

**THE HOLOCAUST AND THE LAW: A MODEL OF
'GOOD HISTORY'?**

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Declaration of Authorship

I, Lynne Humphrey, hereby declare that this thesis, and the work presented in it, is entirely my own. Where I have consulted the work of others, this is always clearly stated.

Abstract

This thesis examines the ability of Anglo-American law to function as a method of historiography in Holocaust-related trials. It is informed by 'empiricist-analytical' (Evans) and 'narrative-linguistic' (White) genres of 'good history' and a 'consensus of critique' (Bilsky, Wilson) that explicitly identifies the history-law relationship as a flawed methodology. Applying theory to practice the thesis focuses its research on the collaborative reconstruction of specific historiographies integral to the Holocaust across the Adolf Eichmann (1961), Ernst Zündel (1985, 1988) and David Irving (2000) trials. More specifically, in response to competing demands of 'good history', the thesis identifies how historians and jurists translated the relevant traces of the past into 'credible and intelligible' accounts *of* (empiricist) or 'convincing representations' *as* (narrativist) the Holocaust regardless of the extra-historical form of legal case and context. The historiographies foregrounded are the evolution of extermination policy, the mass shootings of the Einsatzgruppen 1941 - 1942, homicidal gas chambers at Auschwitz-Birkenau, and the total number of Jewish victims.

Through comparative analysis the thesis finds that the accounts/representations subsequently authorised may have been 'cooked' (Wilson) in accordance with case-specific remits but they were empirically accountable and 'truth-full' in content (McCullagh, Munslow). With few exceptions, they were also compatible across all four courtrooms and consistent with the findings of established Holocaust scholarship both past and present. In complying with the generic demands of both empiricist and narrativist theories the thesis confirms that the history-law relationship can be a model of 'good history'. However, although the stability of accounts/representations indicates the constraint of the past traces, and therefore a 'matching' function *with* the past (empiricist), the research confirms the primacy of its 'making' function (narrativist) *as* the past. The thesis concludes that the methodology and outputs of the history-law relationship are most appropriately explained through the lens of the 'narrative-linguistic' genre.

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Introduction and Methodology

This thesis is a study of history and Anglo-American law as collaborative genres about 'the past'.¹ Informed by contemporary critiques of both the realist foundations of historical scholarship, and the capacity of the law to do justice to its craft, it investigates if and how disciplinary collaboration in the courtroom constitutes a model of 'good history'.² Interest in the concept of 'good history' originates in the author's initial unease with the implications of a particular set of theories critical of the prevailing Rankean-based ('empiricist-analytical') genre of history-making.³ Incorporated within the broader cultural, political and social configuration of the 'postmodern', these theories revisit familiar antagonisms long identified between empiricist and relativist perspectives of knowledge production. But, informed by the cultural and linguistic 'turns', the challenge to history has been identified as much wider and more thoroughgoing than its predecessors, making the 'point again in new and urgent ways' and strengthening 'the hand of the sceptics'.⁴ Established critiques of the truthful foundations of Rankean scholarship have subsequently been reaffirmed by voices that emphasise the fictive, 'netted' and present-centric nature of its specific form of 'historying'.⁵ Most critically, in contrast to the persistent 'presence' of the past defining and privileging this scholarship, these voices insist that 'the past' is not only ontologically distinct, and therefore inaccessible, but inevitably preconceived and prefigured 'as a *story of a particular kind*', as well as 'linguistically-turned' into familiar plot-lines that 'float free' of its remaining

¹ The concept of genre' is understood as the conventions and rules of thinking and practice relating to each discipline, Robert Eaglestone, *The Holocaust and the Postmodern* (Oxford: Oxford University Press, 2004), p6. Reference to 'history' relates to the academic discipline and its scholarship.

² For the purposes of the thesis 'good history' refers to its academic form and relates to claims made during both the 'postmodern challenge' and the trial instigated by David Irving in 2000 that there can be 'bad' histories if not following the conventions and rules of academic scholarship, in other words, the conventions and rules of the 'empiricist-analytical' genre.

³ Alun Munslow, 'On "Presence" and conversing with the past: do historians communicate with the past?', *Rethinking History*, 18:4 (2014), p570. 'Empiricist-analytical' in accordance with the generic conventions and rules of the Rankean form as evidence based and deductive, Alun Munslow, 'Facts to fight over' in *The Guardian*, 6 February 2001.

⁴ Robert Eaglestone, *Postmodernism and Holocaust Denial* (Cambridge: Icon Books, 2001), p35; John Tosh, *The Pursuit of History: Aims, Methods and New Directions in the Study of Modern History* (6th edn.) (Abingdon: Routledge, 2015), p165. For an overview of 'postmodern' thinking see Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984); Roy Boyne and Ali Rattansi (eds.), *Postmodernism and Society* (London: Palgrave Macmillan, 1990); David Harvey, *The Condition of Postmodernity* (Oxford: Blackwell Publishers Ltd., 1990); Max Silverman, *Facing Postmodernity: Contemporary French Thought on Culture and Society* (London: Routledge, 1999).

⁵ Mary Fulbrook, *Historical Theory: Ways of Imagining the Past* (London: Routledge, 2002), p29; Alun Munslow and Keith Jenkins, 'Alun Munslow: in conversations with Keith Jenkins', *Rethinking History*, 15:4 (2011), pp574, 575, 579, 582, 586; Kalle Pihlainen, 'Escaping the Confines of History: Keith Jenkins', *Rethinking History*, 17:2 (2013), pp236, 241.

traces.⁶ History, or more accurately historiography, is therefore a 'narrative-linguistic' construct, 'the contents of which is as much *invented as found*'.⁷ At stake, it is claimed, is the epistemological foundations of the prevailing Rankean genre, or, more specifically, 'the sort of truth to which history aspires'.⁸ Consequently, the concept of 'good history' in its academic form is theoretically contested (chapter one).

Similarly, interest in the history-law relationship originates in the emergence of a 'consensus of critique' that warns of the risks involved when bringing historical inquiry into the courtroom.⁹ Situated within two main 'schools of thought', fears of a 'show trial', that compromises the procedures and standards of law when turning the courtroom into a history seminar ('legal liberalism), contrast with claims, *inter alia*, of the reconstruction of 'cooked' histories when determined through the vagaries of legal norm and practice ('the law and society movement').¹⁰ Yet disciplinary collaboration has a long history that shows no sign of abating.¹¹ Implicit in this history is that historians and jurists have effectively negotiated and overcome any potential risks to either of the disciplinary partners.¹² Indeed, if the law was an incompetent method of history-making why would historians consistently go to trial? However, those celebrating a record of successful litigation have been increasingly challenged by findings of an inherently flawed and dysfunctional methodology. Consequently, opinion on the historiographical competence of the history-law relationship is likewise contested (chapter two).

⁶ Munslow, 'On "Presence"', p571. Tom Lawson, *Debates on the Holocaust* (Manchester: Manchester University Press, 2010), pp5, 9; Hayden White, *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore: Johns Hopkins University Press, 1978), pp58-66; Alun Munslow, *The New History* (Essex: Pearson Education Limited, 2003), p20; Keith Jenkins, *Re-thinking History* (London: Routledge, 1991), pp5-6; Keith Jenkins, *Refiguring History: New Thoughts on an Old Discipline*, (London: Routledge, 2003).

⁷ Munslow, *The New History*, p163; White, *Tropics of Discourse*, p82. Historiography is accepted as both the method and outputs of the history discipline.

⁸ Eaglestone, *The Holocaust and the Postmodern*, p139.

⁹ Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), pp1, 2; Leora Bilsky, 'The Judge and the Historian: Transnational Holocaust Litigation as a New Model', *History and Memory*, 24:2 (2012), p122.

¹⁰ *Ibid.* The concept of 'cooked' history is raised by Wilson, *Writing History*, p169 Although synonymous with other explanations of history-making (as 'netted' or 'present-centric') it more explicitly reflects historiography as a form of intentional reconstruction and therefore it is a concept that is foregrounded throughout the thesis.

¹¹ From the International Military Tribunal in 1945/46 to the Reinhard Hanning trial at the time of writing in 2016 but also through International Tribunals relating to the former Yugoslavia and Rwanda and the International Criminal Court.

¹² Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', in David Bankier and Dan Michman (eds.), *Holocaust and Justice: Representation and Historiography of the Holocaust in Post-War Trials* (New York: Berghahn Books, 2010), p12.

Combining these two areas of interest, the thesis engages in original research of the history-law relationship in accordance with prevailing (empiricist-analytical) and contested (narrative-linguistic) genres of 'good history'. Although informed by theory it is not a philosophy thesis. Likewise, although relating to Anglo-American practice, it is not a law thesis. Rather, it is a historiography thesis, with specific courtrooms as its empirical context and specific theories of academic history as its tool of evaluation. In selecting an appropriate legal context, it is notable that theoretical debates surrounding the history discipline, and the practical collaboration of historians and jurists, are historically linked by the Holocaust. Recourse to the Holocaust has been an intentional response by those defending the realist foundations of the prevailing 'empiricist-analytical' genre (chapter one), while historians and lawyers have been 'inextricably intertwined' in not only the prosecution of its perpetrators and deniers but the recovery of its memory, protection of its record and authorisation of its facts and truths (chapter two).¹³ Consequently, historians and lawyers have formed an arguably 'unique relationship' through which: 'Jurists could not do without history, and, in the service of justice, historians [have] fashioned and refashioned the historiography of the Holocaust'.¹⁴ It is therefore appropriate to site the intended research of the history-law relationship in Holocaust-related trials.

The focus on Holocaust-related trials is a familiar methodology for the study of the history-law relationship. As already implied, a body of literature attests to a breadth of research that has uncovered, on the one hand, a record of disciplinary reciprocity, and, on the other hand, an "unholy alliance", the transfer of intellectual ownership to judges and politicians and injustice at 'the level of historical consciousness'.¹⁵ However, although

¹³ Eaglestone, *Postmodernism and Holocaust Denial*; Dan Stone, *Constructing the Holocaust: A Study in Historiography* (London: Valentine Mitchell, 2003); Lawson, *Debates*; Christopher Browning, 'German Memory, Judicial Interrogation, Historical Reconstruction', in Saul Friedländer (ed.), *Probing the Limits of Representation: Nazism and the "Final Solution"* (Cambridge, Mass: Harvard University Press: 1992), p34.

¹⁴ Erich Haberer, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes', *Holocaust and Genocide Studies*, 19:3 (2005), pp487, 490.

¹⁵ Ibid, p509. Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006), p298. As examples of the reach of this body of literature see: Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (London: Yale University Press, 2001); Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France* (Philadelphia: University of Pennsylvania Press, 2002); Stephen Whinston, 'Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases', *Berkeley Journal of International Law*, 20:1 (2002), pp160-175; David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (London: GlassHouse Press/Cavendish Publishing, 2003); Donald Bloxham, 'From Streicher to Sawoniuk:

providing extensive knowledge of the historical, legal, moral and political complexities of Holocaust litigation cases, as well as empirically accountable detail and analysis of individual trials (chapter two), there are gaps in its methodological approach and assessment. Studies have tended to focus on legal procedure and political context rather than the processing of historiographical reconstruction.¹⁶ Subsequently, attention has been placed on the extra-historical and extra-legal (mis)appropriation and (mis)use of the Holocaust, including its survivors, rather than the accountability and establishment of its facts. Similarly, attention has been placed on the flawed narratives both presented and authorised, rather than the evidential foundations of their 'truth-full' content.¹⁷ Studies have also tended to focus on individual trials, rather than employ comparative analysis across courtrooms.¹⁸ Moreover, the assessment of collaborative competence has been approached from a range of perspectives, including legal propriety, the securing of justice, pedagogy and 'representational efficacy', rather than contested concepts of 'good history'.¹⁹ As a detailed investigation into both historiography in general and the history-law relationship in particular, this thesis redresses these specific methodological omissions.

After confirming that the core function of historical scholarship is the contemporary translation of evidentiary traces into empirically accurate and accountable knowledge of (empiricist) or representations *as* (narrativist) 'the past' (chapter one), the thesis focuses

the Holocaust in the Courtroom', in Dan Stone (ed.), *The Historiography of the Holocaust* (Houndmills: Palgrave Macmillan, 2004), pp397-419; David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham, NC: Carolina Academic Press, 2005); Patricia Heberer and Jürgen Matthäus (eds.), *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln: University of Nebraska Press, 2008); Wilson, *Writing History*; Bilsky, 'The Judge and the Historian', pp117-156; Bankier and Michman (eds.), *Holocaust and Justice*; Kim C. Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (New York: Berghahn Books, 2012); Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton: Princeton University Press, 2016).

¹⁶ Ibid. See also Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963), 2004 and Richard J. Golsan, (ed.), *Memory, the Holocaust, and French Justice: The Bousquet and Touvier Affairs* (Hanover: University Press of New England, 1996).

¹⁷ As opposed to 'truthful', which implies 'the Truth', Munslow *The New History*, p194. C. Behan, McCullagh, 'Invitation to Historians', *Rethinking History*, 12:2 (2008), p277. Some studies have highlighted pieces of evidence integral to specific trials. See for example, R. L. Cope, 'Irving versus Lipstadt: a historian's view of the case', *Kleio*, 33:1 (2001), pp17-44; D. D. Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: Granta Books, 2002); Richard J. Evans, *Telling Lies About Hitler: The Holocaust, History and The David Irving Trial* (London: Verso, 2002); Deborah E. Lipstadt, *History on Trial: My Day in Court with David Irving* (New York: HarperCollins, 2006).

¹⁸ See footnotes 15 and 16. See also, Deborah E. Lipstadt, *The Eichmann Trial* (New York: Schocken Books, 2011).

¹⁹ Pendas, *The Frankfurt Auschwitz Trial*, p288.

attention on how historians and jurists have replicated this methodology within the parameters of Anglo-American law.²⁰ More specifically, it closely examines how historians and jurists have reconstructed specific historiographies of the Holocaust as true 'beyond reasonable doubt' (criminal) or 'on the balance of probability' (civil) across a range of courtrooms acting as discrete discursive (present-centric) contexts investigating its past. Employing comparative analysis, and informed by empiricist and narrativist theories, it seeks to answer four questions relevant to their respective demands of 'good history': (1) although governed by discrete legal forms did Anglo-American law determine and establish empirically accountable evidence and facts *of* or *as* the Holocaust? (2) although case-specific, were the narratives authorised 'truth-full' in content? (3) although variously filtered and shaped were they also compatible and consistent across trials? and (4) although legally probative were the facts and interpretations limited by the past traces (empiricist-analytical) or preconceived and prefigured by narratives that 'floated free' of their content (narrative-linguistic)? Ultimately, did the history-law relationship operate as a 'matching function' *with* the past (empiricist) or a 'making function' *as* the past (narrativist)?²¹

Legal Contexts

The trials selected for comparative analysis are the criminal cases of Adolf Eichmann (1961-1962) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000). In the case of Zündel the two trials in 1985 and 1988 are included in the research since the latter is a retrial of the former and therefore the cases are inextricably linked.

²⁰ **Empiricist:** Richard J. Evans, *In Defence of History* (London: Granta Books, 1997); Fulbrook, *Historical Theory*; Georg G. Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to the Postmodern Challenge* (Middletown CT: Wesleyan University Press, 2003); Gertrude Himmelfarb, *The New History and the Old: Critical Essays and Reappraisals* (2nd edn.) (Cambridge MA: Harvard University Press, 2004); C. Behan McCullagh, *The Logic of History: Putting Postmodernism in Perspective* (London: Routledge, 2004); David Henige, *Historical Evidence and Argument* (Wisconsin: University of Wisconsin Press, 2005); Ann Curthoys and John Docker, *Is History Fiction?* (2nd edn.) (New South Wales: University of New South Wales Press, 2010); Bernard Waites, 'In defence of historical realism: a further response to Keith Jenkins', *Rethinking History*, 15:3, (2011), pp319-334; Andreas Boldt, 'Ranke: Objectivity and History', *Rethinking History*, 18:4, (2014), pp457-474; Tosh, *The Pursuit of History*. **Narrativist:** Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: John Hopkins University Press, 1987); Jenkins, *Re-thinking History*; F.R. Ankersmit, *Historical Representation* (California: Stanford University Press, 2001); Munslow *The New History*; Beverley Southgate, *Postmodernism in History: Fear or Freedom?* (London: Routledge, 2003); Alun Munslow, *Deconstructing History* (2nd edn.) (Oxford: Routledge, 2006); Elizabeth Deeds Ermath, *History in the Discursive Condition: Reconsidering the Tools of Thought* (Oxon: Routledge, 2011); Pihlainen, 'Escaping the Confines of History' pp235-252; Hayden White, 'The History-Fiction Divide', *Holocaust Studies: A Journal of Culture and History*, 20:1-2 (2014), pp17-34.

²¹ Stone, *Constructing the Holocaust*, p229.

The Eichmann, Zündel and 'Irving' trials are not inherently applicable to the intended research or methodologically obvious.²² Rather, in addition to their recording in English, their relevance lies in the diversity of legal case, process and reputation appropriate to comparative study (chapter three). Moreover, these four trials took place in not only different countries and decades but in diverse national (as well as international) contexts relating to the Holocaust. The one shared feature was that none of the countries hosting the trials had been directly involved in the attempted mass murder of European Jewry. Obviously, the state of Israel did not exist between 1933 and 1945, while both Canada and the UK had been classified (and critiqued) as 'bystander' nations. But, in each country, approaches to and consciousness of 'the Holocaust' had been distinctly constructed and framed leading up to and surrounding each trial.

It is possibly difficult to imagine that prior to the Eichmann trial in 1961 'the Holocaust' was not foremost in the consciousness of either the Israeli government or public. Certainly, hundreds of thousands of Holocaust survivors had immigrated to Israel after 1948 and by 1960 comprised one-quarter of its population.²³ Many of these survivors were active in commemorative activities (Warsaw Ghetto Uprising) and political lobbying and had been instrumental in the enactment of the 'Nazis and Nazi Collaborators (Punishment) Law' 1950, which indicted Eichmann, and the establishment of a national Holocaust memorial and research institute, 'Yad Vashem', in 1953, dedicated to its 'Martyrs and Heroes'.²⁴ Source material and records of the Jewish "catastrophe", collated during and in the immediate years post-1945, was known and constituted substantial archives in Yad Vashem.²⁵ Memoirs had been published.²⁶ Kibbutzim dedicated to the ghetto fighters, and other groups of former resistance, were visible and vocal.²⁷ Trials had been held that had

²² Although it was Deborah Lipstadt who had been forced into court future references will relate to the common usage of the 'Irving trial' throughout the thesis.

²³ Hanna Yablonka, *The State of Israel vs. Adolf Eichmann* (New York: Schocken, 2004), p36.

²⁴ Ibid. Zoë Vania Waxman, *Writing the Holocaust: Identity, Testimony, Representation* (Oxford: Oxford University Press, 2006), pp108, 112-113.

²⁵ See as examples of the attempts by Jewish communities and individuals to document their persecution, and then mass murder, prior to, during and immediately after 'the Holocaust' had been defined, Waxman, *Writing the Holocaust*; Laura Jockusch, *Collect and Record!: Jewish Holocaust Documentation in Early Postwar Europe* (Oxford: Oxford University Press, 2012); and Frida Bertolini, 'Truth and Memory After Catastrophe: Historical Fact and the Historical Witness', *Daphim: Studies on the Holocaust*, 29:1 (2015), pp41-57. 'Catastrophe', as well as 'cataclysm' or 'destruction' was the concept used by Jewish documentarians prior to the use of 'the Holocaust', Jockusch, *Collect and Record!*, p3.

²⁶ Waxman, *Writing the Holocaust*; Jockusch, *Collect and Record!*; Bertolini, 'Truth and Memory'.

²⁷ And became the 'moral anchors' in the case prepared against Eichmann, Yablonka, *The State of Israel vs. Adolf Eichmann*, p72.

brought the subject and actions of leaders of the Judenräte (as collaborators) into the public domain.²⁸ And yet it is claimed that the majority of survivors had continued to live in relative anonymity, while crises accompanying the transition of Israel into a sovereign state (including a ‘War of Independence’) had been of more immediate concern.²⁹ It is also noted that the complexities and traumas of survival had been confined and shaped into dominant narratives of heroism and resistance that effectively marginalised and silenced many survivors.³⁰ The Eichmann trial is identified as the event that not only changed these narratives but foregrounded ‘the Holocaust’ as ‘a collective entity’, expanded its atrocities, and the suffering (not only resistance) of survivors, to an entire nation (and world) and began the processing of its centrality to Jewish identity.³¹

In the very different context and role of Canada, the approach to and consciousness of ‘the Holocaust’ was not only defined by its ‘bystander’ status in the period 1939 to 1945 but was closely linked to attitudes towards immigration.³² Canada had been an active participant in the ‘Grand Alliance’ of countries fighting to liberate German-dominated Europe.³³ However, as detailed reports of the extermination of European Jewry came to the attention of the Canadian authorities (from 1942 onwards) the government intentionally sought to censure the reporting of the genocide. This containment was not unique to Canada (see below) but it was linked to its long-standing approach towards immigration in general and Jewish immigrants in particular. As confirmed by Norman Erwin, after decades in which restrictive legislation had specifically, although not solely, intended to prevent entry to Jewish civilians, the then Prime Minister, Mackenzie King, in consistently seeking public support for the war, ‘sensed astutely that Canadians were

²⁸ Especially the libel trial (1954) instigated by Rudolf Kasztner (as leader of the ‘Jewish Relief and Rescue Committee’ in Budapest in 1944) against charges made by Malkiel Gruenwald that he had aided in the murder of his family, and the subsequent assassination of Kasztner in 1957, Ibid, pp27-29. See also Yechiam Weitz, ‘In the Name of Six Million Accusers: Gideon Hausner as Attorney-General and His Place in the Eichmann Trial’, *Israeli Studies*, 14:2 (2009), pp31-37 for background to the so-called ‘Kasztner Affair’ and its links to the prosecution of Eichmann.

²⁹ Yablonka, *The State of Israel vs. Adolf Eichmann*, p11.

³⁰ Ibid, p39. This dominant narrative was not only confined to Israel in the immediate post-1945 years as confirmed by Waxman, *Writing History* and Jockusch, *Collect and Record!*.

³¹ Waxman, *Writing the Holocaust*, p113. Annette Wieviorka, ‘The Witness in History’, trans. by Jared Stark, *Poetics Today*, 27:2 (2006), p389. Others warn that the impact of the Eichmann trial has been overstated, Waxman, *Writing the Holocaust*, p115.

³² Irving Abella and Frank Bialystok, *None Is Too Many: Canada and the Jews of Europe 1933-1948* (Toronto: University of Toronto Press, 1983).

³³ Declaring war on Germany on 10 September 1939, Norman Erwin, ‘The Holocaust, Canadian Jews, and Canada’s “Good War” Against Nazism’, *Canadian Jewish Studies*, 24 (2016), p106. Randolph L. Braham, ‘Canada and the Perpetrators of the Holocaust: The Case of *Regina v Finta*’, 9:3 (1995), pp293-294.

uninterested in the murder of Jews and hostile to the idea of Canada becoming a haven for Jewish refugees'.³⁴

In the immediate post-1945 years Canada relaxed its immigration laws to allow entry to Holocaust survivors. However, despite publicity of its atrocities, and increasing numbers of survivors allowed into the country, the Holocaust was viewed as a low priority until the 1960s, with its genocide viewed as a European phenomenon.³⁵ At the same time, Canada was accused of providing a haven for alleged Nazi war criminals.³⁶ And yet the greater foregrounding of 'the Holocaust' in both Canadian collective memory and Canadian Jewish identity from the 1970s was linked to an increasingly active and vocal survivor voice that focused attention on the thousands of Nazi war criminals allegedly living in Canada, and the subsequent official and public investigation of these allegations from 1982.³⁷ The resulting 'Deschenes Commission Report' (1986) found that the numbers of alleged Nazi war criminals in Canada had been exaggerated, but it recommended that changes in the Criminal Code should be implemented to allow its courts to prosecute the twenty cases it had identified as requiring urgent legal action.³⁸ The necessary changes were enacted by the Canadian Parliament on 23 June 1987 and included a special clause covering 'Crimes against Humanity' as well as 'War Crimes'.³⁹ The two Zündel trials were located in and contributed to this period of public discussion in which, according to Franklin Bialystok, 'the Holocaust' began its institutionalisation into Canada's collective memory.⁴⁰

There were a number of similarities between Canada's and the UK's approach to 'the Holocaust' both during and in the immediate post-war years. But there were also stark

³⁴ Erwin, 'Canada's "Good War"', pp106-107. See Abella and Bialystok, *None Is Too Many*, for a detailed record of Canada's immigration policy prior to and after 1939-1945 and Irving Abella and Frank Bialystok, 'Canada', in David Wyman (ed.), *The World Reacts to the Holocaust* (Baltimore: Johns Hopkins Press, 1996), pp749-781.

³⁵ Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* Montreal: (McGill-Queen's University Press, 2000).

³⁶ See the contested views of Braham, 'Regina v Finta' and Howard Margolian. *Unauthorized Entry: The Truth about Nazi War Criminals in Canada, 1946-1956* (Toronto: University of Toronto Press, 2000).

³⁷ Braham, 'Regina v Finta', pp296-297. Largely through the 'Canadian Holocaust Remembrance Association' (CHRA), then headed by Sabina Citron, and also responsible for finally bringing Zundel to court in 1985. See: Marouf A. Hasian Jr., 'Canadian Civil Liberties, Holocaust Denial, and the Zündel Trials', *Communications and the Law*, 21:3 (1999), pp43-55.

³⁸ Named after the head of the Commission, Mr. Jules Deschenes, a Justice of the Court of Appeal of Quebec and a former Chief Justice of the Quebec Superior Court, Braham, 'Regina v Finta', pp296-297.

³⁹ Ibid, pp297-298.

⁴⁰ Bialystok, *Delayed Impact*.

differences unique to Britain, including its holding of the authoritative mandate of then Palestine. As in Canada, antisemitism impacted on both official and public discourses relating to the initial persecution of Jews in Germany and the subsequent restrictions that applied to Jewish refugees.⁴¹ Consequently, hundreds of thousands of refugees came to Britain between 1939 and 1945 but few were of Jewish origin.⁴² Likewise, the British government was regularly informed of the transgression of persecution to extermination and elected to repress the information, while attempts by Jewish (and other) voices to seek to use the genocide as propaganda or offer proposals of rescue were rejected.⁴³

In the immediate post-war years attitudes towards Jewish refugees did not fundamentally change, even after the horrors of the extermination programme had been exposed.⁴⁴ Crucially, public awareness of Nazi atrocities was initially mediated through images and narratives of the British liberation of Bergen-Belsen, while the death camps of Eastern Europe (liberated by the Soviets) were rarely reported.⁴⁵ Furthermore, although public discourse is never monolithic, the identity of the victims was often anonymous or aligned to specific countries.⁴⁶ At the same time, after the severities of war, the British government and public faced an armed struggle by Jewish groups demanding an independent state in Palestine. Hence, reports about Nazi atrocities in Poland jostled with stories of massacres in Jerusalem.⁴⁷ Consequently, in contrast to its post-war reputation as moral liberator, the number of Holocaust survivors allowed entry into Britain in the immediate post-war years was minimal, with Jews, according to Tony Kushner, still viewed as ‘problematic immigrants’.⁴⁸

Although attempts to broadcast and detail information of the Nazi period, including the mass murder of European Jewry, continued from the 1950s (and in the wake of the

⁴¹ Tony Kushner, ‘The Impact of the Holocaust on British Society and Culture’, *Contemporary Record*, 5:2 (1991), pp349-375.

⁴² *Ibid*, p354.

⁴³ *Ibid*, p355.

⁴⁴ *Ibid*, p356.

⁴⁵ *Ibid*, pp356-357.

⁴⁶ *Ibid*. In fact a raft of publications (academic, legal and personal) had specifically identified the victims of Nazi atrocities as predominantly Jewish as well as the reach and sites of extermination beyond Bergen-Belsen, although access to this literature would have been ‘patchy’, David Cesarani, ‘How Post-war Britain Reflected on the Nazi Persecution and Mass Murder of Europe’s Jews: A Reassessment of Early Responses’, *Jewish Culture and History*, 12:1-2 (2010), pp99-107.

⁴⁷ *Ibid*, p123.

⁴⁸ Kushner, ‘British Society and Culture’, p359.

Eichmann trial) it is generally agreed that it wasn't until the 1980s that both attitudes towards and consciousness of 'the Holocaust' in the UK changed dramatically. With "the rise of the survivor" mirrored in Canada, but also a greater willingness of historians to engage with the Holocaust, and its increased presence in public consciousness through filmic and literary mediums, two key factors are identified as responsible for this change: (1) demands for and the agreed inclusion of Holocaust education in the national curriculum and (2) the foregrounding of war crimes trials and subsequent debates surrounding the enactment of a 'War Crimes Bill'.⁴⁹ Kushner identified a third as the greater prominence of Holocaust denial and demands that the state take action to stop its propagation.⁵⁰ By the time of the 'Irving trial', within a broader political climate in the 1990s that focused on the 'European Project' in the aftermath of the 'Cold War', and a 'continental turn' to Holocaust memory, this specific genocide had shifted from the margins to the forefront of British consciousness.⁵¹ According to Andy Pearce, during the same decade the UK had transformed its role into the 'champion' of Holocaust remembrance in the Western world, culminating with the establishment of 'Holocaust Memorial Day' in the same month the Irving case opened (January 2000).⁵²

Also relevant to comparative study, these four trials encompassed a period in which Holocaust historiography not only emerged into a distinct field of study but increased exponentially. Following the International Military Tribunal (IMT) it is not surprising that initial historian attention had likewise focused on the Nazi leadership and key bureaucracies and officials of the National Socialist party and state.⁵³ Also in accordance with the IMT model, the mass murder of European Jewry was marginalised, if not absent, from these studies. But, since the 1960s, and most prominently from the 1970s, the historiography extended to not only include the wider 'polycratic' administration and experienced functionary beyond the Nazi leadership and central bureaucracies, but also the Holocaust. In particular, attention was placed on the decision-making process (its context, evolution, dating and key stages) that had transgressed anti-Jewish policy from persecution to extermination, as well as wider policy contexts ('anti-modernisation',

⁴⁹ Andy Pearce, 'The Development of Holocaust Consciousness in Contemporary Britain, 1979–2001', *Holocaust Studies*, 14:2 (2008), pp74-80. Kushner, 'British Society and Culture', pp363-367.

⁵⁰ *Ibid*, pp363, 367-369.

⁵¹ *Ibid*, pp80-81, 84-87.

⁵² *Ibid*, p71.

⁵³ Alan Bullock, *Hitler: A Study in Tyranny* (London: Odhams Press Limited, 1952); Helmut Krausnick, *Anatomy of the SS State* (London: Collins, 1968); Joachim E. Fest, *The Face of the Third Reich: Portraits of the Nazi Leadership* (New York: Weidenfeld and Nicolson Limited, 1970).

economic development, 'euthanasia', ghettoisation, the racial categorisation of populations, 'resettlement', war) that had informed and/or escalated the 'machinery of destruction'.⁵⁴ Attention also shifted away from issues of governance to perpetration and from the Nazi leadership to the direct and indirect, or 'desk' murderers.⁵⁵ There was a categorisation of 'victims', 'bystanders' and 'collaborators', while any focus specifically placed on Jewish responses tended to be limited to the controversial subject of the Judenräte, and, in comparison, to the heroics of Jewish resistance.⁵⁶ Micro-histories uncovered life, death and survival in the ghettos and camps, while local and regional studies of allied and occupied countries detailed the diversity and reach of the extermination process, but especially, since the end of the Cold War, in the 'bloodlands' of Eastern Europe.⁵⁷

⁵⁴ See Martin Broszat, *The Hitler State: The Foundation and Development of the Internal Structure of the Third Reich* (London: Longman, 1981) and Jane Caplan, *Government Without Administration: State and Civil Service in Weimar and Nazi Germany* (Oxford: Clarendon Press, 1989) as studies of 'polycracy'. Raul Hilberg, *The Destruction of the European Jews* (London: Holmes and Meier Publishers Ltd., 1985), pp53-62 for references to the 'experienced functionary' and 'machinery of destruction'. See as examples of the chronological literature between 1961 to 2000: Raul Hilberg, *The Destruction of the European Jews* (London: W.H. Allen, 1961); Karl Schleunes, *The Twisted Road to Auschwitz: Nazi Policy Toward German Jews 1933-1939* (Urbana: University of Illinois Press, 1970); Eberhard Jäckel, *Hilter's Weltanschauung: A Blueprint for Power* (Middletown CT: Wesleyan University, 1972); Lucy Dawidowicz, *The War Against the Jews* (New York: Holt, Reinhart and Winston, 1975); Karl-Dietrich Bracher, *The German Dictatorship: The Origins, Structure and Consequences of National Socialism* (London: Penguin, 1978); Christopher R. Browning, *Fateful Months: Essays on the Emergence of the Final Solution* (New York: Holmes and Meier, 1985); Hans Mommsen, 'The Realization of the Unthinkable: The "Final Solution of the Jewish Question" in the Third Reich', in Gerhard Hirschfeld (ed.), *The Policies of Genocide: Jews and Soviet Prisoners of War in Nazi Germany* (London: Allen and Unwin, 1986), pp97-144; Michael Burleigh, *Germany Turns Eastwards: A Study of Ostforschung in the Third Reich* (Cambridge: Cambridge University Press, 1988); Christopher R. Browning, *The Path to Genocide: Essays on Launching the Final Solution* (Cambridge: Cambridge University Press, 1992); Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995); Saul Friedländer, *Nazi Germany and the Jews: Volume I The Years of Persecution 1933-1939* (London: Weidenfeld and Nicolson, 1997); Götz Aly, *Final Solution: Nazi Population Policy and the Murder of the European Jews* (London: Arnold, 1999).

⁵⁵ Roger Gellately, *The Gestapo and Modern Society: Enforcing Racial Policy 1933-1945* (Oxford: Oxford University Press, 1990); Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Occupied Poland* (London: HarperCollins, 1992); Ian Kershaw, "'Working Towards the Führer": Reflections on the Nature of the Hitler Dictatorship', *Contemporary European History*, 2:2 (1993), pp103-118; Daniel J. Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (New York: Knopf, 1996); Martin Dean, *Collaboration in the Holocaust: Crimes of the Local Police in Belorussia and Ukraine, 1941-44* (Basingstoke: Macmillan, 2000).

⁵⁶ Raul Hilberg, *Perpetrators, Victims, Bystanders: The Jewish Catastrophe 1933-1945* (London: Secker and Warburg, 1995); Marion Kaplan, *Between Dignity and Despair: Jewish Life in Nazi Germany* (New York: Oxford University Press, 1998). On critiques of the Judenräte see Hilberg, *The Destruction of the European Jews* and Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963) and the challenge by Isiah Trunk, *Judenrat: The Jewish Councils in Eastern Europe under Nazi Occupation* (New York: Macmillan, 1972).

⁵⁷ Yisrael Gutman, *The Jews of Warsaw 1939-1943: Ghetto, Underground, Revolt* (Brighton: Harvester press, 1982); Christopher R. Browning, 'Nazi Ghettoization Policy in Poland, 1939-1941', *Central European History*, 19:4 (1986), pp343-368; Yitzhak Arad, *Belzec, Sobibor, Treblinka: The Operation Reinhard Death Camps* (Bloomington: Indiana University Press, 1987); Debörah Dwork and Robert Jan van Pelt, *Auschwitz 1270 to the Present* (New Haven: Yale University Press, 1996); Yisrael Gutman and

Across the same decades a variety of analytical frameworks were also appropriated and/or emerged as explanations for ‘the Holocaust’. Although long dominated, and polarised until recently, within ‘intentionalist/functionalist’ debates of decision-making, leadership (monolithic power/weak dictatorship) and genocidal motivation (ideological/structural), these frameworks ranged from the primacy of Hitler’s antisemitism, to the contexts of fascism and totalitarianism (Marxist oriented), the result of a premeditated programme (agency) or ‘cumulative radicalisation’ (ad hoc process), the inherent logic of ‘modernity’ (bureaucratic, industrial, instrumental, scientific), perpetrated by ‘ordinary men’ or ‘willing executioners’ and/or ‘working towards the Führer’, the everyday of Nazi culture and ‘Volksgemeinschaft’ (mirroring the then emerging ‘cultural turn’ across disciplines), and, since the 1990s, an interplay of centre-periphery networks and relationships (‘neo-functionalism’), especially in the eastern occupied territories, as well as gender (with women largely absent from the Holocaust until the 1980s), collective memory and memorialisation (culturally and politically mediated), a return to ideology and race (as fantasy not science), comparative studies of colonialism and genocide (reappraising the ‘uniqueness’ debate) and the ‘voluntaristic turn’ (a governance by consensus rather than coercion).⁵⁸

Michael Berenbaum (eds.), *Anatomy of the Auschwitz Death Camp* (Bloomington IN: Indiana University Press, 1998); Ulrich Herbert, *National Socialist Extermination Policies: Contemporary German Perspectives and Controversies* (Oxford: Berghahn Books, 2000). The concept of the ‘bloodlands’ is borrowed from Timothy Synder, *Bloodlands: Europe Between Hitler and Stalin* (New York: Basic Books, 2010).

⁵⁸ The ‘intentionalist/functionalist’ paradigm was first coined by Tim Mason, ‘Intention and Explanation: A Current Controversy about the Interpretation of National Socialism’, in Gerhard Hirschfeld and Lothar Kettinacker (eds.), *Der Führerstaat: Mythos und Realität. Studien zur Struktur und Politik des Dritten Reiches* (Stuttgart: Klett-Cotta, 1981), pp21-42. As examples of the relevant frameworks of debate conducted across the decades of the trials see: **Hitler’s Antisemitism**: Jäckel, *Hilter's Weltanschauung*; Dawidowicz, *War Against the Jews*. **Fascism/Totalitarianism**: Ernst Nolte, *Three Faces of Fascism* (London: Weidenfeld and Nicolson, 1965); Hannah Arendt, *Origins of Totalitarianism* (3rd edn.) (London: Allen and Unwin, 1966); Bracher, *The German Dictatorship*; Ian Kershaw, *The Nazi Dictatorship: Problems and Perspectives of Interpretation* (3rd edn.) (London: E. Arnold, 1993). **Intentionalist**: Jäckel, *Hilter's Weltanschauung*; Dawidowicz, *War Against the Jews*; Gerald Fleming, *Hitler and the Final Solution* (London: Hamish Hamilton, 1985). **Functionalist**: Schleunes, *Twisted Road*; Broszat, *The Hitler State*; Mommsen, ‘The Realization of the Unthinkable’. **Moderate Functionalist**, Christopher R. Browning, ‘The Decision-Making Process’, in Stone (ed.), *Historiography of the Holocaust*, p178. **Conditional Intentionalist**, Philippe Burrin, *Hitler and the Jews: The Genesis of the Holocaust* (London: Edward Arnold, 1994). **Neo-Functionalists**: Herbert, *National Socialist Extermination Policies*. See also: Doris L. Bergen, *War and Genocide: A Concise History of the Holocaust* (Lanham: Rowman and Littlefield, 2003); Saul Friedländer, *Years of Extermination: Nazi Germany and the Jews 1939-1945* (London: HarperCollins, 2007) and Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* (Oxford: Oxford University Press, 2010) as examples of further modifications of intention/function perspectives published after the trials. **Modernity**: Zygmunt Bauman, *Modernity and the Holocaust* (Cambridge: Polity Press, 1989); Detlev J. K. Peukert, ‘The Genesis of the “Final Solution” from the Spirit of Science’, in David F. Crew (ed.), *Nazism and German Society, 1933-1945* (London: Routledge, 1994). **Perpetrators**: Gellately, *The Gestapo and Modern Society*; Browning, *Ordinary Men*; Kershaw, ‘“Working Towards the Führer”’; Goldhagen, *Hitler’s Willing Executioners*; Michael Mann, ‘Were the

Within this comprehensive and extensive body of scholarship attention was predominantly on the actions of the perpetrators, and quite rightly according to Donald Bloxham, while scepticism over the subjectivity of any source material other than official records had foregrounded the use of perpetrator documentation.⁵⁹ The Jewish victims and survivors were, of course, an integral feature of the prevailing historiographies, while the publication of personal accounts since 1945 had added important insights based on direct experience, perception and understanding of events as they happened.⁶⁰ However, neither Jewish source material nor perspectives had been foregrounded in the established scholarship. Exceptions included Saul Friedländer, whose research integrated the voices of the victims as well as the perpetrators and so-called ‘bystanders’.⁶¹ Indeed, a common criticism has been that the Jewish victims have long been treated as ‘objects’ by historians of the Holocaust; as something to study externally rather than being integral to its

Perpetrators of Genocide “Ordinary Men” or “Real Nazis”? Results from Fifteen Hundred Biographies, *Holocaust and Genocide Studies*, 14:3 (2000), pp331-366. **Nazi Culture:** Ian Kershaw, *Popular Opinion and Political Dissent in the Third Reich: Bavaria 1933-1945* (Oxford: Oxford University Press, 1983); Detlev J. K. Peukert, *Inside Nazi Germany: Conformity, Opposition and Racism in Everyday Life* (London: Penguin, 1989); Michael Burleigh and Wolfgang Ipperman, *The Racial State: Germany, 1933-1945* (Cambridge: Cambridge University Press, 1991); David Welch, *The Third Reich: Politics and Propaganda* (London: Routledge, 1993); Kaplan, *Between Dignity and Despair*. **Gender:** Joan Ringelheim, *The Unethical and the Unspeakable: Women in the Holocaust* (Simon Wiesenthal Center Annual 1, 1984); Marion Kaplan, ‘Keeping Calm and Weathering the Storm in Nazi Germany: Daily Life, Daily Struggles, 1933-1939’, *Feminist Studies*, 16:3 (1990), pp579-606; Carol Rittner and John K. Roth (eds.), *Different Voices: Women and the Holocaust* (New York: Paragon House, 1993); Dalia Ofer and Leonore J. Weitzman (eds.), *Women in the Holocaust* (New Haven, CT: Yale University Press, 1998). **Memory Culture:** Alon Confino, ‘Collective Memory and Cultural History: Problems of Method’, *American Historical Review*, 102:5 (1997), pp1386-1403; James E. Young, *The Texture of Memory: Holocaust Memorials and Meaning* (New Haven, CT: Yale University Press, 1993); Cathy Caruth (ed.), *Trauma: Explorations in Memory* (Baltimore: Johns Hopkins University Press, 1995); Peter Novick, *The Holocaust and Collective Memory: The American Experience* (London: Bloomsbury, 2000). For more recent literatures contributing to debates that tended to develop after the years of the trials (race science and fantasy, colonialism, genocide, the ‘voluntaristic turn’, see Dan Stone, *Histories of the Holocaust* (Oxford: Oxford University Press, 2010), pp296-299.

⁵⁹ Bloxham, ‘From Streicher to Sawoniuk’, in Stone (ed.), *The Historiography of the Holocaust*, pp414-415.

⁶⁰ Some of the most famous included, Elie Wiesel, *Night* (London: MacGibbon and Kee, 1960); Primo Levi, *If This is a Man* (London: Penguin Books, 1979); Primo Levi, *The Drowned and the Saved* (London: Abacus, 1989). See Waxman, *Writing the Holocaust* for details of survivor accounts written in many languages other than English from 1945 to 1949 and increasing in volume during the 1960s and 1970s (mainly in Hebrew, English and German), pp100, 117.

⁶¹ Friedländer, *Nazi Germany and the Jews*. Other exceptions include, Gutman, *The Jews of Warsaw*; Trunk, *Judenrat*; Kaplan, *Between Dignity and Despair*. For more recent scholarship of victim perspectives see Stone, *Histories of the Holocaust*, pp294-295.

histories.⁶² It has also been noted that any wider contextualisation of the Holocaust has placed it in German and/or European but not Jewish history.⁶³

Research largely conducted after 2000 (and therefore after the four trials), and by Jewish historians, has attempted to redress what Norman Goda identifies as the ‘strange disconnect’ between Jewish histories and perspectives of the Holocaust and the key historiographical trends of largely non-Jewish historians in Europe and the US.⁶⁴ This research has not only exposed the myth of survivor silence in the immediate post-war years, but, in utilising the vast archives of documentation, memoirs and testimonies collected and recorded by Jewish individuals and organisations, has challenged a number of once prevailing narratives.⁶⁵ For example, on the oft-contentious subject of the Judenräte, although greater attention has recently been placed on the complexity of contexts impacting on their actions, Dan Michman has critiqued both the confinement of Jewish leadership to these German-imposed organisations and their activities in the ghettos.⁶⁶ Other research has critiqued the more recent focus on eastern Europe, the myopic undervaluation of diaries as first-hand evidence, the neglect of ‘self-help’ and community relations in surviving, and myths that sexual violence had not been used against Jewish women wherever they were found.⁶⁷ And yet controversies remain. While Laura Jockusch is incredulous that it has taken decades for (non-Jewish) historians to turn their attention to the victims, and remains sceptical that they have fully realised the historical potential of survivor accounts, Michman has identified an “Israeli School” of Holocaust research that restricts its historicisation to Jewish reactions and the primacy of antisemitism as causation.⁶⁸ Arguably, notwithstanding the contribution to both the scholarship and understanding of the Holocaust through these new histories, the

⁶² Norman J. Goda, ‘Introduction’, in Norman J. Goda (ed.), *Jewish Histories of the Holocaust: New Transitional Approaches* (Oxford: Berghahn Books, 2017), p4.

⁶³ Goda, ‘Introduction’ in Goda (ed.), *Jewish Histories of the Holocaust*, pp4, 6-7. Dan Michman, ‘The Jewish Dimension of the Holocaust in Dire Straits?: Current Challenges of Interpretation and Scope’, in *Ibid*, pp22-23, 29.

⁶⁴ Goda, ‘Introduction’, in Goda (ed.), *Jewish Histories of the Holocaust*, p5.

⁶⁵ *Ibid*; Waxman, *Writing the Holocaust*; Jockusch, *Collect and Record!*.

⁶⁶ Tim Cole, ‘Ghettoization’, in Stone (ed.), *The Historiography of the Holocaust*, pp65-87; Dan Michman, ‘Jewish Leadership in *Extremis*’, in *Ibid*, pp319-340.

⁶⁷ See the relevant chapters, and more, in Goda, *Jewish Histories of the Holocaust* and as confirmed by David Cesarani, *Final Solution: The Fate of the Jews 1933 – 49* (London: Macmillan, 2016), ppxxxviii-xxxix.

⁶⁸ Jockusch, *Collect and Record!*, pp200-201. Dan Michman, ‘Is there an “Israeli School” of Holocaust Research?’, in David Bankier and Dan Michman (eds.), *Holocaust Historiography in Context: Emergence, Challenges, Polemics and Achievements* (Jerusalem: Yad Vashem, 2008), pp37-65.

seemingly polarisation of ‘Jewish’ and ‘non-Jewish’ is in danger of treating historians as monolithic identities as well as constructing a hierarchy of value on both authorship and subject.

Arguably more specific to the history-law relationship, but related to the wider historiography of the Holocaust, these four trials further encompassed and represented the transformation of the ‘survivor’ as both foundational evidence of the Holocaust and a form of moral authority beyond its genocide, and then, as the numbers of direct witnesses declined and scholarship of the Holocaust increased, the utilisation of historians as both expert and witness by proxy (chapter three).⁶⁹ As indicated above, although survivors (and many who were subsequently murdered) had long collated, recorded and published personal accounts and testimonies of the Jewish “catastrophe”, it was the Eichmann trial that brought their evidence and role as spokespersons of the Holocaust to world-wide attention. The authority subsequently awarded to survivor testimony in Israel not only changed the status of these witnesses as evidence (and role models of surviving) but challenged the hierarchy of proof in both history and Anglo-American law that had long sourced facticity in official documentation over the retrieving of memory (chapter two).⁷⁰ Ironically (and shamefully), therefore, in establishing the facticity of the Holocaust historians and jurists had applied greater trust to the remnants of the perpetrators over the testimonies of ‘people who were there’, including those taking part in the later trials.⁷¹ The Eichmann trial, therefore, not only marked a pivotal change to the advent of the witness (chapter three) but challenged the ‘cult of the document’ then and still pervading both history and the law (chapter two).⁷²

The Eichmann trial was also the first courtroom in which a historian (Salo Baron) was submitted as evidence of historical background.⁷³ However, in comparison to survivor

⁶⁹ Waxman, *Writing the Holocaust*, p6; Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton: Princeton University Press, 2016), p14.

⁷⁰ Jochusch, *Collect and Record!*, p11; Bertolini, ‘Truth and Memory’, p52.

⁷¹ Lawson, *Debates*, p272. See the ‘Witness Report of Richard Evans: David Irving, Hitler and Holocaust Denial’, para 2.4.1, submitted at *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), Holocaust Research Institute, Royal Holloway, University of London (HRIRH), Trial Bundle B1. All proceeding references to the daily transcripts of this trial will be prefixed by HRIRH. Additional archival material relating to the ‘Irving trial’ will also be prefixed by their Trial Bundle (TB) letter and number.

⁷² Bertolini, ‘Truth and Memory’, p52. As noted earlier (footnote 32), Waxman argues that the role of the Eichmann trial in the developing position of the survivor should not be overstated, Waxman, *Writing the Holocaust*, p115.

⁷³ Wieviorka, ‘The Witness in History’ p389.

testimony, historian expertise was a minimal component of the Prosecution's evidential base and strategy in 1961. The reverse was the case in the later trials, as witness responsibility was not only assigned to established historians but their testimony, both oral and written, was now foregrounded as the main source of evidence of the Holocaust (chapter three). And yet Anglo-American law inherently diminishes the evidential authority of historians, while critiques remain over the validity of the expert to act as witness by proxy (chapters two and three).⁷⁴

The four trials therefore provide not only a comparative base of legal case, context, process and reputation, but a comparative base of the utility of the direct and/or expert witness still relevant to on-going debates in Holocaust historiography. They also took place across decades in which 'the Holocaust', and its evidence, had been variously constituted, debated, explained and understood beyond each courtroom. If and how the varying debates and prevailing historiographies impacted upon and/or were reaffirmed by each trial is shown in the empirical research.

It is not surprising that the historiographical reach of the Holocaust presented at each of the four trials was extensive (chapter three). But only four subjects were common to each case: the evolution of extermination policy, the Einsatzgruppen mass shootings 1941-1942, homicidal gas chambers at Auschwitz-Birkenau and the total number of Jewish victims. These four subjects therefore comprise the research focus of the thesis. To allow a direct comparison of their reconstruction, each historiography is organised thematically rather than presented in the form of individual trials (chapters four to seven). To allow clarity of both process and findings the relevant accounts presented, evidence foregrounded, facts established and surrounding record integral to each historiography are extracted from the legal form (see below). The relevant data-streams are also organised by chronology (documentation) and type to allow explicit clarification of their evidential infrastructure. Although this extraction and organisation belies the complexities and submerging of their judicial processing (chapter three) it is necessary to

⁷⁴ Elie Wiesel is representative of those who insist that the truth of the camps can only be known by those that were there, Waxman, *Writing the Holocaust*, pp181-182. See also Tim Cole, 'The Holocaust and Its (Re)Telling: The Nature of Evidence at the Nuremberg and Eichmann Trials, in Debra Kaufman, Gerald Herman, James Ross and David Phillips (eds.), *From the Protocols of the Elders of Zion to Holocaust Denial Trials: Challenging the Media, Law and the Academy* (Middlesex: Vallentine Mitchell, 2007), pp56-66. Waxman disagrees, *Writing the Holocaust*, pp181-182, as does Evans, Richard J. Evans, 'History, Memory, and the Law: The Historian as Expert Witness', *History and Theory*, 41:3 (2002), p339.

both expose the method and evaluate the competence of the history-law relationship operating in each trial.

To likewise allow clarity, the evidential bases of each historiography are limited to those items awarded probative weight as established fact (and not merely probative value through submission) in the Eichmann and Irving trials and those foregrounded by the Judges in their 'Charge to the Jury' in the Zündel trials (see below). This focus belies the quantity of items admitted in the Eichmann and Irving trials and referenced in the Zündel trials (chapter three). In fact, there was simply too much evidence presented or referenced in all four trials and therefore a process of selection had to be applied. However, the content and volume of evidence admitted or referenced is irrelevant to both the items foregrounded as probative in all four courtrooms and the facts established as 'true' in the Eichmann and Irving trials. Consequently, this omission does not impact on the historiographical findings authorised (Eichmann, Irving) or projected (Zündel).

Rather, in response to empiricist and narrativist theories of 'good history', once extracted from the legal form and organised thematically it is possible to uncover and compare the evidential accountability of each historiography, and the consistency and stability, or otherwise, of the facts established across discrete courtrooms. It is likewise possible to quantify if the narratives authorised were 'truth-full' in content, regardless of their case-specific form. It is further possible to identify the primacy of evidential (past) content or discursive (present-centric) narratives, regardless of legal case and context. Ultimately, it is possible to evaluate the 'matching' or 'making' functions of the history-law relationship integral to, and distinguishing, empiricist and narrativist explanations of 'good history'.

Primary Source Material

A body of secondary literature relating to philosophy/theories of history, Anglo-American law and Holocaust litigation cases inform the theoretical framework of the thesis. Comparative and critical analysis of this literature is indicated throughout this 'Introduction' and detailed in chapters one, two and three. It provides background to the primary research, as well as confirming the methodological gaps the thesis addresses. But the main form of evidence informing the research is the primary source material of the

daily transcripts recorded at the Eichmann, Zündel and Irving trials.⁷⁵ As a public, and in most cases of Anglo-American practice, a verbatim record of proceedings, the transcripts offer an enviable degree of evidential access and account of each trial.⁷⁶ However, rather paradoxically, their volume can be a barrier to research. For example, the published record of the Eichmann trial comprises around 1,500 A4-sized pages of text, the transcripts of the two Zündel trials total 56 volumes of written testimony (each 250+ pages), while the transcripts of the Irving trial record 32 days of testimony and comprise around 200 pages of text per day. Comprehending their content can also be challenging. Contrary to the popular dramatisation of court cases a trial is not a clear or linear process. Rather, the content, and even purpose, of each case is submerged in a convoluted method of what Richard Wilson identifies as 'tiresome proceduralism'.⁷⁷ The transcripts mirror the resulting incoherent and dense form. But at least the reader is able to consistently re-check and verify the content of the relevant case, unlike the court audience.

Gaining access to trial transcripts can also be problematic. Although the transcripts of both the Eichmann and Irving trials have been uploaded to specific web-sites, those relating to the Zündel trials can only be accessed through the relevant Appeal Court archive in Toronto, Canada.⁷⁸ Hence, however public in theory, research on these trials reveals the limitations of geography and resource in practice.⁷⁹ One further barrier is language. Unlike the Eichmann trial, many transcripts are not translated into any other

⁷⁵ **Eichmann:** *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Volumes 1-5, Newcastle University Library. All proceeding references to this trial will be prefixed by AET. **Zündel:** *Her Majesty the Queen and Ernst Zündel* (251/85) and *Her Majesty the Queen and Ernst Zündel*, (424/88), Ontario Court of Appeal. All proceeding references to these trials will be prefixed by ZT and the relevant year (1985 or 1988). **Irving:** *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), HRIRH. The Eichmann and Irving transcripts have been read in their entirety. Access to the Zündel transcripts was limited by the financial resources necessary for a visit to the archives in Toronto, Canada in 2011. Relevant data was extracted from the transcripts in the time allowed and supported by the Appellant (Defence) and Respondent (Prosecution) 'Factums', which outline the cases of both parties as well as the evidence foregrounded by the Judges in 1985 and 1988.

⁷⁶ For example, criminal trials in Germany do not follow the Anglo-American model and do not record court proceedings, including the testimony of witnesses, Douglas, *The Right Wrong Man*, p139.

⁷⁷ Wilson, *Writing History*, p11.

⁷⁸ **Eichmann:** <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts>. **Irving:** <http://www.hdot.org>. **Zündel:** Volumes of the 1985 trial transcripts can also be found at the William Ready Division of Archives and Research Collections, McMasters University (Toronto). A selection of primary and secondary source material relating to the 1988 trial can also be found at the Canadian Jewish Congress Charities Commission National Archives ' in Montreal.

⁷⁹ During the visit to Toronto, supported by the 'Friendly Hands Charitable Foundation', entire volumes of transcripts were photocopied or photographed and provide a unique archive of these trials now held by the author in the UK.

language beyond that of their national host. Unfortunately, since only fluent in English, this common practice meant that the author could not access thousands of trials related to the Holocaust.

There are also limitations of content inherent in Anglo-American trial transcripts. In particular, they omit the complexity of decision-making and procedure conducted long before the relevant case comes to court. Subsequently, there is no public record of the fundamental decisions determining the principal content of the trial (the 'facts in issue'), its evidential framework, or parameters of the 'triers of fact'; or whether there will be a trial at all.⁸⁰ Even if comprising a verbatim record, both evidential content (videos) and instruction (judicial rulings) during the trial can be omitted. As ruled by the Judge in the Irving trial, any administrative discussions would not be recorded, unless of substantive relevance to the issues, while any judicial decisions would be transcribed in a separate document.⁸¹ Notably, the evidential content recorded can be a mere citation, or, at best, a detailed excerpt or summary of the items referenced or submitted. Moreover, since impractical, the transcripts do not include copies of the primary source material referred to and/or submitted. Scrutiny of the relevant contemporaneous documentation, or any films, maps or photographs shown to the court, is therefore not possible. Even the archive of the Irving trial, which includes copies of all documents referred to in the expert reports and in court, does not hold the relevant evidence in its original form or entirety.⁸² As an English speaker, evidential scrutiny is further limited by the majority of the contemporaneous evidence being in its original language of German.⁸³ The reader, therefore, has to trust the accuracy of both the jurist in her/his representation of the relevant evidence and the recording by the transcriber.

But the greatest absence of content in Anglo-American transcripts relates to the findings of trials by jury. It is common knowledge that the deliberations of these ultimate 'triers of fact' are not recorded. Indeed, it is a criminal offence for a jury member to be asked, or to

⁸⁰ Hirsh, *Law Against Genocide*, pxxi. One exception is the archive of pre-trial documentation relating to the 'Irving trial' and located at the HRIRH. During this trial Christopher Browning testified that it is now more difficult to access pre-trial documentation of suspected war criminals from German courts because of the increased emphasis on privacy laws in Germany, HRIRH, Day 16, p34.

⁸¹ Ibid, Day 5, pp2-3.

⁸² Ibid, (TBs) HI (i) – HI (xiv), *Documents Referred to in Richard Evans' Report*; H2 (I) – H2 (vi); *Documents Referred to in Robert Jan van Pelt's Report*; H3 (I) – H3 (ii); *Documents Referred to in Christopher Browning's Report*; H4 (I) – H4 (vi); *Documents Referred to in Peter Longerich's Report*.

⁸³ Specifically those items relating to the expert reports of Browning and Longerich.

offer, to reveal any stage of jury decision-making. As Judge Locke reminded the jury in the 1985 Zündel trial:

Under no circumstances are you permitted to reveal to anyone what occurred within the confines of your jury room during your deliberations. That is the law ... That is the way our system of justice survives in this country.⁸⁴

A similar instruction was endorsed by Judge Thomas prior to jury deliberations in the 1988 retrial.⁸⁵ Consequently, in trials by jury, including the Zündel trials, the most decisive stage of fact finding is concealed from public (and historian) knowledge and scrutiny. In the Zündel trials the transcripts record both Judges' 'Charge to the Jury', which summarise the relevant cases and remind the jury (and court audience and reader) of the key arguments posed, evidence foregrounded and points elucidated from cross-examination. Although informative of historiographical process, and indicative of findings, neither Locke nor Thomas authorised any conclusions, or indicated any facts established 'beyond reasonable doubt', since that was the sole responsibility of the respective juries. It is therefore a barrier to research that the historiographical findings of the 'triers of fact' in the Zündel trials remain unknown.

As a written text, the aesthetic characteristics of a courtroom are also missing from the trial transcripts. As highlighted by Jonathan Freedland, exchanges in court replicate 'a daily performance of extraordinary theatre'.⁸⁶ Yet this 'theatre', including body-language and participant innuendo, jurist and witness performance or relationships, is not captured despite being a primary source of information.⁸⁷ Likewise, the transcripts do not record audience reaction to, or even interplay with, the trial participants. It is impossible to capture, for example, the response of a largely Jewish court audience to both Eichmann in person and his crimes as they were presented, or the survivor experience of testifying

⁸⁴ ZT 1985, Vol. XXI, p264.

⁸⁵ ZT 1988, Vol. XXXVI, p10463.

⁸⁶ Jonathan Freedland, 'Court 73 – Where History is on Trial', *The Guardian*, 5 February 2000. See also Shoshana Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust', *Critical Inquiry*, 27:2 (2001), pp201-238 and Shoshana Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (USA: Harvard University Press, 2002), pp106-130.

⁸⁷ Evident when comparing personal observation of specific days of the 'Irving trial' with their respective recorded transcripts. See also Hirsh, *Law Against Genocide*, pxx and Douglas, *The Right Wrong Man*, pp81, 84.

in Eichmann's presence, with the exception of the noted fainting of Yehiel Dinur (a survivor of Auschwitz-Birkenau) and the halting of his evidence.⁸⁸ Similarly, while contempt for Eichmann during cross-examination is evident throughout the 1961 transcripts, they cannot replicate the continuing interplay between an indicted mass murderer of 'the Jewish People' and the legal representative of 'six million accusers'.⁸⁹ In the 1985 transcripts the derision of Zündel's defence lawyer, Douglas Christie, directed at the eyewitnesses, especially Rudolf Vrba as a survivor of Auschwitz-Birkenau, is likewise palpable. However, they fail to capture fully the survivors' reaction to Christie's antagonistic cross-examinations as well as the reaction of the court audience to denier claims and tactics. In 2000 the transcripts of the London trial did not record instances observed by one of the expert witnesses for the Defence, Richard Evans, that included Irving distributing copies of extracts from his book in court and at times addressing his remarks to a 'small clique of his admirers', or members of the Defence team passing information to Deborah Lipstadt's lawyer, Richard Rampton, on 'Post-it stickers ... on the rare occasions on which he missed something'.⁹⁰ Conversely, the testimony recorded in the transcripts should not be taken literally. As noted by David Hirsh, nothing in a trial is straightforward, everything is said for a reason and/or effect.⁹¹ Likewise, as shown above and reiterated by Donald Bloxham, no trial is a blank page, with the subsequent inscriptions of the Holocaust in the courtroom being far from 'objective'.⁹² As with all primary source material, therefore, the content of trial transcripts has to be approached with caution, while a wider reading is necessary to compensate for their lack of extra-historical and extra-legal backgrounds, contexts and insights. Yet, however flawed, they remain a comprehensive archive and record of an evolving collaborative investigation and reconstruction of the Holocaust by historians and jurists pertinent to the intended research of the history-law relationship.

On a more practical level, although recognised from the outset as an essential form of primary source material, it was not immediately obvious how the trial transcripts could be utilised to investigate the questions of 'good history' posed by the thesis. The content of the transcripts was not known to the author prior to the intended research.

⁸⁸ AET, Vol. III, p1237.

⁸⁹ Ibid, Vol. I, p62.

⁹⁰ Evans, *Telling Lies About Hitler*, p204.

⁹¹ Hirsh, *Law Against Genocide*, pxxi.

⁹² Bloxham, *Genocide on Trial*, pvii.

Consequently, where possible, they had to be read in their entirety, with the content of each page of transcript summarised, and then all notes of each trial compared and analysed, before a relevant methodology was identified.⁹³ The density and haphazard nature of both content and legal process, as well as the selection of four trials, ensured that this first stage of the research was a lengthy, and at times challenging, method. But it resulted in the development of a crucial familiarity of not only the content and reach of each trial but the various approaches to and reconstructions of the Holocaust across the four courtrooms. More specifically, it was only after rigorous engagement with the transcripts that it was possible to identify that four historiographies integral to the Holocaust had been similarly investigated at each trial. It was also only after rigorous engagement with the transcripts that it was possible to identify that both the processing and findings relevant to each historiography could be reconstructed. It was similarly only after rigorous engagement with the transcripts that it was possible to determine the form through which their reconstruction could be most appropriately detailed and evaluated. As already mentioned, the form selected was thematic chapters, with both process and findings extracted from the vagaries of Anglo-American practice and organised into a narrative that complied with the intended questions of 'good history'.

Chapter Plan

As an introduction to the theoretical framing of the primary research, chapter one identifies and summarises the central tenets of both the 'narrativist' critique and the 'empiricist' defence of historical scholarship.⁹⁴ It begins with an overview of this latest challenge to the discipline and engages with a range of 'postmodern' voices to determine the content and form of its suggested 'narrative-linguistic' genre of historiography.⁹⁵ The chapter then engages with key voices defending the prevailing 'empiricist-analytical' genre. Through comparative analysis of their respective claims the chapter identifies the key sites of contention that specifically coalesce around the 'presence' of the past, the primacy of evidential content or the fictive form, the mechanics of adjudication and the epistemic privileging of history's knowledge. The chapter confirms that the proponents

⁹³ See footnote 78.

⁹⁴ A convoluted terminology exists in reference to the myriad of allegiances and theoretical positions relevant to both labels, ranging from 'reconstructionist', 'constructionist', deconstructionist (Munslow) to the 'Discursive Condition' (Ermath) and 'postnarrativist' (Kuukkanen). However, the use of 'narrativist' and 'empiricist' will be retained for purposes of generic clarity.

⁹⁵ Although encompassing a broad range of ideas, reference to the 'postmodern' is limited to its critique of historical method and knowledge. See the literature in footnote 3.

of both genres were directly confronted through a deliberate focus on the Holocaust, and Holocaust denial, in a 'knee-jerk' reaction or 'caricature' of postmodern thinking.⁹⁶ It likewise confirms that the heated debates of the late 1990's have waned as concepts arising from the once identified 'intellectual barbarians at the disciplinary gates' have been transformed into insights and assimilated into everyday practice.⁹⁷ However, the persistence of the 'empiricist-analytical' (and modernist) genre 'still pervades the postmodern era'.⁹⁸ The chapter concludes that, despite a degree of theoretical amalgamation, generic contradictions distinguish the 'empiricist-analytical' and 'narrative-linguistic' explanations of historiography. Consequently, the concept and judgement of 'good history' within the academy remains theoretically contested.

As further background to the primary research, chapter two provides an introduction to the history-law relationship. Through comparative analysis of both disciplines it first identifies the assumed similarities of craft, that, in theory at least, explain and justify their long history of collaboration. The claims of a shared craft are then contrasted with the distinct norms and practices that define history and Anglo-American law as discrete disciplines. The chapter finds that contradictions are evident at all sites of assumed symbiosis. The chapter then applies theory to practice and examines existing research of the history-law relationship in Holocaust-related trials. It subsequently finds an acclaimed record of disciplinary reciprocity alongside a developing 'consensus of critique' that foregrounds the inadequacy of ordinary criminal law to deal with both the extraordinary crimes and historical complexities of the Holocaust, and the political (mis)appropriation of its past and record.⁹⁹ More controversially, it identifies a critique suggesting that the law is incapable of delivering justice to the victims and survivors of the Holocaust since it legalised every stage of its perpetration. But, foremost, it confirms that knowledge of the Holocaust has been variously abstracted, distorted and 'cooked' in accordance with legal case and context.¹⁰⁰ The chapter concludes that in both theory and practice the

⁹⁶ Stone, *Constructing the Holocaust*, pxvii; Eaglestone, *Postmodernism and Holocaust Denial*, p7.

⁹⁷ Evans, *Defence*, p8. Dan Stone, 'Introduction', in Dan Stone (ed.), *The Holocaust and Historical Methodology* (New York: Berghahn Books, 2012), p9.

⁹⁸ Beverley Southgate, 'Replacing the Past with Disobedience', *Rethinking History*, 17:2 (2013), p232.

⁹⁹ Wilson, *Writing History*, p1; Bilsky, 'The Judge and the Historian', p122.

¹⁰⁰ Wilson, *Writing History*, pp18, 169.

history-law relationship appears to be a flawed and inherently 'dysfunctional' methodology.¹⁰¹

As background to the legal contexts informing the primary research, chapter three introduces and profiles the criminal trials of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the civil case instigated by David Irving (2000). Through both primary and secondary research, it demonstrates that the trials were not only sited in different countries and decades but were influenced by their surrounding national contexts. In court they were governed by different substantive law, legal statutes, foundations of evidence, standards of proof, evidentiary rules and 'triers of fact', and outside court they were distinguished by different outcomes and reputations. Consequently, the four trials comprise an appropriate canvas for comparative study of the history-law relationship in practice. As additional background to these trials, chapter three also identifies the contribution they make to the existing 'consensus of critique' outlined in chapter two. The chapter finds a familiar record of legal breaches of 'due process', the inadequacy of ordinary law when faced with historical evidence and opinion, and external interests directing all four courtrooms. It also finds a familiar record of distorted and partial narratives, that, however grand in reach, could not 'do justice' to the historical complexities of the Holocaust.¹⁰² Through a detailed reading of the daily recorded transcripts the chapter likewise identifies a record of practice, integral to Anglo-American law, that not only compromised but obscured the evidence and facts of the Holocaust in the legal form. The chapter concludes that, when viewed through the lens of the existing 'consensus of critique', the warnings of the limitations of Anglo-American law as a method of historical inquiry are further corroborated by the Eichmann, Zündel and Irving trials. But, contrary to conventional wisdom berating the cases in Canada, this critique is as relevant to the Eichmann and Irving trials as it is to the Zündel trials.

Comprising the primary research of the history-law relationship, and in accordance with prevailing (empiricist) and contested (narrativist) theories of 'good history', chapters four to seven focus attention on the collaborative reconstruction of four historiographies investigated across the Eichmann, Zündel and Irving trials: the evolution of extermination policy (chapter four), the Einsatzgruppen mass shootings 1941-1942 (chapter five),

¹⁰¹ Haberer, 'History and Justice', p492.

¹⁰² Douglas, 'The Didactic Trial', in Bankier and Michman (eds.), *Holocaust and Justice*, p12.

homicidal gas chambers at Auschwitz-Birkenau (chapter six) and the total number of Jewish victims (chapter seven). Organised thematically, and once extracted from the vagaries of the legal form, each chapter comparatively details the accounts presented, evidential foundations foregrounded and facts established on each historiography, as well as the content of the narratives subsequently authorised at each trial. Each chapter also evaluates the accountability and stability, or otherwise, of each historiographical narrative, as well as the primacy of their past evidential content or present-centric (legal) form. The thematic chapters ultimately confirm that, although each historiography was inevitably 'cooked' in accordance with the case-specific demands of each trial, they were also empirically accountable and 'truth-full' in content. Furthermore, the authorised narratives were, with few exceptions, not only compatible and consistent across courtrooms, but reaffirmed the content and findings of prevailing Holocaust scholarship both past and present. Each chapter therefore finds that the history-law relationship is competent to act as a model of 'good history' in accordance with the demands of both empiricist and narrativist theories. However, although the stability of findings across discrete courtrooms indicated the primacy of evidential constraint, and therefore a 'matching' function *with* the past, each chapter reveals the primacy of the discursive form, in this case the legal demands of the Eichmann, Zündel and Irving trials, that 'floated free' of the relevant traces. Each chapter therefore concludes that the methods and outputs of the history-law relationship in all four trials are more appropriately explained through the 'making' function integral to the logic of, and distinguishing, the 'narrative-linguistic' genre.

Arising from the findings of the thematic chapters the thesis concludes with a number of insights relevant to contemporary debates on historiography in general and the history-law relationship in particular. Three key findings are foregrounded. In contrast to the findings of the existing 'consensus of critique' outlined in chapters two and three, disciplinary collaboration at the level of historiographical reconstruction is capable of successfully negotiating an inherently flawed methodology to 'do justice' to the past traces of the Holocaust, including survivor testimony, historian expertise and established scholarship. Indeed, it is concluded that the history-law relationship is a discrete but no more flawed a methodology than the history discipline when faced with the complexities of the Holocaust. Conversely, in a reaffirmation of the existing 'consensus of critique' outlined in chapters two and three, the focus on historiographical reconstruction clearly demonstrates that Anglo-American practice is a fundamental barrier to public

comprehension of the Holocaust. It is only when extracted from the legal form that the evidential infrastructures and facts of the Holocaust are both transparent and verified. Consequently, it is concluded that the courtroom should not be utilised if pedagogy, especially if related to the rebuttal of Holocaust denial, is the primary objective of its participants. Finally, it is asserted that the 'narrative-linguistic' genre is not only the most appropriate lens through which to explain the historiographical methods and outputs of the history-law relationship, but most appropriately explains the construction of all historical knowledge, including Holocaust scholarship. It is therefore concluded that historians 'make' the past, however 'truth-full' the content of their histories, and not just in the postmodern age.

Chapter One. Empiricist and Narrativist Historiography: Contested Genres of 'Good History'

Questions relating to 'what is history?' may still be ignored by many practising historians but philosophy/theory of history has become a more familiar and populated field since the oft-referred-to debates between E.H. Carr and Geoffrey Elton in the 1960s, and the arguably antagonistic (and some would say crude) disputes between Richard Evans and Keith Jenkins in the late 1990s.¹ As Evans then insisted, although he was not a philosopher, someone has 'got to take them on at their level'.² A complexity of theoretical affiliation, content and explanation has subsequently evolved as a number of historians and theorists have continued to grapple with the artistic/scientific foundations of history's content and form. Notwithstanding an increasingly cluttered field of terminology, contemporary debates revisit familiar antagonisms, or 'history wars', long expressed between empiricist (realist) and rhetorical (sceptical) perspectives.³ But the latest challenge, constituted within the generic label of the 'postmodern', has been identified as much wider and more thoroughgoing than its predecessors. As modernist foundations and meta-narratives were challenged (and de-centred) across academes (and beyond scholarship), more specific to history was the narrativist critique of the prevailing Rankean genre that had, since the nineteenth century, not only disciplined its craft but legitimated its formal authority and status as a truthful, and therefore privileged, account of 'the past'.

As background to the theories informing the primary research of the thesis, this chapter identifies and summarises the central tenets of both the narrativist critique and the

¹ E.H Carr, *What Is History?* (London: Penguin, 1961); Geoffrey Elton, *The Practice of History* (London: Methuen, 1967); Richard J. Evans, *In Defence of History* (London: Granta Books, 1997); Keith Jenkins, *Re-thinking History* (London: Routledge, 1991). Philosophy/theory of history relates to the study of historiographical method and knowledge, although some distinguish between the two concepts. See Jouni-Matti Kuukkanen, 'The Current State of Play in the Theory and Philosophy of History: the Roth-Ankersmit Controversy and Beyond', *Rethinking History*, 18:4 (2014), pp613-619 and Jouni-Matti Kuukkanen, *Postnarrativist Philosophy of History* (New York: Palgrave Macmillan, 2015). References to 'history' relate to its academic form.

² Richard J. Evans, *In Defence of History: Reply to Critics 4*, (1999): at <http://www.history.ac.uk/discourse/moevans.html> (Accessed 25 May 2006).

³ Oliver Daddow and Adam Timmins, 'Darth Vader or Don Quixote? Keith Jenkins in Review', *Rethinking History*, 17:2 (2013), p141. Terminology also used includes the 'documentary genre', 'modernist history', 'professional scholarship', 'constructionism', 'deconstruction', 'post-structuralism', 'narrativity', 'discourse theory', 'semiotics', 'New Historicism', 'practical realism', 'direct realism', 'impositionalism', and, more recently, the 'Discursive Condition' and 'postnarrativity'.

empiricist defence of the history discipline. It begins with an overview of the latest challenge, within the context of the 'postmodern', and engages with a range of authors to determine the content and form of its suggested 'narrative-linguistic' genre of historiography.⁴ Particular emphasis is placed on foundational arguments that distinguish history and 'the past', identify its academic form as a fictive and 'culturally implicated' discourse, link history and historians to dominant regimes and relations of power and expose the prevailing 'empiricist-analytical' genre (Rankean) as a distinct but “made-up” construct of practice, purpose and epistemic authority.⁵ Consequently, although history is still viewed as an intellectual and useful discourse, its knowledge of the past-as-history is no more 'truth-full' than other genres of 'historying'.⁶ The chapter then engages with key voices defending the realist credibility and rationale of the dominant 'empiricist-analytical' genre. In response to the latest challenge, the chapter confirms that amendments have been made to its positivist (scientific) origins. Consequently, previously naïve claims of 'correspondence', 'objectivity' and transcendental 'Truth' have been revised. However, as these same voices insist, 'empiricist-analytical' techniques continue to discipline authorship, while adherence to the content of the past traces guarantees that historical knowledge is not solely forged in the present. Accordingly, the bipartisan conversation between past and present may be more complex than previously admitted or recognised, but the persistent relationship with the primary data of the past uniquely distinguishes and adjudicates between history and fiction, history and myth and history and propaganda. Consequently, academic scholarship retains its epistemic reputation as privileged knowledge of 'the past'.

⁴ The concept of 'genre' is accepted as the conventions and rules of thinking and practice relevant to each discipline, Robert Eaglestone, *The Holocaust and the Postmodern* (Oxford: Oxford University Press, 2004), p6. Historiography is understood as both the method and outputs of the history discipline/genres. It is noted that the use of the 'postmodern' as a specified context and critique is problematic as it remains contested, and, in the consistent attacks on its 'Condition', confused. This is why Elizabeth Ermath suggests that the casual use of the 'postmodern' should be avoided, Elizabeth Deeds Ermath, *History in the Discursive Condition: Reconsidering the Tools of Thought* (Oxon: Routledge, 2011), ppixii, 113. However, the 'postmodern' will continue to be used throughout the thesis as it is a generic and useful shorthand for both the contemporary present and its defining critiques.

⁵ Alun Munslow and Keith Jenkins, 'Alun Munslow: In Conversations with Keith Jenkins', *Rethinking History*, 15:4 (2011), p574; Alun Munslow, 'On "Presence" and Conversing with the Past: Do Historians Communicate with the Past?', *Rethinking History*, 18:4 (2014), p570; Kalle Pihlainen, 'The Distinction of History: On Valuing the Insularity of the Historical Past', *Rethinking History*, 20:3 (2016), pp414-432. Alun Munslow, *The New History* (Essex: Pearson Education Limited, 2003), p23.

⁶ A deliberate distinction with the more common use of 'truthful', which implies the securing of 'the Truth', Munslow and Jenkins, 'In Conversations', pp574, 575, 579, 582, 586; Kalle Pihlainen, 'Escaping the Confines of History: Keith Jenkins', *Rethinking History*, 17:2 (2013), pp236, 241.

The chapter confirms that the arguments of both genres were directly confronted through a deliberate focus on the Holocaust and Holocaust denial. It identifies the use of the Holocaust as the empiricists' "court of last resort" and Holocaust denial as the site at which 'pomophobia' coalesced.⁷ However, the linking of the postmodern climate to Holocaust denial both distorted and misunderstood its thinking. The chapter also confirms that since the height of debate in the late 1990's there has been a degree of theoretical amalgamation between empiricist and narrativist rationale and practice. Indeed, it is now assumed that any perceived threats to the 'empiricist-analytical' genre have been assimilated, or at least tamed, if not defeated, while Tom Lawson has argued that historians are, to a certain extent, 'all postmodernists now'.⁸ However, the chapter likewise confirms that whether assimilated, tamed, defeated, or in part victorious, the 'empiricist-analytical' (and modernist) genre 'still pervades the postmodern era'.⁹ The chapter concludes that, despite a degree of theoretical amalgamation, fundamental contradictions between the 'empiricist-analytical' and 'narrative-linguistic' genres of historiography ensure that the concept and judgement of 'good history' in its academic form remains theoretically contested.

In the late twentieth century familiar critiques were once again foregrounded that challenged the scientific claims of the dominant Rankean genre of academic history that had, since the nineteenth century, reputed to reconstruct the past as it "essentially was" and on its own terms.¹⁰ Within a broader 'intellectual climate' that was 'decentring'

⁷ Dan Stone, *Constructing the Holocaust: A Study in Historiography* (London: Valentine Mitchell, 2003), pxviii. 'Pomophobia' was coined in particular by Beverley Southgate, *Postmodernism in History: Fear or Freedom?* (London: Routledge, 2003), pp16, 18, 24-25, 29, 54.

⁸ Tom Lawson, *Debates on the Holocaust* (Manchester: Manchester University Press, 2010), p3.

⁹ Beverley Southgate, 'Replacing the past with disobedience', *Rethinking History*, 17:2 (2013), p232. Or, more appropriately according to Ermath, in the 'Discursive Condition', Ermath, *Discursive Condition*, pxi.

¹⁰ Evans, *In Defence*, p17. See Robert M. Burns and Hugh Rayment-Pickard, (eds.), *Philosophies of History: From Enlightenment to Postmodernity* (Oxford: Wiley-Blackwell, 2000) for a general history of philosophical scepticism. 'Rankean' relates directly to the acknowledged 'father' of the prevailing empiricist genre, Leopold von Ranke (1796-1886), Andreas Boldt, 'Ranke: Objectivity and History', *Rethinking History*, 18:4, (2014), p464. As examples of the literature relating to the Rankean genre see: Joyce Appleby, Lynn Hunt and Margaret Jacob, *Telling the Truth about History* (New York: W.W. Norton & Company, 1995); Alex Callinicos, *Theories and Narratives: Reflections on the Philosophy of History* (Cambridge: Polity Press, 1995); Jeremy Black and Donald M. MacRaidl, *Studying History* (London: Macmillan Press Ltd., 1997); Georg G. Iggers, *Historiography in the Twentieth Century: From Scientific Objectivity to the Postmodern Challenge* (Middletown CT: Wesleyan University Press, 2003); C. Behan McCullagh, *The Logic of History: Putting Postmodernism in Perspective* (London: Routledge, 2004); David Henige, *Historical Evidence and Argument* (Wisconsin: University of Wisconsin Press, 2005); Ann Curthoys and John Docker, *Is History Fiction?* (2nd edn.) (New South Wales: University of New South Wales Press, 2010); John Tosh, *The Pursuit of History: Aims, Methods and New Directions in the Study of Modern History* (6th edn.) (Oxon: Routledge, 2015).

modernist (western, male and white) foundations and meta-narratives across academes, attention was once again placed on the fictive and relativist foundations of historical knowledge.¹¹ But, incorporated within the 'constellation of ideas' configuring the 'postmodern', this latest challenge was charged with making the 'point again in new and urgent ways' and strengthening 'the hand of the sceptics'.¹² In a now familiar critique, the prevailing 'empiricist-analytical' (Rankean) genre of historiography was primarily exposed as a discourse about, but distinct from, 'the past'.¹³ Quite simply, since the past is ontologically distinct, history uniquely attempts to give meaning to a world that is inaccessible, and therefore 'it forever eludes us, [it is] out of reach; we can never "know it"'.¹⁴ Of course the past has left traces, comprising an 'inexhaustible supply' of 'ingredients' or 'clues', but they are fragmentary.¹⁵ Its events, relationships or situations, therefore, have to be retrospectively imagined, organised, given form and significance as a narrative and 'by historians working under all kinds of presuppositions and pressures which did not ... operate on people in the past'.¹⁶ And: 'Like it or not, the historian approaches the past with a superior vision conferred by hindsight'.¹⁷ Therefore, history, or more accurately historiography, can never be a reconstruction of the past 'as it actually was', but can only be inferred and interpreted through discursive (present-centric)

¹¹ Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (London: Penguin Books Limited, 1994), pp17-20; Southgate, *Postmodernism in History*, pp5-12. As examples of the literature informing the critiques see: Jenkins, *Re-thinking History*; Richard Rorty, *Objectivity, Relativism, And Truth: Philosophical Papers*, (Volume 1) (Cambridge: Cambridge University Press, 1991); Frank Ankersmit and Hans Kellner (eds.), *A New Philosophy of History* (London: Reaktion Books 1995); Burns and Rayment-Pickard, (eds.), *Philosophies of History*; Keith Jenkins, *Refiguring History: New Thoughts On an Old Discipline* (London: Routledge, 2002); Munslow, *The New History*; Southgate, *Postmodernism in History*; Alun Munslow and Robert A. Rosenstone (eds.), *Experiments in Rethinking History* (Abingdon: Routledge, 2004); Alun Munslow, *Deconstructing History* (2nd edn.) (Oxford: Routledge, 2006); Ermath, *Discursive Condition*.

¹² Robert Eaglestone, *Postmodernism and Holocaust Denial* (Cambridge: Icon Books, 2001), p35; Tosh, *Pursuit of History*, p165. For an overview of 'postmodern' thinking see Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984); Roy Boyne and Ali Rattansi (eds.), *Postmodernism and Society* (London: Palgrave Macmillan, 1990); David Harvey, *The Condition of Postmodernity* (Oxford: Blackwell Publishers Ltd., 1990); Max Silverman, *Facing Postmodernity: Contemporary French Thought on Culture and Society* (London: Routledge, 1999).

¹³ Eaglestone, *The Holocaust and the Postmodern*, p340. Munslow, 'On "Presence"', p570; Boldt, 'Ranke: Objectivity and History', p460. 'Empiricist-analytical' in accordance with the generic conventions and rules of the Rankean form as evidence based and deductive, Alun Munslow, 'Facts to fight over' in *The Guardian*, 6 February 2001.

¹⁴ Southgate, *Postmodernism in History*, p157. See also Jenkins, *Re-thinking History*, pp5-6; Eaglestone, *Postmodernism and Holocaust Denial*, pp25-26; Munslow and Rosenstone, *Experiments*, pp10-11; Munslow, 'On "Presence"' pp569-574. Even if directly observed from the present, Kalle Pihlainen, 'What If the Past were Accessible After All?', *Rethinking History*, 16:3 (2012), pp323-339.

¹⁵ Beverley Southgate, 'In Search of Ariadne's Thread', *Rethinking History*, 9:1 (2005), p92; Ermath, *Discursive Condition*, p105. According to Jenkins, 99% of any past is unrecorded, Boldt, 'Ranke: Objectivity and History', p462. See also Eaglestone, *Postmodernism and Holocaust Denial*, p24.

¹⁶ Jenkins, *Re-thinking History*, p10.

¹⁷ Tosh, *Pursuit of History*, p164.

narratives that ‘float free’ of the past.¹⁸ It is how the historian fits the two together that is ‘crucial in determining the possibilities of what history is and can be ...’.¹⁹

As an ‘authored’ representation, the subsequent ‘*stories we tell about the past*’ inevitably engage with the historian’s experience ‘of being human in the present’.²⁰ In turn, the ‘stories’ reveal the ‘epistemic well’ that conditions the historian’s reality (ontology) and approach to the past (epistemology and methodology).²¹ It is present-day contexts, discourses and interests that both drive and pre-empt any visit to the archives, and it is through an interplay of contemporaneous concepts, ethics, hypotheses and theories that the traces are themselves ‘culturally implicated’ and related explanations, facts and historical truths are found.²² Generic conventions and rules may seek to discipline the practice of academic ‘historying’, but its process and findings are governed by the ‘perspectival’ expectations and rigour required of, for example, the Annalist, conservative, feminist, Marxist, Subaltern or empiricist historian, however theoretically unconscious.²³ As is commonly accepted, even the much feted ‘father’ of the ‘empiricist-analytical’ genre, Leopold von Ranke, ‘was as ideological as they come’.²⁴ History, therefore, ‘is always *history from* a certain worldview’, or, as commonly concluded, what the historian makes it.²⁵

Indeed, the multifarious readings and revisions of the past traces are clear evidence that there is no privileged route to the past. If this were the case ‘there would be no need for

¹⁸ Tosh, *Pursuit of History*, p167; Ermath, *Discursive Condition*, pp39-40, 47-48, 96-97; Jenkins, *Re-thinking History*, pp5-6.

¹⁹ Jenkins, *Re-thinking History*, p10. Munslow, *The New History*, p165.

²⁰ Alun Munslow, ‘Thoughts on Authoring the Past as History’, *Rethinking History* 20:4 (2016), pp556-585. Eaglestone, *Postmodernism and Holocaust Denial*, p26. Eaglestone, *The Holocaust and the Postmodern*, p163.

²¹ Alun Munslow, *The Routledge Companion to Historical Studies* (London: Routledge, 2000), p16.

²² Munslow and Jenkins, ‘In Conversations’, p574. See also: Jenkins, *Re-thinking History*, pp12, 26, 40, 68; Munslow, *The New History*, pp6-7, 14-15, 19, 174-175, 194; Southgate, *Postmodernism in History*, p162; Eaglestone, *The Holocaust and the Postmodern*, p235; Munslow and Rosenstone, *Experiments*, p5; Curthoys and Docker, *Fiction?*, pp91-106; Lawson, *Debates*, p308; Tosh, *Pursuit of History*, pp168-169.

²³ ‘Historying’ is an increasingly common label used by postmodern voices. See Munslow and Jenkins, ‘In Conversations’, pp574, 575, 579, 582, 586; Pihlainen, ‘Escaping the Confines of History’, pp236, 241. Mary Fulbrook, *Historical Theory* (London: Routledge, 2002), pp9, 35-48, 50.

²⁴ Boldt, ‘Ranke: Objectivity and History’, p464. See also: Munslow, ‘On “Presence”’ p570; Oliver J. Daddow, ‘Still No Philosophy Please, We’re Historians’, *Rethinking History*, 9:4 (2005), p493.

²⁵ Eaglestone, *Postmodernism and Holocaust Denial*, p34. Jenkins, *Re-thinking History*, p6. See also: Eaglestone, *The Holocaust and the Postmodern*, pp234-235; Alexander Lyon Macfie, ‘On the Defence of (my) History’, *Rethinking History*, 14:2 (2010), pp218, 226; Munslow and Jenkins, ‘In Conversations’, p575; Southgate, ‘Replacing the Past with Disobedience’, pp224-225.

each generation or each culture [or each historian] to write history differently'.²⁶ Rather, as Keith Jenkins infamously stated, the past is 'utterly promiscuous ... [it] will go with anybody without a trace of jealousy or a hint of fidelity to any particular caller'.²⁷ Consequently:

No historian or anyone else acting as if they were a historian ever returns from his or her trip to "the past" without precisely the historicisation they wanted to get; no one ever comes back surprised or empty-handed from that destination.²⁸

Similarly, there can be no privileged position from which competing or diverse interpretations can be adjudicated.²⁹ There is simply no such thing as a neutral or objective perspective or worldview. Consequently, there are no independent means, or 'vantage point', through which 'true' or 'false' accounts of the past can be distinguished beyond aesthetic, ideological or political preferences.³⁰ Or, as Robert Eaglestone noted, beyond the historian's 'ethical sense of truth'.³¹ Likewise, no lessons can be learnt from the past. According to Alun Munslow, the notion that the past is somehow able to inform policy in the present 'makes no kind of sense epistemically'.³² In turn, historical exposés of human behaviour long viewed as simply wrong (gender and racial inequality, mass murder) have never guided contemporary actions as the persistence of power hierarchies and repeated genocides so clearly show.³³ Yet, although it is no longer controversial to accept that history 'is a representation of the past made in the present', empiricist focus on the continued 'presence' of the past ignores the inevitability of history as a one-sided

²⁶ Stone, *Constructing the Holocaust*, p24.

²⁷ Jenkins, *Refiguring History*, p10. Southgate also agreed, Southgate, *Postmodernism in History*, p55.

²⁸ Jenkins, *Refiguring History*, p11.

²⁹ Munslow, *The New History*, pp4-5, 7-8; Southgate, *Postmodernism in History*, pp11-12; Ermath, *Discursive Condition*, pp34, 37, 39-40, 48, 94; Munslow and Jenkins, 'In Conversations', p575.

³⁰ Ermath, *Discursive Condition*, p94; Southgate, *Postmodernism in History*, p63; Keith Jenkins, "'Nobody Does it Better": Radical History and Hayden White', *Rethinking History*, 12:1 (2008), p70. See also Hayden White, *Metahistory: The Historical Imagination in Nineteenth Century Europe* (Baltimore: Johns Hopkins University Press, 1973), p433 and confirmed as a narrativist principle by Kuukkanen, *Postnarrativist Philosophy*, p10.

³¹ Eaglestone, *The Holocaust and the Postmodern*, p11.

³² Munslow, 'On "Presence"' pp571-572; Munslow, 'Authoring the Past', p576-577.

³³ Ermath, *Discursive Condition*, pp106, 110-111.

interrogation.³⁴ Therefore, the greatest fiction propagated by the 'empiricist-analytical' genre is that the traces of the past can somehow 'answer back'.³⁵

Of course there are factual statements that inform historiographical representations, but meaning, far less laws, lessons or truths, cannot be found at their level of description.³⁶ Likewise, although the traces of the past can alter interpretations, 'the historian's narrative freedom is not confined by some dictate in the sources'.³⁷ Previous claims that the source material acted as a mirror to a past reality, or could speak for itself, may have been revised, but the preoccupation with generic conventions and rules cannot adequately explain the contested readings, revisions and uses of the same traces, and even the same statements, however rigorous the scholarship or evidentially accountable the history.³⁸ Therefore, as Munslow insisted, the prevailing claim by historians that the sources act as confirmation and guarantor of past truths 'reveals both an irresponsibility to their readers and an awkward self-deception'.³⁹

Yet, it is history's acclaimed factual correspondence with the past that awards its discipline and knowledge privileged authority and status over other forms of 'historying' (art, drama, film, the novel).⁴⁰ Indeed, according to Munslow, history has always been and remains the primary mechanism through which Western society explains itself to itself.⁴¹ Subsequently, history is awarded both power and purpose. The work of Michel Foucault is commonly recognised as central to the postmodern exposé of history's affiliation with present-day regimes and relations of power.⁴² More specifically, Foucault identified history, alongside other 'human sciences', as one of the key mechanisms charged with the acquisition of truths compliant with dominant interests.⁴³ In turn, he

³⁴ Lawson, *Debates*, p3. Munslow, 'On "Presence"', p571.

³⁵ Ibid, p572.

³⁶ Frank R. Ankersmit, 'Reply to Professor Saari', *Rethinking History*, 9:1 (2005), pp23-33.

³⁷ Dan Stone, 'Introduction', in Dan Stone (ed.), *The Holocaust and Historical Methodology* (New York: Berghahn Books, 2012), p2.

³⁸ Patrick Finney, 'Beyond the Postmodern Moment?', *Journal of Contemporary History*, 40:1 (2005), p158.

³⁹ Munslow and Rosenstone *Experiments*, p9.

⁴⁰ Pihlainen, 'Escaping the Confines of History', pp239-240.

⁴¹ Munslow and Rosenstone *Experiments*, pp8-9. See also Hayden White, 'The Burden of History', *History and Theory*, 5:2 (1966), p123.

⁴² Jenkins, *Re-thinking History*, p70; Southgate, *Postmodernism in History*, p63; McCullagh, *The Logic of History*, p28; Curthoys and Docker, *Fiction?*, pp181-189.

⁴³ Within the organising apparatus of the University. Michel Foucault, 'Truth and Power', in Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977*, edited by Colin Gordon

viewed history as a useful discipline, but not as a means of discovering ‘what actually occurred in the past’ as falsely premised by the empiricist (traditional) form.⁴⁴ Rather, (effective) historical investigations were necessary to help establish the ‘genealogy’ of the dominant ‘regimes’ of power and truth, and subsequently knowledge, in any constructed episteme.⁴⁵ As a site and tool of (Western) power, history was subsequently accused of being ‘the carrier of a disease which was at once the motive force and the nemesis of nineteenth century civilization’, or, in more general terms, of serving ‘nation-state oriented agendas’.⁴⁶ Professional historians were simultaneously accused of being at the forefront of ‘cultural guardianship’, integral to the reproduction of on-going social formations, as well as ‘compliant and pliable instruments for socially dominant interests’.⁴⁷ Conversely, any dissenting voices within the academy faced persistent institutional and structural pressures to comply, especially if wanting to be academically successful.⁴⁸ It was likewise no coincidence that those defending the dominant ‘empiricist-analytical’ genre “float to the top of elite institutions”, while any examination of the discipline’s curricula, funding and reward infrastructures revealed its ‘politically-supported’ ‘belief system’.⁴⁹ Jenkins therefore argued that the question ‘what is history?’ should be substituted by “who is history for?”⁵⁰

Incorporated within the exposé of history’s relations to and reproduction of powerful interests and truths was the so-called ‘cultural turn’.⁵¹ Infamously, within the wider configuration of the ‘postmodern’, history was subjected to the external influences of,

(London: The Harvester Press, 1980), pp131-132. See also Michel Foucault, *The Order of Things* (London: Routledge, 2002), pp400-407.

⁴⁴ Michel Foucault, ‘Nietzsche, Genealogy, History’, in Michel Foucault, *Language, Counter-Memory, Practise: Selected Essays and Interviews*, edited by Donald. F. Bouchard (Ithaca: Cornell University Press, 1977), p157.

⁴⁵ Ibid, pp154-157. Foucault, ‘Lecture Two: 14 January 1976’, in *Power/Knowledge*, pp99-103, ‘Truth and Power’, in Ibid, pp112, 116-117. Genealogy is understood as the study of the origins (and discontinuities) of discursive formations in each episteme. Episteme is understood as a specific period, including the postmodern, defined through its dominant discursive formations of knowledge acquisition and organisation.

⁴⁶ White, ‘The Burden of History’, p123; Claire Norton and Mark Donnelly, ‘Thinking the Past Politically: Palestine, Power and Pedagogy’, *Rethinking History*, 20:2 (2016), p200.

⁴⁷ Jenkins, *Re-thinking History*, pp20-21. Martin Davies, *Historics: Why History Dominates Contemporary Society* (Oxford and New York: Routledge, 2006), p8.

⁴⁸ Alun Munslow, ‘On Keith Jenkins’, *Rethinking History*, 17:2 (2013), pp267-268; Patrick Finney, ‘Keith Jenkins and the Heroic Age of British Postmodern Theory’, *Rethinking History*, 17:2 (2013), pp182-183.

⁴⁹ Susan Pedersen cited in Finney, ‘Keith Jenkins’, p183. Synonymous at the time of writing with the ‘Research Excellence Framework’. Alun Munslow, ‘Genre and History/Historying’, *Rethinking History*, 19:2 (2015), p172. Norton and Donnelly, ‘Thinking the Past Politically’, p201.

⁵⁰ Jenkins, *Re-thinking History*, p18.

⁵¹ Appleby *et al*, *Truth*, pp217-223.

inter alia, culture, the everyday ('history from below'), gender, memory, trauma and post-colonial studies. Consequently, concepts and ideas were imported into the history discipline that introduced methodological innovations and reinstated previously ignored, or marginalised, voices into its scholarship.⁵² Broadly acknowledged as the more 'moderate', 'positive' or 'soft' features of the latest challenge, these innovations were widely recognised as not only exposing existing hegemonic power blocs and relations but democratising both history and the past.⁵³ As celebrated by some, 'we are witnessing the dissolution of "the West"', or at least its 'metaphysics of comprehension'.⁵⁴ Consequently, postmodern 'decentring' opened history up to new sites of potential allegiances, ethical uses and political action.⁵⁵ As Munslow then advised, since history is so obviously 'a contemporary discourse about how we wish to "use the past"', the prevailing allegiance to its modernist colonisation (and burdens) should be abandoned in favour of historical interpretations that aim to inform and inspire ethical presents and futures.⁵⁶ Elizabeth Ermath agrees and further berates the continued allegiance to modern methods and thinking amongst historians that are simply inadequate to the demands and 'purpose' of historical writing in what she prefers to call the 'Discursive Condition'.⁵⁷ Thus, instead of deriving authority and legitimacy from being the 'fact-checker' of events past, historians should actively engage in 'cultural renewal', addressing the problems of the present, or,

⁵² Evans, *Defence*; Southgate, *Postmodernism in History*; Curthoys and Docker, *Fiction?*; Tosh, *Pursuit of History*.

⁵³ Moderation is acknowledged by Evans, *Defence*; Beverley Southgate, *History: What and Why? Ancient, Modern, and Postmodern Perspectives*, (2nd edn.) (London: Routledge, 2001); Gertrude Himmelfarb, *The New History and the Old: Critical Essays and Reappraisals* (2nd edn.) (Cambridge MA: Harvard University Press, 2004). The celebration of democratisation is represented by Derek Attridge, Geoff Bennington and Robert Young, (eds.), *Post-structuralism and the Question of History* (Cambridge: Cambridge University Press, 1987); Robert J. C. Young, *White Mythologies: Writing History and the West* (London: Routledge, 1990); Jenkins, *Re-thinking History*; Rorty, *Objectivity, Relativism, And Truth*; Southgate, *Postmodernism in History*.

⁵⁴ Geoff Bennington, 'Demanding History', in Bennington and Young (eds.), *Poststructuralism*, p20. Eaglestone, *The Holocaust and the Postmodern*, p4.

⁵⁵ Southgate, *Postmodernism in History*, p16. Celebrated by those highlighted in footnotes 53 and 54 but also by Jacques Derrida, *On Cosmopolitanism and Forgiveness*, trans. by Mark Dooley and Michael Hughes (London: Routledge, 2001); Ermath, *Discursive Condition*, pp45-46; Munslow, 'On Keith Jenkins', pp253-273; Southgate, 'Replacing the past with disobedience', pp222-234.

⁵⁶ Alun Munslow, 'The Practical Past', *Rethinking History*, (Book Review) 19:4 (2015), pp695-696. Pihlainen, 'Escaping the Confines of History', pp235-252. Gabrielle M. Spiegel, 'Above, About and Beyond the Writing of History: A Retrospective View of Hayden White's *Metahistory* on the 40th Anniversary of its Publication', *Rethinking History*, 17:4 (2013), pp492-508; Southgate, 'Replacing the Past with Disobedience', pp223-230.

⁵⁷ In contrast to her critique of the confused use of 'postmodern', Ermath, *Discursive Condition*, ppix, 113, 45-46, 104-106.

as many have specifically labelled, the useful production of 'practical pasts'.⁵⁸ In other words, historians should celebrate and take responsibility for their 'use value' in the campaigns and ideas of the present.⁵⁹ As Jenkins infamously suggested to historians, 'go with it ... why not? You have nothing to lose but your pasts'.⁶⁰

Although Jenkins' explicit indeterminacy was identified as the more 'extreme' conclusions of postmodern relativism, even greater antagonism was directed at the so-called 'linguistic turn'.⁶¹ As already noted, identifying history as a 'narrative prose discourse' is a familiar and long-standing feature of sceptical critique.⁶² Thus, the latest charge that history was primarily a form of literature authored as 'the past' was arguably a repetition of previous artistic/rhetorical findings.⁶³ According to Stanley Fish, it had constituted a specific quarrel that had survived "every sea-change in the history of Western thought ...", with those highlighting the rhetorical consistently on the losing side.⁶⁴ However, informing this latest challenge was the findings of literary critics that emphasised the linguistic designation and infrastructure of all forms of knowledge, history included.⁶⁵ With blame long apportioned to Hayden White for importing these findings into history, attention was placed on the prefiguration (and caging) of the conventions and rules supposedly intrinsic to academic history through the literary mechanisms of 'troping', which act as the 'root figures of thought'.⁶⁶ White subsequently identified a specific range of interlocking narrative structures and techniques (argument, concepts, ideology and theory), plot modes (comedy, romance, satire, tragedy) and key figurative devices (metaphor, metonymy,

⁵⁸ Ibid, pp45, 92, 95; Pihlainen, 'The Distinction of History', p429 (footnote 10). Ibid, pp414-432. Borrowing the concept of 'practical pasts' from Michael Oakeshott see the recent work of Hayden White, *The Practical Past* (Evanstone, IL: Northwestern University Press, 2014).

⁵⁹ Pihlainen, 'The Distinction of History', p420.

⁶⁰ Jenkins, *Refiguring History*, p68.

⁶¹ Evans, *Defence*, p243. The 'linguistic turn' was originally 'coined' by the Austrian realist philosopher Gustav Bergmann', Munslow, *Companion to Historical Studies*, p151.

⁶² White, *Metahistory*, p2.

⁶³ Munslow, 'The Practical Past', p695. Beginning with Herodotus and Thucydides, Curthoys and Docker, *Fiction?*

⁶⁴ Cited in Keith Jenkins, *On 'What is History?': From Carr and Elton to Rorty and White*, (London: Routledge, 1995), p131.

⁶⁵ According to John Tosh originating in the work of Ferdinand de Saussure, Tosh, *Pursuit of History*, p165 and according to Curthoys and Docker influenced by the works of Roland Barthes, Jacques Derrida, J.H Hexter, Northrop Frye and Mikhail Bakhtin, Curthoys and Docker, *Fiction?*, pp141-153, 192-196. See also the work of F. R. Ankersmit, *Historical Representation* (California: Stanford University Press, 2001) and Frank Ankersmit, *Meaning, Truth, and Reference in Historical Representation* (Ithaca, NY: Cornell University Press, 2012).

⁶⁶ Curthoys and Docker, *Fiction?*, p191; Michael S. Roth, *The Ironist's Cage: Memory, Trauma, and the Construction of History* (New York: Columbia University Press, 1995); Herman Paul, 'Relations to the Past: A Research Agenda for Historical Theorists', *Rethinking History*, 19:3 (2015), p452.

synecdoche, irony) that not only constructed the familiar principles and practices of the Rankean genre (objectivity, third person narration, the primacy of documents, footnotes, peer review) but endowed its content and form as 'realist' and conflated its scholarship *with* the past.⁶⁷ In turn, the same linguistic architecture provided the lens (and consciousness) through which the historian approached and appropriated the past-as-history. Consequently, historical narratives are inevitably preconceived by the historian (as comedic, heroic, romantic, satirical or tragic), with the past traces emplotted and 'linguistically-turned' into both appropriate and familiar stories '*of a particular kind*'.⁶⁸ Historical narratives are, therefore, certainly constrained. However, any limitations are not sited in the content of the past traces, as commonly asserted, but rather in 'the number of modes of emplotment which the myths of the Western literary tradition sanction as appropriate ways of endowing human processes with meanings'.⁶⁹ Consequently, in all historiography, the 'primacy of the empirical is replaced by the discursive', while the 'form always precedes the content of the past'.⁷⁰

As White also reminded historians, the main medium of their craft is through language, which, far from being transparent or universal, is a complex and relativist system of conventions, meanings and signification that both constitutes our world and informs all reading.⁷¹ Language is also 'loaded with political and moral values; it is never innocent, abstracted or apart from social reality'.⁷² Language is therefore notoriously unstable and no reading is fixed.⁷³ Consequently, language is always "generative" and never "mimetic", even at the level of the individual statement.⁷⁴ Therefore, how can the historian prove any correspondence between what s/he apprehends and what s/he formulates in

⁶⁷ Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1987). Hayden White, *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore: Johns Hopkins University Press, 1978). Also summarised by Munslow, *The New History*, pp167-172. See also Munslow 'On "Presence"', p569 and Ermath, *Discursive Condition*, pp5-25.

⁶⁸ White, *Tropics of Discourse*, pp58-66. Munslow, *The New History*, pp20, 169. Eaglestone, *Postmodernism and Holocaust Denial*, p26.

⁶⁹ White, *Tropics of Discourse*, pp60-61.

⁷⁰ Munslow, *The New History*, pp23, 157-158. Munslow and Jenkins, 'In Conversations', p575.

⁷¹ White, *Tropics of Discourse*, p95. See also, Jenkins, *Re-thinking History*, pp29-31; Munslow, *The New History*, pp1, 20-22, 163-167; Southgate, *Postmodernism in History*, pp14-15; Ermath, *Discursive Condition*, pp34-42 Tosh, *Pursuit of History*, pp165-166.

⁷² Fulbrook, *Historical Theory*, p74.

⁷³ Tosh, *Pursuit of History*, p167.

⁷⁴ Gabrielle Spiegel cited in Stone, *Constructing the Holocaust*, p17. Paul A. Roth, 'Back to the Future: Postnarrativist Historiography and Analytic Philosophy of History', *History and Theory*, 55:2 (2016), pp273-274.

language?⁷⁵ Likewise, in addition to the historian's present-centric affiliations, how can there be an adjudicatory 'court of appeal' between interpretations and readings since: 'With another linguistic net, we'd catch another world; and how do we know which one is preferable, or more valid, or more "true"?'⁷⁶

Furthermore, the past traces, so essential to empiricist histories, are themselves literary constructs. Consequently, as texts, they can only act as substitutes for reality but can never be reality itself.⁷⁷ Communication between past texts and the historian, or, as coined by Ferdinand de Saussure, between the "signified" and the "signifier", may appear straightforward and even transparent, especially if relating to the same language, but it involves a process of mediation across texts (and contexts).⁷⁸ Therefore, the past-as-history is not only literature of a 'certain kind' or 'genre', primarily fictive and prefigured through familiar plot-lines, but confined and constructed "intertextually".⁷⁹ As Jacques Derrida infamously contended, despite there being an extratextual reality (both past and present) "there is nothing outside the text".⁸⁰ White therefore concluded, as a 'narrative-linguistic' construct, historiography, as both method and knowledge, is a verbal fiction, 'the contents of which is as much *invented* as *found*'.⁸¹

It is not surprising that this latest challenge to history's epistemic credibility and rationale was, according to C. Behan McCullagh, 'formidable', leaving the foundations of empiricist history, as noted by Beverley Southgate, 'irreparably challenged and exposed', while Gertrude Himmelfarb specifically accused postmodernism of reversing two centuries of scholarship 'designed to make of history a "discipline"'.⁸² It formed an 'intellectual climate', according to Deborah Lipstadt, that had not only attacked the 'Western rationalist tradition', but one that had placed history 'up for grabs'.⁸³ Postmodern

⁷⁵ Southgate, *Postmodernism in History*, p15.

⁷⁶ Ibid. See also Ermath, *Discursive Condition*, pp34-35, 37, 39-40, 42, 48, 94.

⁷⁷ Curthoys and Docker, *Fiction?*, pp146-148; Tosh, *Pursuit of History*, pp165-168.

⁷⁸ Ibid, pp165-166; Jenkins, *Re-thinking History*, pp29-31; Munslow, *The New History*, pp1, 20-22, 163-167; Southgate, *Postmodernism in History*, pp14-15. Not only in terms of the impact of context on texts but because contexts 'can only be grasped textually in the present', Stone, *Constructing the Holocaust*, p18.

⁷⁹ Curthoys and Docker, *Fiction?*, p191. Eaglestone, *Postmodernism and Holocaust Denial*, p26. Jenkins, *Re-thinking History*, p7; Tosh, *Pursuit of History*, pp165-168.

⁸⁰ Curthoys and Docker, *Fiction?*, p158.

⁸¹ White, *Tropics of Discourse*, p82.

⁸² C. Behan, McCullagh, 'Invitation to Historians', *Rethinking History*, 12:2 (2008), p277. Southgate, *Postmodernism in History*, p29. Himmelfarb, *Critical Essays*, pp16-17.

⁸³ Lipstadt, *Denying the Holocaust*, p17

voices may have celebrated the destabilising of modernist burdens, the exposing of hegemonic power-blocs and the opening-up of the past to democratic, ethical and practical uses, but others deplored a perceived condemnation to 'a life devoid of the certainty of the past and constrained within the walls of our own images of experience'.⁸⁴ Jenkins was especially foregrounded as 'the Darth Vader of postmodernism's evil empire'.⁸⁵ At stake was the acclaimed epistemological foundations, and subsequent esteem, of the Rankean genre, or, as Eaglestone more specifically cited, '*the sort of truth to which history aspires*'.⁸⁶

Although most practising historians ignored or rejected the application of the narrativist, and wider postmodern, critique to the history discipline, a body of literature emerged that specifically engaged with its various challenges.⁸⁷ The respective voices not only responded to perceived threats to the prevailing Rankean genre but sought to redress and redefine long-acknowledged flaws in its positivist (scientific) origins. Consequently, previously naïve theories of correspondence, objectivity and *the Truth* were amended as part of ever more detailed explanations of how and why academic history, despite its flaws, still retained its realist and truthful credibility and utility.⁸⁸ In a now familiar defence, these 'self-appointed' guardians accepted that history-writing '*constructs* rather than records or reflects the past'.⁸⁹ As Tom Lawson observed, most historians are comfortable with the knowledge that 'past and present collide in their markedly provisional narratives'.⁹⁰ However, 'empiricist-analytical' conventions and rules (evidence, reasoning, reflexivity, writing style and verification) still guaranteed evidential accuracy and accountability, however 'contested', 'constructed', 'filtered' or 'indeterminate', still secured interpretive discipline, however 'conceptually netted',

⁸⁴ Silverman, *Facing Postmodernity*, p37.

⁸⁵ Finney, *Beyond the Postmodern Moment?*, p163; Daddow and Timmins, 'Darth Vader or Don Quixote?', p153.

⁸⁶ Eaglestone, *The Holocaust and the Postmodern*, p139.

⁸⁷ Evans, *Defence*, p12; Southgate, *Postmodernism in History*, p28; Oliver, J. Daddow, 'The Ideology of Apathy: Historians and Postmodernism', *Rethinking History*, 8:3 (2004), p432; Finney, 'Keith Jenkins', pp173, 177, 183. For examples of the relevant body of literature see: Appleby *et al*, *Truth*; Evans, *Defence*; Fulbrook, *Historical Theory*; Iggers, *Historiography in the Twentieth Century*; Himmelfarb, *Critical Essays*; McCullagh, *The Logic of History*; Henige, *Historical Evidence and Argument*; Tosh, *Pursuit of History*.

⁸⁸ See the varying explanations of those listed in footnote 87, as well as Bernard Waites, 'In Defence of Historical Realism: A Further Response to Keith Jenkins', *Rethinking History*, 15:3 (2011), pp319-334; Boldt, 'Ranke: Objectivity and History'; Tosh, *Pursuit of History*.

⁸⁹ Southgate, *Postmodernism in History*, p29. Lawson, *Debates*, p3.

⁹⁰ *Ibid.*

'interactive', 'plausible', or 'relative', and still recovered cognitive truths, however 'approximate', 'fallible', 'inferred', or 'mediated'.⁹¹ Histories may be narrative in form, but the required adherence to the content of their primary data ensured that they were not 'unfettered'.⁹² Rather, in the narrativist focus on the authoring of the historical past, its critics had ignored the very core, or 'infrastructure', of the historian's craft; its fact-finding research.⁹³ As Lawson insisted, the bounding of the historian by the sources is 'as self-evident a truth as the idea that the past does not exist'.⁹⁴ Ultimately, the evidence *can* "answer back".⁹⁵ Therefore, although the conversation between history and the past may be more complex than previously admitted or recognised, empiricist demands and discipline continued to guarantee that historical knowledge is not solely forged in the present.⁹⁶

In a direct response to the 'linguistic turn', it was noted that the potential manipulation, obscurity and subjectivity of past texts as literary forms was not a postmodern revelation, but long acknowledged in the generic convention of source criticism.⁹⁷ Indeed, it is integral to history, and the training of historians, that past texts should not be taken at face value.⁹⁸ It has also long been recognised that historians interpret past texts through reference to other texts.⁹⁹ Yet, however fragmentary, and however literary, the texts still relate to 'a referent in reality'.¹⁰⁰ As Bernard Waites argued, the historian may require concepts and theories to help discover the intrinsic properties of past realities, 'but we haven't "invented" or "created" them'.¹⁰¹ Language may be fallible and unstable but to claim that no text can be read as an accurate reflection of something outside itself 'flies in

⁹¹ See: Appleby *et al*, *Truth*, pp195, 259; Fulbrook, *Historical Theory*, pp29, 30, 74, 95-110, 119-121, 182-185; Iggers, *Historiography in the Twentieth Century*, p145; Himmelfarb, *Critical Essays*, pp18, 21, 22; Lawson, *Debates*, pp8-9; Chris Lorenz, 'Historical Knowledge and Historical Reality: A Plea for "Internal Realism"', *History and Theory*, 33:3 (1994), p307; McCullagh, *The Logic of History*, pp43-53.

⁹² Fulbrook, *Historical Theory*, p89. McCullagh, *The Logic of History*, p43.

⁹³ Kuukkanen, *Postnarrativist Philosophy of History*, p7. Also acknowledged by Kalle Pihlainen, 'Historians and "The Current Situation"', *Rethinking History*, 20:2 (2016), pp147-148.

⁹⁴ Lawson, *Debates*, p5.

⁹⁵ Fulbrook, *Historical Theory*, p121.

⁹⁶ Lawson, *Debates*, pp5, 9.

⁹⁷ McCullagh, *The Logic of History*, pp21-23; Waites, 'In Defence of Historical Realism', p327; Stone, 'Introduction', in Stone (ed.), *Historical Methodology*, p5.

⁹⁸ McCullagh, *The Logic of History*, p19.

⁹⁹ *Ibid*, p24.

¹⁰⁰ Waites, 'In Defence of Historical Realism', p327.

¹⁰¹ *Ibid*, p326.

the face of common experience'.¹⁰² Rather, a vital symbiotic relationship exists between external reality, language and the text.¹⁰³ Likewise, as McCullagh claimed, there may be many problems in translation, but once 'the language, context and intention of a text are known, its meaning can usually be fixed'.¹⁰⁴ It is therefore generally agreed that when examining any past text historians 'are limited by the words it contains, words which are not, contrary to what the postmodernists suggest, capable of an infinity of meaning'.¹⁰⁵ As Lawson insisted, to claim that all meanings 'grafted onto the past are of equal interpretative value and potential, is simply an act of intellectual nihilism'.¹⁰⁶

It was accepted that adjudication between competing narratives is more complex than simply self-reflexive constraint, and their findings more credible or "goodness of fit" than definitive, far less '*the Truth*'.¹⁰⁷ However, despite the absence of transcendental criteria, it is still possible for historians (and the reader) to distinguish between valid and invalid interpretations, as well as evaluate 'disconfirmation', through the application of 'mediating levels of reason', 'rational strategies', 'rational warrant' or simply 'common sense' and experience.¹⁰⁸ Therefore, the multifarious readings and revisions of 'the past' are certainly evidence of 'netted' authorship, but, through such adjudicatory reasoning it is possible to assess 'cognitive quality' and consequently to insist that some interpretations are more 'fair, credible and intelligible' than others.¹⁰⁹ Also, as Evans observed, it is possible:

for one source to have only one permissible interpretation in itself, and therefore, to conclude that in a controversy over it, one historian's reading is true and the other's is false.¹¹⁰

¹⁰² Tosh, *Pursuit of History*, pp172-173.

¹⁰³ Stone, *Constructing the Holocaust*, p217.

¹⁰⁴ McCullagh, *The Logic of History*, pp19, 25, 29.

¹⁰⁵ Evans, *Defence*, p106.

¹⁰⁶ Lawson, *Debates*, p5.

¹⁰⁷ McCullagh, 'What Do Historians Argue About?', *History and Theory*, 43:1 (2004), pp37 and 25; McCullagh, 'Invitation to Historians', p277. Waites, 'In Defence of Historical Realism', p330. Evans, *Defence*, p61. Additional concepts include "internal realism", Lorenz, 'A Plea for "Internal Realism"', pp297-327, and an 'intermediate layer', Fulbrook, *Historical Theory*, p109.

¹⁰⁸ Fulbrook, *Historical Theory*, pp182-185; Iggers, *Historiography in the Twentieth Century*, p145; Kuukkanen, *Postnarrativist Philosophy of History*, pp11-12; McCullagh, *The Logic of History*, p11.

¹⁰⁹ Fulbrook, *Historical Theory*, pp119-121. Kuukkanen, *Postnarrativist Philosophy of History*, pp2-9. McCullagh, 'Invitation to Historians', p277.

¹¹⁰ Evans, *Defence*, p91.

Of course, the historian's craft is fallible. Judgements made are not always as rational as they should be, the knowledge produced is not always as reliable as it could be, conclusions reached are not always credible, while the available evidence can be found to have been misleading.¹¹¹ Lawson specifically accepts that the sheer 'presentness' of historiography reveals the frailties of 'History' as a discipline.¹¹² Ann Curthoys and John Docker further identify that in the space between the rigorous scrutiny of the sources and its literary form, in what they label the 'doubleness of history', the discipline will always be at war with itself.¹¹³ But, it is still possible to trust historian accounts, since the aim of the genre (however linguistically determined) is to reconstruct the best and/or 'plausible explanations' based on the available evidence.¹¹⁴ There are of course other genres of historying, and other forms through which past realities can be truly represented. But, unlike the novelist, the historian does not create or invent past events, and, unlike the ideologue, s/he does not ransack the past for material to back-up partisan (or practical) objectives.¹¹⁵ As Evans once asserted, however positioned, 'if political or moral aims become paramount in the writing of history then scholarship suffers'.¹¹⁶ Almost 20 years later John Tosh insisted that the deliberate misuse of evidence distinguishes the ideologue and propagandist from the historian, while McCullagh more specifically argued that the historian has a 'social responsibility' to protect the community from false and biased material.¹¹⁷ Consequently, in the conscious rejection of a role in 'practical pasts', history remains a more 'truth-full' genre and subsequently a privileged form of knowledge about 'the past'.

However, the most explicit defence of the 'empiricist-analytical' genre was by those voices who sought recourse in the Holocaust. According to Michael Dintenfass, the evoking of the Holocaust was the most telling sign of the seriousness of the challenge of the 'linguistic turn', while Dan Stone highlighted its status as the empiricists' "court of last

¹¹¹ McCullagh, *The Logic of History*, p17.

¹¹² Lawson, *Debates*, p308.

¹¹³ Curthoys and Docker, *Fiction?*, p11.

¹¹⁴ McCullagh, *The Logic of History*, pp10, 12-16, 30-32, 43, 45-53.

¹¹⁵ Waites, 'In defence of historical realism', pp326, 327; Lawson, *Debates*, p5; Tosh, *Pursuit of History*, p174. Eaglestone, *The Holocaust and the Postmodern*, pp234, 235, 238, 242-243.

¹¹⁶ Evans, *Defence*, p219.

¹¹⁷ Tosh, *Pursuit of History*, p162. McCullagh, *The Logic of History*, p194.

resort”.¹¹⁸ Consequently, the Holocaust became the one site through which history's critique and defence was visibly confronted. At the forefront of empiricist voices was Evans, who infamously asserted that 'Auschwitz was not a discourse ... The gas chambers were not a piece of rhetoric'.¹¹⁹ Furthermore, 'the suffering of people in Auschwitz' was not a narrative imposed by historians.¹²⁰ Rather, 'Auschwitz was inherently a tragedy' and could not be preconceived, and subsequently emplotted, 'as a comedy or a farce'.¹²¹ Similarly, John K. Roth argued that relativism had met its match in the Holocaust, 'for there is a widely shared conviction that the Holocaust was *wrong*'.¹²² In other words, “absolute moral standards” were both obvious and necessary when faced with the evidence of its genocide.¹²³ Conversely, if there was no extra-ideological, extra-linguistic or extra-textual method, or recourse of “disconfirmation”, how could the reader distinguish between honest appraisals and dishonest fictions of the Holocaust?¹²⁴ According to Berel Lang, the conclusion of relativist logic is that even in the case of the most basic elements of Holocaust history 'there is no way of “getting them right”'.¹²⁵ Evans further insisted that this logic awards fascist histories equal credibility in their portrayal of the Holocaust 'in terms of the struggle of different races for the survival of the fittest ... without fear of contradiction except on moral or aesthetic or political grounds'.¹²⁶

Evans was also at the forefront of voices who apportioned blame to the wider postmodern 'intellectual climate' for not only coinciding 'with the rise of the fascist right in Europe'

¹¹⁸ Michael Dintenfuss, 'Truth's Other: Ethics, The History Of The Holocaust, And Historiographical Theory After The Linguistic Turn', *History and Theory*, 39:1 (2000), p1. Stone, *Constructing the Holocaust*, p xviii.

¹¹⁹ Evans, *Defence*, p124.

¹²⁰ Evans, *Reply to Critics 4*, p24.

¹²¹ Evans, *Defence*, p124 and before the film, *Life is Beautiful*, directed by Roberto Benigni in 1997, in which daily life in a concentration camp is presented through the comedic trope. For discussions on this film see, Melanie J. Wright, 'Don't Touch my Holocaust: Responding to *Life is Beautiful*', *The Journal of Holocaust Education*, 9:1 (2000), pp19-32 and Hilene Flanzbaum, "But Wasn't it Terrific?", A Defense of Liking *Life is Beautiful*, *The Yale Journal of Criticism*, 14:1 (2001), pp273-286.

¹²² John K. Roth, *In the Shadow of Birkenau: Ethical Dilemmas During and After the Holocaust* (Washington DC: United States Holocaust Memorial Museum, 2005), p11.

¹²³ Cited from Omer Bartov, *Murder in Our Midst: The Holocaust, Industrial Killing, and Representation* (New York: Oxford University Press, 1996), pp9-10 in Stone, *Constructing the Holocaust*, p16.

¹²⁴ Lawson, *Debates*, p3.

¹²⁵ Berel Lang, *Uncovering Certain Mischievous Questions About the Holocaust* (Washington DC: United States Holocaust Memorial Museum, 2002), p16.

¹²⁶ Evans, *Defence*, p232. He was subsequently accused by Fulbrook of using the fear of fascism to 'almost scare his readers into accepting the validity of his call to objectivity; as if either or', Fulbrook, *Historical Theory*, p171.

but encouraging and fostering claims that Holocaust denial was legitimate historical revision.¹²⁷ Or, as charged by Lipstadt, of creating a climate in which its 'irrational animus' could not be evidentially exposed and rejected as both 'false' and 'bigotry'.¹²⁸ Although Jenkins *et al* were not directly accused of Holocaust denial, and no postmodern voice has ever denied the past reality of the genocide, the focus on the Holocaust and its denial was arguably intended to not only undermine the authority of the narrativist critique but to shame, if not silence, its protagonists. Hence, as identified by Bonnie Smith in 1995, advocates of the postmodern were raised to the heights of:

the new villains for daring to question the orthodoxy of objectivity and truth; branded as close to fascists only to be recuperated by agreeing that we have learned a bit from them.¹²⁹

Dintenfass in 2000 similarly identified the use of the Holocaust 'as an incantation to ward off the demons of the linguistic turn', while, in 2010, Lawson berated the routine use of Holocaust history 'as the *sine qua non* of conservative rejectionists of the postmodern challenge'.¹³⁰ As Dintenfass concluded:

No past event figures more prominently ... against postmodernist theories of historiography than the Holocaust ... [thus serving] as a limit case that any tenable account of historical representation must accommodate.¹³¹

If the foregrounding of the Holocaust, and its denial, was a deliberate strategy of rebuke it was partly successful, as narrativist critics were not immune to the charges. Infamously, White, as a direct consequence, rejected the prefiguration of the 'Third Reich' as comedic or pastoral, which pointed to a degree of stability of form and moral standards in past texts.¹³² He also invoked the concept of a 'middle voice' as somehow able to operate at

¹²⁷ Matt Perry, *Marxism and History* (London: Palgrave Macmillan, 2002), p150. Evans, *Defence*, pp238-243. See also, Lipstadt, *Denying the Holocaust*, pp17-20. See also Appleby *et al*, *Truth*, p7; Eaglestone, *Postmodernism and Holocaust Denial*, pp6-7; Southgate, *Postmodernism in History*, pp54, 55; Stone, *Constructing the Holocaust*, pp15-16; Curthoys and Docker, *Fiction?*, p212.

¹²⁸ Lipstadt, *Denying the Holocaust*, pp20, 18.

¹²⁹ Bonnie G. Smith, 'Whose Truth, Whose History', *Journal of the History of Ideas*, (1995), p666.

¹³⁰ Dintenfass, 'Truth's Other', p4. Lawson, *Debates*, p3.

¹³¹ Dintenfass, 'Truth's Other', p2.

¹³² Hayden White, 'Historical Emplotment and the Problem of Truth', in Saul Friedländer (ed.), *Probing the Limits of Representation: Nazism and the "Final Solution"* (London: Harvard University Press: 1992), p40.

the juncture between literal and figurative speech and between factual and fictive discourse, which was not too dissimilar to amended empiricist logic.¹³³ Although perhaps unfairly, White was subsequently accused of being so anxious to avoid giving ammunition to deniers that he had undermined what was 'most powerful in his celebrated critique of naïve historical realism'.¹³⁴ Yet, in addition to questions about motivation, contradictions arise in the invoking of the Holocaust as the ultimate court of empiricist appeal. As Dintenfass argued, there is no explanation given to support its prominence in the evaluation of narrativist theory.¹³⁵ Indeed, emotion aside, what kind of analytical reference point does Auschwitz, rather than any other event in the past, provide?¹³⁶

To the contrary, Eaglestone insisted that postmodern reasoning had begun with, and was a 'response to the Holocaust', because of its 'commitment to ethics'.¹³⁷ Consequently, postmodern writers had been at the forefront of exposing Holocaust denial.¹³⁸ Likewise, Stone argued that the Holocaust was 'the harbinger of postmodernity', precisely because it 'throws into doubt older methodologies, and demands the search for new ones'.¹³⁹ Similarly Richard Carter-White noted that 'empirical historiography' may be the dominant genre of the Holocaust, but it 'does not exhaust the facticity of Auschwitz'.¹⁴⁰ Despite his empiricist loyalties, Lawson accepted that 'Auschwitz *is* a discourse' [added italics], with its meanings manifold, changing and contested.¹⁴¹ In support of the postmodern unmasking of the author, Curthoys and Docker agreed that, in the case of such a profound event, 'it is particularly important to scrutinise the practices of historians, to notice the political and historical specificity of histories of the Holocaust'.¹⁴² As Eaglestone insisted, contrary to fostering Holocaust denial, postmodern thinking had explicitly unmasked the authorial link 'between denial and anti-Semitism, fascism and racism', and therefore

¹³³ Ibid, pp47-53.

¹³⁴ Stone, 'Introduction', in Stone (ed.), *Historical Methodology*, p2. Martin Jay, 'Of Plots, Witnesses and Judgements', in Friedländer (ed.), *Probing the Limits*, p97.

¹³⁵ Dintenfass, 'Truth's Other', p4.

¹³⁶ Ibid.

¹³⁷ Eaglestone, *The Holocaust and the Postmodern*, pp3, 4.

¹³⁸ Eaglestone specifically refers to Jean-Francois Lyotard, *The Differend: Phrases in Dispute*, trans. by George van den Abbeele (Manchester: Manchester University Press, 1988), which is a 'detailed rebuttal to French Holocaust deniers', Ibid, pp2, 225.

¹³⁹ Stone, *Constructing the Holocaust*, pxiv.

¹⁴⁰ Richard Carter-White, 'Auschwitz, Ethics and Testimony: Exposure to the Disaster', *Environment and Planning D: Society and Space*, 27:4 (2009), p693.

¹⁴¹ Lawson, *Debates*, p4.

¹⁴² Curthoys and Docker, *Fiction?*, p7.

helped to expose its strategy as not simply 'bad history, not history at all, but anti-Semitic race-hatred thinly camouflaged'.¹⁴³ Moreover, although found by some to be a different genre, since its followers do not conform to even 'the most basic requirements of historical writing, that of empirical accuracy in its individual statements', Carter-White argued that Holocaust denial is more effectively refuted through postmodern reasoning precisely because 'empiricist historiography' and negationist strategy '*privilege the same language game*'.¹⁴⁴ The huge difference is that the latter fails to fulfil its rules and conventions.¹⁴⁵ Consequently, contrary to its reputation, Eaglestone insisted that 'the questions postmodernism asks of history and historians are very strong weapons in the fight against Holocaust denial'.¹⁴⁶

It has long been acknowledged that the equating of Holocaust denial and the postmodern 'intellectual climate' was both erroneous and unjust.¹⁴⁷ This linking not only proved to be a 'knee-jerk' reaction, but indicated a misunderstanding, or 'caricature', of the spectrum of postmodern thinking, including its narrativist critique.¹⁴⁸ In particular, there appears to be a consistent blindness to the latter's differentiation between past realities and their reconstruction as historiography. As Southgate reaffirmed, the past may be promiscuous but that is not the same as denying its existence.¹⁴⁹ Rather:

... it is not possible, without denying the standards of evidence by which we live as both historians and human beings, to deny that something (that we now refer to as the Holocaust) did happen.¹⁵⁰

Despite being placed at the 'stronger' end of the postmodern spectrum Jenkins has never claimed that historians invent the past, while Munslow contended that experimenting with

¹⁴³ Eaglestone, *The Holocaust and the Postmodern*, p241. Eaglestone, *Postmodernism and Holocaust Denial*, p66.

¹⁴⁴ Stone, *Constructing the Holocaust*, p4. See also Eaglestone, *Postmodernism and Holocaust Denial*, pp40-41, 49-50 and Finney, 'Beyond the Postmodern Moment?', pp156-157. Carter-White, 'Auschwitz, Ethics and Testimony', p693.

¹⁴⁵ Ibid.

¹⁴⁶ Eaglestone, *Postmodernism and Holocaust Denial*, p7.

¹⁴⁷ Southgate, *Postmodernism in History*, p55; Curthoys and Docker, *Fiction?*, p7.

¹⁴⁸ Stone, *Constructing the Holocaust*, ppxvii, 267, footnote 2. Eaglestone, *Postmodernism and Holocaust Denial*, p7.

¹⁴⁹ Southgate, *Postmodernism in History*, p55.

¹⁵⁰ Ibid.

its traces is not the same as saying it did not exist.¹⁵¹ Similarly, epistemic scepticism is not the same as lying about the data.¹⁵² To the contrary, the 'narrative-linguistic' genre still employs empiricist-analytical techniques; the difference being that it does so self-consciously.¹⁵³ Narrativist logic may have exposed the absence of transcendental criteria of truth, but, as Eaglestone insisted, postmodern historians also employ positivist (checkable facts) understandings of truth.¹⁵⁴ Once again, in spite of his reputation, Jenkins has never disputed that the traces selected by the historian 'cuts down' their 'logical freedom' to write whatever s/he likes, while Munslow has consistently repeated that fictive is not the same as fictional and agrees that historical narrations can do justice to the varieties of connections 'inferred from the data stream'.¹⁵⁵ Indeed, getting the data right, and deriving the 'most *likely* meanings and explanations', is not a big deal since we do it all the time.¹⁵⁶ Thus, the common concept of 'the Holocaust' may be projected as an 'imaginative creation', or 'cognitive control', with its histories constructed as fictive representations rather than "true" copies, but these charges should not be confused with a rejection of 'empirical accuracy' or the finding of 'narrative truths'.¹⁵⁷ As Stone insists:

there is nothing in postmodern awareness of the importance of subjectivity, perspective and the authorial voice that prevents a commitment to truth and rigorous reliance on the evidence.¹⁵⁸

As debates continued into the twenty first century an initial fear of 'intellectual barbarians at the disciplinary gates', and identified 'pomophobia' emerging across the academy, was followed by claims that insights had been gained.¹⁵⁹ As stated by Evans, as early as 1997, the 'more moderate' positions of the narrativist and wider postmodern critique had

¹⁵¹ Daddow and Timmins, 'Darth Vader or Don Quixote?', p141. Jenkins, *Re-thinking History*, p9. Munslow and Jenkins, 'In Conversations', p582.

¹⁵² Alun Munslow 'History, Discipline and Epistemology' (Review Essay), *Rethinking History*, 12:4 (2008), p563. See also Pihlainen, 'Escaping the Confiners of History', p242.

¹⁵³ Munslow, 'Facts to fight over'.

¹⁵⁴ Combined with ethical (the knowing of experience) understandings of truth, Eaglestone, *The Holocaust and the Postmodern*, pp11, 161-166.

¹⁵⁵ Jenkins, *Re-thinking History*, pp12, 13. Munslow 'History, Discipline and Epistemology', p564.

¹⁵⁶ Munslow and Jenkins, 'In Conversations', p579.

¹⁵⁷ Southgate, *Postmodernism in History*, p55. Stone, *Constructing the Holocaust*, ppixvi, xvii. Munslow *The New History*, pp182, 194.

¹⁵⁸ Stone, *Constructing the Holocaust*, pp15-16.

¹⁵⁹ Evans, *Defence*, p8. Evans argued later that this statement had been said 'tongue in cheek' and was surprised that so many people had taken him literally. Ibid, p294. Southgate, *Postmodernism in History*, pp16, 18, 24-25, 29, 54.

'breathed new life into some old and rather tired subjects', 'restored individual human beings to history', heightened awareness of authorial subjectivity, and reinstated 'good writing' as legitimate historical practice.¹⁶⁰ By 2004 Himmelfarb recognised that the diffusion of postmodern categories and concepts had generated such a structural shift across the discipline that 'what would once have been unacceptable is now acceptable, and what was once taken for granted is now widely challenged'.¹⁶¹ At the time of writing (2016) it is largely assumed that any perceived threats to the 'empiricist-analytical' genre have been assimilated, or at least tamed, if not defeated.¹⁶² Conversely, Finney suggests that postmodernists have won 'a quiet victory', since 'establishing a place for themselves at the disciplinary table", while, according to Lawson, historians are, to a certain extent, 'all postmodernists now'.¹⁶³

Indeed, Jenkins stands as an almost lone voice in his 'end of history' or 'postist' conclusions.¹⁶⁴ As recognised in the foregrounding of 'practical pasts' (see above), those who have arguably replaced his leading role as narrativist critic continue to acknowledge the utility of history.¹⁶⁵ As Munslow insists, the 'narrative-linguistic' critique does not mean history is redundant, but that its processing should be more self-conscious, its content and form more experimental and its authors more honest about empiricism being "history of a particular kind".¹⁶⁶ Ermath agrees and likewise suggests the development of 'new tools' of both historical method and thought more appropriate to the 'Discursive Condition'.¹⁶⁷ More specifically, she recognises the persistent loyalty to the modern methods and techniques of the 'empiricist-analytical' genre as 'profoundly impractical and probably immoral' and advises historians to: 'Get over it'.¹⁶⁸ Southgate also

¹⁶⁰ Evans, *Defence*, pp243, 244, 248.

¹⁶¹ Himmelfarb, *Critical Essays*, p28.

¹⁶² Finney, 'Keith Jenkins', pp172, 179; Munslow, 'On Keith Jenkins', p261; Munslow, 'On "Presence"', p570; Tosh, *Pursuit of History*, p172.

¹⁶³ Finney, 'Keith Jenkins', pp179, 187. Stone would agree to an extent, Stone, 'Introduction', in Stone (ed.), *Historical Methodology*, p9. Lawson, *Debates*, p3.

¹⁶⁴ Southgate, *Postmodernism in History*, p56; Munslow and Rosenstone *Experiments*, p2; Curthoys and Docker, *Fiction?*, p5; Lawson, *Debates*, p3; Munslow, 'Genre and History/Historying', pp165-166. As Finney argued, Jenkins attempted to amend this stance in *Refiguring History*, 'but his heart wasn't really in' it, Finney, 'Keith Jenkins', pp180-181.

¹⁶⁵ In the main the editors (Alun Munslow and Robert Rosenstone) and contributors to the *Rethinking History* journal: www.tandfonline/loi/rrhi20#.VynYHWjTVSB (Last Accessed March 2017).

¹⁶⁶ Munslow and Jenkins, 'In Conversations', p582. See also, Munslow, *The New History*, p193; Munslow and Rosenstone, *Experiments*, pp10-11; Munslow, 'On Keith Jenkins', p260; Munslow, 'On "Presence"', pp573-574. See also the more recent work of Kuukkanen, *Postnarrativist Philosophy of History*.

¹⁶⁷ Ermath, *Discursive Condition*, ppixii-xiii, 91-113.

¹⁶⁸ *Ibid*, ppixii-xiii.

acknowledges that 'history, as a use of the past, can't simply be jettisoned as a modernist irrelevance', since it consistently intrudes into our lives.¹⁶⁹ And, although he agrees with Jenkins that the past 'will "go with anyone" there is no reason to distance ourselves from it like offended prudes'.¹⁷⁰ Similarly, Finney continues to admire Jenkins, but he does not want to follow him 'to his chosen destination'.¹⁷¹ Like Southgate he acknowledges that history cannot end because of 'the ways we are haunted by the past'.¹⁷² But he also contends that he and other historians do not see anything in postmodernism 'that precludes the holding of continued dialogues about the past that might serve a variety of cultural and political purposes'.¹⁷³

In reviewing the latest debates on 'what is history?' it is clear that, with the exception of Jenkins, there has been a greater degree of theoretical amalgamation across the empiricist and narrativist spectrums of historiography than initially premised. As Eaglestone noted, previous notions of an intractable debate have become 'cliched' at best.¹⁷⁴ The ferocity of debate has also waned since its height in the late 1990's. Genuine or strategic fear for the future of the history discipline has receded. In turn, although Ermath suggests that the terminology of the 'postmodern' remains confused, and therefore should be avoided, its narrativist, and wider critique, has been defended and subsequently clarified, while a number of its perceived threats to history's authority have been transformed into insights and assimilated into everyday historiographical practice.¹⁷⁵ In contrast to its 'hyper-relativity' reputation, it is still possible to 'know' something about 'the past' in the postmodern age. Empirical accuracy, in the reading of past texts, is similarly important to postmodern histories.¹⁷⁶ As Eaglestone verified, the unmasking of the 'realist' form and genre does not 'dismiss "historical rigour"' but places it 'in context'.¹⁷⁷ More specifically, and contrary to attacks on narrativist competence and credibility, knowledge of the Holocaust is not only feasible but liberated from its modernist boundaries. Similarly, despite being the most visible site of "pomophobia", Holocaust denial is not only contrary

¹⁶⁹ Southgate, *Postmodernism in History*, p157; Southgate, 'Replacing the Past with Disobedience', p225.

¹⁷⁰ *Ibid*, p227.

¹⁷¹ Finney, 'Keith Jenkins', p182.

¹⁷² *Ibid*.

¹⁷³ *Ibid*, p184.

¹⁷⁴ Eaglestone, *The Holocaust and the Postmodern*, p10.

¹⁷⁵ Ermath, *Discursive Condition*, ppixii, 99-100, 113. Stone, 'Introduction', in Stone (ed.), *Historical Methodology*, p9.

¹⁷⁶ Stone, *Constructing the Holocaust*, pxvii.

¹⁷⁷ Eaglestone, *The Holocaust and the Postmodern*, p160.

to narrativist techniques but most likely to be defeated through its questions and methods. For the majority of postmodern voices, therefore, history, as a 'narrative-linguistic' genre, remains both an intellectual and practical discourse. However, the fictive form of all historiography always precedes the content and findings of the past-as-history, and not only in these postmodern times. Likewise, its purpose or 'use-value' should be both openly admitted and extended to a practical engagement with the campaigns, ideas and problems of the (discursive) present.

It is likewise clear that, in response to the narrativist, and wider postmodern, critique, a complexity of explanation has both redressed and redefined the dominant 'empiricist-analytical' genre of historiography. Consequently, flaws in its positivist origins have not only been recognised but amended in both theory and practice. The narrativity, and relative netting, of historical knowledge is no longer disputed. It is no longer controversial to accept that history is authored in the present. Nor is it controversial to acknowledge that history, as literary in both content and form, can never be a mimetic record of 'the past'. However, 'empiricist-analytical' techniques continue to be cited as the source of disciplined authorship, with the persistent bounding of the past traces and texts guaranteeing that historical knowledge is not merely the result of a one-sided interrogation. Crucially, through exercises of rational adjudication, the evidence can still "answer back". In turn, the persistent recourse to the past traces, and texts, awards history both its fact-based and 'realist' authority and esteem, and distinguishes history, and its 'use-value', from present-centric fiction, myth and propaganda. Consequently, although the bipartisan conversation may be more complex than previously admitted or recognised, history retains its epistemic reputation as privileged knowledge of 'the past'.

It is evident that this defence, regardless of the increased complexity of its explanation, is an elaboration or revision of long-standing attempts at ironing out acknowledged contradictions of Rankean practice, while continuing to default to "practical realist" positions.¹⁷⁸ Hence, there is persistent recourse to the 'presence' of the past and getting 'the (hi) story straight'.¹⁷⁹ Similarly: 'The search for truth remains a "Holy Grail" for such historians despite their proclamations to the contrary', and despite being a contradiction of their own findings.¹⁸⁰ History students are still trained into "doing history properly",

¹⁷⁸ Munslow, 'On "Presence"', p570.

¹⁷⁹ Ibid, pp570, 571.

¹⁸⁰ Daddow, 'Still No Philosophy Please', p493. Stone, *Constructing the Holocaust*, p1.

while those historians who experiment with, far less disobey, the dominant conventions and rules of the Rankean form are few.¹⁸¹ Thus, far from heeding Ermath's advise, the 'empiricist-analytical' (and modernist) genre of historiography 'still pervades the postmodern era'.¹⁸²

An examination of the latest debates therefore concludes that, despite evidence of theoretical amalgamation, defining contradictions remain between the 'empiricist-analytical' and 'narrative-linguistic' genres of academic historiography. In addition to disagreements over its purpose and 'use-value', four key distinctions of method and epistemic authority are identified. First and foremost, both genres accept that past realities existed, but dispute remains over the 'presence' of the past when constructed as historiography. Consequently, history has either a "matching" function' *with* the past or a "making" function' *as* the past.¹⁸³ Secondly, both genres agree that empirical accuracy and accountability is foundational to historiography, but distinctions remain over the primacy of evidential (past) content or the fictive (present-centric) form. Therefore, historical knowledge is either bounded by its past sources and texts or preconceived and prefigured into familiar plot lines that 'float free' of their content. Thirdly, all voices accept the netted authorship of historiography, but disputes remain over the mechanisms of adjudication. Verification of cognitive credibility, and even truth, is therefore sited in either empirical constraint or the historian's "elective affinities" (as argument, hypothesis, ideology).¹⁸⁴ Finally, all voices recognise that the once-acclaimed history/fiction division is 'an oversimplification', but distinct differences remain over the former's 'realist' authority and esteem.¹⁸⁵ History is therefore either a privileged form of knowledge or no more 'truth-full' than other genres of history. These defining contradictions demonstrate that,

¹⁸¹ Munslow, 'Genre and History/Historying', p174. See also Stone, 'Introduction', in Stone (ed.), *Historical Methodology*, pp4-5. As an example of postmodern histories see, Munslow and Rosenstone, *Experiments*. Southgate also lists the work of John Clarke Natalie Zemon Davis, Annabel Patterson and Simon Schama, Southgate, *Postmodernism in History*, pp51-52, while Curthoys and Docker specifically identify Richard Price, *Alabi's World* (Baltimore: John Hopkins University Press, 1990), Robert A. Rosenstone, *Mirror in the Shrine* (Cambridge Mass: Harvard University Press, 1988), as well as Natalie Zemon Davis, *The Return of Martin Guerre*, (Harmondsworth: Penguin, 1985), Curthoys and Docker, *Fiction?*, pp202, 204. Conversely, see Eaglestone for examples of Gitta Sereny and Simon Schama as contravening the dominant genre despite their work carrying authority as historical, Eaglestone, *The Holocaust and the Postmodern*, pp239-240.

¹⁸² Ermath, *Discursive Condition*, pxiii. Southgate, 'Replacing the Past with Disobedience', p232.

¹⁸³ Stone, *Constructing the Holocaust*, p229.

¹⁸⁴ Munslow, *The New History*, p168.

¹⁸⁵ Munslow, 'On Keith Jenkins', pp260-261. For some recent contributions to the subject of history and/as fiction see: Alexander Lyon Macfie (ed.), *The Fiction of History* (London and New York: Routledge, 2015) and Beverley Southgate, *A New Type of History: Fictional Proposals for Dealing with the Past* (London and New York: Routledge, 2015).

regardless of the sites of generic amalgamation, the concept and judgement of 'good history' in its academic form remains theoretically contested. Consequently, in an amendment to Lawson's proclamation, historians may certainly be "all postmodernists now" in practice but many remain resistant to its logic in both theoretical affiliation and consciousness.

Informed by these generic distinctions, the next chapter begins its applied research of 'good history' through the discrete form of the courtroom and Anglo-American law. Chapter two, therefore, seeks to clarify the rationale underpinning the 'unique relationship' between historians and jurists by introducing the theory and practice of the history-law relationship.

Chapter Two: History and Anglo-American Law: A Unique but Flawed Relationship?

The relationship between history and Anglo-American law is long-standing and traced by Carlo Ginzburg to ancient Greece.¹ Similarly, comparison between the historian and the judge 'has had a lasting life'.² More recently, historians have been legally admitted to court as expert witnesses of 'the past'.³ In turn, jurists have 'readily' looked to history to help decide their cases.⁴ Cited similarities of both objective and practice appear to justify their collaboration. Yet, history and the law are distinct disciplines and grounded in divergent conventions, rules and utility. However, despite their differences, disciplinary collaboration has been consistent, especially during the twentieth century, and most obvious in Holocaust-related and other atrocity trials. The 'Irving trial' in London in 2000, the John Demjanjuk trial in Munich in 2011, and the prosecution of Reinhard Hanning in Detmold (Germany) in 2016, as well as cases before International Tribunals (relating to the former Yugoslavia and Rwanda) and the International Criminal Court, are evidence of continued collaboration into the twenty first century.⁵ Implicit is that history and Anglo-American law have not only forged a 'unique relationship', but that generic distinctions have not compromised their integrity once in the courtroom or prevented the intended aims of prosecution and 'transitional justice'.⁶

As additional background to the primary research of the thesis this chapter introduces the theory and practice of the history-law relationship. Through comparative analysis of both disciplines it first outlines their acclaimed similarities of craft. Those identified are then

¹ Carlo Ginzburg, 'Checking the Evidence: The Judge and the Historian', *Critical Inquiry*, 18:1 (1991), pp79-80.

² Ibid, p80.

³ David J. Rothman, 'Serving Clio and Client: The Historian as Expert Witness', *Bulletin of the History of Medicine*, 77:1 (2003), pp25-44.

⁴ Erich Haberer, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes', *Holocaust and Genocide Studies*, 19:3 (2005), p487.

⁵ Although it was Deborah Lipstadt who had been forced into court future references will relate to the common usage of the 'Irving trial' throughout this chapter.

⁶ Haberer, 'History and Justice', p490. 'Transitional justice' was first categorised by Timothy Garton Ash to describe judicial attempts at seeking redress for human rights abuses, Kim C. Priemel and Alexa Stiller, 'Introduction' in Kim C. Priemel and Alexa Stiller (eds.), *Reassessing the Nuremberg Military Tribunals: Transitional Justice, Trial Narratives, and Historiography* (New York: Berghahn Books, 2012), p3. According to Lawrence Douglas it 'asks what role a judicial reckoning with a previous criminal regime should play in the transition to a democratic one', Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton: Princeton University Press, 2016), p12.

contrasted with the norms and practices that distinguish history and Anglo-American law. The chapter finds that, in theory, any sites of potential compatibility are outweighed by their distinctions. Since these distinctions have not prevented consistent collaboration, investigation of the history-law relationship transfers from theory to practice. The chapter acknowledges that the 'unique relationship' between historians and jurists is clearly visible in Holocaust-related trials. Therefore, if theory is to be challenged by practice, it should be evident in the collaborative processing of the Holocaust. Through a critical assessment of a growing body of literature focusing on Holocaust-related trials, the chapter identifies a record of disciplinary reciprocity, but likewise finds a 'consensus of critique' that warns of the risks of a 'show trial', the inadequacy of ordinary criminal law to deal with the extraordinary crimes and evidence of the Holocaust, and the political (mis)appropriation of its history and record.⁷ It has even been suggested that the law is incapable of delivering justice to the victims and survivors of the Holocaust since it legalised every stage of its perpetration. But, foremost, is the critique that knowledge of the Holocaust has been abstracted, diminished, distorted, domesticated, and inevitably 'cooked'.⁸ The chapter concludes that, although opinion over its competence remains contested, the history-law relationship appears to be a flawed and inherently 'dysfunctional' methodology.⁹

It is commonly reputed that history and the law share a compatibility of objective and practice that both allows and justifies their collaboration in the courtroom.¹⁰ The association is easy to comprehend. In theory, both disciplines deal with events passed and share the common aim of bearing witness in the present. Both are similarly authorised to determine and find, if not '*the Truth*' of past events, at least 'essential' or 'probable' truths,

⁷ Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), p1; Leora Bilsky, 'The Judge and the Historian: Transnational Holocaust Litigation as a New Model', *History and Memory*, 24:2 (2012), p122. Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963), p21.

⁸ Wilson, *Writing History*, pp18, 169. Although synonymous with other explanations of history-making (as 'netted' or 'present-centric') the concept of 'cooked' more explicitly reflects historiography as a form of intentional reconstruction and therefore it is a concept that is foregrounded throughout the thesis.

⁹ Haberer, 'History and Justice', p492.

¹⁰ As shown in the research of: Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001); Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (London: Yale University Press, 2001); Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, trans. by Ralph Schoolcraft (Philadelphia: University of Pennsylvania Press, 2002); David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham, NC: Carolina Academic Press, 2005); Patricia Heberer and Jürgen Matthäus (eds.) *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln USA: University of Nebraska Press, 2008); Wilson, *Writing History*; Priemel and Stiller, *Reassessing the Nuremberg Military Tribunals*.

and, in the case of criminal law, those truths 'beyond reasonable doubt'.¹¹ Infamously the oath to 'tell the truth and nothing but the truth' is at the heart of the legal system, and, although not as prescriptive in history, there is a similar mantra of purpose inherent in its dominant 'empiricist-analytical' genre (chapter one).¹² As Oliver Daddow claimed: 'The search for truth remains a 'Holy Grail' for ... historians despite their proclamations to the contrary'.¹³ Furthermore, the ability of history and the law to secure truth is officially and publicly sanctioned outside of their respective academies. Consequently, both disciplines are authorised to not only reconstruct 'the past' but to truly 'know' 'the past'.

Both history and the law are normative in theory and practice. Although more complex and prescriptive in law, both historians and jurists are subsequently bound, guided and regulated by a system of conventions and rules. Consequently, professional historians must prove 'mastery of all the necessary techniques of archival research and historical investigation', long established by 'the PhD', while jurists are governed by a complex network of 'primary' and 'secondary' rules that determines the entire process of materiality (evidence and proof).¹⁴ Both disciplines train a set of practitioners to abide by and carry out the demands of their respective crafts. In turn, disciplinary conventions and rules effectively police those qualified.¹⁵ Both disciplines equally rely on authorised peer groups to scrutinise professional compliance and competence.¹⁶ Ultimately, both insist that the rigorous application of agreed conventions and rules ensures the production of 'good history' and 'good law' respectively.¹⁷

¹¹ Richard Eggleston, *Evidence, Proof and Probability* (2nd edn.) (London: Butterworths Law, 1983), pp139-140; John Jackson and Sean Doran, 'Evidence', in Dennis Patterson, (ed.) *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, 1996), p173; William Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn.) (Cambridge: Cambridge University Press, 2006), pp16, 104-105, 193, 223-224; Adrian Keane, *The Modern Law of Evidence* (7th edn.) (Oxford: Oxford University Press, 2008), pp20, 78-79.

¹² John N. Adams and Roger Brownsword, *Understanding Law* (4th edn.) (London: Sweet and Maxwell, 2006), p197.

¹³ Oliver J Daddow, 'Still No Philosophy Please, We're Historians', *Rethinking History*, 9:4 (2005), p493.

¹⁴ *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), 'Witness Report of Richard Evans: David Irving, Hitler and Holocaust Denial' para. 2.3.8, Trial Bundle B1, Holocaust Research Institute, Royal Holloway, University of London (HRIRH). All proceeding references to the daily transcripts of this trial will be prefixed by HRIRH. Additional archival material will also be prefixed by their Trial Bundle (TB) letter and number. Twining, *Rethinking Evidence*, p114.

¹⁵ Gerald L. Gall, *The Canadian Legal System* (4th edn.) (Canada: Carswell Legal Publications, 1995). HRIRH, (TB) B1, 'Witness Report of Richard Evans'; Martin Partington, *Introduction to the English Legal System* (4th edn.) (Oxford: Oxford University Press, 2008).

¹⁶ Jackson and Doran, 'Evidence', in Patterson (ed.), *A Companion*, p172.

¹⁷ Although the concept of 'good law' is equally contested, Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1987); Jefferson White and Dennis Patterson, *Introduction to the Philosophy of Law: Readings and Cases* (Oxford: Oxford University Press, 1999); Robert S. Summers,

Both history and the law are essentially investigative in practice and utility. They are also both primarily evidence based and empiricist in objective and rationale. Moreover, it is the evidential accountability of both historical and legal investigations that legitimates their disciplinary authority as truthful knowledge and subsequently as 'realist' crafts.¹⁸ Fact determination and finding are similarly integral to history and the law and both disciplines site the probative value and weight of those established in a hierarchy of evidential material that has primary documentation at its apex, although the law places greater emphasis on first-hand oral testimony.¹⁹ Both disciplines admit other forms of evidence (drawings, photographs, secondary literature) and similarly register their content as a 'soft' option.²⁰ Despite the advent of the survivor as foundational evidence and witness since the Eichmann trial (chapter three) both history and the law are equally 'mistrusting' of personal memoir, including survivor testimony, with the 'vagaries of memory' similarly viewed as inherently 'unreliable' or biased.²¹ The predominant 'cult of the document' in both disciplines therefore continues to site evidentiary value and weight in 'physical remnants, over people who were there'.²² According to Richard Eggleston, in a legal case it is assumed that even the 'honest witness' is likely to withhold the whole truth and probably lie outright the more irrelevant they think the questions posed.²³ Similarly in history, Richard Evans suggests that, while all sources must be approached with caution, 'interviews with participants after the event' are perhaps 'the most problematical kind of evidence'.²⁴ Consequently, both disciplines have been criticised for their discriminatory and short-sighted approach to survivor testimony, in particular, and

Essays in Legal Theory (Norwell MA: Kluwer Academic, 2000); Brian Bix, *Jurisprudence: Theory and Context* (London: Sweet and Maxwell, 2003); Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (2nd edn.) (London: LexisNexis, 2003); Twining, *Rethinking Evidence*.

¹⁸ For history see chapter one. For law, see Bix, *Jurisprudence*, pp179-180, 85-186.

¹⁹ Jackson and Doran, 'Evidence', in Patterson (ed.), *A Companion*, p176.

²⁰ Haberer, 'History and Justice', p492. Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', in David Bankier and Dan Michman (eds.), *Holocaust and Justice: Representation of the Holocaust in Post-War Trials* (Jerusalem and New York: Berghahn Books, 2010), p14.

²¹ Laura Jockusch, *Collect and Record!: Jewish Holocaust Documentation in Early Postwar Europe* (Oxford: Oxford University Press, 2012), p198; Annette Wieviorka, 'The Witness in History', trans. by Jared Stark, *Poetics Today*, 27:2 (2006), p389. Tom Lawson *Debates on the Holocaust* (Manchester: Manchester University Press, 2010), p272; Twining, *Rethinking Evidence*, p24; Keane, *The Modern Law of Evidence*, p2.

²² Frida Bertolini, 'Truth and Memory After Catastrophe: Historical Fact and the Historical Witness', *Daphim: Studies on the Holocaust*, 29:1 (2015), p52; Lawson, *Debates*, p272.

²³ Eggleston, *Evidence, Proof and Probability*, p195.

²⁴ HRIRH, (TB) T1, 'Witness Report of Richard Evans', para. 2.4.1.

their subsequent failure to value its unique 'epistemic link' and extract its 'experiential' truths.²⁵

Both history and the law also insist that fact determination and finding is not only evidential but rigorous. Although more prescriptive and visible in law, conventions and rules effectively guide the historians' and jurists' testing of evidence.²⁶ Both disciplines similarly utilise cross-examination, deductive reasoning and source criticism as tools of investigation and scrutiny.²⁷ They equally seek to extract credible and reliable facts, in compliance with agreed standards of evidential proof, while corroboration is an equally foundational concept and objective.²⁸ Both disciplines also insist that the fact finding process is balanced and subject to impartial adjudication.²⁹ Trust is similarly placed on specific 'triers of fact', whether judge, jury or historian.³⁰ As found in chapter one, the historian of the prevailing 'empiricist-analytical' genre is identified as a mediator between past and present, while, in Anglo-American law, the judge and jury 'acts as the objective decision-maker in the face of opposing interests'.³¹ Arguably, the very concept of the 'Rule of Law' implies 'procedural integrity', while the foregrounding of 'due process' imparts notions of fairness, impartiality and transparency.³² Similarly in history, 'open-minded enquiry', and the conversation between past and present by the 'engaged', 'reflexive' or

²⁵ Kirsten Campbell, 'Testimonial Modes: Witnessing, Evidence and Testimony Before the International Criminal Tribunal for the Former Yugoslavia', in Jane Kilby and Antony Rowland (eds.), *The Future of Testimony: Interdisciplinary Perspectives on Witnessing* (London: Routledge, 2014), pp107-108; Richard Carter-White, 'Auschwitz, Ethics and Testimony: Exposure to the Disaster', *Environment and Planning D: Society and Space*, 27:4 (2009), pp682-699. Although Dan Stone argues that belief in the unreliability of memory 'no longer holds as it once did in the academy', Dan Stone, 'History, Memory, Testimony', in Kilby and Rowland (eds.), *The Future of Testimony*, p19.

²⁶ Eggleston, *Evidence, Proof and Probability*, p6.

²⁷ Gall, *The Canadian Legal System*, pp167, 385.

²⁸ Keane, *The Modern Law of Evidence*, pp218-219.

²⁹ Gall, *The Canadian Legal System*, pp167-169, 264; Richard J. Evans, *In Defence of History* (London: Granta Books, 1997); Marilyn T. MacCrimmon, 'Fact Determination: Common Sense Knowledge, Judicial Notice and Social Science Evidence', in Sean Doran and John D. Jackson (eds.), *The Judicial Role in Criminal Proceedings* (Oxford: Hart Publishing, 2000), pp31-50; Mary Fulbrook, *Historical Theory* (London: Routledge, 2002), p166; Patrick Finney, 'Who Speaks for History?' *Rethinking History*, 9:4 (2005), p515; Twining, *Rethinking Evidence*.

³⁰ A legal term but arguably appropriate to the work of the historian.

³¹ Fulbrook, *Historical Theory*, pp182-185; C. Behan McCullagh, *The Logic of History: Putting Postmodernism in Perspective* (London: Routledge, 2004), p43; Bernard Waites, 'In Defence of Historical Realism: A Further Response to Keith Jenkins', *Rethinking History*, 15:3, (2011), pp319-334. Gall, *The Canadian Legal System*, p264.

³² Adams and Brownsword, *Understanding Law*, pp245-246.

'reasonable' historian, is fundamental to 'the absolute authority of empiricist historiography'.³³

Informed through 'empiricist-analytical' rationale, both history and the law have faced similar sceptical critiques.³⁴ During their respective 'postmodern' challenges both disciplines have been reluctant to acknowledge that fact determination and finding is far from contingent or value-free.³⁵ Yet, the 'evidential gap', potential unreliability of key sites of evidence, indeterminacy of source material (including legislation), extra-disciplinary context, and the application of 'netted' (positioned) reasoning, as well as the irrational and unconscious, all contribute to the complexity and fallibility of both historical and legal decision-making.³⁶ Both disciplines also endorse the application of 'common-sense' and concur that it is infinitely contested.³⁷ Consequently, Anglo-American law, like its history counterpart, has revised its positivist (scientific) origins and more readily acknowledges the necessity of interpretation and inferential reasoning, as well as the weaving of narrative, to 'make sense' of the evidence and overall argumentation.³⁸ As shown in chapter one, it is no longer controversial to accept that history-writing '*constructs* rather than records or reflects the past'.³⁹ But, as similarly noted by Eggleston, in law, 'the widely accepted thesis is that human beings need stories in order to make certain kinds of decisions and, more generally, to make sense of the world'.⁴⁰ However, both history and the law insist that narrative is not mere 'story-telling', while any interpretations must be plausible.⁴¹ Thus, although more prescriptive in law, both disciplines concur that fact determination and finding is an interactive negotiation

³³ Ann Curthoys and John Docker, *Is History Fiction?* (2nd edn.) (New South Wales: University of New South Wales Press, 2010); Fulbrook, *Historical Theory*; HRIRH, (TB) B1, 'Witness Report of Richard Evans', para. 1.6.6; Finney, 'Who Speaks for History?', p515.

³⁴ In history see chapter one. In law see Kelman, *Critical Legal Studies*; White and Patterson, *Introduction to the Philosophy of Law*; Summers, *Essays in Legal Theory*.

³⁵ Ibid.

³⁶ Twining, *Rethinking Evidence*, pp99, 109; Fulbrook, *Historical Theory*; Bix, *Jurisprudence*, pp217-219, 249-250; Jackson and Doran, 'Evidence', in Patterson (ed.), *A Companion*, p180; Twining, *Rethinking Evidence*, p100.

³⁷ MacCrimmon, 'Fact Determination', pp31-33.

³⁸ Eggleston, *Evidence, Proof and Probability*, p336.

³⁹ Lawson, *Debates*, p3.

⁴⁰ Eggleston, *Evidence, Proof and Probability*, p336.

⁴¹ Twining, *Rethinking Evidence*, p336. McCullagh, *The Logic of History*, pp10, 12-16, 30-32, 43, 45-53; Twining, *Rethinking Evidence*, p337.

between 'hard' evidence, rules-bound procedure *and* the "culturally relative and value laden" 'stock of knowledge' endemic to all material reasoning.⁴²

In recognition of the complexity of fact determination and finding both history and the law authorise the truths of their investigations on the less than deterministic outcome of "probability". Even the higher standard in criminal cases of 'beyond reasonable doubt' infers a level of proof below that of absolute certainty, while the institutional safeguards of appeal are a visible reminder that legal investigations and findings can be wrong or at least unjust.⁴³ Therefore, in both history and the law, it is acknowledged that the processing of inquiry is more likely to determine what '*probably happened*' rather than what '*actually happened*'.⁴⁴ And yet, however probable, both disciplines are surrounded by a deterministic language (evidence, fact, proof, rigour, standards, truth) that conveys a correctness of method and outcome. Therefore, however amended, the authority of 'empiricist-analytical' (modernist) method and outputs of both history and the law 'pervades the postmodern era'.⁴⁵ Consequently, as found in chapter one, despite the revision of naïve theories of correspondence, objectivity and transcendental adjudication, historians defer to "practical realist" positions, while in law, despite consistent critique, William Twining identifies the persistence of 'evidence scholarship'.⁴⁶

Both disciplines are similarly awarded wider utility beyond the acquisition of material (realist) knowledge. As indicated in chapter one, history is one of the primary mechanisms through which Western society explains itself to itself, while the law is the key site of dispute resolution, legislative enforcement and justice.⁴⁷ However, although the rendering of justice is a formal duty assigned to the law, historians have been equally dedicated to its realisation on behalf of specific victims. Although contested, historians of mass atrocity have insisted that the securing of justice, 'for those who have been silenced', is

⁴² MacCrimmon, 'Fact Determination', p33. Twining, *Rethinking Evidence*, p335.

⁴³ Ibid, pp139-140. Twining, *Rethinking Evidence*, p104.

⁴⁴ Eggleston, *Evidence, Proof and Probability*, p33.

⁴⁵ Beverley Southgate, 'Replacing the Past with Disobedience', *Rethinking History*, 17:2 (2013), p232.

⁴⁶ Alun Munslow, 'On "Presence" and Conversing with the Past: Do Historians Communicate with the Past?', *Rethinking History*, 18:4 (2014), p570. Twining, *Rethinking Evidence*, pp8-9, 100.

⁴⁷ Alun Munslow and Robert A. Rosenstone (eds.), *Experiments in Rethinking History* (Abingdon: Routledge, 2004), pp8-9. See also Hayden White, 'The Burden of History', *History and Theory*, 5:2 (1966), p123.

central to history's purpose.⁴⁸ The securing of justice is likewise cited as central to the combined efforts of history and the law in 'key' perpetrator trials, as well as Holocaust denial and 'cosmopolitan' trials.⁴⁹ Integral to all are didactic objectives that extend notions of justice beyond the accused and relevant victims to the securing of collective memory and the historical record.⁵⁰ Extra-historical and extra-legal considerations are therefore actively sought and endorsed through these trials and with the complicity of both disciplines. Despite warnings of a 'show trial', most participants insist that didactic objectives do not detract from the core purpose of resolving guilt or innocence in a procedurally fair manner.⁵¹

Both history and the law are also viewed as sites and tools of power. As indicated in chapter one, history is a central component of national curricula and tasked with 'cultural guardianship', while the control and influence of the law permeates all social phenomena and relations.⁵² In democratic states both disciplines similarly assert a position of autonomy from the governing authority. Indeed, their public legitimacy is based on their demonstration of political (and state) independence. In theory, the law 'constitutes and constrains political power', while history seeks to distinguish and dismantle partisan-based myths and propaganda (chapter one).⁵³ Yet, the autonomy of both disciplines has been similarly contested.⁵⁴ As shown in chapter one, history has long been critiqued as one of the key mechanisms charged with the acquisition of truths compliant with dominant interests, while the law is viewed as the guardian of specific desires, principles and citizens.⁵⁵ In fact, according to John Adams and Roger Brownsword, 'the whole point of having legislative assemblies seems to be to enable one group (the ruling political party) to translate its sectional interests into a legal form'.⁵⁶

⁴⁸ HRIRH, (TB) B2, *Witness Report of Robert Jan Van Pelt* (2000), pp5-6; Douglas, *The Memory of Judgement*, p1; David Hirsh, 'The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross Examination', *Social and Legal Studies*, 10:4 (2001), pp529-545.

⁴⁹ Prosecuting crimes that took place outside of their national boundaries, David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (London: GlassHouse Press/Cavendish Publishing, 2003).

⁵⁰ Douglas, 'The Didactic Trial' in Bankier and Michman (eds.), *Holocaust and Justice*, pp11-12.

⁵¹ *Ibid*, p12.

⁵² Keith Jenkins, *Re-Thinking History* (London: Routledge, 1991), pp20-21; John Tosh, *The Pursuit of History: Aims, Methods and New Directions in the Study of Modern History* (3rd edn.) (Essex: Longman, 2002), ppix, 1. Kelman, *Critical Legal Studies*, p254.

⁵³ Summers, *Essays in Legal Theory*, p49.

⁵⁴ Jenkins, *Re-Thinking History*; Bix, *Jurisprudence*; Cotterrell, *The Politics of Jurisprudence*. Fraser, *Law After Auschwitz*; Heberer and Matthäus (eds.), *Atrocities on Trial*.

⁵⁵ Kelman, *Critical Legal Studies*, pp232-233.

⁵⁶ Adams and Brownsword, *Understanding Law*, p13.

In theory, therefore, the compatibilities of craft appear to support the methodological validity of collaborative investigation through the history-law interface. Yet, a long-standing 'consensus of critique' contradicts this conclusion. Situated within identified 'schools of thought', a growing number of voices have warned that bringing historical inquiry into the courtroom subverts both history ('the law and society movement') and the law ('legal liberalism') precisely because they are discrete disciplines.⁵⁷ Contradictions of practice are subsequently identified at all sites of acclaimed symbiosis and begin with the case-specific form integral to Anglo-American law. Most notably, in contrast to historical inquiry outside of the courtroom: 'Much of what happens in a trial depends on the kind of case it is and, more specifically, on the nature of the charges'.⁵⁸ Outlined in the 'indictment', the charges determine the disputed 'facts in issue' (principal facts) long before the case comes to court and thereafter govern the content, operation and reach of any trial, including the remit of historical inquiry. Crucially, the requirement to do justice to the accused forecloses any attempt to widen historical inquiry beyond its case-specific remit.⁵⁹ Consequently, the 'scope of analysis is narrowed, the imagination is constrained, and the curiosity, curtailed'.⁶⁰

The admission of evidence is also limited to its case-specific content, while deference to the indictment leads the advocate to 'cherry-pick' evidence regardless of the historical context or record.⁶¹ In turn, historical context is only of interest if it impinges on questions of guilt or innocence.⁶² As noted by David Cesarani: 'In a court of law context and circumstances are the least important evidence ... but in history ... [they] matter a great deal'.⁶³ Once admitted into court the cross-examination and adjudication of evidence is likewise restricted.⁶⁴ What counts as probative for the 'triers of fact', whether judge or jury, is 'case-specific evidence', in contrast to the historian's investigation of 'any evidence deemed necessary for creating as truthful as possible a narrative of when, how

⁵⁷ Wilson, *Writing History*, pp1-2; Bilsky, 'The Judge and the Historian', p122.

⁵⁸ Wilson, *Writing History*, p219.

⁵⁹ *Ibid*, p4.

⁶⁰ Rothman, 'The Historian as Expert Witness', p44.

⁶¹ Wendie Ellen Schneider, 'Past Imperfect', *Yale Law Journal*, 110:8 (2001), pp1542, 1544.

⁶² Wilson, *Writing History*, p7.

⁶³ Stephen Moss, 'History's Verdict on Holocaust Upheld: The Evidence Historians Claim Victory After Rigorous Courtroom Test', *The Guardian*, 12 April 2000.

⁶⁴ Haberer, 'History and Justice', p490.

and why something happened'.⁶⁵ Ultimately, the case-specific form of Anglo-American law threatens to not only confine and control the process of historical inquiry, but to contradict and/or distort the findings of established historiography.

In contrast to historical inquiry, Anglo-American law is also essentially adversarial in both content and form.⁶⁶ Adversary inherently pits one side against the other, with the 'triers of fact' as not only adjudicators but designated referees.⁶⁷ Consequently, the courtroom, unlike more familiar forms of historical debate and presentation, is a place of 'struggle ... for control over information which the jury [or Judge] would use to come to its verdict'.⁶⁸ Crucially, and contrary to both historical inquiry and the law's accredited function, adversary means that the main objective of its participants is not to find out what actually, really or even probably happened. In amongst terminology citing the primacy of establishing or raising sufficient doubt over the 'burden of proof', the goal for both parties is to win their case.⁶⁹ Hence, the law 'is not interested in truth *per se*; truth has merely an instrumental value for the adjudication of guilt and innocence'.⁷⁰ It is therefore not surprising that "hard-nosed" practitioners claim to prioritise "winning, not justice", "proof, not truth", although the two may not be mutually exclusive.⁷¹

Most notably, the adversarial form utilises cross-examination as not only a tool of investigative rigour but as a means of undermining the credibility of oppositional accounts. Thus, in amongst the extraction of relevant facts, a 'good deal of successful cross-examination depends on making the witness, including any experts, look ridiculous'.⁷² Furthermore, cross-examination may be cited by both history and the law as integral to the securing of evidential proof (and therefore certainty) and yet adversary infuses its process in the courtroom with persistent doubt. Rather ironically, it is a system that seeks evidential clarity and corroboration and yet presupposes, and endlessly implies, evidential fallibility and falsity, regardless of any previous sanction of credibility or fact.

⁶⁵ Ibid.

⁶⁶ Twining, *Rethinking Evidence*, pp196-197. Although Twining insists that most cases are 'inquisitorial', Ibid.

⁶⁷ Hirsh, *Law Against Genocide*, p105.

⁶⁸ Ibid, pxix.

⁶⁹ Partington, *English Legal System*, p116. Keane, *The Modern Law of Evidence*, p2.

⁷⁰ Haberer, 'History and Justice', p518.

⁷¹ Twining, *Rethinking Evidence*, p7.

⁷² Eggleston, *Evidence, Proof and Probability*, p198.

Every witness is under suspicion and remains so throughout their testimony. Every 'fact in issue' has to be proven anew. And no form of evidence is exempt, including the historian.

Consequently, once on the stand, historians will be involved in an adversarial contest that s/he neither frames nor controls. They will be 'hostage' to the court's line of questioning and open to deliberate attack and ridicule by legal opponents.⁷³ Historians may also be pitted against each other in support of oppositional accounts. These accounts will then be presented as 'incontrovertible evidence', in direct contradiction to the regular revision of historical conclusions.⁷⁴ It is also likely, in such cases, that opposing historians will effectively nullify the evidence of the other.⁷⁵ Also, once on the stand, historians will have no control over the consequences of their testimony, which could be both distorted and utilised in favour of the opposing side.⁷⁶ Furthermore, when faced with conflicting testimony, a jury is forced to make judgements of credibility alongside the more deductive reasoning of evidential weight. And: 'Psychologists tell us that juries decide more by weighing the plausibility of competing stories than by careful analysis of the evidence'.⁷⁷

Adversary in cross-examination also promotes performance and tactic. Consequently, for the successful advocate, skills of oration, persuasion, impression, innuendo and the seduction of jurors are paramount.⁷⁸ Therefore, in contrast to the training of historians, advocacy literature promotes the use of body language and eye contact, making a good impression, brevity, rhetorical devices and manipulative and diversionary tactics over 'rational argument'.⁷⁹ It is therefore not surprising that "hard-nosed" practitioners claim to prioritise "persuasion, not reason", "experience, not logic", "Art not Science", "feel[ing], not analysis" as desired skills.⁸⁰ As Twining suggested, many of the techniques equated with the effective advocate are contrary to university values of knowledge production '*per se*'.⁸¹ Conversely, the performance and tactic of legal cross-examination

⁷³ Rousso, *The Haunting Past*, pp62, 65.

⁷⁴ Haberer, 'History and Justice', p509.

⁷⁵ Wilson, *Writing History*, p146.

⁷⁶ Rousso, *The Haunting Past*, p62.

⁷⁷ Twining, *Rethinking Evidence*, p281. See also pp333-334 and 336.

⁷⁸ Twining, *Rethinking Evidence*, pp7, 367.

⁷⁹ *Ibid*, p7.

⁸⁰ *Ibid*.

⁸¹ *Ibid*, p24.

demands more from the witness, and expert, than relevant evidence. In amongst the necessity of recall it likewise requires such character traits as vigilance, proficiency and resilience. Arguably the ability of the witness to perform under and withstand cross-examination is almost as important as the evidence s/he holds. It has therefore been suggested that the performance of the witness is more likely to convince a jury of probative weight than the facts articulated, regardless of certain rules or tests (consistency, corroboration) being applied.⁸² And, in such a subjective exercise, there is no guarantee that evidential accountability and perceived credibility will coincide.

But it is in the normative infrastructure of Anglo-American law that disciplinary inconsistencies are most evident. As shown above, both disciplines foreground conventions and rules as legitimate norms of their craft. However, in the case of Anglo-American law, they do not operate as mere principle but are statutory in form and prescriptive in content. Acting as a hierarchical network of 'primary' and 'secondary' rules, they do not only govern legal procedure, relationships and standards of verification but confer the very 'essence of law'.⁸³ Any breach by its practitioners is not merely sanctioned through peer criticism or pressure but constitutes a criminal offence. As already stated, a distinctive set of rules prescribe the entire operation of materiality (evidence and proof).⁸⁴ Hence, from the pre-trial and 'evidential stage' of a case, to the trial itself and post-trial stages, specific rules determine the 'facts in issue', which party carries the 'burden of proof,' the form and range of evidence accepted as both relevant (or irrelevant) and admissible (or inadmissible) and 'what questions are or are not put to witnesses ...'.⁸⁵ A formal question-answer format further confines and re-organises witness testimony, while no 'leading questions' can be posed.⁸⁶ As already acknowledged, there is no obligation on either party to represent any evidence in context, and, most notably, any failure by the witness to disclose relevant facts or truths is permissible.⁸⁷ Therefore, the oath 'to tell the truth, the whole truth and nothing but the truth' does not punish those who withhold part of the truth unless its omission impacts on the truth of what has already been said.⁸⁸ As

⁸² Eggleston, *Evidence, Proof and Probability*, p159. Twining, *Rethinking Evidence*, p189.

⁸³ Adams and Brownsword, *Understanding Law*, p2.

⁸⁴ Twining, *Rethinking Evidence*, p114.

⁸⁵ Partington, *English Legal System*, pp111-112. Twining, *Rethinking Evidence*, p209. Keane, *The Modern Law of Evidence*.

⁸⁶ Hirsh, *Law Against Genocide*, p106. Keane, *The Modern Law of Evidence*, pp161-162.

⁸⁷ Schneider, 'Past Imperfect', p1542. Eggleston, *Evidence, Proof and Probability*, p195.

⁸⁸ *Ibid.*

shown in chapter one, this prescriptive confinement of inquiry is anathema to the history discipline.

A further set of 'exclusionary rules' specifically disallow evidence thought to be prejudicial to the defendant.⁸⁹ At the risk of over-simplification:

... the broad governing principle underlying the English law of evidence can be stated in no more than nine words: all relevant evidence is admissible, subject to the exceptions.⁹⁰

Arguably the most well-known exclusionary concept is 'hearsay', with the relevant rules traditionally preventing the submission of any evidence other than first-hand oral or written evidence, based on the premise that what others may or may not have said or witnessed cannot be directly challenged for reliability.⁹¹ Crucially, since inherently removed from first-hand experience and observation, all history is ruled as 'hearsay'. Although exempted by a further set of rules (see below), the exclusionary rules could, in theory, prohibit evidence and testimony being submitted however relevant to the historian's expertise or the established historiography.

An additional set of rules govern the entire process of fact determination and finding; from the concept and categorisation of 'facts', to their relevancy and probative value and weight. Indeed, a specific set of rules determine and govern the weeding-out of relevant facts (and subsequently evidence) well before the case gets to court. Once at trial a hierarchy of facts is further prescribed, which range from the 'facts in issue' ('principal facts') to 'relevant facts' or 'evidentiary facts' (that relate to the 'facts in issue'), 'collateral' or 'subordinate' facts (relating to the competence and credibility of a witness) and 'preliminary' facts (to be proven before the admissibility of evidence relating to the 'facts in issue' or 'evidentiary facts').⁹² All categories are open to further classification in accordance with substantive law (civil or criminal), while yet more rules govern standards

⁸⁹ Jackson and Doran, 'Evidence', in Patterson (ed.), *A Companion*, pp176-177.

⁹⁰ Keane, *The Modern Law of Evidence*, p1.

⁹¹ Character references, previous convictions, coerced or induced confessions, spousal evidence and privilege likewise qualify as prejudicial, Eggleston, *Evidence, Proof and Probability*, pp58-59. Jackson and Doran, 'Evidence', in Patterson (ed.), *A Companion*, p176; Partington, *English Legal System*, p117.

⁹² Keane, *The Modern Law of Evidence*, pp6-8.

of authenticity, competence and credibility.⁹³ Specific rules also determine the degree to which the facts have to be proven. As already observed, a hierarchy of proof exists between ‘on the balance of probability’ (civil), and, in contrast to history, the more stringent test of ‘beyond reasonable doubt’ (criminal).⁹⁴ Fact determination is, therefore, a more complex process in law, with its rules capable of further confining, relegating and reorganising any historical facts legally investigated or verified. This is why David Fraser asks: ‘Can justice be served by a legal system which creates facts unrecognizable to the historian?’⁹⁵

The adjudication of legal fact finding is likewise not only prescriptive in content but unique in form. Although equivalent in function to the historian as ‘triers of fact’, the judge and jury are distinctive in their separation from the processes of fact determination, while specific rules govern the process of judicial arbitration and ground decisions in case law. Although negating the crucial role of judicial discretion, especially in complex (‘hard’) cases, this body of law exists to either ‘bind’ or act as a ‘persuasive force’ in future decision-making.⁹⁶ Any evolved findings confer authority as new ‘precedent’ and are added to existing case law. The reaching of historical consensus, and the impact of revised findings on future historical research, may act as a form of ‘historian-made’ precedent but the concept and practice of ‘binding’ is contrary to its craft and findings. Furthermore, what happens to the credibility of the historical record if a court and jury finds, and then officially records, facts contradictory to established historiography?

Of specific relevance to the historian as expert witness, the rules of Anglo-American law not only confine and govern both historical evidence and testimony, but inherently challenge and diminish the authority, knowledge and reputation of her/his craft. Potential threats to both discipline and expert begin long before the case comes to court. In contrast to the acclaimed non-partisanship of the historian (chapter one), and despite the legal demands that s/he ‘owes a duty to the court which he [*sic*] must discharge notwithstanding

⁹³ Eggleston, *Evidence, Proof and Probability*, pp74-77.

⁹⁴ Although both standards are open to interpretation, with greater degrees of ‘probability’ and ‘beyond reasonable doubt’ tending to be requested in proportion to the severity of punishment required, *Ibid*, pp117-119.

⁹⁵ Fraser, *Law After Auschwitz*, p199.

⁹⁶ Adams and Brownsword, *Understanding Law*, pp101-104, 128. However, even in cases where decisions are binding future courts still have considerable freedom in determining the significance of earlier decisions, while the authority of precedent depends upon the standing of the court making the decision. *Ibid*, pp129-130.

the interest of the party calling him', experts tend to be allocated to one side or the other.⁹⁷ This allocation could lead to accusations of a "hired gun syndrome", in which bias is implied, while the label of "law-office history" denotes awareness that historical evidence could be organised in support of a particular position.⁹⁸ And yet, rather paradoxically, even when allocated to one side or the other, the historian can be legally omitted from the preliminary stages of the relevant historical investigation; in other words, the very stages that involve the requisite assembly, analysis and critique of documents analogous to historical inquiry.⁹⁹ Instead, historians take to the stand at the very moment when the judicial process is furthest removed from their practice and when legal rhetoric is dominant.¹⁰⁰

Once in court, rules governing the legal qualification of the historian as an expert witness threatens to diminish the authority of the profession. In Anglo-American law there is no requirement that expert witnesses should be professionally trained.¹⁰¹ Therefore, experience and a proven track record of research can qualify in law as expertise.¹⁰² Consequently, under the relevant conventions, Holocaust deniers could be legally qualified to act as historical experts on the same grounds as established historians (chapter three). Conversely, a reputed historian may not necessarily qualify as an expert in the eyes of the law. However, even if qualified, the evidential authority and weight of historian testimony is inherently 'downgraded'.¹⁰³ As already noted, the rules of evidence categorise historical evidence as 'hearsay', but they also categorise expert testimony as 'opinion', and both are legally inadmissible.¹⁰⁴ According to Anglo-American law 'hearsay' relates to second-hand evidence that cannot be directly proven, while opinion is not accepted as fact but as inference drawn from facts. Although exempted from the 'hearsay' rules by a further set of rules, historian testimony is intentionally confined within

⁹⁷ Keane, *The Modern Law of Evidence*, p538. S/he must also sign a 'statement of truth' in civil cases and the same 'declaration of truth' as first-hand witnesses in criminal cases, *Ibid*, pp554, 557. Eggleston, *Evidence, Proof and Probability*, p158; Rousso, *The Haunting Past*, p70; Wilson, *Writing History*, p70.

⁹⁸ Lord Woolf quoted in Keane, *The Modern Law of Evidence*, p549. Schneider, 'Past Imperfect', pp1540-1542. See also Trish Luker, 'Reading the Archive: Historians as Expert Witnesses', *Flinders Law Journal*, 18:2 (2016), pp241-267 as insight into the distrust of historians within Australian courtrooms and the contribution of both disciplines in the 'history wars' over Australia's colonial past (and present).

⁹⁹ Rousso, *The Haunting Past*, pp61-62.

¹⁰⁰ *Ibid*.

¹⁰¹ Keane, *The Modern Law of Evidence*, p537.

¹⁰² *Ibid*.

¹⁰³ Rousso, *The Haunting Past*, p65.

¹⁰⁴ Keane, *The Modern Law of Evidence*, pp2, 528.

strict parameters as well as being diminished in value.¹⁰⁵ Both evidence and opinion are also accompanied by the indeterminate language of 'assumed', 'circumstantial', 'hypothetical' or 'inferential', since their content cannot be accepted as true.¹⁰⁶ Diminution of authority and expertise is then further asserted at the stage of adjudication, when historical fact finding is trusted to a judge or jury that do not tend to be historians in either expertise or by profession. Neither judges nor juries must qualify as historical experts and yet they are tasked, and somehow imbued, with an ability to adjudicate over competing historical interpretations and narratives. Therefore, implicit in Anglo-American law, is that anyone can be a historian.

Conversely, although the law, like history, categorises a hierarchy of evidential form (ranging from oral testimony and documentation to 'things', as well as principal types of evidence) there are no rules in the Anglo-American genre governing the weight attached to their relevancy or probative force.¹⁰⁷ According to Twining an attempt at devising a 'Best Evidence Rule' has not been widely accepted.¹⁰⁸

Thus we have no principle that written evidence is to be given greater weight than testimonial evidence. We have no principle that testimonial evidence is to be given greater weight than circumstantial evidence. Nor is there any general principle of law that states that some kinds of witnesses are more credible than others. Generally speaking, the weighing of evidence is left to the logic and common sense of the trier of fact in the particular circumstances of the case.¹⁰⁹

There are also few rules prescribing the volume of evidence required to prove an argument or fact. The main exception relates to corroboration, which, akin to historical inquiry, demands that the testimony of a witness must be supported by at least one other

¹⁰⁵ In the UK, governed by Part 33 of the 'Criminal Procedure Rules 2005' and Part 35 of the 'Civil Procedure Rules', supplemented by a 'Protocol for the Instruction of Experts to Give Evidence in Civil Claims'. Ibid, pp528-560.

¹⁰⁶ Keane, *The Modern Law of Evidence*, pp11, 528, 543-544.

¹⁰⁷ Principle evidence relates to such as 'hearsay', 'real' (material), 'circumstantial' or 'conclusive' forms, Keane, *The Modern Law of Evidence*, p8.

¹⁰⁸ The 'Rule' aimed to create a hierarchy of types of evidence that placed official documentation at the top followed by documents under seal and then written documents.

¹⁰⁹ Twining, *Rethinking Evidence* pp210-211.

witness or by circumstantial evidence.¹¹⁰ However, examples of mandatory corroboration are few and exceptional.¹¹¹ Thus, contrary to historical inquiry, there is no formal rule requiring corroboration of eyewitness testimony, despite its evidence being universally recognised in law as subjective and therefore unreliable.¹¹²

Beyond its normative system the law, of course, has a unique purpose. History may collaborate with the law in the rendering of justice for specific past crimes but it is not its defining objective. Moreover, the essential purpose of the law is 'judgement'.¹¹³ Basically, the law infuses all forms of judgement, be they moral or political.¹¹⁴ Not all historians agree with Evans that the application of judgement is 'not only far from central to the historian's enterprise but also ... entirely alien to it'.¹¹⁵ However, even those historians with a clear and intentional moral objective do not identify judgement as their central purpose.¹¹⁶ Most notably, even when historians designate blame to their subjects, or condemn opposing interpretations, any judgements of 'innocence' or 'guilt' are not accompanied by powers of coercion, reprimand and sentence beyond the review process. Infamously, the law is *the* infrastructure and instrument of formal punishment, including the loss of personal freedom, and, in some states, of life itself. Furthermore, the law and history are certainly politically instrumental, with their proclaimed autonomy and independence from dominant interests similarly contested.¹¹⁷ However, although both disciplines have been accused of reaffirming hegemonic power blocs, the law, as the main site through which 'power is exercised', is, unlike history, a formal pillar of democratic (state) authority.¹¹⁸

¹¹⁰ Ibid, p211.

¹¹¹ The exceptions being in cases of perjury, unsworn child witnesses and the prosecution of girls for prostitution, Ibid.

¹¹² Ibid.

¹¹³ Giorgio Agamben, *Remnants of Auschwitz: The Witness and the Archive* (New York: Zone Books, 1999), p18.

¹¹⁴ Ibid.

¹¹⁵ Richard J. Evans, 'History, Memory, and the Law: The Historian As Expert Witness', *History and Theory*, 41:3 (2002), p330.

¹¹⁶ HRIRH, (TB) B2, 'Witness Report of Robert Jan Van Pelt', pp5-6; Beverley Southgate, *History: What and Why? Ancient, Modern, and Postmodern Perspectives* (2nd edn.) (London: Routledge, 2001), p157.

¹¹⁷ Kelman, *Critical Legal Studies*, Jenkins, *Re-thinking History*, pp20-21; Gall, *The Canadian Legal System*, pp263-351; Adams and Brownsword, *Understanding Law*, pp50, 86-98, 218-245; Martin Davies, *Historics: Why History Dominates Contemporary Society* (Oxford and New York: Routledge, 2006), p8; Partington, *English Legal System*, pp31-32.

¹¹⁸ Ibid, pp29, 58-59. See also, Gall, *The Canadian Legal System*, pp29-30, 39, 263-267; Cotterrell, *The Politics of Jurisprudence*, pp21-31; Adams and Brownsword, *Understanding Law*, pp86-142.

A theoretical overview of the prevailing history and Anglo-American legal genres therefore confirms that contradictions of objective and practice are evident across all areas of assumed symbiosis of craft. Furthermore, the possible threats to historical inquiry, as a result of these contradictions, would appear to be insurmountable given the nature and reach of the distinctions identified. It is also clear that the history-law relationship is not a partnership of disciplinary equals when collaborating in the courtroom. As shown, the law is the dominant 'partner' and not only determines and governs historical inquiry, both prior to and once brought to trial, but inherently diminishes the value and weight of its evidence and the reputation and status of its experts. In theory, therefore, the history-law relationship appears to be a flawed and inherently 'dysfunctional' methodology of both historical inquiry in general and disciplinary collaboration in particular. However, since this conclusion appears to contradict the long history of disciplinary collaboration, it is useful to transfer the investigation of the history-law relationship away from theoretical appraisal to practical application. No-where is disciplinary collaboration between history and the law more visible than in Holocaust-related trials. Indeed, the Holocaust has been consistently 'brought to trial' since 1945, with both historians and jurists 'inextricably intertwined' in not only the prosecution of its perpetrators and deniers but the recovery of its memory, protection of its record and authorisation of its facts and truths.¹¹⁹ Implicit in the long history of Holocaust litigation cases is that history and Anglo-American law have not only forged a 'unique relationship' over its inquiry, but that generic distinctions, and any flaws, have been effectively negotiated, and surmounted, in order to 'do justice' to its past and histories as well as its victims.¹²⁰

A body of literature attests to a record of acclaimed disciplinary reciprocity in Holocaust-related trials. Since the International Military Tribunal (IMT) (1945-1946), historical background and explanation has been legally authorised as essential to the prosecution process.¹²¹ Consequently, collaboration has been variously formalised through the allocation of teams of historians to individual legal offices involved in specific trials, but also as part of an 'epistemic community' (Nuremberg Military Tribunals (NMTs), non-partisan commissions (US litigation cases), and more permanent investigative bodies

¹¹⁹ Christopher R. Browning, 'German Memory, Judicial Interrogation, Historical Reconstruction', in Saul Friedländer (ed.), *Probing the Limits of Representation: Nazism and the "Final Solution"* (London: Harvard University Press, 1992), p34.

¹²⁰ Haberer, 'History and Justice', p490. Douglas, 'The Didactic Trial' in Bankier and Michman (eds.), *Holocaust and Justice*, p12.

¹²¹ Haberer, 'History and Justice', p496.

(such as the 'Office of Special Investigation' (OSI) in the United States and 'War Crimes Units' developed in Australia, Canada and the UK).¹²² In exchange for legally admissible evidence, as well as expert opinion, historians have acquired vast fonts of historical resource.¹²³ Indeed, as Patricia Heberer and Jürgen Matthäus note, the volume of material amassed by Holocaust-related trials is beyond the ability of any scholar to either read or comprehend.¹²⁴ New archives have been opened-up to historians, that, in turn, have provided important insights and produced new historical narratives.¹²⁵ According to Lawrence Douglas, important histories of the Holocaust could not have been written without the documentary material accumulated by the law.¹²⁶ This material has then comprised an invaluable archive for historians long after the trials have ended.¹²⁷ More recently, participation in the courtroom has helped historians to clarify and construct a solid evidential baseline 'that serves as a bulwark against the historical revisionism, denial and outright lies about the past ...'.¹²⁸ And in all courtrooms, legal rigour and the high standard of 'beyond reasonable doubt' has 'challenged historians to live up to the highest standards of their profession'.¹²⁹

In turn, historian accounts and explanations have provided order to disparate evidence, without which past crimes would have been incomprehensible.¹³⁰ But, most notably, the extraordinary crimes of the Holocaust have forced the law to be innovative in its creation of new concepts of criminality (crimes against humanity and genocide) and legal

¹²² Priemel and Stiller, 'Introduction', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp6-7. Bilsky, 'The Judge and the Historian', pp133-135. Douglas, *The Right Wrong Man*, p10. From 2010 the OSI was renamed as 'Human Rights and Special Prosecutions' and its remit was extended beyond the prosecution of 'Nazi-sponsored acts of persecution' to any US citizen suspected of 'serious human rights violations'. Ibid, p151. Heberer, 'History and Justice', pp506-507.

¹²³ Bloxham, *Genocide on Trial*; Douglas, *The Memory of Judgement*; Hirsh, 'Andrei Sawoniuk'; Heberer, 'History and Justice'; Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006); Wilson, *Writing History*; Bilsky, 'The Judge and the Historian'.

¹²⁴ Heberer and Matthäus, 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, p xv.

¹²⁵ Wilson, *Writing History*, pp1, 18; Bilsky, 'The Judge and the Historian', p135.

¹²⁶ Douglas, *The Memory of Judgement*, p2.

¹²⁷ Ibid, p18.

¹²⁸ Wilson, *Writing History*, p220.

¹²⁹ Heberer, 'History and Justice', p509; Richard J. Evans, *Telling Lies About Hitler: The Holocaust, History And The David Irving Trial* (London: Verso, 2002), pp196, 198.

¹³⁰ Wilson, *Writing History*, p220. Although Dieter Pohl claims that legal prosecutors, rather than historians, led the way in the historical research of Nazi crimes in Germany until the 1970s. Dieter Pohl 'Prosecutors and Historians: Holocaust Investigations and Historiography in the Federal Republic 1955 – 1975', in Bankier and Michman (eds.), *Holocaust and Justice*, pp127-129. Katrin Stoll agrees, Katrin Stoll, 'Hitler's Unwilling Executioners?: The Representation of the Holocaust Through the Bielefeld Bialystok Trial of 1965-1967', in Ibid, p164.

culpability (beyond the individual to the criminalisation of specific organisations and principles of collective guilt and conspiracy).¹³¹ As Douglas highlighted, the newly constructed concept of 'genocide' first gained legal recognition in the IMT indictment and then gained 'greater currency' in the NMTs.¹³² Likewise, the foregrounding of the survivor voice at the Adolf Eichmann trial, as both the driver and foundational evidence of the Holocaust, transformed the process of 'bearing witness'.¹³³ The subsequent 'revolutionary transformation of the victim' was, according to Shoshana Felman, a 'major contribution not only to Jews but to history, to law, to culture – to humanity at large'.¹³⁴ It also changed the role of the defence lawyer. As Heberer and Matthäus recognised, in the NMTs (1946 to 1949) and subsequent trials, defence cases increasingly looked to criticise extra-legal influences on the trials, political expediency and attempts to set the historical record straight.¹³⁵ Infamously, the IMT was the first international tribunal.¹³⁶ According to Douglas, 'it would be no exaggeration to claim that international criminal law was an *invention* of the IMT ...'.¹³⁷ Similarly Thomas Buergenthal claims that it was the scale of Nazi atrocities that led to a 'dramatic legal and conceptual transformation' of law that 'internationalised human rights and humanised international law'.¹³⁸ Consequently, a 'jurisprudence of atrocity' has developed that has advanced the capacity, infrastructure, reach and reputation of international law.¹³⁹

Yet, a 'consensus of critique' has specifically warned of the risks involved when bringing the Holocaust to trial. This critique combines to identify an undermining of 'due process', the inadequacy of ordinary law to deal with the extraordinary crimes of the Holocaust,

¹³¹ Douglas, *The Memory of Judgement*, p4. Patricia Heberer and Jürgen Matthäus, 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, p xviii; Douglas, 'The Didactic Trial' in Bankier and Michman (eds.), *Holocaust and Justice*, p18.

¹³² Douglas, *The Right Wrong Man*, p5.

¹³³ A 'monumental' transition in both evidence and narrative of the Holocaust according to Felman, 'Theatres of Justice', pp212-216, 225-233; Stephen Landsman, 'The Eichmann Case and the Invention of the Witness-Driven Atrocity trial', *Columbia Journal of Transnational Law*, 55:1 (2012), p109.

¹³⁴ Felman, 'Theatres of Justice', p230. However, the Eichmann trial was not the first attempt to record or publicise the experiences of survivors, Zoë Vania Waxman, *Writing the Holocaust: Identity, Testimony, Representation* (Oxford: Oxford University Press, 2006); Jockusch, *Collect and Record!*.

¹³⁵ Heberer and Matthäus, 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, pxx.

¹³⁶ Thomas Buergenthal, *International Law and the Holocaust*, Joseph and Rebecca Meyerhoff Annual Lecture (Washington DC: United States Holocaust Memorial Museum, 2003), p13.

¹³⁷ Lawrence Douglas, 'From IMT to NMT: The Emergence of a Jurisprudence of Atrocity', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, p277.

¹³⁸ Buergenthal, *International Law*, pp5-6.

¹³⁹ Douglas, 'Jurisprudence of Atrocity' in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp276-292. Douglas, *The Right Wrong Man*, p5.

extra-historical and extra-legal drivers and (mis)appropriation of its evidence and record, and the production of 'cooked' histories.¹⁴⁰ A body of literature subsequently discloses that since the IMT the rules of law have been moderated, and at times manipulated, across Holocaust-related trials.¹⁴¹ Indicative is the selective labelling of criminality at both the IMT and NMTs, in which the law visibly discriminated against certain acts of atrocity.¹⁴² Both the IMT and NMTs also admitted evidentially weak, and even irrelevant, evidence, regardless of its lack of probative value or weight.¹⁴³ Despite its seminal reputation, breaches in 'due process' were likewise identified at the Eichmann trial in 1961. In particular, the evidentiary rules on 'hearsay' were relaxed, which, according to the law, violates the rights of the accused (chapter three).¹⁴⁴ Notoriously, at the first trial of John Demjanjuk (1986-1988) the law allowed and sanctioned the probative value of faked evidence, while, according to David Hirsh, 'the Israeli legal system was ready to subordinate entirely the requirements of a fair trial to the requirements of restaging national drama'.¹⁴⁵ As a witness at the trial for the defence later wrote, he knew of "no other case in which so many deviations from procedures internationally accepted as desirable occurred".¹⁴⁶ But they had the wrong man.¹⁴⁷

Conversely, a range of critics indicate that, despite evidence of legal flexibility and innovation, ordinary criminal law remains inadequate when faced with the extraordinary

¹⁴⁰ Wilson, *Writing History*, pp3, 18, 19, 169; Bilsky, 'The Judge and the Historian', p122; Douglas, *The Memory of Judgement*, p4; Hirsh, 'Andrei Sawoniuk'; Hirsh, *Law Against Genocide*; Rebecca Elizabeth Wittman, 'Indicting Auschwitz? The Paradox of the Frankfurt Auschwitz Trial', *German History*, 21:4 (2003), pp509-513; Pendas, *The Frankfurt Auschwitz Trial*, pp1-6, 290, 293; Douglas, 'The Didactic Trial' in Bankier and Michman (eds.), *Holocaust and Justice*; Priemel and Stiller, 'Introduction', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp14-16; Stoll, 'Hitler's Unwilling Executioners?', in Bankier and Michman (eds.), *Holocaust and Justice*, pp184, 192-193; Rousso, *The Haunting Past*; Stephen Whinston, 'Can Lawyers and Judges Be Good Historians?: A Critical Examination of the Siemens Slave-Labor Cases', *Berkeley Journal of International Law*, 20:1 (2002), pp160-175; Fraser, *Law After Auschwitz*; Michael R. Marrus, 'The Case of the French Railways and the Deportation of Jews in 1944', in Bankier and Michman (eds.), *Holocaust and Justice*, pp245-264.

¹⁴¹ See footnote 140.

¹⁴² Fraser, *Law After Auschwitz*, pp127-128, 140-142.

¹⁴³ Ulrike Weckel, 'The Power Of Images: Real And Fictional Roles Of Atrocity Film Footage At Nuremberg', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp221-242.

¹⁴⁴ Wilson, *Writing History*, p67.

¹⁴⁵ At this trial Demjanjuk was infamously indicted as a guard at the Treblinka extermination camp, known as 'Ivan the Terrible', Fraser, *Law After Auschwitz*, p243. Hirsh, *Law Against Genocide*, p148.

¹⁴⁶ Willem Wagenaar cited in *Ibid*, p149.

¹⁴⁷ On appeal, an Israeli court also acquitted Demjanjuk after additional evidence proved that he had not been at Treblinka as originally indicted. He was later found guilty by a Munich court in 2011 of being an accessory to mass murder as a guard at the Sobibor extermination camp. See Douglas, *The Right Wrong Man*.

crimes of the Holocaust.¹⁴⁸ Or, as Felman posed: 'How ... can a crime that is historically unprecedented be litigated, understood, and judged in a discipline of precedents?'¹⁴⁹ In contrast to the creation of a new law in Israel in 1950 (chapter three), aimed specifically at prosecuting crimes against 'the Jewish People', other legal jurisdictions have attempted to either incorporate 'crimes against humanity' into domestic criminal law (France, Germany, UK) or to equate genocide with conventional homicide (Canada, UK).¹⁵⁰ In turn, the confinement of acts of genocide, as common-law murder, has both diminished and domesticated their scope and horror.¹⁵¹ Indicative is the trial of Andrei Sawoniuk (UK), in which the charge of four counts of murder, two of which did not make it to jury, not only confined evidential proof of his perpetration to the specific charges but added to the impression that it was 'an ordinary Old Bailey trial'.¹⁵² Indeed, it was the function of the court to extract the individual charges against Sawoniuk from the huge machinery of mass atrocity.¹⁵³ Infamously, in then West Germany, 'crimes against humanity' and 'war crimes' were incorporated into the 'Penal Code', which not only equated mass crimes with individual cases of conventional murder, but distinguished between the role of 'perpetrator' and 'accomplice'.¹⁵⁴ To indict someone as a 'perpetrator' the prosecution had to prove that they had been motivated by the highly subjective standards of "blood-lust" or "base-motives".¹⁵⁵ Failure to prove such standards of culpability led to a history of lenient sentencing, as indicted perpetrators were downgraded to the minor category of accomplice.¹⁵⁶ These standards of culpability also failed to incorporate the complexity, reach and type of perpetrator.¹⁵⁷ Furthermore, the 'Penal Code' prohibited retroactive

¹⁴⁸ Douglas, *The Memory of Judgement*, p4; Hirsh, 'Andrei Sawoniuk'; Wittmann, 'Indicting Auschwitz?', pp509-513; Pendas, *The Frankfurt Auschwitz Trial*, pp1-6, 290, 293.

¹⁴⁹ Shoshana Felman, 'Theaters of Justice: Arendt in Jerusalem, the Eichmann Trial, and the Redefinition of Legal Meaning in the Wake of the Holocaust', *Critical Inquiry*, 27:2 (2001), p206.

¹⁵⁰ Fraser, *Law After Auschwitz*, pp178-179, 274-276, 279, 284-285, 288-289, 291.

¹⁵¹ Hirsh, 'Andrei Sawoniuk', pp532-534.

¹⁵² *Ibid*, p532.

¹⁵³ *Ibid*, p534.

¹⁵⁴ Wittmann, 'Indicting Auschwitz?'; Haberer, 'History and Justice'; Pendas, *The Frankfurt Auschwitz Trial*; Jonathan Friedman, 'The Sachsenhausen Trials: War Crimes Prosecution in the Soviet Occupation Zone and in West and East Germany', in Heberer and Matthäus (eds.), *Atrocities on Trial*, pp168-171; Stoll, 'Hitler's Unwilling Executioners?', in *Ibid*, pp165-178.

¹⁵⁵ Including 'sexual instincts, greed, maliciousness or cruelty, to facilitate or conceal another crime', Haberer, 'History and Justice', p497.

¹⁵⁶ Wittmann, 'Indicting Auschwitz?'; Haberer, 'History and Justice'; Pendas, *The Frankfurt Auschwitz Trial*; Friedman, 'The Sachsenhausen Trials', in Heberer and Matthäus (eds.), *Atrocities on Trial*, pp171, 174; Stoll, 'Hitler's Unwilling Executioners?', in Bankier and Michman (eds.), *Holocaust and Justice*, pp187-190; Douglas, *The Right Wrong Man*, pp11-13.

¹⁵⁷ Haberer, 'History and Justice', p497.

prosecution, and thus the paradox, in thousands of trials held in then West Germany, of Nazi norms and regulations being used to indict Nazi crimes.¹⁵⁸ As consciousness of the Holocaust was raised in the 1980s in Canada, France and the UK, debates surrounding the incorporation of 'crimes against humanity' (France, Canada) or 'war crimes' (UK) into domestic law, and then on the 'fairness' and legality of the trials themselves, further diminished and distorted the extraordinary crimes of the Holocaust.¹⁵⁹ The debates were also infused by antisemitism (couched in both political and theological narratives) and notions of the Holocaust and Jews as the "Other".¹⁶⁰

Ordinary law has also been criticised as inadequate when faced with the eyewitness evidence of Holocaust survivors.¹⁶¹ For some, the legal binding of past evidence is nowhere more visible and paradoxical than in the case of survivor testimony.¹⁶² Although the law allows survivors to tell and re-tell the truth of their experiences a range of trials have purposively repressed their testimony 'in the name of precision and judicial fair play', while in the United States, according to Wendie Ellen Schneider, the standards applied by the courts to assess survivor accounts have been 'contradictory or irrational'.¹⁶³ More specifically, in contrast to Israeli criminal law, which was not only deliberately extended to accommodate the crimes of the Holocaust but was explicitly 'victim-driven' (chapter three), a number of 'procedurally ordinary' trials have intentionally controlled, derided and officially rejected survivor testimony as 'hearsay' (chapter three).¹⁶⁴ As Hirsh lamented, in such cases:

¹⁵⁸ Meaning that crimes in the past can only be tried or judged according to the laws in place during the period being investigated. Wittmann, 'Indicting Auschwitz?', pp508-510; Haberer, 'History and Justice', pp494-503; Pendas, *The Frankfurt Auschwitz Trial*, pp6, 14. See also: Didi, Herman, 'I Do Not Attach Great Significance To It: Taking Note Of 'The Holocaust' In English Case Law', *Social and Legal Studies*, 17:4 (2008), p428.

¹⁵⁹ Fraser, *Law After Auschwitz*, pp178-179, 188-192, 274-276, 315. See also: Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* Montreal: (McGill-Queen's University Press, 2000); Norman Erwin, 'The Holocaust, Canadian Jews, and Canada's "Good War" Against Nazism', *Canadian Jewish Studies*, 24 (2016), pp103-123; Tony Kushner, 'The Impact of the Holocaust on British Society and Culture', *Contemporary Record*, 5:2 (1991), pp349-375; Andy Pearce, 'The Development of Holocaust Consciousness in Contemporary Britain, 1979-2001', *Holocaust Studies*, 14:2 (2008), pp71-94.

¹⁶⁰ Fraser, *Law After Auschwitz*, pp279, 284-285, 306-307.

¹⁶¹ Hirsh, 'Andrei Sawoniuk', p530; Fraser, *Law After Auschwitz*; Pendas, *The Frankfurt Auschwitz Trial*; Carter-White, 'Auschwitz, Ethics and Testimony'; Lawson, *Debates*, pp271-300.

¹⁶² Hirsh, 'Andrei Sawoniuk', pp529-545; Pendas, *The Frankfurt Auschwitz Trial*, p291.

¹⁶³ Ibid. Schneider, 'Past Imperfect', p1536.

¹⁶⁴ A strategy in 1961 informed by Rachel Auerback, a survivor of the Warsaw ghetto and participant in its uprising, Ruth Bettina Birn, 'Fifty Years After: A Critical Look At The Eichmann trial', *Case Western Reserve Journal of International Law*, 44:1 (2011), p466. Landsman, 'The Eichmann Case', p79.

Cross-examination is Primo Levi's nightmare come to life. An educated, intelligent, articulate person is paid by the state, in the interests of the Nazi killer, to act the part of the friend who refuses to hear.¹⁶⁵

Thus, rather paradoxically, given its role in the securing of survivor justice, the law, in many Holocaust-related trials, has placed greater esteem on perpetrator documentation than on the accounts of the victims.¹⁶⁶ Richard Carter-White has specifically accused the law's 'uncompromising criteria of evidentiality and plausibility' of repeating the tactics of negationists by reaffirming their scepticism of the survivor voice, 'albeit for diametrically opposed reasons'.¹⁶⁷ Likewise paradoxically, while the Eichmann trial was seminal because of its didactic foregrounding of the survivor voice (chapter three), Douglas claims that the misidentification of Demjanjuk in another Israeli courtroom, although 'far from straightforward', 'represented the collapse of the paradigm'.¹⁶⁸

Ordinary criminal law has likewise been identified as inadequate at the stage of punishment. Since the IMT it has been argued that the law is 'simply not equipped to deal ... with a guilt that is beyond crime'.¹⁶⁹ As Gideon Hausner more specifically stated, when seeking the death penalty for Eichmann in 1961, the fact that under the law the same punishment would be meted out for the murder of one human being as it would for the murder of 'ten or a hundred or a million', bears witness to there being no adequate retribution 'which fits the enormity of the crime'.¹⁷⁰ John K. Roth agrees that the punishment of those guilty of mass murder is not equal to complete justice.¹⁷¹ Fraser likewise acknowledges the same limitations plaguing international tribunals and the 'International Criminal Court' (ICC).¹⁷² Although the didactic role of Holocaust-related, and other 'atrocities trials', has been identified as a form of extended retributive redress (see

¹⁶⁵ Hirsh, *Law Against Genocide*, p103.

¹⁶⁶ , Jockusch, *Collect and Record!*, pp11, 200-201. And in common with its history counterpart as noted above.

¹⁶⁷ Carter-White, 'Auschwitz, Ethics and Testimony', pp683, 691, 696.

¹⁶⁸ Douglas, *The Right Wrong Man*, p8.

¹⁶⁹ Ibid, p6.

¹⁷⁰ *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Vol. V, p2214. All proceeding references to this trial will be prefixed by AET.

¹⁷¹ John K. Roth, 'Prosecution, Condemnation, and Punishment: Ethical Implications of Atrocities on Trial' in Heberer and Matthäus (eds.), *Atrocities on Trial* pp283-303.

¹⁷² Fraser, *Law After Auschwitz*, p289.

above), others have argued that they have little impact on public (and political) consciousness.¹⁷³

Conversely, and arguably more controversially, David Fraser insists that the Holocaust does not pose challenges to the law because of its extraordinary crimes but because of its legal normality and basis, with barriers to judicial redress of these crimes inherent in the law itself.¹⁷⁴ Consequently, one of the most paradoxical distortions of Holocaust historiography is the branding of the Nazi regime as criminal and the Holocaust as illegal.¹⁷⁵ First demarcated in these terms by the IMT, and dutifully repeated by successive trials, the Nazi state may have been criminal but this conclusion is an ethical or political decision and not an epistemological fact.¹⁷⁶ As Fraser points out, Nazi law defined, differentiated and persecuted the Jews long before Auschwitz, and constructed an 'entire jurisprudence' of how and why being a Jew was an offense against public order.¹⁷⁷ Most specifically, the infamous 'Nuremberg Laws' were the legalisation of extermination.¹⁷⁸ The 'law-ful' authority of both the government and the Holocaust was also the result of the active participation of an army of lawyers and judges and implemented across all levels of judicial bureaucracies.¹⁷⁹ In turn, this army of 'ordinary men' were willing to act in the 'exclusion, enslavement, spoliation and death of millions of their fellow human beings'.¹⁸⁰

Yet, this valuable lesson of the Holocaust has not pierced the judicial consciousness precisely because it has been declared as "not law".¹⁸¹ Instead, 'mutually reinforcing discourses' of both the Holocaust and the law have been sanctioned in which a particular

¹⁷³ Douglas, *The Right Wrong Man*, pp6-7. Donald Bloxham, 'From Streicher to Sawoniuk: the Holocaust in the Courtroom', in Dan Stone (ed.), *The Historiography of the Holocaust* (Hampshire: Palgrave Macmillan, 2004), pp411-412.

¹⁷⁴ Fraser, *Law After Auschwitz*, pp12, 178-179, 274-276, 279, 284-285, 288-289, 291.

¹⁷⁵ Also raised by Arendt in 1963, Arendt, *Eichmann in Jerusalem*, p290.

¹⁷⁶ Fraser, *Law After Auschwitz*, p278.

¹⁷⁷ *Ibid*, p14.

¹⁷⁸ Relating to two major pieces of legislation passed in Germany in September 1935, the 'Law for the Protection of German Blood and German Honour' and the 'Reich Citizenship Law', identified as central to the German state's racial ideology. *Ibid*.

¹⁷⁹ *Ibid*, pp15, 122.

¹⁸⁰ A reference to Daniel Goldhagen's "willing executioners", Jonah Daniel Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (London: Little, Brown and Company, 1996). Although the complicity of the majority of the legal profession was perhaps more relevant to the concept of 'desk perpetrators'. Fraser, *Law After Auschwitz*, pp15, 5.

¹⁸¹ *Ibid*, p6.

version of law *after* Auschwitz persists.¹⁸² This version consigns law in Nazi Germany as somehow ruptured, in contradiction of its continuity of both legal text and practice and its embodiment of concepts grounded in Western culture and law.¹⁸³ It also ignores the long history of persecution in which the law, variously exercised, has been utilised to define, expel, incriminate and murder Jews (and other minorities) across Europe.¹⁸⁴ More specifically, the 'Nuremberg Laws' were not the first judicial attempts at controlling and criminalising personal relationships between Jewish and other defined citizens in accordance with discriminatory concepts of 'miscegenation'.¹⁸⁵ For some the continuity (and progression) of legal persecution extends from the medieval past to the present-day, with its most visible (and modern) manifestation being the Holocaust.¹⁸⁶ Conversely, David Nirenberg argues that the implied consistency of persecution ignores the contingency of Jewish experience and practise across Europe as well as the impact of individual agency, local contexts and varying discourses of blame.¹⁸⁷ It likewise minimises 'the interdependence of violence and tolerance' accompanying Jewish lives and policy across Europe.¹⁸⁸ Yet, despite the complexity of Jewish persecution 'by the civilized means of the law', Fraser contends that the 'mutually reinforcing discourses' specifically surrounding the illegality and rupture of the Holocaust are likely to continue to dominate, if not historiography, certainly judicial consciousness and training, since the law cannot pardon itself, it cannot confess to itself, but merely try to forget itself.¹⁸⁹

Critics also identify Holocaust litigation cases as comprising a history of political utility, with both disciplines intentionally 'co-opted' for extra-historical and extra-legal ends.¹⁹⁰

¹⁸² Ibid, p216.

¹⁸³ Including eugenics, euthanasia, racial hierarchies, Ibid, p14.

¹⁸⁴ David Nirenberg, *Communities of Violence: Persecution of Minorities in the Middle Ages* (New Jersey: Princeton University Press, 1996). Variously exercised in previous centuries through the Crown, specified municipalities, unions of elites, prior to its modern form in Europe, Ibid, pp19-21.

¹⁸⁵ Ibid, pp127-165. In turn, Israeli religious law 'does not enable intermarriage with non-Jews', Felman, 'Theaters of Justice', footnote 11, p207.

¹⁸⁶ Nirenberg, *Communities of Violence*, pp3-5, 7. See also Deborah Kaufman, Gerald Herman and David Phillips (eds.), *From the Protocols of the Elders of Zion to Holocaust Denial Trials: Challenging the Media, the Law and the Academy* (Middelsex: Valentine Mitchell, 2007).

¹⁸⁷ Nirenberg, *Communities of Violence*, pp6-7, 43-68. See also Albert S. Lindemann, *Anti-Semitism Before the Holocaust* (Oxon: Routledge, 2014).

¹⁸⁸ Nirenberg, *Communities of Violence*, pp7-10, 200-230.

¹⁸⁹ Felman, 'Theatres of Justice', p221. Fraser, *Law After Auschwitz*, p10.

¹⁹⁰ Ibid, pp186-212, 272; Priemel and Stiller, 'Introduction', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, p3. See also Rouso, *The Haunting Past*; Whinston, 'Siemens Slave-Labor Cases'; Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, pp397-419; Pendas, *The Frankfurt Auschwitz Trial*; Heberer and Matthäus (eds.), *Atrocities on Trial*; Bankier and Michman (eds.), *Holocaust and Justice*; Wilson, *Writing History*. Such interests are obviously not confined

Most notably, the interests and relations of the Allied powers played-out at the IMT; a case, according to Fraser, in which the “politics” of Nuremberg competed with the “law” of Nuremberg.¹⁹¹ Similarly, it is noted that the NMTs were informed by post-war 'policies of democratization, denazification, demilitarization, and decartelization'.¹⁹² Likewise, attempts at war crimes prosecutions in Canada were restricted by a discursive matrix of national identity, and in France by objectives of selective redress and collective memory, while the interests and politics of the 'Cold War' both confined and defined a range of perpetrator trials held in East and West Germany, Britain and the United States.¹⁹³

More recently, Rousso has observed that historians have not only been transformed into “advocates”, as coached by either the prosecution or defence, but as agents of national debate and restitution.¹⁹⁴ Although identified as genuine attempts by the state to redress past crimes of atrocity, he is wary of the subsequent transfer of ownership of historical knowledge to not only the courts but to politicians.¹⁹⁵ And, once assigned to serve “the good cause”, or even the “vengeance of the nations”:¹⁹⁶

the more pressure there may be on the historian to provide a certain “right” answer, and the more likely it is that anything deviating from the public's expectations may well be ignored or even rejected.¹⁹⁷

Consequently, historians have been 'forced into the service of moral and legal forms of judgment ... [that] do violence to the subtleties and nuances of the historian's search for

to Holocaust-related trials. See Luker, ‘Reading the Archive’, as an introduction into the use of historians and jurists in the so-called ‘history wars’ related to Australia’s colonial past (and present).

¹⁹¹ Fraser, *Law After Auschwitz*, p123.

¹⁹² Priemel and Stiller, 'Introduction', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, p5.

¹⁹³ **Canada:** Fraser; *Law After Auschwitz*, pp306-337. See also Randolph L. Braham, ‘Canada and the Perpetrators of the Holocaust: The Case of *Regina v Finta*’, 9:3 (1995), pp293-317. **France:** Rousso, *The Haunting Past*; Fraser; *Law After Auschwitz*, pp186-213, and more specifically confined by ahistorical narratives (and national amnesia) of the illegality of the Vichy government and national resistance, *Ibid*, pp186-189. **Germany:** Pendas, *The Frankfurt Auschwitz Trial*, p3; Friedman, 'The Sachsenhausen Trials', in Haberer and Matthäus (eds.), *Atrocities on Trial*, pp159-184. **Britain:** Fraser, *Law After Auschwitz*, pp253-259; Hirsh, *Law Against Genocide*, p101; Ulf Schmidt, "'The Scars of Ravensbruck": Medical Experiments and British War Crimes Policy, 1945-1950', in Haberer and Matthäus (eds.), *Atrocities on Trial*, pp123-150. **US:** Fraser, *Law After Auschwitz*, pp230-232.

¹⁹⁴ James Sadkovich cited in Wilson, *Writing History*, p7. Rousso, *The Haunting Past*, p55.

¹⁹⁵ Henry Rousso, ‘Intellectuals and the Law’, *Modern & Contemporary France*, 17:2 (2009), pp153-161.

¹⁹⁶ *Ibid*; Rene de Chateaubriand cited in *Ibid*, p49.

¹⁹⁷ Ora Avni, 'Foreword', *Ibid*, ppix-x.

truth'.¹⁹⁸ Accordingly, it is recognised that the Holocaust as a past event has been variously manipulated through a multiplicity of discourses that 'owes more to politics than to law' and more to politics and the law than to the historical record.¹⁹⁹ Ultimately, state intervention in history is viewed as 'double-edged'.²⁰⁰ As law professor Alan M. Dershowitz insisted, 'he does not want a government telling him the Holocaust has happened because he does not want to have a government telling him that the Holocaust has not happened'.²⁰¹

However, foremost in the 'consensus of critique' is the accusation that the law cannot 'do justice' to the complexities of the Holocaust.²⁰² A range of legal explanations are proffered, but historians, like their jurist counterparts, site the major barrier as disciplinary incompatibility.²⁰³ It is inevitable that the case-specific form of Anglo-American law will produce partial historiographies of the Holocaust. But, combined with its adversarial practice, it has also produced flawed, and at times empirically inaccurate, facts and narratives of its genocide. Perpetrator trials, in particular, have been found guilty of both relegating the Holocaust to 'background noise' and distorting its 'multifaceted past'.²⁰⁴ Thus, despite its ground-breaking reputation, the genocide of European Jewry was marginalised at the IMT, within an Allied focus on 'crimes against peace' and 'war crimes'. The IMT remains a seminal trial, and yet it misrepresented the crimes of the Nazi regime, marginalised the racial basis of its legal order, misunderstood the complexity of perpetrator behaviour and type and diminished Jewish suffering.²⁰⁵ Furthermore,

¹⁹⁸ Evans, 'History, Memory, and the Law' p326.

¹⁹⁹ Bloxham, 'From Streicher to Sawoniuk', in Stone (ed.), *The Historiography of the Holocaust*, p398. Katrin Stoll disagrees and argues instead that in the Bielefeld Bialystok Trial (1965-1967) the narrative subsequently constructed was predominantly legal, Stoll, 'Hitler's Unwilling Executioners?', in Bankier and Michman (eds.), *Holocaust and Justice*, pp160, 192-193. See also: Rousso, *The Haunting Past*; Whinston, 'Siemens Slave-Labor Cases'; Heberer and Matthäus (eds.), 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, pp xv-xviii; Michael R. Marrus 'The Nuremberg Doctors' Trial and the Limitations of Context', in Ibid, pp105-106; Friedman, 'The Sachsenhausen Trials', in Ibid, pp159-184; Marrus, 'The Case of the French Railways', in Bankier and Michman (eds.), *Holocaust and Justice*, pp245-264.

²⁰⁰ Editorial, 'Judges and Politicians as Historians?', *Journal of Genocide Research*, 9:1 (2007), p2.

²⁰¹ Ibid.

²⁰² Douglas, 'The Didactic Trial' in Bankier and Michman (eds.), *Holocaust and Justice*, p12.

²⁰³ In the main 'legal exceptionalism' (the "law is an ass"), the 'partiality thesis', and the law as 'monumentally boring'. Wilson, *Writing History*, p6.

²⁰⁴ Fraser, *Law After Auschwitz*, pp315, 187-192, 196-212. Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, pp408-411, 414-415; Avni, 'Foreword', in Rousso, *The Haunting Past*, pp xi-xv, 57-55, 73-74; Wilson, *Writing History*, p3.

²⁰⁵ Fraser, *Law After Auschwitz*, pp126-12; Heberer, 'History and Justice', pp493-494; Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment* (Chapel Hill, NC: University of North Carolina Press, 1998); Bloxham, *Genocide on Trial*; Hirsh, *Law Against Genocide*. Of course, this was not the fault of the law but reflected the demands of the respective Allied governments.

Nuremberg was 'the birthplace of intentionalism', an explanatory model later held responsible for distorting and limiting investigations of the Holocaust for decades.²⁰⁶ In turn, a prominent 'Nuremberg historiography' has been accused of over-informing Holocaust scholarship since 1945, and, although modified, still disproportionately informs historian approaches to the Holocaust.²⁰⁷ Subsequently, the IMT has been criticised for 'straight-jacketing' both history and justice.²⁰⁸

Similarly, the following NMTs produced and authorised dominant narratives of totalitarianism as primary explanation and defence, genocide as exclusively the murder of the European Jews, the 'clean hands' of the Wehrmacht, the monolithic nature and primacy of the SS as *the* perpetrator group, and the exculpation of the German population.²⁰⁹ Yet, despite historian input, all narratives were later acknowledged as flawed.²¹⁰ Decades later, in trials in France, contentious narratives were authorised that distorted the roles of both the Vichy government and 'the Resistance'.²¹¹ More recently, litigation cases in the United States, against the use of 'involuntary labour' by Siemens and other German companies during the Nazi regime, failed to distinguish between the 'forced labour' of nationals from the occupied countries and the 'slave labour' of Jews from the concentration camps.²¹² As Stephen Whinston finds, in the Siemens case, the concluding narrative that Jews had been used as war-related labour, rather than worked to death as part of a deliberate policy of extermination, remains on the legal record.²¹³ Equally disturbing, as its education and memorialisation penetrated both official and public consciousness in the UK, English case-law has transformed 'the Holocaust' into a

²⁰⁶ Haberer, 'History and Justice', p494. See also, Rousso, *The Haunting Past*, p67; Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, pp401-402; Fraser, *Law After Auschwitz*, p136; Heberer and Matthäus, 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, ppixvi-xviii, xx-xxi; Bilsky, 'The Judge and the Historian', p131.

²⁰⁷ Bloxham, *Genocide on Trial*, pxi; Rousso, *The Haunting Past*, pp67; Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, pp401-402; Fraser, *Law After Auschwitz*, p136; Heberer and Matthäus, 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, ppixvi-xviii, xx-xxi; Bilsky, 'The Judge and the Historian', p131; Priemel and Stiller, 'Introduction', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp13-14.

²⁰⁸ Haberer, 'History and Justice', p491.

²⁰⁹ Priemel and Stiller, 'Introduction', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp11-13.

²¹⁰ The 'epistemic community' had included Hajo Holborn and Walter L. Dorn, *Ibid*, p8.

²¹¹ See as examples, the Klaus Barbie (1987), Paul Touvier (1994) and Maurice Papon (1997-98) trials, Rousso, *The Haunting Past*; Fraser, *Law After Auschwitz*, pp186-212.

²¹² Whinston, 'Siemens Slave-Labor Cases'.

²¹³ *Ibid*, pp167-170.

stock-phrase that is now uttered 'without awareness' and in cases that have nothing to do with its crimes.²¹⁴

As already noted, Holocaust-related trials have also been found guilty of failing to do justice to the complexities of perpetration, and, most critically, to the experiences and voices of survivors. Given the inevitable focus on individuals (in accordance with the law's rules and functions), but also on 'key' perpetrators, the law has masked the complexity, magnitude and reach of perpetration.²¹⁵ Moreover, in attempts to rouse public indignation, the portrayal of perpetrators as 'sadists and reprobates', 'abnormal', 'inhuman' and the criminal outsider, under-estimated the diversity of motive and type.²¹⁶ Indicative was the 'Auschwitz trial' in West Germany (1963-65), which produced a distorted narrative of 'vicious sadists', while the complex machinery of mass murder was diminished.²¹⁷ According to Devin O. Pendas, the concluding historical account was a form of injustice 'at the level of historical consciousness'.²¹⁸ In particular, a dominant intentionalist focus on a 'monocausal "patho-ideological"' explanation ignored the behaviour, complicity and crimes epitomised by the so-called 'desk perpetrators'.²¹⁹ Although this crucial omission was highlighted by the Eichmann trial, the Prosecution in Israel still reinforced the then 'fashionable understanding' of this key Nazi perpetrator as 'depraved' and 'more of a monster ... than he was' (chapter three).²²⁰

²¹⁴ Herman, 'The Holocaust' In English Case Law', pp430, 444.

²¹⁵ Wittmann, 'Indicting Auschwitz?', p531; Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, pp398, 415; Haberer, 'History and Justice', p493; Pendas, *The Frankfurt Auschwitz Trial*, pp292-294, 301, 304; Heberer and Matthäus, 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, pp xv-xvii; Marrus, 'The Nuremberg Doctors' Trial', in Ibid, pp103-122; Hilary Earl, 'A Judge, A Prosecutor, And A Mass Murderer: Courtroom Dynamics in the SS-Einsatzgruppen Trial', in Bankier and Michman (eds.), *Holocaust and Justice*, pp47-67; Stoll, 'Hitler's Unwilling Executioners?', in Ibid, pp165-166, 188-193; Wilson, *Writing History*, pp3-4; Bilsky, 'The Judge and the Historian', p131.

²¹⁶ Wittmann, 'Indicting Auschwitz?', p512; Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, p415; Pendas, *The Frankfurt Auschwitz Trial*, p292. Jan Erik Schulte, 'The SS As "The Alibi Of A Nation"?: Narrative Continuities From the Nuremberg Trials To The 1960s', in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp146-147. Haberer, 'History and Justice', pp493-494. This portrayal was also reinforced in the prevailing historiography. See as examples, Gerald Reitlinger, *Final Solution: The Attempt to Exterminate the Jews of Europe 1939-1945* (London: Vallentine Mitchell, 1953); Joseph Tenenbaum, *Race and Reich: The Story of an Epoch* (New York: Twayne Publishers, 1956); Arendt, *Eichmann in Jerusalem* (a banal/demonic dichotomy).

²¹⁷ Wittmann, 'Indicting Auschwitz?', pp512-515. Pendas, *The Frankfurt Auschwitz Trial*, p294.

²¹⁸ Ibid, p298.

²¹⁹ Haberer, 'History and Justice', pp493-494, 497. Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, pp404-405; Pendas, *The Frankfurt Auschwitz Trial*, p2. Defined as 'a bureaucratic administrator who commits genocide with the stroke of a pen', Wilson, *Writing History*, ppix, 3.

²²⁰ David Cesarani, *Eichmann: His Life and Crimes* (London: Vintage, 2005), p3. Landsman, 'The Eichmann Case', p81.

In addition to the law's relegation of personal memoir as unreliable (see above), the IMT, NMTs (with the exception of the 'Doctor's Trial') and thousands of successor trials infamously ignored the survivor voice.²²¹ However, even when redressed, narratives of survivors and victims have been abstracted, flawed and misleading. Although celebrated for its 'victim driven' strategy, the Eichmann trial has been found guilty of distorting narratives of both resistance and survival (chapter three), while, in general, survivor testimonies have been assembled into idealised and stable narratives that are not only "historically inappropriate" but contradicted by testimony itself.²²² Furthermore, as already noted, a series of 'procedurally ordinary' trials have intentionally confined, challenged and derided survivor account and credibility (chapter three), while English case-law has been specifically accused by Didi Herman of 'racialising' Jews as 'alien'.²²³ Consequently, although Annette Wieviorka has warned of a contemporary privileging of unreflective survivor testimony, and, notwithstanding the lessons of misidentification at the first Demjanjuk trial (1986-1988), many more voices berate the law's inability to represent the complexity of survival as well as value its 'experiential' truths.²²⁴

And yet, despite the reach of these critiques, Rousso has identified a growing judicialisation of the Holocaust, and other past atrocities, since the 1990s and fears that the law is replacing "the tribunal of history".²²⁵ Schneider has likewise witnessed an increasing "turn to history" in American jurisprudence, despite the law having no standards of history-making.²²⁶ Richard Evans has further identified the development of a terminology surrounding the history of the Second World War that is more legal than historical in origin.²²⁷ And, similar to the concerns of Dershowitz, he fears that: 'Once the law starts dictating what may and what may not be said about the past, who knows where

²²¹ Fraser, *Law After Auschwitz*; Heberer and Matthäus, 'Introduction', in Heberer and Matthäus (eds.), *Atrocities on Trial*, pxix; Bilsky, 'The Judge and the Historian', p131.

²²² Lawson, *Debates*, pp271-300. See also Waxman, *Writing the Holocaust*.

²²³ Douglas, *The Memory of Judgement*, p226. Herman, 'The Holocaust' In English Case Law', p445.

²²⁴ Monica Black, 'A Review of Wieviorka, Annette, "The Era of the Witness"', trans. by Jared Stark, (Ithaca: Cornell University Press, 2006) at H-Net German History, April 2007. (Last Accessed January 2017). Douglas, *The Right Wrong Man*, pp68-108. Pendas, *The Frankfurt Auschwitz Trial*, p291. Of course, the same criticisms have been directed at historians. See footnote 25 and more recently Laura Jockusch, *Collect and Record!: Jewish Holocaust Documentation in Early Postwar Europe* (Oxford: Oxford University Press, 2012).

²²⁵ Rousso cited in Fraser, *Law After Auschwitz*, p201.

²²⁶ Schneider, 'Past Imperfect', p1539.

²²⁷ Evans, 'History, Memory and the Law', p326.

the process of interference with history and historians may end?’²²⁸ Critics have also cautioned against consistently bringing the Holocaust to trial. Rousso has specifically warned of the danger of raising doubts in the minds of the public over histories they thought had been settled.²²⁹ Michael Marrus is likewise wary of the impact of contrasting narratives on the public's trust in the reliability of historical knowledge, while Holocaust denial trials have been specifically accused of not only raising confused messages of its certainty but of risking a debate that ‘mainstream Holocaust historians can never win’ (chapter three).²³⁰

Comparative and critical analysis of a body of literature relating to Holocaust-related trials therefore appears to reaffirm that, regardless of examples of disciplinary reciprocity, the history-law relationship is a flawed and dysfunctional methodology in practice as well as in theory. Yet, opinion remains contested between those forewarning of an “unholy alliance”, amounting to ‘a subversion of justice and a debasement of history’, and those citing trials as ‘paradigmatic’ in their attempt to both grapple with the horror of the Holocaust and uphold justice. Likewise, critiques of political utility and misuse are tempered by support for the law's role in forcing nation states and populations, as well as individual perpetrators, to deal with the crimes of its atrocity.²³¹ Opinion also contrasts between those warning of ‘impoverished’ and ‘cooked’ histories, and those celebrating the production of ‘a distinctive form of authoritative narrative’, important insights and some didactic successes.²³² Furthermore, as repeatedly noted, despite evidence of a flawed and dysfunctional methodology, there is no formal opposition by either discipline to future collaboration in cases involving historical inquiry. In contradicting the findings above, a number of historians may have refused to act as legal witnesses, either as a direct result of previous experience (Raul Hilberg) or in opposition to the process in general (Rousso),

²²⁸ Ibid, p342.

²²⁹ Rousso, *The Haunting Past*, pp72-74.

²³⁰ Marrus, ‘The Case of the French Railways’, in Bankier and Michman (eds.), *Holocaust and Justice*, pp245-264. Haberer, ‘History and Justice’, footnote 106, p518; Carter-White, ‘Auschwitz, Ethics and Testimony’, pp687-688. Robert A. Kahn, ‘Rebuttal versus Unmasking: Legal Strategy in R. v. Zündel’, *Pattern of Prejudice*, 34:3 (2000), p9.

²³¹ Rousso, *The Haunting Past*; Whinston, ‘Siemens Slave-Labor Cases’; Bloxham, ‘From Streicher to Sawoniuk’ in Stone (ed.), *The Historiography of the Holocaust*; Fraser, *Law After Auschwitz*; Pendas, *The Frankfurt Auschwitz Trial*; Rousso, ‘Intellectuals and the Law’; Marrus, ‘The Case of the French Railways’, in Bankier and Michman (eds.), *Holocaust and Justice*, pp245-264; Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*.

²³² Wilson, *Writing History*, pp1, 18, 169. Hirsh, *Law Against Genocide*, p147. Douglas, *The Memory of Judgement*; Douglas, ‘The Didactic Trial’, in Bankier and Michman (eds.), *Holocaust and Justice*, pp11-22; Weckel, ‘The Power of Images’, in Priemel and Stiller (eds.), *Reassessing the Nuremberg Military Tribunals*, pp221-242; Douglas, ‘Jurisprudence of Atrocity’ in Ibid, p290.

but many others appear to be ‘voting ... with their feet and regularly entering the courtroom’.²³³ In turn, individual historians and jurists may agree that in the consistent seeking of justice for the past in the present: "At a certain point, one has to say: 'That's enough!'"²³⁴ But they likewise query if it is possible to leave history out of the courtroom when the law is being asked to judge on historical events.²³⁵ As Evans points out, if historians refused to participate, what other scholar is equipped ‘to offer expert opinion in a legal action that turns on the research and writing of history itself?’²³⁶ Likewise, in cases of mass atrocity, is Deborah Lipstadt correct to assert that: “It is our responsibility”?²³⁷ Moreover, Douglas has argued that historians will play an ever greater role in future Holocaust-related trials. As eyewitnesses diminish in number, and the focus of prosecution transfers to different forms of perpetrator, he argues that the courts will need the expertise of historians to provide not only historical background and explanation but evidence of collaborative guilt.²³⁸ Therefore, despite the inherent flaws of methodology, the collaboration of history and the law is destined to proceed in cases where historical scholarship is legally relevant.²³⁹ A re-evaluation of the history-law relationship is therefore pertinent, to not only address methodological omissions in the existing critical research, but to inform future disciplinary collaboration in the courtroom. The next chapter begins the intended re-evaluation of this relationship by profiling the four Holocaust-related trials selected to act as its research context.

²³³ Rothman, ‘The Historian as Expert Witness’, p31.

²³⁴ Michel Zaoui, former counsel for the civil parties in the Papon case, cited by Marrus, ‘The Case of the French Railways’, in Bankier and Michman, *Holocaust and Justice*, p264.

²³⁵ Pendas, *The Frankfurt Auschwitz Trial*, p299.

²³⁶ Evans, *Telling Lies About Hitler*, p326.

²³⁷ Deborah Lipstadt, quoted in ‘*Holocaust Denial and the 2000 Libel Trial in the U.K.*’, at: <http://www.holocaustdenialontrial.org/trial?view=print> (Accessed 25 February 2008).

²³⁸ Douglas, *The Right Wrong Man*, pp14, 218.

²³⁹ Note that some historians and jurists look to the hybrid models of international tribunals as a future infrastructure of successful disciplinary collaboration. Wilson, *Writing History*, p19. Leona Bilsky similarly suggests that ‘Transnational Holocaust Litigation’ (THL) cases in the US have redressed the failures of the adversarial form, Bilsky, ‘The Judge and the Historian’, p119. However, both authors also accept that fundamental changes need to be made to the legal practices of the former, Wilson, *Writing History*, pp22-23, 216-226, and the nationalist lens of the latter, Bilsky, ‘The Judge and the Historian’, p119. In the meantime there is no evidence that the required changes will be acknowledged by the respective judicial authorities far less implemented.

Chapter Three: Holocaust-Related Trials: A Comparative Base of Disciplinary Collaboration

In changing the focus from a general overview to more specific Holocaust-related trials, this chapter introduces and profiles the criminal cases of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the civil case instigated by David Irving (2000).¹ In the case of Zündel the two trials of 1985 and 1988 are included in the research since they are inextricably linked. The chapter first establishes their comparative credentials. Through both primary and secondary research, it demonstrates that, in addition to being sited in different countries and decades, the Eichmann, Zündel and Irving trials were framed by different backgrounds and contexts, as well as substantive law. They were also governed by different legal statutes, indictments, standards of proof and 'triers of fact'. Once in court, they foregrounded discrete foundations of evidence and variously 'cooked' the record of the Holocaust.² The chapter also demonstrates that, although successful in their respective objectives, the trials have been awarded different reputations in terms of their didactic impact and success. Consequently, the chapter concludes that the Eichmann, Zündel and Irving trials provide an appropriate canvas pertinent to comparative research of the history-law relationship.

As further background and context the chapter also identifies the contribution that each trial makes to the existing 'consensus of critique' outlined in chapter two. Although all four trials join the long history of successful litigation related to the Holocaust, it finds a familiar record of breaches of 'due process', especially in the Eichmann trial, the limitations of ordinary law when faced with historical evidence and opinion, especially in the Zündel trials, and extra-historical and extra-legal interests impacting on all four courtrooms. The chapter also finds the reconstruction of distorted and partial narratives that, however grand in reach, could not 'do justice' to the historical complexities of the Holocaust.³ Through the daily recorded transcripts of each trial, the chapter specifically identifies a record of practice integral to Anglo-American law that not only 'cooked' but

¹ Although it was Deborah Lipstadt who had been forced into court future references will relate to the common usage of the 'Irving trial' throughout this chapter.

² Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), p169.

³ Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', in David Bankier and Dan Michman (eds.), *Holocaust and Justice: Representation of the Holocaust in Post-War Trials* (New York: Berghahn Books, 2010), p12.

masked the facts and record of the Holocaust in the legal form. The chapter concludes that the existing 'consensus of critique', warning of the limitations of the law as a method of historical inquiry, is further corroborated by the Eichmann, Zündel and Irving trials. But, contrary to conventional wisdom berating the legal cases in Canada, this critique is as relevant to the Eichmann and Irving trials as it is to the Zündel trials.

The background, premise and outcome of the criminal trials of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the civil case instigated by David Irving (2000) are already familiar within a body of secondary literature.⁴ However, in order to demonstrate their comparative credentials, it is necessary to identify and repeat many of its findings, while a close reading of the daily recorded transcripts of each trial adds knowledge to its research. From both literature and transcripts it is obvious that disparities begin with the backgrounds of the main characters. It is common knowledge that Eichmann was a recognised perpetrator of the Holocaust, while both Irving and Zündel were known advocates of its denial.⁵ These deniers were further connected, since Irving had not only appeared as an expert witness on behalf of Zündel's defence in 1988, but sited his rejection of foundational facts of the Holocaust to evidence presented at this trial.⁶ However, despite a shared past and record, these deniers differed in profile and repute. In contrast to Zündel, who had been officially cited "as one of the world's biggest purveyors of Nazi propaganda", Irving's body of work was known to an audience of established academics and reviewers and published by reputable companies.⁷ Likewise, although both similarly

⁴ **Eichmann:** Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963); Hanna Yablonka, *The State of Israel vs. Adolf Eichmann* (New York: Schocken, 2004); David Cesarani, *Eichmann: His Life and Crimes* (London: Vintage, 2005); Deborah E. Lipstadt, *The Eichmann Trial* (USA: Schocken Books, 2011). **Zündel:** Alan Davies, 'A Tale of Two Trials: Antisemitism in Canada', *Holocaust and Genocide Studies*, 4:1 (1989), pp77-88; Leonidas E. Hill, 'The Trial of Ernst Zündel: Revisionism and the Law in Canada' (Canada: Simon Wiesenthal Annual 6, 1989); Marouf A. Hasian Jr., 'Canadian Civil Liberties, Holocaust Denial, and the Zündel Trials', *Communications and the Law*, 21:3 (1999), pp43-55; Robert A. Kahn, 'Rebuttal versus Unmasking: Legal Strategy in R. v. Zündel', *Patterns of Prejudice*, 34:3 (2000), pp3-15. **Irving:** Richard J. Evans, *Telling Lies About Hitler: The Holocaust, History And The David Irving Trial* (London: Verso, 2002); D. D. Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: Granta Books, 2002); Deborah E. Lipstadt, *History on Trial: My Day in Court with David Irving* (New York: HarperCollins, 2006).

⁵ Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (London: Penguin Books Limited, 1994). Kahn, 'Rebuttal versus Unmasking'.

⁶ For Irving's examination-in-chief and cross-examination see: *Her Majesty the Queen and Ernst Zündel* (424/88), Vol. XXXIII, pp9312-9450; Vol. XXXIV, pp9455-9822, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1988.

⁷ Hill, 'Revisionism and the Law', p2. Relating to Irving see: Hugh Trevor-Roper, 'Hitler: Does History Offer a Defence?', *Sunday Times*, 12 June 1977; John Keegan, 'Straight Path of Evil', *The Guardian*, 22 June 1978; Donald Cameron Watt, 'Understudy to Evil', *Sunday Times Books*, 13 August 1989. Publishers of his work included, Arndt Verlag (Germany), Harper Collins Publishers (London), Penguin Books

engaged with antisemitic and right-wing groupings, an extensive bibliography, and expertise in the history of the Second World War and the 'Third Reich', had specifically awarded Irving with the contentious reputation of being 'the most assiduous and persistent of researchers', a one-man school of history', alongside charges of being 'a hanger on at Hitler's court' and holding 'repugnant' views.⁸ Given his renowned expertise, Irving had also been identified as 'one of the most dangerous spokespersons for Holocaust denial', indeed 'the denier's best shot'.⁹

Infamously, both Eichmann and Zündel had eluded prosecution until forced into court. They were also both criminal cases. As a registered war criminal, Eichmann was finally located in Buenos Aires in 1957, 'collected' by Mossad on the evening of 11 May 1960, and flown to Israel nine days later (20 May 1960) to be interrogated and to await trial.¹⁰ As a known purveyor of Nazi literature, Zündel was finally brought to trial in Canada in 1985, for disseminating "false news", after previous attempts at halting his propagation of antisemitic/Holocaust denial tracts had proven unsuccessful.¹¹ In contrast, Irving initiated a civil case, and more specifically a libel case, that forced Deborah Lipstadt (author) and Penguin Books (publisher) into court in the UK in 2000, to defend the truth

(London and Canada), Macmillan Publishing Company (London and New York), St. Martin's Press (London).

⁸ Both had been involved with the 'Institute for Historical Review', recognised by Judge Thomas in 1988 as a vehicle of antisemitic and racist literature, ZT 1988, Vol. XXXVI, p10440. For an overview of the range of connections fostered by Irving see the examination and cross-examination of Defence witness Hajo Funke in *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), Day 27, pp9-165 and Day 28, pp10-202, Holocaust Research Institute, Royal Holloway, University of London (HRIRH). All proceeding references to the daily transcripts of this trial will be prefixed by HRIRH. Additional archival material will also be prefixed by their Trial Bundle (TB) letter and number. Irving's published work began in 1963 (*The Destruction of Dresden*) and totalled over 30 different titles by the time of the trial, including, *Hitler's War* (1977, 1991), *The War Between the Generals* (1981), *Goering, A Biography* (1989) and *Goebbels. Mastermind of the Third Reich* (1996). For reviews of his expertise see HRIRH, (TB) B6 'Plaintiff's Expert Reports: ... Material to be put to Subpoenaed Witnesses'. For media coverage of the selected comments see: Watt, 'Understudy to Evil'; Keegan, 'Straight Path of Evil'; Donald Cameron Watt, *Sunday Times*, 29 May 1977; Robert Harris, 'The Man Who Loved Adolf Hitler', *The Evening Standard*, 1 April 1996.

⁹ Lipstadt, *Denying the Holocaust*, p181. Leader, 'Truth's Sheer Weight: Irving was the Deniers' Best Shot', *The Guardian*, 12 April 2000, p22.

¹⁰ Through information sent to the Israeli Foreign Ministry by Fritz Bauer, Attorney-General of Hesse, Cesarani, *Eichmann*, pp222, 223. Or illegally kidnapped according to Eichmann's defence lawyer Dr Robert Servatius, *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Vol. I, p8, Newcastle University Library. All proceeding references to this trial will be prefixed by AET.

¹¹ Zündel was born in Germany in 1939 but emigrated to Canada in 1958. He published under his own company, Samisdat Publications. Previous attempts to bring him to trial included those by the 'Canadian Holocaust Remembrance Association' (CHRA), aiming to have Zündel's mailing privileges revoked in violation of hate speech legislation (1982), and then by Sabina Citron (Holocaust survivor and Head of CHRA), aiming to prosecute Zündel under anti-hate law (1983), Hasian Jnr., 'Canadian Civil Liberties', p47; Kahn, 'Rebuttal versus Unmasking', p6.

of charges written and published that he was a Holocaust denier, a neo-fascist and a falsifier of history.¹²

In common with all legal cases, the trials were not simply 'blank pages' on which the charges had been 'inscribed in an "objective" fashion'.¹³ Held in different countries, they were not only framed by discrete national contexts and objectives but typically made compromises with the history and politics of their respective hosts. Arguably, extra-historical and extra-legal drivers were most obvious in the case of Eichmann, whose trial, in the then new state of Israel, was visibly motivated by 'national pedagogy'.¹⁴ In a context of Israeli nation-building, the intention was to expose not only the criminality of Eichmann but 'the entirety of the Holocaust whether it involved Eichmann or not'.¹⁵ Moreover, its criminal law was not only deliberately extended to accommodate the crimes of the Holocaust, but explicitly conformed 'to the needs of the community of victims, potential victims and survivors'.¹⁶ The intended grand narrative was likewise 'victim-driven', and aimed at not only redressing previous omissions of the survivor voice (chapter two) but alerting domestic and world audiences to the weight of Jewish suffering.¹⁷ In a further political sub-text, the over-representation of active Zionists or combatants amongst the witnesses aimed to support 'the moral reassertion of the Jewish people', and the 'logical inference ... that Israel was the embodiment of the enduring spirit of that nucleus of resisters'.¹⁸

The trials of Zündel (1985, 1988) and the civil case instigated by Irving (2000) were

¹² Irving formally served his 'Statement of Claim' on 5 September 1996, HRIRH, (TB) A1, 'Pleadings'. He also listed four other defendants (bookstore employees) but action against them was not pursued, HRIRH, (TB) T2, 'Judgement', para. 1.10, p8. The trial began on 11 January, and, including the appeal, ended on 15 March 2000. His charges of libel referred to statements in Lipstadt, *Denying the Holocaust*, pp8, 14, 111, 161-163, 170, 179-181, 213, 215, 221, 232-234.

¹³ Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001), pvii.

¹⁴ Wilson, *Writing History*, p4.

¹⁵ Stephen Landsman, 'The Eichmann Case and the Invention of the Witness-Driven Atrocity Trial', *Columbia Journal of Transnational Law*, 55:1 (2012), pp69, 72, 77-83.

¹⁶ Donald Bloxham, 'From Streicher to Sawoniuk: the Holocaust in the courtroom', in Dan Stone (ed.), *The Historiography of the Holocaust* (Hampshire: Palgrave Macmillan, 2004), p406.

¹⁷ Ruth Bettina Birn, 'Fifty Years After: A Critical Look At The Eichmann trial', *Case Western Reserve Journal of International Law*, 44:1 (2011), pp466-467; Landsman, 'The Eichmann Case', pp71-72, 77-83. See also Felman, 'Theaters of Justice', pp212-213

¹⁸ Bloxham, 'From Streicher to Sawoniuk' in Stone (ed.), *The Historiography of the Holocaust*, p407.

indicative of a transfer of official focus away from the crimes of perpetration to safeguarding the historical record.¹⁹ Although more subtle in their extra-historical and extra-legal objectives, these trials reflected the “growing assault” of Holocaust denial, within national contexts in which awareness of the mass murder of European Jewry had moved from the margins into official and public consciousness, and subsequent academic and state attempts to rebut its lies and unmask its political agenda.²⁰ As specifically argued by the Crown at Zündel's trial in 1985:

for the memory of those who perished, the anguish of those who survived, the enlightenment of those to come, the attempted falsification of the truth of that tragic era must not be allowed to go unchallenged.²¹

In Canada legislative attempts to challenge Holocaust denial were channelled through regulations aiming to protect minority communities against discrimination.²² Relevant sections were added to its ‘Criminal Code’ (1970), including those aimed at prohibiting speech that ‘wilfully promotes hatred’ (s.319), while the little-known clause of section 177 (s.177), banning the spread of false literature ‘likely to cause injury or mischief to a public interest’, was retained.²³ S.177 also allowed private actions. Those trying to bring Zündel to court had finally resorted to such an action in 1983, until the case was handed over to the Crown in 1984.²⁴ In contrast, Lipstadt had been one of many academics who had refused to engage with Holocaust deniers, since entering into debate would award

¹⁹ Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (London: Yale University Press, 2001), p7.

²⁰ Lipstadt, *Denying the Holocaust*; Gill Seidel, *The Holocaust Denial: Antisemitism, Racism and the New Right* (London: Beyond the Pale, 1986); Kahn, ‘Rebuttal versus Unmasking’. For information on the relevant national contexts see: **Canada**: Irving Abella and Frank Bialystok, *None Is Too Many: Canada and the Jews of Europe 1933-1948* (Toronto: University of Toronto Press, 1983); Randolph L. Braham, ‘Canada and the Perpetrators of the Holocaust: The Case of *Regina v Finta*’, 9:3 (1995), pp293-317; Franklin Bialystok, *Delayed Impact: The Holocaust and the Canadian Jewish Community* Montreal: (McGill-Queen’s University Press, 2000); Howard Margolian, *Unauthorized Entry: The Truth about Nazi War Criminals in Canada, 1946-1956* (Toronto: University of Toronto Press, 2000); Norman Erwin, ‘The Holocaust, Canadian Jews, and Canada’s “Good War” Against Nazism’, *Canadian Jewish Studies*, 24 (2016), pp103-123. **Britain**: Tony Kushner, ‘The Impact of the Holocaust on British Society and Culture’, *Contemporary Record*, 5:2 (1991), pp349-375; Andy Pearce, ‘The Development of Holocaust Consciousness in Contemporary Britain, 1979–2001’, *Holocaust Studies*, 14:2 (2008), pp71-94; David Cesarani, ‘How Post-war Britain Reflected on the Nazi Persecution and Mass Murder of Europe's Jews: A Reassessment of Early Responses’, *Jewish Culture and History*, 12:1-2 (2010), pp95-130.

²¹ *Her Majesty the Queen and Ernst Zündel* (251/85), Vol. XX, p4667, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1985.

²² Hill, ‘Revisionism and the Law’, pp1, 3, 28-29.

²³ Dating back to the thirteenth century, Kahn, ‘Rebuttal versus Unmasking’, p6.

²⁴ Hasian Jnr., ‘Canadian Civil Liberties’, pp47-48. Instigated again by Sabina Citron. See footnote 11.

legitimacy to their pseudo-scholarship.²⁵ But, once forced into court, a team of historians and jurists intended to rebut and unmask the falsity of both Irving as an assumed historian and Holocaust denial as ‘a legitimate school of thought’.²⁶ In the wake of Lipstadt’s critique of an ‘intellectual climate’ responsible for fostering Holocaust denial (chapter one) it is suggested that the Defence team also intended to reassert ‘the Western rationalist tradition’ of professional (empiricist-analytical) history.²⁷ Subsequently the strategy of unmasking also aimed to extend to the conventions and rules of the historian’s craft.

Each trial was also governed by discrete legal statutes. Eichmann was indicted under the ‘Nazis and Nazi Collaborators (Punishment) Law’ (5710-1950), which had been a specific legislative response by the Israeli Knesset to acclaimed limitations of ordinary criminal law.²⁸ As well as adding the specific category of ‘crimes against the Jewish People’, this law empowered its courts to judge and punish individuals and acts taking place before the existence of the State of Israel, and outside its present boundaries, ‘which wronged persons who were not residents of the State of Israel’.²⁹ It also allowed Israel to prosecute individuals who had already been brought to trial elsewhere, ‘if the full severity of the punishment had not been meted out to them’.³⁰ It was both ‘retroactive’ and ‘extraterritorial’ (usually forbidden in criminal law), but the Prosecution, led by Gideon Hausner, insisted that both its authority and reach were necessary responses to the extraordinary crimes committed.³¹

As already noted, Zündel was charged, in both 1985 and 1988, under s.177 of the Canadian ‘Criminal Code’, which determined that:

Everyone who wilfully publishes a statement, tale or news that he [*sic*] knows is false and that causes or is likely to cause injury or mischief to a public

²⁵ Lipstadt, *Denying the Holocaust*, pp1-2; Kahn, ‘Rebuttal versus Unmasking’, pp4-5.

²⁶ *Ibid*, p4.

²⁷ Lipstadt, *Denying the Holocaust*, p17.

²⁸ Enforced on 10 August 1950. Subsequently referred to as the ‘1950 Law’ throughout this chapter. See AET, Vol. I, pp15-60 for the full debate on the legality of this law.

²⁹ *Ibid*, p8.

³⁰ *Ibid*, p34.

³¹ *Ibid*, pp23, 34-42.

interest is guilty of an indictable offence and is liable to imprisonment for two years.³²

Since relatively obscure there were few precedents guiding the jurists.³³ The regulations were also vague.³⁴ In the absence of an explicit crime of Holocaust denial the law ‘either require[d] the prosecution to establish the falsity of the defendant’s position or allow[ed] the defendant to raise truth as a defence’.³⁵ Thus, despite the Prosecutions’ insistence that the Holocaust was not on trial, focus on its facticity was inevitable.³⁶ Moreover, the inclusion of such ambiguous terms as “false news”, “injury or mischief”, “intolerance” and “the public interest” allowed Zündel's lawyer, Douglas Christie, to distract the court with challenges to their interpretation.³⁷ S.177 was ultimately presented by Christie as a breach of the enshrined right to freedom of speech, and, when extended to historical inquiry, an infringement on ‘freedom to research, freedom to think, freedom to communicate and freedom to disbelieve’.³⁸ Although Christie had manipulated its meaning, the competence (1985) and relevance (1988) of s.177 were consistent features of Zündel’s defence.³⁹ Its applicability and constitutionality were likewise consistent features of Zündel’s appeals.⁴⁰ Although Christies’ arguments were rejected by the respective district and appeal judges’, s.177 was finally repealed as unconstitutional by Canada’s Supreme Court in 1992.⁴¹

³² ZT 1985, Volume I, p11.

³³ Hill, ‘Revisionism and the Law’, pp2-3. Only four prosecutions had previously utilised s.177, Ibid, p4.

³⁴ Ibid.

³⁵ Kahn, ‘Rebuttal versus Unmasking’, p5.

³⁶ ZT 1985, Vol. III, p676; Vol. XX, pp4613, 4617. *Her Majesty the Queen and Ernst Zündel* (424/88), Appeal (1989), ‘Respondent’s Factum’, p133, Ontario Court of Appeal. All proceeding references to the 1989 Appeal will be prefixed by ZT 1989.

³⁷ Christie had a history of defending antisemitic propagandists, Hasian Jnr., ‘Canadian Civil Liberties’, p50.

³⁸ In opposition to s.2 of the ‘Canadian Charter of Rights and Freedoms’, ZT 1985, Vol. I, pp2, 9-15; Vol. XI, p2348.

³⁹ As acknowledged by the Crown in 1985, s.177 did not prosecute the freedom to express viewpoints, however controversial, ZT 1985, Vol. XX, pp4607-4609, and it clearly stated that freedom to honestly criticise was not the same as freedom to ‘pervert the truth to the detriment of others’, Ibid, p4611. See also: ZT 1985, Vol. III, p498 and ZT 1988, Vol. XXXVI, pp10391-10396.

⁴⁰ *Her Majesty the Queen and Ernst Zündel* (424/88), Appeal (1987), ‘Appellant’s Factum’, pp26-31, Ontario Court of Appeal. All proceeding reference to the 1987 Appeal will be prefixed by ZT 1987. See also, ZT 1989, ‘Appeal Book’, p2.

⁴¹ ZT 1987, ‘Appeal Judgement’, pp14-41 and ZT 1989, ‘Appeal Judgement’, pp52-53, 56-63, 66-68. By 1989 S.177 had been reformulated as s.181 in the ‘Criminal Code’.

In contrast, Irving turned to England's civil law, and more specifically the 'Defamation Act 1952', in his writ of libel against both Lipstadt and Penguin Books.⁴² The charged passages in Lipstadt's book, 'Denying the Holocaust', were first published in the United States in 1993, but it was after the book's publication in the UK in 1994 that Irving sought to bring his case to court. The rules governing defamation in England infamously assume that the applicant (Irving) has been maligned until those accused can prove that what they have said or written is true. Hence, any defamatory words 'are presumed ... to be untrue' until proven otherwise.⁴³ This assumption shifts the 'burden of proof' onto those accused (Lipstadt and Penguin Books), although designated as defendants. The reverse is the case in the United States, where the rules underpinning the legal definition of libel actively discourage defamation cases being brought to court.⁴⁴ Commonly viewed as advantageous to the applicant, it is not surprising that critics view Irving's delay, and then recourse to English libel law, as a deliberate strategy to "stack the cards" in his favour.⁴⁵

The trials were further confined and governed by diverse indictments. In Israel Eichmann was charged with four essential crimes: 'crimes against the Jewish People'; 'crimes against humanity'; 'war crimes'; and 'membership of a hostile organisation'.⁴⁶ More specifically, an indictment of 15 counts charged him with active participation in a catalogue of atrocity across Germany and all areas of German influence and occupation between 1939 and 1945, 'with the intention of destroying the Jewish People'.⁴⁷ Indeed, as a ranked official in one of the foundational bureaucracies of persecution and genocide, the Reich Security Main Office (RSHA), and more specifically as head of the 'Gestapo' section tasked with "Jewish Affairs" (IVB4), Eichmann was charged as both the 'executive arm' of the 'Final Solution of the Jewish Question' and a leader of its slaughter.⁴⁸

As mentioned above, Zündel was not formally accused of Holocaust denial but charged with the intentional publication and propagation of its lies. The focus was on one specific

⁴² The cases of both defendants were merged and presented by Richard Rampton QC.

⁴³ HRIRH, (TB) T2, 'Judgement', para. 4.7.

⁴⁴ Evans, *Telling Lies About Hitler*, pp33-34.

⁴⁵ *Ibid*, p34. Rather ironically Evans was also subject to the threat of UK libel law when attempting to publish his book on the trial, *Ibid*, p4.

⁴⁶ Sections 1(a)(1), 1(a)(2) and 1(a)(3) of the '1950 Law' and Section 23 of the 'Criminal Code Ordinance', 1936. The 'hostile organisations' being the 'Schutzstaffeln der NSDAP' (SS), 'Sicherheitsdienst des Reichsführers SS'. (SD) and 'Geheime Staatspolizei' (Gestapo).

⁴⁷ AET, Volume I, pp3-8.

⁴⁸ Eichmann's rank of 'Obersturmbannführer' was equivalent to a British Lieutenant Colonel. For the Prosecution's case see AET, Vols. I-III, pp62-1370.

publication, 'Did Six Million Really Die?' (DSMRD), with Zündel indicted in both 1985 and 1988:

that you did, in or about the year 1981 ... in the judicial district of York, ... publish a statement or tale, namely, "Did Six Million Really Die?", that you know is false and that is likely to cause mischief to the public interest in social and racial intolerance, contrary to the Criminal Code.⁴⁹

In 1985, the presiding Judge, Hugh R. Locke, informed the court that the Prosecution, led by Pearson Griffiths, was not obliged to prove the falsity of each and every portion of the statements made in DSMRD, only that 'the essential elements of each are false'.⁵⁰ Likewise, the Crown was not liable to prove that unrest had in fact occurred because of its publication, but that it could have been likely or probable.⁵¹ In contrast, Irving was officially recorded as a Holocaust denier alongside other categories of contention arising from his writ of libel.⁵² At a 'Hearing', held well before the trial (15 September 1998), it was agreed that, as one of five integrated areas of dispute, Irving's denial of the Holocaust would focus on his obsession with Adolf Hitler and subsequent manipulation of the historical record.⁵³ As the Defence, led by Richard Rampton, argued, driven by his obsession, Irving had 'prostitute[d] his reputation as a serious historian (spurious though it can now be seen to have been) ... ' 'in order to put Hitler in a more favourable light ... ' .⁵⁴ With his motives manifest in the right-wing, neo-Nazi audiences and company he addresses and consorts, Irving 'is not an historian at all but a falsifier of history. To put it bluntly, he is a liar'.⁵⁵

The trials were likewise governed by different standards of proof; the more stringent standard of 'beyond reasonable doubt' in the criminal cases of Eichmann and Zündel, and

⁴⁹ Similarly charged in 1985 regarding the publication, 'The West, War and Islam', ZT 1985, Vol. I, pp190-191, and acquitted.

⁵⁰ ZT 1985, Vol. XXI, p30.

⁵¹ Ibid.

⁵² HRIRH, (TB) A1, 'Statement of Claim'.

⁵³ The five areas can be summarised as: (1) Irving's denial of the Holocaust; (2) his alliance with and the holding of extremist views; (3) his obsession with Hitler and subsequent manipulation of the historical record; (4) the removal of source material (Goebbels diaries) without permission; and (5) being discredited as a historian. Ibid, (TB) A1, 'Defence of the Second Defendant', pp 2-3.

⁵⁴ HRIRH, Day 32, p34. (TB) A1, 'Defence of the Second Defendant', pp 2-3.

⁵⁵ Ibid, Day 1, p89.

the more adaptable 'on the balance of probability' in the civil case utilised by Irving.⁵⁶ The greater flexibility accorded in civil law is even more notable in English libel cases since:

It is not incumbent on the defendants to prove the truth of every detail of the defamatory words published ... [rather] it is the *substantial* truth ... As it is sometimes expressed, what must be proved is the truth of the sting of the defamatory charges made.⁵⁷

Furthermore:

justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the [claimant's] reputation having regard to the truth of the remaining charges.⁵⁸

However, there are cases in which the accusations are deemed so serious that 'a higher standard of proof' can be requested by the court.⁵⁹ The Judge, Charles Gray, agreed that Irving's application for the presentation of a higher standard of evidence was commensurate with the seriousness of the charge against his integrity as a historian.⁶⁰

The trials also relied on different 'triers of fact'; a team of Judges in the case of Eichmann, an individual Judge in the case of Irving and two distinct sets of juries in the Zündel trials. In the Eichmann trial it was unusual that representatives from both district and supreme courts comprised the panel of Judges. However, an amendment to the '1950 Law' insisted that in both retrospective and potential death penalty cases any panel of Judges must be chaired by a Supreme Court justice (Moshe Landau).⁶¹ In the trial instigated by Irving both parties agreed that the complexity of case required the expertise of a Judge.⁶²

⁵⁶ Ibid, (TB) T2, 'Judgement', para. 4.10.

⁵⁷ Ibid, para. 4.7.

⁵⁸ Ibid, para. 4.8.

⁵⁹ Ibid, para. 4.10.

⁶⁰ Ibid, and paras. 13.136-13.137.

⁶¹ As a result of the acclaimed mishandling of the collaborator trial of Rudolf Kasztner in 1954-55 by Judge Benjamin Halevi, who, as president of the Jerusalem District Court, was entitled to preside over the hearings of the Eichmann trial. See Douglas 'The Memory of Judgement', pp156, 287 (footnote 41) and Cesarani, *Eichmann*, p255.

⁶² Evans, *Telling Lies About Hitler*, p199.

Arguably, Irving may have come to regret this decision, given Gray's public condemnation and exposé of both his method and motive in his 'Judgement'. As Richard Evans later conceded:

A jury might have proved susceptible to his bluster, to his rhetoric and his self-advertisement, or found itself as much at sea in the welter of historical argument and counter-argument as the vast majority of the journalists did.⁶³

In Canada the complexity of case did not deter either Zündel or Christie in their request for a jury in both 1985 and 1988. Rather, they utilised the impanelling process to publicly propagate antisemitic concepts of Jewish bias and distrust. Christie insisted, in his 1985 'challenge for cause', that 'certain groups in society would find it very difficult to be objective because it involves them'.⁶⁴ More specifically, since disputes between the 'Jewish Defence League' and Zündel were on-going, Christie requested that no member of that organisation be allowed to sit on the jury.⁶⁵ He likewise requested that a range of questions should be posed to all potential jurors, aiming 'to find a jury that didn't have ... a deep-seated hatred or prejudice against either of the parties ...'.⁶⁶ Although Christie's 'challenge' was rejected by Locke, who, *inter alia*, found the questions proposed to be offensive, a panel of judges found on appeal that the original questions may have been unacceptable but Locke should have advised Christie to reframe them in accordance with legal guidelines.⁶⁷ In light of this serious error, 'the appellant was deprived of his right to have a jury selected according to law, whose impartiality or appearance of impartiality could not be impugned'.⁶⁸ This finding was fundamental to the ordering of a retrial.⁶⁹

⁶³ Ibid.

⁶⁴ ZT 1985, Vol. I, p29. The 'challenge' refers to rules pertaining to the fairness of jury selection. In 1988 Christie made a similar challenge and likewise raised the issue in Zündel's 1989 appeal, ZT 1989, 'Appeal Book', Ground 23, p4. Servatius also raised a similar objection of bias in prosecuting Eichmann in Israel and by Jewish judges, AET, Volume I, p8; Volume V, p2245. Conversely, Israeli ministers did not think it appropriate to select a Jewish or Israeli defence attorney to act for Eichmann, Yechiam Weitz, 'In the Name of Six Million Accusers: Gideon Hausner as Attorney-General and His Place in the Eichmann Trial', *Israeli Studies*, 14:2 (2009), p29.

⁶⁵ ZT 1985, Vol. I, p111.

⁶⁶ Nine questions were posed. Indicative being: (1) 'Can you consider and will your mind allow consideration of the question of whether there were gas chambers in Germany for the extermination of the Jews?', (4) 'Do you believe the Holocaust happened as depicted by the media, and would you be able to remove that idea from your mind and consider the question solely on the evidence presented in Court?', Ibid, pp174-175.

⁶⁷ Ibid, pp186, 187. ZT 1987, 'Appellant's Factum', pp31-37.

⁶⁸ ZT 1987, 'Appeal Judgement', pp56, 125.

⁶⁹ Ibid, p125.

Once in court the trials differed in their application of legal process. As noted in chapter two, in the Eichmann trial the rules of evidence were intentionally relaxed to allow ‘the submission of a wider range of evidence than normally available in a court controlled by Anglo-American rules’.⁷⁰ More specifically, ‘hearsay’ was ruled admissible, despite its prescriptive exclusion in Anglo-American law, and probative, despite its legally designated limitations of value and weight (chapter two). Grounded in the ‘1950 Law’, section 15 (S.15) stated:

In a trial against an offence under this Law, the Court shall be able to deviate from the rules of evidence, if it is satisfied that this will facilitate the ascertainment of the truth and the just disposition of the case.⁷¹

In practice its clauses lifted the common law ban on not only verbal but documented ‘hearsay’, and likewise allowed written rather than oral testimony to be submitted by witnesses that remained alive, but, for various reasons, could not attend Israeli courts.⁷² As Hausner pointed out, a similar relaxing of evidentiary rules had been allowed by other courts adjudicating over comparable cases and was laid down as precedent by the International Military Tribunal (IMT).⁷³ S.15 was regularly invoked by the Prosecution, and, in the majority of cases, supported by judicial ruling.⁷⁴ It specifically liberated the experiential evidence of survivor witnesses and allowed the submission of evidence wholly unrelated to Eichmann.⁷⁵ However, it would be misleading to equate its common employment with a lack of juridical attention or deliberation. Rather, its invocation

⁷⁰ Douglas, *The Memory of Judgement*, p257.

⁷¹ Quoted by Gabriel Bach (Assistant State Attorney) from Section 15 of the ‘1950 Law’, AET, Volume I, p118.

⁷² Ibid, pp117-119, 194-197, 202-206, 237. In the main those witnesses that, if stepping foot on Israeli soil would be arrested and charged with crimes under the ‘1950 Law’, Ibid, pp305, 384-385, 500-502, 508.

⁷³ Ibid, p204.

⁷⁴ Indicative being the admission of the ‘Report of the Polish Commission of Investigation’ (1946), as proof of context in Poland, Ibid, pp194-205, 237-238, 305-308; affidavits and statements made by Dr Theodore Horst Grell (Jewish Affairs Section of German Foreign Ministry in Budapest) and Hans Jüttner (General in the Waffen-SS and Obergruppenführer-SS, chief of Himmler’s secretariat and Chief Adjutant of Himmler), Vol. II, pp731-732; a collection of 15 documents from the Weizmann Archives (President of World Zionist Organisations and 1st President of Israel) in Rehovot dealing with Joel Brand’s mission (‘Blood for Goods’), Vol. III, pp1029-1030.

⁷⁵ Including, the testimony of Professor Salo Baron, Professor of Jewish History at Columbia University, AET, Vol. I, pp169-184; the submission of 3 films showing scenes from a number of camps and taken, in the main, after liberation, Vol. III, pp990-991, 1196, 1283-1285; the testimony of 2 witnesses to sterilisations at Auschwitz-Birkenau and held in camera, Ibid, pp1195-1196, 1255-1266 and Vol. V, pp1870-1873.

triggered a complexity of legal debate, and, in a few cases, requests were rejected.⁷⁶ As admonished by Judge Landau during one such debate, ‘I suggest that our rules of evidence not be forgotten completely’.⁷⁷

In contrast, the Zündel trials were ‘procedurally ordinary’, and followed the conventional practices of criminal law in which the rules of evidence were not only stringently applied but purposefully exploited by the Defence.⁷⁸ In particular, the ‘hearsay’ rules were regularly invoked by Christie in both trials in attempts to curtail the admissibility of key prosecution evidence.⁷⁹ In 1985 Christie specifically exploited these rules to attack the credibility and probative value of eyewitnesses. Consequently, survivor testimony was not only closely monitored by legal protocol but halted and removed from the trial record if breaching its rules.⁸⁰ Yet, integral to the Zündel trials was the exception to the ‘hearsay’ rules allowing the admissibility of historians as expert evidence and opinion.⁸¹ In contrast to both the Eichmann and Irving trials, the ‘best evidence’ of original documentation was largely absent from the Toronto courtrooms.⁸² Substantial in volume, and held in archives outside Canada, the relevant primary source material was deemed to be inaccessible to the court.⁸³ But Canadian law allowed this evidence to be substituted through secondary testimony, so long as the witness had both accessed the relevant material and met the criteria of expert.⁸⁴ According to this criteria, the expert did not have to be academically or professionally trained, so long as s/he could prove that the knowledge held was beyond “the ken of the average layman” and of sufficient competence to aid the jury in their finding of the ‘truth’.⁸⁵ Although Christie challenged the probative value of both history and historians, as part of a wider critique of their epistemic credibility, Locke ruled in 1985 that although ‘the dividing line’ between ‘hearsay’ and history is not ‘entirely clear’: ‘Expertise in the field of history is just as much a field of expertise as that of pure

⁷⁶ Decision 60, AET, Vol. III, p1010; Decision 67, Ibid, p1135; Decision 74, Ibid, p1315; Decision 76, Ibid, pp1318-1319; Decision 78, Ibid, p1345; Decision 82, Ibid, p1364; Decision 99, Vol, V, p1862.

⁷⁷ Ibid, Vol. III, p1041.

⁷⁸ Douglas, *The Memory of Judgement*, pp226-227.

⁷⁹ See as an example of Christie’s arguments, ZT 1985, Vol. III, pp632-692.

⁸⁰ See the testimonies of Arnold Friedman, Ibid, Vol. II, pp307, 309, 317-318, 334, 336, 346; Ignatz Fulop, Vol. III, pp596-597; Chester Tomaszewski, Vol. VIII, pp1688, 1695-1696, 1698, 1700; Dennis Urstein, Ibid, pp1739, 1742, 1746, 1747.

⁸¹ Ibid, Vol. III, p687.

⁸² Ibid, pp667-670. Although not legally prescribed as such, as shown in chapter 2.

⁸³ ZT 1985, Vol. III, pp667-671. ZT 1988, Vol. XXXVI, pp10507-10508.

⁸⁴ ZT 1985, Vol. III, pp667-668.

⁸⁵ Ibid, pp687-688.

science'.⁸⁶ However, as similarly concluded by Judge Ronald Thomas in 1988, since much of the material referenced and/or submitted would ordinarily qualify as 'hearsay' it was not admissible for the truth of its contents.⁸⁷

In London, although largely 'procedurally ordinary', Judge Gray was transparent in his relaxation of procedure in favour of Irving.⁸⁸ In particular, Irving was able to present a case of conspiracy by his "traditional enemies" that, 'in the ordinary run of litigation, the rules of evidence would have prevented him advancing ...'.⁸⁹ Irving had also submitted a written statement at the closing stage of the trial that not only covered issues irrelevant to the case but exceeded the established evidence.⁹⁰ Gray had allowed 'latitude' because the Defence team had made 'the unexpected decision' not to call Lipstadt as evidence, and subsequent cross-examination by Irving, despite her responsibility for the allegations at the centre of the litigation.⁹¹ Although the Defence was 'perfectly entitled to adopt this tactic ... it did place Irving ... at a disadvantage'.⁹² But Gray had been especially lenient because Irving had represented himself.⁹³ Rampton also indicated in his closing statement that the objections of the Defence to this leniency would have been more rigorous if it had been a trial by jury.⁹⁴

However, in contrast to the Zündel trials, the legal admissibility of history and historians was not a subject for discussion in the London courtroom. There was no qualifying process determining the expertise of the relevant witnesses: Christopher Browning, Richard Evans, Peter Longerich and Robert Jan van Pelt. As Gray noted, they were historians 'of the greatest distinction' and 'outstanding in his field'.⁹⁵ Rather, at the beginning of their expert reports, written on behalf of the Defence, curriculum-vitae

⁸⁶ See as examples of Christies' arguments, *Ibid*, Vol. III, pp632-692, and rejected by Locke, *Ibid*, pp687-692.

⁸⁷ ZT 1988, Vol. XXXVI, p10378.

⁸⁸ HRIRH, Day 9, p15; Day 11, pp108-109, 169-17; Day 12, pp31-32; Day 16, pp22-23; Day 18, pp163; Day 19, pp84-85, 86; Day 22, pp23-24, 36-40; Day 25, pp12-13, 73-74; Day 26, pp156-157; Day 29, p168; Day 32, pp4-5.

⁸⁹ HRIRH, (TB) T2, 'Judgement', paras. 3.6, 3.7.

⁹⁰ *Ibid*, Day 32, p4.

⁹¹ *Ibid*, (TB) T2, 'Judgement', para. 3.7

⁹² *Ibid*.

⁹³ *Ibid*.

⁹⁴ *Ibid*, Day 32, p4.

⁹⁵ *Ibid*, (TB) T2, 'Judgement', para. 13.10.

attested to their eligibility and signed oaths verified their independence.⁹⁶ Once in court the reports were admitted as 'evidence in chief', with declarations testifying to the accuracy of their statements of fact and fairness of opinion unchallenged by Gray.⁹⁷ Unlike Christie, Irving did not dispute the legitimacy of processing historical inquiry through the medium of the law, or the academic credentials of the Defence's selected experts.⁹⁸ Of course Irving categorised himself as a historian and subpoenaed others to testify in court to his scholarly contribution and repute.⁹⁹

Once in court the trials also utilised different foundations of evidence. In Israel, the Prosecution team submitted a vast reservoir of primary documentation (1,434 items). The Defence team also submitted primary source material, but its volume was negligible in comparison (109 items).¹⁰⁰ Rather, its leading counsel, Robert Servatius, intended to 'rely upon the documents produced by the Prosecution itself' and promised a 'proper illumination' of its evidence.¹⁰¹ Perpetrator testimony, and specifically Eichmann, was also foundational evidence for both Hausner and Servatius. Hausner accepted that there were obvious limitations to the value of perpetrator testimony, given that its evidence had been taken 'in the shadow of the gallows'.¹⁰² But he insisted that any self-interested claims did not underestimate its probative value and weight.¹⁰³ The testimony of perpetrators still alive, but unwilling to attend the court in Israel (because of the threat of arrest for war crimes), was taken through overseas commission, with the balance between self-interest and probative weight similarly negotiated.¹⁰⁴

But, as is commonly acknowledged, what marked the Eichmann trial as seminal was the primacy of survivor testimony.¹⁰⁵ As already established, the foregrounding of this

⁹⁶ See the expert reports at www.hdot.org, 'Defence Documents' (Last Accessed May 2017).

⁹⁷ HRIRH, Evans, Day 18, p19; Van Pelt, Day 9, p20; Browning, Day 16, pp29-30; Longerich, Day 27, p4.

⁹⁸ With the exception of van Pelt, whose eligibility to present evidence of the architecture of Auschwitz and the toxicology of Zyklon-B was questioned by Irving, *Ibid*, Day 9, pp37-42.

⁹⁹ Professor Donald Cameron Watt (Emeritus Professor of International History, LSE) and Sir John Keegan (knighted for services to military history).

¹⁰⁰ One of Servatius' legal contentions was that Eichmann's legal privilege of full defence had been curtailed since 'the archives of the world ... were not at his disposal', AET, Vol. V, p2056.

¹⁰¹ *Ibid*, Vol. IV, p1371.

¹⁰² *Ibid*, Vol. I, p204.

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*, Vol. V, pp1835-1844, 1847-1849, 1853-1855, 1874-1972.

¹⁰⁵ Although Lawrence Douglas claims that the transition to the focus on the victims in Holocaust-related trials was prepared at the Nuremberg Military Tribunals, Douglas, *The Memory of Judgement*, p287.

testimony aimed to restore the voices of both victims and survivors to the grand narrative of the Holocaust. Although politically strategic, it also intentionally directed the narrative.¹⁰⁶ Crucially, it not only marked a shift away from historiographical reliance, and primacy of value placed, on the ‘paper work of the perpetrators’ to ‘flesh-and-blood’ representation, but, according to Shoshana Felman, reversed ‘the long tradition of traumatization of the Jew by means of law’, allowed the victims to own and write their own history and produced, ‘unwittingly ... a canonical or *sacred narrative*’ of the genocidal crime.¹⁰⁷

The Judges acknowledged that survivor testimony had been the main source of evidence in specific chapters of the genocide and of notable value and weight in others.¹⁰⁸ Yet the vast majority of witnesses had had no contact with Eichmann during their ordeal and therefore could not testify to his specific crimes as charged. Hausner argued that since the indictment covered the murder of millions of Jews so any witness with relevant evidence, however geographically removed from Eichmann at the time, had probative value and weight.¹⁰⁹ The Judges agreed.¹¹⁰ As already noted, the rules of evidence had been relaxed to allow the submission of experiential evidence (S.15), while, and likewise contrary to the rules governing testimony, both its probative value and weight was revered as not only ‘beyond reasonable doubt’ but infallible.¹¹¹ As concluded by the Judges: ‘They spoke simply, and the seal of truth was on their words’.¹¹²

As indicated in chapter two, survivor testimony was also submitted by the Crown as foundational evidence in the 1985 Zündel trial. But the revered authority and status sanctioned in Israel was not only absent in Canada but purposely challenged and

¹⁰⁶ Landsman, ‘The Eichmann Case’, pp69-119.

¹⁰⁷ Tim Cole, ‘The Holocaust and Its (Re)Telling: The Nature of Evidence at the Nuremberg and Eichmann Trials’, in Debra Kaufman, Gerald Herman, James Ross and David Phillips (eds.), *From the Protocols of the Elders of Zion to Holocaust Denial Trials: Challenging the Media, Law and the Academy* (Middlesex: Vallentine Mitchell, 2007), p58. Felman, ‘Theatres of Justice’, pp213, 221, 230, 236. According to Felman, the ‘sacred narrative’ annulled the critiques of misappropriation surrounding the trial, *Ibid*, footnote 57, pp236-237.

¹⁰⁸ Specifically in the chapters covering ‘Eastern Europe (Poland, the Baltic countries and Soviet Russia)’, AET, Vol. V, p2146, but also the extermination camps, *Ibid*, pp2149-2153, ghettos in the East, *Ibid*, pp2153-2154, the foot marches, *Ibid*, pp2164-2165, and Theresienstadt, *Ibid*, pp2165-2166.

¹⁰⁹ *Ibid*, Vol. I, p366.

¹¹⁰ *Ibid*, Vol. V, p2082.

¹¹¹ *Ibid*, p2056. With the exception of Avraham Gordon’s evidence, who testified on Eichmann’s involvement in the murder of a Jewish boy in Budapest, *Ibid*, Vol. III, pp975-986.

¹¹² *Ibid*, Vol. V, p2146.

derided.¹¹³ Likewise, contrary to its evidential privileging in 1961, the probative value and weight of the survivor voice was now equated with the testimony of all other witnesses, including Holocaust deniers.¹¹⁴ As stated by Locke in 1985: 'It is submitted to you that merely because survivors have testified that they are survivors does not make their evidence credible'.¹¹⁵ It is hardly surprising that survivors were unwilling to have their testimony similarly berated in 1988 and it was subsequently absent from the retrial.¹¹⁶ Documentation was likewise foundational evidence in both 1985 and 1988, but, in contrast to both the Eichmann and Irving trials, the volume of contemporaneous material submitted was minimal.¹¹⁷ Conversely, a significant proportion of secondary material was submitted but not for the truth of its contents.¹¹⁸

As shown above, substituting for primary source material for both the Crown and Defence was historian testimony, acting as evidence by proxy. In fact, these two trials visibly represented the transition of evidential weight from the survivor witness in 1961 to the expertise of the historian. It is common knowledge that the historians selected by the prosecution teams were Raul Hilberg in 1985 and Christopher Browning in 1988.¹¹⁹ But the rules also qualified the 'expertise' of known Holocaust deniers, in the main Robert Faurisson (1985, 1988) and David Irving (1988), as equally competent and relevant to those of Hilberg and Browning. In fact, in 1985, Christie specifically requested that Faurisson was accepted as an expert on the Holocaust 'in the same way that Dr Hilberg was'.¹²⁰ Locke agreed.¹²¹ In 1988 Irving was similarly qualified as a 'prominent'

¹¹³ ZT 1985. See the testimonies of Friedman, Vol. II, pp307, 309, 317-318, 334, 336, 346; Fulop, Vol. III, pp596-597; Vrba, Vol. VII, pp1387-1606, Vol. VIII, pp1607-1635; Tomaszewski, Vol. VIII, pp1688, 1695-1696, 1698, 1700; Urstein, Ibid, pp1739, 1742, 1746, 1747.

¹¹⁴ ZT 1985, Vol. XXI, p40.

¹¹⁵ Ibid, p212.

¹¹⁶ Douglas, *The Memory of Judgement*, p246. Facilitated by the awarding of judicial notice, according to Kahn, 'Rebuttal versus Unmasking', p13.

¹¹⁷ ZT 1985, Vol. I, 'Index of Exhibits', ppiii, vii, xii and xv. ZT 1988, 'Exhibits Index', Ontario Court of Appeal.

¹¹⁸ For identification purposes only and including the 'Auschwitz Album'; an excerpt from 'Chambers Encyclopaedia'; 'Plan of Auschwitz II'; 'International Committee of the Red Cross Bulletin', 1 February 1978. A range of secondary material was also submitted for its probative value, including a photocopy of a photograph from Vol. XXX of the International Military Tribunal (IMT); a map of Auschwitz II; and the 'Nazi Concentration camps' film.

¹¹⁹ Professors Michael Kater (York University) and Michael Marrus (University of Toronto) also provided scholarly advice. Richard Minkus (then at the University of Toronto) likewise advised in and outside the courtroom, Hill, 'Revisionism and the Law', footnote 13.

¹²⁰ ZT 1985, Vol. XI, pp2355-2356.

¹²¹ Ibid, p2475.

historian', regardless of Thomas' reminder to the jury that he had profited from writings absolving Hitler.¹²²

However, most distinctive to the Zündel trials was the attempt by the Crown in both 1985 and 1988 to have specific facts about the Holocaust judicially noticed as both notorious and proven beyond doubt.¹²³ The relevant rule states that:

Courts will take judicial notice of what is considered by reasonable men [*sic*] of that time and place to be indisputable either by resort to common knowledge or to sources of indisputable accuracy easily accessible to men.¹²⁴

Once within the field of judicial notice the relevant facts are accepted by the law as true and binding for the duration of the case, exempt from the usual rules of evidence and proof and closed to rebuttal.¹²⁵ In 1985 Griffiths petitioned for judicial notice at two stages in the trial (at the end of the Crown's and then Defence's evidential submission) and claimed that two specific facts met the relevant criteria: (1) 'that millions of Jews were annihilated from 1933 to 1945 because of the deliberate policies of Nazi Germany' and (2) 'the means of annihilation included mass shootings, starvation, privation and gassing'.¹²⁶ Griffiths insisted that these facts were generic in content, and, as the law demanded, left the vast range of those disputed open to the jury process.¹²⁷ Repeating arguments over the instability of historical conclusions, Christie insisted that judicial notice would prejudice Zündel's case.¹²⁸ Locke agreed.¹²⁹ In his first ruling he accepted that from the point of history, 'there exists wide and highly regarded opinion that the Holocaust did occur', but conceded that, from the point of law, judicial notice of the facts requested would place barriers to Zündel's right to a 'full answer and defence'.¹³⁰ In his

¹²² ZT 1988, Vol. XXXVI, pp10398, 10418.

¹²³ ZT 1985, Vol. X, pp2072-2191; Vol. XX, pp4442-4445. ZT 1988, Vol. VI, pp995-1010.

¹²⁴ ZT 1985, Vol. X, p2079.

¹²⁵ Ibid, pp2087, 2093-2097.

¹²⁶ Ibid, p2072.

¹²⁷ Ibid, p2094.

¹²⁸ Ibid, pp2124, 2127-2142, 'because history is controversy and history is subject to revision, always', Ibid, p2144; Vol. XX, p4453.

¹²⁹ Ibid, Vol. X, pp2188-2191.

¹³⁰ Ibid, pp2188, 2191.

second ruling, Locke accepted that, again from a point of law, judicial notice of these facts would shift the 'burden of proof' to the Defence.¹³¹ In both cases he concluded:

It is with no little regret that, for these reasons, I decline to give effect to the motion which I now dismiss.¹³²

In 1988 the Crown once again petitioned for judicial notice, but, after the lessons of 1985, adapted the relevant facts to the more generic claim that, 'during the Second World War the National Socialist regime of Adolf Hitler pursued a policy which had as its goal the extermination of the Jews of Europe'.¹³³ After similar arguments posed by both the Crown and Defence, Thomas ruled that the Holocaust, as defined, was so notorious that it was indisputable among 'reasonable people' and on this ground alone he would take judicial notice of its fact.¹³⁴ However, he removed the reference to 'policy', claiming that it was not essential to the fact of the Holocaust.¹³⁵ The jury was duly informed and instructed that, since indisputable, the Crown's 'burden of proof' did not include the fact that: 'The Holocaust is the mass murder and extermination of Jews by the Nazi regime during the Second World War'.¹³⁶

In London historians also acted as the main form of evidence on behalf of the Defence. They likewise stood as evidence by proxy on behalf of the survivor voice. As confirmed by Lipstadt: 'To have called survivors would have suggested we needed "witnesses of fact" ... to prove there was a Holocaust'.¹³⁷ Moreover, and arguably forewarned by the Zündel case, the defence team 'did not consider it ethical to subject survivors to cross-examination by a man whose primary objective ... was their humiliation'.¹³⁸ But, according to Robert Kahn, their absence also allowed the Defence to 'dispense with

¹³¹ Ibid, Vol. XX, pp4460-4465.

¹³² Ibid, Vol. X, p2191; Vol. XX, p4465. Upheld on appeal, ZT 1987, 'Appeal Judgement', pp8-23.

¹³³ ZT 1988, Vol. VI, p995.

¹³⁴ Crown: Ibid, p1003. Defence: Ibid, pp1003-1004. Ruling: Ibid, pp995-1010.

¹³⁵ Ibid, p1009.

¹³⁶ Ibid, p1010.

¹³⁷ Lipstadt, *History on Trial*, p33. This decision has been criticised, Guttenplan, *The Holocaust on Trial*, pp306-308, and viewed as inevitable as the survivor witness is substituted by the historian, Cole, 'The Holocaust and Its (Re)Telling' in Debra Kaufman *et al* (eds.), *From the Protocols of the Elders of Zion*, pp56-66.

¹³⁸ Lipstadt, *History on Trial*, p33.

emotionally compelling but often unpredictable' testimony.¹³⁹ As already noted, although the relevant historians were open to examination in court, a distinctive feature of this trial was the admissibility of historical treatise in the form of written reports and submitted by the Defence as its 'evidence-in-chief'.¹⁴⁰ These reports 'ran to a total of more than two thousand pages' and were accompanied by a 'massive' volume of documentation in support of the opinions and statements of fact presented.¹⁴¹ Similar to the Zündel trials, this evidence was not admitted for the truth of its contents, but opened to cross-examination by Irving. Likewise, the totality of evidence was not necessarily submitted for cross-examination or accepted by Gray.¹⁴²

Another distinctive feature of the London courtroom was the formal reaffirmation of established historiographical method. Subsequently, in defence of Lipstadt's exposé of Irving as a discredited historian, Richard Evans was tasked with assessing Irving's body of work against the 'accepted and legitimate methods of historical research, exposition and interpretation ...'.¹⁴³ Evans verified that these 'methods' rested on 'thorough, transparent and unbiased investigation of the primary sources', comparative reconstruction, 'reasonably objective' interpretation and footnotes acting as both reference and verification, with any differences of opinion 'generally confined within the limits set by the evidence'.¹⁴⁴ In other words, these 'canons of scholarly research' related to the conventions and rules of the 'empiricist-analytical' genre (chapter one) and were reaffirmed by all four historian experts throughout their testimony.¹⁴⁵

¹³⁹ Kahn, 'Rebuttal versus Unmasking', p15. This conclusion would be critiqued by those who berate the inability of both history and the law to comprehend the unique evidence of survivor testimony. See chapter two.

¹⁴⁰ Richard Evans on *David Irving, Hitler and Holocaust Denial*, Robert Jan van Pelt on the construction of Auschwitz-Birkenau, Christopher Browning on *Evidence for the Implementation of the Final Solution*, and Peter Longerich on *Hitler's Role In The Persecution of the Jews By The Nazi Regime and The Systematic Character Of The National Socialist Policy For The Extermination Of The Jews*. HRIRH, (TBs) B1-B4.

¹⁴¹ Ibid, (TB) T2, 'Judgement', paras. 4.17, 4.11.

¹⁴² See, for example, Rampton's reasoning for his omission of a number of issues relevant to the Defence's case on 'Kristallnacht' when cross-examining Irving, HRIRH, Day 13, pp22-23. The opinion of other historians on Irving's reputation cited in Evans' report was duly ignored by Gray, as liable to accusations of preconception on the part of Evans, Ibid, Day 19, pp79-96.

¹⁴³ As an expert in Modern German History and an 'authority' on its historiography, HRIRH, (TB) B1, *Witness Report of Richard Evans: David Irving, Hitler and Holocaust Denial*, paras. 1.3.6, 1.6.1.

¹⁴⁴ Ibid, paras. 2.4.2, 1.6.5, 1.6.4, 2.4.2, 1.6.6.

¹⁴⁵ Ibid, para. 1.6.1. See as examples: Day 5, p183; Day 6, pp74-75, 134, 165; Day 7, pp99, 101, 105, 124; Day 8, pp75, 167; Day 9, pp113-121; Day 12, 106; Day 13, p135; Day 16, p83; Day 17, pp100, 103-111, 119-125; Day 18, pp23-26, 32-33, 132-136, 142-175; Day 19, pp14-17, 41-44, 58-60, 132-136, 138-139, 167-168; Day 20, p96; Day 21, pp4-5, 11, 41, 169; Day 22, pp4, 23, 66-67, 165-166, 188-201, 194-200;

It is inevitable that these vagaries of legal content, form, method and objective explicitly filtered and shaped the Holocaust both presented and authorised. Subsequently, a diversity of historiographical account, finding and record distinguishes each trial. Arguably, most familiar is the content and reach of the grand narrative presented in Israel by Hausner. More specifically, this designated 'spokesman ... of six million accusers' presented a 'criminal conspiracy of thousands' that, once officially instructed in 1941, constituted a history of planned slaughter in which no wing of the Nazi party, department of the German state, or country of German influence or occupation had been immune.¹⁴⁶ A litany of evidence (including Eichmann) documented and testified to the wide-spread collusion and uniformity of its perpetration.¹⁴⁷ Yet, despite the narrative extending beyond Eichmann, the legal focus on his agency foregrounded specific bureaucracies (RHSA, Department IV, Central Offices for Emigration, the SS, SD and Gestapo,), events (Madagascar, Nisko, the Wannsee Conference) geographies (Hungary, Lublin, Minsk, Riga, Theresienstadt, Warsaw), official groupings (Specialist Officers for Jewish Affairs and German Legations) and personnel (Reinhard Heydrich, Heinrich Himmler, Heinrich Müller, Rudolf Höss, Rolf Günther, Ernst Kaltenbrunner, Eberhard von Thadden, Dieter Wisliceny).

Intentionally driven by its victims it was also a narrative in which cruelty, death and suffering was all-pervasive. If anyone in the courtroom, or wider public audience, had been in any doubt of the degree of inhumanity charged by the Prosecution, on the stand was Max Burger as representative witness to the brutality of the Nisko transports, Henryk Ross as witness to the merciless conditions in the Łódź ghetto, Frieda Masia as witness to the deportations to 'the East' and public hangings, Abba Kovner as representative witness to the murder of 40,000 Jews in the forests of Ponary, Shmuel Horowitz as witness to the shooting of thousands of Jews in the Szeparowce forest (East Galicia), Mordechai Ansbacher as witness to the horror of Theresienstadt, Dr Theodor Löwenstein Lavi as witness to the 'grave of the Jews' at Transnistria (Romania), Dov Freiberg as

Day 23, pp46, 48, 79, 85-86, 124-148; Day 24, pp26, 27, 29, 31, 36, 37-39, 44-47, 49, 53, 55, 64, 67, 69-70, 77-78, 83, 84-88, 171-175, 184-186; Day 25, pp9, 16, 123, 153-156, 167; Day 26, pp102-114.

¹⁴⁶ AET, Vol. I, pp62, 78, 79, 85-109.

¹⁴⁷ Official opposition was recognised in Bulgaria, the Czech Protectorate, Denmark, Italy Norway and Romania, that had saved the lives of tens of thousands of Jews, Ibid, pp96-104, while the uniformity of practice included cultural and economic removal, branding, segregation, arrests, beatings, confiscation of property, forced labour, overcrowding, starvation and selection. Ibid, pp283-292, 308-314, 356-359; Vol. II, pp563-927.

witness to the gassings at Sobibor and Michael Podchlewnik, Ya'akov Wiernik and Yehiel Dinur as representative witnesses to the killing sites of Chelmno, Treblinka and Auschwitz-Birkenau.¹⁴⁸ There were no surviving witnesses to the mass murders in the Belzec extermination camp.¹⁴⁹ As the Judges found, it was a catalogue of suffering so 'beyond human understanding' that they doubted the ability of the court 'to give it adequate expression'.¹⁵⁰ Yet, in the face of such atrocity, it was also a narrative of Jewish resilience.¹⁵¹ On the stand witnesses testified that Jews had fought to survive, had been defiant, had actively resisted and revolted.¹⁵² As Rivka Kuper insisted:

I point this out because the role of the revolt in this story of the Holocaust is a relatively small one, but the effort that was made by those who rebelled was above anything imaginable.¹⁵³

Others had escaped from camps, execution sites, marches, transports, shootings and even burial.¹⁵⁴ And throughout the genocide Jewish aid, culture, education, organisation and

¹⁴⁸ Ibid, Vol. I, pp298-301, 378-381, 441-447, 455-465, 511-514; Vol. II, 675-692, 869-874; Vol. III, 1166-1188, 1219-1220, 1189-1194, 1197-1201, 1202-1218, 1237-1282, 1286-1304.

¹⁴⁹ Ibid, p1221, and thus the submission of the 'Gerstein Report', pp1227-1229, and the 'Polish Commission Report', pp1231-1232, as evidence.

¹⁵⁰ Ibid, Vol. V, p2146.

¹⁵¹ Through active participation in youth movements, the 'Jewish fighting force', partisan groups and underground networks.

¹⁵² As evidenced through the testimony of Dr Moshe Beisky, AET, Vol. I, pp344-354; Zivia Lubetkin-Zuckerman, Ibid, pp399, 401-402, 406-409; Rivka Kuper, Ibid, pp432-433; Frieda Masia, Ibid, pp444-447; Dr Meir Mark Dworzecki, Ibid, pp450, 454; Abba Kovner, Ibid pp455-463; Avraham Karasik, Ibid, pp468-470, 473-474; Avraham Aviel, Ibid, p499; Haim Behrendt, Ibid, pp502-506; Dr Hulda Campagnano, Vol. II, pp656-659; Adolf Rosenberg, Ibid, pp920-924; Moshe Rosenberg, Vol. III, pp1076-1080; Arye Breszlauer, Ibid, pp1097-1098; Zvi Henryk Zimmerman, Ibid, pp1122-1126; Yisrael Gutman, Ibid, pp1153-1157; Dov Freiberg, Ibid, pp1166-1175; Ya'akov Biskowitz, Ibid, pp1182-1187; Ya'akov Wiernik, Ibid, pp1203-1204; Kalman Teigman, Ibid, pp1209-1211; Avraham Lindwasser, Ibid, p1218; Yehuda Bakon, Ibid, pp1248-1249; Dr Aharon Beilin, Ibid, p1264; Raya Kagan, Ibid, pp1269, 1275-1276, 1287, 1298; Shalom Cholawski, Ibid, pp1346-1349.

¹⁵³ Ibid, Vol. I, p433.

¹⁵⁴ As evidenced through the testimonies of Ya'akov Gurfein, Ibid, Vol. I, pp332-334; Dr Leon Wells, Ibid, pp363-374; Rivka Kuper, Ibid, p433; Dr Meir Mark Dworzecki, Ibid, pp454-455; Avraham Karasik, Ibid, pp473-474; Shmuel Horowitz, Ibid, pp513-514; Rivka Yoselewska, Ibid, pp517-518; Dr Alexander Brody, Vol. III, p960; Ze'ev Sapir, Ibid, p974; Leslie Gordon, Ibid, pp1129, 1131; Dov Freiberg, Ibid, p1175; Ya'akov Biskowitz, Ibid, pp1186-1187; Michael Podchlewnik, Ibid, p1191; Mordechai Zurawski, Ibid, p1194; Shim'on Srebrnik, Ibid, pp1200-1201; Kalman Teigman, Ibid, pp1209-1211; Avraham Lindwasser, Ibid, p1218; Gedalia Ben-Zvi, Ibid. pp1302-1303.

negotiation had persevered.¹⁵⁵ Although irrelevant to Eichmann's crimes, the Judges authorised the emphasis placed on these 'inconceivable feats of heroism'.¹⁵⁶

Within the grand narrative of atrocity Eichmann was presented as consciously and ideologically driven to the role of '*genocidaire*', indeed the "one hand" directing the slaughter.¹⁵⁷ Moreover, he had engaged in slaughter 'with a clear mind ... believing it was the right thing to do ...'.¹⁵⁸ When Eichmann was found guilty as indicted, Hausner's grand narrative of the 'Final Solution', and its 'principal offender', was wholly sanctioned by both district and Supreme Courts.¹⁵⁹

As already noted, in the discrete contexts in Canada in 1985 and 1988 the law was not explicitly summoned to reconstruct a narrative of the Holocaust but utilised to rebut and unmask a narrative of denial.¹⁶⁰ Although confined to the content of DSMRD, its rejection of a systematic policy of extermination, intentional death camps 'in the East', the use of gas chambers as killing apparatus, and the total murder of six million Jews is common denier treatise.¹⁶¹ Likewise, its overall presentation of the Holocaust as an 'imaginary slaughter' invented by Jews after the Second World War to collect huge reparations from Germany, is common denier charge.¹⁶² Proving its 'false news', therefore, acted as a rebuttal of not only DSMRD but the genus of Holocaust denial. Moreover, in s.177's

¹⁵⁵ See the testimonies of Zivia Lubetkin-Zuckerman, *Ibid*, Vol. I, pp398-409; Yitzhak Zuckerman, *Ibid*, pp409-416; Abba Kovner, *Ibid*, pp455-465; Dr Joseph Melkman, Vol. II, pp609-620; Werner David Melchior, *Ibid*, pp637-641; Alexander Aronon, *Ibid*, pp827-832; Dr Theodor Lowenstein Lavi, *Ibid*, pp869-875; Dr Ernst Abeles, *Ibid*, pp885-894; Joel Brand, Vol. III, pp pp1015-1024, 1028, 1033-1040, 1061-1070; Arye Breszlauer, *Ibid*, pp1097-1102; Zvi Henryk Zimmerman, *Ibid*, pp1122-1126.

¹⁵⁶ *Ibid*, Vol. V, p2082.

¹⁵⁷ According to David Cesarani '*genocidaire*' is a more appropriate term than perpetrator 'since it identifies the actor with the crime', Cesarani, *Eichmann*, p357.

¹⁵⁸ Landsman, 'The Eichmann Case', p74.

¹⁵⁹ AET, Vol. V, pp2113-2173, 2186. The exceptions were acquittal over the prevention of births at Kovno (count 4), AET, Vol. V, p2188; involvement in policy governing sterilisation (count 4), *Ibid*; the transfer of 16 children from Lidice for 'Germanization' (count 12), *Ibid*, p2193; and the murder of the remaining 93 (count 12), *Ibid*, p2194. Insufficient evidence had also been found on allegations of Eichmann's input into: the special 'Unit' tasked with eliminating all traces of extermination, *Ibid*, p2164; the 'Unit' responsible for the administration of Chemno, *Ibid*; the extermination process within the camps, *Ibid*, p2161; and the evacuation of the camps in 'the East', with the exception of Bergen-Belsen, *Ibid*, p2165. For the 'Appeal Judgement' see, *Ibid*, pp2360-2369.

¹⁶⁰ With more emphasis on rebuttal in 1985 and unmasking in 1988, Hill, 'Revisionism and the Law', p25; Kahn, 'Rebuttal versus Unmasking', pp13-14.

¹⁶¹ 'The East' related to occupied Poland and the occupied territories of the then Soviet Union. This treatise is confirmed in HRIRH, (TB) B1, 'Witness Report of Richard Evans', para. 3.2.16.

¹⁶² ZT 1985, Vol. XIX, pp4338-4344; Vol. XX, pp4618-4619; Vol. XXI, pp30-32, 54-55. ZT 1988, Vol. XXXVI, p10387. DSMRD has a specific chapter titled "Imaginary Slaughter", ZT 1985, Vol. XXI, p30. Also confirmed by HRIRH, (TB) B1, 'Witness Report of Richard Evans', para. 3.2.15-3.2.16.

demand for proof of Zündel's knowledge of the falsity of DSMRD, and subsequent wilful publication (as well as injury to the public interest due to its content), the required unmasking of his background and motives acted as an exposé of wider denial stratagem. Consequently, despite the Crown's insistence that the Holocaust was not on trial, the rejection of key established facts in DSMRD guaranteed an extensive investigation into its evidential accuracy, accountability and record in both 1985 and 1988.¹⁶³

More specifically, inaccuracies, or simply lies, found in specific chapters of DSMRD focused attention on the absence of a 'Hitler order' (as synonymous with the absence of an official plan of extermination), the 'Gerstein statement' (as fallacious perpetrator testimony), the Nuremberg trials (as sites of forced confession and torture), the shootings by the Einsatzgruppen (as 'a massive fabrication'), the Warsaw ghetto (as a 'newly-discovered' death camp in amongst an 'endless list' being produced), Anne Frank's diary (as faked testimony), conditions in the camps (as unexceptional until nearing the end of the war), and the Red Cross (as official recognition of conditions as well as the absence of death camps).¹⁶⁴ But foregrounded in both trials was the use of gas chambers and crematoria in Auschwitz-Birkenau. Despite being rarely mentioned in DSMRD (chapter six) Christie insisted that there was nothing more relevant to the case of the Defence than to prove that gas chambers did not exist, and without gas chambers it would have been

¹⁶³ ZT 1985, Vol. III, p676; Vol. XX, pp4613, 4617. ZT 1989, 'Respondent's Factum', p133.

¹⁶⁴ **Official Plan:** ZT 1985, Vol. III, pp485, 499-450; Vol. X, pp2145-2147; Vol. XII, pp2757-2758; Vol. XX, p4520; Vol. XXI, pp25, 55, 92, 103-104, 108, 148, 182, 205, 212. ZT 1988, Vol. XXXVI, pp10398, 10431-10433. **'Gerstein statement':** Referring to the statement made by SS Officer Kurt Gerstein (typed in French with a 2-page supplement in English) to 2 intelligence officers (Derek Curtis Evans (UK) and John W. Huaght (US) at the closing stages of the war (26 April 1945), ZT 1985, Vol. XII, pp2556-2575; Vol. XXI, pp50, 104-105, 147-148, 152. **Nuremberg:** Vol. III, p493; Vol. XI, p2343; Vol. XII, pp2640-2647, 2729-2731, 2747-2749; Vol. XIII, pp2820-2824, 2967-2970; Vol. XIX, pp4308-4318, 4320-4327; Vol. XX, pp4552-4553, 4562-4563, 4575-4576, 4624-4628; Vol. XXI, pp49, 50-51, 94-96, 202, 215-216. **Einsatzgruppen:** ZT 1985, Vol. XII, pp2712-2715; Vol. XIII, pp2824-2825; Vol. XIX, pp4327-4332; Vol. XX, pp4487-4489, 4629-4630; Vol. XXI, pp25, 92-94, 153, 202, 205, 216. ZT 1988, Vol. XXXVI, pp10422, 10427-10429. **Warsaw Ghetto:** ZT 1985, Vol. XXI, pp96-97, 99. **Anne Frank:** Vol. VII, p1546; Vol. XI, pp2578-2581; Vol. XIII, pp2779-2780; Vol. XVI, pp3601-3602; Vol. XX, p4642. ZT 1987, 'Respondent's Factum', pp32, 44-45. ZT 1989, 'Respondent's Factum', pp48-50. **The Camps:** ZT 1985, Vol. III, pp484, 486; Vol. XI, pp2477-2492, 2515-2522; Vol. XII, pp2717-2727, 2731-2741, 2764-2767; Vol. XIII, pp2786-2791, 2814-2815, 2818, 2899-2909, 2913-2927, 2957-2960, 2986-2990, 2994; Vol. XIV, pp3020-3026, 3029-3038, 3039-3041, 3186-3193, 3226-3227; Vol. XIX, pp4300-4301, 4337-4338; Vol. XX, pp4515-4517, 4521-4524, 4527, 4530, 4532-4533, 4630-4632, 4639-4640, 4641, 4644-4645, 4646, 4650-4651; Vol. XXI, pp48-49, 54, 55, 96, 99, 144-147, 157, 158-160, 161-163, 165-167, 169, 193-194, 207-208, 209-210. In addition to survivor testimony the Prosecution submitted the film 'Nazi Concentration Camps' in 1985 as evidence of the privation and horror of the camps, Vol. X, pp2192-2329; Vol. XIV, p3276. Although ruled admissible by Locke it was rejected as 'hearsay' on appeal, ZT 1987, 'Appeal Judgement', pp111-119. **Red Cross:** ZT 1985, Vol. III, pp475-477, 482-483; Vol. IX, pp1930-2071; Vol. XII, pp2576-2578, 2587-2592; Vol. XIII, pp2825-2845, 2987; Vol. XIV, pp3026-3028; Vol. XX, pp4502-4503, 4569-4570, 4643-4651; Vol. XXI, pp149, 150, 169, 207. ZT 1988, Vol. XXXVI, pp10422-10423, 10484, 10494-10495, 10508-10509.

impossible to murder six million Jews.¹⁶⁵ Consequently, Holocaust historiography in both 1985 and 1988 focused on the architecture of gassing facilities, the physics of cremation, the chemistry of Zyklon-B and the biology of human absorption of poisonous gas (chapter six).¹⁶⁶

It is common knowledge that Christie's narrative of denial failed to convince two teams of jurors. Although jury deliberations and fact finding are withheld from public scrutiny and verification (chapter two), the guilty verdicts against Zündel signified the falsity of DSMRD and intrinsically the falsity of the genus of Holocaust denial. Through Thomas' judicial notice in 1988, the background fact of the Holocaust as 'the mass murder and extermination of Jews by the Nazi regime during the Second World War' was officially ruled as beyond doubt.¹⁶⁷ As Thomas insisted, whether intentional or functionally evolving, debates among 'reasonable people' were over the 'how' of the Holocaust not whether it had taken place.¹⁶⁸

In London in 2000 a similar strategy of rebuttal focused on selected false/misrepresented statements and treatise, but across a compilation of Irving's published work rather than a single denier tract.¹⁶⁹ However, as already noted, a comparable strategy of unmasking was not only directed at the political affiliation and motives driving Holocaust denial but extended to Irving's methodology. In contrast to his Canadian counterparts, Rampton provided a definition of a Holocaust denier at the very beginning of the trial:

By this I mean that he denies that the Nazis planned and carried out the systematic murder of millions of Jews, in particular, though by no means

¹⁶⁵ ZT 1985, Vol. XII, pp2614-2622.

¹⁶⁶ Ibid, Friedman, Vol. II, pp304-470; Fulop, Vol. III, pp591-627; Hilberg, Vol. IV, pp680-916, Vol. V, pp938-1166, Vol. VI, pp1167-1230; Vrba, Vol. VI, pp1244-1386, Vol. VII, pp1387-1606, Vol. VIII, pp1607-1641; Urstein, Vol. VIII, pp1738-1801; Leader, Vol. VIII, pp1802-1834; Faurisson, Vol. XI, p2353-2545, Vol. XII, p2555-2778, Vol. XIII, pp2889-2891; Thies Christopherson, Vol. XIII, pp2979-3015, Vol. XIV, pp3016-3038; William Lindsey, Vol. XIV, pp3043-3105, 3114-3156; Ditlieb Felderer, Vol. XIV, pp3166-3275. ZT 1988, Browning, Vols. XIII-XVII, p4002; Irving, Vol. XXXIII, pp9312-9450, Vol. XXXIV, pp9455-9822; Leuchter, Vol. XXXII, pp8942-9140, Vol. XXXIII, pp9145-9274.

¹⁶⁷ ZT 1988, Vol. VI, p1010.

¹⁶⁸ Ibid, pp1005-1006. Thomas was obviously referring to the 'intentionalist/functionalist' debates then prominent as explanations for the evolution of the Holocaust, which was exploited by Christie to denote the uncertainty of historical opinion.

¹⁶⁹ Nineteen in total and all converging to minimise the murderous apparatus and intent of the Holocaust and to exculpate Hitler. On the subject of Hitler alone the Defence had found over 30 foundational falsifications of the historical record, HRIRH, Day 32, p8. See footnote 8 for a list of the relevant published work.

exclusively, by the use of homicidal gas chambers, and in particular, though by no means exclusively, at Auschwitz in Southern Poland.¹⁷⁰

In mirroring the genus of Holocaust denial premised in DSMRD, rebuttal guaranteed the investigation of an extensive but familiar historiography of an evolving genocidal regime (chapter four) in which Auschwitz-Birkenau was once again foregrounded as a site of extermination. Moreover, it was agreed by both parties that Auschwitz should constitute a discrete category.¹⁷¹ Consequently, as in Canada, Holocaust historiography was again disproportionately focused on the architecture of gassing facilities, the physics of cremation, the chemistry of Zyklon-B and the biology of human absorption of poisonous gas.¹⁷² However, in a case determined by falsehoods/misrepresentations specific to Irving's published work, distinct events and evidence were also foregrounded. In particular, and unique to the Irving case, was the focus on Adolf Hitler's continued leadership of the 'Final Solution'. Marginalised in the Eichmann trial, and largely masked by the focus on a written 'Hitler order' in the Zündel trials, Irving's acclaimed 'obsession' brought Hitler's authority over all stages of extermination policy to the forefront of evidential and historiographical scrutiny.¹⁷³ Likewise, in contrast to both the Eichmann and Zündel trials, Holocaust historiography was disproportionately focused on specific transports of German Jews from Berlin in 1941, and their murder on arrival in Riga, the number of French Jews killed, the accuracy of Marie Vaillant-Couturier's testimony at the IMT, meetings held between Hitler and Hungary's Regent, Miklos Horthy (16-17 April 1943), Allied propaganda and the translation of camouflage language.¹⁷⁴

¹⁷⁰ HRIRH, Day 1, p90.

¹⁷¹ Ibid, p3; Day 2, pp115-120.

¹⁷² Ibid, Day 7, pp107-199; Day 8, pp2-191; Day 9, pp4-193; Day 10, pp4-213; Day 11, pp10-204; Day 13, pp3-20; Day 14, pp3-54; Day 17, pp67-70, 180-181; Day 25, pp41-43; Day 32, pp22-29, 106-181.

¹⁷³ With evidence of Hitler's leadership referenced throughout the Eichmann Judgement, AET, Vol. V, pp2119, 2121, 2124, 2125, 2139, 2140, 2146, 2148, 2159, 2160, 2161, 2169, 2170, 2173-2174, 2181, 2183, 2201, 2204. For references to the 'Hitler Order' see: ZT 1985, Vol. XXI, pp25, 55, 92, 103-104, 108, 182, 205. ZT 1988, Vol. XXXVI, pp10398, 10431-10433.

¹⁷⁴ **Riga:** HRIRH, Day 1, pp39-45, 90-94; Day 2, pp161-168; Day 3, pp15-79; Day 4, pp80-87, 161-167; Day 16, pp102-122; Day 21, pp183-198; Day 22, pp29-35, 88-107; Day 23, pp124-126; Day 24, pp77-79, 138-146; Day 25, pp116-124; Day 26, pp29-31; Day 29, pp78-84. **French Jews:** Day 7, pp55-81; Day 17, pp101-102; Day 22, pp200-202; Day 25, pp194, 195-200; Day 26, pp42-50. **Marie Vaillant-Couturier** (French Communist and member of the Resistance): Day 8, pp13-21; Day 12, p153; Day 20, pp59-61; Day 32, pp103-105. **Hitler/Horthy:** Day 12, pp32-56; Day 23, pp113-123, 150-161, 163, 180-182; Day 26, pp60-68; Day 29, pp86-88; Day 32, pp13-16, 101-102. **Allied Propaganda:** Day 5, pp171-179; Day 20, pp40-54, 122-124; Day 29, pp108-143. **Camouflage language:** With specific focus on the established interpretations of 'vernichtung', Ibid, Day 3, pp132-133, 136-13, 140, 141-142, 147-148, 186-188; Day 6, pp9-10; Day 24, pp27, 36, 40-41, 81-95; and 'ausrottung'/'ausrotten', Day 4, pp196-200; Day 24, pp28-35, 37-39, 42-47, 53-56, 111-112, 168, although Gray paid little attention to the arguments in his 'Judgement'.

Mirroring its defeat in Canada, the genus of denial was rejected along with the evidence and narrative of its ‘best shot’. In his refutation of Irving’s account, Gray ruled that a ‘convergence of evidence’ supported established historiography, and, in contrast to key omissions in the background fact judicially noticed in Canada, acknowledged the common definition of the Holocaust as:¹⁷⁵

the attempt by Nazi Germany, led by Hitler, to exterminate the Jewish population in Europe, which attempt succeeded to the extent of murdering between 5 and 6 million Jews in a variety of ways, including mass gassings in camps built for the purpose.¹⁷⁶

Gray likewise defined a denier as someone who repudiated this background fact and found that there was no doubt that Irving was ‘an active Holocaust denier ... anti-semitic and racist and ... associates with right wing extremists who promote neo-Nazism’.¹⁷⁷ Although there is no legal precedent in Anglo-American law defining the ‘objective historian’, Gray had based his findings from the perspective of the ‘conscientious’ ‘dispassionate’, ‘fair-minded’ and ‘objective’ historian, and subsequently found that Irving had ‘for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence’.¹⁷⁸ For the same ideological reasons, his ‘errors’ converged ‘to exonerate Hitler and to reflect Irving’s partisanship for the Nazi leader’.¹⁷⁹ Although there is no legal precedent in Anglo-American law defining the standards of historical scholarship, Gray agreed with Evans’ conclusions that Irving’s methodology ‘fell far short of the standard to be expected of a conscientious historian’.¹⁸⁰ The Defence team had substantially proven its case, and thus ‘the defence of justification succeeds’.¹⁸¹ More discretely, in Gray’s endorsement and application of Evans’ ‘canons of scholarly research’, the Defence team had also succeeded in not only achieving legal sanction of

¹⁷⁵ This ‘convergence’ was confirmed throughout Gray’s ‘Judgement’. See for example, *Ibid*, (TB) T2, ‘Judgement’, paras. 5.111-5.122, 5.123-5.150, 6.10-6.22, 6.23-6.38, 6.73-6.105, 7.15-8.24.

¹⁷⁶ *Ibid*, para. 8.3 and taken from (TB) B1, ‘Witness Report of Richard Evans’, section 3.1.

¹⁷⁷ *Ibid*, (TB) T2, ‘Judgement’, paras. 8.3, 13.167.

¹⁷⁸ *Ibid*, paras. 7.5, 13.24, 13.29, 13.41, 13.51, 13.55, 13.76, 13.77, 13.80, 13.83, 13.84, 13.87, 13.91, 13.126, 13.151, 13.167. The lack of precedent is observed by Wendie Ellen Schneider, ‘Past Imperfect’, *Yale Law Journal*, 110:8 (2001), pp1531, 1539.

¹⁷⁹ HRIRH, (TB) T2, ‘Judgement’, para. 13.142.

¹⁸⁰ *Ibid*, para. 13.51. Once again, the lack of precedent is observed by Schneider, ‘Past Imperfect’, pp1531, 1539.

¹⁸¹ HRIRH, (TB) T2, ‘Judgement’, para. 13.168.

the 'empiricist-analytical' genre of historiography but presenting it as *the* uncontested method of the historian's craft.¹⁸²

Although all four courtrooms authorised and reaffirmed the facts of both specific historiographies of the Holocaust and its overall genocide, the diversities of case continued post-trial in their acclaimed outcomes and reputations. The Eichmann trial was, and continues to be, celebrated as a 'triumph of didactic legality ... [that] ... transformed the destruction of the European Jews into *the* emblematic event of the twentieth century'.¹⁸³ Indeed, it has long been credited with creating "the Holocaust".¹⁸⁴ Conversely, conventional wisdom records the Zündel trials as a contradiction of their didactic aims.¹⁸⁵ According to Lawrence Douglas, both trials demonstrated 'the perils of relying on legal dramaturgy as a means of buttressing the integrity of history'.¹⁸⁶ More specifically, in the safeguarding of its own rules, these trials were prime examples of how the law often fails to do justice to the very history it has been enlisted to protect.¹⁸⁷ In contrast, the London trial has been designated as a disciplinary and didactic success. As reported in the 'Daily Telegraph': 'The Irving case has done for the new century what the Nuremberg tribunals or the Eichmann trial did for earlier generations'.¹⁸⁸ According to David Hirsh, it produced a newly authoritative narrative that reaffirmed academic historiography.¹⁸⁹ D.D. Guttenplan concluded that the facts of the Holocaust were now 'safer, while its 'Judgement' was heralded by Evans as not only a victory over Irving and the narrative of denial, but 'a victory for history, for historical truth and historical scholarship'.¹⁹⁰ It was also a victory for historians and confirmed that the Holocaust was safe in their hands. But, of specific interest to the history discipline, its authorisation of established (empiricist)

¹⁸² Ibid, (TB) B1, 'Witness Report of Richard Evans', para. 1.6.1.

¹⁸³ Douglas, *The Memory of Judgement*, p178.

¹⁸⁴ Ibid, p6. Dan Michman, "'The Holocaust'" – Do We Agree What We Are Talking About?', *Holocaust Studies: A Journal of Culture and History*, 20:1-2 (2014), p124. Felman agrees, 'Theatres of Justice', pp233, 234.

¹⁸⁵ Kahn, 'Rebuttal versus Unmasking'.

¹⁸⁶ Douglas, *The Memory of Judgement*, p225.

¹⁸⁷ Ibid, p256.

¹⁸⁸ Leader, 'The Bad History Man', *Daily Telegraph*, 12 April 2000.

¹⁸⁹ David Hirsh, *Law Against Genocide: Cosmopolitan Trials* (London: GlassHouse Press/Cavendish Publishing, 2003), p138.

¹⁹⁰ Guttenplan, *The Holocaust on Trial*, p307. Evans, *Telling Lies About Hitler*, p270.

craft was specifically celebrated as ‘a triumph ... over the “extraordinary” “irresponsibility” of postmodernism’.¹⁹¹

The focus on the diversities of the Eichmann, Zündel and Irving trials therefore confirms their applicability to comparative research of the history-law relationship in practice. At face value, they all join the history and record of successful litigation cases involving the Holocaust. Therefore, despite the identified challenges to its evidence, narratives and intended lessons, the implication is that each courtroom acted as an appropriate method of historical inquiry. However, as already indicated in chapter two, a body of secondary literature challenges this conclusion. A close reading of the daily recorded transcripts of the four trials likewise identifies a range of limitations of history-making integral to each legal form. Prior to the intended original research of the history-law relationship, it is therefore pertinent to examine the contribution each of the four trials have made to the existing 'consensus of critique'.

As noted in chapter two, and despite its notoriety, critics have long identified legal flaws in the Eichmann trial. More specifically, in addition to the relaxing of the ‘hearsay’ rules (see above), Hausner was allowed to reconstruct a grand narrative of murderous events in which Eichmann ‘had little or nothing to do’, submit witness testimony, ‘much of it irrelevant to the criminal activities of the defendant’, and integrate “into the procedural framework ... matters that do not directly belong in the trial”.¹⁹² Further breaches of ‘due process’ included the suspected monitoring of the communication lines of Defence and foreign observers, obstructing the Defence from calling its own or cross-examining specific prosecution witnesses, and preventing Servatius from interviewing Eichmann in private, until a threat to resign as Defence counsel forced the government to “backtrack”.¹⁹³

It has already been acknowledged that extra-historical and extra-legal interests directed and governed the trial (see above). Driven by ‘national pedagogy’ many have commented on the political (mis)appropriation of the trial and especially the role of the then Prime

¹⁹¹ Patrick Finney, ‘Beyond the Postmodern Moment?’, *Journal of Contemporary History*, 40:1 (2005), p158.

¹⁹² Landsman, ‘The Eichmann Case’, pp70, 80. Arendt, *Eichmann in Jerusalem*, p221.

¹⁹³ Birn, ‘Fifty Years After’, p462; Wilson, *Writing History*, p4; Weitz, ‘Gideon Hausner’ pp26-49. The quote was taken from the record of an Israeli cabinet meeting held on 7 May 1961 (ISA, 12969/11c), *Ibid*, p38.

Minister Ben-Gurion.¹⁹⁴ It was the conscious decision of both Ben-Gurion and Hausner that the grand narrative of Jewish suffering would be brought to trial even if it took precedence over legal formalities.¹⁹⁵ Both also agreed that the prevailing criticisms of the Judenräte would be absent from this narrative.¹⁹⁶ Ben-Gurion also utilised the media to give the trial and its message national prominence, vetted Hausner's opening address and 'commented liberally on it'.¹⁹⁷ In turn, Hausner reported on the trial directly to Cabinet meetings.¹⁹⁸ Party politics also played a role in witness selection.¹⁹⁹ Arendt subsequently accused Ben-Gurion of orchestrating a 'show' that intended to not only educate and embarrass the "nations of the world" but one that justified the establishment of a Jewish state that could 'hit back'.²⁰⁰ She likewise branded Hausner as 'a government-appointed agent'.²⁰¹ In the face of such overt political drivers, Stephen Landsman suggests that it was only through the diligence of the Judges, and particularly Presiding Judge Landau, that justice was seen to have prevailed in the Israeli courtroom.²⁰²

Critics have likewise identified the limitations of the trials' historiographical compositions and findings. It is noted that, however grand the intended narrative, the Eichmann trial neglected the distinctiveness of the Holocaust, confined its interpretation to an intentionalist lens, and reconstructed an account of Jewish resistance and survival that was not only misleading but silenced alternative experiences and ignored the role of Jewish complicity (however 'grey').²⁰³ It also reconstructed misleading and partial accounts of the complexity of perpetration, with Hausner, as shown in chapter two,

¹⁹⁴ Wilson, *Writing History*, p4. See also: Cesarani, *Eichmann*; Weitz, 'Gideon Hausner'; Birn, 'Fifty Years After'; Landsman, 'The Eichmann Case'. Yablonka argues that Ben-Gurion did not recognise the significance of the trial as early as Hausner and remained more pragmatic since concerned about its impact on relations with then West Germany. Yablonka, *The State of Israel vs. Adolf Eichmann*, pp46-54.

¹⁹⁵ *Ibid*, p37.

¹⁹⁶ *Ibid*.

¹⁹⁷ Birn, 'Fifty Years After', p445. Cesarani, *Eichmann*, p256 and reaffirmed by Weitz, 'Gideon Hausner', p44 and Landsman, 'The Eichmann Case', p85.

¹⁹⁸ Weitz, 'Gideon Hausner', pp37-38.

¹⁹⁹ Birn, 'Fifty Years After', pp444-445.

²⁰⁰ Arendt, *Eichmann in Jerusalem*, pp9-10.

²⁰¹ *Ibid*, p266.

²⁰² Landsman, 'The Eichmann Case', p100. Weitz concurs, 'Gideon Hausner', pp38-39. Conversely, Ben-Gurion has been identified as a 'hero' for not only ensuring that Eichmann was brought to trial but for devising its 'corrective' strategy to the exclusion of specific crimes against the Jewish People and the survivor voice at the IMT, Kaufman *et al*, *From the Protocols of the Elders of Zion*, pp75, 77.

²⁰³ Wilson, *Writing History*, p3; Tom Lawson *Debates on the Holocaust* (Manchester: Manchester University Press, 2010), pp52-81, 271-300; Weitz, 'Gideon Hausner', pp31-37; Landsman, 'The Eichmann Case', pp86-87. An obvious reference to Primo Levi's "Grey Zone" in *The Drowned and the Saved*, trans. by Raymond Rosenthal, (London: Abacus, 1989), pp22-51.

reinforcing the then 'fashionable understanding' of Nazi perpetrators as 'depraved criminals', while casting Eichmann as 'more of a monster and more in control of the killing machinery than he was'.²⁰⁴ As Ruth Bettina Birn argued, 'the major problem' in the trial was 'the discrepancy between Eichmann's real role and the exaggerated image created by Hausner'.²⁰⁵ In effect, Hausner was not interested 'in the real Eichmann'.²⁰⁶ Hausner also ignored facts already found by prosecutors in Germany.²⁰⁷ Thus, by 1961, a level of historical knowledge existed that could have more accurately informed the Prosecution in Israel, but there was 'no sign that Hausner was much inclined to overcome the weakness of his case'.²⁰⁸ Beyond the courtroom the misleading narratives continued, with Eichmann largely reconstructed through the lens of Hannah Arendt as 'the epitome of the totalitarian man'; a depiction which 'helped to shape the way in which generations of historians and thinkers conceptualized the Third Reich'.²⁰⁹ In turn it is argued that her account of the proceedings 'has come to overshadow its subject'.²¹⁰

But perhaps most controversially, critics have also identified flaws in its fêted victim-driven narrative. As already mentioned, at the legal level it was neither pertinent to the witnessing of Eichmann's crimes nor essential to the Prosecution's case.²¹¹ However, since largely unfettered, this narrative was not only prejudicial to Eichmann but 'hamstrung' his counsel.²¹² As confirmed by the transcripts, once admitted as evidence, Servatius rarely challenged or questioned the Prosecution's witnesses.²¹³ In court he justified his approach as 'respect for their suffering', but, arguably, once faced with this suffering it is more likely that he did not want to 'anger the court or provoke even greater

²⁰⁴ Cesarani, *Eichmann*, p3. Landsman, 'The Eichmann Case', p81.

²⁰⁵ Birn, 'Fifty Years After', p471.

²⁰⁶ Ibid, p450.

²⁰⁷ Through investigations carried out by the "Central Agency for the Investigation of Nazi Crimes" (Ludwigsburg) since 1959, Ibid, pp447-450.

²⁰⁸ Ibid, pp448-449, 473.

²⁰⁹ Cesarani, *Eichmann*, p4.

²¹⁰ Especially in Europe and the US, Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', in David Bankier and Dan Michman (eds.), *Holocaust and Justice: Representation of the Holocaust in Post-War Trials* (New York: Berghahn Books, 2010), p22; Felman, 'Theatres of Justice', pp210, 211.

²¹¹ Acknowledged by Hausner after the trial, Gideon Hausner, *Justice in Jerusalem* (London: Nelson, 1967), p291.

²¹² Lipstadt, *The Eichmann Trial*, p87.

²¹³ Asking only for points of clarification from 21 witnesses.

sympathy for them'.²¹⁴ Crucially, as highlighted by Arendt, the submission of testimony that had no direct link to Eichmann established "the right of the witness to be irrelevant".²¹⁵ Conversely, however seminal in its restoration of the survivor voice, the expectation and process of 'bearing witness' was not without cost. Several witnesses were emotionally traumatised both prior to and during their testimony.²¹⁶ Most visible was the fainting of Yehiel Dinur (a survivor of Auschwitz-Birkenau) and the halting of his evidence.²¹⁷ Likewise, however evidentially privileged, others assumed their credibility was under scrutiny.²¹⁸ Thus, in contrast to the attention placed on the law's inability to 'do justice' to the experiential evidence of the survivor voice (chapter two), Birn has challenged the assumed empowerment of those who testified at the trial, while Landsman agrees that the impact of testifying continues to be neither adequately considered nor explicitly recognised.²¹⁹ Beyond the Eichmann trial, the adoption of Hausner's 'victim-driven' model in successive perpetrator trials has not only shifted attention away from the criminal activities of the accused, but has yielded protracted investigations as well as flawed and questionable results.²²⁰ Yet, the so-called '*Eichmann strategy*', continues to 'seduce prosecutors'.²²¹ Thus, despite its invaluable contribution to the "human story of the Jewish victims' suffering", the Eichmann legacy is contested.²²²

In contrast, the critiques of the Zündel trials have never been challenged. Despite reaffirming the falsity of denier treatise no commentator has disputed Douglas' conclusion that Canadian court procedures and rules impeded a historical reckoning with the Holocaust.²²³ As indicated above, although successful in finally bringing both Zündel and denier treatise to trial, s.177 allowed Christie to focus attention on the facticity of the

²¹⁴ AET, Vol. V, p2056. Servatius had suggested that the witness statements be waived but the Judges ruled that their evidence had to be heard in light of Eichmann's denial of all counts in the Indictment, Vol. I, p366. Landsman, 'The Eichmann Case', p96.

²¹⁵ Arendt, *Eichmann in Jerusalem*, p225.

²¹⁶ Birn, 'Fifty Years After', p467; Landsman, 'The Eichmann Case', pp93-94.

²¹⁷ AET, Vol. III, p1237.

²¹⁸ Landsman, 'The Eichmann Case', pp94-95.

²¹⁹ Birn, 'Fifty Years After', pp465-469. Landsman, 'The Eichmann Case', p95. For example, testifying does not resolve the trauma of surviving, while, in the aim that future generations 'never forget', any attempt at coming to terms with or even the liberation from traumatic memory is intentionally denied, Zoë Vania Waxman, *Writing the Holocaust: Identity, Testimony, Representation* (Oxford: Oxford University Press, 2006), pp15-16, 118-119, 159-160.

²²⁰ Landsman, 'The Eichmann Case', pp100-109.

²²¹ Most recently in International Tribunals. Ibid, p109.

²²² Lipstadt, *The Eichmann Trial*, p 192.

²²³ Wilson, *Writing History*, p53.

Holocaust from the outset, while denier strategy and tactic largely reduced its complexities to mechanistic narratives of gassing and incineration capacity and utility at Auschwitz-Birkenau. In contrast to the Eichmann trial there were no breaches of 'due process'. Rather, the rigid application of legal protocol, and especially the 'hearsay' rules, not only challenged but intentionally confined, and even rejected, the evidence of the Holocaust. Indeed the 'hearsay' rule acted as the Defence's "controlling trope".²²⁴ Even when exempted from its protocol, the admission of established historian evidence and testimony was not only restricted but its value and weight was inherently diminished. As recognised in chapter two, historical expertise was explicitly downgraded to second-hand 'opinion' rather than first-hand fact, and therefore viewed as a weaker form of evidence, while the qualifying rules legitimated the opinion of Holocaust deniers 'along the same lines' as established historians.²²⁵

Most notably, and contrary to its intention, the request for judicial notice of the central facts of the Holocaust allowed its authority to be further challenged and undermined. Despite Locke's insistence to the contrary, the rejection of judicial notice in 1985 implied doubt over its reputable facts, and, however regretful, 'seriously upset the didactic ends of the trial'.²²⁶ Conversely, it provided 'a major propaganda victory for the deniers'.²²⁷ Although rectified in 1988, the facts judicially noticed in the retrial reduced the complexity of the Holocaust to mere background definition. Furthermore, the specific removal of the reference to policy may have been legally relevant (as pertinent to the 'facts in issue') but Thomas' claim that it was not essential to the fact of the Holocaust was simply wrong.

Explicit blame has long been apportioned to Christie for 'desecrating' both experiential and historical evidence.²²⁸ But, arguably, this was his function as defence counsel. Blame has likewise been assigned to the Crown, especially in the 1985 trial, in which the primacy of rebuttal placed an inevitable focus on the Holocaust instead of Zündel.²²⁹ Griffiths has also been specifically blamed for failing to petition for judicial notice at the very

²²⁴ Douglas cited in *Ibid*, p54.

²²⁵ ZT 1985, Vol. XI, p2475.

²²⁶ *Ibid*, Vol. X, pp2188, 2191; Vol. XX, p4465. Douglas, *The Memory of Judgement*, p224.

²²⁷ Kahn, 'Rebuttal versus Unmasking', p12.

²²⁸ Douglas, *The Memory of Judgement*, pp225, 241.

²²⁹ Kahn, 'Rebuttal versus Unmasking', pp10-13.

beginning of the 1985 trial.²³⁰ Yet, the actual staging of the petition was immaterial.²³¹ Rather, it was the selected facts themselves that were at fault in a case in which those petitioned for notice were central to those 'in issue'. It is suggested that Griffiths especially erred when raising judicial notice a second time. The legal justifications for the first ruling had not changed and therefore rejection a second time was inevitable. At the retrial in 1988 the strategy of rebuttal was retained by Pearson, but it was accompanied by a greater emphasis on unmasking Zündel's political agenda.²³² According to Kahn, the shift in emphasis resulted in a less controversial trial 'but also one that was less effective as a statement against Holocaust denial'.²³³

Outside the courtroom blame has also been apportioned to the media. In 1985, amid a glare of press attention, newspapers reported the points made in court, 'however false or ludicrous', and often without correction.²³⁴ Headlines created the public perception of controversy and doubt, while providing 'an air of legitimacy to Holocaust denial'.²³⁵ According to Alan Davies, disbelief in the Holocaust 'was portrayed as a perfectly reasonable position', with every discrepancy, however irrelevant or trite, aired as a 'revisionist' victory.²³⁶ Some Jewish commentators also viewed the media attention awarded to Zündel as 'an obscenity'.²³⁷ Yet others, including key prosecution witness Rudolf Vrba, were undaunted since: "It's inevitable that any crook gets publicity when justice catches up to him. That's the price of freedom".²³⁸ In 1988 public reporting of the trial was initially banned by Thomas, but media attention never reached the heights of interest shown in 1985.²³⁹ Although publicity to Holocaust denial was subsequently curtailed, Leonidas Hill argues that the suppression of news of the trial left interested citizens 'uninformed about a matter of public and educational interest to a democratic

²³⁰ Hill, 'Revisionism and the Law', p11; Kahn, 'Rebuttal versus Unmasking'; Douglas, *The Memory of Judgement*.

²³¹ Hill, 'Revisionism and the Law', p11; Kahn, 'Rebuttal versus Unmasking', p12.

²³² Hill, 'Revisionism and the Law', pp25-26; Kahn, 'Rebuttal versus Unmasking', pp13-14.

²³³ Ibid, p3.

²³⁴ Ibid. Hill, 'Revisionism and the Law', p31.

²³⁵ Ibid, Kahn, 'Rebuttal versus Unmasking', pp3, 10.

²³⁶ Davies, 'A Tale of Two Trials', p86. Kahn, 'Rebuttal versus Unmasking', p10.

²³⁷ Hill, 'Revisionism and the Law', p23.

²³⁸ A survivor of Auschwitz-Birkenau (then known as Walter Rosenberg) and imprisoned from June 1942 until his escape (with Alfred Wetzler) on 7 April 1944. Vrba quoted in Hill, 'Revisionism and the Law', p23.

²³⁹ Hasian Jnr., 'Canadian Civil Liberties', p52; Hill, 'Revisionism and the Law', p25.

society'.²⁴⁰ Despite the furore surrounding the media coverage, the overall impact of the trials on public interest and knowledge has been difficult to calculate.²⁴¹ Although a broad section of Jewish representatives supported the trial, and welcomed its verdict, many Canadians suspected the price of conviction had been "'too high'".²⁴²

In contrast to both the Eichmann and Zündel trials criticism of the Irving trial has been rather muted. Yet, notwithstanding its celebrated victories, the trial was not without its flaws or risks. Most notably, despite Rampton's insistence that the Holocaust was not on trial, legal process, as in Canada, blurred the intended focus on Irving and threatened to confuse the public audience.²⁴³ Many commentators assumed that not only the Holocaust but 'History' itself was on trial, or perhaps they were witnessing the site of a new 'Historikerstreit'.²⁴⁴ Also, as in Canada, historiographical focus and dispute in London was guided by and submerged within a 'miasma of denial'.²⁴⁵ Consequently, over a period of 32 days the genus of Holocaust denial was played out, yet again, to a world-wide audience.²⁴⁶ Irving subsequently forced established historians to justify both their competence and craft, and, through hostile cross-examination of their expert reports, controlled the content and discussion of their testimony within 'a fog of uncertainty'.²⁴⁷ Outside the courtroom, media headlines reported claims made by Irving denying established facts of the Holocaust, and gave voice to those arguing that 're-examining the claims behind the genocide will be no bad thing', or those decrying its privileged status in 'modern public memory'.²⁴⁸

²⁴⁰ Ibid, p31.

²⁴¹ Ibid.

²⁴² Cited in Hasian Jnr., 'Canadian Civil Liberties', p55.

²⁴³ HRIRH, Day 1, p101, Day 11, p9. Examples of media confusion include: Sarah Lyall, 'At War Over the Holocaust', *International Herald Tribune*, 12 January 2000; Douglas Davis, 'Holocaust on Trial in London', *Jerusalem Post*, 11 January 2000; Neal Ascherson, 'Last Battle of Hitler's Historians', *The Observer*, 16 January 2000.

²⁴⁴ For example: Ascherson, 'Last Battle of Hitler's Historians'; Jonathan Freedland, 'Court 73 – Where History is on Trial', *The Guardian*, 5 February 2000; Clare Dyer, 'Judging History', *The Guardian*, (G2), 1 April 2000. See Evans, *Telling Lies About Hitler*, as background to a range of public misinterpretations of the trial as well as a number of issues raised by commentators on both history and the Holocaust, pp28-33, pp202-205, pp245-255 and pp 258-265. Note that the main title of Lipstadt's book on the trial was 'History on Trial' as was Chapter 1 of Evans, *Telling Lies About Hitler*.

²⁴⁵ Deborah Lipstadt, 'The Eichmann Trial', *The New York Times*, Sunday Book Review, 8 April 2011. See: www.nytimes.com/2011/04/10/books/review/excerpt-the-eichmann-trial-by-deborah-lipstadt.html?pagewanted=all&_r=0 (Accessed 2 May 2014).

²⁴⁶ HRIRH, (TBs) T9-12, 'Press Clipping's provide an overview of international media coverage of the trial.

²⁴⁷ Guttenplan, *The Holocaust on Trial*, p164. Evans, *Telling Lies About Hitler*, p202.

²⁴⁸ See the coverage of Harry Arnold, 'Slaughter of Jews by Gas 'Never Happened' Historians' libel trial claim', *Daily Record*, 18 January 2000; Tim Jones, 'Irving Insists that Hitler Did Not Order the Holocaust', *The Times*, 19 January 2000; Special Report, 'Gas Chambers "That Never Were"', *The Guardian*, 27 January

Civil law also threatened to award credibility to both Irving and his treatise. Mirroring its criminal counterpart, the court not only admitted both denier account and Irving's 'chain of documents' but awarded them with equal probative value (however lacking in probative weight once cross-examined). Likewise, despite his outright condemnation of Irving's method and narrative of denial, Gray awarded authority to Irving's expertise; identifying his knowledge of the military history of the Second World War as 'unparalleled' and Evans' negative assessment as 'too sweeping'.²⁴⁹ Although forced to testify on behalf of Irving, Professor Donald Watt similarly accorded him a degree of authenticity when publicly claiming:

I have a very strong feeling that there are other senior historical figures, including some to whom I owed a great deal of my own career, whose work would not stand up, or not all of whose work would stand up, to this kind of examination.²⁵⁰

Some observers were 'impressed' by Irving's performance.²⁵¹ Thus, while also forced to testify on behalf of Irving, the military historian, Sir John Keegan reported:

He is a large, strong, handsome man, excellently dressed, with the appearance of a leading QC. He performs well as a QC also, asking, in a firm but courteous voice, precise questions which demonstrate his detailed knowledge of an enormous body of material.²⁵²

Moreover, while the 'Judgement' found that a 'convergence of evidence' reaffirmed the facts of established Holocaust historiography, Gray was 'sympathetic' to Irving's claim of a lack of contemporaneous documentation relating to the foundational subjects of gas

2000, HRIRH, (TB) T9 and T10, 'Press Clippings'. As an example of those suggesting re-examination see Christopher Hitchens, 'The Holocaust Revisited', *Yorkshire Post*, 18 January 2000. For critiques of its 'privileged status' see Evans, *Telling Lies About Hitler*, p266 and challenged by David Cesarani, 'History on Trial', *The Guardian* (G2), 18 January 2000, pp1-3.

²⁴⁹ HRIRH, (TB) T2, 'Judgement', paras. 13.7, 13.8.

²⁵⁰ *Ibid*, Day 7, pp42-43. Watt also contributed an article to *The Evening Standard* on the day of the Judgement arguing that 'History Needs Its David Irvings', 11 April 2000, HRIRH, (TB) T11, 'Press Clippings'.

²⁵¹ Evans, *Telling Lies About Hitler*, p207.

²⁵² John Keegan, 'The Trial of David Irving – And My Part in His Down-fall', *Daily Telegraph*, 12 April 2000.

chambers as killing centres.²⁵³ He also agreed that documentary evidence implicating Hitler in the systematic shooting of Jews was 'sparse'.²⁵⁴ Gray likewise found that Irving had made 'valid comments' about the unreliability of various accounts provided by both survivors and camp officials.²⁵⁵ Although common limitations of the historian's craft, these conclusions threatened to infer doubt amongst a public that 'had supposed that the evidence of mass extermination of Jews in the gas chambers at Auschwitz was compelling'.²⁵⁶

More generally, despite analysis of the pre-trial documentation indicating that Irving could not win, there were no guarantees that this 'just' case would inevitably prevail.²⁵⁷ As Lipstadt later admitted, the Defence team recognised that 'because of the vagaries of the British libel system, we might lose even though the facts were on our side'.²⁵⁸ Likewise, there is no guarantee that the 'fog of uncertainty' deliberately devised by deniers will be inevitably exposed. Gray, for example, raised the possibility of Irving being 'honestly anti-Semitic and honestly extremist' in the closing stages of the trial, which implied that he had not understood, or been convinced by, Rampton's linking of antisemitism and Holocaust denial.²⁵⁹ As Kahn observed, whether rebuttal, unmasking, or both, looking to litigation as a means of combating Holocaust denial is inherently problematic.²⁶⁰ It not only exposes Holocaust historiography to the lies of its politics, but forces historians to engage with 'an opponent who is free to change factual positions as the situation warrants'.²⁶¹ It therefore risks an exchange that 'mainstream Holocaust historians can never win'.²⁶² As long cautioned by Lipstadt, it also threatens to award a degree of

²⁵³ HRIRH, (TB) T2, 'Judgement', para. 13.73. With Gray's support of the 'convergence of evidence' recorded in *Ibid*, paras. 5.111-5.122, 5.123-5.150, 6.10-6.22, 6.23-6.38, 6.73-6.105, 7.15-8.24.

²⁵⁴ *Ibid*, para. 6.27.

²⁵⁵ *Ibid*, para. 13.74.

²⁵⁶ *Ibid*, para. 13.71.

²⁵⁷ See Lynne Humphrey, *Court 73: A Political Propagandist Revealed?* (MA Dissertation: Royal Holloway, University of London, 2000) for a detailed analysis of the pre-trial material. Douglas, *The Memory of Judgement*, p 5.

²⁵⁸ Deborah E. Lipstadt, 'The Holocaust: From Memoirs to Material Evidence. How Can We Know and Understand What Happened', Public Lecture, Richard and Susan Master Visiting Professorship, 21 March 2006. An Irving win was also considered in the media by Ascherson, 'Last Battle of Hitler's Historians', *The Observer*, 16 January 2000; Walter Reich, 'Look Again: This London Trial Is Not About the Holocaust', *International Herald Tribune*, 20 January 2000; Jonathan Freedland, 'Let's Close the Book', *The Guardian*, 12 April 2000. HRIRH, (TBs) T9-11, 'Press Clippings'.

²⁵⁹ *Ibid*, Day 32, pp46-48.

²⁶⁰ Kahn, 'Rebuttal versus Unmasking', p4.

²⁶¹ *Ibid*, p9.

²⁶² *Ibid*. See also Douglas, *The Memory of Judgement*, pp255-256.

legitimacy to the narrative of denial, with the very act of engagement implying its claims are simply another point of view.²⁶³ The Zündel trials may serve as exemplars of this critique but the Irving trial presented similar opportunities and threats. And, regardless of their legal and public defeats, it is evident that neither Irving nor Zündel have been silenced, while the false claims constituting Holocaust denial continue to be propagated.²⁶⁴

Notwithstanding the flaws indicated in these familiar critiques, engagement with the daily recorded transcripts specifically reveal that, whether relaxed or procedurally ordinary, it is legal process itself that posed the biggest threats to both the established facts and narratives of the Holocaust, as well as any intended lessons. Manifest in legal submissions from the outset, to consistent wrangling over evidential admissibility, the adversarial cross-examination of witnesses, and, in the cases of both Eichmann and Zündel, regular recourse to judicial ruling, the Holocaust was not only variously ‘cooked’ but masked and submerged in the vagaries of the legal form. Most notably, the Eichmann trial audiences were not only inundated with the submission of 1,434 pieces of documentary evidence, but had to attend to, and comprehend, an accompanying dialogue of explanation, dispute and ruling.²⁶⁵ Indicative was the convoluted debate over the admissibility of the ‘Sassen Document’.²⁶⁶ Comprising photocopies of transcripts of 67 tapes of conversations, held between Eichmann and Willem Sassen in Buenos Aires over a period of 4 months in 1956 to 1957, this one item of documentary evidence confronted the audience with not only opposing accounts over the accuracy of its content but discussions on evidence of a direct statement rather than ‘hearsay’, the organisation and transfer of the recordings to

²⁶³ Lipstadt, *Denying the Holocaust*, pp17-19, 221-2.

²⁶⁴ Largely on-line and more recently brought to public attention in Greece through Parliamentary representatives of the neo-fascist party ‘Golden Dawn’. See also Kaufman *et al*, *From the Protocols of the Elders of Zion*, in which the persistence of antisemitic lies and rumour is both derided and lamented regardless of the numbers of times they have been brought to trial and defeated.

²⁶⁵ For example, the **explanation** of such as the executive instructions from Reinhard Heydrich, issued in 1936, detailing the procedure of inter and intra-departmental communication, AET, Vol. I, p271; minutes of a meeting held in Berlin, on 21 September 1939, chaired by Heydrich and attended by high SS officers including Eichmann, to discuss the ghettoisation and removal of Jews from Poland, *Ibid*, p314; 18 reports sent to Eichmann, each relating to a transportation of 1,000 Jews from France and selected because they were representative of the deportation process, Vol. II, pp593-594. **Disputes:** over Rudolf Höss’ handwritten autobiography/statement (1946) and memoirs, *Ibid*, pp240-243, 256; two orders of execution by ‘shooting’ signed by Eichmann, *Ibid*, pp341-342; the ‘Kasztner Report’, Vol. II, pp908-910; the testimony of 2 witnesses sterilised at Auschwitz-Birkenau (held in camera), Vol. III, pp1195-1196. **Rulings:** on the submission of Dieter Wisliceny’s reports, *Ibid*, Vol. I, p237; the submission of the official ‘Polish Bulletin’ containing Höss’ autobiography, *Ibid*, p241; the relevancy of testimony by Dr Wells, *Ibid*, p366; the admission of witness testimony on sterilisation and in camera, Vol. III, p1196; and exhibits containing evidence of Höss, *Ibid*, p1312.

²⁶⁶ *Ibid*, pp1323-1340. Sassen was a Dutch journalist and former Nazi Party member and volunteer in the Waffen SS. The joint aim had been to ‘publish a book on the role of Eichmann in the persecution of the Jews’, *Ibid*, p1337.

transcript, the relevance of Eichmann's hand-written and typed corrections, and the admissibility of unsigned statements prior to indictment.²⁶⁷ Likewise, convoluted debates surrounded the admissibility of a range of documentation relating to Dieter Wisliceny's statements (Eichmann's deputy), when imprisoned in Bratislava (1946), and testimony to the IMT (November 1945), as well as accompanying affidavits by Smith W. Brookhart (USA official at the IMT) as authentication.²⁶⁸ In amongst confusion over the exact document being referred to in the ensuing debates, the court audience had to contend with disputes over Wisliceny's credibility as a witness, the 'self interest' motives of those 'in the shadow of execution', hostile opinion, perpetrator collusion in drawing up 'a common line of defence', and the admissibility of shortened versions of statements, written opinions and those expressed retrospectively.²⁶⁹ Even when documentary overload was intentionally 'relieved' by survivor testimony, the re-telling of personal experience was not only harrowing in content but also added to the density of evidential procedure.²⁷⁰ Consequently, Hausner was regularly reminded to 'brief the witnesses before they come to testify' in order to 'prune any superfluous detail'.²⁷¹

Similarly, in the Zündel trials, audiences were subjected to consistent wrangling over the admissibility of a range of evidence, however minimal in comparison. Indicative was the Crown's request in 1985 to submit a film and narrative on the 'Nazi Concentration Camps'. This one item of evidence forced audiences to follow, and comprehend, arguments on not only the relevance of its content but the probative value of edited material, added and anonymous narration, photographic representation, transcripts sanctioned at the IMT, the concepts of impartiality and prejudicial, and the accessibility, archiving and criteria of a public document.²⁷² Likewise, the Prosecution's submission of

²⁶⁷ Ibid, pp1323, 1325-1329, 1330-1336, 1337-1338, 1353. Since the interviews had been published by *Life* magazine in November 1960, while Eichmann was being interrogated, Ibid, pp1325-1327, 1330-1333, 1335, 1353. The vast majority of the transcripts were typewritten (on 3 typewriters) alongside 83 pages of handwritten notes verified by an expert (Inspector Hagag) as Eichmann's handwriting. The Prosecution had subsequently organised the typewritten transcripts into 16 files, corresponding to the sequential tapes, and Eichmann's handwritten notes into File 17.

²⁶⁸ AET, Vol. I, pp194-206.

²⁶⁹ Ibid, pp195-206.

²⁷⁰ Cesarani, *Eichmann*, p328. Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton: Princeton University Press, 2016), p71. Conversely, the documentation sessions acted as a buffer to the harrowing experience of listening to 'unreserved disclosures' of human atrocity, Felman, 'Theaters of Justice', p226.

²⁷¹ AET, Vol. I, 270, 366-367, 397-398, 466; Vol. II, pp583, 797, 799, 800, 827, 851; Vol. III, pp1187-1188, 1235-1236, 1237, 1277-1279.

²⁷² ZT 1985, Vol. X, pp2192-2287.

a copy of a bulletin by the 'International Committee of the Red Cross' (ICRC) forced audiences to grapple with debates surrounding various sections of the 'Evidence Act', relevant precedents relating to the admission of 'hearsay', 'defective' and 'reasonable' submission notices, the definitional provisions of a 'record', the credibility of editorial comment, 'inculpatory/exculpatory sentences', and repeated arguments over anonymous authorship, 'competent and compellable' authentication (Rene de Grace) and records made, disseminated and stored in the 'usual and ordinary course of business'.²⁷³ In both 1985 and 1988 the volume of primary source material may have been a fraction of the items submitted in the Israeli courtroom, but, during cross-examination of a range of expert witnesses, audiences were inundated with the contested interpretation of evidence referred to by proxy as well as a corpus of secondary literature, drawings, maps and photographs of gas chambers, crematoria and various camps, specifically Auschwitz-Birkenau.²⁷⁴

Protracted debate in the London courtroom, over the content, context, language and translation of a 'massive' range of documentation, was equally 'stupefying' to both audience and reader.²⁷⁵ Indicative were debates that raged back and forth on Hitler's authorisation of 'Kristallnacht', the interpretation of 'Judentransport', Irving's deliberate mistranslation of 'haben' as 'Juden', the role of Hitler in the mass shootings of Berlin Jews on arrival in Riga in 1941, the date and meaning of the reference to Hitler wanting 'the solution of the Jewish problem postponed until after the war is over', and proof that Hitler had been sent, and had read, the reports of the Einsatzgruppen's mass shootings of Jews in 1942.²⁷⁶ Irving's consistent dispute over the translation of camouflage language

²⁷³ Submitted as evidence that this bulletin had not verified DSMRD's lower figures of Jewish victims as claimed in DSDRD. Ibid, Vol. IX, pp1934-1947, 1951-1967. For the ruling and further submissions see, Ibid, pp1968-1994.

²⁷⁴ Ibid, 'Index of Exhibits'. ZT 1988, 'Exhibits Index'.

²⁷⁵ Noted by Gray in his 'Judgement', HRIRH, (TB) T2, para. 4.11 and reported by one journalist as a 'barrier to historical truth', Cal McCrystal, 'Court 73 Comes to Auschwitz', *Evening Standard*, 11 February 2000. Evans, *Telling Lies About Hitler*, p197.

²⁷⁶ **'Kristallnacht'**: Heydrich's order 1.20a.m. 10 November 1938, HRIRH, Day 12, pp96-97, 109-113, 116-120, 129; Day 13, pp24-30, 44-45; Day 22, pp21-22; Day 23, pp228-232; Rudolf Hess' office message 2.56a.m. 10 November 1938, Day 12, pp108, 124-128, 140; Day 13, pp46-48, 53, 55; Day 21, pp87-97; Day 23, pp227-228, 233; Eberstein's telex 2.10a.m. 10 November 1938, Day 12, pp114-115, 123-124; Day 13, p55; Day 21, pp82-85, 97-102; Goebbels' diary entries, 10 November 1938, Day 12, pp79-85, 103-104; Day 13, pp30-35; Day 21, pp102-104; and 1 November 1938, Day 13, pp36-43, 49-51; Nazi Party Tribunal Report, 13 February 1939, Day 12, pp86-89, 136-140; Day 13, pp58-70, 21, pp104-114; Day 23, p228. **'Judentransport'**: Himmlers' log, 30 November 1941, Day 1, pp90-94; Day 2, pp288-291; Day 3, pp29-50, 57, 81-79, 115-127; Day 4, pp122-132; Day 16, pp111, 113-119; Day 21, pp183-185, 188-190; Day 22, pp41-42, 53-64; Day 26, pp28-31. **'Haben/Juden'**: Himmlers' log 1 December 1941, Day 1, pp164-165; Day 2, pp283-287; Day 3, pp53-56; Day 16, pp107-109; Day 21, pp192-193; Day 22, pp64-78, 93-101; Day 23, pp234-235; Day 24, pp138-139; Day 26, p101. **Riga shootings**: The 'Bruns report', Day 1, pp36-

also forced audiences in London to grapple with German grammar (including the subjunctive) and idiom.²⁷⁷ As reported by Neal Ascherson:

We spend hours on the timing of a scribbled Himmler phone-note about how a transport of Berlin Jews should be treated in Riga, on a bugged conversation between captured SS men in London about whether somebody said he had an order from Hitler to kill Latvian Jews, on the meanings of words such as Vernichtung (destruction) or Judentum (Jewry).²⁷⁸

Furthermore, as in the Zündel trials, the focus on homicidal gas chambers at Auschwitz-Birkenau also forced audiences to grapple with not only historical data and event but architecture, biology, chemistry, engineering, physics and toxicology.²⁷⁹

Comprehension and facticity was further obscured by the adversarial form, or, as identified by Locke in 1985, the ‘unarmed combat and contest’ of cross-examination.²⁸⁰ With the exception of Servatius’ passive approach to survivor testimony in Israel, the tactics of adversary (chapter two) were visibly evident in all four trials. Consequently, admissions and concessions were determined and established but painstakingly extracted. Indicative was Hausner’s cross-examination of Eichmann, during which he struggled to clarify a range of charges, far less extort admissions of guilt over, for example, Eichmann's role in the plundering of Jewish assets, 'Kristallnacht', Jewish affairs in the RSHA, the extermination camps and the initiation and supply of gas as a method of mass murder.²⁸¹ As the Judges found:

43; Day 2, pp280-282; Day 3, pp54-55, 82-99, 111-115, 201-204; Day 22, pp35, 79-91; Day 26, pp108-114. **Hitler's 'solution'**: Day 1, pp169-172; Day 6, pp155-193; Day 7, pp2-22; Day 22, pp109-168. **Einsatzgruppen report**: Heinrich Müller’s order (Head of the Gestapo) to the Einsatzgruppen, 1 August 1941, Day 14, pp56-67; Day 16, pp85-90; Day 17, pp97-99, 183, 193; Day 24, pp150, 156-157; Day 29, p85. **Hitlers’ “Table Talks”**: 25 October 1941, Day 4, pp161, 170-191; Day 5, pp17-25; Day 17, pp86-91, 198-199; Day 26, p40.

²⁷⁷ HRIRH, Day 3, pp139-140; Day 16, pp126-127; Day 22, p119; Day 24, p160. See also ‘camouflage language’ in footnote 174.

²⁷⁸ Ascherson, 'Last Battle of Hitler's Historians'.

²⁷⁹ See as example the examination-in-chief and cross-examination of van Pelt in London, HRIRH, Day 9, pp20-193; Day 10, pp5-213; Day 11, pp10-204; Day 13, pp3-20; Day 14, pp3-25.

²⁸⁰ ZT 1985, Vol. I, p93.

²⁸¹ AET, Vol. IV, pp1590, 1591, 1595, 1637, 1710-1711.

We saw him again and again winding his way under the impact of cross-examination, retreating from complete to partial denial, and only when left no alternative, to admission²⁸²

In turn, Eichmann was at varying times confused, elusive and verbose.²⁸³ He sought to avoid certain lines of questioning, on such as the intention of the 'Madagascar Plan', his knowledge of the use of gas, and his representatives in Hungary, or reverted to a lack or no memory of his role in such as the murder of children from Lidice (Czechoslovakia) or the so-called 'Kistarcsa transport' (Hungary).²⁸⁴ At other times Eichmann's explanations were unconvincing or contradictory. Indicative was his consistent claim that Jews from the Reich had been excluded from Operations Units' shootings, despite accepting that the Hitler order had applied to all Jews.²⁸⁵ He also consistently claimed that his office had had no jurisdiction in the 'Generalgouvernement', despite a document from the 'Political Department' in Auschwitz clearly stating the opposite.²⁸⁶ Eichmann was also inconsistent. Indicative was his approach to the reliability of documentary evidence; at times defending its integrity at other times keen to highlight its fallibility.²⁸⁷ Thus, assertions of its veracity, since 'the documents are telling the truth, the documents confirm that which I have just said', were juxtaposed with the berating of their authority, since forged, fragmentary, misleading, mistaken, selected for purpose, or the result of 'bureaucratic sloppiness'.²⁸⁸

In the Zündel trials adversary was most visible in Christie's questioning of both expert and survivor witnesses. As already noted, the deference of Servatius in 1961 was starkly replaced in 1985 by an advocate with no respect for the 'suffering' of survivors.²⁸⁹ Consequently, witnesses were forced repeatedly to defend their testimony (and credibility) against typical denier charges of gassing as 'hearsay', the alternative purposes of fumigation, death through typhus, the absence of smoke and flames from identified

²⁸² Ibid, Vol. V, p2204. According to Arendt, the Judges 'got more out of' Eichmann in 2½ sessions than Hausner had been able to elicit in 17, Arendt, *Eichmann in Jerusalem*, p223.

²⁸³ AET, Vol. IV, pp1559-1600, 1676, 1697, 1701, 1708, 1775, 1769, 1788

²⁸⁴ Ibid, pp1608, 1656, 1772, 1744-1745, 1750, 1783.

²⁸⁵ Ibid, 1637.

²⁸⁶ Ibid, pp1728-1729, 1730-1731.

²⁸⁷ **'Integrity'**: Ibid, pp1595, 1744-1745, 1782, 1783, 1788, 1812. **'Fallibility'**: Ibid, pp1616, 1669, 1689, 1749-1750.

²⁸⁸ Ibid, pp1388, 1418, 1595; 1587, 1615-1616, 1621, 1626, 1669, 1689, 1690, 1691, 1744, 1764-1765, 1769, 1791-1792, 1795-1796, 1797, 1812.

²⁸⁹ A reference to Servatius' statement in the Eichmann trial, AET, Vol. V, p2056.

crematoria, the cruelty of Jews in the camps, and exaggerated numbers of Jews murdered.²⁹⁰ One survivor, of both concentration and extermination camps, Dennis Urstein, was crudely coerced to name 20 of the 154 family members ‘killed by the Nazis’.²⁹¹ But Christie was arguably most hostile in his cross-examination of Rudolf Vrba.²⁹² As an eyewitness of ‘great interest’ to the Crown, and therefore to the Defence, Christie’s contempt was evident from his opening question of, ‘will you say it’s true that you have told stories about Auschwitz’, to his demand towards the end of cross-examination that Vrba produce ‘evidence of one single body of a person who is gassed, who was never registered ...’.²⁹³ Vrba was a match for Christie, but the ensuing antagonistic struggle was tortuous to follow and brought rebuke from the Judges.²⁹⁴ Christie was equally adversarial in his cross-examination of the prosecutions’ expert witnesses.²⁹⁵ From his initial rejection of Hilberg as a trained historian, to the equating of his ‘exterminationist’ opinion with that of Faurisson’s ‘revisionist’ history, Christie’s continued ‘assault’ was partly blamed by Hilberg when refusing to attend the retrial to be faced with:²⁹⁶

every attempt to entrap me by pointing to any seeming contradictions, however trivial the subject might be, between my earlier testimony and an answer I might give in 1988.²⁹⁷

²⁹⁰ **Hearsay**: ZT 1985, Friedman, Vol. II, pp408, 417, 418; Fulop, Vol. III, pp608-609; Vrba, Vol. VII, pp1473-1475, 1527-1530, 1557-1558; Leader, Vol. VIII, p1833. **Fumigation**: Friedman, Vol. II, p364, 365, 376-378, 392, 394-395, 422; Fulop, Vol. III, pp615-616; Vrba, Vol. VIII, pp1616, 1631; Tomaszewski, Ibid, pp1707-1709, 1717; Leader, Ibid, pp1826, 1830. **Typhus**: Vrba, Vol. VII, pp1547-1549; Tomaszewski, Vol. VIII, pp1707-1708, 1716-1717; Leader, Ibid, pp1826-1828. **Smoke/Flames**: Friedman, Vol. II, pp428-430, 432, 434-436, 440-441; Fulop, Vol. III, p607-608. **Cruelty by Jews**: Friedman, Vol. II, pp409-410, 415; Fulop, Vol. III, p593, 595, 609; Vrba, Vol. VII, p1435, 1506; Tomaszewski, Vol. VIII, p1691.

²⁹¹ Also forced to accept that of the 154 family members murdered he had only witnessed his parents being transferred to a camp, ZT 1985, Vol. VIII, pp1782-1786.

²⁹² For the complete cross-examination of Vrba see Ibid, Vol. VII, pp1387-1606 and Vol. VIII, pp1607-1635.

²⁹³ Ibid, Vol. III, p482; Vol. VII, pp1387, 1591.

²⁹⁴ Vrba at Ibid, pp1393, 1411, 1503-1504, 1541, 1546; Christie at Ibid, p1591 and Vol. VIII, pp1618-1619, 1619a, 1624.

²⁹⁵ Ibid, Vol. IV, pp680-916; Vol. V, pp938-1166. For the full cross-examination of Hilberg see, Vol. VI, pp1167-1230. ZT 1988, Vols. XIII-XVII, p4002, for the full cross-examination of Browning.

²⁹⁶ Hilberg’s Doctorate was in ‘Public Law and Government’. In using the labels of ‘exterminationist’ and ‘revisionist’ Christie was once again attempting to exploit the then dominant ‘intentionalist/functionalist’ debates by claiming that oppositional perspectives were a feature of historical inquiry, ZT 1985, Vol. XI, p2448. Vol. III, pp499-500, 639.

²⁹⁷ Quoted from one of Hilberg’s letters to the court, dated October 5 1987, ZT 1989, ‘Appellant’s Factum’, p19.

In London exchanges between Rampton and Irving were regularly antagonistic, but, arguably, the most visible display of adversary emerged between Irving and Evans.²⁹⁸ From the very outset, Evans refused to face Irving during cross-examination.²⁹⁹ He also consistently demanded that he was given copies of the documents or extracts from his report referenced by Irving prior to any response, since he did not trust Irving's account.³⁰⁰ But the process of fact determination was made especially confusing and frustrating by Irving's evasive tactics. In particular, Irving consistently denied that he had deliberately mistranslated a range of foundational documentation, that the Einsatzgruppen reports, detailing the numbers of Jews shot, were proof of a 'systematic policy' of mass shooting, that architectural blueprints proved the building of gas chambers and not air-raid shelters, that the methodology of the 'Leuchter Report' (chapter six) was fundamentally flawed, and that the camps of 'Operation Reinhard' (Belzec, Sobibor, Treblinka) had been purposely built for extermination, regardless of both evidence to the contrary and any previous concessions made.³⁰¹ Indicative of Irving's approach was this single exchange with Rampton:

Rampton: If in August 1941 at the time that the Einsatzgruppen were just starting their work there is an order in place that the Fuhrer [*sic*] is to be supplied with regular reports of their work, it is not at all surprising that by

²⁹⁸ **Irving/Rampton:** HRIRH, Day 2, pp230-238, 246-247, 249, 250-252, 267-268; Day 3, pp31-32, 35, 93-94, 97-98, 124-125, 136-140, 156, 174, 177, 179, 186, 192-193, 194; Day 4, pp74, 78-79, 85-86, 112-113, 129, 131-132, 133-134, 202-203, 206; Day 5, pp33-34, 182-183, 184-185; Day 6, pp7, 44-46, 50-51, 94-95, 171-172, 182-184; Day 7, p196; Day 8, pp73, 76, 107, 161-162; Day 12, pp64-65; Day 14, p60; Day 20, p148; Day 22, pp142-143. **Irving/Evans:** Day 20, pp148-149, 162-163; Day 21, pp93-94, 134, 144; Day 22, pp18, 62-63; Day 23, pp24-25, 154, 156, 164-165. See also Guttenplan who observed 'an electric current of loathing ... between the two men', Guttenplan, *The Holocaust on Trial*, p223.

²⁹⁹ Enabling Evans to deal with Irving's 'questions, statements, innuendos and insults ... in a dispassionate way', Evans, *Telling Lies About Hitler*, p207.

³⁰⁰ *Ibid.*, pp209-210, and over 4 days of cross-examination, HRIRH, Days 19 to 24.

³⁰¹ **Mistranslations:** Himmler's log, 30 November 1941, *Ibid.*, Day 1, pp90-94; Day 2, pp288-291; Day 3, pp29-50, 57, 81-79, 115-127; Day 4, pp122-132; Day 16, pp111, 113-119; Day 21, pp183-185, 188-190; Day 22, pp41-42, 53-64; Day 26, pp28-31; Himmler's note, 18 December 1941, Day 4, pp88-94; Day 16, pp131-137; Day 22, pp180-181; Day 24, pp65, 66, 168-169; Day 25, pp89-94, 97-98; Himmler's speech in Posen to the Gau and Reichleiters, 6 October 1943, Day 6, pp89-100; Day 17, pp59-60; Day 24, pp59-63, 182-184; Day 29, p89. **Einsatzgruppen reports:** Day 2, pp257-279; Day 4, pp63-66, 70-74, 84-85, 96-99, 154-160; Day 16, pp97-101, 141-142; Day 17, pp98-100, 192-195, 199, 208; Day 24, pp150-151; Day 25, p84. **Blueprints:** Day 8, pp84-101, 115-116, 133-148; Day 10, pp93-95, 150-156, 173-176; Day 11, pp21, 54-55, 67, 189-190; Day 12, pp2-3; Day 28, pp136-137; Day 32, pp22-23, 175-180. **Leuchter Report:** Day 6, pp45-48; Day 7, pp97-134, 179-182; Day 8, pp27-84, 109-122, 182-191; Day 9, pp22-36; Day 20, pp14-18. **Reinhard Camps:** Day 2, p243; Day 5, pp90-94, 98, 121-156, 161-170; Day 6, pp31-44, 54-56, 80-83; Day 7, pp82-90; Day 9, pp83-84; Day 16, pp72-75, 79-81, 90; Day 17, pp3-20, 85-86, 146-152, 154-155, 162-182, 186-187; Day 19, pp193, 200-202; Day 20, p44; Day 23, pp16-19, 88-89; Day 25, pp144-145, 152-161; Day 26, pp89-92, 95-96, 100-101, 118-120. This list is by no means conclusive of the range of topics consistently disputed by Irving.

December 1942 that system is still in place and these reports are still coming in, is it?

Irving: I disagree. Suppose in August 1941 you ask for a plumber to come and fix a sink, and finally in December 1942 a firm of plumbers contacts you and says, "here is an estimate for fixing your sink", it does not necessarily mean there is any connection between them.³⁰²

Likewise indicative, after consistently revising his position on Hitler's awareness of a report on the murder of 363,000 Jews by the Einsatzgruppen, dated 29 December 1942, Irving was ordered by Gray, in contravention of legal protocol, to present his views in writing to the court.³⁰³ Gray subsequently noted that Irving's written views differed 'very, very substantially' from those he had adopted in cross-examination.³⁰⁴ Irving was equally evasive when faced with conclusive evidence (including video footage) that he had addressed right-wing and 'extremist' meetings and rallies, that his reference to 'traditional enemies' related overwhelmingly to Jewish individuals and organisations and that he was a Holocaust denier.³⁰⁵ Irving also consistently repeated the same arguments and posed the same questions regardless of their previous debate and deliberation, thus forcing Gray to regularly insist he 'move on'.³⁰⁶ As Gray concluded, Irving had manifested 'a determination to adhere to his preferred version of history, even if the evidence does not support it'.³⁰⁷

Comprehension of the Holocaust was further masked by convoluted and protracted legal debate throughout the trials of Eichmann and Zündel.³⁰⁸ From initial challenges by both

³⁰² Ibid, Day 2, p271.

³⁰³ Ibid, Day 24, pp152-166.

³⁰⁴ Ibid, Day 25, p2.

³⁰⁵ **Meeting/Rallies:** Ibid, Day 26, pp130-153; Day 27, pp9-161, 165-170, 174-182; Day 28, pp10-202; Day 29, pp13-72. **Traditional enemies:** Day 15, p66; Day 19, pp52-55, 61-70; Day 20, pp2-5; Day 28, pp125-127. **Holocaust denier:** as shown throughout the trial but most visibly in Irving's own words. Ibid, (TB) D2 (iii), 'Plaintiff's Speeches Taken From Irving's "Focal Point" Website'; (TB) D3 (i), 'Press Releases/Flyers'; (TB) D7, 'Action Reports'; (TB) D8 (i-iv), 'Website Material'; (TBs) D6 (i) and D6 (ii), 'Diary Entries'; (TB), K3, 'Claimant's Statements: Auschwitz/Gas Chambers/Anti-Semitism'; and (TB) K4, 'Claimant's Statements: Anti-Semitism'.

³⁰⁶ Ibid, Day 16, p97; Day 17, p127; Day 19, pp52, 86-88; Day 20, pp22, 28, 81, 91-92, 113; Day 21, pp102, 144, 149; Day 22, p61; Day 23, pp154, 163; Day 25, pp77-78, 84.

³⁰⁷ Ibid, (TB) T2, 'Judgement', para. 13.159.

³⁰⁸ In London Gray ruled that any administrative discussions would not be recorded unless of substantive relevance to the issues, while any judicial decisions would be transcribed in a separate document, Ibid, Day 5, pp2-3.

Defence teams to the very legality of their respective trials, a wide range of issues and subjects continued to necessitate judicial debate, discretion and ruling. Thus, in Israel, after an attempt by Servatius to have the court ruled incompetent to try Eichmann, the non-legal audience had to contend with a raft of terminology that included 'statutes', 'precedents', 'hearsay', 'retroactive application', 'extraterritorial jurisdiction', 'Acts of State', 'criminal conspiracy', and 'superior orders'.³⁰⁹ As already mentioned, audiences were also confronted with judicial debate and rulings on over one hundred evidential items and subjects.³¹⁰ In Canada judicial dispute was largely conducted in the absence of the juries, and was therefore arguably more disruptive to these 'triers of fact' than confusing to their deliberations. But, from the very beginning, a wider non-legal audience had to contend with protracted debate over Christie's challenge to the legality of 's.177', submissions made on media and jury prejudice, oppositional arguments and precedents on the admissibility of a range of evidence, the qualification of historians, and application of 'judicial notice', as well as the legalise of 's.177', 'challenge of cause', 'Charter argument', 'public interest', 'full answer and defence' and 'facts and opinions'.³¹¹ Although legal debate is obviously integral to a court of law, its regular intrusion into the Eichmann and Zündel trials served to both interrupt the evidential process and further confuse both audiences and reader.

³⁰⁹ **Competence:** AET, Vol. 1, pp8-60. **Statutes:** relating to: 'The '1950 Law'; 'Penal Law Revision (Offences Committed Abroad) Law'; Sections 6, 17, 19, 23 and 243 of the 'Criminal Code Ordinance 1936'; the 'Moscow Declaration', 30 October 1943; the 'London Charter' of the IMT (8 August 1945); the judgement of the IMT (30 August 1946); Section 37(2) of the 'Criminal Procedure (Trial Upon Information) Ordinance'; the 'Universal Declaration of Human Rights and European Convention for the Protection of Human Rights' (1950). **Precedents:** Vol. I, pp548-562; Vol. II, pp708-709; Vol. III, pp990, 1330-1339; Vol. IV, pp1569-1574; Vol. V, pp1978-1979, 1981, 1996-1997, 2021-2022, 2036, 2043, 2108-2112, 2189. **Hearsay:** Vol. I, pp117-119, 194-206, 237, 305, 704-709. **Retroactive:** Ibid, pp15-30, 36-37, 39, 544, 553-562. **Extraterritorial:** Ibid, pp31-34, 39-51. **Acts of State:** Ibid, pp53, 532-541. **Conspiracy:** Vol. V, pp1980-1982, 2043-2044. **Superior Orders:** Vol. I, p546; Vol. II, p708, 709; Vol. V, pp2021-2024, 2196-2197.

³¹⁰ Ranging from Wisliceny's reports, Ibid, Vol. I, p237, and Höss' handwritten autobiography/statement (1946) and memoirs, Ibid, pp240-243, 256; to two orders of execution by 'shooting' signed by Eichmann, Ibid, pp341-342; documentary films providing evidence on Auschwitz-Birkenau after its liberation; the Warsaw Ghetto; the transport of Jews to Ravensbruck, and scenes at Mauthausen, Vol. III, pp990-991, 1196, 1237, 1283-1285; and the testimony of 2 witnesses sterilised at Auschwitz-Birkenau (held in camera), Ibid, pp1195-1196.

³¹¹ **Legalise and submissions:** ZT 1985, Vol. I, pp8-27, 36-187. **Evidential disputes:** in addition to those on the 'Nazi Concentration Camps' film and ICRC bulletin mentioned above judicial rulings were made on 70 photographs and slides taken by Robert Faurisson of an American gas chamber; Auschwitz 1 in different years; the Birkenau camp, crematoria and fumigation chamber; the gas chambers at Hartheim Castle and Stutthoff-Danzig; and other features relevant to the process of gassing (fumigation) with Zyklon-B, Vol. XII, pp2699-2700, 2710-2712. **Qualification of 'historians':** of Hilberg, Ibid, Vol. III, pp679-693, and Faurisson, Vol. XI, pp2466-2474. **Judicial notice:** Vol. X, pp2181-2191; Vol. XX, pp4460-4465. ZT 1988, Vol. VI, pp995-1010.

Consequently, despite the best efforts of the jurists involved, the transcripts show that the facts and record of the Holocaust were effectively consumed in an evidential struggle that may have been rigorous in method but was convoluted, frustrating, impenetrable, and often inconclusive in form. Paradoxically, in all four trials, there was also too much evidence, whether referenced or submitted, while the mechanics of evidential submission and cross-examination consigned the facts of the Holocaust to consistent dispute, disparagement, distortion, and, in the cases of Zündel and Irving, denial. The oral summing-up by both parties at the end of each trial is intended to clarify as well as summarise each case and its evidential accountability.³¹² The danger is that by the time the trials reached this point in the proceedings they had lost their intended audiences, both figuratively and literally.

Analysis of both primary and secondary sources focusing on the Eichmann, Zündel and Irving trials therefore reaffirms, not only their comparative credentials, but the findings of the existing 'consensus of critique' outlined in chapter two. The overview of all four trials specifically finds a familiar record of legal breaches of 'due process', especially in the Eichmann trial, the limitations of ordinary law when faced with historical evidence and opinion, especially in the 'procedurally ordinary' Zündel trials, and extra-historical and extra-legal influences impacting on all four courtrooms. It also finds that, since disciplined and governed by discrete 'facts in issue', historiographical, as well as legal, focus was both confined and distorted in accordance with the case-specific form of each trial. Adversarial practice likewise ensured that the evidential accountability of the Holocaust was not only rigorously cross-examined but repeatedly challenged, and, in the later trials, repeatedly derided and denied. Subsequently, facts were established but painstakingly extracted. Although meeting the standards of legal proof, the narratives authorised were inevitably 'cooked' in accordance with the demands of each case, and, however grand in content and reach, could not 'do justice' to the complexities of the Holocaust.

Through a close reading of the daily transcripts, the chapter explicitly finds a record of practice integral to the law, that not only variously 'cooked' the record of the Holocaust, but masked and submerged its evidence and facts in the vagaries of the legal form. This

³¹² **Eichmann:** by Hausner, AET, Vol. V, pp1973-2043, and Servatius, Ibid, pp2046-2063. **Zündel:** summarised in the 'Charges to the Juries' in ZT 1985, Vol. XXI and ZT 1988, Vol. XXXIV. **Irving:** by Rampton, HRIRH, Day 32, pp5-34, and Irving, Day 32, pp49-218.

form, regardless of its context, objective, or relaxing of its rules, effectively lost, as well as threatened, the lessons and record of the Holocaust the trials intended to communicate and protect. Regardless of its official defeat, the trials involving the strategy and tactics of Holocaust denial were especially confusing and threatening since inferring intentional and persistent doubt. Whether through rebuttal, unmasking, or both, the intended 'fog of uncertainty' propagated by deniers is awarded a public audience when brought to trial, while comprehension of the ensuing debates cannot be controlled.³¹³ It is therefore concluded that, when viewed through the lens of the existing 'consensus of critique', the warnings related to the history-law relationship are corroborated by the Eichmann, Zündel and Irving trials. But, contrary to conventional wisdom, it is not only the Zündel trials that have left 'an uncertain legacy'.³¹⁴

Despite this conclusion, the existing 'consensus of critique' remains contested and disciplinary collaboration continues unabated (chapter two). Based on the persistent trust of both historians and jurists, in what has been shown to be an inherently flawed methodology, a re-examination of the history-law relationship is appropriate. Based on the expected continuation of disciplinary collaboration in future Holocaust-related trials, despite the far-reaching critique of both its methods and outputs, a re-examination of the history-law relationship is also opportune. The next chapters (four to seven) seek this re-examination by focusing attention on the very basic criteria of historical inquiry, the transference of the past traces into accountable and 'truth-full' knowledge *of* (empiricist) or representations *as* (narrativist) 'the past', in this case *of* or *as* the Holocaust (chapter one). Consequently, in redressing methodological omissions in the existing 'consensus of critique' (introduction), chapters four to seven focus on the collaborative reconstruction of historiographies both integral to the Holocaust and investigated across the discrete discursive (present-centric) contexts of the Eichmann, Zündel and Irving trials, and evaluate both the methods and outputs of the history-law relationship through the demands of the prevailing ('empiricist-analytical') and contested ('narrativist-linguistic') genres of 'good history' (chapter one).

As indicated above, the content and reach of the Holocaust investigated at the Eichmann, Zündel and Irving trials was extensive. However, four subjects were common to each courtroom: the evolution of extermination policy (chapter four); the Einsatzgruppen mass

³¹³ Guttenplan, *The Holocaust on Trial*, p164. Evans, *Telling Lies About Hitler*, p202.

³¹⁴ Douglas, *The Memory of Judgement*, p260.

shootings 1941-1942 (chapter five); homicidal gas chambers at Auschwitz-Birkenau (chapter six); and the total number of Jewish victims (chapter seven). Organised thematically, and with the processing and findings of historiographical reconstruction necessarily extracted from the legal form (introduction), these four subjects comprise the primary sites of the intended re-examination of the history-law relationship in practice.

Chapter Four: The Evolution of Extermination Policy

How and why state persecution of Germany's Jewish citizens after 1933 transgressed into the intended genocide of European-wide Jewry has always been and remains a key feature of Holocaust historiography. The evolution and leadership of its systematic policy was also integral to the criminal trials of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000), but for very different legal (and extra-legal) reasons. Comparative reconstruction of this historiography identifies the diversity of accounts of extermination policy presented at each trial in accordance with the 'facts in issue'. In so doing it records the transfer of attention away from those responsible (Eichmann) to the reaffirmation of its facts. It also records the transition of focus from the unquestioned, but marginalised, leadership of Adolf Hitler in 1961 to the reassertion of his authority and continued complicity by the 1980s. It likewise records the evolution of explanation from top-down intention (1961) to a more convoluted system of decision-making, however centrally authorised (1985, 1988, 2000).

Comparative reconstruction also identifies an evidential base capable of supporting the historiographical and legal demands of each case. However, and despite comprising an extensive volume of perpetrator testimony, contemporaneous documentation and historian opinion and report, a recognised ambiguity of evidence was reaffirmed in the later trials, especially in 2000. In what would have been anathema to the Israeli case, courtroom and public audience in 1961, the 'circumstantial' foundations of extermination policy were found to be most obvious when relating to the key facts of Hitler's continued authority over policies escalating the mass shootings of the Einsatzgruppen in 'the East' and the use of gas as an alternative method of genocide.¹

Revisions of interpretation, fact and narrative were established across all four trials as a result of case-specific demands, but also as a result of the evolution of historiographical research and debate since 1961 and therefore the mirroring of the shift from 'intention' to 'function'. However, the revisions were minimal, and, with the exception of the elevation of Eichmann's authority and the narrative of intention found in 1961, they were not incompatible. Rather, between 1961 and 2000, a generic record of the evolution of extermination policy similarly informed the narratives reconstructed across all four trials.

¹ With specific focus on the occupied territories of the then Soviet Union.

It was also a record of policy that remains familiar in present-day Holocaust historiography.

Comparative reconstruction makes it clear that the narratives of extermination policy subsequently authorised at each trial were 'cooked' in accordance with the focus on Eichmann in 1961, a 'Hitler order' in 1985 and 1988 and the continuing authority and command of Hitler in 2000. But, it is also made clear that the narratives were both empirically accountable and 'truth-full' in content. Likewise clear, is that, although the consistency of fact and record of extermination policy established across the four trials implied the dominance of past evidential constraint, comparative reconstruction reveals the primacy of preconceived and prefigured narratives in all four courtrooms that determined and governed the relevant past traces.

The evolution of a policy of systematic extermination of European Jewry during the 'Third Reich' was not a discrete subject of scrutiny in the trial of Adolf Eichmann in 1961. But nor was it in doubt. Rather, its realisation was explicit in the indictment of not only a defined perpetrator, but a ranked government and party official in the 'Gestapo' tasked with central instruction over 'Jewish Affairs' (IVB4).² Indeed, the overriding legal purpose of the trial was to verify Eichmann's agency and status in the bureaucratic infrastructure responsible for authorising and governing the 'Final Solution of the Jewish Question', with the grand narrative presented by the Prosecution essentially a reconstruction of its policy from 1933.³ Furthermore, neither the Prosecution nor the Defence doubted that Adolf Hitler had initiated its murderous order, or commanded, governed and intended its evolution from persecution to slaughter.⁴

In stark contrast, since critical to denier stratagem (chapter three), extermination policy was an explicit feature of historiographical focus and investigation in both the Ernst

² Noting 'the implementation of a plan known by its title "The Final Solution of the Jewish Question"' in counts 1 and 3, *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Vol. I, pp3-5, Newcastle University Library. All proceeding references to this trial will be prefixed by AET.

³ AET, Vols. I-III.

⁴ Explicit throughout Gideon Hausner's opening address, *Ibid*, Vol. I, pp62-109 and implicit in Robert Servatius' case for the Defence, Vol. IV, p1371.

Zündel trials and the libel case instigated by David Irving.⁵ Despite a long-established historiography attesting to the contrary, the Crown in Canada (1985 and 1988) and the Defence team in London (2000) had to rebut the charge both published (Zündel) and written (Irving) that the 'Final Solution' had not been official policy authorised or coordinated from Berlin.⁶ Rather, as stated in the denier treatise of 'Did Six Million Really Die?' (DSMRD) published by Zündel, the "allegation ... of official German policy ... is a brazen lie propagated by Zionists in order to collect money from Germany by way of compensation".⁷

Likewise, in both Canada and London, Hitler's authorisation and leadership of any murderous outcomes involving Europe's Jews was not only contested but wholly rejected. More specifically, in the Zündel trials, the absence of a written 'Hitler Order' (authorising mass murder) was synonymous with the absence of deliberate policy.⁸ As summed up by Zündel's defence lawyer, Douglas Christie, in 1985: 'Our position is, there was no order, there existed no order, there existed no plan, there existed no budget ... ', while Irving contended in 2000:⁹

I would say that certainly at a lower level a system emerged and that it was systemized somewhere in the hierarchy ... [but] the Defendants will find it very difficult to suggest that it was a Third Reich decision. In other words an Adolf Hitler decision¹⁰

⁵ Although it was Deborah Lipstadt who had been forced into court future references will relate to the common usage of the 'Irving trial' throughout this chapter.

⁶ See as examples of the relevant historiography, Martin Broszat, *The Hitler State: The Foundation and Development of the Internal Structure of the Third Reich* (London: Longman, 1981); Christopher R. Browning, *Fateful Months: Essays on the Emergence of the Final Solution* (New York: Holmes and Meier, 1985); Raul Hilberg, *The Destruction of the European Jews* (London: Holmes and Meier Publishers Ltd., 1985); Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995); Saul Friedländer, *Nazi Germany and the Jews: Volume 1 The Years of Persecution 1933-1939* (London: Weidenfeld and Nicolson, 1997). **Zündel**: 'Did Six Million Really Die?' in 1981/83. **Irving**: with specific focus on his editions of *Hitler's War* (1977, 1991) but also *The Destruction of Dresden* (1963), *The War between the Generals* (1981), *Goering, A Biography* (1989) and *Goebbels. Mastermind of the Third Reich* (1996).

⁷ *Her Majesty the Queen and Ernst Zündel* (251/85), Vol. XXI, p32, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1985. *Her Majesty the Queen and Ernst Zündel* (424/88), Vol. XXXVI, p10413, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1988.

⁸ ZT 1985, Vol. XXI, pp25, 148. ZT 1988, Vol. XXXVI, p10414.

⁹ ZT 1985, Vol. III, p485

¹⁰ *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), Day 2, p157, Holocaust Research Institute, Royal Holloway, University of London (HRIRH). All proceeding references to the daily transcripts of this trial will be prefixed by HRIRH. Additional archival material will also be prefixed by their Trial Bundle (TB) letter and number.

Irving further claimed that Hitler had been ignorant of the murderous intention and perpetration of others (in particular Heinrich Himmler and Reinhard Heydrich) until October 1943, at which time he:¹¹

had no excuse for not knowing ... because he then came into very close proximity with a large number of people who had been briefed in the most nauseating detail by Himmler himself as to what he was doing.¹²

Subsequently, the historiographical focus on extermination policy differed at each trial. In Israel the central role of Eichmann placed disproportionate attention on the bureaucracies and chains of command in which he had operated, specific duties he had carried out, countries he had been sited, and cases of decision-making he had noticeably shaped. Hence, distinctively dominant was not only Eichmann's leadership of 'Jewish Affairs', and his base in the Reich Security Main Office (RSHA), but the development and organisation of emigration, the 'Nisko' and 'Madagascar' territorial 'solutions', the role of the Foreign Ministry, internecine struggles over control of the 'Jewish Question' in the 'Generalgouvernement', the organisation and transportation of Jews to the extermination camps, the administration of Theresienstadt, the provision of skeletons for experimental research, Eichmann's 'Special Operations Unit' in Hungary, the 'Kistarcsa' transport (Hungary) and 'Goods for Blood' mission.¹³ Specific clauses in the indictment likewise introduced a range of policy-making unique to the trial that focused attention on specific decisions governing the forced displacement of over 500,000 Polish and 14,000 Slovene civilians, the deportation and murder of 93 children from Lidice (then in Czechoslovakia) and 'agreed' measures of sterilisation.¹⁴

¹¹ Posing the same argument at Zündel's trial in 1988, ZT 1988, Vol. XXXVI, p10418.

¹² HRIRH, Day 5, pp180-181.

¹³ **'RSHA'**: AET, Vol. V, pp2123-2183. **Emigration**: through 'Central Offices for Jewish Emigration' in Vienna, Prague and Berlin, Vol. IV, pp1587-1593, 1610, 1692-1701; Vol. V, pp2114, 2116-2119. **Nisko/Madagascar**: Ibid, pp2120-2121, 2122-2123. **Foreign Ministry**: Ibid, pp2113-2204. **Generalgouvernement**: Ibid, pp2156-2158. **Extermination camps**: Ibid, pp2120-2206. **Theresienstadt**: Vol. II, pp790-817; Vol. V, p2125. **Skeletons**: Vol. III, pp1317-1321; Vol. V, pp2171-2172. **Hungary**: Vol. III, pp928-1132; Vol. V, pp2140-2146. **'Kistarcsa'**: Vol. I, pp73-74, 109; Vol. III, pp947-949, 953-959, 962-963, 964-965, 988, 989, 1115, 1120-1121; Vol. V, pp2016-2017, 2141-2142, 2145. **'Goods for Blood'**: Vol. III, pp1020-1024, 1033-1040, 1042, 1070-1075; Vol. V, pp2143-2144.

¹⁴ Counts 4, 9, 10, 12, Ibid, Vol. I, pp5, 6-7. **Polish civilians**: Vol. II, pp563-567; Vol. V, pp2121, 2190-2192. **Slovene civilians**: Vol. II, pp883-900; Vol. V, pp2135-2136, 2192-2193. **Lidice**: Vol. II, pp900-905; Vol. V, pp2193-2194, 2206. **Sterilisation**: Vol. I, pp321-322; Vol. III, pp1321-1322; Vol. V, pp2169-2171.

Implicit, if not always explicit, was that decision-making in all areas had originated in Berlin.¹⁵ However, although the leadership of Hitler was formally recognised, it was also marginalised in a narrative that foregrounded Eichmann as not only a principal offender, but, according to the Prosecution, 'the one who planned, initiated and organized, who instructed others to spill this ocean of blood, and to use all the means of murder, theft and torture'.¹⁶ As noted by Defence lawyer, Robert Servatius, the explicit conclusion was that Eichmann 'rather than Hitler, Himmler or Goering was the great culprit'.¹⁷

Conversely, in the Zündel trials, specific statements (1988) and the overall denier treatise of DSMRD (1985, 1988) reinstated historiographical focus on Hitler's leadership, but disproportionately framed its investigation of policy through disputes over the existence, form (written or verbal) and necessity of a specific 'Hitler Order'.¹⁸ Christie also deliberately exploited contemporaneous debates over the 'intentional' or 'functional' evolution of extermination policy, and its official language, to emphasise disciplinary and evidential fallibility 'on when and how decisions were taken'.¹⁹ Similarly, in London, distinct statements selected from Irving's published work, and overall denier treatise, also focused attention disproportionately on Hitler's leadership.²⁰ However, in a repeat of Irving's failed testimony at Zündel's 1988 trial, emphasising not only the absence of a specific '*Führer [sic] Liquidierung*' but any further evidence relating to Hitler's involvement in extermination policy, rebuttal was more discretely focused on Hitler's authority over both its initiation and evolving command.²¹ More specifically, distinct statements under scrutiny focused attention on Hitler's awareness and instruction of the

¹⁵ As evidenced throughout the 'Judgement', Ibid, Vol. V, pp2113-2183.

¹⁶ Ibid, Vol. I, p62. For references to Hitler see, Vol. V, pp2119, 2121, 2124, 2125, 2139, 2140, 2146, 2148, 2159, 2160, 2161, 2169, 2170, 2173-2174, 2181, 2183, 2201, 2204.

¹⁷ Ibid, p2046.

¹⁸ A long-debated subject of historians focusing on the decision-making process of the Nazi regime. See the literature in footnote 20. Acknowledged by Judge Locke in ZT 1985, Vol. XXI, p25, and by Judge Thomas in ZT 1988, Vol. XXXVI, p10431.

¹⁹ ZT 1988, Vol. XXXVI, pp10432-10433. See also Christie's arguments related to the intentionalist/functionalist debates in 1985, ZT 1985, Vol. III, pp499-450.

²⁰ Specifically, from *Hitler's War* (1977, 1991) but also from the range of publications listed in footnote 6. See HRIRH, (TB) T2, 'Judgement', paras. V (1) – (xviii), for a list and summary of these statements.

²¹ Ibid, Day 4, pp79-81. For Irving's examination-in-chief and cross-examination at Zündel's retrial see ZT 1988, Vol. XXXIII, pp9312-9450 and Vol. XXXIV, pp9455-9822. In London see: HRIRH, Day 4, pp79-81, 153; Day 32, pp74-150. Irving contended that a 'chain of documents' proved that Hitler had been unaware of the fate of the Jews until October 1943. See: Day 5, pp180-183; Day 6, pp86-96, 98-100; Day 19, p30; Day 24, pp177, 182, 183; Day 32, pp108-110. For examples of the Defence's rebuttal see Ibid, Day 2, pp161-172, 259-273, 283-291; Day 3, pp53-59, 82-99, 127-148, 170-182, 191-204; Day 4, pp34-41, 70-99, 133-206; Day 5, pp70-94, 103-109, 128-132, 179-184.

mass shootings in 'the East' and the 'gassing programme'.²² Likewise discretely, given Irving's novel claim that once in power Hitler had 'lost interest in anti-semitism', the Defence focused attention on Hitler's background and public statements.²³ Also, somewhat distinctively, the Defence emphasised the huge scale of the extermination programme (and required resources at a time of war), with its leading counsel, Richard Rampton, concluding that it was:

wholly inconceivable that during the whole three and a half years for which the killing lasted, Himmler could, or indeed would, have concealed from Hitler the enormous, systematic operation that he was directing.²⁴

Discrete data-streams were subsequently foregrounded in support of the varying accounts presented and differed in both content and form. In Israel the main source of evidence was eyewitness testimony. However, while survivor testimony had provided foundational evidence of the murderous consequences of extermination policy, it was perpetrator testimony, and foremost Eichmann, that provided proof of its official decision-making and governance. More specifically, in addition to Eichmann's direct confirmation of the initiation, progression and reach of extermination policy, Dieter Wisliceny (Eichmann's deputy) had reaffirmed Heydrich's delegation of policy (to Eichmann) 'within the framework of the RSHA', Otto Ohlendorf (Head of Einsatzgruppe D) had testified to both the central command and organisation of the Einsatzgruppen, Walter Blume (Einsatzgruppe B) had attested to Eichmann's attendance at a meeting of their initial instruction as killing units on the eve of the invasion of the Soviet Union, Oswald Pohl (Economic-Administrative Head Office) had verified the dual purpose of 'Aktion Reinhard' (extermination and plunder), Kurt Gerstein (SS Director for Disinfectant) and Rudolf Höss (Commandant of Auschwitz) had offered unique insight into the negotiation and supply of gas and gassing vans to the extermination camps (as well as implicating IVB4 and Eichmann) and Paul Blobel (Einsatzgruppe C) had identified the order (from

²² As confirmed by specific sections in the 'Judgement', (TB) T2, paras. 6.10-6.66, 6.68-6.105, with 'the East' relating more specifically to the occupied territories of the former Soviet Union.

²³ Ibid, paras. 6.3, 6.1.

²⁴ HRIRH, Day 32, p18.

Himmler), in the autumn of 1942, to 'remove the traces' of Einsatzgruppen slaughter (also implicating IVB4).²⁵

Documentation was also a key form of evidence in 1961. Hundreds of items were subsequently authorised by the Judges as comprising an overall catalogue of official instruction, implementation and report that both explicitly and implicitly constituted a wide-spread policy of extermination.²⁶ Foregrounded as proof of policy initiation, but also Eichmann's knowledge and complicity, was Hitler's speech to the Reichstag, on 30 January 1939, as evidence of his intention to exterminate European Jewry 'as soon as he laid hands on them', a letter drafted by Eichmann, signed by Heydrich, and dated 21 December 1939, designating central responsibility to Eichmann for the evacuations of Jews to the 'Generalgouvernement', an order signed by General von Brauchitsch, and dated 2 May 1941, as evidence of military compliance in RSHA plans to 'round up and execute Soviet Commissars and all the Jews' in the Eastern Occupied Territories, various Einsatzgruppen reports, as proof of not only the mass shootings of Jews from the end of June 1941 but Eichmann's knowledge that after this date any activity relating to deportation would lead to extermination, Hermann Göring's letter of appointment to Heydrich, dated 31 July 1941, as evidence of the initiation of all necessary preparations for the 'Final Solution of the Jewish Question', and a letter from Eichmann to the Foreign

²⁵ **Eichmann:** AET, Vol. IV, pp1575-1792 and confirmed by the Judges, Vol. V, pp2113-2183. **Wisliceny:** Ibid, p1989. **Ohlendorf:** Ibid, p2148. **Blume:** Ibid, p2173. **Pohl:** Ibid, p2161. **Gerstein:** Ibid, pp2149-2151, 2176-2177. **Höss:** Ibid, pp2151-2152, 2162, 2176-2177. **Blobel:** Ibid, p2164.

²⁶ Indicative being: **instructions** issued to the Einsatzgruppen at a meeting of SS leaders, on 21 September 1939, on such as the staged implementation of the 'final aim', the secrecy of the measures, the establishment of 'Councils of Jewish Elders' and the seizing of Jewish enterprises, Ibid, p2119; Regulation 11 (Reich Nationality Law), dated 25 November 1941, removing German nationality from Jews living overseas, including German Jews forcibly removed from Germany, and the confiscation of their property, Ibid, pp2126-2127; instructions from the 'Commander of the Order Police' to all offices in the Old Reich, Austria and the Protectorate of Bohemia and Moravia, in October 1941, on the evacuation of 50,000 Jews to the East (Minsk and Riga), Ibid, p2126; a series of draft directives sent for approval/amendment by the 'Ministry of the Eastern Occupied Territories' to other government authorities, including Himmler and Heydrich, on the administration of the 'Jewish Question' in the relevant regions, December 1941-January 1942, Ibid, p2159. Indicative of **implementation** being: the minutes of a meeting of SS officers in Berlin on 21 September 1939, chaired by Heydrich and including Eichmann, detailing the ghettoisation of Jews in Poland and their removal from the countryside and the beginning of the transportation of Jews from the Reich, Ibid, pp2119, 2190; confirmation sent to Eichmann on the evacuation of Jews (1,700) from Dusseldorf to Riga and notes made of the rumour that of 35,000 Jews in Riga only 2,500 can be exploited for labour, with the others being directed elsewhere or shot by the Latvians, Ibid, 2126; a summary report, of 14 January 1942, claiming *inter alia* that Estonia is 'judenfrei' and that over 400,000 Jews have been murdered by the Einsatzgruppen from the day Russia was invaded to the end of 1941, Ibid, p2148. Indicative of **reports** being: a report by Oberstleutnant Lathousen on the first murderous stage of the Einsatzgruppen in Poland in 1939, Ibid, p2119; a special report sent to Hitler (and typed on the 'Fuhrertypewriter' [sic]) summarising the murder of 363,211 Jews in Ukraine and Bialystok during October to December 1942, Ibid, p2148; Edmund Veessenmayer's report (Reich Plenipotentiary in Hungary from March 1944) to the Foreign Ministry, on 10 December 1943, on the importance of getting "a firm hold" on the Jewish problem in Hungary, Ibid, p2140.

Ministry, dated 28 August 1941, noting the halting of emigration because the 'Final Solution of the Jewish Question' is now in its "preparatory stage".²⁷

Foregrounded as evidence of its further command and evolution, but also Eichmann's continued complicity, was the so-called 'Brown File', dated 10 January 1942, as 'decisive proof' of not only centralised policy but Eichmann's and Heydrich's demand for more severe treatment against the Jews,' extracts from Hans Frank's diary (Governor General of the 'Generalgouvernement'), as evidence of central (and therefore Eichmann's) control over extermination in the 'Generalgouvernement', the 'Wannsee Protocol' of 20 January 1942, as verification of wider bureaucratic complicity in mass murder and Eichmann's position as its authorised Referent within the RSHA, letters delivered by Eichmann to Odilo Globocnik (Head of 'Aktion Reinhard') in the winter of 1941/1942, as proof of continued central (and Eichmann's) control over the 'slaughter in the camps in the East' and a report by Globocnik to Himmler, dated 4 November 1943, indicating the completion of the 'Reinhardt Operation', including a final report on 18 January 1944 totalling the income generated from its intended plunder of Jewish property.²⁸

The absence of a documented 'Hitler order', initiating a policy of extermination, was of no concern or necessity to either party in 1961. Rather, Hitler's authority and intention was not only presumed from the very beginning but referenced in a range of selected documentation and testimony and confirmed by Eichmann.²⁹ Eichmann also repeatedly acknowledged that there had been an order. However, contrary to the Prosecution's claim that Eichmann 'had in his possession a written document containing Hitler's order for the

²⁷ Ibid, pp2119, 2121, 2174, 2173-2174, 2124, 2173.

²⁸ Ibid, pp2159, 2156, 2127-2128, 2161-2162, 2155.

²⁹ As indicated in the minutes of a meeting of officials (including Heydrich) to discuss the coordination of expulsion and resettlement of Jews, Poles and gypsies from the areas incorporated in the Reich, Ibid, p2121; a memorandum from Franz Rademacher (Foreign Ministry) dated 21 August 1941, noting Eichmann's claim that Hitler had approved the marking of Jews, Ibid, p2125; notification of Hitler's decision, on 17 July 1941 that Himmler should be in charge of security measures in the Eastern Occupied Territories, Ibid, p2159; Heydrich's reference to Hitler's order of extermination at the 'Wannsee Conference', Ibid, p2124. Hitler's leadership was also reaffirmed by perpetrator testimony, including Rudolf Höss, Ibid, pp2173-2174 and Walter Blume (Einsatzgruppe B), Ibid, p2173. A number of documents also compared Hitler's apparently more conciliatory approach than Eichmann's, on such as the descendants of mixed marriages, Ibid, p2170, and the emigration of Jews from Hungary, Ibid, p2182, in a case that also aimed to prove Eichmann's antisemitic fervour and independence, to the extent that he was prepared to challenge the orders of the Führer, Ibid, p2181. According to Eichmann he had been informed of Hitler's order of extermination by Heydrich around September 1941, Ibid, p2173.

extermination of the Jews,' he continued to insist that it had been in the form of a verbal instruction.³⁰

In Canada, the Crown in 1985 requested judicial notice of the notorious fact that 'millions of Jews were annihilated from 1933 to 1945 because of the deliberate policies of Nazi Germany', and in 1988 that 'during the Second World War the National Socialist regime of Adolf Hitler pursued a policy which had as its goal the extermination of the Jews of Europe'.³¹ As shown in chapter three, these similar facts were rejected for notice in 1985 and amended in 1988 on legal grounds.³² Rather paradoxically, given its centrality to the case, Judge Thomas deliberately removed the reference to 'policy' from the amended fact noticed in 1988, claiming that it was not necessary to the facts of the Holocaust (chapter three).³³ In place of judicial notice the main form of evidence was the historian expertise of Raul Hilberg in 1985 and Christopher Browning in 1988.³⁴ Documentation was referenced in both 1985 and 1988 in support of Hilberg's and Browning's testimonies. But, in contrast to the Eichmann trial, only a few items were legally submitted. Rather, as reiterated in chapter three, these experts were qualified to act as evidence by proxy.

Foregrounded from Hilberg's extensive testimony in 1985 was his claim that a verbal directive, instigated by Hitler, had authorised the 'extermination of the Jews' from early 1941 in preparation for the invasion of the Soviet Union.³⁵ More specifically, Hilberg opined that there had been two Hitler orders: (1) tasking mobile killing units with the murder of Jews in Russia and (2) initiating the wholesale murder of European Jewry in killing centres.³⁶ But, in opposition to those citing premeditation, he sourced the subsequent evolution and implementation of policy in "an incredible meeting of minds, a

³⁰ AET, Vol. I, p80; Vol. IV, p1561.

³¹ ZT 1985, Vol. X, p2072. ZT 1988, Vol. VI, p995.

³² As integral to the 'facts in issue', ZT 1985, Vol. X, pp2187-2191; Vol. XX, pp4460-4465. ZT 1988, Vol. VI, pp995-1010.

³³ Ibid, p1009.

³⁴ As noted in footnote 20 both historians were at the forefront of scholarship relating to the decision-making process and contributors to the prominent 'intentionalist/functionalist' debates.

³⁵ *Her Majesty the Queen and Ernst Zündel (251/85)*, 'Appeal Judgement' (1987), pp64-65, Ontario Court of Appeal. Ibid, 'Respondent's Factum', p15. All proceeding references to the 1987 Appeal will be prefixed by ZT 1987. For the full cross-examination of Hilberg see, ZT 1985, Volumes. XIII-XVII.

³⁶ Ibid, Vol. XX, p4488, although he had revised this conclusion by the 1988 trial, now aligning the 2nd order to Heydrich, ZT 1987, 'Respondent's Factum', p15, and by the Irving trial had withdrawn from the debate, HRIRH, Day, 17, pp119-125. These revisions are reflected in his published work, Raul Hilberg, *The Destruction of the European Jews* (London: W.H. Allen, 1961) and then the 1985 edition, Hilberg, *The Destruction of the European Jews*.

consensus, a mind reading by a far-flung bureaucracy".³⁷ In 1988, although concurring that 'phase 1 in the plan ... took place in 1941', and that phase 2 had been 'the deportation of the Jews from various parts of Europe to the extermination camps in Poland', Browning disputed Hilberg's implied autonomy of decision-making, or the minimising of Hitler's involvement once the transition to systematic extermination had been authorised.³⁸ Rather, 'initiatives and signals coming from Hitler ... were understood by those under him, namely Himmler and his deputy, Heydrich, to be orders'.³⁹

A range of evidence was referenced by both historians in support of these and other opinions relating to extermination policy.⁴⁰ Those specifically foregrounded by Judges Locke and Thomas included the eyewitness testimony of Wilhelm Hoettl (SS officer in Department VI, RSHA) in 1985 and Eichmann in 1988, as evidence of a verbal 'Hitler order' to these and other ranked officials (for example, Heydrich), Eichmann's memoirs and testimony again in 1988, as evidence that this key perpetrator had never denied the central organisation of extermination, while survivor testimony in 1985 proved the similarity (and therefore policy) of the killing process across the camps.⁴¹ Foregrounded from the contemporaneous documentation referenced, and/or submitted, in both trials (although minimal) was the 'Luther memorandum' of 21 August 1942 (1985), as evidence of a summary of policy beginning in 1939, various Einsatzgruppen reports (1985, 1988), as evidence of 'phase one' of the policy by mass shooting, and a direct challenge to the DSMRD claim that proof of policy was limited to the "worthless" Wisliceny statement (1988), extracts from Hans Frank's diary, as proof that the killing of millions of Jews had been 'Nazi Policy' (1985), with 'the order' coming from 'higher authorities' (1988), the 'Wannsee Protocol' of 20 January 1942 (1988), as evidence that the plan to exterminate the Jews 'had taken form, and was communicated to the ministerial bureaucracy through their State Secretaries in Berlin', and Himmler's Posen speeches on 4 October 1943 (1985, 1988), as official acknowledgement that: "We are exterminating the Jews", and on 6

³⁷ According to Hilberg's testimony in 1985 and read-out in 1988, ZT 1988, Vol. XXXVI, p10433.

³⁸ Ibid, pp10428, 10432-10433.

³⁹ Ibid, p10433.

⁴⁰ Including 'hundreds of documents' according to Hilberg, ZT 1985, Vol. XXI, p92.

⁴¹ **Hoettl**: Dated 25 November 1945, Ibid, p103. **Eichmann**: ZT 1988, Vol. XXXVI, pp10429-10430; Vol. XIV, pp3232-3233. **Survivor Testimony**: ZT 1985, Arnold Friedman, Vol. XXI, pp69-80; Ignatz Fulop, Ibid, pp84-89; Rudolf Vrba, Ibid, pp109-127; Chester Tomaszewski, Ibid, pp127-135; Henry Leader, Ibid, pp135-138.

October 1943 (1985), as proof that extermination had been deliberate and intended to include women and children.⁴²

In London the main form of evidence was again historian expertise and through the oral and written testimonies of Christopher Browning and Peter Longerich.⁴³ However, in contrast to the Zündel trials, a huge volume of documentation was submitted in support of their opinions and reports. More specifically, foregrounded as proof of centralised command and the escalation of extermination policy, was the Wehrmacht guidelines of 19 May 1941, as evidence of official orders for "ruthless, energetic and drastic measures" to be taken against specific categories of Soviet Jews, Heydrich's order to the Einsatzgruppen, dated 2 July 1941, as further evidence of central instruction over the discriminate shooting of Jews, various Einsatzgruppen reports, as proof that these units had followed orders from Berlin, 'Stahlecker's report', dated 15 October 1941, as evidence of "basic orders" instructing 'the most complete means possible' in solving the 'Jewish Question', correspondence between Dr Erhard Wetzel (Head of Jewish Affairs in the Eastern Occupied Territories), Alfred Rosenberg (Reichsminister for the Occupied Eastern Territories) and Hinrich Lohse (Reichskommissar for the Ostland) in October 1941, as proof of official instruction on gassing apparatus in Riga, and the intention that Jews unfit for work be "removed" accordingly, a further exchange of letters between Rosenberg and Lohse, dated 15 November and 18 December 1941, as evidence that not even economic considerations would deter the intended 'Final Solution', the 'Wannsee Protocol', of 20 January 1942, as proof of an important milestone at which a ministerial bureaucracy, under the leadership of Heydrich, prepared the implementation of a European-wide 'Final Solution', and Himmler's speech to SS leaders on 4 October, 1943,

⁴² **Luther memorandum**: relating to Martin Luther, an official in the Foreign Office, and the involvement of the Foreign Ministry during the stage, according to Hilberg, when death camps and gas chambers were being constructed, ZT 1985, Vol. XXI, p108. **Einsatzgruppen**: Ibid, pp92-93; ZT 1988, Vol. XXXVI, pp10427-10428, with the reference to the 'Wisliceny statement' relating to the post-war testimony of Dieter Wisliceny (Eichmann's deputy) utilised at both the International Military Tribunal (IMT) and Eichmann's trial, *Her Majesty the Queen and Ernst Zündel* (424/88), Appeal (1989), 'Respondent's Factum', p30, Ontario Court of Appeal. All proceeding references to the 1989 Appeal will be prefixed by ZT 1989. **Hans Frank**: ZT 1985, Vol. XX, p4622 and confirmed by Locke, Vol. XXI, p215; ZT 1989, 'Respondent's Factum', p23. **Wannsee**: ZT 1988, Vol. XXXVI, pp10426-10427. **Himmler**: Ibid, p10427; ZT, 1985, Vol. XX, pp4622-4623 and Vol. XXI, p215.

⁴³ Longerich, like Browning and Hilberg, had also contributed to the decision-making debates, but by the time of the trial had largely published his findings in German. HRIRH, (TB) B3, 'Witness Report of Christopher Browning: Evidence for the Implementation of the Final Solution' and (TB) B4, 'Witness Report of Peter Longerich: Hitler's Role in The Persecution of the Jews By The Nazi Regime' and 'The Systematic Character Of The National Socialist Policy For The Extermination Of The Jews'.

as conclusive evidence of official direction over 'the widespread killing operations in which the SS had been engaged'.⁴⁴

Foregrounded as specific proof of Hitler's authority and continued complicity in extermination policy, was Heinrich Müller's (Head of the Gestapo) instruction to the Einsatzgruppen, dated 1 August 1941, as evidence that Hitler was to be kept informed of their "work" in the East, Hans Frank's diary entry of 16 December 1941, as evidence that Hitler had directed the policy of liquidation, at that stage "presaging the extermination of Jews by gassing", specific diary entries of Joseph Goebbels, as proof of Hitler's relentless pursuit of the 'Final Solution', a range of Himmler's correspondence, diaries, memoranda and other writings, as evidence of regular meetings with Hitler regarding Jewish matters, extracts from a number of 'Table Talks', as further evidence of Hitler's continued antisemitism and input into "absolute extermination", the 'Bruns report' of 25 April 1945, as proof that Hitler had ordered the shooting of German Jews in Riga, as well as Hitler's own words in speeches to the Reichstag.⁴⁵ As Rampton insisted, these documents, if 'fairly read by an open-minded, careful historian, plainly implicate Hitler' in a policy of extermination.⁴⁶

However, while Browning and Longerich corroborated Hitler's continued antisemitic fervour after 1933, and concurred that extermination policy had been incremental, with Hitler influencing rather than micro-managing its continued evolution, they acknowledged (and represented) disputes over its precise dating.⁴⁷ Although both

⁴⁴ **Wehrmacht:** (TB) T2, 'Judgement', para. 6.13. **Heydrich:** Ibid. **Einsatzgruppen:** Ibid. **Stahlecker** (Frank Walter, Commander of Einsatzgruppe A until March 1942), Ibid, para. 6.18. **Wetzel:** Ibid, para. 6.70. **Rosenberg/Lohse:** Ibid, para. 6.19. **Wannsee Protocol:** Ibid, paras. 6.86-6.87. **Himmler:** Ibid, para. 6.21.

⁴⁵ **Müller:** Ibid, paras. 6.32, 6.33, 13.57. **Frank:** Ibid, paras. 6.35, 6.84, 5.129. **Goebbels:** 24 August 1938, November 1941, 13 December 1941, 15 February 1942, 20 March 1942, 27 March 1942, 30 March 1942, Ibid, paras. 5.127, 5.128, 5.131, 5.174, 5.176, 6.35, 6.62, 6.83, 6.89. **Himmler:** in particular, his letter to Arthur Greiser (Gauleiter in the Warthegau), dated 18 September 1941, Ibid, para. 6.65; his note of 30 November 1941 (after meeting Hitler for lunch), Ibid, para. 6.34; his note of 18 December 1941 (after a meeting with Hitler on 16 December 1941), Ibid, paras. 5.130, 6.36, 6.85; a number of diary entries in March 1942, Ibid, para. 6.89; a letter to Gottlob Berger (Senior Officer at SS Headquarters), dated 30 March 1942 (after a series of lunches with Hitler), Ibid, para. 6.94; a handwritten agenda for a meeting with Hitler on 22 September 1942, paras. 5.187, 5.188, 5.189; his situation report of 26 December 1942 and sent to Hitler, paras. 6.20, 6.37; and his speech in Posen, on 6 October 1943, paras. 5.222-5.225. **Tabletalks:** in particular those dated 25 October 1941, Ibid, para. 6.33, and 25 January 1942, Ibid, para. 5.132. **Bruns:** referring to Major General Walter Bruns, stationed in Riga in 1941, and recorded secretly when a prisoner of the British in 1945, Ibid, para. 5.113. **Hitler:** in particular his speeches of 30 January 1939, Ibid, para. 6.7, and 30 January, 14, 22 and 24 February 1942, Ibid, para. 6.85.

⁴⁶ HRIRH, Day 32, p19.

⁴⁷ Christopher Browning: Ibid, Day 16, p41; Day 17, pp26-27, 32, 123-124. Richard Evans: Day 21, pp164-169, 173-175, 200-201; Day 22, pp161-162. Peter Longerich: Day 24, pp97-105, 109, 177-184; Day 25,

'functionalist' in perspective, Browning opined that the transition to systematic slaughter evolved in the fall of 1941, while Longerich implied its inclusion of all targeted Jewry had been determined as late as the spring/summer of 1942.⁴⁸ But, as Browning insisted, the contention amongst historians was over the chronology of the 'killing programme' and not over the fact of its official mandate.⁴⁹

It is not surprising that discrete facts on extermination policy were subsequently established from the foregrounded data-streams. In Israel, since Eichmann could only be indicted from the stage at which he had acted in full knowledge of its order, a timeline of extermination policy was determined for legal (as well as historical) purposes.⁵⁰ Three principal (although overlapping) stages were identified by the Judges, during which policy had progressed with increasing severity from persecution (1933-1939) to mass deportation (1939 to mid-1941) and then to mass murder (mid-1941-1945).⁵¹ More specifically, the Judges found that Hitler had intended to exterminate the Jews as early as January 1939 (and therefore during the first stage) and that his objective was then known to a small group of people.⁵² However, the policy had not yet been finalised at this stage and the order for implementation had not yet been given.⁵³ Similarly, they agreed that during the second stage there had not been a 'uniform aim' behind the mass deportations, other than 'to get rid of the Jews by all means'.⁵⁴ But, it was not until the invasion of the Soviet Union in June 1941 (triggering the third stage) that a deliberate plan of extermination had been devised.⁵⁵ It was found that, close to this date, an order had been initiated by Hitler, officially relayed to Heydrich by Göring on 31 July 1941 and then

pp97-98, 101-108, 134-135, 148; while agreeing that the SS (Himmler) had been tasked with overall policy direction and implementation, Day 25, p72.

⁴⁸ Browning: *Ibid*, Day 16, pp46, 101; Day 17, pp85-86. Longerich: Day 24, p142. Browning has identified himself as a 'moderate functionalist' Christopher R. Browning, 'The Decision-Making Process', in Dan Stone (ed.), *The Historiography of the Holocaust* (Hampshire: Palgrave Macmillan, 2004), p178. Longerich has not specifically labelled himself but agrees with the radicalisation of policy emerging through an interplay of centre-periphery decisions and initiatives (neo-functionalism), Longerich, *Holocaust*.

⁴⁹ *Ibid*, Day 17, p113.

⁵⁰ AET, Vol. V, p2173.

⁵¹ *Ibid*, pp2113-2178

⁵² Referring to his speech to the Reichstag on 30 January 1939, *Ibid*, p2119.

⁵³ *Ibid*.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*, p2124.

verbally communicated to Eichmann.⁵⁶ Thereafter, all actions against Europe's Jewish citizens had intended their physical destruction.⁵⁷

Hitler was placed at the top of decision-making, alongside other 'initiators' who had guided Eichmann.⁵⁸ However, the Judges found that Eichmann had not only been a 'principal offender' but 'amongst those who pulled the strings'.⁵⁹ Moreover, since 'privy to the extermination secret' as early as June 1941, and 'personally ... permeated' with its intent', Eichmann had been actively involved in all three stages of its perpetration, although 'with a varying degree of intensiveness'.⁶⁰ The Judges likewise found that an entire state infrastructure had devised, legitimated and propagated policy:⁶¹

But all this does not detract from the fact that the Accused's Section in the RSHA stood at the very centre of the Final Solution; and the guilt of the others does not lessen by one iota the personal guilt of the Accused.⁶²

In Canada in both 1985 and 1988 the findings of the respective juries on the evolution of extermination policy are not known (chapter three), while instruction provided by the Judges in their 'charge to the jury' was minimal. In 1985 Locke reminded the jury that the Crown's position was that:

Nazi Germany [had] deliberately embarked upon a plan to slaughter the Jews of Europe. That plan was embarked upon as the Second World War proceeded. It became a plan when other avenues approached failed by reason of war.⁶³

⁵⁶ Ibid, pp2124, 2173.

⁵⁷ Ibid, pp2124, 2184.

⁵⁸ Ibid.

⁵⁹ Ibid, p2182.

⁶⁰ Although siting his knowledge as early as June 1941 appears to contradict the verbal communication of the Hitler order to Eichmann by Heydrich at the end of July 1941, this earlier date referred to Eichmann's attendance at the meeting of the Einsatzgruppen leadership in June 1941 when informed of their role prior to the invasion of the Soviet Union, Ibid, pp2173, 2183, 2187, 2188. Also note that Eichmann was indicted from August 1941 as the Judges accepted that they did not have proof of specific action conducted by Eichmann in the interim period between June-August 1941, Ibid, p2183.

⁶¹ Ibid, p2188.

⁶² Ibid.

⁶³ ZT 1985, Vol. XXI, pp53-54.

He also reminded the jury that the Crown had 'suggested that the evidence you have heard discloses that millions of Jews as well as others ... were killed by the German S.S. on orders from their Nazi superiors'.⁶⁴ This evidence had included hundreds of documents, including daily reports (Einsatzgruppen) detailing to 'senior German officers and office holders' the numbers killed.⁶⁵ Locke also reminded the jury that Hilberg had testified to the camouflage of policy through language in documentation 'accepted by all who read them as conveying the meaning that, on their face, it would not necessarily convey'.⁶⁶ In particular, "relocate" meant "to kill", "resettle" meant "to be taken to a death camp to die there", 'evacuation' meant 'to be shot ... or sent to be gassed'.⁶⁷ Locke noted that Hilberg had been 'cross-examined extensively' on the subject of a 'Hitler order', and had testified that 'an order came down from Hitler to exterminate the Jews. It was a verbal order' and corroborated by Hoettl.⁶⁸ However, Hilberg had conceded that some historians questioned its authenticity, while controversy remained amongst others over its verbal or written form.⁶⁹ Locke then instructed the jury:

if you conclude that an order came down and that there was an organised Nazi plan to exterminate the Jews of Europe, you will have to decide for yourselves whether or not it is likely that such an order is put in writing.⁷⁰

He further reminded the jury that Hilberg had testified that it had been an order from Himmler in 1944 that 'the death camps should be dismantled', since the "Jewish Problem" had been resolved'.⁷¹ Locke acknowledged that this order had not been produced in court, but, according to Hilberg, its existence had been verified by 'persons that he named who testified later after the war'.⁷²

In 1988 Thomas reminded the jury of a range of evidence both referenced and submitted by Browning (see above). He specifically noted that Browning, but also Hilberg in 1985,

⁶⁴ Ibid, p54.

⁶⁵ Ibid, p92.

⁶⁶ Ibid, p102.

⁶⁷ Ibid.

⁶⁸ Ibid, p103.

⁶⁹ Ibid, pp103, 108.

⁷⁰ Ibid, p103.

⁷¹ Ibid, p104.

⁷² Ibid.

had corroborated the evolution of two key phases of 'the plan' from 1941.⁷³ Thomas likewise reminded the jury that Eichmann had testified in 1961 that 'Heydrich told him that there was an order of the Fuehrer that all the Jews were to be physically exterminated'.⁷⁴ He further reminded the jury that 'Eichmann never denied the plan to exterminate. He heard it from Heydrich who attributed it to a direct order from Hitler'.⁷⁵ Thomas also noted that, according to Hilberg, extermination had not been premeditated, but that 'thinking on this subject converged in 1941'.⁷⁶ However, as Browning had insisted, Hitler had 'incited the initiatives'.⁷⁷ Thomas further acknowledged that the International Military Tribunal (IMT) had judged the origin of extermination policy to be 1941, but stated that whether the court had been correct in this conclusion was 'not of particular significance'.⁷⁸ Unfortunately it is not known if any of the Judges' instructions were heeded by the respective juries, far less the content of any facts or narratives finally established or authorised on the evolution of extermination policy by these 'triers of fact'.

In London Judge Gray found that 'Hitler's anti-semitism continued unabated after 1933', but, 'until the latter part of 1941, the solution to the Jewish question which Hitler preferred was their mass deportation'.⁷⁹ He also found that policy had extended to 'successive programmes of shooting ... and gassing Jews in large numbers', and that Hitler had been complicit in these more 'radical solutions'.⁸⁰ More specifically, Gray accepted that a programme of mass shooting had been carried out 'from about November 1941 ... which Hitler knew about and authorised ... initially in Russia and later spreading to towns in the Warthegau ... the General Government ... and Serbia'.⁸¹ Gray further accepted that 'the deportation of the European Jews continued apace in the months and years after the Wannsee Conference' at the beginning of January 1942.⁸² However, the question was whether these deportations were a prelude to extermination and specifically gassing.⁸³

⁷³ ZT 1988, Vol. XXXVI, p10428. As already highlighted, Hilberg's 1985 testimony was read out in court in 1988 but he did not attend for cross-examination.

⁷⁴ Ibid, p10429.

⁷⁵ Ibid, pp10429-10430.

⁷⁶ Ibid, p10431.

⁷⁷ Ibid, p10432.

⁷⁸ Ibid, pp, 1005, 1009.

⁷⁹ HRIRH, (TB) T2, 'Judgement', paras.13.54, 13.26.

⁸⁰ Ibid, paras. 13.55, 13.28-13.29.

⁸¹ Ibid, para. 13.64.

⁸² Ibid, para. 13.59.

⁸³ Ibid.

Gray accepted that 'there is no reference to be found to a *Hitler Befehl* (Hitler order) authorising the extermination of Jews by gassing at the Reinhard Camps' and at Auschwitz-Birkenau.⁸⁴ However, he also found that evidence submitted by Irving had not controverted 'the contention by the Defendants that by March 1942 the "radical solution" favoured by Hitler was extermination and not deportation'.⁸⁵ Gray ultimately found that, 'even if not wholly irrefutable', Hitler was not only aware of the gassing programme but he had been 'consulted and approved the extermination'.⁸⁶ The evidence supporting this conclusion included the 'Wannsee Protocol', but the 'main reason' for his finding was incredulity that:

Himmler would not have obtained the authority of Hitler for the gassing programme (and even more unlikely that he would have concealed it from his Fuhrer) [*sic*].⁸⁷

It is obvious that although discrete data-streams were submitted across the four trials they were authorised as equally probative in accordance with the demands of each legal case and context. However, it is also obvious that, even when shared, the evidential base was discretely utilised in accordance with the 'facts in issue'. Indicative was the use of Frank's diary in 1961 as proof of internecine struggles over control of the 'Jewish Question' in the 'Generalgouvernement', in 1985 and 1988 as evidence of the deliberate murder of millions of Jews and in 2000 as evidence of both an emerging policy of extermination and Hitler's complicity and direction.⁸⁸ Instructions from Hitler to General Jodl (Chief of the Army Leadership Staff), dated 3 March 1941, were authorised by the Judges in the Eichmann trial as evidence of the murderous objectives of the Einsatzgruppen, and in the Irving trial as evidence of Hitler's intimate involvement in an intended ideological war against "Jewish-Bolshevism".⁸⁹ In 1961, the 'Luther memorandum' of 21 August 1942 was authorised as specific evidence of the 'Madagascar Plan', and Hitler's order of extermination after the invasion of the Soviet Union, while in 1985 it was foregrounded

⁸⁴ Ibid, paras. 13.66, 13.91.

⁸⁵ Ibid, para. 13.38.

⁸⁶ Ibid, para. 13.67.

⁸⁷ Ibid.

⁸⁸ AET, Vol. V, p2156. ZT 1985, Vol. XXI, p215; ZT 1988, Vol. XXXVI, p10426. HRIRH, (TB) T2, 'Judgement', paras. 5.129, 6.35, 6.84.

⁸⁹ AET, Vol. V, p2147. HRIRH, (TB) T2, 'Judgement', para. 6.28.

by Locke as evidence of an evolution of policy since 1939.⁹⁰ Even though Himmler's speech on 4 October 1943 was similarly authorised across all four courtrooms as evidence of an official policy of genocide, in the Eichmann trial it was also foregrounded as proof that officers could request to be moved from the murder process without punishment, and in the 1988 Zündel trial as a specific challenge to the claim in DSMRD that merely "veiled allusions" to genocide could be found in the existing documents.⁹¹

It is likewise obvious that some of the 1961 findings were later revised in 1985, 1988 and 2000. Most notably, in 1961 Eichmann was *the* principal offender but marginalised in the accounts/representations of policy reconstructed in the later trials. It is also obvious that the intentionalist findings, that had underpinned the three-staged evolution of policy found at the Eichmann trial, had been informed by the functionalist leanings of Hilberg, Browning and Longerich in 1985, 1988 and 2000. Subsequently, the acceptance of intent, as early as 1939, at the Eichmann trial had been challenged by the 1980s, while authorisation of a direct order of extermination by Hitler in 1961 had, by 1988 and 2000, translated into 'signals' or 'incitements' from Hitler.⁹² Likewise, an unquestionable acceptance of top-down leadership in 1961 had developed into a greater complexity and uncertainty of decision-making and evolution in 1985, 1988 and 2000.

Similarly, revisions of evidential interpretation and status meant that the foregrounding of Hitler's speech to the Reichstag, on 30 January 1939, as evidence of intent prior to any killing in the Eichmann trial, was, by 2000, deemed probative of Hitler's antisemitic fervour but not as 'a programme, a blueprint to kill European Jews during the next years'.⁹³ Göring's appointment letter to Heydrich, dated 31 July 1941, was identified in 1961 as 'one of the basic documents in the history of the extermination' and yet by 2000 it was merely referenced during Browning's testimony as authorisation to carry out a 'feasibility study' for a 'Final Solution'.⁹⁴ The 'Wannsee Protocol' was identified in 1961 as the 'central

⁹⁰ Referring to a plan first initiated in 1940, aiming to deport Jews to the island of Madagascar once it had been relinquished to Germany as part of a future peace treaty with France, AET, Vol. V, pp2122, 2124-2125. ZT 1985, Vol. XXI, p108.

⁹¹ AET, Vol. V, p2199. ZT 1989, 'Referent's Factum', p24.

⁹² According to Browning, ZT 1988, Vol. XXXVI, p10433 and HRIRH, Day 17, p123.

⁹³ HRIRH, (TB) T2, 'Judgement', para. 6.7. According to Longerich it was clearly intended to 'threaten German Jews to leave the country as soon as possible', while provoking the Western powers into supporting Jewish immigration. It could also suggest that Hitler was 'actually trying to envisage what would happen in a case of a war', Ibid, Day 25, pp87-88.

⁹⁴ AET, Vol. V, p2124. HRIRH, Day 17, pp145-146.

event in the history of the Final Solution', while, by 2000, although still vital evidence of bureaucratic complicity, it was interpreted by Browning as an 'implementation conference' at which no decisions were made and no indication that Hitler had been aware of its agenda.⁹⁵

However, with the exception of Eichmann's elevated status, and the deterministic stages of both intent and perpetration found in 1961, the accounts presented and facts both foregrounded and established were not contradictory across the four trials. Rather, a surprising consistency of record informing the relevant narratives of extermination policy emerged across all four courtrooms. This record agreed that policy had been ideologically-driven, and, although opinion differed over its intent or incremental evolution, noted its key stages of progression from cultural and economic exclusion to forced emigration, 'Kristallnacht' and its aftermath, forced deportations to 'the East', ghettoisation, mass shootings, mobile gassing vans and finally fixed gassing chambers and crematoria in the 'Operation Reinhard' camps and at Auschwitz-Birkenau.⁹⁶ Although opinion differed over its precise dating, and the inclusion of all European Jewry, the initiation of a policy of extermination was similarly aligned to the invasion of the Soviet Union in June 1941 and the mass shooting of Soviet Jews.⁹⁷ Key bureaucracies (RSHA) and personnel (Himmler, Heydrich) were equally foregrounded in amongst an all-encompassing complicity of political, professional and state infrastructures that had been officially recorded at the 'Wannsee Conference' in January 1942.⁹⁸ The terminology of the 'Final Solution of the Jewish Question' was similarly agreed to have evolved from territorial intentions (such as Madagascar), until utilised as camouflage language for mass murder.⁹⁹ It was likewise agreed that a catalogue of atrocity, expropriation and slave labour was integral to the 'Final Solution', and that no country influenced or occupied by

⁹⁵ Ibid, p130.

⁹⁶ AET, Vol. I, pp65, 76; Vol. V, pp2113-2183, 2199, 2203. ZT 1985, Vol. V, pp2103-2121; Vol. XXI, pp53-54. ZT 1987, 'Respondent's Factum', p15. ZT 1988, Vol. XXXVI, p10439. ZT 1989, 'Respondent's Factum', pp10-11, 30. HRIRH, Day 5, pp179-180; Day 16, pp142-143; Day 17, pp35, 42, 45; Day 24, pp121-122. Ibid, (TB) T2, 'Judgement', paras. 6.1-6.105, 6.2, 6.26, 6.28, 6.29, 6.30, 6.82.

⁹⁷ AET, Vol. V, pp2113-2178. ZT 1987, 'Respondent's Factum', p11; Ibid, 'Appeal Judgement', pp64-65. ZT 1989, 'Respondent's Factum', p30. HRIRH, Day 16, pp32, 34; Day 17, pp32, 34; Day 24, p142; Day 32, p17; Ibid, (TB) T2, 'Judgement', paras. 5.171, 6.13-6.15, 6.18, 6.22, 6.28-6.31.

⁹⁸ AET, Vol. V, pp2128, 2182, 2204. ZT 1988, Vol. XXXVI, pp10426-10427, 10429-10430, 10433. HRIRH, Days 16, p57, 17-18; Day 22, p130, 24-26, 32, p18; Ibid, (TB) T2, 'Judgement', para. 13.67.

⁹⁹ AET, Vol. V, pp2122-2123, 2173. ZT 1985, Vol. XXI, pp93, 108-109. ZT 1989, 'Respondent's Factum', p30. HRIRH, (TB) T2, 'Judgement', para. 5.142.

Germany had been immune.¹⁰⁰ It was further agreed that Germany had acted as the policy 'prototype' but that local circumstances had impacted on the intended diffusion of anti-Jewish measures across the Holocaust's European reach.¹⁰¹ It was similarly concluded that its murderous perpetration had ended with the mass gassing of Jews from Hungary and its murderous consequences had been the extermination of millions of Europe's citizens simply because they were identified as Jews.¹⁰² Despite continued research on the subject since 1961 this generic record of extermination policy not only reflected the content of prevailing scholarship but remains familiar in present-day Holocaust historiography.¹⁰³

It is therefore suggested that the most startling revision since 1961 did not relate to the content or interpretation of the evidential base underpinning the record of extermination policy, but to the legal exposé of its fallibility. In contrast to the evidential determinacy of policy in 1961, the later trials were forced to focus on the fragmentary nature of the source material. The Eichmann trial not only implied innumerable proof and record of policy, but the judgement portrayed certainty in the data-stream subsequently authorised.

¹⁰⁰ AET, Vol. V, pp2113-2183. ZT 1985, Vol. XXI, p54, and explicit in the evidence provided by the eyewitnesses, Friedman, *Ibid*, pp69-80; Fulop, *Ibid*, pp84-89; Vrba, *Ibid*, pp109-127; Tomaszewski, *Ibid*, pp127-135; Leader, *Ibid*, pp135-138; and noted throughout ZT 1989, 'Respondent's Factum', pp7-8, 10-11, 13, 22, 42, 54-55, 60-61. HRIRH, Day 5, pp160-163; Day 11, pp92-93; Day 16, p72; Day 17, pp4-10, 82, 140-141; Day 22, pp169, 171-172; Day 24, p75; Day 25, pp18-19, 21, 33-37, 53-58, 65, 172-173, 176-177; Day 26, pp2-3, 38-39, 54-55, 57-59; and reaffirmed in (TB) T2, 'Judgement', paras. 6.75, 6.76. It was only in the Eichmann trial that all the relevant countries were specifically examined, AET, Vol. V, pp2128-2132 (focusing on Germany and "the Reich"), 2132-2146 (focusing on countries 'outside the Reich'), 2155-2160 (focusing on Eichmann's role in the Eastern Occupied Territories). In the Zündel and Irving trials it is both explicit and implicit in references to policy being Europe-wide: ZT 1985, Vol. XXI, pp47, 53-54 and in the testimonies of the eyewitnesses, Friedman (Czechoslovakia/Hungary), *Ibid*, pp pp69-80; Fulop (Hungary), *Ibid*, pp84-89; Vrba (Czechoslovakia), *Ibid*, pp109-127; Tomaszewski (Romania), *Ibid*, pp127-135; Leader (Poland), *Ibid*, pp135-138. In ZT 1988, Vol. XXXVI, pp10425-10426, 10428 and ZT 1989, 'Respondent's Factum', pp14, 15, 17, 19, 21-22. HRIRH, Day 32, p17 and (TB) T2, 'Judgement', paras. 6.63-6.66, 6.79, 6.86, 6.105.

¹⁰¹ Once again the focus on the impact of policy on all countries under German influence and occupation is more explicitly stated in the Eichmann trial, AET, Vol. V, p2128, but the diffusion of Germany's anti-Jewish directives across its European reach is implicit in both the Zündel and Irving trials, ZT 1985, Friedman (Czechoslovakia), Vol. II, pp304-471; Fulop (Hungary), Vol. III, pp591-627; Vrba (Czechoslovakia), Vol. VI, pp1244-1286, 1301-1386, Vol. VII, pp1387-1606, Vol. VIII, pp1607-1635; Tomaszewski (Poland), *Ibid*, pp1685-1718; Dennis Urstein (Austria), *Ibid*, pp1737-1802; Leader (Poland), *Ibid*, pp1802-1834. HRIRH, (TB) T2, 'Judgement', para. 6.61. The impact of varying conditions was likewise explicitly stated in AET, Vol. V, pp2128, 2132, and implied in the eyewitness testimonies at the Zündel trial referenced above. In London see: HRIRH, Day 25, p117 and (TB) T2, 'Judgement', paras. 5.200-5.204, 6.20.

¹⁰² With Hungary specifically referred to as the 'last act in the tragedy of European Jewry' in 1961, AET, Vol. V, pp2140-2146, 2172. ZT 1985, Vol. IX, pp2052-2058; Vol. XX, p54. ZT 1988, Vol. XXXVI, pp10422, 10425-10426. HRIRH, Day 9, pp118-119; Day 10, pp205-207; Day 11, pp21-27, 172-173, 174; Day 13, pp14-15; Day 23, pp113-123; Day 26, pp67-68; Day 32, p18; *Ibid*, (TB) T2, 'Judgement', paras. 5.200-5.201, 13.63-13.64, 13.78, 13.91.

¹⁰³ See as example, Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* (Oxford: Oxford University Press, 2010) and David Cesarani, *Final Solution: The Fate of the Jews 1933-1949* (London: Macmillan, 2016).

In only a few instances, most specifically when aiming to prove RSHA (and thus Eichmann's) control over the 'Generalgouvernement', did the Judges acknowledge any gaps in the relevant evidence and thus the need for judicial discretion.¹⁰⁴ Conversely, in response to deliberate denier stratagem aimed at raising doubt over the facticity of decision-making from Berlin, the later trials both focused on and reaffirmed the interpretive necessity of its evidential accuracy and accountability. As Browning acknowledged in 1988, he had based his conclusions on 'circumstantial evidence', and therefore differences of opinion were held amongst historians 'on when and how decisions were taken'.¹⁰⁵ More specifically, when reconstructing policy of the gassing programme, Browning acknowledged:

there is no document in existence ordering the commencement of gassing ...
no document ordering the stopping of gassing, no document setting out the
organizational plan or blueprint to carry out gassings, and there is no overall
budget report on the "Final Solution"¹⁰⁶

Similarly, in 2000, Browning noted that historians were working with 'inference', while Longerich agreed that, despite access to additional archives of primary sources since 1961, there were still areas of decision-making where 'hard evidence' was lacking.¹⁰⁷ Thus, when reconstructing Hitler's continued input into policy:

it is not so easy, you do not have the daily or the weekly records of the
conversations between Himmler and Hitler about the Holocaust. We have to
use these bits and pieces and put it together and to come to our conclusions.¹⁰⁸

¹⁰⁴ AET, Vol. V, pp2156-2158. There was also insufficient evidence on: Eichmann's responsibility for 'covering up the traces' of extermination, Ibid, p2164; a link between IVB4 and those responsible for the administration of Chemno, Ibid; IVB4 and Eichmann's participation in the preparation or implementation of sterilisation measures, Ibid, 2171; Eichmann's responsibility for the order and implementation of forced abortions at Kovno, Ibid; Eichmann's control over extermination in the camps, Ibid, p2161; his involvement in the evacuation of the camps in 'the East', with the exception of Bergen-Belsen, Ibid, p2165; Eichmann's input into measures against the children of mixed marriages, beyond discussion and correspondence, Ibid, 2170; and the murder of 93 children from Lidice, Ibid, p2194.

¹⁰⁵ ZT 1988, Vol. XXXVI, pp10432-10433.

¹⁰⁶ Ibid, p10430.

¹⁰⁷ HRIRH, Day 16, p121; Day 17, p57; Day 25, p149.

¹⁰⁸ Ibid, Day 25, p156.

Rampton likewise acknowledged that he was compiling a 'jigsaw puzzle' of evidence of policy, rather than presenting the single document Irving continued to demand.¹⁰⁹ Although Gray accepted the probative weight of its totality, he also acknowledged that the 'documentary pointers' of Hitler's complicity in key areas of extermination policy were 'sparse'.¹¹⁰ More specifically, there was 'no explicit evidence' that Hitler had discussed the gassing programme with Himmler, it was not 'wholly irrefutable' that he had been consulted and approved of its use at the 'Reinhard Camps', and the 'documentary picture' implicating Hitler in the systematic mass shooting of Jews 'is a partial one'.¹¹¹ Both the initial challenge and these formal conclusions would have been anathema to the Israeli case, courtroom and public audience in 1961.

When comparing the collaborative investigation of extermination policy across the Eichmann, Zündel and Irving trials it is clear that its reconstruction was case-specific. It is also clear that an available data-stream existed that both accommodated and supported the diversity of accounts, interpretations and facts established, regardless of the demands of each legal case and context. Although extensive in volume, it is arguably surprising that there was very little overlap of evidence across the four trials. Consequently, only three items were mutually foregrounded in all four courtrooms: the Einsatzgruppen reports, Hans Frank's diary and Heinrich Himmler's 4 October 1943 speech to SS officers in Posen. But, perhaps less surprising, is that, even when shared, varying explanations were found and supported. Revisions of interpretation, fact and narrative were also established across all four trials. Most obviously, the elevation of Eichmann's leadership at all stages of extermination policy identified in 1961 had been revised and redressed by the 1980s. Specific primary source material authorised as 'the basic documents in the history of the extermination' in 1961 were either ignored or marginalised in the later trials.¹¹² In contrast to the clear and linear progression of policy found in 1961, a recognised ambiguity of both evidence and explanation surrounding its initiation, evolution and geographic extension was reaffirmed in 1985, 1988 and 2000. More specifically, in contrast to its acclaimed didactic and historical success, it was during the judgement at the Irving trial that the 'circumstantial' foundations of extermination policy, however extensive in volume, were most formally determined and verified.

¹⁰⁹ Ibid, Day 5, p117.

¹¹⁰ Ibid, (TB) T2, 'Judgement', para. 6.27.

¹¹¹ Ibid, paras. 6.105, 6.27, 13.67.

¹¹² AET, Vol. V, p2124.

Yet, with the exception of the elevation of Eichmann, and the determinacy and intent of decision-making found in 1961, it is clear that the facts and narratives authorised on extermination policy were not fundamentally incompatible. Furthermore, regardless of almost forty years of additional research and debate between 1961 and 2000, a generic record of the evolution of extermination policy similarly informed the narratives authorised across all four trials. Notably, this record mirrored the content of the established historiography prevailing at the time of each trial, and, with the exception of Eichmann's elevated authority found in 1961, remains familiar in present-day Holocaust scholarship. Similarly, areas of contention highlighted in the later trials, in the main the dating of the authorised transgression to systematic extermination, remain in dispute in 2017.

It is obvious that the narratives authorised were 'cooked' in accordance with the 'facts in issue'. And, despite their historiographical reach, it is likewise obvious that they did not 'do justice' to the complexities of extermination policy indicated in the prevailing scholarship. In 1961 the legal (and political) focus on Eichmann's criminality and 'pivotal role' at all stages of the 'Final Solution' not only marginalised the leadership and overall command of Hitler but distracted attention away from the complexity of decision-making and perpetration beyond the chains of command relevant to Eichmann, Section IVB4 and the RSHA. It is likewise obvious that Hausner not only presented a case of policy through the then dominant intentionalist lens but that the Judges reaffirmed its competence as both historical explanation and fact. In the later trials, the narratives of extermination policy were disproportionately focused on central, and especially Hitler's, authority and leadership. Consequently, they reinforced narratives of top-down decision-making, however functionalist the interpretations. Other central characters (Himmler, Heydrich, Goebbels) were identified, but, in cases in which Hitler's complicity, command and even continued antisemitism, was under scrutiny, their role in decision-making was subordinated. Moreover, in response to Holocaust denier charges, disproportionate focus was placed on specific areas of policy-making, in particular the mass shootings of the Einsatzgruppen in 'the East' and the 'gassing programme' at the 'Operation Reinhard' and Auschwitz-Birkenau camps. Although central to extermination policy, this focus ignored or marginalised the breadth, complexity and sites of decision-making preceding and surrounding their command and perpetration. In the Irving trial, it likewise negated the evidence of a convoluted interplay of centre-periphery relations, especially focusing on

the escalation of the Einsatzgruppen mass shootings in the eastern occupied territories (chapter five), found in regional studies of those territories throughout the 1990s.¹¹³

However, despite being 'cooked', it is likewise obvious that the authorised narratives were both empirically accountable and 'truth-full' in content'. Yet, while the consistency of fact and record implied the dominance of past evidential constraint, regardless of the discrete demands of the Eichmann, Zündel and Irving trials, it is most obvious that the reconstruction of extermination policy in each courtroom was primarily determined through preconceived and prefigured narratives that 'floated free' of and governed the relevant past traces.

¹¹³ Ulrich Herbert (ed.), *National Socialist Extermination Policies: Contemporary German Perspectives and Controversies* (Oxford: Berghahn Books, 2000).

Chapter Five: The Einsatzgruppen Mass Shootings 1941 – 1942

The Einsatzgruppen mass shootings, of predominantly Soviet Jewish civilians in the relevant occupied territories from June 1941 to December 1942, has always been and remains a central feature of Holocaust historiography. It was likewise integral to the criminal cases of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000), but for different legal (and extra-legal) reasons. All four trials identified the Einsatzgruppen as officially organised killing units, but variously debated and disputed their leadership, systematic policy, discriminate targeting of Jews, responsibility for the transition to the use of gas and the numbers of those killed. Comparative reconstruction of this historiography, therefore, records a diversity of accounts presented across the four trials in accordance with the 'facts in issue'. Given the focus on Eichmann in 1961, and denier challenges to both its systematic policy and Adolf Hitler's authority in the later trials, it also records the evolution of historiographical focus from unquestioned decision-making and leadership from Berlin, including Eichmann, in 1961, to the foregrounding of Hitler in Einsatzgruppen command by 2000. Since governed by the 'facts in issue', it likewise records a consistent focus on top-down initiative and command that does not 'do justice' to the complexities of the governance and perpetration of the Einsatzgruppen after June 1941.¹

Comparative reconstruction identifies and establishes an evidential base capable of supporting the historiographical and legal demands of each case. However, in comparison to the contemporaneous data-stream relevant to the evolution of extermination policy overall (chapter four), it was found to be fragmentary in both content and volume. From an acknowledged 'mixed bag ... rather than a fairly rich and steady run', only one form of primary source material was mutually foregrounded across all four trials: the Einsatzgruppen reports.² In turn, by 2000, this evidential source had not only supported a range of interpretations but had extended both its historical and legal reach and value.

¹ Lawrence Douglas, 'The Didactic Trial: Filtering History and Memory into the Courtroom', in David Bankier and Dan Michman (eds.), *Holocaust and Justice: Representation of the Holocaust in Post-War Trials* (New York: Berghahn Books, 2010), p12.

² *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), Day 17, p100, Holocaust Research Institute, Royal Holloway, University of London. All proceeding references to the daily transcripts of this trial will be prefixed by HRIRH. Additional archival material will also be prefixed by their Trial Bundle (TB) letter and number.

It is not surprising that revisions of fact and interpretation relating to the Einsatzgruppen mass shootings were found between 1961 and 2000. And yet, with the exception of the elevation of Eichmann's authority found in 1961, these revisions were minimal. A generic record similarly framed and informed the narratives authorised at each trial. This record, again with the exception of Eichmann's elevated authority found in 1961, but also the absence of knowledge relating to the 'regional turn' (neo-functionalist) after the 1990s, was not only consistent across the four trials but remains familiar in present-day Holocaust scholarship.

Comparative reconstruction clearly shows that the narratives authorised at each trial were 'cooked' in accordance with the focus on Eichmann in 1961, Einsatzgruppen objectives and intended victims in 1985 and 1988 and Hitler's continued awareness of and complicity in the mass shootings in 2000. It likewise shows that the narratives were empirically accountable and 'truth-full' in content. Once again, although the consistency of both fact and record across the discrete discourses of the Eichmann, Zündel and Irving trials implied a form of past evidential constraint, it was obvious that preconceived and prefigured narratives had operated as the governing authority of the relevant but fragmentary traces.

The identity of the Einsatzgruppen as four mobile SS units (A-D) that had followed the advancing German army into the territories of the Soviet Union from June 1941 was an accepted fact in the Adolf Eichmann, Ernst Zündel and David Irving trials.³ It was also mutually agreed that these units had engaged in the mass shootings of targeted Soviet civilians from this date until 1942.⁴ However, in accordance with the 'facts-in-issue' governing each trial, different accounts were presented in relation to their official orders, leadership, systematic escalation, the transition to the use of gas and the identity and numbers of those killed. At the Eichmann trial the intentional and systematic mass

³ *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Vol. V, p2146, Newcastle University Library. All proceeding references to this trial will be prefixed by AET. *Her Majesty the Queen and Ernst Zündel* (251/85), Vol. XX, p4629, Vol. XXI, pp25, 93, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1985. *Her Majesty the Queen and Ernst Zündel* (424/88), Vol. XXXVI, p10428, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1988. HRIRH, (TB) T2, 'Judgement', para. 6.10, although the 'General Government' is wrongly referenced here instead of the Soviet Union.

⁴ AET, Vol. V, p2160. ZT 1988, Vol. XXXVI, pp10428-10429. HRIRH, (TB) T2, 'Judgment', para. 6.10. But again, Grey relates the vast numbers of Jews subsequently shot in the area of the 'Generalgouvernement', Ibid, and yet throughout his 'Judgement' it is obvious that the shootings relate to those carried out after the invasion of the Soviet Union in June 1941, Ibid, paras. 6.10-6.59.

shootings of predominantly Soviet Jews by the Einsatzgruppen after June 1941 was not a subject of dispute.⁵ Indeed, systematic policy was explicit in the charges relating to Eichmann's influence over the Einsatzgruppen. Furthermore, neither party questioned the central authorisation and instruction of the mass shootings, directed by Adolf Hitler, nor their murderous conclusion, totalling the death of hundreds of thousands of Jewish men, women and children.⁶ More specifically, neither party disputed that Eichmann had organised transports of Jews to 'the East' from the autumn of 1941, or that the method of killing by the Einsatzgruppen had transferred from shooting to the use of gas vans by the end of 1941.⁷ Rather, the focus of attention and dispute was on Eichmann's leading authority in what one prosecution witness described as the 'slaughter-house on wheels'.⁸ According to the leading counsel, Gideon Hausner, Eichmann, as the executive arm of the SS, had been at the centre of Einsatzgruppen instruction and reporting.⁹ Since fully aware of the subsequent mass shootings taking place in 'the East', he had intentionally transported Jews from the Reich to selected killing sites.¹⁰ Crucially, when visiting such sites at Lvov and Minsk, Eichmann had initiated the transition to gas after suggesting that "some more elegant way must be found".¹¹ And, following an order from Heinrich Himmler in the autumn of 1942, Eichmann had instructed the setting-up of a special unit, 'Kommando 1005', to remove the traces of Einsatzgruppen crimes.¹² All of these specific charges were disputed by Eichmann.¹³ Hausner also intended to extend the focus on Eichmann to a wider narrative of the subsequent 'blood-bath'.¹⁴ As Hausner exclaimed in his opening address:

How could it ever have happened?" It is almost impossible to believe that for many months, thousands of people daily, in cold blood, deliberately and of set purpose murdered multitudes of human beings with their own hands, the

⁵ See Gideon Hausner's opening address, AET, Vol. I, pp69-95. The subject of the Einsatzgruppen was not specifically mentioned in the Defence's brief opening remarks, Ibid, Vol. IV, pp1371-1372.

⁶ Ibid, Vol. I, pp69, 93; Vol. IV, pp1388, 1410, 1411-1412.

⁷ Ibid, Vol. I, pp78, 80, 94, 109; Vol. IV, pp1417, 1522, 1557, 1559-1561.

⁸ Judge Michael A. Musmanno, Ibid, Vol. II, p713. Musmanno had been the presiding Judge at the Einsatzgruppen trial (1947-1948), as part of the Nuremberg Military Tribunals (NMTs).

⁹ Ibid, Vol. I, pp62, 63, 69, 72-73, 77-78, 93, 94; Vol. V, pp1995, 2003, 2004.

¹⁰ Ibid, Vol. I, pp94-95; Vol. V, p2004.

¹¹ Ibid, Vol. IV, p1706. Also highlighted in Hausner's opening address, Vol. I, p81, and oral summing up, Vol. V, p2004.

¹² Ibid, Vol. III, p1312.

¹³ Ibid, Vol. IV, pp1388, 1410-1411, 1417, 1418, 1557; Vol. V, p2054.

¹⁴ Ibid, Vol. I, p93.

numbers rising steadily until they totalled three-quarters of a million. It is difficult to accustom oneself to the idea that such beasts ever walked the face of this earth.¹⁵

Dictated by the overall thesis (1985) and specific statements (1988) in 'Did Six Million Really Die?' (DSMRD), the Ernst Zündel trials recorded typical denier challenges to the established historiography and consequently focused attention on both the official objectives and murderous conclusions of the Einsatzgruppen. In accordance with this denier tract, Zündel's defence lawyer, Douglas Christie, argued that its 'operations units' had been set up to specifically target partisans and Communist commissars in Russia, that any shooting of Jews had not been systematic, and that the numbers killed had been exaggerated.¹⁶ In a repeat of denier tactic, that had equated the absence of a written 'Hitler order' with the absence of extermination policy (chapter four), the unavailability of a documented instruction directly tasking the Einsatzgruppen with "a general massacre of Russian Jews" was deemed synonymous with the absence of policy governing their actions.¹⁷ The transition to and use of gas as a method of killing was also a central theme of both Zündel trials, but more specifically related to denier focus on the extermination camps, especially Auschwitz-Birkenau, and fixed gas chambers (chapter six), rather than its use in mobile vans by the Einsatzgruppen.¹⁸

In 2000 David Irving largely repeated the same charges in defence of claims he'd made in books, specific interviews and speeches.¹⁹ As reiterated by Judge Grey, Irving had insisted that 'the shooting of the Jews in the East was random, unauthorised and carried out by individual groups or commanders', that in the initial stages they had been 'confined to the intelligentsia and served a military purpose', that the 'initiative for the orders came

¹⁵ Ibid.

¹⁶ In 1985 see the cross-examination of Robert Faurisson, ZT 1985, Vol. XII, pp2712-2716; Vol. XIII, pp2824-2825; and Zündel, Vol. XIX, p4331. Confirmed by Locke, Vol. XXI, pp182, 202, 205. In 1988 see Irving's examination by Christie, ZT 1988, Vol. XXXIII, pp9485-9486, 9492. For the relevant extracts from DSMRD (30-41) see *Her Majesty the Queen and Ernst Zündel* (424/88), Appeal (1989), 'Respondent's Factum', pp29-35, Ontario Court of Appeal. All proceeding references to the 1989 Appeal will be prefixed by ZT 1989.

¹⁷ ZT 1989, 'Respondent's Factum', extracts 32-33, pp30-31.

¹⁸ ZT 1985, Vol. XXI, pp24-25, 48, 54-55, 96, 101, 103, 104-108, 114-118, 122-124, 125-126, 131-136, 144, 145-146, 151, 152, 170-174, 174-175, 182, 187-188, 207-208, 211, 212. ZT 1988, Vol. XXXVI, pp10397, 10399-10405, 10408-10412, 10413, 10420, 10422, 10427, 10430.

¹⁹ In *Hitler's War* (1977 and 1991) and *Goebbels: Mastermind Of The Third Reich* (1996). In Australia in 1986, HRIRH, Day 4, pp112-115. To the Institute of Historical Review in October 1992, Ibid, Day 3, pp100-102, Day 4, pp112-115.

from the Nazi High Command [Military] rather than from Hitler', and that the reported numbers of Jews subsequently murdered were "fantasy figures".²⁰ Since Irving specifically absolved Hitler from their order, additional attention was also placed on not only Hitler's authorisation but his continued complicity in Einsatzgruppen command. The transition to and use of gas vans by the Einsatzgruppen was acknowledged and placed within the 'genesis of [a] gassing programme'.²¹ However, as in the Zündel trials, a greater focus was placed on Auschwitz-Birkenau and its gas chambers rather than the use of gas vans by the Einsatzgruppen.²²

Given the discrete focus on Eichmann in 1961, it is to be expected that the evidential base relevant to the Einsatzgruppen shootings differentiated from those presented and submitted at the later trials, and did so in both content and form. In Israel the primary form of evidence of the subsequent 'blood bath' was survivor testimony.²³ Consequently, witness after witness attested to the 'atrocities' of the 'evil design', in which Jewish civilians had been variously beaten, humiliated, forcibly undressed, led to pits, shot, and, after Himmler's order in the autumn of 1942 to remove 'all traces of slaughter', dug-up from mass graves and burnt.²⁴ As recalled by Avraham Aviel: 'Children, women, family after family. Each family went up together'.²⁵ Similarly, Rivka Yoselewska testified to the murder of her mother, father, grandmother, aunt and sisters until:

my turn came ... I felt them tearing my daughter away from me, I heard her last cry and heard how she was shot ... Then he turned me around and shot. I fell into the pit and felt nothing.²⁶

²⁰ HRIRH, (TB) T2, 'Judgement', paras. 6.13, 6.39, 6.47.

²¹ Ibid, paras. 6.68-6.72. See also, Day 17, pp75-85, 202-205; Day 25, pp136-137, 142, 144-145, 161-162; Day 26, pp117-118.

²² As Christopher Browning testified, the use of gas vans by the Einsatzgruppen had been 'a very minor part of their killing operations', HRIRH, Day 17, p85.

²³ Ada Litchman, AET, Vol. I, pp324-326; Dr Leon Wells, Ibid, pp370-373; Dr Meir Mark Dworzeck, Ibid, p454; Abba Kovner, Ibid, pp456-457, 465; Avraham Karasik, Ibid, pp472-474; Dr Aharon Peretz, Ibid, pp476, 481; Eliezer Karstadt, Ibid, p490; Avraham Aviel, Ibid, pp495-498; Haim Behrendt, Ibid, p503; Shmuel Horowitz, Ibid, p513; Rivka Yoselewska, Ibid, pp517-518; Leslie Gordon, Vol. III, pp1128-1130; Shalom Cholawski, Ibid, p1346.

²⁴ AET, Vol. V, pp2146-2147, 2004, 2164.

²⁵ Ibid, p2146.

²⁶ Ibid.

Yoselewska had survived the shooting and related 'how with the last ounce of strength she rose up from the grave, from amongst the corpses heaped above her'.²⁷ In what was described by the Judges as 'amongst the most horrifying parts of all the evidence submitted by the Prosecution', Dr Leon Wells testified to the uncovering of the graves of Jews murdered and the subsequent removal, piling, and burning of the bodies, and then grinding of the bones and pillaging of any valuables found in the ashes.²⁸ Wells had also testified that the relevant Unit (1005) had participated in further mass shootings before casting its victims, some still alive, into 'the flames'.²⁹ Forced to work with this Unit, Wells estimated the number of bodies burnt to have been 'several hundred thousand'.³⁰

This testimony was not challenged by the Defence and was awarded inherent probative value and weight by the Judges.³¹ However, since none of the witnesses had met Eichmann during their ordeals, they could not testify to his specific agency in the slaughter. Rather, the primary form of evidence of both Eichmann's knowledge of and active role in the Einsatzgruppen mass shootings was perpetrator testimony and foremost Eichmann himself. Indeed, Eichmann corroborated survivor testimony when recalling that, on a visit to Minsk around September 1941, he had witnessed:

Young marksmen ... shooting into the pit ... I can still see a woman, her arms behind her, and then my knees gave way, and I left the place³²

On his journey back to Berlin he had also witnessed 'blood spurting as if from a fountain out of another pit which had already been covered over'.³³ This admission of eyewitness record, but also his acknowledged receipt of the daily reports of these Units from June 1941, was accepted as not only further evidence of the horror of the mass shootings but confirmation that Eichmann had always known the fate of the Jews he had 'sent to the Operations Units commanded by Nebe and Rasch'.³⁴

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid. The work of this 'Unit' was also corroborated by Avraham Karasik, Ibid.

³¹ Ibid, pp2146-2147.

³² Ibid, p2147.

³³ Ibid.

³⁴ Referring to Arthur Nebe, as Commander of Einsatzgruppe B, and Emil Otto Rasch, as Commander of Einsatzgruppe C, Ibid, p2173.

Additional perpetrator testimony was also foregrounded as evidence of Eichmann's direct role in Einsatzgruppen command. In particular, Otto Ohlendorf (Commander of Einsatzgruppe D) had reaffirmed (at the International Military Tribunal (IMT) the control, leadership and dominance of personnel from the Reich Security Main Office (RSHA).³⁵ With Eichmann's section (IVB4) based in the RSHA the crucial question then posed by the Judges was 'whether the line of command from [Reinhard] Heydrich and the commanders of the Operations Units passed through the Accused'.³⁶ Perpetrator testimony, taken overseas, was then utilised to verify Eichmann's prominence in this 'line of command'.³⁷ In particular, the testimony of Erich von dem Bach-Zalewski (Higher SS and Police Leader) was foregrounded as evidence that, if Eichmann had been receiving reports of the Operations Units' shootings, it would indicate the importance of his Section (IVB4).³⁸ But it was the testimonies of Walter Blume (Einsatzgruppe B) and Gustav Noske (Einsatzgruppe B and RSHA) that the Judges foregrounded as probative weight of Eichmann's agency in the Operations Units and 'from the commencement of their activities'.³⁹ More specifically, Blume had testified to Eichmann's participation in a meeting of Einsatzgruppen leaders, at which Heydrich had authorised their murderous intent, on the eve of the invasion of the Soviet Union, while Noske had claimed that from the spring of 1942 reports of the Einsatzgruppen killings had been sent directly to Eichmann, who then summarised their content for redistribution to his "superiors".⁴⁰

Perpetrator testimony was likewise accepted as evidence of the use of gas by the Einsatzgruppen (Paul Blobel, Otto Ohlendorf). But it was Eichmann's own statement that was foregrounded as proof of his principal role in the transition from mass shootings to a "cleaner" and "more efficient" method of murder.⁴¹ Eichmann had admitted in his pre-trial statement that he had questioned the impact of the shootings on "those men of ours" on his visit to Minsk, but consistently denied in court that he had initiated, far less

³⁵ Ibid, pp2147, 2148, 2160.

³⁶ Ibid, p2160.

³⁷ Ibid.

³⁸ Relating to the "Einsatzgruppen reports", which comprise 195 'Event Reports', compiled by Reinhard Heydrich's staff between 23 June 1941 and 24 April 1942, 11 'Activity and Situation Reports', also compiled by Heydrich's staff between 31 July 1941 and 31 March 1942, and three additional reports, two compiled by Franz Stahlecker, Commander of Einsatzgruppen A, and one by Karl Jaeger, Commander of Einsatzkommando 3. Ibid, p1848.

³⁹ Ibid, pp2173, 2160.

⁴⁰ Ibid.

⁴¹ Ibid, p2174.

instructed, the introduction of gas into 'the East'.⁴² Perpetrator testimony was yet again foregrounded as evidence of Eichmann's involvement in covering up the traces of Einsatzgruppen crimes.⁴³ In particular, the testimony of Rudolf Höss (Commandant of Auschwitz-Birkenau) was authorised as proof of links between Paul Blobel, ordered by Himmler in the autumn of 1942 to remove all traces of slaughter', and the 'Eichmann Service Unit' that subsequently opened up the mass graves and burnt the bodies.⁴⁴ The statement of Dieter Wisliceny (Eichmann's deputy) was also foregrounded as proof that Blobel's Unit was "formally placed under Eichmann".⁴⁵ It was noted that in his statement to the IMT Blobel had not mentioned Eichmann, but he had been under the direct command of Heinrich Müller, as had Eichmann.⁴⁶

Primary source documentation was also foregrounded by the Judges as further evidence of RSHA, and therefore Eichmann's, authority and command of the Einsatzgruppen. When organised chronologically, this documentation included an order signed by Walter von Brauchitsch (Commander-in-Chief of the German Army), on 2 May 1941, as proof of not only agreed cooperation between the Security Police (RSHA) and the military command in the intended occupied territories of the Soviet Union, but specific authorisation for the Operations Units "to take the necessary steps for the execution of their plans as regards the civil population", detailed instructions from Department IV (Gestapo, RSHA), on 17 July 1941, as evidence that the 'prime objective' of the Operations Units 'was to round up and execute Soviet Commissars and all the Jews in those areas', and notification from the 'Reich Commissioner in the Ostland' 'that the liquidation of the Jews is the task of the Security Police and the SD' (RSHA).⁴⁷ Copies of specific Einsatzgruppen reports were likewise foregrounded as proof of the subsequent mass murder of Jews 'month after month across the length and breadth of the Eastern Occupied Territories', while yet others indicated that they had been copied and directed to Eichmann's section (IVB4) in the RSHA.⁴⁸

⁴² Ibid, pp2174-2175.

⁴³ Ibid, p2164.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid, pp2147-2148.

⁴⁸ Those dated 11 September 1941, 29-30 September 1941, 15 October 1941, January 1942 and 26 December 1942, Ibid, p2148. Those dated 29 July 1941, 7 August 1941, 9 August 1941, 15-31 August 1941, Ibid, Vol. I, pp520-521.

But, the most important documentation foregrounded, in support of not only Eichmann's direct authority within Einsatzgruppen command but his role in its escalation to the use of gas, was a collection of letters and memoranda (the latter both handwritten and typed) drafted by Dr Erhard Wetzel (Reich Ministry of the Occupied Eastern Territories) in October 1941 to the 'Reich Commissioner in the East' (Hinrich Lohse) that implicated Eichmann in a decision-making process seeking to import the apparatus of Viktor Brack (T4 programme) into 'the East'.⁴⁹ Specific attention was placed on extracts from the second drafted letter in which Wetzel noted Eichmann's agreement that "there is no reason why those Jews who are not fit for work should not be liquidated by means of Brack's apparatus".⁵⁰ Since Ohlendorf had testified to the delivery of a gas van to the Operations Units in the spring of 1942, this collection of documentation placed Eichmann at the beginning of a crucial escalation of policy that exchanged 'the system of execution by shooting for execution by means of gas vans'.⁵¹ Letters of instruction from IVB4 to Einsatzgruppen B and D (amongst other recipients) in March 1943, and again to the commander of Einsatzgruppe B in September 1943, were likewise foregrounded as evidence of Eichmann's involvement in Einsatzgruppen command well into 1943.⁵²

In the Zündel trials the main form of evidence of both the official objectives and murderous conclusions of the Einsatzgruppen was historian testimony. In 1985, the facts considered for judicial notice had included the use of 'mass shootings' as a 'means of annihilation', but, as shown in chapter three, this fact was ruled inadmissible by Judge Locke on legal grounds.⁵³ Rather, and acting as evidence by proxy, Raul Hilberg testified to the existence of documents:

... prepared by Germans themselves reporting to senior German officers and office-holders that ... a squad of military personnel accompanied the advancing Army for the purpose of killing Jewish persons and others.⁵⁴

⁴⁹ Ibid, Vol. V, pp2175-2176. Brack's 'apparatus' referred to the so-called 'euthanasia' programme (September 1939-August 1941), in which approximately 70,000 German citizens, identified as 'unfit lives', were intentionally murdered, some by gas, on the order of Hitler, Peter Longerich, *Holocaust: The Nazi Persecution and Murder of the Jews* (Oxford: Oxford University Press, 2010), pp135-142.

⁵⁰ AET, Vol. V, p2175.

⁵¹ Ibid, p2176.

⁵² Ibid, pp2159, 2160.

⁵³ ZT 1985, Vol. X, pp2072, 2181-2191; Vol. XX, pp4464-4465.

⁵⁴ Ibid, Vol. XXI, p92, although these documents are not specifically identified by the Judge in his 'Charge to the Jury'.

The daily reports of the Einsatzgruppen were especially foregrounded (but not submitted) as evidence of both the systematic implementation and scale of the mass shootings, in direct opposition to the claim in DSMRD that there was 'no statistical basis' for Hilberg's figure of 1.4 million Jews subsequently murdered.⁵⁵ Hilberg testified 'that he has seen such documents, and that they were used at Nuremberg'.⁵⁶ Likewise, in response to the claim made in DSMRD that evidence of an Einsatzgruppen order 'to liquidate all Soviet Jews is based only on "the worthless Wisliceny statement"', Hilberg highlighted the testimony of Einsatzgruppen commanders at Nuremberg and 'German military documents'.⁵⁷

In 1988 Christopher Browning likewise foregrounded a number of Einsatzgruppen reports as evidence of both official policy and phase 1 of the 'Final Solution' in 1941 by:

... squads of security police that came upon the scene after the German troops had advanced and ... conducted open-air firing squads against the Jews; 1.4 million Jews were their victims.⁵⁸

These reports were utilised to directly challenge claims in DSMRD that the portrayal of the Einsatzgruppen at Nuremberg "has been proved since to be the most enormous exaggeration and falsification", that evidence of a verbal Hitler order to extend the killings to a "general massacre" of Soviet Jews was most probably based on "the worthless Wisliceny statement", that the "number of casualties" had been nearer 100,000, of which "only a small proportion ... could have been Jewish partisans and Communist functionaries", and, inflicted "during savage partisan warfare on the Eastern front".⁵⁹ However, in this trial, copies of specific Einsatzgruppen reports were formally submitted as evidence alongside Browning's expert testimony, that, in contrast to 1985, visibly outlined to the jury the discriminate targeting of Jewish civilians as well as the figures

⁵⁵ Ibid, pp92-93; Vol. XX, p4629.

⁵⁶ *Her Majesty the Queen and Ernst Zündel (251/85)*, Appeal (1987), 'Respondent's Factum', p11, Ontario Court of Appeal. All proceeding references to the 1987 Appeal will be prefixed by ZT 1987.

⁵⁷ Referring to Dieter Wisliceny's statement at the International Military Tribunal (IMT), ZT 1987, 'Respondent's Factum', p11. The relevant documents are not identified in either the Judge's 'Charge to the Jury', Vol. XXI, or by the Prosecution in the afore-mentioned 'Respondent's Factum'.

⁵⁸ ZT 1988, Vol. XXXVI, p10428.

⁵⁹ ZT 1989, 'Respondent's Factum', pp29, 30, 33.

and categories of those shot in only a matter of specified months.⁶⁰ In particular, the 'Stahlecker Report' recorded the mass shooting of 118,430 Jews by Einsatzgruppe A in less than 4 months, and "in accordance with basic orders received".⁶¹ Another report, in December 1942, detailed the execution of 363,211 Jews in South Russia, Ukraine and Bialystok in only 'four months - August to December' 1942, while yet another report identified 'the use of wallposters to lead the Jews to believe they were being resettled, when in fact they were being led to execution'.⁶²

Browning likewise foregrounded a report prepared by a Professor Seraphim.⁶³ Contained within a letter from the 'Army's Inspectorate in the Ukraine' to the 'High Command of the Armed Forces', on 2 December 1941, this report referenced 'a planned shooting of Jews' conducted in public, 'with the use of the Ukrainian militia and members of the armed forces', in which 'masses were executed'.⁶⁴ Seraphim's report also acknowledged the sacrifice of the economic war effort in the occupied territories to 'the ideological goal of murdering all the Jews'.⁶⁵ Browning likewise highlighted Eichmann's testimony in 1961, and in particular his eyewitness account of an 'Einsatzgruppen execution' at Minsk.⁶⁶ Browning testified that, according to Eichmann, 'it was one of the worst things he had every [*sic*] experienced in his life'.⁶⁷ As already noted, in contrast to the Eichmann trial, the transition to the use of gas vans by the Einsatzgruppen was not specifically debated or evidentially foregrounded in either 1985 or 1988. However, in 1988, Browning testified to their initial use at Chelmno (Poland).⁶⁸

Historians were once again the main form of evidence of the relevant Einsatzgruppen mass shootings in London in 2000 and through the oral and written testimonies of

⁶⁰ Those dated 25 September, 3 and 14 November and 12 December 1941, ZT 1988, 'Exhibits Book'. ZT 1989, 'Respondent's Factum', p30

⁶¹ Referring to Franz Walter Stahlecker, Commander of Einsatzgruppe A until March 1942. ZT 1989, 'Respondent's Factum', p30.

⁶² This report obviously relates to the 'Higher SS and Police Leader' report of 26 December 1942 and yet Thomas ascribes it to Himmler and dates it as 22 December 1942, ZT 1988, Vol. XXXVI, pp10428-10429. ZT 1989, 'Respondent's Factum', p31.

⁶³ A senior military advisor external to the Einsatzgruppen ('Oberkriegsverwaltungsrat') and a historian; one of the few historians directly involved in mass murder as well as justifying Nazism in his writings.

⁶⁴ ZT 1989, 'Respondent's Factum', p31.

⁶⁵ Ibid.

⁶⁶ According to Browning, 'the most extensive testimony of any one individual involved in the holocaust! [*sic*]', ZT 1989, 'Respondent's Factum', p47.

⁶⁷ Ibid.

⁶⁸ Ibid.

Christopher Browning and Peter Longerich. However, as already indicated, at this trial an additional focus, and therefore differentiated data-stream, aimed to prove not only their central and systematic command, escalation and murderous consequences, as similarly challenged in the Zündel trials, but Hitler's authority, knowledge and continued complicity in its policy. It was acknowledged by Browning in 2000 that there is nothing so crudely written as: "We are going to invade the Soviet Union so that we can destroy the Jews"; there is no such 'smoking pistol document'.⁶⁹ However, a range of corroborative evidence demonstrated that the Einsatzgruppen had followed orders rather than pursuing 'random actions by the local commanders' as charged by Irving.⁷⁰ Although limited in number, a chronology of directive included the 'Wehrmacht guidelines' of 19 May 1941, as evidence, prior to the invasion of the Soviet Union, of the authorisation of "ruthless, energetic and drastic measures" against Jews in general, Heydrich's order to the Einsatzgruppen, of 2 July 1941, as proof of the targeting of "Jews in party and state functions", as well as the instigation (by indigenous anti-Jewish factions) of 'pogroms in the Jewish ghettos', Himmler's direct order (and escalation of policy) on 1 August 1941, to SS units in the area of the Pripet marshes (Belarus), as evidence that authorisation had extended to Jewish women, and correspondence between Hinrich Lohse (Reichskommissar for the Ostland) and Alfred Rosenberg (Reichsminister for the Occupied Eastern Territories), in November and December 1941, as proof that a central directive had by now authorised the SS to execute all Jews 'irrespective of the economic interests of the Wehrmacht', although in future, mass shootings 'were to be carried out in a better organised manner'.⁷¹ According to Longerich this latter correspondence demonstrated that, regardless of the interests of the civilian authorities governing the occupied territories, the Einsatzgruppen now had 'carte blanche' over the execution of the Jews.⁷² Retrospective documentation relating to the shootings was also foregrounded. In particular, Himmler's speech to SS officers on 4 October 1943 was presented as evidence of the 'widespread killing operations in which the SS had been engaged', and the "Bruns report", recorded on 25 April 1945, as corroboration of both the horror of a specific

⁶⁹ HRIRH, Day 17, pp56-57. Also accepted by Longerich, Day 25, pp106-107.

⁷⁰ Ibid, Day 16, p103.

⁷¹ The limited data-stream was acknowledged by both Browning, Ibid, Day 17, p100, and Rampton, Day 2, p270. (TB), T2, 'Judgement', paras. 6.13, 6.16, 6.10, 6.17.

⁷² Ibid, Day 26, pp106-108. (TB), T2, 'Judgement', para. 6.19.

Einsatzgruppen execution in Riga on 1 December 1941 and the directive for discretion mentioned in the Lohse/Rosenberg correspondence.⁷³

As in the earlier trials, specific Einsatzgruppen reports were especially foregrounded in 2000 as evidence of not only the shooting operations themselves but of a systematic policy, official escalation 'in the scale of shootings' and the subsequent killing of 'large numbers of Jews'.⁷⁴ In particular, the report of Einsatzkommando 3 (Karl Jäger), dated 2 August 1941, made reference to "general orders from above which cannot be discussed in writing".⁷⁵ Thereafter reports from this Einsatzkommando recorded both increasing numbers of Jews shot and the inclusion of Jewish women and children.⁷⁶ The 'so-called Jager [*sic*] report', dated 1 December 1941, specifically categorised the killing of 134,000 civilians, of whom barely 1.5% had been non-Jewish.⁷⁷ Finally, the 'Higher SS and Police Leader' report, of 26 December 1942, detailing the killing of 363,211 Jews, was foregrounded as evidence of both the continuation and scale of the shooting programme across Ukraine, Southern Russia and Bialystok.⁷⁸

However, unique to this trial was the foregrounding of a range of documentation relating to the investigation into the role of Hitler in the command of the Einsatzgruppen. As Gray queried in his 'Judgement': 'Was Hitler aware of what was going on and did he approve of it?'⁷⁹ The Defence team, led by Richard Rampton, contended that:

... the scale of the killing was so immense and its effect on the war effort so great, that it is difficult to conceive that Hitler was not consulted and his authority sought.⁸⁰

⁷³ Ibid, Day 25, p101. The 'Bruns report' was a secretly recorded conversation between Major General Walter Bruns and other German senior officers when held as POWs in a British-run detention camp in April 1945, Ibid, (TB), T2, 'Judgement', para. 6.19.

⁷⁴ In particular, Einsatzgruppe C, July 1941; Einsatzkommando Jäger, 2 August 1941; the 'Jager [*sic*] report', December 1942; report (No. 51), 26 December 1942, Ibid, paras. 6.10, 6.15, 6.17, 6.20.

⁷⁵ Ibid, para. 6.15.

⁷⁶ Ibid.

⁷⁷ Referring yet again to Karl Jäger as Commander of Einsatzkommando 3. Ibid, para. 6.18.

⁷⁸ Ibid, para. 6.20.

⁷⁹ Ibid, para. 6.23.

⁸⁰ Ibid, para. 6.24.

But a documentary record, however limited, also supported this charge. When organised chronologically, it began with Hitler's instruction to the 'Chief of the Army Leadership Staff' (General Jodl) on 3 March 1941, ordaining, in the intended invasion of the Soviet Union, both "the confrontation of two world views" and the subsequent elimination of the "Jewish-Bolshevik intelligentsia", and was followed by 'a package of measures' that included Jodl's subsequent directive to the Armed Forces on 13 March 1941, as evidence that "special responsibilities" arising from the "struggle" between "two opposing political systems" had been allocated to Himmler and the SS, statements made by Hitler to senior army officers on 17 and 30 March 1941, as proof of the intended elimination of the "Bolshevik Commissars and the Communist intelligentsia", and a memorandum of a conference, held on 16 July 1941, noting Hitler's instruction for the shooting of "anyone who just looks funny".⁸¹ However, most critically, an instruction from Heinrich Müller (Head of the Gestapo) to the Einsatzgruppen on 1 August 1941 specifically commanded:

The *Fuhrer* [*sic*] is to be kept informed continually from here about the work of the *Einsatzgruppen* in the East.⁸²

This single instruction was foregrounded as proof that Hitler was not only aware of, but wanted to be kept updated on, the Einsatzgruppen shootings.⁸³ As the shootings escalated from selective to wholesale murder in the latter months of 1941, additional documentation was submitted as evidence of Hitler's continued complicity and approval. Foregrounded was Hitler's 'table talk' of 25 October 1941, in which he had regaled in the widespread knowledge that "exterminating Jewry goes before us", Joseph Goebbels' diary entry of 22 November 1941, as proof of Hitler's demand (at a meeting held the previous day) for an "energetic policy against the Jews, which, however, does not cause us unnecessary difficulties", Himmler's note on 30 November 1941, as evidence of discussions with Hitler on the subject of a transport of Berlin Jews deported to and killed in Riga, Hans Frank's diary entry of 16 December 1941, as proof of Hitler's instruction to the Gauleiter (12 December 1941) to extend the murder programme to the 'Generalgouvernement', Himmler's appointment book for 18 December 1941, as evidence of both a forthcoming meeting with Hitler to discuss the 'Judenfrage' and subsequent instruction to annihilate the Jews as if partisans, and finally the 'Higher SS and Police Leader' report (No. 51),

⁸¹ Ibid, paras. 6.28-6.31.

⁸² Ibid, para. 6.32.

⁸³ Ibid.

dated 26 December 1942, signed by Himmler on 29 December 1942 and submitted to Hitler on 31 December 1942, as not only evidence of the execution of 363,211 Jews (as if partisans) in Ukraine, Southern Russia and Bialystok over the preceding four months, but proof of Hitler's explicit knowledge of this particular slaughter.⁸⁴ According to the Defence, the totality of this primary source documentation comprised evidence of both a process of incremental decision-making from the centre and Hitler's continued complicity as well as direction and instruction at its various stages.⁸⁵

Although the transition from mass shootings to the use of gas by the Einsatzgruppen was not central to the historiography reconstructed in London, the 'Wetzel memoranda' was once again foregrounded as evidence of its origins. It was especially noted that, within a context of the experimental use of gas in both mobile vans and at Auschwitz-Birkenau (on Soviet POWs), Wetzel (Reich Ministry of the Occupied Eastern Territories), after meeting with Viktor Brack (Reich Chancellery and T4) and then Eichmann on 25 October 1941, had drafted a letter to Rosenberg (Reich Minister of the Occupied Eastern Territories) and Lohse (Reich Commissioner for the East) stating that there were 'no objections if Jews who were not fit for work were "removed" ... ' by gassing apparatuses being planned in Riga.⁸⁶

It is not surprising that distinct facts were established from the discrete data-streams foregrounded and in accordance with the 'facts in issue'. In 1961 facts relating to a record of the central initiation, instruction and policy of mass shootings, the identity of the intended victims, and the hundreds of thousands of Jewish men, women and children subsequently murdered by the Einsatzgruppen after June 1941, were not in dispute.⁸⁷ Moreover, Hitler's complicity and leadership of the Einsatzgruppen murders was not in doubt, although marginalised and rarely mentioned in the relevant Judgement.⁸⁸ Likewise the prominent role of Himmler and Heydrich in the command of the Einsatzgruppen was similarly confirmed, but again marginalised as fact within a narrative that foregrounded

⁸⁴ It was also noted by Gray that Hitler had met with Himmler and Heydrich on the same day as Wetzel had met with Brack and Eichmann and then drafted his letter noting official support for the use of gassing apparatus, Ibid, paras. 6.70, 6.33, 6.35, 6.34, 6.36, 6.37.

⁸⁵ Confirmed by Browning, Ibid, Day 17, p32.

⁸⁶ Ibid, (TB), T2, 'Judgement', para. 6.70.

⁸⁷ AET, Vol. V, pp2146-2148.

⁸⁸ See the relevant sections on the 'Operations Units'; Eichmann's introduction of gas; and the "removal of the traces", Ibid, pp2146-2148, 2160, 2164, 2173-2174. But, elsewhere, the Judges identify orders from Hitler informing the actions of the 'Operations Units' at the outset, Ibid, pp2124, 2159.

Eichmann's authority and remit.⁸⁹ Legal demands governing the date from which Eichmann could be indicted explicitly ignored the actions of the Einsatzgruppen in Poland from 1939.⁹⁰ But, from the eve of the invasion of the Soviet Union, he was found to have been part of a group of RSHA officials initially informed of their intended role in the 'extermination of the Jews', and thereafter in consistent contact with the Units as they carried out their orders in 'the East'.⁹¹ Consequently, it was found that Eichmann had been aware from the summer of 1941 that 'anything connected with the expulsion of Jews would lead to their final destruction'.⁹² This included Jews deported from the Reich in October 1941, contrary to Eichmann's insistence that he had specifically sent the first transports of German Jews to the Łódź ghetto (Poland) 'in order to rescue them from death at the hands of the Operations Units'.⁹³ As the Judges concluded:

It is therefore clear that all the Jews dispatched by the Accused and his Section to the East for "posting for work" or under any other camouflage term, were dispatched to death by him knowingly⁹⁴

Although the documentary evidence relating to Eichmann's command was sparse the Judges accepted the testimony of Noske (Einsatzgruppe B and RSHA) as 'a sufficient basis for drawing conclusions, especially as the Accused himself has not disputed the accuracy of Noske's testimony'.⁹⁵ From this testimony the Judges specifically established that, by the spring of 1942, Eichmann had been actively involved in their 'operational directives ... by collecting the material relating to the extermination of Jews and preparing summaries thereof'.⁹⁶ According to the Judges:

The preparation of summaries was obviously intended to be of assistance to those who had authority from time to time to decide upon the continuation of the activities of the Operations Units.⁹⁷

⁸⁹ See for example, *Ibid*, pp2115, 2123, 2124, 2132, 2147-2148, 2158, 2159, 2160, 2172-2174, 2176, 2178-2182, 2199, 2204.

⁹⁰ *Ibid*, p2146.

⁹¹ *Ibid*, p2173.

⁹² *Ibid*, p2174.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ *Ibid*, p2160.

⁹⁶ *Ibid*.

⁹⁷ *Ibid*.

Crucially, the Judges found that Eichmann, despite his insistence to the contrary, had been 'undoubtedly occupied' with finding an alternative method of mass killing, other than shooting, 'as early as the end of the summer or the beginning of the autumn of 1941'.⁹⁸ Through the 'Wetzel memoranda' it was found that Eichmann had 'expressed the consent of the RSHA to the use of gas vans in October 1941'.⁹⁹ The Judges noted Eichmann's acceptance of relevant evidence (predominantly the Wetzel documents) when under interrogation prior to the trial, and so, did 'not attach any value' once in court to his consistent denial or 'accept it'.¹⁰⁰ Ultimately, the Judges found Eichmann to be present at all stages of Einsatzgruppen initiation and escalation of mass murder in the occupied territories of the Soviet Union 'from the commencement of their activities'.¹⁰¹

The only claim the Judges could not authorise related to the removal of the traces of Einsatzgruppen crimes. In this case the Judges found that 'the evidence is not sufficient to place the responsibility for the activities of Blobel's unit [1005] on the Accused'.¹⁰² Rather, they concluded:

it does not necessarily follow that the Section of the Accused, which was occupied with carrying out the Final Solution, should also be engaged in the specific operation of covering up the traces.¹⁰³

Unfortunately, the findings of the juries in the Zündel trials of 1985 and 1988 are not known on the issues contested (Einsatzgruppen objectives, orders and murderous consequences), while any instruction by either Judge in their respective 'charge to the jury' was minimal. In 1985 Locke reminded the jury that the Einsatzgruppen had been presented as:

German S.S units sent out into the field in regiments or battalions to kill people as the German Army advanced into Russia.¹⁰⁴

⁹⁸ Ibid.

⁹⁹ Ibid, p2176.

¹⁰⁰ Ibid, p2175.

¹⁰¹ Ibid, p2160.

¹⁰² Ibid, p2164.

¹⁰³ Ibid.

¹⁰⁴ ZT 1985, Vol. XXI, p25.

He likewise reminded the jury that Hilberg had testified to the existence of documents, 'prepared by Germans themselves', that proved their subsequent killing 'of Jewish persons and others' on a mass scale, including daily reports 'of how many were killed'.¹⁰⁵ In 1988 Thomas reminded the jury that Hilberg had testified in 1985 that 1.3 to 1.4 million Jews 'had died as a result of the systematic shootings conducted by the Einsatzgruppen in the USSR, Galicia and Serbia'.¹⁰⁶ He further reminded the jury that Browning had testified to the content of a number of reports, 'filed by the Einsatzgruppen commanders', detailing 'the number of Jews liquidated'.¹⁰⁷ He similarly reminded the jury that the Defence had not presented any evidence to support its claim that these reports had exaggerated the numbers of Jews murdered.¹⁰⁸ Conversely, in a direct retort to the Defence's rejection of central and systematic governance of the mass shootings, the Crown had insisted:

... why would the man in the field exaggerate the reports if it was not a policy of their leaders to exterminate the Jews? The records are there ... and speak for themselves¹⁰⁹

Thomas further reminded the jury that both Hilberg in 1985 and Browning in 1988 had identified the Einsatzgruppen mass shootings as 'phase one' in a 'policy to exterminate the Jews'.¹¹⁰ Of course, the impact, if any, of the respective instructions on the facts and narratives authorised by either jury relating to the Einsatzgruppen remains unknown.

In London, in 2000, Gray found that much of the 'documentary evidence relating to he [*sic*] shooting in the East was destroyed'.¹¹¹ However, he likewise found, that what remains 'suffices to establish that ... four mobile SS units called *Einsatzgruppen* were established by Himmler's deputy, Heydrich'.¹¹² He also found that the evidence presented

¹⁰⁵ Ibid, pp92-93.

¹⁰⁶ ZT 1988, Vol. XXXVI, p10422.

¹⁰⁷ Ibid, p10428.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ HRIRH, (TB) T2, 'Judgement', para. 6.12.

¹¹² Ibid.

by the Defence 'indicates that the programme of shooting Jews in the East was systematic ... originated in Berlin and was organised and co-ordinated from there'.¹¹³ Consequently:

it inexorably follows that Irving was misrepresenting the historical evidence when he told audiences in Australia, Canada and the US (as he accepted he did) that the shooting of Jews in the East was arbitrary, unauthorised and undertaken by individual groups or commanders.¹¹⁴

Gray more specifically ruled that the Jews targeted in the initial stages 'were males in leadership positions and in selected professions', but escalated to include women and children after August 1941. He also ruled that, as early as the report from Einsatzkommando 3, dated 2 August 1941, 'it would appear ... that such restrictions as had been imposed on the Jews who were to be shot had been relaxed', while, by the date of 'Report 51' (26 December 1942) 'even Jewish labourers who might have made a contribution to the Nazi war effort were not spared'.¹¹⁵ Gray further ruled that 'the evidence, principally in the form of reports by the *Einsatzgruppen*':

appears to establish that between 500,000 and 1,500,000 people (including a large proportion of Jews) were shot by those groups and by the auxiliary *Wehrmacht* units seconded to assist them.¹¹⁶

He also found that these reports (in various forms) 'represent the primary source of knowledge about the shootings on the Eastern front up to the spring of 1942'.¹¹⁷ He acknowledged that the Defence had suggested that the 'true figure' of those shot by the *Einsatzgruppen* had been even higher, but found that there was 'no useful purpose ... served by my attempting to assess whether the evidence supports a higher figure'.¹¹⁸ Gray accepted that as the mass shootings of Soviet Jews spread to the killing of Jews in other regions, in particular the Warthegau, Lublin and Serbia, 'gas vans and associated

¹¹³ Ibid, para. 13.57.

¹¹⁴ Ibid, para. 13.58.

¹¹⁵ Ibid, paras. 6.15, 6.37.

¹¹⁶ Ibid, para. 13.56.

¹¹⁷ Ruled by Gray as initially collated as 'Operational reports' by *Einsatzgruppen* leaders, and sent to Berlin where they were processed into 'event reports' (*Ereignismeldungen*). 'Activity reports' were also prepared, Ibid, para.6.12.

¹¹⁸ Ibid, para. 13.56.

personnel were then moved to the East ... in late 1941 and early 1942'.¹¹⁹ Although the use of gas by the Einsatzgruppen was not foregrounded in his 'Judgement' he found that there 'is no dispute that the use by the Nazis of gas to kill human beings had its origins in the euthanasia programme' (Brack).¹²⁰

On the specific subject of Hitler's authority and continued complicity in the Einsatzgruppen mass shootings, Gray found that, despite both an ambiguous and partial 'documentary picture, 'the evidence bears out the contention of the Defendants that Hitler sanctioned the killings'.¹²¹ More specifically, Hitler's instruction to the 'Chief of the Army Leadership Staff' (General Jodl), on 3 March 1941, was evidence, from that date, of his central role in 'converting Nazi ideological thought into concrete action ... [and] laying the ground for a racist war of extermination'.¹²² Once accepting that Hitler was aware of and approved the programme of the mass shootings of predominantly Soviet Jews, Gray found that:

it is reasonable to suppose that he would have been consulted about and approved a policy to exterminate them by another means, namely by the use of gas'.¹²³

Gray likewise concluded that 'the vast manpower required to carry out the programme at a critical stage in the war would surely have required the approval of Hitler'.¹²⁴

It is obvious that the narratives both foregrounded and authorised on the Einsatzgruppen mass shootings in the occupied territories of the Soviet Union after June 1941 were established as both empirically accountable and 'truth-full' in accordance with the demands of each legal case. They were also informed by a consistent record of the relevant mass shootings that reaffirmed the central instruction of Einsatzgruppen objectives prior to the invasion of the Soviet Union, the primary role of the RSHA in its instruction and implementation of policy, the consistent leadership of Himmler and

¹¹⁹ Ibid, paras. 6.73, 6.70.

¹²⁰ Ibid, para. 13.60.

¹²¹ Ibid, para. 6.27.

¹²² Ibid, para. 6.28.

¹²³ Ibid, para. 13.67.

¹²⁴ Ibid, para. 13.57.

Heydrich, but also Hitler, the deliberate targeting of specific categories of Soviet citizens, and especially Jews, from the outset, the escalation of both numbers of Jews killed and the inclusion of Jewish women and children after August 1941, the later submerging of all other interests (including the war effort) to the ideological slaughter of Jews across the occupied territories, and the transition to the use of gas vans as an alternative method of mass murder from the end of 1941. This record further reaffirmed the systematic murder of between 500,000 to 1.5 million European civilians by the Einsatzgruppen, predominantly Jews.

There were obvious revisions of historiography authorised across all four trials. Most notably, the elevated role of Eichmann's leadership in Einsatzgruppen command found in 1961 had been revised by the 1980s. In the later trials it was acknowledged that Eichmann occupied an informed role in Einsatzgruppen instruction and reporting from his privileged position in the RSHA, but his authority was now marginalised in narratives that focused on the leadership of Himmler, Heydrich, and especially Hitler.¹²⁵ In contrast to the 1961 narrative, the authority and continued complicity of Hitler was not only reaffirmed in 2000 but explicitly reinstated within Einsatzgruppen historiography. It is also obvious that, although Eichmann was mentioned in discussions on the transition to gas in both the Zündel (1988) and Irving trials, there was no suggestion that he had instigated its use.¹²⁶ Furthermore, in contrast to the 1961 finding that all Jews sent by Eichmann 'to the East' were immediately shot by the Einsatzgruppen, it was acknowledged by 2000 that German Jews had not been included in the relevant instruction until the end of 1941.¹²⁷ However, these revisions were minimal.

It is also noted that, in 2000, the focus on central, and especially Hitler's, authority and governance omitted knowledge acquired through local and regional studies of the occupied territories of eastern Europe during the 1990s.¹²⁸ In all four trials the focus on the leadership of the mass shootings reinforced narratives of not only systematic policy

¹²⁵ ZT 1989, 'Respondent's Factum', pp46-48. HRIRH, (TB) T2, 'Judgement', para. 6.101.

¹²⁶ Ibid, paras. 6.68-6.105.

¹²⁷ Ibid, Day 14, pp100-101, 107-122; Day 20, pp186-196; Day 22, pp92-93; Day 24, pp135-140; Day 26, pp114-115.

¹²⁸ Ulrich Herbert (ed.), *National Socialist Extermination Policies: Contemporary German Perspectives and Controversies* (Oxford: Berghahn Books, 2000); Matthäus, 'Controlled Escalation'; Dan Stone, 'Beyond the "Auschwitz Syndrome": Holocaust Historiography after the Cold War', *Patterns of Prejudice*, 44:5 (2010), pp454-468; Henri Zukier, 'Diversity and Design: The "Twisted Road" and the Regional Turn in Holocaust History', *Holocaust and Genocide Studies*, 27:3 (2013), pp387-410.

but top-down control and directive. Yet, it is now common knowledge that, since the opening-up of relevant archives in Eastern Europe in the 1990s, this top-down narrative has been challenged by evidence of decision-making and initiative by and through bureaucracies and personnel 'on the ground'.¹²⁹ In these studies central instruction is still reaffirmed, but the "controlled escalation" of the Einsatzgruppen shootings is now viewed as the consequences of the interplay of decision-making, not only between the centre and periphery, but between agencies across and within the occupied regions.¹³⁰ Of course the relevant primary source material was not available to the Prosecution teams in Israel or Canada, but it was known to historians by the time of the Irving trial in London.¹³¹ However, even when local initiatives were referenced in this trial, for example the shooting of a transport of Berlin Jews on arrival in Kovno (Belarus) in November 1941, the focus was on central instruction, in this case Himmler's reprimand of the relevant SS and Police Leader (Friedrich Jeckeln) and subsequent order to remain within 'RSHA [central] guidelines'.¹³² Although an omission, rather than a revision of facts or interpretation since 1961, this focus was inevitable in a case that sought to contest Irving's claim that the shootings had been 'random, unauthorised and carried out by individual groups or commanders'.¹³³

The comparative reconstruction of the Einsatzgruppen mass shootings, of predominantly Soviet Jews, between June 1941 to December 1942 therefore confirms a case-specific focus across the Eichmann, Zündel and Irving trials. It also confirms that an evidential base existed that was capable of accommodating and supporting a range of accounts, facts and narratives relevant to this mutually investigated historiography. This base differentiated in both content and form, and included eyewitness testimony (perpetrator and survivor), a chronology of primary source material and the expert opinion and report of historians. However, although an integral feature of Holocaust historiography, the volume of contemporaneous documentation relating specifically to the Einsatzgruppen was notably fragmentary in all four courtrooms. Although the deliberate burning of

¹²⁹ Ibid.

¹³⁰ Matthäus, 'Controlled Escalation', pp218-242. Stone, 'Beyond the "Auschwitz Syndrome"', p464.

¹³¹ Acknowledged by Longerich, HRIRH, Day 24, p66; Day 25, pp149-150.

¹³² Evidenced by a message from Himmler to Jeckeln, 1 December 1941, summoning him to a conference with Himmler on 4 December 1941 to discuss the relevant shootings, and a telegram sent by Himmler to Jeckeln on the same day (1 December) relating to the relevant "guidelines", Ibid, Day 3, pp19-20; Day 24, pp138-139. See also: Day 3, pp19-20, 55, 56-59; Day 16, pp107-109; Day 24, pp135-140.

¹³³ Ibid, (TB) T2, 'Judgement', para. 6.13. See also, Ibid, Day 2, pp267-273, 278-279; Day 3, p24; Day 4, pp60-70, 112-116; Day 16, p103; Day 20, pp29-31; Day 25, pp146-148.

official documentation by Eichmann had been acknowledged in 1961, any limitations of evidence was not specifically raised in a trial in which the value and weight of eyewitness experience and record of the mass shootings, especially survivor testimony, was both privileged and rarely challenged.¹³⁴ And yet it is suggested that the findings of Eichmann's authority over the Einsatzgruppen, and especially his role in the initiation of and transition to the use of gas as an alternative method of mass murder, were based on an ambiguous evidential base.¹³⁵ Conversely, by 2000, Judge Gray acknowledged that not only had 'much of the documentary evidence relating to he [*sic*] shooting in the East' been destroyed, but the material 'implicating Hitler' in its command was 'sparse'.¹³⁶ This conclusion by Gray may have been more evidentially accurate, but it would have been anathema to the Israeli case, court and public audience in 1961.

It is obvious that the 'mixed bag' of available evidence was discretely and variously employed in accordance with the 'facts in issue'. The only primary source material foregrounded in all four courtrooms was the Einsatzgruppen reports. These reports were not only able to accommodate and support a range of interpretations and findings, but appear to have extended their historical and legal probative reach and value since 1961. There were only two other documentary sources shared by the various trials, the 'Higher SS and Police Leader' report of 26 December 1942 and the 'Wetzel memoranda', with both sources variously interpreted in accordance with the demands of each case. However, it is also obvious that, with the exception of Eichmann's elevated authority in 1961, the interpretations of the relevant data-stream were not fundamentally incompatible. Furthermore, a broader record of Einsatzgruppen initiative, co-ordination, discriminate target, escalation, links and transition to a gassing programme, and the overall slaughter of up to 1.5 million European civilians, predominantly Jews, emerged across all four courtrooms. Once again, with the exception of Eichmann's elevated authority found in 1961, but also the omitted research of the 'regional turn' in 2000, this record, and the authorised narratives, were not only consistent across the discrete trials

¹³⁴ Including the burning of 'tens of thousands' of Gestapo documents, AET, Volume V, p1991. As shown in chapter three the self-interested motivations of perpetrator testimony was acknowledged by Hausner but he did not underestimate its probative value, *Ibid*, Vol. I, p204.

¹³⁵ According to Ruth Bettina Birn it was known at the time of the trial that IVB4, and therefore Eichmann, was not part of the command of the Einsatzgruppen, while many of those taking part in the shootings, such as the Police Units, were not institutionally linked to Eichmann. However, Hausner was not interested in this information as it did not fit into his preconceived imagination of Eichmann. Ruth Bettina Birn, 'Fifty Years After: A Critical Look At The Eichmann trial', *Case Western Reserve Journal of International Law*, 44:1 (2011), pp447-459.

¹³⁶ HRIRH, (TB) T2, 'Judgement', paras. 6.12, 6.27.

but were compatible with the established historiography prevailing at the time of each trial and remain familiar in present-day Holocaust scholarship.¹³⁷

It is clearly demonstrated that the narratives both foregrounded and authorised were 'cooked' in accordance with the focus on Eichmann's leading role in 1961, Einsatzgruppen objectives and intended victims in 1985 and 1988, and Hitler's authority and continued complicity in 2000. Consequently, each narrative both distorted and failed to 'do justice' to the complexities of the prevailing historiography. In a repetition of mistakes identified in 'key' perpetrator trials (chapter two), they ignored, for example, the motives and type of perpetrator constituting the Einsatzgruppen, as well as the wider network of perpetrators also involved in the mass shootings. They also minimised the complexity of decision-making, including the crucial impact of local initiatives, while the later trials, again in common with earlier perpetrator trials, ignored the voices of Jewish communities and individuals. Thus, although survivor testimony of the 'blood bath' was intentionally foregrounded and heard in the Eichmann trial, the focus on Einsatzgruppen instruction in Canada and Hitler's authority in London ensured that this integral evidence was reduced to background noise in 1985, 1988 and 2000.

However, it is also clearly demonstrated that, despite being 'cooked', the narratives authorised on the Einsatzgruppen mass shootings between June 1941 and December 1942 were both empirically accountable and 'truth-full' in content. Once again, the consistency of facts and record implied the dominance of past evidential constraint, regardless of the discrete demands of the Eichmann Zündel and Irving trials. Nevertheless, it is concluded that its reconstruction in each courtroom clearly exposed the primacy of preconceived and prefigured narratives that both governed and 'made sense' of the relevant past traces.

¹³⁷ Raul Hilberg, *The Destruction of the European Jews* (London: W.H. Allen, 1961); Christopher R. Browning, *Fateful Months: Essays on the Emergence of the Final Solution* (New York: Holmes and Meier, 1985); Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Occupied Poland* (London: HarperCollins, 1992); Richard Rhodes, *Masters of Death: The SS Einsatzgruppen and the Invention of the Holocaust* (New York: Alfred A. Knopf, 2002).

Chapter Six: Homicidal Gas Chambers at Auschwitz-Birkenau

Auschwitz-Birkenau is foundational to Holocaust historiography. It is recognised as the largest site of extermination, while its combined role as a labour camp witnessed the survival of thousands of its prisoners at the time of its liberation in January 1945, and therefore the survival of a living record of its atrocity and genocide.¹ In comparison to the 'pure' extermination camps at Belzec, Sobibor and Treblinka, Auschwitz-Birkenau has been identified as the 'capital of the Holocaust'.² It has also evolved into a symbol of inhumanity beyond its genocide.³ It is therefore not surprising that the murder apparatus of gas chambers at this camp was a key site of historiographical debate at the criminal trials of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000). It is likewise not surprising that challenging the facts of Auschwitz-Birkenau is at the centre of Holocaust denial.

Comparative reconstruction of this historiography across the discrete discursive contexts of the Eichmann, Zündel and Irving trials once again records the presentation of varying accounts of Auschwitz-Birkenau in accordance with the 'facts in issue'. It subsequently records the transition of focus from Eichmann's authority and input at all stages of the camp in 1961 to the minutiae of its gassing and incineration apparatus in 1985, 1988 and 2000. It also records the evolution of Auschwitz-Birkenau's status in Holocaust historiography since 1961, and, therefore, its greater prominence in the later trials. It further records the establishment of an infrastructure of evidence that was capable of supporting the historiographical and legal demands of each case. Most striking about this evidence was the continued necessity of eye-witness testimony despite its secondary status in both history and the law. Likewise surprising was the acknowledged fallibility of not only eye-witness testimony but all forms of contemporaneous traces in the later

¹ Robert Jan van Pelt identified a total of 10 functions at the Auschwitz site and 100,000 survivors in his expert report, *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), Trial Bundle B2, 'Witness Report', Part One (i) and (ii), Holocaust Research Institute, Royal Holloway, University of London (HRIRH). All proceeding references to the daily transcripts of this trial will be prefixed by HRIRH, and, where appropriate, by their Trial Bundle (TB) letter and number.

² Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton: Princeton University Press, 2016), p157. Peter Hayes, 'Auschwitz, Capital of the Holocaust', (Review Essay) *Holocaust and Genocide Studies*, 17:2 (2003), p331.

³ As noted by van Pelt in his expert report, (TB) B2, (i) footnote 31 and (ii), and more recently by David Cesarani, *Final Solution: The Fate of the Jews 1933-1949* (London: Macmillan, 2016), ppxxv-xxvi. It is also common knowledge that the United Nations designated 'Holocaust Memorial Day' as the day (27 January) on which Auschwitz-Birkenau was liberated.

trials, but especially in 2000. In what would have been anathema to the Israeli case, court and public audience, Judge Gray confirmed that, despite the 'cumulative' weight of evidence relating to the homicidal purpose of the camp, the criticisms raised by Irving 'deserves to be taken seriously'.⁴

Through comparative reconstruction it is clear that distinct facts were established in accordance with those 'in issue'. And, aside from the elevated authority of Eichmann found in 1961, that they were not contradictory. Rather, the very different facts established in the later trials were the result of the deliberate transfer of attention onto the minutiae of the gassing and incineration processes. Furthermore, despite the very different focus at the later trials, a consistent record of Auschwitz-Birkenau emerged and informed all four courtrooms that remains familiar in present-day Holocaust scholarship.

Through comparative reconstruction it is obvious that the narratives authorised on Auschwitz-Birkenau were 'cooked' in accordance with the foregrounding of Eichmann, and specific charges, in 1961, and the reductive focus on the architecture of gas chambers, the chemistry of Zyklon-B, the physics of cremation and the human biology of gas absorption in 1985, 1988 and 2000. However, it is also obvious that these narratives were empirically accountable and 'truth-full' in content. Yet again, the consistency of fact and record of homicidal gas chambers at Auschwitz-Birkenau implied the dominance of past evidential constraint across the four trials. However, comparative reconstruction of this most iconic symbol of the Holocaust clearly exposed the primacy of preconceived and prefigured narratives that both 'floated free' of and governed the relevant past traces.

The existence of facilities that acted as gas chambers and crematoria at Auschwitz-Birkenau was an accepted fact at the criminal trials of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000).⁵ All four trials also distinguished between the main camp (Auschwitz I) and Birkenau (Auschwitz II)

⁴ HRIRH, (TB) T2, 'Judgement', paras. 13.83, 13.74.

⁵ *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Vol. I, pp112-114; Vol. IV, pp1559-1561, Newcastle University Library. All proceeding references to this trial will be prefixed by AET. *Her Majesty the Queen and Ernst Zündel* (251/85), Vol. XXI, pp24-25, 54-55, 101, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1985. *Her Majesty the Queen and Ernst Zündel* (424/88), Vol. XXXVI, pp10400, 10403, 10405, 10408, 10409-10410, 10415, 10420-10422, 10427, 10429-10430, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1988. HRIRH, (TB) T2, 'Judgement', paras. 7.6, 7.11.

and accepted that the majority of its crematoria (II-V) were sited at the latter.⁶ However, beyond these basic facts, the diversity of legal case and context challenged their very intention and use (1985, 1988, 2000), as well as their command (1961), design (1985, 1988, 2000), systematic process (1985, 1988, 2000) and viability as killing apparatus (1985, 1988, 2000). In 1961 Auschwitz-Birkenau was introduced to the Eichmann trial as 'the largest and most terrible of the extermination camps ... remembered in the annals of humanity as the symbol of horror and infamy'.⁷ The existence of its gas chambers, and the subsequent murder and incineration of up to 2 million Jewish civilians, was not in doubt or debated.⁸ At no point was the murderous capacity and viability of the gas chambers or crematoria investigated far less questioned. When giving evidence Eichmann never once denied the genocidal instruction or intention of the camp.⁹ Rather, throughout his testimony and cross-examination, he confirmed his numerous visits to Auschwitz-Birkenau (between 1941 and 1944), the categorisation and extermination of 'Transport Jews' routed (by IVB4) to the camp, the burning of bodies on a 'gridiron' and the use of Zyklon-B as its unique killing agent.¹⁰

Yet, despite its reputation, Auschwitz-Birkenau was not singled out from a range of concentration and extermination camps included in the Prosecution's grand narrative of wholesale slaughter.¹¹ But, specific charges against Eichmann did raise its profile. According to the leading prosecution counsel, Gideon Hausner, Eichmann could be found at every stage of its transition from a site of concentration and forced labour to an extermination camp. More specifically, Hausner charged him with direct involvement in the initial selection of an area 'for the erection of the extermination apparatus', procuring the necessary supplies of Zyklon-B, issuing detailed directives for the implementation of deportations to the camp, supplying its gas chambers with the 'sacrificial victims', instructing the execution of Jews as punishment, conveying the order for the burning of

⁶ AET, Vol. V, p2151. ZT 1985, Vol. XXI, p101. ZT 1988, Vol. XXXVI, pp10420-10421. HRIRH, (TB) T2, 'Judgement', para. 7.3.

⁷ By Gideon Hausner in his opening address, AET, Vol. I, p112.

⁸ Accepting the figure Rudolf Höss claimed he had been given by Eichmann, Ibid, Vol. V, p2151.

⁹ See the case for the Defence, Ibid, Vol. IV, pp1371-1569, and cross-examination, pp1575-1792.

¹⁰ IVB4 was the section of the Gestapo (IV) in the Reich Security Main Office (RSHA) headed by Eichmann and responsible for "Jewish Affairs". 'Transport Jews' were distinguished from 'Jews under protective custody', Ibid, p1714. For the relevant references see also Ibid, pp1559, 1560, 1568, 1631, 1633, 1643, 1683-1684, 1712, 1714, 1746, 1768, 1770-1771, 1780, 1784-1785, 1791, 1800, 1801-1802, 1814, 1815 and Vol. V, p2162.

¹¹ That included Belzec, Chelmno, Majdanek, Sobibor and Treblinka in the section on 'The Camps' in Hausner's opening address, AET, Vol. I, pp109-114. See also Hausner's submission of evidence on 'The Camps', Vol. III, pp1148-1315.

bodies in crematoria, organising the collation of records of Jews killed, directing the 'tremendous pillage' at the camp, ordering the delivery and murder of 150 of its prisoners for anthropological research, and, even when defeat of Germany was imminent, circumventing Heinrich Himmler's 'Blood for Goods' negotiations in order to keep the 'Auschwitz mills' working.¹² Eichmann denied the majority of these charges outright or sought to mitigate or negate his role and responsibility.¹³

In Canada, in both 1985 and 1988, Ernst Zündel's defence team forced attention onto the facticity of specific 'extermination camps' in general, and the use of gas chambers as homicidal apparatus at Auschwitz-Birkenau in particular.¹⁴ Yet, as the Crown, led by Pearson Griffiths, reminded the jury in 1985, the denier publication under scrutiny, 'Did Six Million Really Die?' (DSMRD), did not consider the construction or operation of gas chambers.¹⁵ In 1988, the Crown, led by John Pearson, likewise confirmed that the subject was rarely mentioned in either the overall content of DSMRD or its statements of fact.¹⁶ The existence of gas chambers was therefore not relevant to either the 'facts in issue' or to Zündel's state of mind, and the Crown, particularly in 1988, did not introduce specific evidence on the subject.¹⁷ However, as Zündel's lawyer, Douglas Christie, verified in 1985, there was nothing more relevant to the case of the Defence than to prove that the

¹² Ibid, Vol. I, pp78, 109, 80, 81, 114, 113, 107. 'Blood for Goods' referred to a proposal directed to the Allies and Jewish organisations in 1944 that suggested the exchange of Jewish lives for goods vital to Germany's war economy.

¹³ Those denied included charges related to Eichmann's control of the camp, Ibid, Vol. V, pp1556, 1562, 1633, 1634, 1658-1659, 1672, 1712, 1714, 1730, 1731, 1780, 1800; the selection of sites for extermination apparatus, Ibid, p1557; the provision of gas to the camp, Ibid, pp1418, 1561, 1653, 1654-1657, 1707-1708, 1711, 1800; the order of skeletons for anthropological research, Ibid, pp1427-1430; the instruction of the burning of bodies in the crematoria, Ibid, p1560; the subject of the pillaging of Jewish possessions, Ibid, pp1382, 1387, 1389-1390, 1400-1401, 1402, 1404, 1454, 1590, 1728, although Eichmann accepted that he had been involved in the varying stages of robbery, Ibid, pp1401-1402, 1403, 1404-1405, 1470, 1486, 1508, 1535, 1695, while his section (IVB4) had been expanded on 1 October 1943 to cover, *inter alia*, the 'confiscation of property' from 1 April 1944, Ibid, p1754. See also Servatius' oral summing up, Vol. V, pp2049, 2052, 2053, 2054. Instances of negation included his insistence that, although responsible for organising the routing, and recording the fate, of the 'Transport Jews', he was carrying out orders that he had neither initiated nor had the authority to obstruct, Ibid, Vol. IV, p1371 and Vol. V, pp2053, 2058, 2059; accepting that he had been directly implicated in the 'Blood for Goods' negotiations, but insisting that his aim had been to save the lives of 1 million Jews, Vol. IV, pp1372, 1538-1540 and Vol. V, p2061; accepting that some transports were intended for immediate extermination at Auschwitz-Birkenau but asserting that 'he did not select people for deportation, he did not order the deportations', Ibid, p2051.

¹⁴ ZT 1985, Vol. III, pp484, 485, 489, 490, 493. Auschwitz: Vol. XX, p4504. ZT 1988, Vol. XXXVI, p10400.

¹⁵ ZT 1985, Vol. XX, pp4613-4614.

¹⁶ Raised as a subject only twice in DSMD, ZT 1988, Vol. XXXVI, p10402, and mentioned in only 7 of the 85 extracts highlighted as containing false statements of fact, *Her Majesty the Queen and Ernst Zündel* (424/88), Appeal (1989), 'Respondents Factum', pp7-68, Ontario Court of Appeal. All proceeding references to the 1989 Appeal will be prefixed by ZT 1989.

¹⁷ ZT 1988, Vol. XXXVI, pp10402, 10398.

'alleged gas chambers that you see in Auschwitz today are ... scientific impossibilities'.¹⁸ Or, as more directly summarised by Judge Thomas in 1988, according to the Defence there were 'no homicidal gas chambers ... no Zyklon-B to kill people ... and no cremation for living and dead persons'.¹⁹ Rather, gas chambers had existed but only as 'disinfection' facilities, Zyklon-B had been utilised but only to protect people from disease and crematoria had operated but only to accommodate dead bodies as standard practice.²⁰

Consequently, in both 1985 and 1988, the Crown was forced to focus on (and prove) the minutiae of the gassing and incineration process, with specific focus on holes in the roof of crematorium II (to allow the introduction of Zyklon-B into the chamber), the positioning of wire-meshed columns (allowing the dispersal of Zyklon-B), the molecular properties of hydrogen cyanide (as explanation of why those gassed were found stacked up on top of each other as they fought for air), sources of heat in the chamber (required to activate the vaporisation of gas), the existence of ventilation systems (required to hasten the removal of the dead bodies), the staining of floors and walls (as evidence of a chemical reaction with cyanide), the protective capacity of gas masks (adequate to the levels of Zyklon-B utilised), the use of water to hose down the chamber (necessary to dilute cyanide remnants and hasten the removal of bodies), the porosity of mortar in the walls (determining the absorption or dilution of cyanide after hosing down), the number and capacity of ovens (as evidence of the viability of the volume of bodies incinerated), the existence of belching smoke, flames and heat-resistant bricks in chimneys (as proof of intensive incineration), the self-fuelling of human fat (as explanation for the quantities of coke supplied), and the comparative poisoning of lice and humans (as evidence that smaller quantities are needed for killing the latter).²¹

This denier focus and treatise was largely repeated in London in 2000. However, there were also additional links between David Irving and the Zündel trials on the subject of

¹⁸ ZT 1985, Vol. XX, p4504. ZT 1988, Vol. XXXVI, p10400.

¹⁹ Ibid, p10415.

²⁰ ZT 1985, Vol. III, p489; Vol. XXI, pp54-55; Vol. VXIV, pp3043-3119. ZT 1988, Vol. XXXVI, p10415.

²¹ For discussions on all of these disputed factors see ZT 1985, Vol. IV, pp680-916; Vol. V, pp938-1166; Vol. VI, pp1167-1230; Rudolf Vrba, Ibid, pp1244-1386, Vol. VII, pp1387-1606, Vol. VIII, pp1607-1641; Arnold Friedman, Vol. II, pp304-470; Ignatz Fulop, Vol. III, pp591-627; Dennis Urstein, Vol. VIII, pp1738-1801; Henry Leader, Vol. VIII, pp1802-1834; Robert Faurisson, Vol. XI, p2353-2545, Vol. XII, p2555-2778, Vol. XIII, pp2889-2891; Thies Christopherson, Vol. XIII, pp2979-3015, Vol. XIV, pp3016-3038; William Lindsey, Vol. XIV, pp3043-3105, 3114-3156; Ditlieb Felderer, Vol. XIV, pp3166-3275. ZT 1988, Vols. XIII-XVII, p4002; Vol. XXXIII, pp9312-9450; Vol. XXXIV, pp9455-9822; Vol. XXXII, pp8942-9140; Vol. XXXIII, pp9145-9274.

Auschwitz-Birkenau. As raised in chapter three, Irving acted as a key witness on behalf of Zündel in 1988 and it was the reading of the 'forensic analyses' of the so-called 'Leuchter Report', presented by the Defence at that trial (see below), that had convinced him that the established historiography on its homicidal gas chambers had been a 'big lie'.²² Irving had later published the 'Leuchter Report' for circulation in the UK, and had written a foreword in which, *inter alia*, he highlighted Germany's 'atonement for the "gas chambers of Auschwitz"' despite their homicidal use being 'a myth'.²³ His subsequent 'sea change' was infamously summarised in his address to a meeting of 'so-called revisionists' in 1991:²⁴

I don't see any reason to be tasteful about Auschwitz. It's baloney. It's a legend. Once we admit the fact that it was a brutal slave labour camp and large numbers of people did die, as large numbers of innocent people died elsewhere in the war, why believe the rest of the baloney? I say quite tastelessly in fact that more women died on the back seat of Edward Kennedy's car at Chappaquiddick than ever died in a gas chamber in Auschwitz.²⁵

Once in court the Defence's leading counsel, Richard Rampton, confirmed that, 'Auschwitz in Mr Irving's utterances and certainly in our eyes is at the centre of Holocaust belief. It is therefore at the centre of Holocaust denial'.²⁶ Irving likewise agreed that 'Auschwitz is really the battleship, the capital ship of this entire case'.²⁷ Specific attention was placed on Crematorium II, identified by the Defence's expert witness, Robert Jan van Pelt, as the 'centre of the atrocity', and by Irving as demolishing the gas chamber 'story'.²⁸ As Rampton insisted, the Defence would prove 'two things', firstly that Irving had based

²² The 'Leuchter Report' was compiled by Fred Leuchter, a self-acclaimed expert in execution hardware, when commissioned by Zündel in February 1988 to test for cyanide levels in the remaining ruins at Auschwitz-Birkenau, HRIRH, Day 2, pp248-255. Irving also made similar admissions at the 1988 Zündel trial, ZT 1988, Vol. XXXIV, pp9474, 9558, 9814, 9915, 9959. For Irving's full examination-in-chief and cross-examination see ZT 1988, Vol. XXXIII, pp9312-9450 and Vol. XXXIV, pp9455-9822.

²³ HRIRH, Day 1, pp95-96.

²⁴ Also evident in the differences of content on the subject in the 1977 and 1991 publications of Irving's *Hitler's War*, Ibid, pp95, 99.

²⁵ Ibid, p100.

²⁶ Ibid, Day 5, p14.

²⁷ Ibid, Day 6, p44.

²⁸ Ibid, Day 9, pp52-53, 54, 78, 169, 172-175, 185-192; Day 10, pp5-41, 69-71, 87; Day 11, pp22-23, 24, 35, 56, 58-59, 72, 111-141; Day 32, pp23-25, 156-169. (TB) T2, 'Judgement', paras. 7.92, 13.81, 13.83.

his denial of gas chambers on a discredited 'piece of so-called research which is not worth the paper it is written on' (the 'Leuchter Report'), and secondly that his denial has a political motive.²⁹

Faced with the repetition of denier treatise presented in both Zündel trials it is not surprising that a similar reductive history of Auschwitz-Birkenau was foregrounded in London in 2000. Consequently, its genocide was once again largely presented through oppositional arguments on the architecture of gassing facilities, the physics of cremation, the chemistry of Zyklon-B and the human biology of gas absorption.³⁰ Notably, in contrast to the historiographies of extermination policy and the mass shootings of the Einsatzgruppen (chapters four and five), the authority, knowledge and continued command of Adolf Hitler over the gassing programme at Auschwitz-Birkenau was largely absent from Irving's charges. However, in contrast to the Zündel trials, the prominence of the camp in this legal case was formally acknowledged in the agreement by both parties to divide the trial into 'two separate compartments'; one being Auschwitz, the other 'all the other issues'.³¹

In support of the various accounts presented the data-stream submitted on Auschwitz-Birkenau differed across the four trials and did so in both content and form. In 1961, in accordance with the focus on Eichmann's authority over the camp, the main form of evidence was eyewitness testimony of perpetrators, including Eichmann, and survivors.³² Through survivor testimony a record of evidence detailed the pillaging of those arriving at the camp (Gedalia Ben-Zvi), the absence of registration of those killed on arrival (Raya

²⁹ Ibid, Day 6, pp194-195.g

³⁰ **Architecture:** in particular, the 'adaptive reuse' of doors, the height and purpose of peep holes in 'gas tight doors', the positioning of concrete pillars and wire-meshed columns, the redesign of stairs, holes in the roof of crematorium II, the existence of drainage and ventilation systems, the metal coverings of ventilation openings, the porosity of bricks and mortar, protruding chimneys, adaptation as air raid shelters and reconstruction post-1945. **Cremation:** in particular, the feasibility of lifts to remove the volume of bodies, the capacity of muffle ovens, quantities of coke both delivered to the camp and required to burn human corpses, the combustion of human fat, 'belching smoke and furnaces.' **Zyklon-B:** in particular, its properties, dispersal, staining, toxicity relating to both humans and lice, vaporisation and ventilation. **Gas absorption:** through the lungs and skin and in comparison to lice. HRIRH, Day 7, pp107-199; Day 8, pp2-191; Day 9, pp4-193; Day 10, pp4-213; Day 11, pp10-204; Day 13, pp3-20; Day 14, pp3-54; Day 17, pp67-70, 180-181; Day 25, pp41-43; Day 32, pp22-29, 106-181. The similarity of denier content to that raised at the Zündel trials (see above) is evident.

³¹ HRIRH, Day 2, p119. See also Day 1, p3 and Day 2, pp115-120.

³² Adolf Engelstein, AET, Vol. II, p817; Erzai Elisheva Szenes, Vol. III, pp961-963; Joseph Zalman Kleinman, Ibid, pp1238-1240; Yehuda Bakon, Ibid, pp1243-1252; Dr Aharon Beilin, Ibid, pp1262-1263; Raya Kagan, Ibid, pp1269-1272, 1277-1280; Esther Goldstein, Ibid, p1283; Vera Alexander, Ibid, p1290; Nachum Hoch, Ibid, pp1291-1293; Gedalia Ben-Zvi, Ibid, pp1294-1298, 1301; Alfred Oppenheimer, Vol. V, pp1865-1867, 1869.

Kagen), the forced walk to the crematoria (Nachum Hoch), the use of Zyklon-B (Aharon Beilin), the inoperable shower heads and existence of wire-meshed columns, ventilation shafts and lifts in the gas chambers and crematoria (Yehuda Bakon), the marking and 'butchering' of those suspected of swallowing valuables (Ben-Zvi), the removal of the ashes of burnt bodies for use on the roads (Bakon) and the inability of the crematoria to keep pace with the rate of murder of the Hungarian Jews in 1944 (Ben-Zvi).³³ Some witnesses also identified their own drawings (Bakon) or the photographs of others (Esther Goldstein, Vera Alexander) that documented life and survival at the camp as well as its killing apparatus (Bakon).³⁴ Many witnesses likewise testified to the murder of family members at the camp.³⁵ As with all survivor testimony, this evidence was awarded both probative value and weight by the Judges.³⁶ However, as in the case of the Einsatzgruppen mass shootings (chapter five), none of the witnesses had met Eichmann during their ordeals and therefore could not testify to his crimes relating to Auschwitz-Birkenau.

Rather, to help prove the specific charges against Eichmann relevant to the camp, the Prosecution relied principally on the perpetrator testimonies of Kurt Gerstein (Waffen SS Hygiene Institute) and Rudolf Höss.³⁷ Although formally submitted as evidence of gassing at the Belzec camp, the so-called 'Gerstein statement' was foregrounded as evidence of discussions between Gerstein and Eichmann's section (IVB4), in the Reich Security Main Office (RSHA) in June 1942, on the procurement of the more lethal and rapid working cyanic acid for use in the extermination camps.³⁸ According to Gerstein, Eichmann's deputy, Rolf Günther, had ordered between 100 and 260 kilogrammes of potassium cyanide on 8 June 1942 and more than 2,000 kilogrammes at the beginning of 1944 (April-May).³⁹ Although Eichmann was not specifically mentioned by Gerstein in

³³ Ibid, Vol. III, pp1298, 1272, 1293, 1263, 1249-1251, 1301, 1248, 1301.

³⁴ Ibid, pp1249-1252, 1281-1282.

³⁵ See the testimonies of Kleinman, Bakon, Goldstein, Hoch, and Oppenheimer referenced in footnote 32.

³⁶ AET, Vol. V, p2146. The exception being the inadmissibility of the so-called 'Vrba-Wetzler Report' because of the discrepancy between figures of those murdered in the full text and those in a table at the end of the report. Vol. III, pp1313-1315; Vol. V, p1862.

³⁷ As 'Head of Technical Disinfection Services', Gerstein's statement was made to two intelligence officers (1 American, 1 British) at the closing stages of the war (26 April 1945). The statement is typed in French and includes a 2-page supplement in English, AET, Vol. III, p1221. As 'Kommandant' of Auschwitz-Birkenau, evidence from Höss included extracts from his hand-written autobiography/statement, composed when imprisoned in Kraków (November 1946), including an appendix on Eichmann, his full testimony from his trial in Kraków in 1947 and testimony provided at the International Military Tribunal (IMT) (15 April 1946).

³⁸ AET, Vol. V, pp1227, 1229, 2176-2177. For the use of Gerstein's evidence of gassing in Belzec see Vol. III, pp1221-1232, 1228-1229.

³⁹ Ibid, Vol. V, p2177.

this exchange, he had 'made a partial admission' in court that he had heard at the time of Guenther's activity in connection with the supply of gas'.⁴⁰

But it was the various testimonies made by Höss (once imprisoned in 1946 to 1947) that constituted the primary source of evidence of Eichmann's role at Auschwitz-Birkenau.⁴¹ Foregrounded from these testimonies was Höss' claim that Eichmann, following orders from Heinrich Himmler in the summer of 1941 that the Auschwitz site 'was destined to be the main centre for extermination of the Jews', had met with him 'shortly afterwards, and together they chose Birkenau as the extermination place'.⁴² During the same visit Höss claimed that Eichmann had given instructions on extermination procedure, that included the extraction of gold teeth from the corpses and the shaving of women's hair.⁴³ He also claimed that Eichmann had expressed the view that 'all the Jews arriving in the camp should be exterminated immediately and not used for labour'.⁴⁴ It was noted that, at the time of Eichmann's visit, Zyklon-B had already been tested on Russian 'Prisoners of War' (POWs) interned at the camp.⁴⁵ Consequently, when Eichmann made a further visit to Auschwitz-Birkenau, Höss had 'told him about this use of Zyklon-B and we decided to introduce this gas in future for the mass executions'.⁴⁶ However, in Berlin, around November 1941, they had discussed 'extermination methods', but, according to Höss, 'I could not secure information about the date the operation was to begin. Eichmann had not yet managed to obtain suitable gas'.⁴⁷ Once in operation, Höss claimed that Eichmann had not only specifically categorised those routed to the camp by IVB4 as 'Transport Jews', but had marked them 'with certain figures and letters to avoid their getting mixed up with transports of other detainees'.⁴⁸

In notes written at the International Military Tribunal (IMT), Höss also detailed the overall killing process at Auschwitz-Birkenau; from the system of transportation to the camp, the separation of men from the women and children deemed 'unfit for work' and

⁴⁰ Ibid.

⁴¹ See footnote 37.

⁴² AET, Vol. V, pp2162, 2176.

⁴³ Ibid, p2162.

⁴⁴ Ibid, pp2151, 2162.

⁴⁵ Ibid, p2176.

⁴⁶ Ibid.

⁴⁷ Ibid, pp2162, 2176.

⁴⁸ Ibid, p2163.

'taken to the nearest extermination installation that was empty', to the introduction of Zyklon-B 'through a special aperture', death after 'thirteen to fifteen minutes', and the removal, desecration and burning of bodies.⁴⁹ Höss had likewise confirmed the use of five crematoria, with a killing capacity of 10,000 corpses per day, and had estimated that over the duration of the camp it was possible to murder 2.5 million people, although in his opinion 'one and a half million, at most, were exterminated'.⁵⁰ Although Eichmann had not been directly referenced by Höss in these notes, the Judges recognised that:

... this horrifying description, given by the master butcher himself, in the language of a dry office report, has been fully confirmed by witnesses who testified before us.⁵¹

As further evidence of Eichmann's influence over the camp, a combination of perpetrator and survivor testimony was also submitted as corroborative evidence of his involvement in the so-called 'skeleton industry', and, more specifically, in accordance to the charge that:⁵²

... in response to Eichmann's order 150 Auschwitz prisoners were "supplied" for death in the Natzweiler Camp in Germany, so that their skeletons might be sent for anthropological research at the SS Institute of Race Research (Ahnenerbe), which had requested skulls of "Jewish Communist Commissars".⁵³

Foregrounded was the testimony of Wolfram Sievers (Director of Ahnenerbe), as evidence that he had directly requested to Eichmann that he "create suitable conditions in Auschwitz" for the necessary examinations 'in accordance with Himmler's instructions', the testimony of Josef Kramer (Commander of the Natzweiler Camp), as proof that the Jews selected from Auschwitz-Birkenau, and sent to the Natzweiler camp, had been gassed in August 1943, in accordance with instructions provided by Professor Hirt (Ahnenerbe, University of Strasbourg), and then delivered to Strasbourg, and the

⁴⁹ Constituting a lengthy reply to a question raised by the IMT's psychologist, Professor Gilbert, on the practicality of murdering 2 million Jews at the camp. Ibid, p2151.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid, Vol. III, p1320.

⁵³ Ibid, Vol. I, p113.

testimony of Henri Henri-Pierre (Prisoner at Hirt's laboratory) as evidence that the bodies had arrived in three consignments.⁵⁴

Additional perpetrator and survivor testimony was further foregrounded as evidence of not only Eichmann's direct input into the so-called 'Blood for Goods' negotiations (May and July 1944), but his continued zealous pursuit of the 'Final Solution' at Auschwitz-Birkenau, contrary to his claim that he had instigated negotiations to save the lives of an initial 100,000 and finally 1 million Jews.⁵⁵ In particular, Hansi and Joel Brand (Relief and Rescue Committee Budapest) testified that it had been Himmler's, and not Eichmann's, initiative at this late stage of the war to 'barter ... Jewish lives against goods required by the Germans, especially trucks', that Eichmann had authorised the selection of Joel Brand to act as intermediary (in Istanbul) between himself (on behalf of Himmler) and the relevant Allied and Jewish authorities, that Eichmann had promised to blow-up the gas chambers at Auschwitz-Birkenau if Brand returned from Istanbul with a positive reply, or, alternatively, to "letting the mill run" if unsuccessful, and that Eichmann continued to transport Hungarian Jews to the camp as the negotiations continued.⁵⁶ As corroborative evidence, the testimony of Dieter Wisliceny (Eichmann's Deputy) at the IMT was foregrounded as proof that when Brand did not return from Istanbul, and the negotiations 'collapsed', Eichmann had 'expressed satisfaction', while Eichmann's own testimony was foregrounded as evidence that after March 1944 the gas chambers at the camp 'were working to full capacity, and could hardly cope with the pace of the transports'.⁵⁷

Contemporaneous documentation relating to Eichmann's authority over the camp was sparse. Only one item, relating to a set of instructions from Richard Glücks (Economic and Administrative Main Office (EAHO)), on 21 November 1942, specifically referenced the categorisation of 'Transport Jews' and the connection with IVB4, while those

⁵⁴ Ibid, Vol. V, pp2171, 2172. Submitted at the 'Doctor's Trial' at the Nuremberg Military Tribunals (NMT).

⁵⁵ Ibid, Vol. I, pp63, 73-74, 82, 108, 109; Vol. IV, pp1372, 1538-1540.

⁵⁶ Ibid, Vol. V, p2143-2144. For the relevant references in Hansi Brand's testimony see, Vol. III, pp1047, 1049, 1051-1052, 1055, 1056-1058, 1059, 1061. For those in Joel Brand's testimony see, Ibid, pp1022-1024, 1028, 1034-1040, 1062-1066, 1067, 1068, 1069-1070. According to Joel Brand, Istanbul was selected as a meeting place because 'I knew that the delegations of the various Pioneer groups and of the Jewish Agency etc. were there', Ibid, p1020.

⁵⁷ Ibid, Vol. V, pp2144, 2141.

foregrounded as proof of plunder at the camp did not mention or relate to Eichmann.⁵⁸ However, the latter documentation acted as corroborative evidence of items submitted throughout the trial that placed Eichmann in a systematic policy of plunder accompanying all stages of the 'Final Solution'.⁵⁹ It was also noted that Eichmann had admitted that plunder was inherent to the work of IVB4.⁶⁰

In contrast, documentation specifically corroborated Eichmann's role in the 'skeleton industry'. Foregrounded was a range of correspondence between Sievers, Rudolf Brandt (Personal Administrative Officer to Himmler), Himmler and Eichmann from February 1942 to September 1944, that included a memorandum from Sievers to Brandt, dated 9 February 1942, as evidence that the work of Professor Hirt should be extended to examinations of the skeletons and skulls of Jews, a letter from Himmler, dated 7 July 1942, as proof that he had approved Hirt's research, a letter from Sievers to Brandt, on 2 November 1942, as evidence of his request for the delivery of 150 skeletons of Jews from Auschwitz-Birkenau, and that a draft letter of confirmation should be sent to IVB4 'for the attention of the Accused', a subsequent letter of instruction from Brandt to Eichmann, dated 6 November 1942, and specifically titled, "Subject: The Establishment of a Collection of Skeletons in the Anatomy Institute at Strasbourg", extracts from Sievers diary, as evidence that he had discussed examinations and procedures to be carried out at the camp with Günther (Eichmann's deputy) on 28 April 1943, and a document, dated 21 June 1943, as proof that Eichmann's section had been duly informed that:⁶¹

the research work in Auschwitz had been completed and that the people examined (79 Jews, 30 Jewesses, two Poles, and four other persons) are to be transferred to the Natzweiler concentration camp.⁶²

⁵⁸ Ibid, Vol. III, p1149, Vol. V, p2163. Documentation relating to plunder included a letter addressed to Himmler from the EAHO, as evidence of the categorisation of possessions removed from those arriving at the camp, Ibid, pp2154-2155; a partial report, dated 6 February 1943, as proof of the inventory of possessions removed and their redistribution to various authorities and groups ('Volksdeutsche', German youth), Ibid; a copy of the 'Polish Government Main Commission for the Investigation of Nazi Crimes', as evidence of the range of possessions found in six surviving 'Canada' [*sic*] stores when the camp was liberated, Ibid, p2154.

⁵⁹ Ibid, pp2116, 2118, 2123-2124, 2129, 2130, 2131, 2143.

⁶⁰ Ibid, pp2118, 2182.

⁶¹ Ibid, pp2171-2172.

⁶² Ibid, p2172.

A final document, dated 5 September 1944, from Sievers to Brandt was evidence of the former's request for instructions on what to do with the collection of skeletons 'in view of the danger that Strasbourg might be occupied by the Allied armies'.⁶³ Although the Judges acknowledged that Brandt's reply to Sievers was not known, they accepted the submission of a certificate from a member of the French police stating that, when the city was liberated, 'bodies and body parts were found, with some identified as "'apparently Jews"''.⁶⁴

Documentation likewise provided corroborative evidence of Eichmann's role in the 'Blood for Goods' negotiations. Foregrounded by the Judges was a report compiled by Moshe Sharett (Zionist leader and negotiator), as proof of both his meeting with Joel Brand in Istanbul in June 1944 and the absence of any reference to Eichmann's alleged proposal to release an initial 100,000 Jews, the 'Kasztner Report', as evidence of a statement made by Eichmann, on 9 June 1944, that if he did not receive a positive response from Joel Brand in 3 days he would "operate the Mill at A", and a report by Eberhard von Thadden (Foreign Office, Jewish Desk), following a plan of action provided for him by IVB4, as proof that contrary to preparing to save 100,000 Jewish lives after May 1944 Eichmann was organising the evacuation of all Jews from Budapest 'within 24 hours in the middle or at the end of July in one huge operation'.⁶⁵ When combined, this data-stream placed Eichmann within a decision-making process that related to the entire duration, as well as murderous perpetration, of the Auschwitz-Birkenau camp.

In the 1985 Zündel trial the notorious facts of the Holocaust considered for judicial notice had included the use of 'gassing' as a 'means of annihilation'.⁶⁶ However, as shown in chapter three, this fact was ruled inadmissible on a point of law, although 'with no little regret' by Judge Locke.⁶⁷ In its place, the testimony of survivors of Auschwitz-Birkenau once again constituted a primary form of evidence of the camp's homicidal utility. Most prominent was Dr Rudolf Vrba, who, according to Griffiths:

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid, pp2172, 2144. Rudolf Kasztner was a leader of the 'Jewish Relief and Rescue Committee' in Budapest and had negotiated directly with Eichmann over the fate of Hungarian Jews from April 1944. His report was written in 1946 and referenced at Vol. III, p1072.

⁶⁶ ZT 1985, Vol. X, p2072.

⁶⁷ Ibid, p2191.

worked ... on the ramps, as it is called, at Birkenau and Auschwitz, and he kept mental tally of the trainloads that were coming in, how many people were sent towards the crematoria and how many people were allowed to come into the barracks.⁶⁸

Vrba would therefore 'be an original source that people like Dr. Hilberg would go to'.⁶⁹ Vrba's evidence was corroborated by the testimonies of Alfred Friedman, Ignatz Fulop, Dennis Urstein and Henry Leader.⁷⁰ Although the evidential authority and respect awarded to survivor testimony in 1961 was replaced by the procedurally ordinary tactics of cross-examination in 1985 (chapter three), experiential evidence was foregrounded as proof of the selection process on arrival at the camp, and the active role of Dr Mengele (Friedman, Vrba, Urstein), the plunder of Jewish possessions (Ignaz Fulop, Vrba, Urstein), the transport of the 'elderly, children and mothers with children' by truck, or forced to walk to the Birkenau camp, from where 'they never came out' (Friedman, Vrba, Leader), the non-registration of those killed on arrival (Vrba), sightings of homicidal gas chambers, crematoria and multiple ovens, (Friedman, Vrba, Urstein, Fulop, Henry Leader), the introduction of Zyklon-B into vents on the roof of the gas chamber (Vrba), flames and/or smoke rising from the crematoria chimneys (Friedman, Fulop, Urstein), the removal of bodies by Jewish prisoners to be burnt in crematoria (Vrba, Urstein) or pits (Vrba), the sighting of burnt bones in pits, including the 'heads of children' (Vrba), the extension of apparatus 'to accommodate the oncoming influx of Hungarian Jews' (Vrba), and the murder of between 1.75 and 2.5 million Jewish civilians (Vrba).⁷¹ As Griffiths concluded:

Were all these men lying? Were these men suffering from some group fantasy? The stories gel so nicely, having come from different camps, different times ... You saw them ... heard what they said, the way they said, and you saw the men themselves. I'd suggest to you that each and every one of these men is worthy of your belief.⁷²

⁶⁸ Then known as Walter Rosenberg. Ibid, Vol. III, p474.

⁶⁹ Ibid.

⁷⁰ Friedman: Ibid, Vol. II, pp304-470; Fulop: Vol. III, pp591-627; Urstein: Vol. VIII, pp1738-1801; Leader: Ibid, pp1802-1834.

⁷¹ Ibid, Vol. XXI, pp71-74, 76, 77-79, 84, 88,113, 115, 118, 122, 123, 124, 125, 127, 131, 134, 137, 217.

⁷² Ibid, Vol. XX, p4632.

It was noted that none of the survivors had directly witnessed the gassing process.⁷³ But, as Fulop insisted, 'anyone who had seen a gas chamber would not be around to testify'.⁷⁴ However, Urstein had directly participated in the post-gassing process after being selected, alongside 29 other prisoners, to remove the bodies of Jews gassed in crematorium III.⁷⁵ He subsequently detailed not only the facts of its homicidal structure and utility but its horror when finding:

... a lot of bodies ... naked ... men, women and children ... entangled with one another as if they had all recently been trying to get on top of one another.

The strongest were on top. The children were at the bottom.⁷⁶

Urstein estimated 'six to seven hundred bodies, forty per cent of which were children up to ten, eleven and twelve years old'.⁷⁷ Urstein further reaffirmed the existence of a 'shower fixture', every 12 inches along the ceiling, 'a lot of steel piping going to the ceiling with wire mesh', and no windows, and that, after the gassing process, the floor of the chamber had been covered in a 'lot of water'.⁷⁸ He likewise testified that he and the other prisoners had been given 'a hook with a handle on it', approximately 3 feet long, and ordered to: "Get these Jew bastards out", and that once removed, the bodies were 'stacked on top of one another on a head-to-foot basis'.⁷⁹ He and the others had then been ordered to 'wash out the chamber', before being loaded onto a truck and returned to their barracks.⁸⁰ The whole process had taken 'three hours'.⁸¹

The expert testimony of Raul Hilberg constituted the other primary form of evidence of Auschwitz-Birkenau. Acting as evidence by proxy (chapter three) Locke reminded the jury that Hilberg had testified that a gas chamber had been reconstructed in the main camp of Auschwitz, that two gas chambers had been constructed at Birkenau in 1942, that had acted as 'temporary structures', with the bodies buried at this stage, and then 'four massive

⁷³ Ibid, Vol. XXI, pp77, 79, 88, 124, 125.

⁷⁴ Ibid, p88.

⁷⁵ Ibid, pp131, 134.

⁷⁶ Ibid, pp132-133.

⁷⁷ Ibid, p133.

⁷⁸ Ibid, pp133-134.

⁷⁹ Ibid, pp132-133.

⁸⁰ Ibid, pp133-134.

⁸¹ Ibid, p134.

extensive structures were built and labelled "crematoria" in 1943'.⁸² Hilberg had further testified that, once gassed, designated prisoners had worn gas masks 'when they were dragging out the bodies', that hair, and teeth containing gold, were removed from the corpses 'by different squads of camp workers, and yet others then took the bodies to be burned'.⁸³ Hilberg had accepted that 'scientific documents or other types of documents' referring explicitly to homicidal gassing had not been found.⁸⁴ However, he had insisted that it was 'unlikely' that the 'German hierarchy' would have produced documents that clearly stated they were killing people, hence the use of camouflage language surrounding extermination policy (chapter four).⁸⁵ Yet, despite gaps in the documentary record, Hilberg had stated that 'numerous German documents ... [showed] that gas was being delivered', and not 'solely, to fumigate clothing and buildings', 'independent evidence' had corroborated the Gerstein statement' on the delivery of Zyklon-B to the camp, aerial photographs revealed 'poisonous chemicals being employed by the Germans', 'documents and other writings' had 'caused him to form the opinion' that ventilators had been installed in the gas chambers, and that 'plans of the ovens' did exist.⁸⁶ Locke noted that Hilberg had not brought these documents to the court, 'because he was not asked to'.⁸⁷ Also, as the Crown had suggested, 'documents in the German language would do no good'.⁸⁸ Hilberg had finally testified that 'approximately one million people', predominantly Jews, had been murdered at Auschwitz-Birkenau.⁸⁹ Although this was a lower figure than Vrba's, Hilberg had maintained that it had been calculated on the basis of 'much more information than had been at his [Vrba's] disposal'.⁹⁰

In contrast to the absence of contemporaneous documentation, a range of drawings, maps and photographs were foregrounded as visual evidence of the camp and its gassing

⁸² Ibid, p101.

⁸³ Ibid, p107.

⁸⁴ Ibid, pp105-106.

⁸⁵ Ibid, pp102, 105-106.

⁸⁶ Unfortunately the relevant documents or writings are not identified by Locke, with the exception of the 'Gerstein statement'. Ibid, pp102, 104-105, 107. See also: *Her Majesty the Queen and Ernst Zündel* (251/85), Appeal (1987), 'Respondent's Factum', p15, Ontario Court of Appeal. All proceeding references to the 1987 Appeal will be prefixed by ZT 1987.

⁸⁷ ZT 1985, Vol. XXI, p102. According to the Crown, Hilberg had more accurately testified that it was because the introduction of documents into the court 'was for the Crown to decide', ZT 1987, 'Respondent's Factum', p14.

⁸⁸ ZT 1985, Vol. XXI, p214.

⁸⁹ ZT 1987. 'Respondent's Factum', p16.

⁹⁰ Ibid.

apparatus.⁹¹ Those specifically highlighted were maps of the Auschwitz and Birkenau sites (Vrba, Müller), a map of crematoria I and II (Vrba), a drawing by Urstein (in the courtroom) of crematorium III, estimates from Vrba's 1944 report of the numbers of Jews gassed in Birkenau (1942-1944), and photographs of specific activities, buildings and personnel in the camp (the 'Auschwitz Album').⁹² However, since irrelevant to the facts expressed in DSMRD, evidence on the chemical properties and absorption rates of Zyklon-B was not submitted by the Crown but extracted through the cross-examination of the Defence's expert chemist, Dr Lindsay.⁹³ More specifically, and aligned to denier charges, Lindsey was forced to admit that cyanide (Zyklon-B) is lighter in weight than air, and, therefore, if introduced onto the ground, it would rise slowly, that people standing would be killed, even if near to the floor, and that a small child would be killed first as nearer to the ground, at a specific saturation in the air (300 parts cyanide per million of air) death by inhalation can be as quick as 3 minutes, one of the treatments when coming into contact with cyanide is to soak the area with water to dilute it, and therefore, someone removing corpses killed by cyanide, but hosed down, would not die from the contact, that gas masks at that time did protect against cyanide, that it takes higher concentrations of cyanide to kill insects, such as lice, than it does to kill humans, and that corpses can generate heat when cremated and therefore act as fuel.⁹⁴ Griffiths then concluded for the Crown:

Yes, there were gas chambers, ladies and gentlemen, and that is the evidence in this trial. There is reliable evidence of that before you, and I'd like you to accept it. Having accepted it, put the lie to the allegations here that there were no gas chambers.⁹⁵

In the 1988 retrial the main form of evidence for the Crown was historian expertise through the testimony of Christopher Browning.⁹⁶ Foregrounded from this testimony was

⁹¹ The vast majority being submitted by the Defence. For the full list of material submitted by the Crown see, ZT 1985, 'Index of Exhibits', Vols. II-X, and by the Defence, Ibid, Vols. XI-XIX.

⁹² ZT 1985, Vol. XXI, pp59-61, 123, 124, 134, 147. The '1944 Report' was authored by Vrba and Wetzler after their escape and published as the 'War Refugee Board Report 1944'. This Report also included the drawings of the maps of the camp submitted alongside Vrba's testimony. See footnote 36 in relation to its reference (and use) at the Eichmann trial.

⁹³ Ibid, Vol. VIII, pp3120-3150 and confirmed by Locke, Vol. XXI, pp217-218.

⁹⁴ Ibid, Vol. VIII, pp3126-3128, 3133, 3135, 3139, 3144-3146.

⁹⁵ Ibid, Vol. XX, p4639.

⁹⁶ Raul Hilberg's 1985 testimony was also read out in court as additional evidence for the Crown, ZT 1988, Vols. VIII-X.

Browning's conclusions that experimental gassing had taken place at Auschwitz-Birkenau in 1941, that intended gassing had commenced 'on a larger scale' during 1942, that increased quantities of Zyklon-B had been 'shipped to Auschwitz during the Hungarian deportation' after March 1944, and that its 'gas chambers and crematoria' had been blown up prior to the camp's liberation in 1945.⁹⁷ Also foregrounded was Browning's claim that Eichmann, in both his memoirs and testimony in 1961, had admitted to visiting the camp, had witnessed the 'farmsteads where the gas chambers were', agreed that the pellets of Zyklon-B in these gas chambers had been 'different from the carbon monoxide used elsewhere', and, in a note to his attorney, Robert Servatius, had firmly situated Höss (but not himself) in its killing programme.⁹⁸ Likewise foregrounded was Browning's claim that Philip Müller, a 'sonderkommando' for three years at Auschwitz-Birkenau, had testified in 1979 to the gassing process in his book 'Eye Witness: Auschwitz'.⁹⁹ Browning had insisted that Müller's testimony was 'very credible'.¹⁰⁰

In a trial in which Browning's expertise acted as evidence by proxy (chapter three), contemporaneous documentation relating to Auschwitz-Birkenau was sparse. Indeed, the only item foregrounded in 1988 was a copy of a letter sent from Karl Bischoff (SS Construction Management Auschwitz) to Hans Kammler (Head of the Waffen SS Supply Department), dated 29 January 1943, as implicit evidence of 'ventilation systems' and explicit references to 'either a gassing chamber or a gassing cellar or a gassing room' in crematorium II.¹⁰¹ As the Crown had asserted, 'it really doesn't matter whether it is chamber, cellar or room. The important point is that reference is made to gassing in the documents'.¹⁰² As in 1985, since of limited relevance to the statements of fact identified in DSMRD, but also in the absence of survivor testimony, the Crown's evidence of the gassing process was largely extracted through cross-examination of Defence witnesses, but this time Fred Leuchter, relating to what Christie had claimed was the 'first on-site, scientific investigation' of the camp, and James Roth (chemist), relating to Leuchter's

⁹⁷ Ibid, Vol. XXXVI, pp10427, 10502. See also ZT 1989, 'Respondent's Factum', pp22, 53.

⁹⁸ ZT 1988, Vol. XXXVI, p10429. See also, ZT 1989, 'Respondent's Factum', p48.

⁹⁹ Ibid, p45. Referred to as 'Filip' elsewhere in the Zündel trial, ZT 1985, Vol. VII, pp1468-1470; Vol. XIII, p2870. Also by Gray in the Irving trial, HRIRH, (TB) T2, 'Judgement', para. 7.44.

¹⁰⁰ ZT 1989, 'Respondent's Factum', p45.

¹⁰¹ ZT 1988, Vol. XXXVI, pp10411, 10405.

¹⁰² Ibid, p10405.

sampling procedure and conclusions.¹⁰³ Foregrounded admissions from these witnesses accepted, once again, that cyanide is slightly lighter than air and rises very slowly, that those dropping Zyklon-B pellets from the roof would not be in danger, that cyanide gas forces the person to gulp for air and invokes sickness, headaches and vomiting, and, in direct opposition to Leuchter's infamous conclusions, that the killing of lice required far greater amounts of cyanic gas than the killing of humans.¹⁰⁴ The Crown had subsequently concluded that 'the defence evidence about gas chambers really was much to do about nothing'.¹⁰⁵

In London in 2000 the main form of evidence was yet again historian expertise through the oral and written testimony of Robert Jan van Pelt. As with the other expert witnesses for the Defence, van Pelt's findings were contained in his commissioned report and submitted as 'evidence-in-chief'.¹⁰⁶ His testimony, in support of this evidence, was therefore largely elicited through cross-examination by Irving.¹⁰⁷ This testimony, and its subject reach, was extensive, covering, as outlined above, the architecture of gassing facilities, with additional focus on crematorium II, the physics of cremation, the chemistry of Zyklon-B and the human biology of gas absorption. Perpetrator testimony was once again a foundational source of evidence, but now represented through the report and testimony of van Pelt. Once again Höss' testimony at the IMT was foregrounded as proof of the introduction of Zyklon-B 'into the death chamber through a small opening', gas chamber capacity of '2,000 people at one time', a killing timescale of 3 to 15 minutes, the removal and desecration of the dead by 'Special commandos', and 'the extermination, by gassing and burning, of at least two and a half million' people, predominantly Jews.¹⁰⁸ The testimony of architects (Walther Dejaco, Fritz Ertl), physicians (Drs Johann Paul Kremer and Fritz Klein) and SS officers (Hans Aumeier, Pery Broad) based at Auschwitz-Birkenau further detailed the selection process of those sent to the gas chambers on arrival, the homicidal intent of the gas chambers, including the introduction of Zyklon-B through holes in the roof, or through 'a side opening', the increased capacity of crematoria

¹⁰³ Comprising Leuchter's conclusions of 31 samples of brick and stone he had taken from the sites of crematoria I-IV and a "control sample" from a delousing facility at Birkenau. Ibid, pp9274-9310, 10400. For discussions on Leuchter's legal qualification see, Ibid, pp8943-9055.

¹⁰⁴ Ibid, pp9253-9254, 9256-9257, 9245-9248.

¹⁰⁵ Ibid, p10408.

¹⁰⁶ HRIRH, (TB) B2, 'Witness Report'. Ibid, Day 9, p20.

¹⁰⁷ HRIRH, Day 9, pp47-193; Day 10, pp5-213; Day 11, pp10-141; Day 13, pp3-13; Day 14, pp15-20. Van Pelt was re-examined by Rampton on Day 11, pp154-202; Day 13, pp14-17; Day 14, pp5-9, 21-23.

¹⁰⁸ Ibid, (TB) T2, 'Judgement', para. 7.29.

II and III, the removal of bodies into ovens, the construction of new crematoria for "special actions", with instructions 'that no reference should be made to gassing', and Himmler's order in 1944 for 'the cessation of gassing in Auschwitz and the dismantling of the extermination installations in the crematoria'.¹⁰⁹

Survivor testimony was also foregrounded, but again represented through van Pelt's report and testimony as corroborative evidence of the selection process, both on arrival and when subsequently deemed "unfit", the introduction of Zyklon-B into wire-meshed columns, the internal design and mechanics of the gas chambers and crematoria (from the gas-tight doors, peep holes, 'dummy' shower heads, mesh columns, and ventilation systems to the desecration and transfer of the bodies, the lifts, furnaces, pits and incineration process, including the self-burning of human fat) and the subsequent systematic murder of large numbers of Jews.¹¹⁰ This testimony, specifically David Olere's drawings, also comprised the primary source of evidence against Irving's challenge to the existence of chimneys on the roof of crematorium II.¹¹¹

Contemporaneous documentation likewise accompanied van Pelt's testimony, with a far greater number and range of items submitted than in the previous trials. Foremost, was copies of blueprint material found in the surviving archive of the 'Central Construction Office' at Auschwitz-Birkenau. More specifically, initial drawings of new buildings (crematoria IV and V), dated August 1942, demonstrated the incorporation of 'undressing rooms' (although not designated as such), 'morgues' (gas chambers according to van Pelt), several windows to be placed 'above eye level' (coinciding with windows in other documents required to be gas proof according to van Pelt) and a drainage system, 'which appears to link up with the camp sewage system'.¹¹² Additional drawings, produced in late 1942, demonstrated the redesign of the entrance to crematorium II, moving it to the street side of the building (for access from the railway station according to van Pelt), the

¹⁰⁹ Presented at trials in Vienna (Dejaco, Ertl) in 1972; the Belsen trial (Kremer, Klein); the IMT (Aumeier); and the Auschwitz-Birkenau trial (Broad). But also the testimonies of Dieter Wisliceny (IMT); Josef Kramer (Belsen trial); Franz Hössler (Belsen trial); and Hans Stark (Auschwitz-Birkenau trial). HRIRH, (TB) T2, 'Judgement', paras. 7.30, 7.31, 7.32, 7.49, 7.52, 7.55, 7.56, 7.57.

¹¹⁰ 'Sonderkommandos': Dr Charles Bendel; Schlomo Dragon; Salmen Gradowski; Stanislaw Jankowski; Filip Müller; David Olere; Henry Tauber. Also the testimonies of Yehuda Bakon; Dr Ada Bimko; Walter Bliss; Marie Claude Vaillant-Couturier; Michael Kula; Severina Shmaglevskaya; Jerzy Tabeau; Rudolf Vrba; Janda Weiss; and Alfred Wetzler. Ibid, paras. 7.17, 7.23-7.25, 7.26-7.27, 7.33, 7.35, 7.36, 7.38, 7.39, 7.40, 7.44, 7.45, 7.46, 7.51, 7.54.

¹¹¹ Ibid, para. 7.120. Although largely depicting the structure of crematorium III, Ibid, paras. 7.23-7.27.

¹¹² Ibid, paras. 7.63-7.64.

replacement of a slide into the morgue/chamber (when initially intended for corpses) by a new stairway (now intended for 'living people to walk downstairs' according to van Pelt), and the provision of ventilation into the chamber of crematorium II (to extract poisonous air and so speed up the removal of the corpses to the incinerators according to van Pelt).¹¹³ Finally, a 'fresh drawing', dated 19 December 1942, demonstrated the redesign of the double door leading into the chamber of crematorium II to open outwards (since impossible to open inwards as initially designed against the 'crush of corpses against ... the door of those who struggled to get out' according to van Pelt).¹¹⁴ Also unique to the trial was the submission of a computer-generated model of crematorium II (presented as a slide show) reconstructed by van Pelt from these blueprints.¹¹⁵

Additional contemporaneous documentation was further foregrounded as evidence of the extension of both gassing and cremation capacity at Auschwitz-Birkenau from 1942. This documentation, when organised chronologically ranged from a patent application for 'multi-muffle ovens', made by the Topf engineering company (although not specific to Auschwitz-Birkenau but operating on the same principle as the ovens supplied to the camp in 1942/43), the record of a meeting between members of the 'Auschwitz Construction Office' and Topf on 19 August 1942, as evidence of discussions on the construction of four crematoria and 'triple oven incinerators near the ... "bath-houses for special actions"', a report by Heinrich Kinna (Main Personnel Office SS), dated 16 December 1942, as proof of an order to liquidate 'limited people, idiots, cripples and sick people', a letter from Karl Bischoff to Hans Kammler, dated 29 January 1943, indicating the reference to the use of a 'Vergasungskammer' (gas chamber or cellar), a letter from the camp to the Topf company, dated 6 March 1943, as proof of the use of hot air to pre-heat the morgue in crematorium II, a further letter from Bischoff, dated 31 March 1943, as evidence of the request for the 'delivery of a gastight door with a spyhole of 8mm glass, with a rubber seal and metal fitting', the timesheet of a construction worker at the camp, as evidence of the fitting of 'gastight windows' to crematorium IV, and finally a letter from Bischoff to Kammler, dated 28 June 1943, as proof of the intended murder of 4,756 people every 24 hours in the five crematoria at the camp.¹¹⁶

¹¹³ Ibid, paras. 7.61-7.62.

¹¹⁴ Ibid, para. 7.60.

¹¹⁵ Ibid, Day 10, pp157-158, and shown and debated on Day 11, pp16-77. The only additions he had made that were not explicit in the original blueprints had been the 'Zyklon-B introduction columns' and the 'hot air system', Day 10, p157.

¹¹⁶ Ibid, (TB) T2, 'Judgement', paras. 7.65-7.69.

Further corroborative evidence was provided by a number of photographs and reports of forensic findings. Two contemporaneous photographs were foregrounded as proof of chimneys on the roof of crematorium II in both 1942 and 1944.¹¹⁷ An additional photograph was foregrounded as evidence of Hungarian women and children, on arrival at the camp in 1944, walking from the railway spur towards crematorium II rather than to the women and children's section of the camp.¹¹⁸ A chronological record of post-war forensic findings was also foregrounded as corroborative evidence of cyanide found in the zinc covers of the ventilation openings removed from the gas chambers at Birkenau immediately after the war, as well as in 25.5kg of human hair recovered from the camp, and in the remaining bricks of the gas chambers tested in 1990.¹¹⁹ As the Defence contended this:

substantial body of evidence ... should demonstrate to any fair-minded objective commentator that gas chambers were constructed at Auschwitz and that they were used to extermination [*sic*] Jews on a massive scale.¹²⁰

It is obvious that common and familiar themes on Auschwitz-Birkenau emerged from the discrete data-streams foregrounded. However, as to be expected, distinct facts were established in accordance with those 'in issue'. In 1961, the Judges found that Auschwitz-Birkenau had been 'the largest of the extermination camps' and constituted a 'reign of terror ... in the shadow of the smoke going up from the crematoria'.¹²¹ They likewise found that Eichmann had played an integral role in this 'reign of terror'. More specifically, the use of Zyklon-B, as a 'system of carrying out executions', may have been initiated by Höss' deputy, Karl Fritzsche, to kill Russian POWs, but it was Eichmann, jointly with Höss, who had decided to extend its use to the 'mass killing of Jews' after visits to the camp in the autumn of 1941.¹²² Eichmann had also been involved in the supply

¹¹⁷ One taken by a camp official in February 1942, which showed smudges on its roof corresponding to the chimneys 'through which it is alleged that Zyklon-B would have been poured into morgue 1', *Ibid*, para. 7.70. The other was an aerial photograph of crematoria II and III captured in the summer of 1944, in which spots shown 'are the protruding chimneys', *Ibid*.

¹¹⁸ *Ibid*, para. 7.72.

¹¹⁹ From the 'Soviet State Extraordinary Commission' (1945) and 'Polish Central Commission for Investigation of German Crimes in Poland' (PCC) (1946/47), *Ibid*, paras. 7.19, 7.22. The 1990 test was in response to the publicity given to the 'Leuchter Report', *Ibid*, paras. 7.73-7.74.

¹²⁰ *Ibid*, para. 7.6.

¹²¹ AET, Vol. V, pp2151-2152.

¹²² *Ibid*, p2177.

of large quantities of Zyklon-B to Auschwitz-Birkenau in 1944.¹²³ Although it had been ordered by Günther, the Judges ruled that 'the activities of ... the Accused's deputy, are to be attributed prima facie to the Accused'.¹²⁴ They also found that Günther, 'with the knowledge of the Accused', had attempted to introduce Zyklon-B to the other extermination camps in 1942, but he had not been successful and they continued to use 'motor exhaust gas'.¹²⁵

The Judges ruled that Eichmann had been in control of the delivery of victims to the camp, and, despite the administrative authority of the Economic-Administrative Head Office (EAHO), had continued to exercise command over their fate. They found that those routed to Auschwitz-Birkenau through IVB4 had been categorised as "Transport Jews", and 'condemned to death by a general decree ... by the Accused's Section'.¹²⁶ It had also been within Eichmann's competence:

to give instructions in advance that a specific transport should not be taken off for immediate extermination, but only after some time had elapsed, as laid down by him.¹²⁷

The Judges likewise found that Eichmann had been one of three recipients of reports notifying him of the transports sent to Auschwitz-Birkenau, and had likewise been informed of those executed in the camp (on the orders of Himmler and Heinrich Müller) as punishment.¹²⁸ The Judges further found that Eichmann had been actively involved in the policy of plunder at the camp:

... since he was responsible for bringing the victims to the camps where the acts were committed, with the knowledge that these acts would be committed.¹²⁹

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

¹²⁶ Ibid, pp2162, 2188, 2163.

¹²⁷ Ibid, p2163.

¹²⁸ Other recipients were the 'Inspector of Concentration Camps' and the Auschwitz-Birkenau camp. AET, Vol. V, pp2133, 2163-2164.

¹²⁹ Ibid, p2190.

Eichmann had likewise been complicit throughout the 'skeleton industry'.¹³⁰ More specifically, the Judges found that Eichmann, either directly or through Günther, had given the necessary instructions to the personnel at Auschwitz-Birkenau for the selection and delivery of prisoners to the Natzweiler camp, 'knowing for certain that the end of these detainees would be their execution'.¹³¹ The Judges further found that it had been Himmler, and not Eichmann, who had initiated the 'Blood for Goods' proposal, but Eichmann had 'carried it out'.¹³² They found that Eichmann's 'whole effort to appear now before this Court as the initiator of the above transaction is nothing but a lie'.¹³³ Rather, at the time of the negotiations, Eichmann:

was not engaged in preparations for the emigration of 100,000 Jews, as he had the temerity to allege in his evidence, but in the deportation of all Hungarian Jewry to Auschwitz at an accelerated pace, that is to say, the extermination of those Jews who still remained in German hands and who were to be the subject of barter against goods.¹³⁴

Somewhat uniquely, the Judges disputed the testimony of Joel Brand when claiming that Eichmann had 'promised him to blow up the extermination installations at Auschwitz the moment an agreement was concluded'.¹³⁵ Since it had not been mentioned in Mr Sharett's report (of his meeting with Brand) the Judges found it 'inconceivable' that such an important promise would not have been put in writing if 'communicated to him by Brand'.¹³⁶

The Judges finally found, in accordance with Höss' testimony, that the numbers of Jews murdered at Auschwitz-Birkenau had totalled between 1.5 and 2.5 million, although they chose to 'refrain from deciding which is the correct figure'.¹³⁷ However, although they found Höss' testimony on the extermination process to be 'authentic', since corroborated

¹³⁰ Ibid, p2172.

¹³¹ Ibid.

¹³² Ibid, pp2143-2144.

¹³³ Ibid, p2143.

¹³⁴ Ibid, p2144.

¹³⁵ Ibid.

¹³⁶ Ibid. Yet Joel Brand continued to argue during cross-examination by both Servatius and the Judges that Eichmann had made this promise, Ibid, Vol. III, pp1065, 1069.

¹³⁷ Ibid, Vol. V, p2151.

by its survivors, the Judges found insufficient evidence to support his statement that Eichmann had 'brought him the order for the extraction of gold teeth and the cutting off of women's hair ...,' or the order from Himmler 'for the ... burning of the bodies', or that he had expressed the view on the immediate extermination of those routed to Auschwitz-Birkenau by IVB4.¹³⁸ The Judges likewise found that Eichmann did not have the authority to initiate the orders of punishment in the camp.¹³⁹ 'Accordingly, the Accused will have the benefit of the doubt'.¹⁴⁰ Consequently, although placing Eichmann at every stage of Auschwitz's genocide from late 1941 to the mass murder of Hungarian Jewry in 1944, the Judges did not find him in 'complete control' over the Jews sent to the camp as indicted by the Prosecution.¹⁴¹

It is again unfortunate that there is no record of the facts or narratives authorised on the subject of Auschwitz-Birkenau in either the 1985 or 1988 Zündel trials. Once again both Judges summarised the cases relevant to the camp and provided some basic instructions to their respective juries. In 1985 Judge Locke highlighted the corroborative weight of survivor testimony, and maintained that Hilberg had been 'consistent', and therefore a 'great weight should be given to his evidence'.¹⁴² He reminded the jury that the Crown's primary eyewitness, Rudolf Vrba, had 'testified at great length' on his observations; from the selection process at the ramp dividing Auschwitz and Birkenau to the 'bundling' and removal of gassed bodies 'to the crematorium to be burned'.¹⁴³ Locke also reminded the jury that Vrba had counted the trucks delivering the bodies to the crematoria 'day and night' and it was through 'that method that he ... estimated the numbers of people who he saw enter but never come out'.¹⁴⁴ Vrba had subsequently calculated the murder of 1.765 million Jewish civilians during the time he had been imprisoned at the camp. Locke therefore suggested:

¹³⁸ Ibid, pp2151, 2163-2164.

¹³⁹ Ibid, pp2163-2164.

¹⁴⁰ Ibid, p2164.

¹⁴¹ Ibid, Vol. I, p113.

¹⁴² ZT 1985, Vol. XXI, p214. See survivor testimony at, Ibid, Friedman, pp69-80; Fulop, Ibid, pp84-89; Vrba, Ibid, pp109-127; Urstein, Ibid, pp130-135; Leader, Ibid, pp135-138.

¹⁴³ Ibid, pp109, 115-117.

¹⁴⁴ Ibid, p118.

I do not think there is any problem ... with you concluding that he saw what he saw, if you accept that; but he did not see anyone actually gassed.¹⁴⁵

Locke also reminded the jury of Urstein's direct participation in the removal of gassed bodies in crematorium III.¹⁴⁶ Once again, although he had not directly witnessed 'anyone actually gassed', Urstein had insisted:

“You see the selection. People aren't shot. The Nazis have a way to put them away. It's like the Humane Society gassing cats; they don't shoot them, they gas them”.¹⁴⁷

In response to specific facts in DSMRD, but also central to overall denier treatise, Locke also reminded the jury of admissions elicited from Defence witnesses during cross-examinations that related to the properties and absorption of Zyklon-B, the removal of gassed bodies, the presence of smoke from the chimneys, 'when the trains did come in', and the self-fuelling of human fat.¹⁴⁸ In relation to denier attempts to challenge the feasibility of the homicidal use of gas chambers based on the remaining ruins of the camp, Locke finally reminded the jury that ' what exists on the ground today cannot be compared to what may have existed then ... which were taken apart brick by brick and dismantled as the Russians moved west ... '.¹⁴⁹

In 1988 Judge Thomas was arguably more candid in his 'charge' than Locke. Indicative was his reminder to the jury that:

there have been numerous trials in the world ... and there has been no evidence called in this court room to indicate to you at any time in the past anyone has suggested that gas chambers did not exist.¹⁵⁰

¹⁴⁵ Ibid, p125.

¹⁴⁶ Ibid, pp131-135.

¹⁴⁷ Ibid, p135.

¹⁴⁸ Ibid, pp217-218.

¹⁴⁹ Ibid.

¹⁵⁰ ZT 1988, Vol. XXXVI, pp10409-10410.

Thomas also reminded the jury that, under cross-examination, the Defence's key expert on gassing and incineration design and process, Fred Leuchter, had been forced to admit that he did not have 'the expertise required to reach the type of conclusion that he reached ... [and] that became clear when basic questions were put to him'.¹⁵¹ In particular, Leuchter's findings on the effects of Zyklon-B on humans had been 'totally unfounded'.¹⁵² As Thomas further reminded the jury, in addition to the invalid methodology of examining memorial sites, 'more than forty years after the event', Leuchter had admitted 'that he had not done a great deal of research before he went ... he had not looked at the documentation ...'.¹⁵³

Thomas likewise reminded the jury that, under cross-examination, Defence witness, James Roth, had testified that Leuchter's sampling procedure had been 'unscientific', while the conclusions of their expert historian, David Irving, 'comes from ... a man who has been able to profit substantially from his writings ... in which he absolves Hitler from any significant blame in the matter ...'.¹⁵⁴ However, conversely, Thomas also reminded the jury that Browning had accepted that:

there is no document in existence ordering the commencement of gassings ... no documents ordering the stopping of gassings, no document setting out the organizational plan or blueprint to carry out gassings ... and no autopsy report of any person killed by Zyklon-B.¹⁵⁵

He likewise noted that although the delivery of a ventilation system for the gas chambers was implied in the Bischoff/Kammler letter, dated 29 January 1943, this conclusion was 'hearsay'.¹⁵⁶ Once again, there is no way to confirm if any of the comments made and raised by the respective Judges formed any of the facts or narratives subsequently authorised on Auschwitz-Birkenau by the juries in 1985 or 1988.

¹⁵¹ Ibid, pp10403-10405.

¹⁵² Ibid, p10405.

¹⁵³ Ibid, pp10403, 10405.

¹⁵⁴ Ibid, pp10407-10408, 10418.

¹⁵⁵ Ibid, p10430.

¹⁵⁶ Ibid, p10411.

In London in 2000 Judge Gray acknowledged that the only general fact initially agreed by both parties had been:

... that from the autumn of 1941 large numbers of Jews were deported to Auschwitz from Germany and from the eleven other countries which had been occupied or formed part of Nazi controlled Europe.¹⁵⁷

The overall question that he had to decide upon was:

whether the available evidence, considered in its totality, would convince any objective and reasonable historian that Auschwitz was not merely one of the many concentration or labour camps established by the Nazi regime but that it also served as a death or extermination camp, where hundreds of thousands of Jews were systematically put to death in gas chambers over the period from late 1941 until 1944.¹⁵⁸

Gray found that, as the trial had progressed, Irving had 'modified his position', and had accepted that 'there was at least one gas chamber (or "cellar") at Auschwitz, albeit used solely or mainly for the fumigation of clothing'.¹⁵⁹ Irving had also accepted 'that gassing of Jews had taken place at the camp "on some scale"', but 'firmly denied ... that 500,000 Jews were killed in morgue 1 of crematorium 2'.¹⁶⁰ In light of these concessions, but also the consistent claim of the Defence that 'almost one million Jews were put to death in the gas chambers of Auschwitz', Gray focused his findings on the scale of the gassings.¹⁶¹ In a summary of the arguments, evidence and rebuttal relevant to the capacity of the homicidal apparatus at the camp (see above), he specifically found that the 'first and most significant body of ... contemporaneous documentary records' was the 'blue print material' found in the camp's surviving archive of the 'Central Construction Office'.¹⁶² But, in place of overt references, van Pelt had:

¹⁵⁷ HRIRH, (TB) T2, 'Judgement', para. 7.5.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, para. 13.69.

¹⁶⁰ Ibid.

¹⁶¹ Ibid, paras. 13.69-13.70.

¹⁶² Ibid, paras. 7.1-7.130, 7.58-7.59.

sought to illustrate by means of detailed analyses of certain features of the drawings that it reasonable [*sic*] to infer that certain chambers were designed to function as gas chambers.¹⁶³

Arising from these analyses, Gray found that this material had clearly depicted both the adaptation of crematoria II and III and the new construction of crematoria IV and V.¹⁶⁴ More specifically, the drawing of the redesign of crematorium II in 1942 constituted 'powerful evidence that the morgue was to be used to gas live human beings who had been able to walk downstairs'.¹⁶⁵ Conversely, there was 'no hint in the documents' that the redesign of crematoria II and III aimed to convert the buildings into air raid shelters as Irving contended.¹⁶⁶ As corroborative evidence, Gray found that the Bischoff letter, dated 31 March 1943, requisitioning 'a gas-tight door with a spy-hole of extra thickness', had to indicate homicidal intention, since it was 'difficult to see why a spy-hole would be necessary in the door of a chamber used only for fumigating corpses or other objects'.¹⁶⁷ The Bischoff/Kammler letter, dated 28 June 1943, was 'further cogent evidence of genocidal gassing', because the figures provided on the incineration capacity of the five crematoria 'cannot have been needed to incinerate those who succumbed to disease'.¹⁶⁸ Gray also found, from the rates of incineration referenced in this letter, that 'if the incinerators were operated continuously and many corpses were burnt together ... no more than 3.5kg of coke would have been required per corpse' rather than the 35kg premised by Irving.¹⁶⁹

Gray likewise found that the similarity of eyewitness accounts, 'and the extent to which they are consistent with the documentary evidence ... would require exceedingly powerful reasons to reject it'.¹⁷⁰ In particular, the account provided by Henry Tauber (Sonderkommando) was 'so clear and detailed that no objective historian would

¹⁶³ Ibid, paras. 7.58-7.59.

¹⁶⁴ Ibid, para. 7.59.

¹⁶⁵ Ibid, para. 13.76.

¹⁶⁶ Ibid, paras. 13.85-13.86.

¹⁶⁷ Ibid, para. 13.84.

¹⁶⁸ Ibid, paras. 7.69, 13.76. This one finding vastly underestimates the oppositional debates between Irving and van Pelt on the subject of the incineration capacity of coke, ovens and human bodies, Day 9, pp122-155.

¹⁶⁹ Ibid, (TB) T2, Judgement, paras. 7.125, 13.90.

¹⁷⁰ Ibid, paras. 13.77-13.78.

dismiss it as invention unless there were powerful reasons for doing so'.¹⁷¹ It was also corroborated by the testimony of Stanislov Jankowski and Schlomo Dragon (Sonderkommando).¹⁷² Gray also found that the testimony of Höss and Pery Broad (SS) appeared 'credible to a dispassionate student of Auschwitz' and he could find no evidence of 'cross-pollination' in their accounts.¹⁷³

Gray further found that 'the apparent absence of evidence of holes in the roof of morgue [*sic*] at crematorium 2 falls far short of being a good reason for rejecting the cumulative effect of the evidence on which the Defendants rely'.¹⁷⁴ He confirmed that Irving had finally accepted that the 'Leuchter Report' was both 'fundamentally flawed' and had 'no [methodological] validity'.¹⁷⁵ In particular, Leuchter had been wrong when assuming 'that a greater concentration of cyanide would have been required to kill humans than was required to fumigate clothing'.¹⁷⁶ Subsequently, no 'objective historian':

would have regarded the Leuchter report as a sufficient reason for dismissing, or even doubting, the convergence of evidence on which the Defendants rely for the presence of homicidal gas chambers at Auschwitz.¹⁷⁷

However, Gray was 'sympathetic' to Irving's claim that the contemporaneous documentation 'yield little clear evidence of the existence of gas chambers designed to kill humans'.¹⁷⁸ He agreed that the 'isolated references to the use of gas ... can be explained by the need to fumigate clothes so as to reduce the incidence of diseases such as typhus'.¹⁷⁹ Similarly, the quantities of Zyklon-B delivered to the camp, 'may arguably be explained by the need to fumigate clothes and other objects'.¹⁸⁰ Furthermore, 'the photographic evidence for the existence of chimneys protruding through the roof of morgue 1 at crematorium 2 is, I accept, hard to interpret'.¹⁸¹ Gray likewise accepted that

¹⁷¹ Ibid, para. 13.77.

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Ibid, para. 13.83.

¹⁷⁵ Ibid, para. 13.79.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid, para. 13.80.

¹⁷⁸ Ibid, para. 13.73.

¹⁷⁹ Ibid.

¹⁸⁰ Ibid.

¹⁸¹ Ibid.

Irving had made 'valid comments' about the unreliability of various accounts made by both perpetrators and survivors.¹⁸² In such accounts, he agreed, there is the possibility of exaggeration, while 'various motives ... such as greed and resentment (in the case of survivors) and fear and the wish to ingratiate themselves with their captors (in the case of camp officials)' can lead to invention and even false record.¹⁸³ However, when considering the combined effect of the 'convergent evidence relied on by the Defendants', Gray concluded:

... that no objective, fair-minded historian would have serious cause to doubt that there were gas chambers at Auschwitz and that they were operated on a substantial scale to kill hundreds of thousands of Jews.¹⁸⁴

It is therefore obvious that the narratives both foregrounded and authorised at each trial were evidentially accountable and 'truth-full' in content in accordance with the legal demands of each case. Furthermore, despite discrete 'facts-in-issue', a generic historiographical record of Auschwitz-Birkenau also emerged and informed these narratives. This record acknowledged that Auschwitz (I) had initially served as a concentration camp, and then a key slave labour camp, under the direct management of Rudolf Höss and the administration and command of the EAHO, but also influenced by and through the official personnel of Himmler and the RSHA, that hundreds of thousands of Jews from allied and occupied Europe had been transported (by Eichmann) to its main and surrounding sites, that survival in its labour camps had been brutal and short, that gassing chambers and crematoria (both adapted and newly constructed) were located at the main camp (Crematorium I) but predominantly at Birkenau (Crematoria II-V) from 1942, that supplies of Zyklon-B had been delivered as their unique killing agent, that selections directed transports of Jews into the gas chambers on arrival, with the deaths of vast numbers of civilians unregistered, that deception and plunder accompanied the gassing process, with the desecration of the bodies continuing after death in the removal of gold teeth from all corpses and hair from the women, that the gassed bodies were largely incinerated in ovens but also in pits, and, despite regular break-downs, the

¹⁸² Ibid, para. 13.74.

¹⁸³ Ibid.

¹⁸⁴ Ibid, para. 13.91.

outcome was the murder of hundreds of thousands of predominantly Jewish civilians.¹⁸⁵ This record did not contradict the prevailing historiography on the camp across the relevant decades and remains familiar in present-day Holocaust scholarship.¹⁸⁶

The comparative reconstruction of homicidal gas chambers at Auschwitz-Birkenau therefore confirms a case-specific focus in accordance with the 'facts in issue' governing the Eichmann, Zündel and Irving trials. Accordingly, it also confirms fundamental changes of historiographical focus in the later trials that would have been incomprehensible to the court in Israel in 1961. To doubt the fact of homicidal gas chambers and crematoria at 'the largest and most terrible of the extermination camps' was not an option in 1961, while an architectural examination of their apparatus, far less the demand for proof of holes in the roof of one of the crematoria, would have been anathema to the Israeli case, court and public audience.¹⁸⁷ Likewise, the forensic probing of the burning capacity of coke and ovens, far less human corpses, would have been met with incredulity. And yet, rather paradoxically, given Hausner's intended grand narrative of mass slaughter in 1961, and in contrast to denier tactic from the 1980s, insight into Auschwitz-Birkenau and its genocide was far more extensive in the later trials, especially in 2000, than both presented and reconstructed in 1961. This insight reflected the greater focus that had been placed on the camp after 1961, and consequently its primary target of Holocaust denier strategy. But it was also the outcome of the distinct focus on and forensic examination of the killing apparatus and process itself. Consequently, although the later trials reduced the historiography of the camp to mechanistic narratives of gassing and incineration apparatus and practice, they not only corroborated but augmented the long-established scholarship of Auschwitz-Birkenau.¹⁸⁸

¹⁸⁵ **Eichmann:** AET, Vol. V, pp2012, 2151, 2152, 2154, 2162, 2163, 2164, 2177, 2190. See also Vol. I, pp 113, 114; Vol. III, pp1005, 1006, 1307-1308, 1248, 1250, p1301. **Zündel:** ZT 1985, Vol. VII, pp1403, 1406, 1414-1415, 1468-1480, 1548, 1555, 1556, 1568-1571, 1581-1591, 1594-1606; Vol. IX, pp1771, 1791; Vol. XII, p2671; Vol. XX, pp4631-4632, 4634, 4637-4737; Vol. XXI, pp24, 101, 102, 107, 112-116, 117, 118, 125. ZT 1987, 'Respondent's Factum', p16. ZT 1988, Vol. XIV, pp3231, 3223-3224; Vol. XXXIII, pp9196-9258; Vol. XXXVI, pp10403, 10420-10422. ZT 1989, 'Respondent's Factum', pp34-35, 38, 52, 62. **Irving:** HRIRH, (TB) T2, 'Judgement', paras. 7.1-7.5, 7.62, 7.66, 7.69, 7.75, 7.123, 7.125-7.126, 7.128, 7.129, 7.130, 8.21, 8.22, 13.72, 13.88, 13.90, 13.91.

¹⁸⁶ Gerald Reitlinger, *Final Solution: The Attempt to Exterminate the Jews of Europe 1939-1945* (London: Vallentine Mitchell, 1953); Primo Levi, *If This is a Man* (London: Penguin Books, 1979); Debörah Dwork and Robert Jan van Pelt, *Auschwitz 1270 to the Present* (New Haven: Yale University Press, 1996); Yisrael Gutman and Michael Berenbaum (eds.), *Anatomy of the Auschwitz Death Camp* (Bloomington IN: Indiana University Press, 1998); Laurence Rees, *Auschwitz: A New History* (New York: Public Affairs, 2005).

¹⁸⁷ AET, Vol. I, p112.

¹⁸⁸ See Dwork and van Pelt, *Auschwitz 1270 to the Present*.

It is clearly shown that a diverse evidential base existed that was capable of accommodating and supporting the historiographical and legal demands relating to the camp. This evidential base differed in both content and form, but it was also extended after 1961 to incorporate historian expertise and opinion, a chronology of primary source material, specifically architectural blueprints, and computer-generated modelling by 2000. It is rather surprising that, once again, the items shared across all four trials were minimal, while eyewitness testimony, both perpetrator and survivor, remained the primary form of both evidence and fact. More specifically, despite consistent denier challenges, (since viewed as two of the 'three-pillars' of "exterminationist" evidence), and contemporary acknowledgement of their flaws, the historiographical and legal value and weight of the Rudolf Höss and Kurt Gerstein testimonies, alongside Eichmann, has persisted since 1961.¹⁸⁹ Likewise, despite both denier and legal challenges to their credibility, survivor accounts of life, death and survival at Auschwitz-Birkenau have retained their evidential probity and status. Indeed, the consistency, and therefore corroboration, of content across eyewitness testimonies since 1961 is striking. Furthermore, despite being procedurally challenged and confined in 1985, and intentionally absent from directly testifying in the courtrooms of 1988 and 2000 (chapter three), survivors continued to find their voice in these trials, albeit not without question as in 1961 and largely obscured by the minutiae of the murder process.

That said, it is also clear that, despite the compatibility and extension of evidence foregrounded by 2000, the data-stream of this integral historiography of the Holocaust is not infallible. Although recognised in both Israel and Canada, it was in London that the evidential ambiguity of the homicidal utility of the camp was specifically exposed and verified. In fact, the continued primacy of eyewitness testimony reaffirms the ambiguity of the documentary record as well as its experiential credibility and value. And yet, as noted in chapter two, despite their necessity to the historiography of Auschwitz-Birkenau, perpetrator and survivor testimony is allocated secondary status as a 'soft' (and subjective) option by both history and Anglo-American law.

¹⁸⁹ 'Exterminationist' was specifically labelled by both Faurisson and Christie in ZT 1985, Vol. XII, pp2557-2558, 2744-2774, but also attacked by Irving, HRIRH, Day 8, pp167-170; Day 10, pp124-128; Day 13, pp18-19; Day 14, pp14-15; Day 17, pp64-70, 155-156, 160-163, 166-178; Day 20, pp82-85; Day 32, pp106, 181-182. The final "pillar", according to Faurisson, is the 1944 'Vrba-Wetzler report', ZT 1985, Vol. XII, pp2745-2756. Flaws acknowledged at ZT 1985, Vol. XXI, pp104-105 and HRIRH, Day 17, pp166-178.

It is likewise clear that varying facts were established in accordance with those 'in issue', while the authorised narratives, however grand in content and reach, remained partial in accordance with the focus on Eichmann, and specific charges, in 1961, and gassing and incineration apparatus, capacity and homicidal utility in 1985, 1988 and 2000. However, with the exception of Eichmann's elevated role in the camp found in 1961, and most notably his authorisation of Birkenau as the site of extermination and primary influence over the introduction of Zyklon-B into its gas chambers, neither facts nor narratives were contradictory. Rather, the content of a generic record of life, death and survival in the camp had remained consistent between 1961 and 2000 and remains familiar in present-day Holocaust scholarship.

Once again, the narratives authorised on homicidal gas chambers at Auschwitz-Birkenau were 'cooked' in accordance with the focus on Eichmann's authority in 1961, and, in response to denier strategy and tactic since the 1980s, the foregrounding of the minutiae of the killing process in 1985, 1988 and 2000. But, all narratives were also empirically accountable and 'truth-full' in content in accordance with the demands of each legal case. Once again, the consistency of fact and record across all four trials implied a form of past evidential constraint. However, comparative reconstruction of this integral, and iconic, symbol of Holocaust historiography clearly exposed the primacy of preconceived and prefigured narratives governing the past traces in each courtroom.

Chapter Seven: The Total Number of Jewish Victims

The murder of six million Jewish citizens of Europe, as the consequence of Nazi-initiated genocide, is a foundational fact of Holocaust historiography. It is also notorious as public record. It is therefore not surprising that the total number of Jewish victims was often noted and discretely investigated at the criminal trials of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000), but for different legal (and extra-legal) reasons. Comparative reconstruction of both this fact and its various calculations and contexts once again reveals the diversity of accounts presented in accordance with those 'in issue'. It subsequently records the transition of focus from perpetrator cognisance and responsibility in 1961 to typical denier charges of exaggeration and invention by the 1980s. It also records that, despite an extensive data-stream, this precise total was not authorised at any of the four trials.

Comparative reconstruction also reveals that, given the unique focus on Eichmann's culpability in 1961, discrete facts were found at this trial'. But they were not incompatible to those established in the later trials. Rather, and despite the acknowledged imprecision of census data and statistics, a consensus emerged across all four trials over the numbers of Jewish citizens murdered at the various stages of the genocide, the eradication of Polish Jewry in particular and the total loss of between five and six million 'innocent lives'.¹ However, in light of the imprecision of statistical data, it is shown that the Judge at the 'Irving trial' was rather cautious in his relevant conclusions and arguably did not place the five to six million deaths beyond further denier challenges.

Comparative reconstruction likewise clearly demonstrates that the narratives authorised across all four trials were 'cooked' in accordance with the focus on Eichmann in 1961, and the various challenges to the six million figure in 1985, 1988 and 2000. But, they were also empirically accountable and 'truth-full' in content. Yet again, the consistency of figures across the various sites of mass murder and in total implied the dominance of past evidential, and more specifically statistical, constraint, regardless of their varying utility. However, comparative reconstruction clearly shows that preconceived and

¹ *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), Holocaust Research Institute, Royal Holloway, University of London (HRIRH), Day 32, p18. All proceeding references to the daily transcripts of this trial will be prefixed by HRIRH, and, when referencing other documentation, by their Trial Bundle (TB) letter and number.

prefigured narratives both determined and governed the relevant evidence, even when quantitative in content.

The notorious fact that a total of six million Jewish citizens of Europe had been murdered as a consequence of Nazi-initiated genocide was regularly referenced across the criminal trials of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000), with the focus of attention ranging from perpetrator knowledge and responsibility in 1961 to direct confrontation of the numbers killed in 1985, 1988 and 2000. In 1961, Eichmann was directly charged with the murder of millions of Jewish citizens between 1939 and 1945, while in 1985, 1988 and 2000, in response to denier accusations of exaggeration and invention, attention was placed on both the facticity and feasibility of the six million figure. In all four cases the establishment of the number of Jews murdered at the various stages of extermination policy were incorporated within a range of historiographical debates, such as the Einsatzgruppen mass shootings and those gassed at Auschwitz-Birkenau, but discrete attention was also paid to the total number of Jewish victims at each trial.

In Israel the first count of the indictment specifically charged Eichmann with 'causing the deaths of millions of Jews' between 1939 and 1945.² A precise figure was not formally stated, but, as infamously asserted by Gideon Hausner in his opening address:

When I stand before you here, Judges of Israel, to lead the Prosecution of Adolf Eichmann, I am not standing alone. With me are six million accusers. But they cannot rise to their feet and point an accusing finger towards him who sits in the dock and cry: "I accuse".³

The figure of six million also continued to be presented throughout the Prosecution's case.⁴ And, although recognising that the perpetrators had extended beyond the 'leaders of the nation', it was Eichmann who had to bear responsibility as if with his own hands he had 'lashed the victims into the gas chambers, who shot in the back and pushed into

² *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Vol. I, pp3-4, Newcastle University Library. All proceeding references to this trial will be prefixed by AET.

³ Ibid, p62.

⁴ Ibid, pp114, 184, 307; Vol. IV, pp1519, 1526, 1661, 1665; Vol. V, pp1892, 1893, 1911, 1987, 2029, 2030.

the open pit every single one of the millions who were slaughtered'.⁵ In his defence Eichmann did not dispute that millions of Jews had been murdered and admitted to a figure of five million during his pre-trial interrogation.⁶ However, once in court, he claimed that the five million figure had referred to the killing of all 'enemies of the Reich' and not solely Jewish civilians.⁷ In terms of individual responsibility, Eichmann acknowledged 'human guilt', because of his role in the deportation of Jews to their death, but consistently denied legal guilt since he had not ordered the killings.⁸ Rather, faced with 'Acts of State', he had been 'simply a tool in the hands of stronger powers and stronger forces, and of an inexorable fate'.⁹ Governed by the indictment, the Prosecution, therefore, had to prove the numerical consequences of the Holocaust alongside Eichmann's cognisance of and complicity in its total slaughter.

In Canada, in both 1985 and 1988, a total figure of six million murdered Jews was again specifically referenced but now explicitly contested. As indicated in the title of the denier tract under scrutiny, 'Did Six Million Really Die?' (DSMRD), the overall thesis asserted an 'imaginary slaughter'.¹⁰ More specifically, individual statements contained within DSMRD claimed that less than 300,000 Jews had been killed in camps during the war, that the six million 'allegation' was numerically impossible, since there had been less than this number of Jews living in the relevant European territories prior to 1939, and that its figure had been the invention of post-war propaganda.¹¹ As stated in 1985, by the Defence's legally qualified expert, Robert Faurisson:

... when you ask a Frenchman how many Frenchmen died during the War, a Frenchman usually doesn't know ... but everybody knows that six million Jews died. It's not because the information is right, accurate. It is because it is repeated and repeated and repeated.¹²

⁵ Ibid, Vol. I, p62.

⁶ Outlined in the statement of his interrogation prior to the trial and in his written notes.

⁷ AET, Vol. IV, pp1567-1568, 1575-1577.

⁸ Ibid, p1568.

⁹ Ibid.

¹⁰ One of the chapter headings in DSMRD, as verified by Judge Locke in 1985, *Her Majesty the Queen and Ernst Zündel* (251/85), Vol. XXI, p30, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1985.

¹¹ ZT 1985, Vol. XI, p2515; Vol. XII, p2734; Vol. XIX, p4281; Vol. XXI, pp31, 146-147. *Her Majesty the Queen and Ernst Zündel* (424/88), Vol. XXXVI, p10387, Ontario Court of Appeal. All proceeding references to this trial will be prefixed by ZT 1988.

¹² ZT 1985, Vol. XII, p2607.

Consequently, the Crown in both 1985 and 1988 was forced to prove both the facticity and feasibility of the six million figure.

The notorious fact of six million Jewish deaths had similarly been denied by David Irving, forcing yet another rebuttal of alternative and much smaller figures in London in 2000.¹³ As explicitly stated by Richard Evans, in his expert report on behalf of the Defence, the claim that 'far less than six million' Jews had been 'killed by the Nazis' was one of four core 'beliefs' of a Holocaust denier.¹⁴ Although exact figures were not provided by Irving, he accepted that 'between one and two million Jews' had been 'deliberately murdered ... during the course of the War' by means other than disease, overwork or starvation.¹⁵ He specifically identified one million deaths through mass shootings on the Eastern front, and an unstated number through the use of gas vans, since witnessed by Eichmann.¹⁶ The disparity between his two million figure and the five to six million Jewish victims that, as also recorded by Evans, defined the Holocaust, directly related to Irving's denial that millions of Jews had been murdered by gas in extermination camps.¹⁷ Rather, according to Irving, the acclaimed 'factories of death' had been the propaganda invention of British intelligence officers during the war.¹⁸ Consequently, as in Canada, the huge disparity of figures forced the Defence to prove the facticity of the numbers murdered alongside the wider focus on the reality and utility of both gassing apparatus and extermination camps (chapter six).

A discrete evidential base was subsequently foregrounded across all four trials in accordance with the 'facts in issue'. The exception was the mutual use of the Einsatzgruppen reports, as evidence of the number of Jews murdered by mass shootings.¹⁹ As shown in chapter five, although varying reports were submitted in each courtroom, a consensus emerged over the numbers murdered by these killing units, as well as the

¹³ HRIRH, (TB) T2, 'Judgement', para. 8.20 for a list of extracts referencing Irving's various claims (1990-1997) of between 25,000-100,000 Jews murdered at Auschwitz-Birkenau, the majority from 'natural causes'.

¹⁴ Ibid, (TB) B1, 'Witness Report of Richard Evans', para. 3.2.16.

¹⁵ Ibid, Day 2, pp240-241.

¹⁶ Ibid, p241. According to Irving, the use of gas vans had been referenced in Eichmann's papers that he had obtained in Argentina, Ibid, p244.

¹⁷ Ibid, (TB) B1, 'Witness Report of Richard Evans', para. 3.1.13. Ibid, Day 2, p250.

¹⁸ Ibid, Day 5, pp171-179; Day 20, pp40-54; Day 29, pp108-135.

¹⁹ AET, Vol. I, pp520-521; Vol. V, p2148. ZT 1985, Vol. XXI, p92-93. ZT 1988, Vol. XXXVI, pp10428-10429. HRIRH, (TB), T2, 'Judgement', paras. 6.15, 6.17, 6.20.

privations of war. However, additional evidence was necessary in each trial to prove the murder, and, in Israel, Eichmann's direct knowledge and responsibility, of much larger numbers of Jewish civilians. In 1961, and unique for this trial, Salo Baron (Professor of Jewish History, Columbia University) was legally admitted as an expert historian, who, in amongst his testimony on the breadth and contribution of Jewish culture and life prior to the Holocaust, identified the overall fall of world Jewry from 16.5 million in 1939 to 10.5 million in 1945; a clear six million loss.²⁰ Baron also detailed the removal of Jewish populations in specific countries, most prominently Poland, 'the country where there had been approximately 3,300,000 Jews' prior to 1939 and only '73,955' remaining in August 1945.²¹ Baron accepted that he was not a 'statistician', but testified that estimates could be calculated on the basis of 'several sources'; in particular the 'Polish Commission' census, 15 August 1945, and a general survey documented by Gregory Frumkin of 'Population Changes in Europe Since 1939'.²² Baron also noted that the six million figure had been 'stated by the Nuremberg Tribunal'.²³

However, the key form of evidence, of both the facticity of millions of Jewish deaths and Eichmann's cognisance of and responsibility for their 'inexorable fate', was perpetrator testimony, including Eichmann. As shown in chapter six, Rudolf Höss had detailed the gassing of between 1.5 and 2.5 million Jews at Auschwitz-Birkenau, as well as Eichmann's leading role in the murder process in the camp.²⁴ But the main focus of attention relating to the total number of Jewish victims was on the testimonies of those who claimed to have witnessed Eichmann's confession, in the face of Germany's military defeat, to his role in the murder of five to six million Jews. Foregrounded by the Prosecution were extracts from Theodor Horst Grell's testimony (Jewish Affairs Section, Foreign Ministry, Budapest) to a German court on 14 June 1961, as evidence that Eichmann, in a conversation in the late autumn of 1944, had identified himself as war criminal number one in the eyes of the enemy powers and admitted that "he had some six million people on his conscience".²⁵ Likewise, extracts from Dr Wilhelm Hoettl's

²⁰ AET, Vol. I, pp170-184; Vol. V, p2172.

²¹ Ibid, Vol. I, p181.

²² The census was part of the 'Polish Government Main Commission for the Investigation of Nazi Crimes' (PCC) and translated into English, Ibid. Frumkin's work was published in 1951, in London by A.M Kelley, Ibid, p184.

²³ An obvious reference to the International Military Tribunal (IMT), Ibid.

²⁴ AET, Vol. III, pp1005-1007, 1307-1312, 1312; Vol. V, pp2151-2152.

²⁵ Ibid, Vol. IV, p1526.

testimony (Group leader, Department VI, RSHA), at both the International Military Tribunal (IMT) and in an Austrian court on 19 June 1961, showed that, in a discussion on the inevitability of the Russian advance, Eichmann had exclaimed that “he stood no chance anymore ... in view of his role in the programme to exterminate the Jews, the Allies were considering him to be a top war criminal”.²⁶ Furthermore, when Hoettl had asked for the total figure of Jews “exterminated”, Eichmann had estimated some six million; 4 million in extermination camps and 2 million by shootings, disease etc.²⁷ Hoettl also testified that Eichmann had shown no remorse at this slaughter.²⁸ Extracts from Dieter Wisliceny's testimony (Eichmann's Deputy), in an affidavit signed at the IMT on 14 November 1945, likewise documented that at their last meeting in February 1945 Eichmann had claimed:

I will laugh when I jump into the grave because of the feeling that I have killed 5,000,000 Jews. That gives me great satisfaction and gratification.²⁹

The only form of secondary source material specifically foregrounded as numerical evidence of Jewish deaths was the 'Polish Commission' Reports.³⁰ According to these 'Reports', approximately 1.75 million Jews had been murdered at the 'Operation Reinhard' and Majdanek camps: 700,000 at Treblinka; approximately 600,000 at Belzec; at least 250,000 at Sobibor; and 200,000 at Majdanek.³¹

In Canada, in both 1985 and 1988, the Crown attempted to secure judicial notice of the notorious fact that millions of Jews had been systematically murdered by the Nazi regime.³² In 1985 the request was rejected on legal grounds, while specific numbers were omitted from the general fact judicially noticed in 1988 (chapter three). Since forced to rebut the much lower numbers of Jewish deaths cited by DSMRD, the main form of

²⁶ Ibid, p1519.

²⁷ Ibid.

²⁸ Ibid.

²⁹ Ibid, Vol. I, p202.

³⁰ See footnote 23.

³¹ AET, Vol. V, pp2149, 2151.

³² In 1985 the fact requested for judicial notice stated that 'millions of Jews had died from 1939 to 1945 in Europe as a result of a concerted effort by Germany to annihilate them', ZT 1985, Vol. III, 1985, p480. For the Crown's argument on judicial notice see Vol. X, pp2072, 2103, 2115-2121, 2170. In 1988 the fact noticed was of the Holocaust as the 'mass murder and extermination of Jews by the Nazi regime during the Second World War', ZT 1988, Vol. VI, p1010. For the debate and ruling on judicial notice in 1988 see, Ibid, pp995-1010.

evidence at both trials was the testimony of historians Raul Hilberg (1985) and Christopher Browning (1988). In 1985, in addition to references to the Einsatzgruppen reports, as evidence of the numbers of Jews murdered by mass shootings (chapter five), and the testimony of Rudolf Vrba, relating to the murder of 1.75 million Jews whilst imprisoned at Auschwitz-Birkenau (chapter six), Hilberg foregrounded, but did not submit, four primary sources. Acting as evidence by proxy, Hilberg claimed that the 'Korherr Report' (1942-1943), comprising monthly statistics of Jewish populations in regions then under German control, had documented their consistent decline 'as people died'.³³ From this 'Report' historians had accurately documented a Jewish population of around 3.35 million in Poland in September 1939 and only 50,000 remaining in 1945.³⁴ Jewish Council reports of ghetto populations had similarly detailed the death of Jews through disease, and other privations, in the relevant sites as well as the numbers deported to the varying extermination camps.³⁵ The 'Stroop Report' had specifically recorded the deportation of 300,000 Jews from the Warsaw Ghetto to the 'death camp' of Treblinka, while Hans Frank (Governor General of the Generalgouvernement) had stated in his personal diary that official policy had killed 'millions and millions of Jews'.³⁶

Hilberg also foregrounded census data as evidence of both pre-war and post-war Jewish populations in Europe. In particular, 'Chambers Encyclopaedia' had documented 6.5 million Jews living in pre-1939 Europe, excluding Russia, but, when including Russia, an additional 3 million Jews increased the relevant European Jewish population to 9.5 million.³⁷ Additional census data, of the districts and regions under German influence and occupation, specifically reaffirmed the loss of over 3 million Jews in Poland between 1939 and 1945.³⁸ From both primary and secondary source material Hilberg had calculated that 5.1 million Jewish civilians had been murdered, including 3 million in the camps, 'from starvation, disease, brutality and, yes, gassing'.³⁹ Once again Hilberg had not produced the relevant documentation in court, since 'a railroad car full of German

³³ Compiled by Richard Korherr, SS statistician. ZT 1985, Vol. XX, p4622.

³⁴ *Her Majesty the Queen and Ernst Zündel* (251/85), Appeal (1987), 'Appeal Judgement', pp67-68, Ontario Court of Appeal. All proceeding references to the 1987 Appeal will be prefixed by ZT 1987.

³⁵ *Ibid*, p67.

³⁶ Compiled by Jürgen Stroop (SS and Police Leader) in command of the liquidation of the Warsaw Ghetto in April-May 1943, ZT 1985, Vol. XXI, p98. Frank: *Ibid*, Vol. XX, p4622.

³⁷ *Ibid*, pp4621-4622.

³⁸ *Ibid*, pp4621, 4640.

³⁹ *Ibid*, pp4648, 4651.

documents ... wouldn't be any assistance at all'.⁴⁰ However, as the Crown reminded the court: 'If Dr Hilberg misrepresented those documents, rest assured that Dr Faurisson would have told you about it. He didn't'.⁴¹

In 1988, and again in addition to evidence relating to the murder of up to 1.5 million Jewish civilians by the Einsatzgruppen (chapter five) and hundreds of thousands more by gassing at Auschwitz-Birkenau (chapter six), Browning foregrounded three sets of contemporaneous German statistics, copies of which, in contrast to 1985, were legally submitted. According to Browning the 'Burgdorfer Report/Statistics', commissioned by the German Foreign Office in the summer of 1940 (17 July), indicated that the number of Jews living in Europe at that date was between 9.8 and 10.72 million.⁴² An additional survey, conducted by the SS in the same summer, as part of the 'Madagascar Report', indicated that 4 million Jews were living in those areas of Europe then controlled by Germany, while the minutes of the 'Wannsee Conference' was proof of both the documentation of an estimated 11 million Jews living across all countries of Europe at the beginning of 1942, and evidence that far fewer numbers of Jews had emigrated to safety than cited in DSMRD.⁴³ Excerpts from Hans Frank's diary, dated 16 December 1941, were also foregrounded as proof of the intended "destruction" of 3.5 million Jews then confined in the 'Generalgouvernement'.⁴⁴ Although Browning acknowledged that the 11 million figure in the Wannsee minutes had been inflated, because of errors made on the number of Jews living in France, it was possible to calculate from official German figures that in 1939 'there was in the area of ten million Jews in Europe'.⁴⁵

In addition to Hilberg's 1985 testimony, which was read out in court, Browning similarly foregrounded and submitted census data found in 'Chambers Encyclopaedia' and the 'World Almanacs' of 1939 and 1950.⁴⁶ He acknowledged that some of the census data of the relevant countries had been broken down into religion, while others were 'a little bit

⁴⁰ Ibid, p4621.

⁴¹ Ibid.

⁴² From the President of the Bavarian statistical office (Friedrich Burgdorfer) in preparation for the 'Madagascar Plan', a proposal to forcibly deport the Jews of Europe to the island of Madagascar. *Her Majesty the Queen and Ernst Zündel* (424/88), Appeal (1989), 'Respondents Factum', p14, Ontario Court of Appeal. All proceeding references to the 1989 Appeal will be prefixed by ZT 1989.

⁴³ Ibid, pp14, 16.

⁴⁴ ZT 1988, Vol. XXXVI, p10426.

⁴⁵ Ibid, p10425. ZT 1989, 'Respondent's Factum', p16.

⁴⁶ ZT 1988, Vol. XXXVI, p10420-10422.

more nebulous'.⁴⁷ Reaffirming Hilberg's evidence from 'Chambers', Browning testified to its documentation of 6.5 million Jews living in Nazi-dominated lands in 1939, excluding Russia, but, when including Russia, the 'ballpark figure for the number of pre-war Jews is about 9.5 million'.⁴⁸ 'Chambers' also showed that 'barely 2,500,000 remained alive when the war ended 6 years later'.⁴⁹ The 'World Almanacs' further detailed the number of Jews world-wide in 1939 as 16,643,120 and by 1948 as 11,373,000; a loss of over 5 million Jewish citizens.⁵⁰

In London in 2000 the main form of evidence was again historian testimony, in particular Christopher Browning and Peter Longerich, but also Richard Evans. However, in contrast to both the Eichmann and Zündel trials, a more detailed data-stream was foregrounded in support of their expert reports and testimony. In addition to the Einsatzgruppen reports, once again as evidence of the numbers of Jews murdered by mass shootings (chapter five), and source material relating to gassing and incineration capacity at Auschwitz-Birkenau (chapter six), the contemporaneous documentation included Hans Frank's diary extract of 16 December 1941, as evidence that at a Gauleiter and Reichleiter meeting in Berlin on 12 December 1941 he had been told to: "Liquidate them yourselves" in reference to 'Poland's two or three million Jews' then sited in the 'Generalgouvernement', a letter from Arthur Greiser (Gauleiter of the Warthegau) to Heinrich Himmler, on 1 May 1942, as proof of the killing of 100,000 Jews in 2-3 months in the region in which the extermination camp of Chelmno was then in operation, a document, dated 5 June 1942, as evidence of the killing of 97,000 Jews in 3 gassing vans over a 6 month period (December 1941-June 1942), a letter from Himmler to Gottlob Berger (Head of the Reich Security Main Office), dated 28 July 1942, as proof of an order to 'free' the occupied Eastern territories (Soviet Union) of Jews by the end of the year, and just days after the beginning of the 'Operation Reinhard' programme, 'accurate' lists of deportations from Germany and Western Europe, as evidence of 'the number of people per train' sent to the extermination camps from the summer of 1942, a letter from Albert Ganzenmüller (Ministry of Transport) to Karl Wolff (Office of the Reichsführer-SS), dated 28 July 1942, as proof of the deportation of 5,000 Jews each day from Warsaw to Treblinka, and 5,000 Jews twice a week from Przemysl to Belzec, with additional transports to be directed to

⁴⁷ZT 1989, 'Respondent's Factum', p14.

⁴⁸Ibid, pp14, 15.

⁴⁹Ibid, p15.

⁵⁰Ibid, p18.

Sobibor from October, Wolff's reply on 13 August 1942, as evidence of 'his joy at the assurance that for the next two weeks ... there would be a daily train carrying 5,000 of the "chosen people" to Treblinka', the records of ghetto populations in Poland, as proof of 'a fairly good rough figure of Polish Jews' sited in the relevant camps prior to their 'liquidation', and the 'Korherr Report', as evidence of the deportation of around 1.42 million Jews from the Eastern provinces for 'Sonderbehandlung' (special treatment) by March 1943.⁵¹

Contemporaneous material was also foregrounded to counter Irving's accusation that the mass murder of Jews in gas chambers had been a British invention. In particular, Foreign Office files demonstrated that the flow of information of mass gassing passed into London from external sources. Foregrounded from these files was a report forwarded to the British Foreign Office in August 1942, from the 'Secretary of the World Jewish Congress', as evidence that the US and UK governments had been duly informed of a plan to exterminate Jews in occupied Nazi territories, which included the possible use of prussic acid.⁵² Additional reports had also been sent to London, in August 1943, that informed the Foreign Office of the deportation and extermination of Polish civilians, specifically from the regions of Lublin and Bialystok, including their systematic killing in gas chambers.⁵³ Evans testified that the 'Head of the Psychological Warfare Executive' (PWE), Victor Cavendish-Bentinck, had referred to a lack of direct evidence in the reported 'atrocities stories' at this stage, but insisted that it was not the same as stating that gas chambers did not exist, or that the use of such 'stories' as propaganda from 1942, by the British PWE, equated to their invention.⁵⁴

In place of 'overt documentary evidence' relating to all extermination camps, 'coupled with the lack of archeological [*sic*] evidence' of Belzec, Sobibor and Treblinka, the main form of evidence of the numbers gassed at these sites was eyewitness testimony.⁵⁵ In addition to the perpetrator and survivor testimony utilised by Robert Jan van Pelt as evidence of mass gassing at Auschwitz-Birkenau (chapter six), the perpetrator testimony of Kurt Gerstein (Waffen SS Hygiene Institute) was foregrounded as proof of the gassing

⁵¹ HRIRH, Day 3, pp159-169; Day 17, pp12-13, 14, 74-75, 79-85, 131-134, 186-187, 189-190, 205-206; Day 26, pp83, 85, 89-93. Ibid, (TB) T2, 'Judgement', para. 6.95.

⁵² Ibid, Day 5, pp172-174; Day 29, pp108-112.

⁵³ Ibid, Day 20, pp45-54; Day 29, pp116-122.

⁵⁴ Ibid, Day 20, pp45-54.

⁵⁵ Ibid, (TB) T2, 'Judgement', para. 6.80. Ibid, Day 17, pp151-152.

of thousands of Jews daily at Belzec and Treblinka.⁵⁶ Browning agreed that: 'As with any body of eyewitness testimonies, there are errors and contradictions as well as both exaggerations and apologetic obfuscation and minimisation'.⁵⁷ However, he insisted that the testimonies converged to establish 'beyond reasonable doubt what took place in those camps'.⁵⁸

Two forms of secondary source material were likewise foregrounded as evidence of both specific and total numbers of Jewish victims. In particular, pre-war and post-war census records revealed a pre-1939 Jewish population in Poland of around 3.3 million and in the Soviet Union of 5 million, but by 1945 only 300,000 survivors in the former and 3 to 4 million in the latter.⁵⁹ Browning also testified that a series of German court investigations in the 1960s had recorded the agreement of both Defence and Prosecution teams that the numbers of Jews gassed at the 'Operation Reinhard' camps had totalled 550,000 at Belzec, 200,000 at Sobibor and 900-950,000 at Treblinka, with an additional 150,000-250,000 gassed at Chelmno, based, primarily, on the rigorous calculations of German historian Wolfgang Schafler.⁶⁰ As Browning claimed:

So, in terms of Holocaust victims from Poland westward, we are not floundering ... Where historians differ and where you get this figure of between 5 and 6 is because we do not have those figures for the Soviet Union.⁶¹

Consequently, Richard Rampton concluded for the Defence, that the numbers of Jews murdered at all stages of the Holocaust had included the mass shootings of 1.5 million Russian and Baltic Jews, after the invasion of the Soviet Union in the autumn of 1941 to 1942, the gassing of 2.6 million Jews in Poland and the Warthegau from December 1941 to 1943, and the gassing of 1.12 million Central, Southern and Western European Jews

⁵⁶ Responsible for delivering Zyklon-B to the camps for use as a fumigation agent. Ibid, Day 17, pp162, 167-178.

⁵⁷ Ibid, p152.

⁵⁸ Ibid, p153.

⁵⁹ Ibid, pp13, 191, 192, 198.

⁶⁰ Through a comparison of pre-war populations, then ghetto populations, and then the numbers sent to work camps or transportations to the various 'Operation Reinhard' camps, Ibid, pp17, 19-21. Browning accepted that the figures were less certain for smaller towns than, for example, Lodz, and therefore 'we do not have a day by day deduction or a train by train calculation, but we do have statistics of what the populations were there before the whole operation began', Ibid, p20.

⁶¹ Ibid, p13.

deported to the East from autumn 1941, mainly at Auschwitz-Birkenau, until 1944.⁶² This catalogue of murder had totalled five to six million 'innocent lives'.⁶³

A range of both disparate and mutual facts were subsequently established in accordance with those 'in issue'. In Israel, the Judges accepted that the indictment did not include exact totals of victims, but 'speaks of millions of Jews exterminated, mostly in the extermination camps, and hundreds of thousands by the Operations Units'.⁶⁴ They likewise accepted that 'precise figures' were only available in a limited range of documentation, while statistical data was incomplete.⁶⁵ Consequently, they did not attempt:

to give specific figures even approximately but confine ourselves to a general finding, that the extermination of millions has been proved, and that ... according to demographic calculations made by Professor Baron ... there is no doubt that the total number of victims of the Final Solution was about six million.⁶⁶

Eichmann had also accepted this final figure, and, as the Judges found, 'he probably knows the details better than any other person, because it was in his Section that secret statistical data were [*sic*] collected on the progress of the extermination programme'.⁶⁷ The Judges also found that entire Jewish communities across countries had been 'completely wiped out', and that Polish Jewry had been annihilated from its pre-1939 number of '3,300,000 souls' to a 'remnant of some 70,000'.⁶⁸

On Eichmann's cognisance and responsibility for the deaths of 'about six million' Jews, the Judges confirmed that he had admitted under interrogation:

... I said to the men and to the soldiers. For five year's millions of the enemy attacked Germany. Millions of enemies were also annihilated, and according

⁶² Ibid, Day 32, p17.

⁶³ Ibid, p18.

⁶⁴ AET, Vol. V, p2172.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

to my estimate, the War also cost five million Jews. Now all this is over, the Reich is lost. And should the end come now, I said, I shall also jump into the pit.⁶⁹

However, Eichmann had been categorical during his defence that he had stated instead:

The end has come, it is all over. The collapse is imminent ... therefore, if this is the end of the Reich, then I shall gladly jump into the pit, knowing that in the same pit there are five million enemies of the state.⁷⁰

Although Eichmann had insisted that the 'enemies' had not related to European Jewry, but to the then advancing Russians and the fleets of the Allied bombers, the Judges found that 'this explanation is nothing but a lie'.⁷¹ Rather, they accepted that not only had Eichmann expressly mentioned, both during interrogation and in his testimony to the court, the five million Jews killed 'in one breath with his readiness to "jump into the pit"', but a number of witnesses had testified to the same facts and sentiment (Grell, Hoettl, Wisliceny).⁷² The Judges accepted that it was not explained to them on what grounds Eichmann had calculated the five million figure, but found that it 'stands to reason, that the Accused spoke at the time about the front on which he was active and where his listeners were active, i.e., the battlefield against the Jews'.⁷³ Moreover, the Jews 'were considered enemies of the Reich, in the language of the Nazi propagandists, which the Accused adopted in its entirety'.⁷⁴ The Judges also found that, in accordance with Wisliceny's statement, Eichmann had 'expressed satisfaction at the death of millions of Jews, and declared that the very thought would make it easier for him to "jump into the pit"'.⁷⁵ They likewise found that this 'satisfaction' was 'sufficient to indicate his true attitude to the business of murder in which he had been engaged'.⁷⁶ However, while Hausner had argued that the five million figure referred to by Eichmann had not included the victims of the

⁶⁹ Ibid, p2202.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid, p2203.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

Operations Units, the Judges found that 'it is difficult for us to be definite on this point'.⁷⁷ They ultimately found Eichmann guilty of count 1 and convicted him:

of causing the death of millions of Jews from August 1941 to May 1945 in Germany, in the territories of the Axis states, in the occupied territories of Germany and the Axis states and in the areas subject to the authority of Germany and the Axis states, with the purpose of implementing the plan known as the Final Solution of the Jewish Question.⁷⁸

As with the previous historiographies examined, the privacy accorded to jury deliberations prevents academic and public scrutiny of any facts established on the total number of Jewish victims in either of the Zündel trials. However, in their 'charge to the jury', both Judges reminded the respective courtrooms of the evidence submitted and/or testified in support of the murder of a total number of between five and six million Jewish citizens. In 1985 Judge Locke specifically observed that according to the Crown:

... there is evidence that millions were murdered in extermination camps through a variety of methods including hanging, shooting, starvation, overwork, exposure to the elements and gassing. That is the Holocaust.⁷⁹

He reminded the jury that this evidence, 'including census statistics of certain countries, ghetto figures, Gestapo figures', had documented a Jewish population of 9.5 million living in Europe prior to World War Two, with the vast majority, over six million, residing in Poland and the Soviet Union.⁸⁰ Although Hilberg had acknowledged that 'allowances must be made for errors in census figures which ... depending on various countries, are unreliable', Locke reminded the jury that contemporaneous sources, including the 'Korherr Report', had recorded 'how many people were under German control at various periods of time, and the Germans published these figures, the death figures'.⁸¹ Locke likewise reminded the jury that Encyclopaedias had been employed as evidence of the

⁷⁷ Ibid, p2172.

⁷⁸ Ibid, p2205.

⁷⁹ ZT 1985, Vol. XXI, p54.

⁸⁰ Ibid, p91.

⁸¹ Ibid, pp91-92, 97.

numbers subsequently murdered across Europe.⁸² Consequently: 'The numbers [5.1 million] were submitted to you by Mr. Griffiths' who had concluded that DSMRD was a 'lie' produced at great contrast to the documentation.⁸³

In 1988 Judge Thomas reminded the jury from the outset that he had judicially noted that:

the mass murder and extermination of Jews in Europe by the Nazi regime during the Second World War is a historical fact which is so notorious as not to be the subject of dispute among reasonable persons.⁸⁴

As already highlighted, no specific numbers were included in this fact since the total number of Jews murdered was 'in issue' at the trial. Thomas subsequently reminded the jury that Browning had studied three sets of contemporaneous German statistics and estimated that 10 million Jews had resided in Europe at 1940. 'Therefore, six million could have been exterminated'.⁸⁵ In terms of precise figures murdered, Thomas further reminded the jury that Hilberg had calculated in 1985:

slightly in excess of five million Jews were killed: 3 million in the camps, most by gassing, 1.3 to 1.4 million Jews died as a result of the systematic shootings conducted by the Einsatzgruppen ... the rest were accounted for by deaths in the ghettos.⁸⁶

These figures had been corroborated by Browning, who reaffirmed that a total of 1.4 million Jews had been killed by the Einsatzgruppen, while gassing apparatus at the extermination camps of Belzec, Chelmno, Sobibor, Treblinka, and 'on a larger scale' at Auschwitz-Birkenau, had murdered 'most of Polish Jewry' by the end of 1942.⁸⁷ Thomas also reminded the jury that Hilberg, in 1985, had specifically made reference to the annihilation of Polish Jewry and had documented its diminution from 3.35 million in 1939 to only 50,000 in 1945.⁸⁸ In terms of total deaths, Thomas finally reminded the jury that:

⁸² Ibid, p215.

⁸³ Leading Council for the Crown in 1985. ZT 1985, Vol. XX, p4651.

⁸⁴ ZT 1988, Vol. XXXVI, p10375.

⁸⁵ Ibid, p10426.

⁸⁶ Ibid, p10422.

⁸⁷ Ibid, pp10427, 10428.

⁸⁸ Ibid, p10422.

Dr. Browning estimated between 5 and six million Jews died as a result of the systematic execution—as a result of the plans of the Nazi regime. Hilberg suggests 5.1 million.⁸⁹

Of course, regardless of the evidence and figures highlighted, and even reaffirmed, by the Judges, the total figure of Jewish victims authorised by the respective juries, if indeed part of their decision-making, remains unknown.

In London in 2000 Judge Gray detailed a number of facts relating to the numbers of Jews murdered at various stages of the genocide. Consequently, in reference to the mass shootings, he found that:

... the evidence, principally in the form of reports by the *Einsatzgruppen*, appears to establish that between 500,000 and 1,500,000 people (including a large proportion of Jews) were shot by those groups and by the auxiliary *Wehrmacht* units seconded to assist them.⁹⁰

However, although noting that the Defence had suggested that a larger number of Jews had been shot, he ruled that: 'I do not see that, in the context of this case, any useful purpose would be served by my attempting to assess whether the evidence supports a higher figure'.⁹¹ When calculating the numbers of Jews systematically murdered by gas, Gray acknowledged evidential barriers to 'accurate' findings.⁹² However, he accepted that thousands had been murdered in mobile gassing facilities, but did 'not intend to explore any further the evidence as to the number of those killed in vans'.⁹³ He further ruled that Irving had 'ultimately' accepted that the 'Reinhard camps' had been 'Nazi killing centres', in which hundreds of thousands of Jews had died.⁹⁴ Therefore, while Irving continued to dispute the figures provided by the Defence on gassing at these camps, Gray concluded

⁸⁹ Ibid, p10431.

⁹⁰ HRIRH, (TB) T2, 'Judgement', para. 13.56.

⁹¹ Ibid.

⁹² Ibid, paras. 6.80, 8.21-8.22.

⁹³ Ibid, para. 13.60.

⁹⁴ Including Chelmno and Semlin 'for convenience', Ibid, paras. 13.61, 13.63.

that 'given the huge number of deaths accepted by Irving, little appears to me to turn on the disparity in their respective estimates'.⁹⁵

Likewise, on the subject of Auschwitz-Birkenau, Gray found that the calculation of accurate figures of those murdered in gas chambers was 'compounded by the undoubted fact that many inmates died from disease and above all in the typhus epidemics which from time to time ravaged the camp'.⁹⁶ He also accepted Irving's argument that, over time, official numbers of those killed at Auschwitz-Birkenau had varied between 1.1 million and 4 million.⁹⁷ Furthermore, debate had ensued amongst the Defence's own experts over the proportion of Jews gassed from their figure of almost 1 million deaths in the camp.⁹⁸ However, as found in chapter six, Gray accepted that 'the convergent evidence relied on by the Defence' indicated that 'no objective, fair-minded historian would have serious cause to doubt that ... gas chambers at Auschwitz ... operated on a substantial scale to kill hundreds of thousands of Jews'.⁹⁹ Linked to Auschwitz-Birkenau, Gray also found that Irving had failed to provide evidence that British intelligence had invented the story of gas chambers for propaganda purposes.¹⁰⁰ Rather, he found that 'the story was provided to the Foreign Office by the secretary of the World Jewish Council, who in turn had received it from a source in Berlin'.¹⁰¹ Gray further found that there was no evidence to prove that once known the British intelligence services had made propaganda use 'of the story'.¹⁰²

It is notable that Gray appeared cautious when making judgements on the numbers of Jews murdered at each stage of the genocide. It is also notable that, although Gray had referenced the accepted definition of the Holocaust as including the mass murder of five to six million Jews, he did not authorise a total figure in his 'Judgement'.¹⁰³

⁹⁵ Ibid, para. 13.63.

⁹⁶ Ibid, para. 8.22.

⁹⁷ Ibid, para. 8.23.

⁹⁸ Peter Longerich testified that around 865,000 had been gassed and around 100,000 killed through disease, starvation and forced labour, HRIRH, Day 26, p59, while Gray claimed that he was 'not sure' that Robert Jan van Pelt had arrived at the same conclusion, Ibid.

⁹⁹ Ibid, para. 13.91.

¹⁰⁰ Ibid, para. 13.99.

¹⁰¹ Ibid.

¹⁰² Ibid.

¹⁰³ Ibid, para. 8.3.

The comparative reconstruction of the total number of Jewish victims across the Eichmann, Zündel and Irving trials therefore confirms the presentation of varying accounts in accordance with their case-specific content and form. Consequently, historiographical and legal focus ranged from Eichmann's cognisance of, and responsibility for, the deaths of millions of Jews to the rebuttal of claims of exaggeration, feasibility and invention. It also confirms that an evidential base was determined and legally authorised in accordance with the demands of each case. Once again, mutually shared items of evidence were minimal, and restricted to copies of the Einsatzgruppen reports, as probative of the numbers of Jewish civilians murdered by mass shootings, and secondary sources of census data, as probative of the existence and then destruction of European Jewry, predominantly in Poland, between 1939 and 1945. The most discrete data-stream was submitted in 1961, in accordance with its unique focus on Eichmann's cognisance and witnessed celebration of the death of millions of Jewish civilians once faced with Germany's military defeat. Yet again, Eichmann was marginalised in the later trials as the rebuttal of denier tactic foregrounded numerical evidence of both pre-and-post-1939 European Jewish populations.

It is clearly shown that a range of discrete numerical facts were established in accordance with the demands of each legal case. However, they were not contradictory. A broad consensus emerged across all four trials on the size of the European Jewish population prior to 1939, the mass murder of consistent numbers of its citizenry at each stage of the genocide, the resulting total decline of European Jewry at 1945, and, in particular, the slaughter of Polish Jewry. The numbers authorised may have been approximations at each trial, as well as variously revised, but a total figure of over five million 'innocent lives' persisted between 1961 and 2000. However, despite the consistency of this total figure, the oft-quoted 'six million' deaths foundational to Holocaust historiography (and collective memory) was not specifically authorised at any of the four trials. Even when most assertively cited by the Prosecution in Israel the Judges did not sanction this exact figure, while, as witnessed in the later trials, disputes still ensued amongst historians over the totality of between 5 and six million deaths. Of course, when faced with the murder of millions of civilians surely a precise figure is immaterial? However, for Raul Hilberg: 'The numbers matter' as each discrepancy relates to unaccounted-for Jewish lives.¹⁰⁴ Conversely, since the gaps largely relate to a lack of numerical evidence of Jews

¹⁰⁴ D.D. Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: Granta Books, 2002), pp303, 304.

remaining in the then Soviet Union, the totality of deaths could be even higher than six million.

Ambiguity over the exact figures was acknowledged in all four trials, but was most visible in the London judgement in 2000. Although Judge Gray accepted Evans' definition of the Holocaust, including the mass murder of “between 5 and 6 million Jews”, he more cautiously found mass shootings of between 500,000 to 1.5 million, the killing of 'thousands' in mobile gas vans, the gassing of 'hundreds of thousands' in the 'Operation Reinhard' camps, and again 'hundreds of thousands' at Auschwitz-Birkenau.¹⁰⁵ In other words, if Gray's figures are taken at their lowest possible configuration, the number of Jewish victims could total around 1 million. Consequently, although the limitations surrounding the calculation of victims of genocide were acknowledged as early as 1961, the 'Judgement' in 2000 arguably opened-up the notorious fact of six million deaths to continued challenge by Holocaust deniers.

It is clearly demonstrated that the narratives authorised were 'cooked' in accordance with the focus on Eichmann's cognisance and complicity in 1961, the finding of a pre-war Jewish population in Europe, from which six million deaths was numerically feasible, in 1985, 1988 and 2000, and the invention of gas chambers at Auschwitz-Birkenau by the British government, again in 2000. Rather paradoxically, despite the focus on the murder of millions of human beings, the voices, as well as the violence, behind the figures were once again relegated to background noise in the later trials. Likewise, although understandable given its annihilation, the numerical impact of the Holocaust on Jewish communities across Europe was masked by the focus on Poland. But, it is also clear that, regardless of crucial omissions in the narratives authorised, they were empirically accountable and 'truth-full' in content in accordance with the demands of each legal case. With quantitative evidence at its core, the consistency of figures not only implied past statistical constraint but it was explicit in the census data utilised across the discursive contexts of the Eichmann, Zündel and Irving trials. However, despite the stability of the figures presented, the reconstruction of the foundational fact of six million Jewish victims yet again exposed the primacy of preconceived and prefigured narratives in each courtroom that both 'floated free' of and governed their numerical content.

¹⁰⁵ HRIRH, (TB) T2, 'Judgement', paras. 8.2, 13.56, 13.63, 13.91.

Conclusions

As a study of historiography in general and the history-law relationship in particular this thesis identifies a number of key findings. History is a 'made-up' discourse or genre about the past, with the epistemic authority of its prevailing Rankean-based content and form justifiably challenged. Although initial disputes among historians and theorists have somewhat waned since the 1990s, and despite acknowledged sites of practical and theoretical amalgamation, generic distinctions still remain between 'empiricist-analytical' and 'narrative-linguistic' explanations of history-making. As shown in chapter one, four key distinctions are identified. First and foremost, although both genres accept that past realities existed, dispute remains over the presence of the past when narrated into historiography. Consequently, history has either a 'matching function' *with* the past or a 'making function' *as* the past.¹ Secondly, although both genres agree that empirical accuracy and accountability is foundational to historiography, distinctions remain over the primacy of the past traces or the fictive form. Therefore, historical knowledge is either bounded by its primary sources or preconceived and prefigured into familiar plot lines that 'float free' of their content.² Thirdly, both genres accept the netted authorship of all histories but disputes remain over the mechanisms of adjudication. Verification of not only empirically accurate and accountable but convincing, credible and even truthful accounts/representations is therefore sited in either evidential constraint or the historian's affiliated interests and perspectives. Finally, although both genres recognise that the once-acclaimed history/fiction division is an oversimplification, distinct differences remain over history's realist authority and esteem. Historiography is therefore either a privileged form of knowledge about 'the past' or no more 'truth-full' than other genres of history-making. Consequently, the concept and judgement of 'good history' in its academic form remains contested.

In recognition of the 'unique relationship' of collaboration between historians and jurists, but more specifically the contrasting opinion on the legitimacy of bringing historical inquiry into the courtroom, the empiricist and narrativist theories of 'good history' were then applied to the history-law relationship in Holocaust-related trials. As background and introduction to the rationale of collaboration chapter two compared acclaimed

¹ Dan Stone, *Constructing the Holocaust: A Study in Historiography* (London: Valentine Mitchell, 2003), p229.

² Keith Jenkins, *Re-thinking History* (London: Routledge, 1991), pp5-6.

similarities of craft with the distinctive objectives, practices and utility defining the history and law disciplines, specifically the Anglo-American genre. In theory contradictions were found at all sites of assumed symbiosis. A study of existing literature likewise reaffirmed a range of contradictions when examining the history-law relationship in practice. As chapter two also found, in trials related to the Holocaust since the International Military Tribunal (1945-1946), the history-law relationship has proven to be an inherently flawed and dysfunctional methodology. Consequently, a record of acclaimed disciplinary reciprocity is contrasted by a 'consensus of critique' detailing a history in which the Holocaust has been consistently misappropriated and reduced to background noise, its crimes diminished, its survivors derided, silenced and inherently 'racialised', its perpetrators abstracted and even civilised and its histories 'cooked'.³ As shown in chapter three, primary and secondary research of four specific trials, the criminal cases of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the libel case instigated by David Irving (2000), reaffirmed this critique. As chapter three also found, a close reading of the daily recorded transcripts of each of these four trials disclosed that the greatest barrier to comprehension of the complexities and facts of the Holocaust was the legal form itself. Implicit, therefore, is that the history-law relationship is not a model of 'good history' as conventionally authorised.

The findings of the 'consensus of critique' are long-standing. However, with the exception of a few vocal historians, Henry Rousso in particular, there is little sign of disciplinary opposition to future collaboration as cases relating to the Holocaust continue to be brought to trial.⁴ To help understand this persistent trust in the history-law relationship specific methodological omissions found in the current literature were redressed. Consequently, attention was shifted away from the historical, legal, moral and political contexts and insights underpinning the existing 'consensus of critique' (chapter two) and placed instead on the method and findings of historiographical reconstruction. The evaluation of collaborative competence was also transferred from familiar perspectives, of such as legal propriety, the securing of justice, pedagogy and 'representational efficacy', and judged

³ Richard Ashby Wilson, *Writing History in International Criminal Trials* (Cambridge: Cambridge University Press, 2011), pp1, 169; Leora Bilsky, 'The Judge and the Historian: Transnational Holocaust Litigation as a New Model', *History and Memory*, 24:2 (2012), p122. Didi Herman, 'I Do Not Attach Great Significance To It: Taking Note Of 'The Holocaust' In English Case Law', *Social and Legal Studies*, 17:4 (2008), pp427-452.

⁴ Henry Rousso, *The Haunting Past: History, Memory, and Justice in Contemporary France*, trans. by Ralph Schoolcraft (Philadelphia: University of Pennsylvania Press, 2002).

instead through empiricist and narrativist demands of 'good history'.⁵ Likewise, rather than focusing on the (mis)use of the Holocaust in individual trials, comparative analysis was employed as a means of both investigation and assessment across courtrooms. Informed by empiricist and narrativist genres of historiography the aim was to answer four questions relevant to their demands of 'good history': (1) although governed by discrete legal contexts did Anglo-American practice determine and establish empirically accountable evidence and facts *of* (empiricist) or *as* (narrativist) the Holocaust? (2) although case-specific, were the narratives authorised 'truth-full' in content? (3) although variously filtered and shaped were they also compatible and consistent across trials? and (4) although legally probative were the facts and interpretations limited by the past traces (empiricist) or preconceived and prefigured by narratives that 'floated free' of their content (narrativist)? Ultimately, did the history-law relationship operate as a 'matching function' *with* the past (empiricist) or a 'making function' *as* the past (narrativist), in this case relating to the Holocaust?⁶

Utilising the criminal cases of Adolf Eichmann and Ernst Zündel and the libel case instigated by David Irving as its comparative base, chapter three confirmed that four historiographies integral to the Holocaust were common to each courtroom: the evolution of extermination policy (chapter four), the Einsatzgruppen mass shootings 1941-1942 (chapter five), homicidal gas chambers at Auschwitz-Birkenau (chapter six) and the total number of Jewish victims (chapter seven). These subjects formed the research focus of the history-law relationship in practice. Organised thematically, and once extracted from the legal form, a range of findings were identified that provide original insight into the judicial processing of historical inquiry in general and contemporary reconstruction of specific historiographies in particular. Most obviously, it was expected, and reaffirmed by each thematic chapter, that diverse accounts/representations of the four historiographies would be foregrounded in accordance with the 'facts in issue' governing each trial. Consequently, in 1961 the focus was on Eichmann's authority and role across all stages of the 'Final Solution' reconstructed at the trial. In the later courtrooms, the authority and continued command of Adolf Hitler was reinstated into the relevant historiographies, as well as a wider focus on top-down and systematic leadership of extermination policy in general and the Einsatzgruppen mass shootings in particular.

⁵ Devin O. Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History, and the Limits of the Law* (Cambridge: Cambridge University Press, 2006), p288.

⁶ Stone, *Constructing the Holocaust*, p229.

Greater attention was also awarded to the genocidal intent and practices of Auschwitz-Birkenau in 1985, 1988 and 2000, with its murder and violence largely obscured within mechanistic narratives of gassing and incineration capacity and process. Likewise, the horror and incredulity expressed and witnessed in 1961 at the systematic murder of up to six million Jewish citizens of Europe was submerged within calculations of its numerical feasibility.

Each thematic chapter also confirmed that an evidential base was both determined and established in support of the various accounts/representations presented. This base differed in content, form and volume across subject and trial and was both mutually and variously interpreted. Through comparative analysis, each chapter specifically identified the breadth and diversity of evidence both available to historians and jurists and found to be of probative weight across historiographical subject and legal context. It also demonstrated a growing reliance on historian expertise and testimony, acting as evidence by proxy of both documentation (1985, 1988) and eyewitness testimony (1988, 2000). Despite the volume of documentation submitted, in the Eichmann and Irving trials in particular, it was surprising that very few items of evidence were mutually foregrounded across all four courtrooms regardless of the historiography reconstructed. The most common were the Einsatzgruppen reports, Hans Frank's diary and Heinrich Himmler's speech to SS officers in Posen on 4 October 1943. Other documents, such as Hitler's instructions to General Jodl, dated 3 March 1941, the 'Wetzel memoranda' of October 1941 and the 'Wannsee Protocol', dated 20 January 1942, were similarly shared by more than one trial but not necessarily foregrounded as probative evidence across all four courtrooms. Despite the volume submitted in the Eichmann and Irving trials, but also the privileged status awarded to documentation by both history and Anglo-American law, it was also surprising that eyewitness testimony remained an essential source of evidential proof. In particular, the post-war testimonies of Eichmann and Rudolf Höss, but also Kurt Gerstein, remained foundational to knowledge of the evolution and perpetration of the use of gas as a method of mass murder. Likewise, survivor testimony remained equally foundational to knowledge of the mass shootings in the Eastern Occupied Territories (1961) and life, survival and death in Auschwitz-Birkenau (1961, 1985, 1988, 2000). Indeed, the similarity, and therefore corroboration, of testimony, both perpetrator and survivor, was striking across all four trials and especially when detailing the murder process at this camp. Moreover, whether testifying directly to court or through historian

evidence or report, the survivor voice continued to be heard up to 2000, although not without question in the later 'procedurally ordinary' trials.⁷

It was also expected, and again demonstrated by each thematic chapter, that discrete facts would be established by each trial and adjudicated as 'true' in accordance with those 'in issue'. However, less expected was that, with few exceptions, they were not incompatible. Each chapter also found that the narratives foregrounded at each trial were informed by a historiographical record that, again with few exceptions, was not inconsistent. Essentially, each chapter provided original insight into not only the detail and reach of each surrounding record but the consistency of its content and interpretation between 1961 and 2000. Moreover, again with few exceptions, the surrounding record and narratives reconstructed were consistent with the content of established scholarship of the Holocaust prevailing at the time of each trial and remain familiar in present-day historiography. The elevation of Eichmann's authority at all stages of the 'Final Solution' in 1961 was the most obvious exception. But, as shown in chapter three, prevailing scholarship was reflected in its reaffirmation of a grand narrative of the intentional extermination of European Jewry and the framing of its key perpetrator as not only criminal but depraved and somehow distinguishable from the majority of humanity. Similarly, the shift of focus in Holocaust scholarship after 1961, from 'intention' to 'function' as an explanatory framework for the transgression to extermination, was clearly represented in the later trials. Likewise, historians' debates over the precise dating of this transgression was not only reflected in the later trials but clearly represented in 2000 through the evidence of Christopher Browning and Peter Longerich. The later trials also reflected the foregrounding of Auschwitz-Birkenau since 1961 and augmented the expanding scholarship relating to the camp. Consequently, despite the dominance of Anglo-American case and practice in the courtroom, the transference of Holocaust scholarship to non-historians, and, more specifically in the Zündel trials, the diminution of both history and its experts, the historian's voice and established scholarship not only reached the higher standards of legal proof but maintained influence over the content of all four historiographies.

⁷ Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (London: Yale University Press, 2001), p226.

Crucially, each thematic chapter demonstrated the reconstruction of not only empirically accountable, but, since based on established facts, 'truth-full' narratives of each historiography in accordance with the demands and adjudication criteria of legal case and context. Although including discrete facts and interpretations in accordance with those 'in issue', these narratives ultimately reaffirmed the truth 'beyond reasonable doubt' (Eichmann) or 'on the balance of probability' (Irving) of a complex, pervasive and systematic policy of extermination, initiated and continuously authorised by Hitler and perpetrated through political, professional and state infrastructures across occupied and influenced Europe (chapter four), the central instruction and subsequent discriminate shootings of up to 1.5 million predominantly Soviet Jewish civilians by the Einsatzgruppen in the Eastern Occupied Territories between June 1941 and December 1942 (chapter five), the intentional homicidal utility of gas chambers at Auschwitz-Birkenau, and the subsequent murder, desecration and physical removal of hundreds of thousands of predominantly Jewish men, women and children up to 1944 (chapter six), and the total genocide at 1945 of between five and six million European citizens, predominantly Polish, simply because they were identified as Jews (chapter seven). These same narratives were likewise foregrounded at the Zündel trials as probative by Judges Locke (1985) and Thomas (1988), although the exact findings remain known only to the respective juries. As both empirically accountable and 'truth-full', these narratives were not only adjudicated as credible accounts/representations in accordance with the demands of legal case and context but met the criteria of both 'empiricist-analytical' and 'narrative-linguistic' genres of academic historiography detailed in chapter one. Consequently, despite being a flawed methodology, at the level of historiographical reconstruction the history-law relationship in the Eichmann, Zündel and Irving trials proved capable of being a model of 'good history' in accordance with the demands of its academic form.

However, as also detailed in chapter one, distinctive to these genres of academic historiography is the primacy of the past traces (empiricist) or the discursive form (narrativist). The consistency of both facts and foregrounded narratives across discrete legal contexts indicates an instrument of stability in operation, or at least constraint, which, according to empiricist theory, is sited in the content of the past traces. Subsequently, the consistency of both facts and narratives across the Eichmann, Zündel and Irving trials indicates that the history-law relationship is not only a model of 'good history', but, in accordance with empiricist theory, operates as a 'matching' function *with* the relevant past.

And yet, as shown in the thematic chapters, factual and narrative consistency does not explain the adaptability of the evidential base in accordance with the extra-historical demands of each legal case and context. It also does not explain why items of evidence found to be foundational in 1961 were either ignored at the later trials or afforded alternative explanations. Conversely, it does not explain why the single piece of evidence of Hitler's continued cognisance of the Einsatzgruppen mass shootings (Heinrich Müller's instruction of 1 August 1941) foregrounded in 2000 was not mentioned in 1961, 1985 or 1988. Factual and narrative consistency likewise does not explain why the Einsatzgruppen reports had both extended their evidential reach and status between 1961 and 2000 beyond the actual shootings and resulting 'blood bath' to proof of official policy (1985, 1988, 2000), Hitler's complicity (2000), standardised killing practice (2000) and the focus on Jewish civilians as intended target (1985, 1988, 2000).⁸ Nor does it explain the foregrounding of Auschwitz-Birkenau since 1961 and the evidential focus on its gassing and incineration capacity and process.

The ability of the past traces to accommodate and support a variety of equally credible interpretations is inherent to academic historiography and acknowledged by the advocates of both 'empiricist-analytical' and 'narrative-linguistic' genres. Changes in evidential focus and reputation are likewise inherent to academic historiography and equally accepted by both genres. However, when evidential content, interpretation and reputation is so obviously determined by the demands of an extra-historical perspective, in this case various legal cases, then they are clearly being preconceived and prefigured in accordance with narratives that 'floated free' of the relevant past traces.

Factual and narrative consistency also masks the ambiguity of the past traces. Although rarely referenced in the Eichmann trial, evidential fallibility was intentionally foregrounded in the later courtrooms as a deliberate strategy and tactic of Holocaust denial. As shown in each thematic chapter, although regularly raised as an issue by Zündel's lawyer, Douglas Christie, in 1985 and 1988, evidential ambiguity and fallibility was specifically raised and verified by Judge Gray in 2000. Hence, in what would have been unimaginable to the courtroom in Israel, Gray accepted that the documentary

⁸ *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (Jerusalem: Rubin Mass Ltd., 1992), Vol. I, p93, Newcastle University Library. All proceeding references to this trial will be prefixed by AET.

evidence implicating Hitler in the command of the Einsatzgruppen was 'sparse', and in the gassing programme 'not wholly irrefutable'.⁹ On the subject of homicidal gas chambers at Auschwitz-Birkenau he accepted that not all of the evidence 'is altogether reliable' and this applied 'with particular force to the evidence of the eye-witnesses'.¹⁰ Gray likewise acknowledged that 'the documentary evidence, including the photographic evidence, was capable of more than one interpretation'.¹¹ Furthermore, he found 'few overt references to gas chambers at Auschwitz in contemporaneous documents', while 'the physical evidence remaining at the site of Auschwitz provided little evidence to support the claim that gas chambers were operated there for genocidal purposes'.¹² Although Gray ultimately found that a 'convergence of evidence' far outweighed the vulnerabilities of individual categories, his formal sympathy towards Irving's critiques both misrepresented common historiographical practice and clearly exposed the disciplinary disparities relating to the law's demand for evidential stability (chapter two).¹³ In effect, Gray's clear unmasking of the circumstantial foundations of knowledge integral to Holocaust historiography contradicted the acclaimed certainty of his 'Judgement' (chapter three). But, crucially, the evidential ambiguity of the past traces reaffirmed both the necessity and the primacy of preconceived and prefigured narratives, in these cases predominantly legal, that floated free of their content.

Factual and narrative consistency also masks the various revisions authorised across the four trials. Of course, revisions of both content and interpretation are expected when determined by discrete 'facts in issue'. The most obvious revision was the elevation of Eichmann at all stages of the 'Final Solution' in 1961 and the subsequent marginalisation of his role in the later trials. As posited by Eichmann's lawyer, Robert Servatius, the explicit conclusion of the Prosecution's case in 1961 was that Eichmann 'rather than Hitler, Himmler or Goering was the great culprit'.¹⁴ In contrast, the foregrounding of the leadership of Hitler in 'converting Nazi ideological thought into concrete action ... ' was

⁹ *David John Cawdell Irving v Penguin Books Limited and Deborah E. Lipstadt* (2000), Trial Bundle T2, 'Judgement', paras. 6.27, 13.67, Holocaust Research Institute, Royal Holloway, University of London (HRIRH). All proceeding references to this trial will be prefixed by HRIRH, and, where appropriate, by their Trial Bundle (TB) letter and number.

¹⁰ *Ibid*, para. 7.75.

¹¹ *Ibid*.

¹² *Ibid*, paras. 7.127, 7.118.

¹³ *Ibid*, paras. 7.75, 13.75, 13.80, 13.91.

¹⁴ AET, Vol. V, p2046.

reinstated into Holocaust historiography in 1985 and 1988 but especially in 2000.¹⁵ As already noted, likewise obvious was the revision of the certainty of Hitler's antisemitic and premeditated 'intention' in 1961 by the more convoluted and radicalised decision-making of 'function' as explanatory framework of extermination policy at the later trials. As specifically found in chapter four, acceptance of a direct order of extermination by Hitler in 1961 had, by 1988 and 2000, translated into 'signals' or 'incitements' from Hitler.¹⁶ Similarly, an unquestionable acceptance of top-down leadership in 1961 had developed into a greater complexity and uncertainty of decision-making and evolution in 1985, 1988 and 2000. As found in chapter five, the absence of the findings of the 'regional turn' in 2000, relevant to the escalation of the mass shootings of the Einsatzgruppen 'on the ground', was more of an omission than a revision in a trial that intended to prove Hitler's, and wider central and systematic, authority over all aspects of extermination policy.

But the most obvious revision was the transference of extra-historical (political) and therefore legal focus away from the criminality of the individual perpetrator in 1961 to the rebuttal and unmasking of Holocaust denier strategy, tactic and pseudo-scholarship by the 1980s.¹⁷ Consequently, in the later trials the past traces of the genocide were filtered and shaped by not only Anglo-American law and specific 'facts in issue' but by a 'miasma of denial' that would have been inconceivable in 1961.¹⁸ More specifically, as shown in chapter four, the undoubted leadership and continued antisemitism of Hitler in 1961 had to be proven anew by the 1980s. As shown in chapter five, the disgust and incredulity at the 'slaughter-house on wheels' in 1961 was relegated to background noise within narratives focusing on the command of the Einsatzgruppen from Berlin.¹⁹ As visibly reflected in chapter six, historiographical attention on Auschwitz-Birkenau had shifted from life, death and survival in the camp in 1961 to the minutiae of its gassing and

¹⁵ HRIRH, (TB), T2, 'Judgement', para. 6.28.

¹⁶ *Her Majesty the Queen and Ernst Zündel* (251/88), Vol. XXXVI, p10433, Ontario Court of Appeal. HRIRH, Day 16, p41; Day 17, pp26-27, 32, 123-124; Day 24, p109; Day 25, p148.

¹⁷ It is recognised that there has been a return of focus to perpetration since 2000 and evident in the trials of John Demjanjuk in 2011, charged and convicted of being an accessory to mass murder as a guard at Sobibor extermination camp, Oscar Gröning in 2015-2016, charged and convicted of being an accessory to the murder of 300,000 Hungarian Jews between May and July 1944 when a 'bookkeeper' at Auschwitz-Birkenau, and Reinhard Hanning, in 2016, charged and convicted of complicity in the killing of at least 170,000 prisoners as a guard at Auschwitz-Birkenau between January 1943 and June 1944.

¹⁸ Deborah Lipstadt, 'The Eichmann Trial', *The New York Times*, Sunday Book Review, 8 April 2011. See: www.nytimes.com/2011/04/10/books/review/excerpt-the-eichmann-trial-by-deborah-e-lipstadt.html?pagewanted=all&r=O (Accessed 2 May 2014).

¹⁹ AET, Vol. II, p713.

incineration facilities as proof of their murderous capacity. Likewise, as indicated in chapter seven, the horror and incredulity surrounding the mass murder of six million human beings clearly expressed and directly represented in 1961 was submerged in calculations of a sufficiently-sized Jewish population able to accommodate this number of lives lost. Consequently, and equally inconceivable to the case, courtroom and wider audience of 1961, the later trials not only illustrated the extra-historical evolution of Holocaust denial but demonstrated the primacy of its narratives over the past traces that subsequently preconceived and prefigured their interpretation and utility in the courtrooms of 1985, 1988 and 2000.

Factual and narrative consistency further masks the 'cooked' reconstruction of each historiography in accordance with the demands of legal case and context. Although most obvious in Israel in 1961, in which Eichmann's authority over all stages of the 'Final Solution' was both foregrounded and magnified, it was likewise obvious in the later trials in the focus on the rebuttal and unmasking of Holocaust denial. As already highlighted, regardless of the extensive record surrounding each historiography, legal, and therefore historical, focus was subsequently placed on Hitler's authorisation and continued command and cognisance of all stages of a systematic policy of extermination (chapter four), central instruction over the discriminate mass shootings of Jewish men, women and children by the Einsatzgruppen (chapter five), the Auschwitz-Birkenau camp in general, and the architecture of its gas chambers, the biology and chemistry of its unique killing agent and the physics of its crematoria in particular (chapter six), and the numerical calculations of pre-and-post-1939 Jewish populations in Europe from which six million civilians could have been murdered (chapter seven). Consequently, despite meeting the criteria of 'good history' in the reconstruction of empirically accountable, credible and 'truth-full' accounts/representations, knowledge of the Holocaust was inevitably distorted and its complexities inevitability minimised in all four trials.

As each thematic chapter clearly demonstrated, 'cooked' is not the same as false, fictional or inaccurate. But it is a concept that very clearly acknowledges the preconception and prefiguration of each historiography through narratives that 'floated free' of the relevant past traces. This leads to the conclusion that, although the thematic chapters indicated the apparent 'matching' function of the history-law relationship, in finding the primacy of the discursive form over the content of the past traces it likewise confirms the primacy of its 'making' function. Consequently, although the history-law relationship is capable of

producing 'good history' in accordance with prevailing 'empiricist-analytical' demands and techniques, its historiographical methods and outputs in the Eichmann, Zündel and Irving trials are most appropriately explained through the lens of the 'narrative-linguistic' genre.

A number of observations arise from these conclusions and findings that contribute to contemporary debates on historiography in general and the history-law relationship in particular. They also contribute knowledge to Holocaust scholarship. In contrast to the existing 'consensus of critique' detailed in chapters two and three, the history-law relationship in the Eichmann, Zündel and Irving trials successfully negotiated the flaws of methodology to 'do justice' to the past traces of the Holocaust, including survivor memoir and testimony. Although procedurally restricted in the later trials, the survivor voice not only continued to be heard but its experiential truths remained central to the facts and record of historiographies foundational to not only each trial but to Holocaust scholarship both past and present. It is therefore suggested that the consistency and persistence of survivor memoir and testimony contradicts its relegation by both 'empiricist-analytical' historiography and Anglo-American law as biased and unreliable. Conversely, the privileged value and weight awarded to an extensive archive of documentation, also necessary to the empirical accountability of Holocaust historiography, belied its fallibility. The research therefore supports those who argue that both 'empiricist-analytical' historiography and Anglo-American law should reassess a hierarchy of evidence that privileges fragmentary documentation 'over people who were there'.²⁰ Reassessment does not mean the same as passive or unquestioning acceptance of the accounts of survivor memoir or testimony. As the first trials of John Demjanjuk (1986-1988) infamously exposed, both can be fallible even under the rigour of Anglo-American practice. However, reassessment does mean that the ambiguity of all traces of the past should be more clearly acknowledged in historiography as the 'narrative-linguist' genre demands (chapter one). Although criticised in existing literature for misappropriating the evidence of the Holocaust (chapters two and three), it is therefore suggested that Anglo-American practice is a more honest form of historiographical reconstruction since it clearly acknowledges its fallibility.

²⁰ Tom Lawson *Debates on the Holocaust* (Manchester: Manchester University Press, 2010), p272.

Likewise, in contrast to the existing 'consensus of critique' detailed in chapters two and three, the history-law relationship across the Eichmann, Zündel and Irving trials may have distorted and minimised the complexities of the Holocaust but it also successfully negotiated the flaws of methodology to 'do justice' to both the expertise of the historian and prevailing scholarship. As already shown, regardless of the inequality of partnership identified in chapter two, the confinement of historical evidence and opinion by Anglo-American practice, and the diminution of its value and weight in the Zündel trials, historians maintained their influence over the content and interpretation of each historiography when acting as its witness by proxy. Consequently, the discrete facts and narratives established across the courtrooms in which historians were key witnesses (Zündel, Irving) did not contradict their testimony. Likewise, as already shown, although the narratives authorised were 'cooked' in both content and form they were also largely compatible, consistent and 'truth-full' in accordance with not only the demands of both empiricist and narrativist theories of 'good history' but in accordance with the findings of Holocaust historiography prevailing at the time of each trial. And, as consistently noted, with the exception of the elevation of Eichmann's authority in Israel, the narratives legally established between 1961 and 2000 remain familiar in present-day Holocaust scholarship. Consequently, in contrast to the existing 'consensus of critique', the research supports those who argue that it is reasonable for historians to trust the law with both their expertise and scholarship and therefore continue to 'offer expert opinion in a legal action that turns on the research and writing of history itself'.²¹ Or, as more specifically concluded by David J. Rothman: 'Advocacy has its place, and it can be promoted without compromising the craft'.²² This finding is especially pertinent at a time in which Lawrence Douglas posits that historians will extend their role in future Holocaust-related cases beyond the provision of historical context and explanation to proof of the individual guilt of different forms of perpetration.²³ However, as the thesis demonstrates throughout its chapters, participation in the adversarial and dense form of Anglo-American practice is challenging. Its research therefore also supports those who argue that models of 'good

²¹ Richard J. Evans, *Telling Lies About Hitler: The Holocaust, History and The David Irving Trial* (London: Verso, 2002), p326.

²² David J. Rothman, 'Serving Clio and Client: The Historian as Expert Witness', *Bulletin of the History of Medicine*, 77:1 (2003), p44.

²³ Lawrence Douglas, *The Right Wrong Man: John Demjanjuk and the Last Great Nazi War Crimes Trial* (Princeton: Princeton University Press, 2016), pp14, 218.

practice' should be developed that inform and prepare both historians and jurists involved in future collaborative inquiry.²⁴

Furthermore, and again contrary to the existing 'consensus of critique', it is suggested that the 'cooked' outputs of the history-law relationship are no different from the outputs of all Holocaust scholarship, with the confines of legal case and context acting as merely another form of 'netted' authorship (chapter one). As the magnitude of Holocaust scholarship proves, a single (transcendental) narrative does not exist, nor can it. As revealed in the consistent debates and expansion of Holocaust historiography, its past is regularly revised as new evidence is accessed and familiar evidence is re-evaluated and re-interpreted in accordance with changes in methodology and perspective. Whether labelled as 'netted', present-centric, or 'cooked' all historiography subsequently distorts and minimises the complexities of the Holocaust, while its past traces are infinitely appropriated and interpreted. Since these practices of historiography are common knowledge (chapter one) it is unclear why expectations of the law are somehow different to those of the history discipline. Rather, demands made of the law to 'do justice' to the complexities of the Holocaust are not only unreasonable, given its case-specific form, but contradictory to its reconstruction by historians beyond the courtroom. It is therefore suggested that in the production of 'cooked' historiographies the history-law relationship is no more flawed a methodology than the history discipline when seeking to 'do justice' to the Holocaust. Indeed, it is further suggested that the law is once again a more honest method of historiographical reconstruction since, as the 'narrative-linguist' genre demands, it admits its case-specific, and therefore preconceived and prefigured (and 'cooked'), reconstruction of the past.

Conversely, the research reaffirms the existing 'consensus of critique' detailed in chapters two and three in its identification of the barriers to public comprehension, and therefore any intended lessons, imposed by the legal form. The competence of the history-law relationship as a model of 'good history' is only obvious when extracting and organising the fact determination and finding processes from and beyond the density of Anglo-American practice. Of course, the necessary extraction and organisation is not available to the court audience, media and wider public as a trial progresses. It cannot be emphasised enough that only those conversant in both Anglo-American practice and

²⁴ For a suggested model of 'good practice' see, Wilson, *Writing History*, pp220-226.

Holocaust historiography would have been able to follow, far less comprehend, the empirically accountable and 'truth-full' accounts/representations reconstructed at the Eichmann, Zündel and Irving trials. This conclusion is even more pertinent if engaging in the rebuttal of Holocaust denial. It is suggested that engaging with the strategy and tactic of denial through the medium of the law is not only a waste of time, since it never silences the voices of denial, but, and of greater concern, it allows its protagonists to exploit the density of the legal form to further confuse and instil doubt in a largely inexperienced media and wider public. It is therefore suggested that, even if the historian's voice and established scholarship continue to be both heard and reaffirmed through the history-law relationship, the courtroom should not be utilised if pedagogy is the objective of its participants. Consequently, the research supports those who argue that the courtroom should not act as an intentional history lesson or tribunal. It likewise supports those who insist that the courtroom should not be utilised specifically to rebut Holocaust denial.

The research also reaffirms the existing 'consensus of critique' detailed in chapters two and three in its exposé of the impact of extra-historical and extra-legal influences on the (mis)use of the Holocaust at each trial. Although most evident in the foregrounding of Eichmann's authority and depravity in 1961, as well as the wider context of national pedagogy (chapters two and three), external influences were likewise obvious in the focus on the rebuttal and unmasking of Holocaust denial in the later trials and the intended reassertion of the 'empiricist-analytical' genre in 2000 (chapter three). Consequently, in accordance with the findings of Michel Foucault raised in chapter one, each trial reflected dominant discourses prevailing in each epistemic context. It is also noted that, although the facts of the Holocaust, and the authority of its scholarship, were certainly reaffirmed at each trial, they did not add any unexpected knowledge to the prevailing historiography. Consequently, as mentioned in chapter one, none of the participants were surprised by what they found in the evidence or by the content of the narratives of the Holocaust subsequently reconstructed at each trial. The research therefore supports those who argue that a study of Holocaust-related trials is more illuminating of present-centric contexts and interests governing the reconstruction of the Holocaust *as* historiography than providing new knowledge or insights into its past.

Finally, the research not only concludes that the history-law relationship is most appropriately explained through the 'narrative-linguistic' genre but reasserts its epistemic

and generic credibility as a method and theory of academic historiography beyond the courtroom. As already observed, Anglo-American practice may be a distinct discursive form of history-making, but its methodology is no more preconceived and prefigured than the historian's craft. As the thematic chapters specifically demonstrated, the form, in this case the discrete legal cases of the Eichmann, Zündel and Irving trials, preceded the evidential content of the past, in this case relating to the Holocaust. Each present-centric form also acted as the criteria of adjudication, and, in the case of Holocaust denial, 'disconfirmation'.²⁵ But, in a discipline of netted authorship, the form of historical scholarship, since inevitably governed by the various affiliations and interests of the historian, likewise precedes and adjudicates over the content of all history-making, including Holocaust historiography. Consequently, however unconscious the individual historian may be of the primacy of preconceived and prefigured narratives over her/his empiricist craft, historiography inevitably comprises fictive representations *as* the past, in this case *as* the Holocaust. As demonstrated by the thematic chapters, and in contrast to empiricist thinking, this fictive dominance is not a barrier to the reconstruction of 'good history'. But it is inherent to the 'truth-full' historying of academic scholarship. The research therefore supports those who argue that the 'narrative-linguist' genre is the most appropriate explanation of all historiography and not only in these postmodern times.

The conclusions and findings of this thesis are based on a selective sample of Holocaust-related trials. It is obvious that, regardless of their relevance to the intended research of the history-law relationship, the Eichmann, Zündel and Irving trials cannot stand as definitive exemplars of all Holocaust-related cases. Furthermore, although the selection of the four trials was based on the range of diversities pertinent to comparative study, rather than the content of each case, it is recognised that the majority of the selected trials (Zündel, Irving) related to the rebuttal of Holocaust denial. Consequently, the focus of these trials was on the historiographical record, or what Lawrence Douglas refers to as the 'Holocaust as History', rather than the more familiar focus on the guilt (or innocence) of individual perpetrators.²⁶ Since most exceptions to the findings of compatibility and consistency related to the Eichmann trial it is not clear if trials of other perpetrators would have similarly challenged the findings of historiographical stability. However, regardless of its exceptions, the content and findings of historiographical reconstruction at the

²⁵ Mary Fulbrook, *Historical Theory* (London: Routledge, 2002), pp182-185.

²⁶ Douglas, *The Right Wrong Man*, p14.

Eichmann trial still met the criteria of ‘good history’ and likewise reaffirmed the primacy of both the logic and practice of the ‘narrativist-linguistic’ genre.

It is also recognised that the focus on Anglo-American trials did not consider the history-law relationship operating through other legal genres (continental law) or in contexts where accusations of a ‘show trial’ have been commonly raised (German Democratic Republic, Soviet Union).²⁷ Once again it is not clear if a repetition of methodology through the lens of these alternative cases and legal forms would have altered the findings relevant to the Anglo-American contexts or genre. These recognised omissions indicate areas of future research.

Notwithstanding the limitations of selection integral to all research, the method and findings of this thesis contribute knowledge to contemporary debates on ‘what is history?’, most recently identified as ‘a dynamic field currently in the (re)making’, and the history-law relationship as it continues to judicially confront, inform and seek justice for the Holocaust both as a crime and historical record.²⁸

As shown, it distinctively applied theories of historiography to both practical sites of history-making and reconstructions *as* ‘the Holocaust’. In so doing, the thesis was transparent in demonstrating the fictive core of history-making in its academic form. It consequently adds weight to the voices of those who insist that fictive is not the same as fictional and to the epistemic credibility of the ‘narrativist-linguistic’ genre.

It also distinctively applied theories of historiography to the history-law relationship. In so doing, the thesis adds a new methodology of examination and evaluation of its competence to act as a model of ‘good history’. It likewise distinctively applied comparative analysis as a tool of both historiographical evaluation and reconstruction across courtrooms. These combined approaches add new information to the relevant scholarship by: (1) demonstrating that Anglo-American law can be as trusted as the

²⁷ David Fraser, *Law After Auschwitz: Towards a Jurisprudence of the Holocaust* (Durham, NC: Carolina Academic Press, 2005), pp259, 274-276; Jonathan Friedman, ‘The Sachsenhausen Trials: War Crimes Prosecution in the Soviet Occupation Zone and in West and East Germany’, in Patricia Heberer and Jürgen Matthäus (eds.) *Atrocities on Trial: Historical Perspectives on the Politics of Prosecuting War Crimes* (Lincoln USA: University of Nebraska Press, 2008), pp159-184; Douglas, *The Right Wrong Man*, p12.

²⁸ Jouni-Matti Kuukkanen, ‘The Current State of Play in the Theory and Philosophy of History: the Roth-Ankersmit Controversy and Beyond’, *Rethinking History*, 18:4 (2014), p1.

history discipline with historical inquiry and (2) detailing the content and processing of historiographical reconstruction across the Eichmann, Zündel and Irving trials.

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