections of the event. "At no time during the entire deposition," remembered the IHR employee, "did Mermelstein shed a single tear. On the contrary, he [appeared] hostile, combative, and evasive throughout the entire deposition." (1)

According to the IHR's review, "The drama portray[ed] Mermelstein as a cooperative witness willing, if not eager, to answer [the IHR attorney's] questions honestly and completely

[143] during the first deposition ... What in fact took place at that deposition was that Mermelstein proved a most elusive respondent: often he seemed unwilling to give a straight answer to even the simplest questions, misunderstanding them, waxing broadly philosophical, forgetting inconvenient details, dueling back and forth ... and all in all leading IHR's lawyer on a merry chase." (2)

The most grievous misrepresentation of the "docu-drama," however, came in the conclusion. The denouement of the film showed Mermelstein righteously taking the witness stand before Judge Thomas Johnson to recount his vow to his late father that he would "never forget." Then, dramatically, Judge Johnson is shown issuing his controversial judicial notice that "Jews were gassed to death at the Auschwitz concentration camp in Poland in 1944."

This, noted the IHR, was represented "as a signal legal and historical victory which effectively ended the lawsuit" (3) (which ruling, of course, was not, in fact, the end of the story by any means).

There was one big problem with this scene. Although the drama began with an assurance to the viewers that "all legal proceedings portrayed [have been] based on actual transcripts and documents," (4) the fact is that Mermelstein never once took the stand at that hearing in question nor did he give any testimony then whatsoever.

As the IHR pointed out: "The entire scene is pure invention, devised to provide something of an emotional catharsis to what remains a "weak, and for the millions, undoubtedly soporific, made-for-television movie." (5)

Interestingly enough, all of the factual flaws and outright fallacies of the film notwithstanding, the IHR concluded that the real "big lie" of *Never Forget* was this: "the whopper that the revisionists are somewhat politically powerful, shrewd, bigoted, sadistic and well-connected., while the exterminationists are weak, innocent, and morally upright." (6)

Nonetheless, there was a bright side as far as the IHR was concerned. "Clearly," the IHR commented, "the intended purpose of trying to slam, smear and isolate the Revisionists is counterbalanced by two quite unintended messages to the viewer: 1) historical revisionism is strong and growing, and 2)

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1 / *Ibid.*

2 / *Ibid.*

3 / *Ibid.*

4 / *Ibid.*

5 / *Ibid.*

6 / *Ibid.*

[144] the embattled but still mighty IHR is leading this movement, which is of the greatest concern to the Establishment." (1)

Mermelstein's counsel, tough-talking Gloria Allred, partner in the firm of Allred, Maroko, Goldberg & Ribakoff that handled the final stages of Mermelstein's assault on the IHR, weighed in with her own unusual perspective on the film.

"What was profoundly disturbing to me," she declared in an op-ed piece in the *Los Angeles Times*, "was how the film distorted the historical record about the role that the Jewish community played in winning [the] case." (2) The film, she said, was "irresponsible in its clear distortion, omissions and misrepresentations of the role that the Jewish community played in this case." (3)

Allred took particular umbrage at the way the film highlighted the role of a non-Jewish attorney (William Cox) in handling Mermelstein's initial case after at least two Jewish organizations (namely, the Simon Wiesenthal Center and the Anti-Defamation League of B'nai B'rith) had rejected Mermelstein's plea for assistance in combating the IHR.

(Not only were these organizations fearful that Mermelstein's lawsuit would give the IHR publicity – and they were correct in that – but they were also concerned about entangling themselves with the "moody, difficult" Mermelstein who, the IHR had asserted, was perceived as a fool by the Jewish community.)

Pointing out that the attorney, Cox, was portrayed as an "Irish Catholic" (which he was not), Allred noted that the film failed to portray the Jewish attorneys who had participated in the preparation of the motion for judicial notice that declared the gassing of Jews at Auschwitz to be an historical fact.

What's more, Allred railed, it was the so-called "Irish Catholic" lawyer who withdrew from the case after the motion for judicial notice was granted. "Jewish lawyers in my firm then took the case," she sniped, "and won it." (4)

Almost complaining – maybe bragging, too, Allred declared, "We spent thousands of hours and three years litigating [the case]. We won the apology and the financial settlement that was mentioned in the film but falsely attributed to the 'Irish Catholic' lawyer." (5)

Practically accusing Ted Turner and Leonard Nimoy of

[145] being historical revisionists themselves, Allred said, "Jewish people are entitled to the truth about their invaluable contribution to the winning of Mel Mermelstein's victory ... Their role should not be discounted, ignored or attributed to others.

"The producers had a duty to share this truth. They should not use the excuse of time litigations or dramatic license as a reason to distort the historical record. Like Mel Mermelstein," said Allred, "the Jewish people have not just been victims. They have been, and continue to be, leaders in the battle for truth. This too is a story that must be told and a lesson that Hollywood must never forget." (6)

When all was said and done, the bottom line was that Gloria Allred – a notorious publicity hound – was furious because neither she nor her law firm received any attention and literally millions of dollars in free advertising in the many-times-televised docu-drama presentation of the Mermelstein affair.

In the end, apparently, the negative effect of the silly film was negligible, at the very least. However, *Never Forget* did illustrate the lengths to which the media could go to promote a false version of even recent history and disguise it as fact.

The events (or non-events) shown in that film – broadcast in 1991 – had (or had not, as the case may be) happened ten years previously. In real life, in the spring of 1991, events were happening – real events – in the course of the unfinished legal combat between Mermelstein and the IHR.

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1 / *Ibid.*

2 / *Los Angeles Times*, April 15, 1991.

3 / *Ibid.*

4 / *Ibid.*

5 / *Ibid.*

6 / *Ibid.*

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## Chapter Twenty-Two

### Countdown to Trial

As all of the Hollywood hoopla over Mel Mermelstein and his very public affairs became a part of history, some very down-to-earth legal maneuvers were taking place in his case against the IHR.

The Von Esch family – the IHR's former attorneys and fellow defendants in the Mermelstein case – were moving to settle with Mermelstein. They wanted out. They wanted no part of this dangerous and costly venture.

A large basis of Mermelstein's complaint against the Von Esches was hinged on the fact that their name was German – Prussian, in fact. (What could be worse ?) This was evidence, as far as Mermelstein was concerned, that the Von Esches were anti-Jewish and pro-Nazi, despite the fact that Robert Von Esch, Jr. (head of the firm) had lost a leg fighting the Nazis as an American soldier during World War II.

The Von Esches advised the IHR that they, themselves, were inclined to settle with Mermelstein on their own in order to get out of the case. (They did not advise the IHR, however, to settle the case, insofar as the IHR was involved.)

The Von Esches believed that Mermelstein's case was nothing more than a malicious prosecution itself, but it was a distraction from their own day-to-day work and they simply didn't need the unfavorable publicity, not to mention Mermelstein's assertions about the Von Esches' alleged Nazi sympathies. An impending trial, lasting thirty days, as estimated, would have additionally been a financial drain on the Von Esch firm.

While the IHR didn't agree with the decision, considering it an unnecessary surrender to a litigious trouble-maker and his attorneys, the IHR and those associated with its defense understood the thinking.

So it was that on May 22, 1991 an attorney representing the Von Esch family and their law firm advised all of the parties in the case that the Von Esches were prepared to surrender \$100,000 to Mel Mermelstein to end their involvement in the lawsuit. And so they did. Mel Mermelstein

[148] was \$100,000 richer and the IHR's own attorneys had abandoned them to fend off the suit that they (the Von Esches) had helped initiate. (1)

By this time, some nine law firms, not to mention thirteen active attorneys – along with the nationwide network of the Anti-Defamation League (ADL) of B'nai B'rith – were actively engaged on the side of Mel Mermelstein's prosecution of the IHR and its co-defendants.

The names of the law firms and the attorneys in question (while unfamiliar to most law-abiding, non-litigious Americans) are worth noting for the record, if only because the names in question constitute some of the most high-powered names in the American legal arena.

- Skadden, Arps, Slate, Meagher & Flom. One of the nation's top five biggest law firms. Among its partners included Kenneth Bialkin, the former national chairman of the ADL. Skadden Arps partners and associates have long been tied to the inner circles of the ADL. Attorneys Katherine M. Elwood and Howard K. Szabo were deployed to the

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<sup>1</sup> / Letter from Attorney Robert M. Dickson to all parties in the case of *Mel Mermelstein vs. Legion for the Survival of Freedom*. (Date: May 22, 1991). Case No. 629224. Superior Court of the State of California for the County of Los Angeles.

Mermelstein case.

- Sidley & Austin. Yet another of the nation's biggest law firms, it included among its partners former California Governor George Deukmejian. Attorneys involved in the Mermelstein case were Donald Samuels, Craig S. Bloomgarden and Ronnie M. Schmelz.

- Turner, Gerstenfeld, Wilk, Tigerman & Heller. Partner Larry Heller, a hard-driving and well-known Los Angeles trial attorney, emerged as Mermelstein's chief pit bull in the attack on the IHR.

- Berman, Blanchard, Mausner & Kindem. Partner Jeffrey Mausner, a former prosecutor with the Justice Department's "nazi hunting" division, the notorious Office of Special Investigations (OSI) – best known for its nine-year campaign of harassment and abuse of Ukrainian-American John Demjanjuk (recently cleared by Israel's Supreme Court of the OSI's charges) was one of Mermelstein's key legal handlers.

- Kelton & Artan. Attorneys Lynn Carmen, Howard S. Wolf and Peter Bersin were assigned to the Mermelstein case. Bersin, in the finale, served on the courthouse team that presided over the professional holocaust survivor's embarrassing legal demise.

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- Rosenfeld, Meyer & Susman. This firm sent in two attorneys to work on the Mermelstein affair: Robert Rotstein and Stacey M. Byrnes.

- Cooper, Epstein & Hurewitz. Not content with handling the legal work for Radnitz/Nimoy Productions, which produced the critically acclaimed – but critically flawed – movie extravaganza *Never Forget* hyping Mermelstein's campaign against the IHR, this firm sent in attorney Karin Magid to assist in the actual legal harassment of the IHR. (1)

Needless to say, the legal expenses for the defense of the IHR and its co-defendants were not being donated (as much of Mermelstein's costs and legal talent were). Fortunately, supporters of the IHR were generous in their support and continued to help assist financially.

What's more, a number of long-time IHR supporters were providing their own time and energy in volunteering to assist in preparing the critical research necessary for the IHR's defense.

There had already been more than 100 pounds of legal paperwork alone, generated by Mermelstein's malicious prosecution. This not to mention perhaps another 200 pounds of research material generated in-house by IHR researchers.

Willis Carto had assembled a battery of character witnesses on his own behalf that would have provided an allstar line-up in the courtroom, dazzling even a Hollywood celebrity such as Mel Mermelstein. Among those prepared to testify on Carto's behalf:

- Robert L. Brock, a leading Black nationalist based in Los Angeles (Brock's critics at the Anti-Defamation League called Brock "the would-be Black Führer," of all things!);

- Kirkpatrick Dilling, a prominent Chicago attorney and one of the country's leading litigators in the field of food and drugs;

- Dick Gregory, the popular comedian, civil rights activist and social critic;

- Lt. Col. James (Bo) Gritz, the most widely-decorated American veteran of the Vietnam War and the model for Hollywood's *Rambo* films (Gritz having returned to Southeast Asia in search of missing American prisoners of war);

- Dr. Robert John, diplomatic historian and Middle East authority;

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- Victor Marchetti, an icon of the "liberal-left" who was a former top-ranking Central Intelligence Agency official, author of the best-selling *The CIA and the Cult of Intelligence*, and now a fierce critic of the Israeli lobby;

- Maureen Kennedy Salaman, best-selling author of several books on natural health; and then-president of the National Health Federation, a health freedom advocacy organization;

- Maj. James H. Townsend, editor and publisher of the Fullerton, California-based *National Educator* newspaper and an early backer of President Ronald Reagan;

- Col. L. Fletcher Prouty, a retired Air Force officer (who later became internationally known as the model for "Colonel X" in Oliver Stone's controversial film, *JFK*); and

- Tom Valentine, the veteran print and radio journalist.

Slated to testify as "expert" witnesses on behalf of the IHR were French revisionist

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<sup>1</sup> / IHR Newsletter, May 1991.



Professor Robert Faurisson and British historian David Irving. (1)

However, despite the big names lining up behind the IHR, the legal fire-power behind Mermelstein, as we have seen, was impressive. And the IHR was by no means guaranteed a victory.

In the last *IHR Newsletter* published prior to the beginning of the courtroom bout with Mermelstein scheduled for August 9, the IHR advised its supporters: "Make no mistake about it: if IHR suffers a crushing judgment in this case, it will mark a serious setback for Historical Revisionism around the world." (2)

That Mermelstein's suit, however, was frivolous – the danger notwithstanding – was apparent. Even Judge William Huss, during a hearing prior to the final stages leading to the trial, asked Mermelstein and his attorneys – point blank: "Is this a concocted lawsuit?"

Yet, Mermelstein's frivolous action was a matter of concern to both the IHR and Liberty Lobby. His nuisance suit could prove costly – and destructive.

A final attempt to settle with Mermelstein and his attorneys, prior to the scheduled proceedings, failed. Mermelstein said he was willing to drop the case for a cool \$2.5 million. Needless to say, the IHR and Liberty Lobby declined the opportunity to make Mermelstein a millionaire.

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Then, according to the judge who oversaw the settlement negotiations, Mermelstein become "flexible" to the tune of \$850,000. That was still ridiculous in the eyes of the IHR. At best, they said, they would settle for the costs of what it would take for Mermelstein to conduct a two week trial. But Mermelstein rejected this. It was clearly going to be a fight to the finish and the IHR was armed and ready.

IHR researchers had been working steadily in preparation for the trial, examining Mermelstein's own published writings and statements that he had made during the course of the past and present litigation.

In the course of so doing they had uncovered repeated instances in which Mermelstein's statements contradicted one another, to say the very least. Mermelstein himself had said during a deposition that he was indeed his own "best witness" as to what had happened during World War II and the Holocaust and was presenting himself as such. Essentially, Mermelstein and his attorneys were planning to present the plaintiff to the upcoming jury as a victim, pure and simple. The IHR was the "villain," having dared question the veracity of a Holocaust survivor.

Yet, Mermelstein's many contradictory statements – in the written public record – cast some doubt on his veracity. It had been on this basis, indeed, that the IHR had questioned Mermelstein's reliability to begin with. As the IHR put it in a special report to its supporters issued just prior to the commencement of the trial:

"The numerous discrepancies, contradictions, and nonsensical inventions relating to what Mel Mermelstein claims to have seen and experienced in the concentration camps, as they have been unearthed in his writings and statements by patient research at the Institute will enable the defense attorneys to challenge Mermelstein's credibility as an eyewitness and a reliable informant on Auschwitz and Buchenwald, i.e. at precisely the points on which Mermelstein's ability to 'prove' the 'Holocaust' depends." (3)

The IHR cited several glaring instances in which Mermelstein's claims about what he saw and experienced during World War II did not jibe with known facts.

•Mermelstein wrote in a letter published in the Long

[152] *Beach Independent/Press Telegram* on July 29, 1980 that he saw his 'mother and two sisters driven among others to the tunnel for their final station, the Gas Chamber No. 5 at Birkenau.' He testified under oath when deposed by IHR in 1981 to having seen, from a distance of 40 or 50 feet, 'a tunnel going down in there.' (Gas Chamber No. 5) and that the gas chambers were 'underground' in that structure. In fact, Crematorium No. 5 at Birkenau (Mermelstein's "Gas Chamber No. 5") was entirely above ground.

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1 / *The Spotlight*, October 7, 1991.

2 / *IHR Newsletter*, July/August 1991.

3 / *IHR Special Background Report*, September 1991.

- Mermelstein, under oath in his 1981 deposition, testified that he had done nothing, other than 'some detail work,' during the time he claims to have been at Auschwitz I (six weeks) and Auschwitz-Birkenau (a night and a day). He also testified in the same deposition that he had only witnessed one gassing – that of his mother and sisters (and perhaps his father). After bumping into Mermelstein at Auschwitz in 1987, however, [then-New York Mayor] Ed Koch wrote an article quoting Mermelstein as follows: 'I was part of a special detail which hauled the bodies from the gas chamber and took them to the crematoria.' [Koch's article was published in the *Staten Island Advance* on February 23, 1987.]

- Mermelstein stated under oath in his 1981 deposition that he was ordered to wash with soap made from Jewish fat at Auschwitz.

- Mermelstein stated under oath in his 1981 deposition that Dr. Miklos Nyiszli, whom he claimed to know personally, would testify on Mermelstein's behalf about [Dr. Josef] Mengele's alleged crimes at Auschwitz. At that time, though, Nyiszli had been dead for more than 25 years. (1)

There were other glaring instances in which Mermelstein's account of what he experienced did not simply have the ring of truth or in which he contradicted his own previous accounts. Those which follow are representative of numerous examples of Mermelstein's apparent contradictions – contradictions that the IHR's attorneys expected Mermelstein to explain during the course of the upcoming trial:

- In his memoirs Mermelstein claimed that his father died in bed after being worked to death. However, in the February 15, 1983 edition of the *Los Angeles Herald-Examiner*,

[153] Mermelstein claimed that he saw his father being gassed to death. In a June 10, 1985 deposition Mermelstein had yet another version of his father's expiration which included "cruelty, starvation, beatings." (2) Which was it ?

- In a deposition on November 1, 1989 Mermelstein very firmly claimed to have "hauled not only bodies but clothes, dragging them into the pits" but when pressed to elaborate he said only that there "may have been some bodies" among the clothes, evidently unable to differentiate between dead bodies and piles of clothing.

- In a deposition on May 27, 1981 Mermelstein said that he never saw children in the internment camps except Birkenau and that they were being led to the gas chambers. However, in his memoirs he wrote delightedly of being relieved to be greeted by eight-, ten-, and eleven-year-old children.

- In response to legal interrogatories in June 1981 Mermelstein says he was never examined by anyone he knew to be a doctor or otherwise received medical attention in the camps. Yet, in his memoirs he exhibited documentary evidence tending to show treatment of typhus or against typhus or typhoid.

- In his memoirs he claimed that his sleep on the first night at Birkenau camp had been "a deep one." However, in his May 27, 1981 deposition he said that he had "no sleep" on that horrible first night.

- In his memoirs he writes of hallucinating during a train journey to Auschwitz. However, in a June 10, 1985 deposition Mermelstein said that he never hallucinated or had his perception distorted while at Auschwitz.

- In the *Orange County Register* of October 19, 1989 Mermelstein was quoted as having claimed to have been guarded by one Bruno Karl Blach (who was then in the news facing war crimes allegations. However, Blach served only at Dachau and Mauthausen and Mermelstein had never claimed to have been at those camps.

- In a statement to the Auschwitz Museum authorities on October 23, 1967 Mermelstein claimed to have taken "part in uprising, self-liberation" of the Buchenwald camp. Yet, in his memoirs he claims he was at most a spectator to the event and

[154] that his health and physical condition was poor. (In fact there is some question as to whether such an "uprising, self-liberation" actually took place.)

All of these instances of apparent distortions of fact – among others – the IHR had concluded, would cast doubt upon Mermelstein in the eyes of any objective juror hearing the

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1 / *Ibid.*

2 / Unless otherwise noted, quotations and references are taken from an unpublished working summary prepared by the IHR for the use of attorney Mark Lane during the course of the IHR's investigation into Mermelstein's past allegations about his experiences during World War II.

case.

So it was that the IHR's attorneys prepared to meet Mermelstein head on and ask him – under oath – to clarify the contradictions in his previous statements about what he really and truly had experienced during World War II.

It was indeed going to be a fight to the finish.

## Chapter Twenty-Three

### The Beginning of the End

In anticipation of the trial, Liberty Lobby's attorney, Mark Lane, had laid it on the line to Willis Carto. "This is going to be a tough case to win." What Lane said Liberty Lobby and the IHR needed was "a non-traditional judge."

It was just shortly thereafter, Lane remembers, that Carto called Lane: "Well, Mark," he said, "you wanted a nontraditional judge. You've got him. Judge Stephen Lachs. He's Jewish, and he's also gay." <sup>(1)</sup>

It was Judge Stephen Lachs who had been assigned to preside in the Mermelstein trial. A former public defender with a long-time affiliation with the American Civil Liberties Union, Lachs had been initially appointed to the bench by former liberal Democratic Governor Jerry Brown of California. Additionally, Lachs was the first avowed homosexual to sit on a California court.

The defense team's junior counsel, Bill Hulsy, presumed as a consequence of learning of Lachs' background that the proceedings would take place in what Hulsy, perhaps biased, perceived would be a "liberally-oriented" courtroom.<sup>(2)</sup> However, Lachs also had a reputation for being fair and just.

Nonetheless, there were still concerns that perhaps the nature of the subject matter of the conflict between Mermelstein and the IHR might give rise to some unintentional bias on the part of the judge. (Two earlier judges who were Jewish had recused themselves because of this very issue.)

As a result, attorney Hulsy asked Lachs if he would consider recusing himself because of the expected emphasis by Mermelstein's attorneys on "Jewish" issues and the Holocaust. However, Lachs expressed his own feeling that he could be impartial. This was enough for Hulsy, Lane and Purdy.

The media, in the meantime, was giving Mermelstein a friendly nudge. An article in the Cleveland, Ohio *Plain-Dealer* (and reprinted around the country) appeared shortly before the trial. The article, focusing on IHR founder Willis Carto was entitled, "Carto's days in court-founder of Liberty Lobby enters media spotlight." <sup>(3)</sup>

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The article which highlighted the Mermelstein case, most IHR supporters agreed, left the reader with the impression that, once and for all, the evil Willis Carto, Liberty Lobby and the IHR were about to get the courtroom punishment they justly deserved.

The beginning of the courtroom proceedings was less than momentous. Although one or two newspaper reporters were on hand – no doubt summoned by Mermelstein himself – they didn't stay around very long after the proceedings got underway.

"Mermelstein and his attorneys will have a press release for them at the end of the day, anyway," commented one IHR supporter in the courtroom, "It will describe how Mermelstein single-handedly defeated the Nazis in one fell swoop."

There were indeed several IHR supporters on hand, among them Russ Granata, who had devoted much of his own time and energy doing volunteer research assisting the IHR in

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<sup>1</sup> / Recorded comments by Mark Lane (unpublished).

<sup>2</sup> / Recorded comments by William Hulsy (unpublished).

<sup>3</sup> / *Cleveland Plain-Dealer*, September 15, 199 1, p. I-D.

digging up evidence in preparation for the case. Throughout the proceedings Granata took detailed and comprehensive notes of the events of the trial that would prove most valuable to the IHR defense team.

Also on hand was a young researcher who was interested in filming the court proceedings for the historical record. Although the proceedings were never filmed, for a variety of reasons, the young researcher, David Cole, later rose to international fame as the producer/narrator of a controversial video documentary featuring an interview with Dr. Franciszek Piper, the curator of Auschwitz. Cole's interview and video essentially laid to rest the myth of homicidal gas chambers at Auschwitz.

(This author – no relation to Franciszek Piper, incidentally – was also on hand to cover the trial for *The Spotlight* newspaper – the only newspaper, by the way, to provide a full and complete account of what really happened. The author was also scheduled to testify as a witness verifying that, indeed, the IHR and Liberty Lobby were two entirely separate entities, the Carto connection notwithstanding. In the end, as we shall see, the author's testimony was unnecessary.)

The IHR-Liberty Lobby defense team was assembled and ready for action. Mark Lane had been joined by his lovely

[157] wife, Trish, who not only helped out as her husband's paralegal, but also as his valuable "eyes and ears" inside the courtroom when Lane was busy questioning witnesses or conferring with his clients.

Co-counsel Chip Purdy was engaged in ongoing legal research relative to the case and did not arrive for the initial proceedings.

Mark Lane was eager to get the proceedings underway. So was Willis Carto who had decided to sit at the defense table, representing himself in the courtroom during the proceedings. (Prior to that, attorney William Hulsy had prepared legal declarations on Carto's behalf and worked closely with the IHR founder in preparing the IHR's defense.)

Mermelstein arrived at the courthouse in the company of three attorneys: Jeffrey Mausner, Peter Bersin, and Lawrence Heller. Out of a virtual army of lawyers who had been involved in some aspect or another of the Mermelstein case during the past eleven years, these three were the ones who would have the glory – so they thought – of destroying the IHR in courtroom combat. The Mermelstein entourage swept into the courtroom cocky and confident.

There was an interesting contrast between the three attorneys. Jeffrey Mausner, in the words of one less-than-charitable observer, was a "pencil-necked geek." Tall, thin, his dark hair balding, young Mausner's pasty complexion was made more so by the thick-lensed horn-rimmed glasses he wore.

However, despite his appearance, Mausner was not someone to be toyed with. As one IHR supporter in the courtroom commented, "Mausner is like a cobra in glasses." A former attorney with the ruthless Office of Special Investigations at the Department of Justice, an agency which specialized in sending elderly Europeans (re-settled in America) to trial and punishment – and sometimes execution – in foreign lands on what generally were trumped-up charges of having committed Nazi war crimes.

Critics contended that people such as Mausner and his OSI associates were as vicious and brutal as the alleged Nazi war criminals they had targeted for special treatment at the expense of the American taxpayers.

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Mausner was no fool. It was Mausner who had coerced the Hartford into handing him \$22,000 and Mermelstein \$60,000 – under the threat of exposing Hartford to a jury as a greedy insurance company that wasn't nice to Holocaust survivors.

Junior counsel on the Mermelstein team was Peter Bersin. Tall and brawny, Mermelstein's dark-haired young lawyer moved in a hulking, somewhat clumsy fashion. "He's like a big gorilla," commented the same IHR critic who compared his colleague Mausner to a cobra. What's more, Bersin had a deep growling voice that complemented his simian appearance. There was, yet, something childlike about the man-beast that Mermelstein was unleashing on the IHR.

Chief counsel for Mermelstein was Lawrence Heller. A sharp, perhaps flashy, Los Angeles trial attorney, Heller was very clearly in charge. Although Bersin towered above Heller, the junior counsel seemed to follow Heller's every lead, perhaps recognizing a superior intellect. Slight in stature, but lithe and muscular, Heller personified the fast-talking and clever Beverly Hills lawyer that he was.

Heller's facade of easy-going camaraderie – with even the IHR's attorneys – was, however, a mask. This hard-driving lawyer with his hawk-like profile was circling, ready for the kill. He meant business, his glad-handing notwithstanding.

The entry of Judge Stephen Lachs set the proceedings in motion. A slightly-built, athletic man with bright, observant eyes, Lachs had a slender mustache, his hair somewhat strawcolored, with perhaps even a hint of silver.

Lachs was a younger man. He was indeed a "non-traditional" judge. He didn't bear any resemblance to the grizzled, rasping voiced and cynical old men that one often finds presiding at the judge's bench. Lachs spoke in cordial, measured tones in a precise and thoughtful fashion.

Nonetheless, it was clear from the beginning that Lachs, too, meant business. He wanted to get the proceedings underway in an orderly fashion. He wanted to dispense with the procedural matters and get down to the substance of what would – and would not – be heard by the jury. He also wanted to select that jury.

However, Judge Lachs still held out a last-minute hope

[159] that perhaps there could be a pretrial settlement between Mermelstein and the IHR.

At the very beginning, Mermelstein's attorneys made it clear that this was indeed, from their point of view, a fight to the finish, the IHR's Waterloo.

When Judge Lachs asked if Mermelstein and the IHR could reach a settlement before the case went to trial, Mermelstein's attorney, Bersin, told him, "Based on my knowledge of the history of this case a settlement is not likely." (1)

Mark Lane pointed out that his clients did hope to settle beforehand. "It was in the area of 30 or 40 thousand dollars [they were offering]. Then at the last conference I understand [Mermelstein's attorneys asked for] \$2.5 million." (That kind of "settlement," obviously, as far as the IHR was concerned, was out of the question.)

It was clear that a pre-trial settlement was not about to happen. Pointing out that whether he had to handle this case or some other case, he would still have a full calendar either way, Judge Lachs ordered the case to proceed.

One of the first problems facing Judge Lachs (as well as the attorneys) was dispensing with a number of pre-trial motions put forth by the attorneys for both of the opposing sides.

A critical portion of the case revolved around the libel question. IHR attorney Bill Hulsy pointed out to the court that in his original complaint, Mermelstein cited the reference to him being a "demonstrable fraud" as having been libelous. However, in the year 1990 – almost four and a half years after that original complaint, Mermelstein's attorneys decided to add references to "vainglorious prevaricators" and "false tale spinners" to the complaint.

As the IHR attorney pointed out, these references did not have any direct reference to Mermelstein, nor did they even appear in the same article in the disputed edition of the *IHR Newsletter*. Also added to the complaint was the IHR's newsletter reference to Mermelstein being "perceived as a fool."

According to Hulsy, as a consequence, "Four and a half years after the fact we have to come up with witnesses as to

[160] what the attitude in the Jewish community was towards the defendant. That is patently unfair to ask us to do that. I believe... it is just violative of the concept of the statute of limitations."

After some discussion, however, Judge Lachs ruled, in part, against the IHR's motion. "I feel that there is little difference between 'demonstrable fraud,' 'false tale spinners' and 'vainglorious prevaricators.' I am going to have trouble with all that through the trial, perhaps," he said. "It would appear to me that if the [IHR] is ready to defend against 'demonstrable fraud,' they would be hard put to say that they couldn't defend against 'vainglorious prevaricators.'"

In the question of Mermelstein's foolishness and the perception that he was indeed foolish, Judge Lachs ruled in favor of the IHR. He threw out Mermelstein's complaint that he had been libeled on that question. Already Mermelstein's case was beginning to unravel.

The libel question before the judge (and, thence, presumably before the jury) would be over the reference to Mermelstein being a "demonstrable fraud," and the use of the terms "vainglorious prevaricator" and "false tale spinner" that Mermelstein alleged were used in

<sup>1</sup> / All quotations which follow (unless otherwise noted) are taken directly from the official transcriptions of the proceedings in *Mel Mermelstein vs. Legion for the Survival of Freedom, et al.* Case No. C-629224. Superior Court of the State of California for the County of Los Angeles, Sept. 10- 17, 1991.

reference to him.

Mermelstein's attorneys had also put forth an important motion: to sever from the case and try separately the issue of whether or not Mel Mermelstein was a public figure.

If Mermelstein were determined to be a public figure – not a shy and retiring private citizen – this would lessen the impact upon IHR and its co-defendants. Public figures, to show damages, must show "actual malice" and "reckless disregard for the truth." Private citizens do not have that burden in a libel action.

Mermelstein's attorneys addressed the question: "Has the plaintiff voluntarily thrust himself out in to the public eye on an issue of controversy? We maintain that he has not and we are willing to put up evidence that he has not." The IHR, obviously, intended to prove otherwise.

Recognizing that determination of Mermelstein's public figure status was central to the libel question, Judge Lachs said that "it seems to me ... from the sense of judicial economy, it will save everybody a lot of time and trouble to know at the

[161] outset before we get involved in the case too heavily whether or not Mr. Mermelstein is going to be found a public figure."

As a result, Lachs granted Mermelstein's attorney's motion. "We will try that before the rest of the case," added Lachs.

(This, ultimately, proved to be critical to the undoing of Mermelstein's entire case, although Mermelstein and his legal team clearly did not know it at that time. It was in Chapter I where we saw Mermelstein's unfortunate and perhaps somewhat amusing courtroom display during the hearing over the question of his legal status – whether he was a private citizen or a public figure.)

Throughout the proceedings – from the beginning, in fact – Judge Lachs displayed an easy-going sense of humor – sometimes subtle, sometimes even biting – that added a much-needed note of humanity to what had otherwise been a long and bitter and drawn out battle between the two opposing parties.

At one point, when discussing the question of libel and defamation and the First Amendment, Judge Lachs commented: "I shouldn't even say anything about the First Amendment in this case, because five years from now when I am in front of some Senate committee, when I am nominated to the Supreme Court, they will go back into these records and ask me to explain what I meant."

One particularly controversial aspect of the case dealt with the matter of the Von Esch family law firm and their surrender to Mermelstein. The IHR's attorneys wanted to call members of the Von Esch firm as witnesses to explain why they had settled out-of-court with Mermelstein even after they had filed the IHR's libel action against Mermelstein that was the basis of Mermelstein's ongoing malicious prosecution complaint.

Mermelstein's attorneys, however, wanted to avoid that. The IHR wanted to prove to the court that it had received sound legal advice (from the Von Esch law firm) insofar as the filing of the libel lawsuit against Mermelstein was concerned, and that the action was neither frivolous nor malicious. Mermelstein's attorneys did not want the IHR to be able to use as their defense that they had relied upon the advice of their

[162] attorneys in filing the libel action against Mermelstein.

(As noted previously, the IHR decided to drop the libel action against Mermelstein when it became apparent that the lawsuit would be more costly and more trouble than it was worth. This decision, unfortunately, gave Mermelstein the opening to file his "malicious prosecution" action against the IHR.)

As IHR attorney Bill Hulsy frankly told Judge Lachs: "I know privately what was told to me by the attorneys for the reason that this was settled, and it had nothing to do with the ostensible merits, but rather had to do with the two attorneys attending a 30-day trial, being away from their work and potential loss of clients because of being tainted with the brush of anti-Semitism.

"I think that the Von Esches should be permitted to come before the court and explain the reasons why they felt there was probable cause to proceed on this matter ... There is no question that this firm is not an anti-Semitic firm, and rather than be subjected to this kind of guilt by association, tarring and feathering, etc, verbally, they folded on this case."

Chief counsel Mark Lane was perhaps even more adamant. "I believe that our former counsel and [Mermelstein's attorneys] have sandbagged us and treated us unfairly."

Hulsy added, "The rug was pulled out from under us when our attorneys settled out,

and there is an ethical question of propriety – that of settling out and not taking care of their clients."

Mermelstein's attorneys were alleging the IHR had waived their "advice of counsel" defense, some two years previously. As a consequence, Mausner told Judge Lachs, "If you waive the advice of counsel, you have to [submit to the process of] discovery. The attorney/client privilege is waived, and [the opposition attorneys] are entitled to find out what was going on: what the conversations were as to whether [the IHR and its co-defendants] really were just relying on the advice of counsel.

At this juncture Willis Carto stepped in, pointing out. "At the time I recall this vividly. The reason that I am recalling why we did not avail ourselves of the 'advice of counsel'

[163] privilege was simply because we wanted to be gentlemen about it. We had no idea we would be betrayed by the Von Esches."

Essentially, the advice of counsel privilege was a defense to malicious prosecution complaints saying that the defendant [in this case, the IHR] had only filed a legal action because attorneys advised such action.

Carto and the IHR had waived the privilege at least a year prior to the time that the Von Esches decided to surrender to Mermelstein and make a \$100,000 payment in restitution for their part in the filing of the libel suit that Mermelstein alleged was a "malicious prosecution."

Attorney Hulsy, speaking for the IHR, elaborated on the unusual situation:

"I have talked to several attorneys about this, about what happened, and they have almost to a man agreed that it is unethical for an attorney to settle out of a malicious prosecution case on his own and not take care of their clients because they're acting on behalf of their clients.

"That happened and [Mermelstein and his attorneys] got \$100,000. Therefore, I think in fairness that such rules should be fashioned to permit us to assert the [advice of counsel] defense at this time.

"We are not interested initially in trying to put ourselves in an adversary position with our [former] attorneys. We are willing to take responsibility for their actions. However unwise, whatever, we don't concede that they were negligent in this case. And they were acting with [our] authority in filing the case.

"So we are prepared to be gentlemen about the matter (and not sue the Von Esches for abandoning the IHR). They probably could have gotten us out of this thing, too, but they didn't do that and acted completely on their own. Now we are left hanging here with decisions made in a gentlemanly fashion some years ago."

Hulsy then pinpointed the great irony of the fact that Mermelstein and company continuing to press the malicious prosecution claim against the IHR even though "They have the \$100,000 [that the Von Esches had surrendered]. So," he added, perhaps a bit facetiously, "they have been somewhat compensated for this situation."

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Considering all of the aspects of the situation at hand – complex indeed-Judge Lachs determined, in the end, that the real issue was whether or not there was probable cause for the IHR to have sued Mermelstein. He precluded the IHR from claiming, as part of its defense, that the Von Esch law firm had filed the suit on its own without first consulting the IHR.

Next on the agenda was the attempt to inject the issue of alleged "racism" and "anti-Semitism" into the case, which actually had nothing to do with either. However, in his complaint, Mermelstein had concocted a theory that he was somehow the victim of a labyrinthine anti-Semitic conspiracy aimed exclusively at him – presumably the number one target of the revisionists.

As part of his effort to inject the issue into the case – presumably to sway potential Black and Jewish members who might be seated on the jury that would be selected, Mermelstein and his attorneys had assembled a wide variety of documents – published articles, private correspondence and other materials – that were ostensibly "racist" and "anti-Semitic" in nature.

Although most of the writings had nothing whatsoever to do with the case at hand, Mermelstein and company hoped to have them shown as evidence to the jury in a trumped-up effort to have the allegedly racist and anti-Semitic remarks imputed to the IHR and to Liberty Lobby (neither of which published the materials in question).

One item in particular showed precisely how far Mermelstein's attorneys were reaching in their "racism by association" campaign.



They cited an alleged letter dated in the mid-1950's, in which Willis Carto wrote approvingly of a plan that was widely endorsed by Black leaders around the country for the repatriation of Blacks to Africa where they would be able to rebuild their lives free of racism, drugs, crime and poverty. Repatriation was one of various forms of Black self-help programs that has appeared time and again in America since the days of slavery.

Carto himself had many contacts in the Black community over the years, Dr. Robert Brock of the Los Angeles-based Self-Determination Committee, among them. Brock, of course,

[165] was scheduled to be a character witness for Carto and he had shown a long-standing interest in various forms of joint Black-White endeavors to alleviate racial strife, the opposition of the Establishment notwithstanding.

Although Carto himself couldn't swear that he had even written the letter in question, Mermelstein's lawyers maintained that it was among documents that had been stolen from Carto's personal files 30 years before. (In effect, they were saying, "Well, it must be a real letter. It was stolen from Carto.")

Carto acknowledged that he had seen photocopies of the letter at various times over the years and had heard it quoted time and again by people who were trying to impute "racist" attitude toward him. However, he pointed out, if the letter was real and it had been among documents stolen from him, he couldn't know for certain.

Carto had never been able to retrieve what was purported to be "the original letter" back from the thief or his paymaster, the late columnist Drew Pearson, a notorious smear-specialist who worked closely with the Anti-Defamation League of B'nai B'rith. Pearson had bragged in print about one of his agents having rifled through Carto's private files. Despite legal action, Carto was never able to find out what precisely – if anything – had actually been taken.

What's more, the letter that Carto had allegedly written and which Mermelstein wanted to introduce was nothing more than a photocopy of a photocopy (probably many times over) of a carbon copy – unsigned.

Be all of this as it may, Mermelstein's effort to introduce racism was falling short of proving the theory to the judge. Finally, the judge concluded: "I believe that nobody can maintain that if you are anti-Semitic that you are necessarily anti-Black, or if you are anti-Black that you are necessarily anti-Semitic. You can be one. You can be the other. You can be both or you can be neither," said Lachs.

As a consequence, Lachs determined: "I am ordering that in this case the focus of this case will be anti-Semitism. It is not going to be [anti-Black] racism. And to the extent that it is possible, I am going to excise racist material and allow the jury to see when it is appropriate and when it is relevant to the evidence to the case, anti-Semitic material."

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This was a much-needed victory for the IHR, but the specter of the smear of "anti-Semitism" still remained. The issue had not been resolved. However, there were many other matters to resolve before the case would even come near to being concluded.

As the first day of court came to a close, the IHR-Liberty Lobby defense team were feeling much less uncertain about the ability of Judge Lachs to be fair and impartial. As Mark Lane commented later, "As soon as I met the judge and saw him at work, I realized that he was thoughtful, meticulous and very, very fair. That became clear in a very short time." (1)

However, there was no question in Lane's mind that, as Lane put, "Lachs was not sympathetic to our cause." (2) In fact, the judge made that very clear.

The judge simply did not like reading many of the materials from the IHR and Liberty Lobby that Mermelstein's attorneys had submitted for the record and which they were hoping to bring before the jury, and he said so. "However," Lane commented, "I don't think the judge would have ever said that before a jury, even if the case had gotten before a jury and lasted a year" (3) The judge was being impartial and that was all they could ask.

The second day of proceedings began mid-afternoon on Wednesday, September 11, 1991. The issue of what Willis Carto had written many years before still remained a sticking point, although it had nothing whatsoever to do with either the work of the IHR or of Liberty Lobby. However, Mermelstein's attorneys were determined to keep the issue of "anti-

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<sup>1</sup> / Recorded comments by Mark Lane.

<sup>2</sup> / *Ibid.*

<sup>3</sup> / *Ibid.*

Semitism" alive.

Mark Lane was intrigued by the theory that photocopies of multiple generations of photocopies of thirty-seven year old private correspondence – genuine or not – would be able to be introduced as evidence before the jury, as though it had something to do with the case at hand.

"It does strike me," said Lane, "that if Mr. Carto or anyone else had been convicted of arson – first degree arson in burning down a synagogue, that long ago in most states and in the federal courts, that could not even be brought out."

The judge himself admitted that Mermelstein and his attorney obviously had something in mind by trying to bring

[167] these old alleged letters into evidence. Lachs said, "There is no question in my mind that these materials are highly prejudicial. That is undoubtedly one of the reasons that the plaintiff wants to introduce them, maybe."

In arguing that because he may have written something down many years before, it might not reflect his opinions about that same subject matter today, Carto pointed out, "In the last 37 years, there have been literally more cataclysmic and revolutionary changes in that period of time in the world's history than I suppose any other time barring a world war. Everything, just about everything, has changed."

IHR attorney Bill Hulsy pointed out to the court that he was particularly irked by the constant effort by Mermelstein and his attorneys to dredge up the issue of the Holocaust, whether it was material to the legal points of the case or not.

Hulsy noted that "Over a couple of years in this case, almost every document filed with the court has contained almost a ritualistic declaration that we are a bunch of Nazis, neo-Nazis, national socialists."

At one point, Hulsy pointed out, attorney Mausner had asked an IHR employee, "Isn't it a fact that what you guys are trying to do is to rehabilitate the Nazis so they can take over here so they can finish eliminating all the rest of the Jews?"

Mark Lane advised the judge that, "I took Mr. Mermelstein's deposition. Every time I asked him a question about [his perception of the connections between the various defendants] – not every time I asked him that [obviously] – I was at risk of being called a Nazi by Mr. Mermelstein. He said, 'You're a Nazi. Your Nazi clients, they can tell you all that.'"

Mermelstein's former Nazi-hunting attorney, Mausner, jumped in crying, "That is not true, your honor," Lane responded by saying, "This happened quite regularly, and if it didn't happen and Mr. Mausner said it didn't happen and if it doesn't happen at this trial, that will be fine. I just ask that it not happen anymore."

The judge was firm: "To the extent that this court has to get involved in admonishing either lawyers or witnesses as to their language and their intemperate use of language, it is not going to play well with the jury.

"And I am going to do it because this is my courtroom. I

[168] preside in this courtroom. I am going to see to it that to the extent I can that this is a civilized trial, if you will ...

"So to the extent that there is a philosophical discussion of the philosophy of Nazi[ism] ... that to that extent on the intellectual level we are going to be able to if it is relevant – to talk about it, to use the word, it is not a forbidden word. To the extent that it is used as a pejorative term in referring to people... I am not going to have that happen."

Mermelstein's attorneys began pressing the question of a debate over the issue of what did or didn't happen during the Holocaust and how it would apply during the forthcoming trial. Mermelstein and company obviously wanted to debate the Holocaust before the jury.

"Is it [the IHR's] position," asked attorney Heller, "they are going to stipulate that Jews were exterminated and genocide was practiced upon them by the Germans, by the German government or –"

However, the judge broke in, before Mermelstein's attorney could finish. "I don't think I heard that," the judge said sharply.

"What you heard was me saying that it has already been found [by a previous judge] to be a fact in this case. And all I said is to the extent that it has been found to be a fact, I am not going to allow it to be reproven ...

"To the extent that Judge O'Neil has concluded in this case this fact, it is binding in this case and it is not necessary to reprove it. So if there was an intention to take the time to

reprove that, that cuts down the time that we are going to have to spend trying this case. We are not going to retry what Judge O'Neil has already taken judicial notice of."

Hulsy pointed out, "In the very article, your honor, which ... is the basis for the defamation suit, it talks about Holocaust survivors and the contribution Holocaust survivors can make if they tell the truth. How can it be said that it is our position there was no holocaust when we were writing about Holocaust survivors?"

Lane said, They are entitled to interpret the evidence as they wish, but they should not make false statements to the jury, your honor, and not say to the jury it is our contention ... that there never was a holocaust. That would be a deliberate false statement made to the jury.

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Heller responded: "Let's not split hairs with the evidence at this stage. My understanding of their position [is this] ... that there was no genocide practiced, no gassing upon the Jews. I believe that is their position ... and they intend to put that up as a defense to be true. I have always understood that is what the case is about."

The judge silenced Heller. "You're wrong," he said.

Heller was undaunted. He continued pressing his point. "If your honor is saying right now '[Mr. Mermelstein], you have already won that issue . . . because judicial notice has been found of the mass extermination of the Jews, then I have no problem."

Now Judge Lachs was getting angry:

"Mr. Heller," he said, "I am going to say this, I hope for the last time: I have read the paperwork in this case. You are not in a position to tell the jury what the defense is. Your job is to tell the jury what the plaintiff's position is.

"All through the papers that I have read, the position of the defendant has been that when they said that Mr. Mermelstein was a fraud, when they said he was a liar, etc, they were not referring to his contention that Jews were gassed during World War II.

"That is your position. You may disagree with it. You may believe that that is not true. But that, at least as far as the paperwork, is what they maintain."

(Later, reflecting upon this moment, Mark Lane said, "That was a major turning point in this case: when the judge told Mermelstein's attorney, 'you're wrong.' Mermelstein's attorneys were astonished – and I was astonished – that the judge put it so clearly." (!) )

IHR attorney Hulsy hastened to point out that the disputed writing by Bradley Smith in the *IHR Newsletter*, the subject of Mermelstein's defamation action, dealt with what he called "a laundry list" of inconsistencies in Mermelstein's testimony. It had nothing to do with the issue of whether there as – or was not – a Holocaust.

Mermelstein's attorneys, he said, wanted to claim that this was the IHR defense, "and then we will have a big trial here with all sorts of experts on whether there was a holocaust, and that," said Hulsy, "is not the issue in the case."

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As Hulsy later reiterated, "We are not here to litigate the Holocaust, to bring in a bunch of experts and argue over what that means or what happened in World War II. We are not taking the position, as [Mark] Lane pointed out, that terrible things didn't happen there."

All in all, thus far, Judge Lachs had been eminently fair and had made it clear that the Holocaust and the issues of racism and anti-Semitism and Nazism would not dominate his courtroom during the adjudication of the legal questions before him.

Although Lachs was still carefully weighing – and would continue to weigh – precisely what documents, letters and other materials could be shown to the jury if and when the issue of anti-Semitism became an issue for the jury in making a decision, it was clear that Mermelstein's campaign to focus on the matter was not going to prevail.

There were, however, other procedural questions to be resolved, prior to the selection of the jury, and they would be a part of the agenda for the attorneys and their clients during the subsequent days of the proceedings.

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<sup>1</sup> / *Ibid.*

## Chapter Twenty-Four

### The "Borking" of Mermelstein

In addition to their attempt to drag the issue of the Holocaust into the midst of the case, Mermelstein's attorneys were also eager to drag the IHR into past legal problems that had involved its co-defendant, Liberty Lobby, the Washington-based populist institution.

This went hand-in-glove with Mermelstein's decision – as far back as 1981 – to drag Liberty Lobby into his conflict with the IHR, when, in fact, Liberty Lobby had nothing to do with the affair.

Mermelstein contended, as we have seen, that the two entities were essentially one and the same, and that views and positions of Liberty Lobby could likewise be attributed to be those of the IHR-and vice versa.

Notwithstanding the baseless nature of the arguments being put forth by Mermelstein's lawyers, the fact is that his attorneys wanted to introduce as evidence previous judicial rulings that presented Liberty Lobby in a negative light or otherwise lent credence – whether accurate or not – to Mermelstein's complaint.

In short, Mermelstein wanted to smear the IHR through a process of "guilt by association." If somebody said something unpleasant about Liberty Lobby, that same unpleasantness could be inferred, likewise, to be applicable to the IHR, and vice-versa.

Mermelstein's attorneys were determined to present, during the trial, an opinion written by Judge Robert Bork, who had, until his retirement, been a federal judge on the U.S. Court of Appeals for the District of Columbia. Bork's opinion, in their view, reflected negatively upon Liberty Lobby and could thereby be used as part of the evidence in the context of Mermelstein's complaint against the IHR.

(This was the same Robert Bork who had been nominated by Ronald Reagan to serve on the U.S. Supreme Court, only to have his elevation to the high court rejected in one of the most bitter Senate fights in many years.)

In trying to prove that the IHR's long-since-dismissed libel case against Mel Mermelstein was indeed "malicious

[172] prosecution," Mermelstein's attorneys wanted to bring into court statements made by Judge Bork about Liberty Lobby (and, in fact, the IHR).

The assertions made by Bork appeared in an opinion he wrote on the court of appeals dismissing an appeal brought by Liberty Lobby. Bork expressed his view that Liberty Lobby appeared to have a history of using libel actions against its critics in an effort to silence them. Bork also made a passing reference in which he suggested that the IHR was a "less reputable" affiliate of Liberty Lobby, a contention that Mermelstein and his attorneys had long maintained.

These assertions were not a portion of the legal finding in the particular question in the case before Bork. They were simply personal expressions of opinion by Bork in what is known in legal jargon as "dicta." It was not a formal part of the legal opinion in the dismissal of Liberty Lobby's appeal that had gone before Bork.

Essentially Mermelstein's attorneys were arguing, evidence that Liberty Lobby had a history of employing libel actions could be imputed as evidence that the IHR did also. (This contention was based on the aforementioned – and false – claim that the two institutions were one and the same and functioned in a concurrent and concurring fashion.)

Mark Lane objected vehemently to the attempt to use Bork's opinion as evidence in the case. "I believe it would be a travesty to allow that Bork opinion or any part of it in," said Lane. "And I believe the Bork opinion is a travesty, and I would like to acquaint the court

with the facts," he said. <sup>(1)</sup>

Lane then described the circumstances which led to the issuance of Bork's opinion. Here is what happened. Lane's client, Liberty Lobby, had filed a libel action against the *Wall Street Journal* after the Establishment daily had published false, malicious and defamatory comments about the Washington institution. The case was initially heard by Judge Thomas Penfield Jackson in the U.S. District Court for the District of Columbia.

During the course of the initial libel action, a reporter for the *Wall Street Journal* wrote yet another defamatory article about Liberty Lobby that appeared in the *Journal*, and the case was amended to include this defamation.

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Shortly thereafter, Judge Jackson harshly criticized Lane for his treatment of the *Wall Street Journal* reporter during a deposition. Lane realized that something was amiss. Neither Lane nor the attorneys for the *Journal* had submitted a transcript of that deposition for the court record. The honorable judge was getting his information from elsewhere.

Follow-up research by Liberty Lobby uncovered the fact that the judge was a regular poker-playing buddy and longtime close Republican Party political associate of high-powered Washington fixer Leonard Garment who also doubled as a key figure in the pro-Israel lobby.

It was Garment's wife, Suzanne, who had written the second defamatory article that was the subject of Liberty Lobby's amended libel action and who had been the *Journal* reporter deposed by Lane, much to Jackson's distress.

After this damaging information was discovered, Lane moved to have Judge Jackson recuse himself from the case as he should have done because there was an "appearance" of unethical conduct-all that is required. However, Jackson refused to step down. The next step was to appeal Jackson's refusal to recuse himself to the U.S. Court of Appeals for the District of Columbia where Judge Robert Bork was a sitting member.

However, Bork had taken what amounted to a leave of absence from the appeals court to prepare for what he hoped would be his Senate confirmation – his promotion – to the Supreme Court.

During this period it was widely reported that none other than Leonard and Suzanne Garment were not only good friends of Bork, but they were also organizing the public relations campaign in favor of his Supreme Court nomination.

(Bork, Garment and Judge Jackson were all old friends from their days in the Nixon administration where Bork served as U.S. solicitor general and then as acting attorney general for a short period during the Watergate scandal.

(Perhaps Bork's most unusual action as solicitor general was his decision to dismiss a criminal case against international criminal syndicate kingpin Meyer Lansky, so-called "chairman of the board" of organized crime, on the basis that there wasn't enough evidence to try him, despite Lansky's

[174] widely-documented lifetime in the underworld.)

However, Bork was not among the panelists on the appeals court who were hearing Liberty Lobby's appeal of Judge Jackson's refusal to recuse himself in the *Journal*-Garment libel affair. He was busy – with the Garments' assistance – campaigning for a seat on the Supreme Court.

Then, practically on the eve of Mark Lane's argument before the court of appeals, Liberty Lobby was advised that the court panel had changed. Judge Bork would be the chief justice among the three members of this new panel.

Mark Lane told Judge Lachs of his quandary. "I called the clerk of the United States Court of Appeals and I said, 'I don't want to do anything to embarrass Judge Bork after all he has been through...'" pointing out to the clerk the apparent conflict of interest in question. "I don't want to embarrass the judge by making a motion to recuse him ... I [also] don't want to do anything which could be called improper [such as calling the judge's chambers about the matter].

"Is there a proper, informal way ? I asked," noted Lane. "The answer was 'No, you have to file a motion to recuse.'" That is what Lane did.

And while the motion for Judge Bork's recusal was pending before Judge Bork, the news media reported that Bork was not going to hear any further cases on the court of

<sup>1</sup> / All quotations which follow (unless otherwise noted) are taken directly from the official transcriptions of the proceedings in *Mel Mermelstein vs. Legion for the Survival of Freedom, et al.* Case No. C-629224. Superior Court of the State of California for the County of Los Angeles.

appeals, that he was going to retire from the court and work in the private arena as a consultant to the Heritage Foundation alongside his close associate, Suzanne Garment.

However, Bork refused to recuse himself, saying he expected to have a long stay on the U.S. Court of Appeals (the media reports notwithstanding). It was then that Bork issued the opinion upholding Judge Jackson's refusal to recuse himself from hearing the *Journal-Garment* libel matter.

This was Bork's last decision on the court of appeals. In conjunction with his ruling, he announced his retirement. As Mark Lane told Judge Lachs, "He had come back only to issue that opinion, your honor, and that is the opinion [that Mermelstein's lawyers were now trying to introduce into evidence]."

Bork's statements regarding Liberty Lobby's alleged litigiousness had nothing whatsoever to do with the legal

[175] opinion expressed regarding the matter of Judge Jackson's refusal to recuse himself in the libel case. However, Mermelstein's attorneys were trying to bring this totally unrelated matter into the case.

There was an audible hush in the courtroom when Lane concluded his exposition by saying, "When I see Judge Bork on television, everyone says, 'Well, there are questions about his politics, but no one has ever questioned his integrity.' And I only say it is because nobody has asked me about that."

To Mermelstein's attorneys, Lane issued this challenge: "I will say this: we will waive all of our objections if they can bring Judge Bork as an expert, if I am given the opportunity to cross-examine Judge Bork. Let him come with his opinions and try to persuade the jury as to why he took those positions."

Mermelstein's attorneys sought to counter Lane's devastating report about Judge Bork – who was, in a sense, an indirect "expert" witness and a "star" witness through his written opinion. They continued to argue that Bork's attack on Liberty Lobby was relevant, but Judge Lachs, in the end, didn't buy their claim.

Judge Lachs said resolutely, addressing Mermelstein's attorneys: "I am ruling that [Bork's opinion] is not coming before this jury. It has nothing to do with the resolution of the case. It is his opinion. It may be correct. He may be absolutely on the dime. If you want to get Judge Bork in here to testify, then do that, but we are not going to get that kind of opinion testimony in front of a jury merely because it was written in a case."

This was significant in that a past opinion expressed about Liberty Lobby and the IHR in a legal opinion by a very well known jurist – right or wrong, and very wrong in this case – was being prevented from being used as "proof" that the two institutions were related or that their actions were undertaken in conjunction.

This was a blow to Mermelstein's attorneys and, for the historical record, it was, in a sense (although perhaps not intended by Lachs to be such) a repudiation of a malicious attempt by Mermelstein's attorneys to use Judge Bork's own malicious judicial mischief as a propaganda tool in the courtroom against Liberty Lobby and the IHR.

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The case of Jackson-Bork and the Garments and their incestuous conspiracy against Liberty Lobby and the IHR is a classic example of judicial misconduct, perhaps even outright corruption. That it was nearly brought into the midst of the Mermelstein case highlights the way in which the court system can be abused – something which Mel Mermelstein clearly understood.

False and malicious statements about both Liberty Lobby and the IHR made by judges and other "experts" had been repeated and given credibility time and again. However, in the Mermelstein case Judge Lachs was not permitting these defamations to be used in evidence.

So it was that the IHR had managed to counter one of Mermelstein's primary propaganda schemes before it was ever able to reach the jury that was expected to hear the case. The proceedings thus closed on the second day on a rather positive note for the IHR, although there was much more to come.

Mark Lane, by this time, was not impressed with the caliber of Mermelstein's legal team. Their behavior in the courtroom was less than professional, in Lane's opinion, and their manner of addressing the judge astounded Lane.

"Hold on, Judge," they would shout, often with a hand in their pocket," Lane later recalled. "I had never seen anything like this kind of behavior on the part of an attorney when he was addressing a judge. There is no way for me to understand the way they acted the way

they did." <sup>(1)</sup>

Mermelstein's attorneys, Lane also noted, had developed a habit of arguing with the judge after he had made his rulings. Yet, Lachs was, according to Lane, "very kind, patient and meticulous with them, explaining the points of law." <sup>(2)</sup> At one point, remembered Lane, he told the judge, frankly, that he felt he was back in "Law 101" with Mermelstein's attorneys. "Perhaps Defamation 10 1," the judge responded. <sup>(3)</sup>

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<sup>1</sup> / Recorded comments of Mark Lane (unpublished).

<sup>2</sup> / *Ibid*

<sup>3</sup> / *Ibid*

## Chapter Twenty-Five

### The Case Unravels

The issue of Mel Mermelstein's alleged emotional distress – the injuries he suffered and what he deserved as a reward, if anything – was another factor in the consideration of what could go before the jury which still remained to be selected.

Of particular concern was the controversy over the \$60,000 settlement that Mermelstein had received from the Hartford Insurance Company for the emotional distress it allegedly inflicted upon Mermelstein at the same time the IHR was allegedly doing the same.

As to Mermelstein's emotional distress, IHR attorney Hulsey said:

"In this case [Mermelstein] is asking for emotional distress from two independent people, and it is very hard to decide how much of the distress was from the pending lawsuits, which he wants us to pay, how much was his distress because [the Hartford Insurance Company] wouldn't defend him in the pending lawsuit, how much was the distress as a result of being called a demonstrable fraud. And it is he that has tied these things together.

"He can't ask to be paid substantial sums of money for emotional distress and then not let us get into trying to find out how each of these different stresses that was stressing him, that is: 'Which caused them and was he compensated ?

"We don't want him to be recovering twice from the same harm. That wouldn't be right. And this is not something remote ... This is all right now. This is what this case is about. These two claims are overlapping." (1)

There was also the controversy over whether or not the attorneys for the IHR would be able to tell the jury that Mermelstein's attorney, Jeffrey Mausner, had collected some \$22,000 in attorneys fees when he was able to coerce Hartford into handing Mermelstein the \$60,000 in damages.

Mark Lane agreed that he would not bring up the amount that Mermelstein had received or the fact that Mausner had received a hefty pay-off for successfully representing his client in the case against Hartford.

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However, the judge said, "Without question, [the IHR] will be able to go into the question of emotional distress that resulted from the Hartford claim ... They will be able to explore the emotional distress with Mr. Mermelstein ... and it is agreed that there will not be any mention of the resolution [of the case] vis-a-vis the hiring of a lawyer. In other words, it will not be brought forth that Hartford did agree and ended up, I take it, hiring and paying for lawyers."

A somewhat relieved Mausner responded, "Okay, I understand." Judge Lachs said, "You can feel free to leave, if that is what you were waiting for – this motion." Mausner said, well, he might stay around.

(Mausner ultimately did leave. In fact, insofar as the Mermelstein case was concerned, Mausner was neither seen by the IHR and its lawyers and their associates, nor heard from, again.)

The question of Mel Mermelstein and whether or not he was a public figure was still outstanding. At the motion of Mermelstein's attorneys – in the end they probably regretted it

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<sup>1</sup> / All quotations which follow (unless otherwise noted) are taken directly the official transcriptions of the proceedings in *Mel Mermelstein vs. Legion for the Survival of Freedom, et al.* Case No. C-629224. Superior Court of the State of California for the County of Los Angeles. September 10-19, 1991.



– the judge did indeed grant a special pre-trial hearing (prior to jury selection) to resolve the matter.

It was on Thursday, September 12 that Mel Mermelstein took the stand and in an unforgettable performance proved, beyond question, that he was very much a public figure – indeed an international celebrity.

In Chapter One we reviewed Mermelstein's stunning admissions of seeking fame and fortune in the business of promoting the Holocaust and of all the plaudits he received.

Frankly, Mark Lane obviously enjoyed the time he spent conducting his inquiry of Mermelstein on the witness stand.

"It was all quite interesting." Lane later commented. "When I asked him if he began giving lectures because of his fight with the IHR," he responded, 'No, I lectured long before the IHR came along.' He kept proving the point that he was a public figure.

"When it came to the question of how many times he had given lectures over the years, Mermelstein said in his testimony in the morning, before the lunch break, that he could count on his fingers the number of lectures he'd given. In the end, however, he said it was 'hands and fingers.' In all my

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years of practicing law, I had never seen such a dramatic reversal of testimony in so short of time.

"What more could Mel Mermelstein have done to make himself a public figure if he wasn't already a public figure?" asked Lane. (1)

The attorney was seriously inclined toward asking Judge Lachs to levy sanctions upon Mermelstein and his attorneys for having wasted everyone's time – and the court's time – proving the obvious: that Mermelstein was very much a celebrity, very much a public figure.

All in all, that determination was very much a blow to Mermelstein's libel action and, for all intents and purposes, it had brought that portion of Mermelstein's overall complaint to an end.

The court proceedings continued to move forward, disposing of the various and sundry house-keeping matters that needed resolution prior to jury selection. Although the court went into recess on several occasions for periodic breaks, often giving Lachs an opportunity to look up a point of law – the judge was eager to resolve these questions and move ahead since, at this juncture, Mermelstein was clearly not inclined to settle.

A very big question outstanding was whether or not there had been probable cause on the part of the IHR and its attorneys in bringing the libel suit against Mermelstein that he contended was an act of malicious prosecution.

The fact was – as noted previously – that Mel Mermelstein was never served with the lawsuit and under questioning in deposition by Mark Lane, Mermelstein was uncertain when he had first heard about the IHR's lawsuit against him.

At one point during the proceedings there was some question as to whether or not Bersin was correct on the facts concerning the filing of the suit against Mermelstein and service of legal papers upon his client, Bersin explained that he was "new to the case."

However, Mark Lane jumped in and pointed out to the court that Bersin had been handling affairs for Mermelstein for at least one year and eight months prior to that time. He was, in short, hardly "new to the case."

Be that as it may, the IHR and its attorneys did indeed believe that they had probable cause – and that their then

[180] attorneys, the Von Esches, agreed that they had probable cause – to file a libel action against Mermelstein for claiming that they had signed Judge Johnson's judicial notice affirming that Jews had been gassed at Auschwitz in 1944.

Carto reminded the court, "Mr. Von Esch knew very well, and everybody at the IHR knew very well, and all of the supporters knew very well, that at no time did the IHR agree with the judicial notice."

Mark Lane summarized the process of what had happened as follows:

"[The IHR] never agreed. In fact, they fought against the substance of the judicial notice. And when they entered into their [settlement], there is a record of what was agreed upon and what was not agreed upon, and what they contended is set forth.

"They did sign an apology. It has no reference whatsoever to the broader issues. It is an apology for having caused harm to Mr. Mermelstein.

"Now, what did Mr. Mermelstein say (when he went on the radio program) to people who

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<sup>1</sup> / Recorded comments by Mark Lane (unpublished).

have no background and understanding about what took place? ... He said, 'It is a judgment. It is very important that this be identified properly. It is a judgment. It is a judgment. It is not a settlement.' That is the first thing he said. And then he went on further to say ... 'What is more significant is as they signed the judicial notice, which is very clear and concise...'

"So," continued Lane, "What did Mr. Mermelstein say that was untrue ? What he said that's untrue is that the defendants signed the judicial notice... They didn't sign it and they didn't agree. They have always disagreed.

"But Mr. Mermelstein was not content to say that they agreed, when that was an absolutely false statement; he went on to say what they agreed to is that now no one can question any aspect of the holocaust. That is what [the IHR does]. They raise specific questions about specific details [about the Holocaust].

"And so when the [libel] complaint was filed, Mr. Von Esch stated in the complaint that this statement was untrue and it was defamatory, and that one could infer from these statements that everything done by the IHR was fraudulent, and that they admitted it. Not wrong, but they admitted that

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what they were doing all of these years is wrong, and as a result of that in this very narrow, very small, unusual world of revisionists they were reviled for 'having quit.'

"They [received angry calls and long-time IHR supporters] attacked them, not for having lost the law case – that is not what they were reviled for – [but] for having [appeared to have] conceded that they were wrong, that the Holocaust took place exactly as it was said."

Elaborating on this matter, IHR attorney Hulsy said, "I think it is pretty much commonly agreed that these are revisionist historians who question aspects of the Holocaust, and particularly the question of homicidal gas chambers at Auschwitz. But they do dispute certain aspects of the Holocaust.

"Now the fact is that the judicial notice does not say that the Holocaust is not subject to dispute. It dealt only with the narrow issue of what happened in Auschwitz in 1944, not everything else ... [The IHR] didn't sign the judicial notice . .

The court never ruled that the Holocaust is not subject to dispute. These are lies, mischaracterizations."

As far as the question of filing the libel suit to begin with, Lane said, "I will tell you this, your honor. I think that this is a winnable case, the one [from] which [the Von Esch law firm] withdrew.

"If you look at the documents in this case, [you find Mermelstein's attorney] Mr. Mausner telling the Hartford Insurance Company: 'We are going to brand you an antiSemite. You'd better give [Mermelstein] \$60,000 for waiting for the check to come [which caused] the intentional infliction of emotional distress.' He got \$60,000 because he was waiting for a check for \$22,000 in attorney's fees. It took too long to come and they settled it.

"There was probable cause. That [was] a winnable [libel] case. If the Von Esches were not German and were not being charged with being anti-Semitic by Mr. Mermelstein every time they turned around, they would have tried that case and might have won the case.

"There is probable cause, because here is the record: [Mermelstein] said they agreed that everything [the IHR] believed in was a lie and a fraud, and they can't ever say that

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ever again. And he was traveling everywhere saying that, and that is why they filed the lawsuit. There was no probable cause ? That is a winnable case.

"But no one ever had the chutzpah, the courage, to take that case forward, and that is why we are here today because sometime, somewhere along the line, someone has to draw the line... There was probable cause and they know it. We all know it."

Judge Lachs was inclined to agree with the contention of the IHR:

"I would suggest," said the judge, "that the reasonable understanding of the reasonable hearer on the radio would be that why it was more significant was because they signed, in the sense of agreed to ... the proposition which [Mermelstein] then read ...

"In fact, I think it is the interpretation which most people would have to give it. Most reasonable people hearing this, I think would have to agree that the reasonable interpretation is that ... Mr. Carto and the IHR had agreed with Judge Johnson's ruling. So I find that was at least a reasonable understanding that people would have."

The judge went on to remark that if Mermelstein's attorney would have actually wanted a statement by the IHR that it agreed to the contention that there had been Jews gassed at Auschwitz that the attorney, Michael Maroko, would have drafted the statement and apology accordingly. However, said Lachs, "Nowhere in either document, statement of record or the apology, is there anything that says that is what happened.

"I think," said the judge, "one would be hard-pressed, honestly, to read a statement of record with all of those 'whereases' that had been apparently a subject of much negotiation, and take it from that the [IHR] agreed with the underlying facts of Judge Johnson's ruling."

Having said all this, Judge Lachs ruled that Mermelstein's statement was not defamatory on its face. However, he added, in order to find probable cause, "there have to be people that would have understood this as being a defamation of the IHR... and Mr. Carto. And there would have had to have been special damages ... [which the IHR would ultimately have to prove during the trial]."

"So," said the judge, "with that in mind, I would have to

[183] find that there was probable cause [for the IHR to bring a libel action against Mermelstein]."

This was another major blow to Mermelstein's case. Now the IHR had only to prove that there were indeed special damages. That would come later.

Also outstanding to be considered by the court was the question of whether or not the alleged libel of Mel Mermelstein by the IHR in its newsletter was, as IHR attorney Hulsy put it, "part of a private libel, or was it part of a discussion of public concern?"

Hulsy pointed out that a Holocaust memorial museum was, even then, being constructed in Washington, D.C. Perhaps stating the obvious, but for the record, Hulsy added, "I would say something very newsy runs about once a month on the subject in the popular press."

Judge Lachs responded, "I think everybody here in this room would concede that the Holocaust is a subject of public concern. I don't know whether it would be conceded that the public concern is whether or not the Holocaust took place. I doubt if that is of public concern, except to a handful of people."

It was at this juncture that the judge pushed forward, eager to dispose of the question as to whether or not the IHR could defend itself on the common law doctrine of the so-called "special interest" defense which, under California's statutory provisions, was described as "qualified privilege."

If the IHR were able to establish that its newsletter – the subject of the libel dispute – was essentially a privileged communication to a well-defined and limited audience with a "special interest" in its subject matter, rather than a publication offered to a broad audience with various interests, Mermelstein's ability to recover any meaningful damages – if any – would be severely curtailed.

Addressing that matter, IHR attorney Hulsy said, "We are attempting here to establish that this is a group with a unique special interest, that the people they communicate with are people who have subscribed and are interested in this subject matter. That is really a very small circle and that would fall within the common law doctrine of the special interest defense ... and within the qualified privilege..."

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Mermelstein's attorneys sought to derail the qualified privilege defense by claiming that the IHR's publications, in fact, went to a wider audience than those who subscribed to the publications or who were otherwise interested in the issues of the Holocaust, the events of World War II and related subjects covered by the publications of the IHR.

"I would say that this is an issue of fact," said Mermelstein's attorney, Bersin, "and we would want a hearing on that."

"Do you have evidence on that?" inquired IHR attorney Hulsy.

"We have evidence on that," responded Bersin.

Judge Lachs suggested, at this juncture, that the attorneys for both sides try to prepare the evidence they needed; Mermelstein's attorneys needed to come up with proof that the IHR did not have the privileged communication defense – that, in fact, the IHR's publications were indeed widely distributed.

Because of the lateness of the hour, Judge Lachs proposed adjourning for the day and resuming court action on Thursday morning, September 19. The Jewish holiday of Yom Kippur fell the next day (Wednesday) and court would not be in session. One day of rest lay ahead. Judge Lachs left the courtroom and the attorneys began packing their voluminous files.

Six lengthy days of proceedings had run Mermelstein – and his attorneys, in particular – ragged. They were not in a good mood. The combined efforts of Mark Lane and Bill Hulsy had riddled Mermelstein's suit full of holes.

Mark Lane felt very strongly – and he told his clients so – that for all intents and purposes, by this point, Mermelstein's lawsuit had been eviscerated.

It was at this time that the desperate state of Mermelstein's attorneys became fully apparent. Lane pressed Heller who asserted that he was "sure" there would be more evidence. To which Lane responded, "We are less interested in predictions than evidence." <sup>(1)</sup> This was just too much for the exasperated Heller.

"Go — yourself!" snarled Heller, his voice reaching a fevered pitch. Lane was visibly surprised — as were all of the spectators nearby — but Lane chose not to respond. Heller was clearly unnerved by Lane's non-response and pushed further.

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"If you're going to play this — with me, I'm going to throw it back at you, so don't — with me," screamed Heller, his eyes flashing angrily.

Buoyed by his senior colleague's aggression, the childlike Bersin pushed forward toward Lane, both his paws clenched tightly, his face fligid. Bersin thrust his snout into Lane's face. It appeared violence was imminent. Trish Lane moved forward. One IHR supporter in the spectator's area, sitting beside Mrs. Lane, prepared to jump into the impending fray. The spectators braced themselves.

Mark Lane didn't move an inch, but instead stared down Bersin whose snarling visage was just inches from Lane's face.

"Go — yourself!" shrieked Bersin. That was the sum total of what the young attorney could muster. At that point Mark Lane walked calmly away, commenting, "We are in a courtroom. Don't use that language. I don't believe this."

Bersin was determined to exacerbate the situation. He approached Lane and positioned himself within inches of Lane. "Do you have a problem with that?" he shouted. "Let's go outside and settle it now."

Lane stepped away, again saying, "I don't believe this." Addressing two courtroom personnel who were standing nearby, Lane asked, "Do you hear this? Can you believe this? I hope everyone is listening." (They were listening, including, undoubtedly, Judge Lachs, whose chambers were just steps away.)

Bersin refused to give up. He approached Lane and demanded, "C'mon outside, then, if you've got something to say. Just step outside." At that point Bill Hulsy stepped forward, seeking to defuse the situation. "Come on," he said in a professional and conciliatory tone to Bersin, "This is just business."

How did Bersin respond? At the top of his voice he barked at Lane, "You're nothing but a scum bag. Why don't you go outside to the pool and — yourself?"

Bersin's colleague hadn't calmed down either. Entering into the spectator area of the courtroom the cocky attorney stopped and said to Lane, "If you don't like it, go tell the judge. Go call the police. Sue us."

The caliber of Mermelstein's legal team was bared not

[186] only to the handful of spectators — most all of them IHR supporters — who had already figured out the truth about Bersin and Heller for themselves, but also to the courtroom personnel who most assuredly advised Judge Lachs of the events, however unlikely that the judge hadn't heard it all for himself.

What is particularly interesting is that the young and athletic Bersin and Heller (the latter having bragged outside the courtroom of his proficiency in martial arts) chose to pounce on Lane as they did.

Inasmuch as Bersin had been described as the Mermelstein's "expert" on the IHR's codefendant, Liberty Lobby and its weekly newspaper, *The Spotlight*, he certainly was not unaware that the 64 year-old Lane had undergone quintuple bypass open-heart surgery several years previously.

Lane had written several detailed stories for *The Spotlight* about his physical condition and his subsequent treatment (chelation therapy in particular). These stories almost certainly had not gone by "expert" Bersin's eagle eye, perhaps accounting for his eagerness for a fight.

Although Lane had grounds to have Bersin arrested, or to bring a civil suit for assault, Lane chose not to do so. Under California's criminal code — Section 415 — an invitation to fight constitutes a crime. Bersin was, actually, lucky that he got away unscathed, other than from, of course, the legal pummeling that Lane and Hulsy had dealt him during the proceedings.

Following the incident, Lane and his wife Trish, Willis Carto, and other IHR

<sup>1</sup> / Quotations which follow are taken from *The Spotlight*, Sept. 30, 1981, p. 6.

supporters who witnessed the event prepared declarations addressed to the court summarizing the events that had taken place. These declarations were submitted to the judge for his inspection.

That evening, both the IHR-Liberty Lobby team – and Mermelstein and his lawyers – had much to consider. The pretrial hearings were at a critical juncture and some fast thinking and decision-making was in order.

The reaction by Heller and Bersin gave the IHR-Liberty Lobby team a certain amount of confidence. The opposition clearly was unnerved by the developments of the past week. However, nothing was certain, by any means.

## Chapter Twenty-Six

### The Judge Speaks

Court resumed on Thursday morning, September 19, 1991. Contention was in the air, particularly after the events that had erupted at the closing of the court late Tuesday afternoon.

Well aware of what had taken place in his courtroom, the judge was clearly exasperated, if not angry, when he gavelled the court into order. "I hope to conclude everything we have to do. We have now spent much longer than I anticipated," he said, "and I am sure much longer than anybody anticipated. We are just going to have some finality as to certain issues." <sup>(1)</sup>

Mermelstein's attorney Bersin indicated that he wished to call Willis Carto to the stand to determine whether or not the IHR had suffered any special damages as a result of Mel Mermelstein's radio pronouncement that had led Carto and the IHR to sue Mermelstein for libel. The judge suggested that this issue should have been disposed of in deposition.

"We are not allowed to put Mr. Carto on the stand, is what you are ruling?" cried Bersin, his voice rising.

The judge responded sharply, telling Bersin, "What I am saying, sir, is this case has been in court for years. I told you that what I wanted – and I have said this for days now, and I just don't know why it is so difficult to understand – what I want is to know what your proof is on this issue, so that I can make a determination as to whether there are factual issues that should go to the jury."

Chastened and perhaps a bit embarrassed, but still obviously angry, Bersin said, "I understand that."

The judge continued. "I want to know what your proof is –" only to be interrupted by Bersin's colleague, Larry Heller, who broke in, saying, "Excuse me, your honor."

The judge responded, "Excuse me, Mr. Heller, let me just say one other thing. This is not an opportunity [for] discovery. This is the trial. Let's bear that in mind."

At this point Heller – obviously at a boiling point – took on the judge. "I don't consider that we fairly had a chance to fairly put on our evidence ..."

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The judge did not respond favorably to Heller's challenge. "Mr. Heller ... you people, everybody in this courtroom, including me, has been searching through what one does in these kinds of trials from the first time we started it ..."

"Because I don't think you had any better idea of how these things worked than I do, even though you have been in the case – you're hired and you are a lawyer in the case. I don't think you knew any better than I do."

(Judge Lachs was referring, in this case, to particular – sometimes peculiar and esoteric – aspects in the law of libel and defamation.

(The judge himself had acknowledged at the beginning of the proceedings that much of the law in this field was new to him and he made no bones about it.)

"I have been working my way through this step-by-step with not a tremendous amount of help," said the judge. "And if I change my mind as to how mechanically we should proceed, it is because of the work that I have been doing."

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<sup>1</sup> / All quotations which follow (unless otherwise noted) are taken directly the official transcriptions of the proceedings in *Mel Mermelstein vs. Legion for the Survival of Freedom, et al.* Case No. C629224. Superior Court of the State of California for the County of Los Angeles. September 10- 19, 1991.

After the judge finished his remarks, Heller responded, elaborating on his complaint that the judge had been unfair. Finally, Heller concluded, saying again, "I don't think we have been treated fairly in this court, your honor, and I will state that for the record."

Lachs said, patiently, his voice never rising, "Mr. Heller, your perception of how you have been treated is your perception and I may never be able to change that. Let me tell you something for the record. I have no ax to grind with you or Mr. Bersin or your client, or anybody else on your side. I listen to what people proffer ...

After reminding Heller that it was he (the judge) who had, in fact, raised a number of questions that were favorable to Mermelstein's attorneys, the judge said firmly, "Let me tell you this. I am not going to let your obvious anger influence the way I decide my rulings."

Heller responded: "For the record, I am not angry. I am protecting my record."

The judge commented, "You sure sound it, sir. I will tell you that."

Bersin, however, responded this time. "I am angry, your honor, but I don't want it to affect your ruling in any way."

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Ultimately, despite this exchange, Willis Carto was called to the stand to explain the special damages suffered by the IHR.

Under questioning from Mermelstein's attorney, Carto said, "It was very clear that the IHR was sustaining damages by a campaign of Mr. Mermelstein at that time to confuse and obfuscate the facts about the settlement [between the IHR and Mermelstein in the first legal encounter]."

Carto went on to point out that "Mr. Mermelstein has stated that it is his intention to wreck the Institute for Historical Review... by causing so much expense and needless litigation and concocted lawsuits and so much misinformation among the public, generally, that people will be under a complete misconception of the issues.

"At that time," said Carto, "yes, my [recollection] is that [the IHR's staffers] at that time were very concerned that Mr. Mermelstein was going around making speeches, as he has admitted, about 20 a month. That he was having interviews with newspapers. He was on the radio constantly, and he was saying things about the settlement that were not true.

"This is very damaging to the Institute for Historical Review, because it completely undermined all of the research that they had been doing on this subject. The damages were very clear, that the Institute or Historical Review seemed to be a fraudulent enterprise.

"If [the IHR] has seemed to be making things up out of the whole cloth, if it has seemed to be repudiating its positions, why it is very clear that no one is going to support [the IHR]."

"The Institute for Historical Review is a scholarly institution that entertains and seeks information from scholarly research on any number of subjects, including the Holocaust, and for it to come out or be accused of repudiating a position that it has held is, of course, very damaging."

The IHR's administrative director also took the stand, called in by Mermelstein's attorneys who wanted to explore the issue of special damages further. He pointed out that Mermelstein's statements about the IHR allegedly "signing" the judicial notice had created quite a furor among IHR supporters.

"I do recall that they were very upset because they were basically getting in touch with us to find out what we actually

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had agreed to in the settlement. They misunderstood what we had agreed to settle on. They thought, in fact, that we had agreed with Judge Johnson's judicial notice ... It was very difficult to explain."

He pointed out that there had indeed been a decline in contributions to the IHR in the period following Mermelstein's statement and that it continued "severely" and that the IHR was in jeopardy financially.

In discussing this aspect of the damages with the court, IHR attorney Hulsy pointed out that "The test [for determining probable cause for the IHR to file a libel suit [was]: 'Did [the IHR] reasonably believe that damages were sustained or would be sustained if the lawsuit had not been filed – amongst other things, to correct the record and attempt some recovery and recompense ? I submit,' said Hulsy, "that the burden has been met by [the IHR] ..."

The judge had earlier found that he believed that the IHR did, in his mind, have probable cause to file a libel suit. He was now faced with the critical decision of whether or not special damages had been proved, whether that issue would have to go to the jury.

A very critical juncture in the case had now been reached, and Mermelstein's attorneys knew that all too well. They had fought hard to prove their point and had fought hard to sway

the judge's thinking.

Before Judge Lachs retired to consider the issue, according to Mark Lane, he had faced what Lane perceived to be a very subtle challenge from Mermelstein's attorneys that had continued throughout the proceedings.

"It was my impression," Lane later commented, "that they were threatening Judge Lachs. If you read the transcript and see the language they were using, you'll understand.

"They were saying, 'Judge Lachs, you're Jewish. You'll have to face the voters in your district. Everybody will know what you've done to our client if you rule against him.'

"Mermelstein and his attorneys were Jewish," Lane pointed out. "The judge was Jewish. I was the only person on the IHR-Liberty Lobby team who was Jewish. I could see what was going on. The judge was under an immense amount of pressure." <sup>(1)</sup>

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However, despite these tactics, the judge wouldn't allow himself to be strong-armed by Mermelstein's attorneys. So it was that Judge Lachs, having heard all of the give and take from both sides, said, "Based upon ... everything that has gone on to date, I am going to find that there was probable cause [by the IHRJ for filing of the underlying lawsuit...]"

The IHR's attorney, at this point, made a motion for a non-suit, which the court granted, insofar as Mermelstein's malicious prosecution action was concerned. Thus, Mermelstein's malicious prosecution action had been dismissed.

Judge Lachs once again reiterated his personal position. "I want to make it very, very clear again. I have, as I said earlier today, no ax to grind with any of the plaintiff – with the plaintiff or any of his attorneys or anybody associated with him.

"I have taken no pleasure in having to read the writings that Mr. Carto and his colleagues have put forth over the years ... I do not like what I read. I might feel even more strongly about it, but I am not going to discuss it. It is not whether I like it or not. It's not important for this case. The depths of my feeling are only important to the extent that I might be prejudiced in favor of one side or the other.

"I indicated at the beginning of the case when Mr. Hulsy asked me whether I would be inclined to recuse myself, I wouldn't be inclined to recuse myself because I felt that I could adjudicate the issues in the case fairly for all of the parties. I know, because I have been a lawyer and tried cases, that I never liked rulings against me.

"I can only say, for hopefully the last time, to the extent I am capable of doing it, I am going to read the law fairly. I am going to listen to the facts fairly. I am going to apply the law to the facts as fairly as I can. And the outcome, unlike a lot else in life, the outcome in a case like this is available to be reviewed by others wiser than myself."

On that positive note, Lachs adjourned the court for a short lunch break. This gave the attorneys for both sides the opportunity to review the situation at hand. Clearly, Mermelstein's case was in shambles. Fast action was needed to save what remained – if anything.

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One of the IHR's supporters in the courtroom heard Mermelstein muttering to his attorneys as they left the courtroom, "I don't want to try this case." <sup>(2)</sup>

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<sup>1</sup> / Recorded comments by Mark Lane (unpublished).

<sup>2</sup> / *The Spotlight*, October 7, 1991.



## Chapter Twenty-Seven

### Surrender

Attorneys for the IHR and its co-defendants were waiting with bated breath for the final resolution of Mel Mermelstein's assault-his fight to the finish. Mermelstein's lawyers had one last-ditch ploy.

When court resumed at 1:40 PM, Mermelstein's attorney Heller stepped forth, asking that the court give him the opportunity to appeal the dismissal of the malicious prosecution action – before the rest of the case proceeded, either before Judge Lachs or before a jury.

After Heller completed his presentation, Mark Lane dropped a bombshell that clearly left Mermelstein and his attorneys reeling. "Your honor," began Lane, "if it please the court, I question the integrity of the motion which has been made." <sup>(1)</sup>

Heller responded angrily, saying, "Your honor, I am not going to sit here and have him attack me personally on this ...

"If Mr. Lane has a legal argument or a factual argument he would like to give, fine; otherwise, I respectfully request that the court should not permit Mr. Lane to –"

Lane would not back down. He interrupted Heller, saying simply, "I would like to present some facts, your honor. That is all I wish to do." Lane charged on before Heller could burst in again.

"During this morning my wife was seated here in the well of the courtroom. She came to me and said that Mr. Heller was speaking to Mr. Bersin and to Mr. Mermelstein, and she reported to me that Mr. Heller said to Mr. Bersin and to Mr. Mermelstein, 'Well, you don't want to try this case before this judge, do you?'

"Now after she told me that," said Lane, "in order that there would be a record of this, I asked her to repeat to Mr. Hulsy what she had heard. We knew this before the luncheon break, your honor, and we were prepared, waiting to see what they would do in order to try to do something, which I believe is inappropriate. So I question the legitimacy of the motion.

"In any event, your honor, even if it were appropriate to

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make a motion, it is not appropriate to make the motion for the wrong reasons ... At this point, to tell us after all of these years, after all of these depositions, after all of the lawyers gathered here, that they want to stop the case – even for a good reason, and I suggest it is not a good reason – would be inappropriate."

When the judge finished hearing what Lane had to say, he turned to Heller, who stood glaring silently at Lane, and asked quietly, "Mr. Heller, do you have anything you want to say in response?"

Heller more or less acknowledged his guilt – and his defeat. "I don't think there is any response to it," he said, adding somewhat defiantly, "I am sure from now on I will keep my voice a little lower." He insisted that his motion was appropriate and said, that, "The reason I made the motion – well, let me say this: it appears clear to me that [if the motion goes up on appeal] ... I am going to come back in front of you, your honor."

Judge Lachs, as he had throughout the case, remained composed, despite the fact that it was clear – and had been made clear by Heller and his co-counsel throughout the proceedings – that Mermelstein's attorneys believed that Lachs was biased against them and in favor of the IHR (which, of course, was clearly not the case).

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<sup>1</sup> / All quotations which follow (unless otherwise noted) are taken directly the official transcriptions of the proceedings in *Mel Mermelstein vs. Legion for the Survival of Freedom, et al.* Case No. C629224. Superior Court of the State of California for the County of Los Angeles. September 10-19, 1991.

Addressing Heller – and the court in general – Lachs indicated that an appeal would take time. "You would have to brief your positions. You would have to provide transcripts. You would have to wait for the reporter, probably, to type up a transcript.

"The parties are all here, they are ready for trial. Mr. Mermelstein has pled a case for defamation, and I have made many, many rulings in that area ... [Mr. Mermelstein] has pled emotional distress, I believe, as one of the components of his damages from the defamation. I believe that the parties should be allowed to proceed with their lawsuit. It is costly in terms of court time. It is costly in terms of the parties' time to just break off."

With those concluding words, Judge Lachs denied a further delay in the proceedings as requested by Mermelstein's attorney.

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Lachs said, "I believe that my decision is a correct one under the law and the facts as they have been presented. Otherwise, I wouldn't have made the decision that I did ...

"I am not going to try and persuade Mr. Mermelstein to stay in this court. That is for him to decide. It is for his lawyers to decide."

Lachs continued, in a sincere – but firm – tone: "I will tell you, whether you feel it or not, and I will just say it: that I don't think you will end up in a court – if you ever get back into a court – [where you will] find a judge who will more closely listen to what you say, read what you have to offer, and weigh it.

"You may not like the results, but I don't think that you are going to find anybody who will give you a greater opportunity [than me] to present your case properly to a jury."

Noting that the defamation portion of the case would still go to the jury (notwithstanding the fact that the determination that Mermelstein was indeed a public figure had done immense damage to the case), the judge gave Mermelstein's attorneys the chance to re-examine their position.

It was then that Heller moved to dismiss the libel action entirely, and the judge granted the motion.

At this point the two basic charges in Mermelstein's case against the IHR had been dismissed – the malicious prosecution action and the libel case.

Mermelstein's attorney also moved to dismiss the charge of intentional infliction of emotional distress as it related to the libel action.

Mermelstein's attorneys asked for the stipulation, however, that should Judge Lach's malicious prosecution dismissal be overruled on appeal and ultimately come to trial that Mermelstein be permitted to raise the question of emotional distress arising from the alleged "malicious prosecution" by the IHR.

Speaking for the IHR, attorney Lane, said that to the extent that it was possible to do so, his clients would accept that stipulation.

It was at that time that Judge Lachs concluded, for the record, "The case then, in its entirety, is dismissed." With apparent relief in his voice, Lachs said, "We don't have

[196] anything sitting here for me to work on."

It was at 2:55 PM on September 19, 1991 – after seven days of proceedings, following eleven years of litigation – that Mermelstein and his attorneys had finally thrown in the towel. The IHR had very clearly won a momentous and resounding victory. There was no question about it.

## Chapter Twenty-Eight

### An Unpublicized Victory

IHR founder Willis Carto expressed his satisfaction with the results:

"The IHR survived this third major effort to destroy it. The first lawsuit by Mermelstein could have been devastating, but the IHR survived.

"The bombing of the institute's headquarters on July 4, 1984 could have spelled the end, but it didn't. The IHR survived.

"Mermelstein's second lawsuit, like the first one, could have destroyed us. But, thanks to the truth and thanks to a fair and impartial judge, we prevailed.

"And we couldn't have done it without the good will and support of grass-roots revisionists around the country who rallied behind us each and every time." (1)

However, what was interesting in the wake of Mermelstein's devastating defeat was the manner in which the media chose to ignore it. Despite prior media publicity promising the final vanquish of the IHR, one would assume (based on the news coverage of the final results), that the case had slipped into the memory hole.

There were several reports that did appear, minimal though they may have been. One such report appeared in the *Los Angeles Daily Journal* on September 23. The story was headlined, "No end in sight to litigation against holocaust skeptics."

However, as Mark Lane noted in a letter to the *Journal*, "That was indeed a curious summation of a judicial ruling dismissing half of the case and the plaintiff's voluntarily dismissal with prejudice of the rest of the case.

"Those acts concluded a decade-long controversy with a clear-cut defeat for Mermelstein and his attorneys and a victory for my clients.

"The passage of time may demonstrate that [Mermelstein's attorney] Bersin's knee-jerk public reaction, 'We will appeal' [quoted in the *Journal*], was but an empty prediction." (2)

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Lane went on to comment favorably on the performance of Judge Lachs during the proceedings, echoing comments he had made privately to his clients from the first day of the proceedings until their conclusion:

"I have never tried a case before a court which was so patient, fair, meticulous and cautious. There is no basis, real or imagined, for an appeal. Indeed, Judge Lachs on more than one occasion ... raised for consideration questions of potential value to Mermelstein which his own lawyers had missed or failed to understand until the Court explained the issues to them." (3)

In an interview with Liberty Lobby's weekly newspaper, *The Spotlight*, which had featured Lane's past courtroom skill in several previous cases involving the Washington-based institution, Lane told the supporters of Liberty Lobby that, in his view, "This was our greatest victory," (4) considering all of the factors that had initially stacked up against Liberty Lobby and the IHR.

Although the *Los Angeles Times* had, in the past, been interested in the life and times

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<sup>1</sup> / Unpublished comments by Willis Carto to IHR supporters at a victory party on the evening of September 19, 1991.

<sup>2</sup> / Letter (dated September 25, 1991) by Mark Lane to *Los Angeles Daily Journal*

<sup>3</sup> / *Ibid.*

<sup>4</sup> / *The Spotlight*, October 7, 1991.

of Mel Mermelstein, the *Times* report of the IHR's conquest of Mermelstein appeared only in the Orange County edition of the *Times* on September 25, several days after Mermelstein's legal demise.

The article was brief and generally factual, bearing the headline "Doubters of holocaust win a round in court," suggesting that there was "no end to the dispute in sight." The article quoted an IHR spokesman calling the dismissal of Mermelstein's case a "victory" and a "vindication," saying that the court's action represented "the collapse of the Mermelstein case." <sup>(1)</sup>

Interestingly enough, the IHR had been tipped off that the behind-the-scenes decision makers at the *Los Angeles Times* had been advised – presumably through Mermelstein's attorneys, either directly or indirectly – that Mermelstein's case was collapsing. <sup>(2)</sup>

This perhaps explains the reticence of the *Times* to send reporters to the courtroom and give the affair the intense coverage it undoubtedly would have received if it had been Mermelstein who had emerged triumphant.

Mermelstein's attorney, Lawrence Heller, was not so

[199] elated in his meeting with the press. Defaming the judge, he complained to the *Los Angeles Times* that Judge Lachs was "unfair and not impartial." <sup>(3)</sup> Heller went on to predict that the suit would be reinstated on appeal. "These guys are still not off the hook," said Mermelstein himself. We'll definitely win the appeal." <sup>(4)</sup>

Mermelstein did, in fact, appeal. However, on October 28, 1992 the California Court of Appeal (Second Appellate District, Division Two) ruled decisively in favor of the IHR and its co-defendants after an unusually brief hearing.

All three of the judges hearing the appeal of Judge Lach's dismissal of Mermelstein's complaint of malicious prosecution unanimously rejected Mermelstein's appeal.

Mermelstein's attorneys had argued before the court that Judge Lachs had erred in finding that the IHR and Willis Carto had probable cause to sue Mermelstein for libel.

However, the IHR's persuasive brief and its oral arguments – coupled with Judge Lachs' careful attention to the facts and the law as evidenced in the transcripts of the earlier proceedings – were enough to convince the appeals court to reject Mermelstein's appeal. <sup>(5)</sup>

Mermelstein had thirty days in which to ask the California State Supreme Court to hear an appeal of the rejection by the Court of Appeal, but Mermelstein chose not to proceed. So it was that after eleven long years Mel Mermelstein's campaign to destroy the Institute for Historical Review came to a complete and definitive victory for the IHR. <sup>(6)</sup>

Perhaps the crowning glory came when Mermelstein's attorney issued three checks drafted on December 11 and drawn on the account of the trust fund of his firm, Alfred, Maroko, Goldberg & Ribakoff. These court-ordered payments were to cover "all costs ordered by the court" payable to the recipients.

One check was issued to the Legion for the Survival of Freedom and its attorney in the amount of \$906.39. A second check was in the amount of \$8,007.94 made payable to Liberty Lobby and its attorney, Mark Lane.

A third check in the amount of \$84.00 was made payable to Willis Carto, who had represented himself. "I should frame

[200] this-but I won't," remarked Carto shortly before he cashed the check.

This was a payment Carto and his devoted wife, Elisabeth, well deserved (minimal though it was) after what was now twelve years of time and energy and money – yes, even emotional distress – spent fending off Mel Mermelstein's campaign to destroy Liberty Lobby, the IHR and the historical revisionist movement.

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<sup>1</sup> / Quotations in this paragraph taken from *Los Angeles Times* (Orange County Edition), September 25, 1981, p. 139.

<sup>2</sup> / *The Spotlight, Ibid.*

<sup>3</sup> / *Los Angeles Times, Ibid.*

<sup>4</sup> / *Ibid.*

<sup>5</sup> / *Journal of Historical Review*, January/February 1993, p. 7.

<sup>6</sup> / *Ibid*, March/April 1993, p. 13.

## Chapter Twenty-Nine

### The Soap Lady

It was in the Spring of 1982 (in the early stages of the IHR's conflict with Mel Mermelstein) that one of the first major responses to the burgeoning of Holocaust revisionism appeared in an Establishment journal. *Present Tense* magazine, the house organ of the American Jewish Committee, published a lengthy analysis addressing the question: how best to respond – if at all – to Holocaust revisionism? The author of this think-piece was Jonathan Sarna. His article was entitled "Fighting intellectual anti-Semitism." <sup>(1)</sup>

A summary of the major points made in this rather astounding article is critical, if only because they constitute an overview of precisely the fashion in which historical revisionism had indeed been dealt with.

Now, with the advent of the Mermelstein case, and a growing awareness of revisionism, the anti-revisionist forces were beginning to find themselves at wit's end. They needed to determine precisely how they were going to rally against this new form of what they had dubbed "intellectual anti-Semitism." Let us examine the debate as outlined by Sarna.

What was "intellectual anti-Semitism"? According to Sarna, it was "anti-Semitism with academic pretensions" and among the many forms of anti-Semitism, he said, "few [were] more pernicious" than this brand.

Attacks on the Jewish religion, on theological grounds, and on the Jewish people as a race, had been replaced by "hate-mongering in the cloak of history," wrote Sarna.

"Modern practitioners call it historical revisionism and through it hope to achieve a radical reinterpretation of the past. At the center of revisionist studies stands the Institute for Historical Review."

After citing examples of the IHR's alleged mendacity, Sarna asked: "How can Jews respond to this malicious rigmarole?" He answered the question himself: "Four strategies suggest themselves. They are best described as outrage, silence, instruction and obstruction. Each has been put to use in different places at different times."

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The problem with "outrage" in response to revisionism, said Sarna, was that the "act of shouting ... often focuses attention on the very sentiments the shouters most wish to see forgotten. Those who attack intellectual anti-Semitism sometimes unwittingly gain it recognition. Many who would never have known anything about the Institute for Historical Review may learn about it only as a result of the protests."

What's more, pointed out Sarna, this approach might invite the "crying 'wolf'" response by those who have heard it all before: "The more often shouting is heard the less likely anyone is to listen."

The opposite approach to outrage, said Sarna, is "silence." That is, simply ignore the revisionists altogether. Give them the so-called silent treatment.

One problem in remaining silent, said Sarna, is that those who refuse to answer

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<sup>1</sup> / All quotations which follow, unless otherwise noted, are taken from Jonathan Sarna's article, "Fighting Intellectual Anti-Semitism," published in the Spring 1982 issue of *Present Tense* magazine.

revisonists "expose themselves to the charge of being unable to answer ... Not to answer historical revisionists ... not only allows them to claim victory by default; it may actually lead some people to give credence to their charges."

Then there is the third response: "instruction." The theory that assumes that, in Sarna's words, "hatred can be countered with hard facts." (Sarna's definition of hatred, in this context, is historical revisionist research and writing.)

According to Sarna, "Those who follow this advice patiently respond to the claims of historical revisionists, hoping that truth will win out in the end. Since the majority of Americans now living have no conscious memories of the Holocaust (a fact that has received far too little attention) they must depend for information on what they learn from others. This theory holds that even if revisionists are not convinced by instructive refutations based on fact, some innocent readers at least might be."

But, alas, said Sarna, "Unfortunately, such well-meaning efforts can unwittingly accord hate-mongers both free publicity and a certain legitimacy. Their vicious ideas may wind up being regarded as serious contributions to the market-place of ideas, and they themselves may emerge in the public mind as not evil, but just misguided. The controversy about the Holocaust could in the end be viewed as no more than a debate

[203] between two competing historical interpretations – a far cry from the truth."

The fourth response: "obstruction." According to Sarna, this is when the foes of revisionism "treat them as enemies and work to undermine them."

Hailed as an obstructionist was none other than Mel Mermelstein. Sarna noted, perhaps parenthetically, that most obstructionists "use perfectly legal means." (He did not specify the use of malicious and groundless lawsuits as a tactic, but that, of course, is precisely what tactic Mermelstein employed. Nor did he elaborate on non-legal means.)

Also mentioned as obstructionists were the members of the violence-prone Jewish Defense League of which, as we have seen, Mermelstein was evidently a supporter.

Sarna noted that certain "obstructionists" had even gone so far as to bomb the offices of the IHR on June 25, 1982. (Just short of two years before the IHR's offices in Torrance, California were totally destroyed on July 4, 1984 in yet another terrorist attack.)

Suggesting that "historical reasons make concrete action to obstruct anti-Semitism seem appealing" and that while many "silently applaud strong-arm tactics" there are many Americans who reject violence. As a consequence, said Sarna, "obstructionist efforts can easily backfire and create sympathy for those who actually should be discredited."

How then to respond to holocaust revisionism ? According to Sarna, "intellectual anti-Semites have Jews in an inescapable bind. To ignore them can prove to be dangerous; to pay them too much attention can be equally risky. Instruction may unintentionally grant them legitimacy, while obstruction may bring them sympathy."

However, he said, "For while individually each method of responding has drawbacks, taken together the four methods can work remarkably well. Their unfortunate side effects tend to cancel each other out, while their benefits prove mutually reinforcing.

"A little outrage, a little silence, a little instruction, a little obstruction – no better strategy for fighting anti-Semitism exists. The ideal mixture – the exact proportional balance – may prove elusive. But so long as all the right components are

[204] available and used," said Sarna, even "the most virulent of America's intellectual anti-Semites" (i.e. the holocaust revisionists) can be dealt with.

Outrage. Silence. Instruction. Obstruction. There might be another way to define it: Defame. Deny. Debate. Destroy. This is what Sarna counseled. The only tactic that Mel Mermelstein did not utilize was silence and denial. When the Anti-Defamation League of B'nai B'rith and the Simon Wiesenthal Center told Mermelstein, in effect, "shut up," he ignored them. He repudiated their counsel of silence.

However, when Mermelstein's campaign against the IHR did indeed show signs of possible success, the ADL and the Wiesenthal Center threw their resources behind the "difficult" and "moody" Mermelstein.

Outrage, instruction and obstruction (with the help of a battery of high-powered law firms, thugs from the Jewish Defense League, and propaganda from the media) became the standard operating procedure in Mermelstein's approach to dealing with the IHR.

There was some question in the minds of many as to whether or not debate with the historical revisionists was the right approach in dealing with this apparent "menace."

Four years after Sarna's illuminating – perhaps instructive – article, on July 4, 1984,

the IHR received the ultimate in obstruction-arson.

It was finally, six years after Sarna's article appeared, during the midst of the IHR's second legal encounter with Mermelstein that the *New York Times* – ever a bellwether of Establishment thinking – reported about what it described as "a kind of scholar's waking nightmare." (1)

*The Times* told the story of Professor Deborah Lipstadt, whom they described as a "scholar of the Holocaust" (2) who was becoming unnerved at the growing acceptance of Holocaust revisionism.

What would a nightmare be to Lipstadt? According to the *Times*: "She sees books on an imaginary shelf describing the Jewish genocide of World War II; next to them she sees other books, put there because of some well-meaning but misplaced commitment to open debate, denying that the slaughter of the Jews ever took place.

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"There is," according to the *Times*, "reason for this grim vision. For many years there have been a host of small groups in this country and elsewhere that have denied the reality of the Holocaust, despite the crushing weight of evidence, testimony and scholarship." (3)

What was frightening, said the *Times* was this: Although this thinking had generally been perceived to be the product of crackpots and bigots, "a more subtle version of Holocaust revisionism ... is gaining some acceptance.

"This has prompted soul-searching and discussion among more conventional historians not only over the phenomenon itself but also over how, or whether, to respond." (4)

The aforementioned Lipstadt was among those historians, said the *Times*, who was wondering just what to do. However, when the Center for the Study of Anti-Semitism at the Hebrew University in Israel asked Lipstadt to begin a study of the revisionist phenomenon (presumably accompanying the request with a hefty grant), she reacted, she said, "uneasily" (no doubt shuddering all the way to the bank).

"As I began to probe [the revisionists]," she said, "I become concerned with giving them some legitimacy, [enabling] them somehow to emerge as one school of thought among others.

"And yet, I feel you've got to expose these people rather than keep them under wraps. So, yes," she concluded, "I'm giving them some undeserved legitimacy by making them an object of study..." (5)

Although the *Times* was careful not to mention the Institute for Historical Review, it hastened to add that the Anti-Defamation League (ADL) of B'nai B'rith said that the views of the revisionists were important "propaganda weapons" (6) for what the *Times* called "neo-Nazi and other extremist groups." (7)

Speaking of her revisionist targets, Lipstadt said, "What I see is a fine-tuning of their material, so that some of their positions could enter into the mainstream." (8) This, apparently, is what Lipstadt was determined to prevent.

"Children today," she said, "are the last people who will ever know a Holocaust survivor or eyewitness. Starting now and certainly in the future, it might be possible for some

[206] people to believe falsehoods that it would have been impossible to believe until now." (9)

(Lipstadt, in referring to falsehoods, was probably not referring to the famous story that the Nazis made soap out of Jewish prisoners – a myth, taught as fact in school textbooks, that Lipstadt herself publicly repudiated in a letter to the *Los Angeles Times* on May 16, 1981 – and she was certainly no revisionist. Perhaps this is why one revisionist wag – yes, some revisionists do have a sense of humor – has dubbed Lipstadt "the Soap Lady.")

On April 16, 1993, *Forward*, the New York-based Jewish weekly, commented on the

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1 / *New York Times*, June 21, 1988.

2 / *Ibid.*

3 / *Ibid.*

4 / *Ibid.*

5 / *Ibid.*

6 / *Ibid.*

7 / *Ibid.*

8 / *Ibid.*

9 / *Ibid.*

growth of revisionism. "As the century of the Holocaust enters its twilight years and eyewitnesses to the horror die at a rate of 10% a year, Holocaust revisionists are enjoying a new wave of popularity, prompting alarm among those [dedicated] to preserving the true story." (1)

Noting that several new books were being issued on the subject, *Forward* commented:

"The gravity with which the revisionist movement is being viewed and the urgent priority that is being given to fighting it is underscored [by the publication of those books].

"The movement's new popularity is prompting concern that the true story of the Holocaust – and of the extent of its horrors – will be lost or adulterated. Already, critics of the movement are warning that it has begun to gain a foothold of credibility in mainstream American culture – for example, on college campuses." (2)

It was in the summer of 1993 – well more than a year following Mermelstein's courtroom decimation – four widely-promoted volumes of would-be refutations of Holocaust revisionism appeared in print.

Newspaper and magazine reviews from coast to coast hailed the "scholarly" attacks on Holocaust revisionism, praising them as a much-needed breath of fresh air, pushing out the stench of what they were now calling "holocaust denial."

Most often mentioned was *Denying the Holocaust* by none other than the aforementioned Deborah Lipstadt – the Soap Lady. Needless to say, Lipstadt focused on the work of

[207] the IHR in particular and delved into the Mermelstein case.

After reciting the historical circumstances of the Mermelstein case – in language less than temperate – she finally concluded on page 141 of her book:

"The Mermelstein case did not end there. On August 7, 1985, in the course of a radio interview, Mermelstein said that the IHR defendants had signed the judicial notice. On August 6, 1986, one day before the statute of limitations expired, Willis Carto and the IHR filed suit against Mermelstein, claiming that he had defamed them in the interview. A year and a half later the defendants voluntarily dismissed the suit. Mermelstein has subsequently filed action against the IHR and Carto for malicious prosecution. That case remains in litigation." (3)

Inasmuch as the Soap Lady was being hailed as a major force in refuting and repudiating the Holocaust revisionists, it is interesting to note just how flawed her assessment of the case really was – indeed, how inaccurate her summary was.

First of all, historian Lipstadt failed to mention that when he brought the case for malicious prosecution, Mermelstein also brought action for libel, intentional infliction of emotional distress and conspiracy. These actions were ultimately dismissed by Mermelstein himself who realized that their case could not survive scrutiny by the judge or by a jury.

Secondly, historian Lipstadt never once mentions that Judge Lachs had, in fact, dismissed Mermelstein's malicious prosecution action on the grounds that the IHR did indeed have probable cause to bring the underlying libel action (which the IHR itself had dismissed).

Clearly, Mermelstein had already suffered an agonizing and embarrassing defeat at the hands of the IHR, but Lipstadt's careful and clever wording suggests that somehow Mermelstein was still ahead in the game, that he was not yet finished with dragging the IHR through the court system.

She utterly fails to mention any of the dramatic events that took place in the courtroom in Los Angeles during the middle of September, 1991 – nearly two years before her book went to press in the spring of 1993.

Inasmuch as Lipstadt cited her source on the status of the

[208] Mermelstein case "*Appellant's Opening Brief. Mel Mermelstein vs. Legion for the Survival of Freedom, etc., et al.*, May 4, 1992," she was obviously aware of Mermelstein's pummeling in Los Angeles.

(Her cited source, obviously, was Mermelstein's brief appealing Judge Lachs' dismissal of his malicious prosecution action against the IHR.)

So Lipstadt's statement that the malicious prosecution action "remains in litigation"

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1 / *Forward*, April 16, 1993, p. 1.

2 / *Ibid.*

3 / Deborah Lipstadt, *Denying the Holocaust* (New York: The Free Press, 1993). p. 141.



might lead some casual readers (not versed in the details of the affair) to conclude that the case was not yet resolved.

However, the case was, of course, resolved on October 28, 1992 when the California Court of Appeal rejected Mermelstein's appeal of Judge Lach's dismissal. As a result, there is reason to think that Lipstadt was being disingenuous with her readers, at the very least.

Lipstadt's defenders might argue that she had already finished researching and writing her book and had sent it off to the printer before the Mermelstein case was dismissed by the California appeals court.

However, the fact is that in her book – in reference note 44 in her first chapter – she cites a news report from the Jewish Telegraph Agency dated November 11, 1992 – a report published **after** the rejection of Mermelstein's appeal of Judge Lach's dismissal of the malicious prosecution suit.

So it is that the allegedly authoritative book by historian Lipstadt repudiating and refuting the Holocaust revisionists is fatally in error, and that is putting it very lightly. Should there be a revised and updated edition, it will be interesting to see if Lipstadt corrects her error for the record.

Reviewing the Soap Lady's book in the *Los Angeles Times*, Jonathan Kirsch referred to what he called "the weird phenomenon" <sup>(1)</sup> of Holocaust revisionism which, he said, was finally gaining widespread acceptance (much to his dismay). Holocaust revisionism, he declared, "is a kind of moral and intellectual virus that has spread from the crackpot fringe to the very heart of public discourse in the media, the courts and the universities around the world." <sup>(2)</sup>

Ignoring the substance of revisionist arguments, Kirsch instead – typically – resorts to *ad hominem* attacks on the

[209] revisionist historians and charges that "the deniers cook up phony evidence while ignoring the voluminous testimony of survivors, eyewitnesses and self-confessed Nazi war criminals." <sup>(3)</sup>

Kirsch fails, however, to take into account the very problems that crop up in the testimony of survivors – Mel Mermelstein among them – "best witness" though he perceives himself to be – and hails Lipstadt for unraveling (so he says) "the web of half-truths and outright lies that amount to an international propaganda crusade." <sup>(4)</sup>

Because, according to Kirsch, "the Holocaust deniers have insinuated themselves into classrooms, Op-Ed pages, talk shows, courtrooms and computer bulletin boards, and they have become too dangerous to be ignored or dismissed – they must be squarely and clearly repudiated." <sup>(5)</sup>

Responding to a writer who had reviewed Lipstadt's volume for the *Washington Times*, IHR founder Willis A. Carto commented, in part:

"First of all, those who condemn revisionists must define what they are talking about because their 'official' definitions change so rapidly.

"Even now, most Americans who have heard the word 'Dachau,' for example, including uncounted hordes of GIs in 1945 and American tourists since then, credulously believe that internees in that detention center were gassed by the millions because that is exactly what they were told by the 'experts' for thirty-five years or so.

"But today, now that we revisionists have proven that no one was gassed at Dachau or any other camp in Germany proper during the war, 'everyone' is forced to admit the truth – including Simon Wiesenthal, Abba Eban and even Ms. L. [Lipstadt] herself. And she admits it, on page 78 [of her book].

"Your reviewer says, 'a disturbingly large number of Americans seem never to have heard of Auschwitz and do not know what the Holocaust was.' Possibly this is because they know now that the number of four million Jewish victims there is false, as determined by the Polish government, which has officially lowered the figure to 1.5 million even though the hard evidence known to revisionists now shows that probably not more than 150,000 Auschwitz internees of all ages and

[210]

religions died at Auschwitz during the war from all causes, including old age.

"No wonder that with the exception of your reviewer and a few other uninformed parties, the word 'Auschwitz' seems to have dropped off the end of the media's plank." <sup>(6)</sup>

<sup>1</sup> / *The Los Angeles Times*, July 28, 1993, p. E8.

<sup>2</sup> / *Ibid.*

<sup>3</sup> / *Ibid.*

<sup>4</sup> / *Ibid.*

<sup>5</sup> / *Ibid.*

<sup>6</sup> / Letter by W. A. Carto to the *Washington Times* (not published by the *Times*).

Willis Carto called the release of not only Lipstadt's book on the subject of Holocaust revisionism – but three others as well – a "watershed."

According to Carto, "Try as they do, the professional 'Holocaust' promoters, who have always said that they won't debate us nasty revisionists because it would be beneath their dignity, are being dragged kicking and screaming to a horrible fate – they find themselves trying to answer legitimate questions about their favorite subject whether they want to or not. Necessarily, most of their arguments must be *ad hominem*." (1)

Accompanying Lipstadt in the rush to defame the so-called "holocaust deniers" was Pierre Vidal-Naquet, a French historian of the ancient world who had apparently decided to bring his study of the world up to more recent times. His book was dramatically entitled *Assassins of Memory*.

Previously an author of books on Greek drama, economy, society and mythology, Vidal-Naquet and his English translator, Jeffrey Mehlman (a professor of French literature) had evidently decided to look at modern-day myths, specifically the details of the Holocaust.

According to Vidal-Naquet, "One can and should enter into a discourse concerning the 'revisionists'; one can analyze their texts as one might the anatomy of a life; one can and should analyze their specific place in the configuration of ideologies, raise the question of why and in what manner they surfaced. But one should not enter into debate with the 'revisionists.'

"It is of no concern to me whether the 'revisionists' are neo-Nazi or extreme left wing in their politics: whether they are characterized psychologically as perfidious, perverse, paranoid or quite simply idiotic. I have nothing to reply to them and will not do so. Such is the price to be paid for intellectual coherence." (2)

Although Vidal-Naquet's primary interest in the

[211] revisionist movement was focused on the activities of the highly respected and detail-oriented French revisionist intellectual, Dr. Robert Faurisson, the author did take time out to mention the Mermelstein affair.

Writing of Mermelstein, he said:

"In California, the institute financing revisionist activities had proposed a sum of \$50,000 to whoever could prove the existence of a gas chamber. A citizen, Mr. Mermelstein, who had seen part of his family disappear at Auschwitz, accepted the challenge.

"Naturally, the conditions under which evidence was to be presented were such that only a dead person would have been an acceptable witness. The money was thus not awarded for reason of insufficient evidence.

"The candidate filed a suit, his case was heard, a settlement was reached under the supervision of the Los Angeles Superior Court, and the Institute for Historical Review apologized to the plaintiff and paid the promised amount." (3)

Unfortunately, like his fellow anti -revisionist, Lipstadt, Vidal-Naquet was also not quite on the mark as far as the truth was concerned regarding the facts about the Mermelstein affair.

First of all, the \$50,000 reward offer was not offered to anyone who could "prove the existence of a gas chamber." It was far more specific than that. The reward offer was for forensic proof that Jews – or anybody – had been homicidally gassed in gas chambers at Auschwitz during World War II.

Secondly, the conditions were not such that "only a dead person" would have been an acceptable witness. (This attempt at irony is effective, but it misrepresents the very specific and demanding nature of the scientific proof that could have been brought forth to prove homicidal gassings at Auschwitz, if indeed there ever had been any such crimes committed.)

Thirdly, the money was not refused Mermelstein on the basis of "insufficient evidence." In fact, the IHR had initially advised Mermelstein that it would ultimately adjudicate his claim. Mermelstein, however, filed suit against the IHR before the claim process was ever completed. The fact is that Mermelstein's evidence would have indeed been insufficient.

Fourth, when the IHR apologized to Mermelstein, it did

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1 / Letter by W. A. Carto to the Tampa *Tribune* book review section.

2 / Pierre Vidal-Naquet. *Assassins of Memory*. [New York: Columbia University Press, 1992], pp. xxiv-xxv.

3 / *Ibid*.

[212] not pay him what Vidal-Naquet called "the promised amount." Damages were paid. The damages did not include the \$50,000 reward money that had been offered.

Considering these factual errors in Vidal-Naquet's accounting of the Mermelstein case, it is clear that both he and his fellow writer Lipstadt had more in common than being anti-revisionist in their outlook. Actually, both were perhaps "revisionist" historians in their own fashion.

Reviewing Vidal-Naquet's book, Deborah Lipstadt herself (putting in a plug for her own anti-revisionist "scholarship") wrote:

"Until recently, most scholars tended to look down on this area of research, believing that the deniers made such preposterous claims that no one could or would take them seriously.

"One scholar who has done important research on the history of the Holocaust said to me a number of years ago that he would no more devote scholarly efforts to studying the deniers than he would to investigating people who believed that they had been captured by creatures from outer space. That scholar recently called me to inquire when my own work on the deniers would be available and to urge me to complete it as quickly as possible.

"The attitude change on his part and on the part of many of his colleagues is a response to two developments: the deniers' changing methods and the increasing success they are having in confusing (though not yet convincing) good-hearted people who believe that academicsounding arguments must have some credibility.

"The American public is particularly susceptible because it is historically illiterate and consequently unable to make the distinction between genuine historiography and the deniers' purely ideological exercise.

"Knowing this, the deniers foster the notion that they are engaged in a genuinely scholarly effort when, of course, they are not. They employ a strategy of distortion in which truth is mixed with absolute lies, critical information is purposefully excluded and anything that confirms the truth of the Holocaust is dismissed as forgery and falsehood." (')

It is interesting that Lipstadt refers to the American public

[213] being "particularly susceptible because it is historically illiterate" inasmuch as it has been the official Establishment propaganda line about the Holocaust – not the revisionists' research – that has been taught in the school books and promoted in the popular media.

In a sense, perhaps, Lipstadt is right about the public being historically illiterate, precisely because the public has been – at least until now – denied any real exposure to what the holocaust revisionists have to say.

The popular historical illiteracy was a consequence of the determination by Lipstadt and others to silence the revisionists. Now, though, Lipstadt has taken a different tack and is fighting them. But to do so, she's been forced to address their arguments.

Interestingly enough, in her view of Vidal-Naquet, Lipstadt inadvertently throws a bone to the revisionists when she refers to Vidal-Naquet's treatment of the debate over the so-called "diary" of Anne Frank.

Lipstadt writes: "The only flaw in Mr. Vidal-Naquet's book is his confusion about the authenticity of the *Diary* of Anne Frank. Here even this fine historian has fallen into Mr. Faurisson's trap." (') (Much to Lipstadt's dismay, Vidal-Naquet himself had been forced to acknowledge that, at least on certain points, there was some question about the full story of the little girl's celebrated "diary.")

Inevitably, of course, the Anti-Defamation League (ADL) of B'nai B'rith would have to get into the anti-revisionist action, particularly since during the spring and summer of 1993 the organization was caught up in a criminal scandal resulting from its illegal domestic spying.

Hoping to shift the public focus from its outrageous and widely-documented own misdeeds to the law-abiding activities of the revisionists, the ADL joined Lipstadt and Vidal-Naquet in issuing a broadside against the revisionists and, likewise, managed to distort the truth (something that the ADL had a long-standing history of doing).

According to the ADL's account of the Mermelstein affair: "The battle between Mermelstein and the Holocaust revisionists is not yet over. On October 17, 1988, Mermelstein decided to once again file suit against Willis Carto *et al.* This

[214] time he filed a malicious prosecution lawsuit in the Superior Court of Los Angeles County, Long Beach District.

<sup>1</sup> / *The Washington Times*, Feb. 14, 1993, p. B-8.

<sup>2</sup> / *Ibid.*

"A press release put out by Mermelstein's attorney explained the charges: 'Mr. Mermelstein's complaint alleged that the defamation lawsuit had been filed against him was completely groundless, frivolous and without probable cause. Mermelstein claims that the defendants filed the defamation suit against him in order to intimidate, harass, and attack him, because he is Jewish.' Though the malicious prosecution lawsuit was dismissed in September, 1991, Mermelstein filed an appeal on August 11, 1992." (1)

While the ADL went further than Lipstadt and acknowledged that the malicious prosecution suit had been dismissed and that Mermelstein had filed an appeal, the ADL – like Lipstadt – managed to get its book to press "just in time" to miss pointing out that the court of appeal had itself dismissed Mermelstein's appeal, leaving the reader with the impression that the case was unresolved.

The ADL, significantly, failed to detail the manner in which Mermelstein and his attorneys were dealt a devastating courtroom defeat when the libel, intentional infliction of emotional distress, and conspiracy counts fell by the wayside in September of 1991.

Again, like the other authors, the ADL preferred to play fast and loose with the facts rather than report the truth.

Needless to say, the anti-Revisionist books received the full-fledged endorsement of the publishing establishment. This was illustrated best when, on the same day, July 11, 1993, lead articles in both the *Washington Post* Book World and the *New York Times* Review of Books hailed their release.

In the *Washington Post*, British historian Paul Johnson – who failed to even get the name of the IHR correct, calling it the "Institute for Historical Research" – took a hard-line stance against the revisionists in reviewing the Lipstadt book. According to Johnson, "Holocaust-denial is now the fastest growing and probably the commonest form of anti-Semitism." (2)

Johnson favorably cited Lipstadt's discussion of the manner of combating revisionists in the courts. He writes: "There are really only two effective ways of dealing with

[215] blatant anti-Semitism. One is the use of the law. Lipstadt shows that specific statutes have been employed both in Europe and Canada to expose and combat Holocaust-deniers, and that even in the United States, where freedom of speech, however outrageous, is zealously protected by the First Amendment, litigation was successfully conducted against the IHR." (3)

(Unfortunately, however, Johnson's review – at this juncture – veers off into myth-making. Relying, apparently, on Lipstadt's incomplete recitation of the Mermelstein case, Johnson seems to perceive the IHR as having been bested by Mermelstein when, of course, that was not the case.)

Johnson continues:

"These court cases are most instructive. Although, as Lipstadt says, a law court is not the ideal arena for establishing historical truth, it is an objective forum whose findings are generally accepted by the public, and in every case where the reality of the Holocaust has been tested there, it has eventually been vindicated.

"The fact that evidence of the Holocaust has been successfully validated in the courts makes it easier to pursue the second method of dealing with the plague: to destroy its intellectual respectability.

"In the long run, the only way to eradicate anti-Semitism is to make it impossible for any politician, journalist, writer or academic who holds anti-Semitic views, including Holocaust denial, to be taken seriously.

"We have come a long way since 1945 in attaining this objective, and in the end we shall get there. Lipstadt's book is an important step forward because it means that, henceforth, any opinion-former who tries to deal in this particular anti-Semitic coin can easily be shown to be using false currency." (4)

These were fighting words from this Establishment historian. He clearly does not believe that freedom of expression includes the right to be able to calmly and rationally debate serious questions of history such as the many controversies surrounding the Holocaust. Those who question the Holocaust, in any way, shape, or form, in his view, must be shouted down, made to appear to be liars and fools – if you

1 / Anti-Defamation League of B'nai B'rith, *Hitler's Apologists* [New York: Anti-Defamation League, 1993], pp. 33-34.

2 / *Washington Post* Book World, July 11, 1993, p. 14.

3 / *Ibid.*

4 / *Ibid.*

[216] can't send them to jail, drive them into bankruptcy or burn them down, that is.

Walter Reich, a psychiatrist by profession, was the *New York Times'* choice to review both the Lipstadt and Vidal-Naquet tomes. Holocaust revisionism, said Reich, is "the second murder of the Jews" <sup>(1)</sup> and it must be fought. Reich recognized that the revisionists were making their case heard:

"Remarkably, despite the existence of overwhelming evidence that the Holocaust really happened, and the repeated discrediting of the Holocaust deniers, they have managed to have their case presented in a variety of forums.

"To some extent, this success has been a product of an age which promotes the idea that every issue must have two sides, and that each side should be accorded equal respect in the marketplace of discussion.

"This approach to ideas is fostered by a number of current assumptions, increasingly popular in academia, regarding the indeterminacy of truth, as well as by the modern phenomenon of television talk shows and the journalistic ethos that no news story is complete unless all views about it are aired, including the most absurd and discredited." <sup>(2)</sup>

(Note Reich's complaint about an age that – horror of horrors – promotes "the idea that every issue must have two sides, and that each side should be accorded equal respect in the marketplace of discussion."

(Reich's fears the idea that "no news story is complete unless all views about it are aired," including ones that run counter to his way of thinking on the Holocaust which, obviously are "the most absurd and discredited" – presumably by Deborah Lipstadt who, we have seen, can't get the truth out when she's under a publishing deadline.)

"But," adds Reich, "the success of the Holocaust deniers is also the product of an age in which the freedom to express views is confused with an obligation to facilitate their expression." <sup>(3)</sup> He complains of a variety of college newspapers that have published advertisements from the so-called "deniers" (namely long-time IHR associate Bradley R. Smith in particular).

The psychiatrist in Reich most clearly emerges when he points out that as he immersed himself in the arguments of the

[217] Holocaust revisionists (as outlined in the Lipstadt and Vidal-Naquet volumes), "I was, at some level of fantasy, hoping that the deniers were right ... [that the Holocaust] was merely the product of a bad dream. In a moment of reverie, and in the yearning to escape despair, one seizes on such a fantasy.

"But the devastating truth about the Holocaust is that it was a fact, not a dream. And the devastating truth about the Holocaust deniers is that they will go on using whatever falsehoods they can muster, and taking advantage of whatever vulnerabilities in an audience they can find, to argue, with skill and evil intent, that the Holocaust never happened." <sup>(4)</sup>

Reich's review of Lipstadt and Vidal-Naquet made reference to the Mel Mermelstein affair, but he misstated the facts. He also claimed that the Los Angeles Court had ordered the IHR to pay the \$50,000 reward to Mermelstein, which, of course, was not true.

The psychiatrist-turned-book reviewer also failed to describe the final devastating courtroom defeat that Mermelstein suffered in 1991, a defeat compounded in late 1992 by the rejection of his appeal.

With some regret, Reich did note: "It appears, however, that the institute has seen the Mermelstein case as having given Holocaust denial valuable publicity." <sup>(5)</sup> Perhaps that was the only perfectly accurate statement that appeared in Reich's entire review.

Now there was yet a fourth volume issued on the subject of so-called "Holocaust denial" and that was its title: *Holocaust Denial*.

Published by the American Jewish Committee, the book's author was Kenneth Stern, the self-described "program specialist" for "anti-Semitism and extremism" for the committee.

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<sup>1</sup> / *New York Times* Book Review, July 11, 1993.

<sup>2</sup> / *Ibid.*

<sup>3</sup> / *Ibid.*

<sup>4</sup> / *Ibid.*

<sup>5</sup> / *Ibid.*

In his introduction to the book he wrote:

"I hope this book persuades the reader of two things: one, that Holocaust denial must be taken seriously; two, that combating it cannot be a matter of Holocaust education alone." (1)

"Make no mistake about it," warned Stern. "To the unknowing, the minutiae of Holocaust denial appear reasonable." (2)

Remarkably, three of the four appendices appearing in his

[218] book, constituting some 48 pages, were actual reprints of what the author called the "holocaust denial" material:

- The text of an advertisement placed by revisionist researcher and former *IHR Newsletter* editor Bradley R. Smith in a number of college newspapers around the country;
- The transcript of an April 30, 1992 broadcast of the Montel Williams television talk show on which an IHR spokesman and Jewish-American revisionist researcher David Cole were the guests; and
- A complete listing, alphabetically by author, of Holocaust revisionist books and pamphlets as well as every signed article published in the *Journal of Historical Review* up until that time.

Stern also, predictably, wrote of *l'affaire Mermelstein* in his diatribe against the "deniers." Describing Mermelstein's attack on the IHR as a "principled and courageous action," (3) Stern summarized the Mermelstein case – not accurately – as follows:

"Mel Mermelstein, a survivor whose family had been killed in the Holocaust, took up the [IHR's reward challenge]. He submitted eyewitness accounts, documents, photographs, and histories to the IHR. When he heard nothing in response, he sued – and was tormented by the deniers for his efforts." (4)

(Stern also claimed that the IHR's director had also sent a harassing letter to Mermelstein, asking him how many times he had been gassed.)

Stern cited Judge Johnson's judicial notice that there were gasings at Auschwitz and how, ultimately, the IHR paid damages of \$90,000 to Mermelstein in settling the case. He did not, however, describe Mermelstein's sound defeat in Los Angeles six years later.

While Stern's version of the history of the Mermelstein case ended in 1985, even his facts up to that date weren't correct.

First of all, of course, it is not true that Mermelstein heard "nothing in response." In fact, it was precisely because the IHR did respond to Mermelstein's correspondence that the stage was set for his eventual lawsuit.

Secondly, it is simply not true – it is a lie – that the IHR director wrote Mermelstein the taunting letter cited. The letter in question was sent by an independent party. It was not sent

[219] either by the IHR or with its approval, either before or after the fact.

What's more, the IHR did not seek to torment Mermelstein. On the contrary, in point of fact, it will be recalled, it was Mermelstein himself who had first written the taunting letter referring to the IHR that was published in the *Jerusalem Post* and which was brought to the IHR's attention.

Not surprisingly, Stern's inaccurate book and its recitation of the Mermelstein case received an enthusiastic boost from none other than Mel Mermelstein himself.

Mermelstein's words of praise were reprinted on the back cover of the slender volume: "Kenneth Stern's book is detailed and accurate," declared Mermelstein, who certainly knew better.

"As one who survived Auschwitz-Birkenau and Buchenwald, and as one who has been in constant litigation with deniers for over a decade," Mermelstein snorted, "I can only add my warning to that of Mr. Stern and the American Jewish Committee: if Holocaust denial is

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1 / Kenneth S. Stern. *Holocaust Denial*. (New York: American Jewish Committee, 1993), p. xii.

2 / *Ibid.*, p. 5.

3 / *Ibid.*, p. 17.

4 / *Ibid.*

not combated, it may become a catalyst for anti-Semitism in the next century." (1)

Author Stern, on one occasion, actually found himself fending off inquiring questions about the details of the Holocaust from Establishment newspaper reporters when he went on the road promoting his little work.

When questioned as to why the American Jewish Committee continued to dramatize the 6 million figure [referring to alleged Jewish Holocaust victims] when a number of historians used lower numbers, Stern responded, "Some serious investigators will say 4 to 5 million, others 5 to 6 million, but 6 million is still the best figure. The Holocaust deniers try to legitimize themselves by taking advantage of the lower estimates by serious historians." (2)

Clearly, the media was giving a big boost to the antirevisionists with a great deal of favorable publicity for their efforts. On the other hand, obviously, the media (and certainly not with any intent) was also providing the IHR access to a new and bigger audience of people who might not previously have been aware of the existence of Holocaust revisionism.

Virtually every library in America will no doubt purchase a copy of the Soap Lady's book *Denying the Holocaust*. After

[220] all, so the reviewers say, it's "must reading."

As a consequence, now, each of those libraries will have a book citing, in detail, the work of the IHR and Holocaust revisionists worldwide. The year 1993 did indeed herald a new era in revisionism.

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<sup>1</sup> / *Ibid.*, cited on back cover of book.

<sup>2</sup> / *Washington Times*, May 6, 1993, p. A3.

## Chapter Thirty

### The Triumph of Historical Revisionism

Both of Mel Mermelstein's courtroom encounters with the IHR – proclaimed Mermelstein and his supporters – would spell the end for holocaust revisionism. Actually, as we have seen, Mermelstein's twelve-year entanglement with the IHR had quite the opposite effect.

Mel's first lawsuit brought widespread international publicity to the IHR and its endeavors. In the end, if truth be told, that probably more than made up for the emotional distress, the time consumed, and the \$90,000 in cash that Mermelstein ran away with. The second lawsuit by Mermelstein, of course, resulted in his ignominious repudiation.

Mermelstein's defeat also signaled the beginning of a new and vibrant era in which both growing public recognition – and acceptance – of revisionism (already burgeoning) came to new heights. The conquest of Mel Mermelstein by the IHR was indeed a signal of the triumph of historical revisionism.

Just shortly after he filed his second nuisance suit against the IHR on June 6, 1986, Mermelstein bragged about his prior courtroom success when the IHR had chosen to settle out of court rather than go to the trouble and expense of a costly and potentially devastating trial. Mermelstein described that event as "the knockout blow" (1) that he had dealt the revisionists.

As an IHR spokesman later remarked, "How galling it was for Revisionists to see Mermelstein vaunt himself to the nation and the world as the man who proved the Holocaust, who had humbled the IHR and the Revisionists." (2)

Gloria Allred, Mermelstein's attorney and fellow celebrity, was adamant, too, that revisionism was on its way out. "We believe we've established, in court, a record of truth regarding history and the Holocaust. And we're not going to be satisfied until those who wish to revise history aren't allowed to get away with it anymore." (3)

(We can only presume that Allred fully intended to rewrite the Constitution itself and scrap the Bill of Rights, that nasty First Amendment in particular, that guarantees freedom

[222] of speech. That, theoretically, of course, would be the only way to guarantee that the revisionists wouldn't be "allowed to get away with it anymore.")

However, Allred and Mermelstein were ready for a fight. Mermelstein's second suit, declared Mermelstein himself, was "barely the seed we've planted for [their] downfall." (4)

Or so he said. In hindsight we know, of course, that this was bluster and bravado although Mermelstein was confident of victory. The revisionists at the IHR, no matter how strong a case they had, knew that they were in a bitter – and again, potentially devastating – fight to the finish.

However, Mermelstein's second lawsuit was, instead, the seed planted for Mermelstein's downfall – and, in fact, the beginning of the end for the ironclad monopoly that the antirevisionists held upon the historical record and the writing of history itself.

The Mermelstein case was never – and will never be – the topic of discussion at the

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1 / *Israel Today*, June 12-15, 1986.

2 / Address to the 11th international revisionist conference (October 10-12, 1992).

3 / *Israel Today*, *Ibid.*

4 / *Ibid.*



average dinner table of the average, hard-working American family, if only for one reason in particular: most Americans (like many other peoples around the globe) are tired of hearing about "The Holocaust."

However, the Mermelstein case and the growth of Holocaust revisionism and the expanding work of the Institute for Historical Review has certainly emerged as a major topic of concern in the minds of powerful forces not only in the United States but around the globe.

The comments by the IHR's chief defense counsel, Mark Lane, are particularly interesting when reviewing the final consequences of the Mermelstein trial and its impact on the course of historical revisionism. Mermelstein's attorneys, Lane said, "wanted a judge with a lynch rope ready for the IHR."

However, when confronted with Judge Lachs, said Lane, "They ran out of the courtroom in fear of the adjudication – before a fair judge – of the question of whether or not their client, Mermelstein, was, as the IHR had asserted, a demonstrable fraud. They fled. They were afraid to try their case."

Lane pointed out that, "Mr. Mermelstein has made a lot of money from a lot of people because he was a Holocaust survivor: a \$90,000 settlement from the IHR and Liberty Lobby, a \$60,000 settlement (plus \$22,000 in attorneys fees)

[223] from the Hartford Insurance Company, and \$100,000 from the Von Esch law firm.

"If we had lost this second suit against the IHR and Liberty Lobby, we would have been on the front pages of newspapers all over the country – but since we won, we weren't. That's why it's our responsibility to let people know what really happened in this case," said Lane. (1)

The truth about what really happened in the Mermelstein case, you see, is just as important as bringing out the truth about what really happened in the Holocaust. The truth is not what it may seem to be, the Establishment history books and media "news" stories notwithstanding.

The Holocaust has taken on a life of its own, thanks to the efforts of promoters such as Mel Mermelstein, but the revisionist historians, despite the greatest of opposition, have clearly cracked the monopoly once held by those such as Mermelstein and others.

Now the Holocaust promoters realize that their time has passed and that, whether they like it or not, there is, as revisionist historian Bradley Smith has called for, "free and open debate on the Holocaust."

An era has ended.

On August 11, 1993, the attorney general of Israel decided not to file new charges against the recently-acquitted alleged former "Nazi war criminal," 73-year-old Ukraine-born John Demjanjuk.

Railing against the decision, Yehuda Raveh of the World Jewish Congress complained that "other courts all over the world will see this as a message that the Holocaust is over." (2)

That's exactly what he said: "A message that the Holocaust is over." His words meant a lot. He said these words in 1993 – almost 50 years after the Allied forces liberated the European concentration camps where, so the story goes, some six million died.

Raveh was saying that the Holocaust – contrary to popular conception – had not ended with the liberation of the concentration camps in 1945. It was, instead, an ongoing phenomenon, apparently something that required a constant reminder, a constant perpetuation in the mind of the world, something apparently that would never end.

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The fact is that in every instance where the facts have been presented, the promoters of the Holocaust have failed to prove their case – whether it be in the momentous "Holocaust trial" of Ernest Zündel in Canada or in the Demjanjuk case in Israel, or, needless to say, in the Mermelstein affair.

Mel Mermelstein himself devoted his entire post-war lifetime to reminding the world about the Holocaust, flavoring the real truth with his own perceptions and misperceptions. In fact, Mermelstein made a career out of the Holocaust – keeping it alive – and it was a profitable career at that.

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<sup>1</sup> / Unpublished comments by Mark Lane.

<sup>2</sup> / *Los Angeles Times*, August 12, 1993.

While other Holocaust survivors lived quiet lives, Mermelstein went on the lecture circuit. He wrote a book. He was honored publicly, time and again. He was featured in the newspapers. He filed lawsuits – and made big money. A television drama depicted his lawsuit and Mermelstein as a hero of the Holocaust – a man who would make sure that the world would never forget.

In a glowing review of *Never Forget*, the highly-fictionalized Hollywood melodrama about the life and times of Mel Mermelstein, the *New York Times* went out on a limb and avowed, in all apparent sincerity – perhaps hope – that "the Holocaust, and how it will be remembered, is at the very core of this story." (1)

*The Times*, of course, had no idea how the Mermelstein affair would end in a squalid and sorry surrender by Mermelstein on September 19, 1991 after little more than a week of pre-trial litigation. The *Times* review of the film appeared on April 8, 1991, in those heady months before the scheduled trial when Mermelstein and his legal team were on a roll.

The Holocaust had indeed brought much fame and fortune to Mel Mermelstein and in his second courtroom bout with the IHR he expected much, much more. It wasn't to be that way, however, as we have seen, the *New York Times* vision notwithstanding.

If, as the *Times* asserted, the Holocaust and how it will be remembered is at the core of the Mermelstein case, then it is certainly time for those who have devoted so much energy propagandizing the legends of the Holocaust to review precisely what it is that they have been so fiercely determined

[225] to memorialize.

It is time that they look at the facts and the figures – as the revisionist historians have done. It is time that they recognize that many of the stories told about the Holocaust are indeed myths – not facts – and that many of the so-called witnesses – such as Mel Mermelstein – are unreliable, at best.

Mel Mermelstein's strident media propagandist and cheerleader, the fanatic Herb Brin, publisher of *Heritage*, had been confident that the Mermelstein case was going to carve out a special place in history.

"Mel's fight against the revisionists of history who would deny that the Holocaust ever happened will be part of the literature of the Holocaust forever," he boasted. "There are few people anywhere," declared Brin, "who would dare to put everything on the line to confront them." (2) But Mel Mermelstein did – and lost. Badly.

So where then, does Mel Mermelstein, the great pioneer of anti-Revisionist obstructionism, fit in the historical scheme of things? Mel Mermelstein is indeed the "best witness."

Not merely because at one point in a deposition Mermelstein referred to himself as his own "best witness," but because, as an IHR spokesman pointed out,

"In a very real sense, Mermelstein is indeed the best witness to the gas chambers."

"He twice succeeded in getting judges in the state of California, a trendsetter in legal fashion as in so much else, to pronounce the Auschwitz gassings as indisputable fact.

"While sharing with other self-proclaimed Holocaust survivors such as Elie Wiesel the same knack for wild exaggerations, bizarre contradictions, and flat absurdities, Mermelstein is unlike them in having submitted his claims to careful scrutiny and relentless cross-examination.

"And so, while Mel Mermelstein is admittedly so far the best witness to the alleged gas chambers at Auschwitz, the best clearly isn't good enough." (3)

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1 / *New York Times*, April 8, 1991.

2 / *Heritage*, January 21, 1983.

3 / Address to the 11th International Revisionist Conference (October 10-12, 1992).

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## Afterword

### WHY IS 'THE HOLOCAUST' IMPORTANT ?

by W. A. Carto

WHAT IS 'THE HOLOCAUST' ?

The question is often asked of Holocaust revisionists by the naive, "Why are you bothered by 'The Holocaust,' which is ancient history ? You must be a little crazy to doubt it; do you also believe the Earth is flat ? Are you a violent antiSemite to doubt all the eyewitnesses ? Everybody in their right mind accepts it. Let people like Mel Mermelstein have their holocaust if they want it. What's the difference ?"

The common perception of "The Holocaust" is what is important, not the definition of it (as found in Chapter Three) because perception, not reality is the stock in trade of all salesmen, advertisers, public relations professionals, political campaign managers, "Holocaust" promoters and other merchandisers. People in the mass are moved by their perception of the truth, by deep and profound psychological motives and by authority, not by the truth itself, which is normally unknown to them.

Exploiting the moral sensibility and the feeling of guilt which is always close to the surface in Christians, Americans are constantly reminded that Israel rose "from the ashes of 'The Holocaust' " (etc.) and that it is their moral responsibility to continue to ensure "Israel's survival." Israel, we are assured, is "America's closest ally," and "the only democracy in the Middle East." The result is that American taxpayers continue to shell out billions each year as if buying modern-day indulgences.

Quite literally, and without exaggeration, "The Holocaust" is a religion. The faithful vigorously reject any and all facts perceived as contrary to their faith and their ugly dogma has the internal consistency only of a revelation taken on faith, not a logical story based on commonly accepted facts, not what history is supposed to be. The alleged facts of "The Holocaust" are contradictory; its high priests cannot agree on the details even among themselves, which is why they

[228] frantically discourage debate and know nothing else other than to try to ignore or smear those wanting to confront them.

"The Holocaust" is a trigger concept that produces a Pavlovian response. By calling up an image implanted in the minds of the targeted subjects it induces a pliable attitude enabling the professionals who have implanted the image to manipulate the subjects. That the term has in reality little meaning which corresponds to the facts is immaterial; it is the religious attitude of guilt, worshipful horror and fear that counts. This syndrome, which precisely fits Hitler's famous definition of the "Big Lie" in his *Mein Kampf*, has cost Americans far more than mere money and the cost increases daily.

"The Holocaust" is alive and growing, not dead and fading. It affects every American every hour of the day and more so today than yesterday. It impacts on every financial decision made by the government and on most decisions made by private parties. Like it or not, "The

Holocaust" must be faced and questions must be asked. Continued acceptance of the image by the unthinking, or manipulation by the corrupt and/or cowardly, is no longer acceptable by conscientious and decent Americans, including Jews.

#### DOLLAR COST OF THE HOLOCAUST'

Former Undersecretary of State George Ball has calculated both the direct and indirect costs of the so-called "special relationship" between the United States and Israel during the period 1948, when Israel was established as a state, through 1991. Direct costs, including standard grants, loans, refinancing of Israeli debts to the U.S., free use of U.S. arms patents, concessionary tariff arrangements, etc., were an astounding \$61,822,000,000.00.

Indirect costs of the U.S.-Israeli relationship including aid to Egypt (to buy Egypt's friendship with Israel); loss to the U.S. economy because of Arab oil boycotts and loss to the U.S. economy because of Israeli interference in U.S.-Arab commerce, etc. is an even larger \$107,356,000,000.00, a total of almost \$170 billion. Extrapolating this through 1993 and including the recent \$10 billion loan guarantee passed by a compliant Congress during the waning days of the Bush

[229] administration, the figure hovers around \$200 billion, with literally no end in sight.

This tidy sum figures to almost one thousand dollars for every man, woman and child in the United States.

But wait, there's more. The sum so far does not include tax revenue lost on private tax-deductible gifts (largely from American Jews) which benefit Israel and which have been estimated at \$20 billion. Nor does it include the cost of deployment of U.S. forces in the Middle East for the protection of Israel – including the so-called Desert Storm operation – a cost of some \$340 billion. (1) So the total cost of Israel to the taxpayers of America is over \$500 billion.

The above does not include at least \$135 billion in reparations paid by German taxpayers to Israel and to individual Jewish "Holocaust" survivors since the end of World War II.

Nahum Goldmann, former president of the World Jewish Congress and chairman of the claims conference which was convened following the war to work out the reparations agreement described the results of German reparations to Israel, wrote:

"Without the German reparations, the state of Israel would not have half of its present infrastructure; every train in Israel is German, the ships are German, as well as the electricity, a large part of the industry ... without mentioning the individual pensions paid to the survivors ... in certain years the amount of money received by Israel from Germany exceeds the total amount of money collected from international Jewry – two or three times as much. (2)

All of these costs to the American and German taxpayer for the maintenance of Israel, as if flowing from an infinite cornucopia, have brought mountains of corruption to every person and institution involved, illustrating the ironclad historical law that corruption inevitably follows money, and the more money, the more corruption. In this case, the corruption is tacitly endorsed by the likes of Billy Graham, Pat Robertson and a virtual army of "Christian" Israelites.

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And in spite of, or perhaps because of the avalanche of money, Israel itself is in the throes of traumatic moral and economic decline. Israeli journalist, Barry Chamish, writing in *The Fall of Israel*, is one of many journalists and writers who have documented massive corruption and mismanagement that runs rampant, from top to bottom of Israel's government, business and society – a state of affairs leaving the ruling elite to a life of Croesus while the large majority of the Israeli people lives in a perpetual state of financial despair and instability. (3)

#### SHOAH BUSINESS

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1 / George Ball and Douglas Ball, *The Passionate Attachment*. (New York: W.W. Norton Co., 1992). pp. 281-282.

2 / Quoted in *The Journal of Historical Review*, Summer, 1988.

3 / Barry Chamish, *The Fall of Israel*. (Edinburgh, Scotland: Canongate Publishers). 1992.

As part of the multi-media campaign to promote the desired "Holocaust" image, virtual theme parks, Disneyland style, are now the rage. There have to be dozens of "Holocaust" museums and memorials in the U.S., and one is scheduled for Berlin. Even our own Mel Mermelstein has his "Holocaust" museum, the "expenses" of which are of course tax-deductible, including trips to Israel and elsewhere for the distinguished curator.

The American taxpayer-subsidized Holocaust Memorial Museum in Washington, D.C. – literally a stone's throw from the grounds of the Washington Monument and conveniently located next door to the nation's currency factory, the U.S. Bureau of Engraving and Printing (has anyone checked for a tunnel ?) – is the primary example.

Much to the dismay of the museum's dedicators, including President Bill Clinton, who departed from his prepared remarks to assail Liberty Lobby (which had organized the demonstration) as "depraved and insensate," several hundred angry American taxpayers gathered outside the building on April 22, 1993, when the museum opened, waving signs and protesting this waste of their tax dollars, pointing out that the museum had no place on American soil in any case.

Among those leading the protest was New York-based revisionist activist Jack Wyckoff who produced highly effective signs that attracted media attention. "Move it to Israel !" read one.

Other protestors included American Blacks who

[231] compared the dubious six million to the alleged genocide of millions of African slaves. Finding a precedent for Black reparations in the billions sent by American taxpayers to Israel, they argue that sauce for the Zionist goose is sauce for the Black gander. And the next in line for some sauce, we predict, will be American Indians.

The Holocaust Museum has to be the most grotesque and macabre exhibit, outside of carnival side shows, ever presented to an audience. Graphic sculptures show pathetic Jews being led to gas chambers. Stacks of used shoes, presumably from "Holocaust" victims" (although they could just as well be from Goodwill Industries) and other personal belongings replay the horrors of daily life in the concentration camps. Visitors, including children, are urged to adopt the identity of an internee and follow the victim's path to the "gas ovens."

One notable feature of this house of horrors is a documentary film titled *Anti-Semitism* which at least one Christian minister, Rev. Dale Crowley, Jr., says is anti-Christian, at best, and violates the very spirit of tolerance which the museum purports to exemplify. The film puts the blame for "The Holocaust" on Christianity itself.

The idea that Christianity itself was responsible for the alleged "Holocaust" is a frequent topic for media treatment. Even many Christian religious leaders have been convinced or coerced into their *mea culpa* for existing. Christianity, historically the religion of love and forgiveness, has become the cause of violence and suffering. Christians are evil so they must pay. And pay and pay.

American-born Rabbi Shlomo Riskin, who lives on Israel's West Bank from which Palestinians who have lived there for a thousand years have been deported, said in an inspirational sermon: "The world is divided into two parts: those who actively participated with the Nazis and those who collaborated with them. It was Christianity, especially Catholic Christianity, that fostered 'The Holocaust.' The Church is still dripping with blood because it still has not recognized Israel." (1)

Massive private contributions from a wide variety of associations, unions, service organizations and other entities have been made to the Holocaust Museum, and not necessarily

[232] with the assent of their members.

As of April 22, 1993, such contributions included from these unions, are for example: The AFL-CIO; American Federation of Teachers; Communications Workers of America; Hotel Employees and Restaurant Employees Union; International Association of Bridge, Structural and Ornamental Workers Union; American Postal Workers Union; International Brotherhood of Electrical Workers.

In Los Angeles, the Simon Wiesenthal Center has a "Museum of Tolerance" which is perhaps even more intolerant than the U.S. Holocaust Memorial Museum. Wiesenthal collects an annual fee of \$75,000 for the use of his name but the profits do not end there. Wiesenthal's "Museum of Tolerance" is the ultimate in Hollywood high-tech and plays daily to eager

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<sup>1</sup> / *Chicago Tribune*, May 9, 1993.

customers. Says Judith Miller:

"You are led by computer-synchronized light, color and sound through a succession of tableaux that take you back in time. You are in Europe before and during the Holocaust. You hear the actual words of the victims, the victimizers, the heroes and the apathetic bystanders ... As a searchlight comes on you are at a replica of the gates of Auschwitz ... and you hear echoes of the victims-those who survived and those who did not." <sup>(1)</sup>

However, museums such as described are only a small part of what some have scoffingly called, "Shoah Business." (The term "Shoah" is the Hebrew word for "catastrophe.") Television, motion pictures, books and almost daily "news" stories in the press help promote "The Holocaust." It has become a major and profitable industry.

#### THE MOST EXPENSIVE COST

The dollars-and-cents price of "The Holocaust" to American taxpayers and citizens by itself is too expensive to bear but mere money is not the most intolerable cost.

Imagine the likely shape of our world today without this curse and you will be startled by its contrast with reality. It is evident that the image of "The Holocaust" has radically

[233] distorted America in every significant way.

Without "The Holocaust" image there would be no state of Israel nor its burden on American taxpayers who would be some half a trillion dollars richer.

Even more importantly, the United States would not be inextricably involved in affairs of the Mideast which do not concern us, nor would Moslems from Casablanca to Zamboanga hate us.

Without the alien and malicious influence of Israel exercised upon Congress and the White House and every one of the 535 sitting members of Congress, domestic affairs could be conducted toward the interests of America, not toward an alien nation. American newspapers and the cognoscenti would concern themselves with soluble American problems, not insoluble foreign ones.

Our contrived obsession with "The Holocaust" as the pivotal and defining historical moment of all time has permeated, inhibited and polluted all academic and religious discourse, twisting its focus from our own needs and objective truth to the real or imagined needs of others. This suicidal bias has infected academic subjects from anthropology to sociology, biology and genetics, not only history.

"The Holocaust" is said to be the ultimate in human degradation but it is the ultimate in Hollywood imagery. It serves elitism by teaching that every nation may become as evil as the Germans if they try to live true to themselves (the definition of nationalism) and oppose the international plutocratic elite. This is why the image of "The Holocaust" serves the major political movement of our day – the move away from The Constitution, national sovereignty and a structured and free society to the formlessness, chaos and tyranny of the new world order – the Global Plantation.

"The Holocaust" tends to atomize individuals by breaking up traditional loyalties, thus ripening the public to accept revolutionary changes they have not chosen nor do they understand. It cuts the age-old tethers of Americans and all peoples to their own traditions and history, their pride, their instinctive love for kind and country. Indeed, such love – hitherto normal and the essential foundation keystone of political stability – is increasingly viewed with suspicion and

[234] hostility by the doyens of political correctness.

Finally, "The Holocaust" has perverted public philosophy and infected public morality by injecting a false standard. The reverse logic of "The Holocaust" is, "If a people as historically cultured and civilized as the Germans – the most advanced and creative people on Earth – can engage in mass murder when they are left on their own and not directed by those moral paragons who direct us, then anyone can." The stigma of real genocide is removed.

Thus, the world tolerates Israel's savage treatment of Palestinians and other enemies. Israel, in fact, is the only country in the world that legally countenances torture of political prisoners. And why not? Weren't "they" (the Jews) treated even worse by the Germans?

But there is more. Such atrocities as "The Holocaust" may be expected from savage

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<sup>1</sup> / *Washington Post BookWorld*.

third worlders – even excused – but from highly cultured European Whites ? The very people who have literally created the modern world ? If so, then Western culture and the White race should be destroyed. Thus we hear the politically correct chant, "Hey, hey, ho, ho, Western culture has got to go" on American campuses.

The evil lie of the dimensions of "The Holocaust" is not a take-it-or-leave-it subject for others. It encompasses the most important issues facing Americans and it cannot be separated from them.

Unless public perception of "The Holocaust" can be changed from the artificial and false to the truth, there is no stopping our decline.

We are facing literally an issue of survival.

This is why All Americans should be concerned with "The Holocaust."

Whether they like it or not.

## LAST COVER PAGE

Cutting through veritable mountains of misinformation and silence, this is the book that describes the little-known trial of Mel Mermelstein vs. the Institute for Historical Review and Liberty Lobby.

Working from a six-foot pile of sworn depositions, court filings and trial records, the author confronts the most untouchable issue of our day, the so-called "Holocaust" of six million Jews by the Nazis.

Neither the author, Michael Collins Piper, nor the IHR nor Liberty Lobby "deny the Holocaust." But they know – as do all criminal investigators and millions of murder mystery fans – that "the truth is in the details." And to get at the truth of the holocaust, allegedly the greatest crime of history, the details have to be known.

The trial of the IHR and Liberty Lobby became the trial of Mel Mermelstein, as the reader will see. The book contains only a fraction of the whole truth about the holocaust but it is important for that reason.

As it turned out, Mel Mermelstein, the self-described "best witness" to the holocaust, with the aid of five law firms, the entire press of the world and a Jewish judge, came out a bad loser against two institutions with no Establishment support whatsoever and the hostility of the press.

The book will be a revelation to most readers and a bitter pill to many who may have forgotten that in America those who debunk sacred cows have rights as well as those who worship them.

The author is a correspondent for *The Spotlight*. He is also the author of *Final Judgment*, a controversial "underground best-seller" that sheds stark new light on the big secret about the JFK assassination conspiracy.