

Nova Law Review

Volume 27, Issue 2

2002

Article 3

Irving v. Penguin UK and Deborah Lipstadt: Building a Defense

Deborah Lipstadt*

*

Copyright ©2002 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <http://nsuworks.nova.edu/nlr>

Irving v. Penguin UK and Deborah Lipstadt: Building a Defense Strategy, an Essay by Deborah Lipstadt *

In September 1996, I received a letter from the British publisher of my book, *Denying the Holocaust: The Growing Assault on Truth and Memory*,¹ informing me that David Irving had filed a Statement of Case with the Royal High Court in London indicating his intention to sue me for libel for calling him a Holocaust denier in my book.² When I first learned of his plans to do this, I was surprised. Irving had called the Holocaust a “legend.” In 1988, the Canadian government had charged a German emigre, Ernst Zündel, with promoting Holocaust denial.³ Irving, who had testified on behalf of the defense at this trial, told the court that there was no “overall Reich policy to kill the Jews,” that “no documents whatsoever show that a Holocaust had

* Dr. Deborah E. Lipstadt is Dorot Professor of Modern Jewish and Holocaust Studies at Emory University in Atlanta where she directs the Institute for Jewish Studies. Her book DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (1993) and is the first full length study of those who attempt to deny the Holocaust.

She recently decisively won a libel trial in London against David Irving, who sued her for calling him a Holocaust denier and right wing extremist in her book. The trial was described by the *Daily Telegraph* (London) as having “done for the new century what the Nuremberg tribunals or the Eichmann trial did for earlier generations.” *The Times* (London) described it as “history has had its day in court and scored a crushing victory.” The judge found David Irving to be a Holocaust denier, a falsifier of history, a racist, an antisemite, and a liar. Her legal battle with Irving lasted approximately five years. According to the *New York Times*, the trial “put an end to the pretense that Mr. Irving is anything but a self-promoting apologist for Hitler.” In July 2001, the Court of Appeal resoundingly rejected Irving’s attempt to appeal the judgement against him.

Dr. Lipstadt has also written *BEYOND BELIEF: THE AMERICAN PRESS AND THE COMING OF THE HOLOCAUST* (Free Press/Macmillan, 1986, 1993). The book, an examination of how the American press covered the news of the persecution of European Jewry between the years 1933 and 1945, addresses the question “what did the American public know and when did they know it?”

1. DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993).

2. For additional information regarding this trial, see *Holocaust Denial on Trial*, at <http://www.holocaustdenialontrial.org> (last visited Jan. 25, 2003). The information contained in this essay is based on the personal experiences of the author. As a result, the reader should contact the author for further information regarding the contents of this essay.

3. *R v. Zündel*, [1992] 2 S.C.R. 731. He was charged under a law that was subsequently declared unconstitutional by the Canadian Supreme Court. *Id.*

ever happened,” and gas chambers were an impossibility.⁴ Since then, he repeatedly denied the Holocaust. When asked by the press why all mention of the Holocaust had completely disappeared from a new edition of one of his books, he responded: “If something didn’t happen, then you don’t even dignify it with a footnote.”⁵

I was sure that his threats to sue me were much “sound and fury” signifying very little at all. In fact, they would turn out to be anything but innocuous. They evolved into a six-year battle that would tremendously impact my life. In my book, which was a scholarly study of the phenomenon of Holocaust denial, I had devoted no more than a few pages to Irving.⁶ I had described him as a Hitler partisan, someone who knew the truth but who bent it until it fit his political ideology, and “the most dangerous Holocaust denier.” The reason, I argued, that he posed a danger was because he had written numerous books about World War II and the Third Reich, many of which were well-known and well regarded. Other deniers are publicly known only for being deniers. Irving, on the other hand, had a reputation as a writer of historical works that long predated, and was independent of, his activities as a denier. Consequently, his pronouncements about Holocaust denial garnered far more attention than they would coming from other deniers. More importantly, he could and did insinuate different elements of the panoply of Holocaust denial arguments in his books on other topics, for example, his biography of Goebbels. Even those readers who completely dismissed his beliefs about the Holocaust found it hard to avoid them. Though my words about Irving and his *modus operandi* were harsh, I did not worry about being sued because it seemed to me that what I had written was no worse than what others had written about him in the past. Moreover, everything I learned about Irving since the book was published in 1993 convinced me that my assessment of him was correct. It seemed utterly incomprehensible that David Irving would deign to challenge the charge that he was a Holocaust denier. My nonchalance about Irving’s charges of libel was reinforced by the fact that what I had written about him came from published sources. I assumed that this problem would be easily resolved.

My nonchalance when I first received Penguin’s letter was not the first time I had treated the topic of Holocaust denial with undue jocularity. I had done the same thing close to twenty years earlier when I first heard about Holocaust deniers. A professor from Israel was visiting Seattle where I then

4. David Irving’s 1988 Testimony, R v. Zündel, [1992] 2 S.C.R. 731.

5. Tr. of Day 1 at 97, Irving v. Penguin Books, Ltd. (Queen’s Bench Div. 2000) at <http://www.holocaustdenialontrial.org> (last visited Jan. 25, 2003).

6. See generally LIPSTADT, *supra* note 1.

taught. He told me about this loosely organized group which was actively sending out letters to university professors promoting a journal which denied the Holocaust. I had then wondered who would take them seriously. And now I wondered who could take David Irving's claims that he was not a denier seriously. Certainly this was a ploy just to scare me. As it turned out, I was wrong on all accounts. Irving would energetically fight. The fact that my sources were all documented did not protect me in the United Kingdom, as it would have in the United States. The British courts took this matter most seriously. In fact, since British libel law favored the plaintiff, it put the onus on me, the defendant, to prove the truth of what I had written, rather than on Irving to prove the falsehood, as would have been the case in the United States. Defamatory words are presumed under English law to be untrue. In short, I had to prove I told the truth. Had I not fought, he would have won by default. I would have been found guilty of libel and, ipso facto, Irving's definition of the Holocaust—no gas chambers in which Jews were systematically killed, no officially sanctioned Third Reich plan to kill the Jews, no systematic killings, no Hitlerian involvement in, or endorsement of, the persecution of the Jews—would have been determined to be a legitimate one.

This legal action was the first trial involving the Holocaust in which a denier was the plaintiff and a scholar the defendant. It was about me and what I had written, and it was about far more than me and my book. Ostensibly, it was about the past, but it was also how the past would be remembered in the future. The trial captivated the interest of both those who study the history of the Third Reich and the Holocaust, as well as those who study and combat neo-Nazi's attempts to resurrect that past. Two courts ultimately rendered a decision, the Royal High Court of Justice and the court of public opinion.

Although Penguin and I were both being sued by David Irving, we had different commitments and priorities. Penguin was a subsidiary of the multinational corporation, Pearson, Ltd., I feared that its fidelity would be to its parent company, its shareholders, and the financial "bottom line." Even if it wanted to fight, Penguin was not a completely free agent. An insurance company paid its legal expenses, and the insurance company would have a determining role in how the case would be handled. I feared that, as legal costs escalated, Penguin might abandon the case or be forced to do so by their insurers. Such a decision could come at any point, including after a trial had already begun. I could easily be left in the lurch midway through the proceedings. Penguin did have a commercial incentive to stay in the battle. Settling with Irving, though possibly financially attractive to a public

company, would give the publisher a black eye among authors. It might well make those who wrote controversial books leery about doing business with Penguin. Nonetheless, I could not be sure of what it would ultimately do. I was well aware that in recent years publishers had not made a practice of standing by their authors, even when they thought they were in the right. Given all this, I instinctively felt that I needed someone to formulate a legal strategy based on my best interests and no one else's.

At a loss as to how to proceed, I called a friend in London who had already heard about the case and had a suggestion for me: Anthony Julius. I knew Julius's name because he had just written *T.S. Eliot, Anti-Semitism and Literary Form*.⁷ Many reviewers had given critical acclaim to the book. Reviews had made a point of mentioning that Julius had written this intellectually thick book as his Ph.D. dissertation while working full time as a lawyer. I recalled a profile of Julius in *The New Yorker* in which he had observed, in response to a reporter's comment about a lawyer getting his Ph.D. in literary theory, that many lawyers have hobbies. This book was his "golf equivalent."

Julius had been intrigued by the way a great poet, such as Eliot, appropriated the degraded discourse of anti-Semitism to animate his own work. Eliot had taken that which the enlightened world had supposedly discarded, anti-Semitic speech, and turned it into art. But it was not just Eliot's anti-Semitism that intrigued Julius. It was the way legions of critics and readers had ignored, minimized, or tried to explain away this element of Eliot's work. Anti-Semitism was not, Julius argued, peripheral to Eliot's poetry, but central to those texts in which it appears.

Julius's book had generated serious discussion and debate regarding the literary establishment's treatment of Eliot's anti-Semitism. Eliot scholars had positioned themselves on different sides of the controversy that swirled around the book. Many scholars and critics had long dismissed Eliot's anti-Semitism as ironic, peripheral, or merely the "price to pay for admission into the club of Modernism." Some, perhaps feeling a bit defensive, rejected Julius's attempt to affix the label of anti-Semite on the work of a poet whom they so treasured. Others were tremendously impressed by Julius's erudite, even forensic, analysis of this aspect of Eliot's poetry and his argument that Eliot meant what he said about Jews. Julius's book was so tightly argued that one reporter described it as "the eviction of Eliot from the house of lame excuses." Attesting to the importance of this work, Oxford University's Professor of Poetry, James Fenton, had made it the subject of one of the

7. ANTHONY JULIUS, *T.S. ELIOT, ANTI-SEMITISM AND LITERARY FORM* (1996).

three annual lectures he delivers each year at the university. In the lecture, which was entitled “Eliot v. Julius,” Fenton posited that “whatever assessment is made of Eliot in the future, the Julius book will have to come into it.” Zeroing in on what may have well made some Eliot defenders so uncomfortable, Fenton noted, “Julius says an anti-Semite is a scoundrel. What is it that holds us back from saying that Eliot was a scoundrel?”⁸

Julius was also Princess Diana’s divorce lawyer and his name had regularly appeared in the British press during the Princess’s divorce settlement negotiations. He had become part of that story. Though I was happy to learn about Julius’s willingness to help me, I wondered if a divorce lawyer was the right person for a case such as this. A bit of Internet surfing revealed that his specialty was not divorce, but press and libel cases. Born in 1956, Julius studied English literature at Jesus College, Cambridge. He had joined a law firm in 1981, and became a partner by 1984. By 1986, he was a member of the firm’s management committee, and a year later, the head of its litigation department. He taught law part-time at University College in London where he created a new course, *Law and Literature*. Not surprisingly, a number of the reviewers linked his critique of Eliot to his work for Princess Diana. One described him as the ultimate iconoclast, willingly challenging two British idols, T. S. Eliot and the House of Windsor.

While Irving was hardly anyone’s idol, I figured that this was precisely the kind of lawyer I needed, one who was unafraid of taking on formidable cases. I reached for the phone to dial his office, fully expecting to have to negotiate my way through a phalanx of receptionists and secretaries. A friendly voice answered on the first ring, “Anthony Julius.” “Is this Anthony Julius’s office?” I asked. “This is Anthony Julius,” was the response. Surprised to be connected so rapidly, I launched into an explanation of the case. After a few moments he politely interrupted to assure me that he knew many of the details already. There was nothing left but the pivotal question. “Would you be willing to represent me?” Without any hesitation, Julius said, “Of course. I would be delighted to do so.” With someone of Julius’s caliber on board, I assumed that this matter would be dispatched in a relatively straightforward fashion.

I did not have long to bask in these feelings of reassurance. A few days later, a colleague dropped a recent issue of *The New York Review of Books* on my desk. “Hear you are having trouble with this guy, David Irving. There’s an article here which might interest you.” The journal contained a review of Irving’s recent biography of Josef Goebbels by the highly

8. *The Talk of the Town*, THE NEW YORKER, May 20, 1996, at 29.

venerated Gordon Craig, Professor Emeritus at Stanford University, and author of the *Germany, 1866–1945*,⁹ among many other important books. I respected Craig's work and was anxious to see his assessment of Irving. I was surprised, if not shocked, by what I read. While Craig disparaged Irving's claim that Auschwitz was "a labor camp with an unfortunately high death rate" as "obtuse and quickly discredited," he praised Irving's iconoclastic views of history.¹⁰ "Such people as David Irving have an indispensable part in the historical enterprise and we dare not disregard their views."¹¹ I wondered how Craig, an impeccable scholar with a distinguished reputation, could believe that someone with such a distorted notion of Auschwitz should have an "indispensable part" in the historical conversation. I found it perplexing that Craig could so readily bifurcate the different aspects of Irving's work. If Irving so grossly distorted one major element of the history of the period, how could his treatment of other elements be trusted? Second, I was deeply distressed by Craig's failure to grasp that, by including Irving in the conversation, he was according these "obtuse and quickly discredited" views a new found prominence and credibility. I worried, however, that if someone such as this highly respected scholar, who knew so much about the period, could be beguiled by Irving, how much easier it would be to beguile a jury of ten British citizens or even a British judge.

Though he hoped Irving would drop the threat of a lawsuit, Julius counseled that we must proceed as if we would end up in court. When I asked Julius how we were going to fight this, he explained that there were a number of different options open to libel defendants. They could argue that the plaintiff was misinterpreting the words in question. This option was not available to me because Irving was not misinterpreting what I had said about him. When I had called him a Hitler partisan, right wing ideologue, and Holocaust denier, I meant exactly that. The second option was to argue that the words were not defamatory. That, too, was not an avenue I could choose. The words were meant to be critical of him. I hoped that, when others read them, they would grasp that this man was a denier who had made overtly anti-Semitic statements. Finally, defendants could claim "justification," that the words, about which the complaint was lodged, though defamatory, were true and the author was, therefore, justified in writing

9. GORDON A. CRAIG, *GERMANY, 1866–1945* (1978) (OXFORD HISTORY OF MODERN EUROPE).

10. Gordon A. Craig, *The Devil in the Details*, N.Y. REV. OF BOOKS, Sept. 19, 1996 (reviewing DAVID IRVING, *GOEBBELS: MASTERMIND OF THE THIRD REICH* (1997)).

11. *Id.*

them. That, Julius explained, was the path we would pursue. While we did not have to prove that every detail of what I wrote was correct, we did have to prove the essence of my words, or, as the courts defined it, their “*substantial* truth.” In British law this is generally known as proving the truth of the “sting” of the libel.¹² We would not only demonstrate for the court the falsehood of Irving’s contentions regarding the Holocaust, but would also endeavor to show that, when discussing the Holocaust, Irving consistently distorted, misquoted, and ignored those documents which disproved his theories. Julius was unequivocal: “We will argue, exactly as you did in your book, that Irving does not follow established historical procedures and subordinates the truth for ideological purposes. His writings and comments about the Holocaust are, we will contend, designed to spread anti-Semitism and engender sympathy for the Third Reich.”

As Julius laid out our battle plan, I felt reassured. Julius, who told me he would be working together on this matter with his colleague, James Libson, explained that, at this point, he was not sure Irving would really pursue this case. Our objective, in fact, was to get him to drop the case. We would do so by vigorously responding to his charges, using every legal avenue open to us. We hoped that, faced by a formidable opposition, he would drop the matter. Listening to Julius talk about Irving, I understood that his Eliot book was far more than a “golf equivalent.” It was an expression of his deepest intellectual and moral commitments. He could not abide anti-Semitism irrespective of whether it came from a T.S. Eliot or a David Irving. He had even less tolerance for those who were willing to ignore, justify, or rationalize away hatred and prejudice for any reason, be they critics, reviewers, or scholars.

Over the next few months, Julius and James laid out for me in e-mails and phone conversations the various steps involved in this kind of libel case. James, whose job it seemed to be to walk me through the intricacies of British law, explained that first we would have to prepare the “pleadings,” our presentation to the court of what we perceive to be the central issues in the case. At the same time, we would begin the discovery process, the process by which each party turns over to the other side all materials it has in its possession relevant to the issues, including correspondence, documents, papers, books, and tapes. All the research material I used in preparing the book was going to have to be disclosed. So, too, I would have to disclose any correspondence or notes that concerned Irving.

12. *Judgment at 4.7*, Irving v. Penguin Books, Ltd. (Queen’s Bench Div. 2000), at <http://www.holocaustdenialontrial.org> (last visited Jan. 25, 2003).

The next step was the preparation of witness statements. My statement would be my means of introducing myself to the court. In it, I would have to provide background information on my professional and personal life, insofar as it pertained to the case. We would then select expert witnesses, and ask them to analyze Irving's work in order to assess my claim that he was a denier and falsifier of history. Their reports would be submitted to the court and to Irving well in advance of the trial, if there was to be one. English court proceedings stipulate that the parties to such suits prepare their evidence in writing and exchange it in the form of witness statements some time before the trial. The purpose is to avoid "trial by ambush" and also to shorten any legal proceedings. It was a crucial stage since one commits, fairly early on, to the evidence which will be introduced at the trial. Finally, based on the expert reports, we would present Irving with a list of interrogatories, questions which he would have to answer prior to the trial itself. Julius and James were fairly certain that Irving, faced for one of the first times in his career with a vigorous defense against his legal threats, would eventually abandon this case. Underlying this strategy was a fundamental proposition, which James articulated for me one day in a phone conversation when I expressed amazement at the level and amount of work being done:

No detail will be left unturned. We will never allow ourselves to assume, even for a moment, that simply by putting before the jury an array of Irving's statements we will succeed in convincing it of the truth of your words. We will fight this case as if it were the biggest commercial case to ever cross our desks. Though we may believe that Irving denied the Holocaust, we will not lull ourselves into thinking this will be self-evident to either a judge or a jury.

As our strategy evolved, we not only decided what we would do, we also decided what we would not do. Many people, lawyers in particular, urged us to consider a countersuit against Irving. Julius, James, and I agreed that, even if Irving decided to drop the case, we would not pursue that avenue. We knew that a countersuit would create a real burden for Irving. However, since he had few accessible financial assets, there seemed to be nothing to be gained from a countersuit. It would afford him the media attention he so craved, as well as the opportunity to play the victim. We also determined that if we did go to court, we would not call survivors. Our decision was based on both forensic and moral calculations. We were adamant that this trial was not about proving the Holocaust happened. It was about proving that as related to the history of the Holocaust, David Irving

was a liar. To have called survivors would have been to suggest that we needed the “eyewitnesses” or “witnesses of fact” to prove that there indeed was a Holocaust. There was another reason why we were reluctant to put survivors in the witness box. Irving was planning to act as his own lawyer. We did not believe it ethical to place elderly survivors in a position to be harassed and challenged by a Holocaust denier. Though we did not doubt that they could withstand his challenges to their testimony, we did not feel it right to impose this burden on them.

Over the course of the Fall of 1997, Julius, James, and I were in frequent conversation about what we would want our team of experts to do. Knowing Irving’s work as I did, I fully expected the experts would find a willful pattern of historical distortions when they scrutinized his writings on the Holocaust. The experts’ reports on Irving served another purpose as well. They would put Irving on the defensive and alter the equilibrium of the legal battle. He began this process as the plaintiff. As a result of our exposure to his historical calumnies he would end up, we hoped, as the “defendant.” By January 1998, an impressive team had been drafted. We asked Professor Richard Evans from Cambridge, a specialist on German history, to serve as our lead historical witness and conduct a historiographic investigation. He would analyze Irving as a historian, asking whether, when writing about the Holocaust, Irving adhered to generally acceptable standards of historical scholarship, or whether he deliberately distorted and falsified history. In essence, we asked him to follow Irving’s footnotes. I was familiar with Evans’ work on Germany, particularly his book *In Defense of History*,¹³ which challenged post-modernist critiques contending that history was often used as an ideological prop for bourgeois institutions. Evans’ book argued that the past “really happened, and we really can, if we are very scrupulous and careful and self-critical . . . reach some tenable conclusions about what it all meant.”¹⁴ It was this that had prompted Julius to suggest Evans serve as our lead historical witness. Professor Robert Jan van Pelt, an architectural expert who had coauthored a meticulous, in-depth study of the history of Auschwitz, joined Evans. Few people in the world were more familiar with Auschwitz, its history, and its archives than van Pelt. We asked him to focus on Irving’s claims that the gas chambers at Auschwitz were fakes. How did Irving justify these claims? What “evidence” did he use to buttress his conclusions? Did Irving take into consideration existing testimony and documentary evidence regarding the

13. RICHARD J. EVANS, *IN DEFENSE OF HISTORY* (1999).

14. *See generally id.*

gas chambers? Professor Christopher Browning of the University of North Carolina, author of *Ordinary Men: Reserve Police Battalion 101 & the Final Solution in Poland*,¹⁵ and an expert on the origins of the Final Solution, agreed to evaluate Irving's assertions that those Jews who were killed were victims of rogue actions and not of a centralized plan, a Final Solution with its roots in the highest echelons of the Third Reich. In his report, Browning would marshal the documentary evidence of the Final Solution, evidence Irving had to ignore in order to make his claims. Chris Browning was then in the process of serving as a witness for Scotland Yard at the war crime trial of Anthony Sawoniuk.¹⁶ Sawoniuk, who had been charged with murdering Jews, had arrived in England after the war and worked as a British Rail ticket collector. The prosecution charged that he had personally been responsible for murdering Jews in his hometown of Domachevo, Belarus. Browning testified as an expert witness at the Zündel trial when Irving had proclaimed Holocaust a legend and the gas chambers fakes. Peter Longerich, a German born specialist on Hitler and a Professor at the University of London, would analyze Hitler's role in the Final Solution. Longerich would focus on Irving's claim that Hitler had no direct role in the persecution of the Jews. Hajo Funke, a Professor of Political Science at the Free University in Berlin and one of Germany's leading specialists on right wing extremism, agreed to examine Irving's involvement with the German radical right and neo-Nazi fringe. We wanted to demonstrate to the judge and jury that David Irving's Holocaust denial had a motive and that there was a relationship between his pattern of historical falsification and political ideology. In other words, his Holocaust denial was not just loopy history but was a means of furthering his political ideology.

As the months passed, I became consumed by the preparation of my discovery list. I began to have almost daily phone calls with James and his colleagues, reviewing what would be on my list. They kept stressing that I had to scour my files and pull everything that might, even in the most oblique way, relate to what I had written about David Irving. I also had to strip my shelves bare of any books I had cited in *Denying the Holocaust*.¹⁷ All those books had to be sent to London. Together with my research assistant, we began to review the thousands of pieces of paper I had accumulated while writing the book. Files that I had assumed I would never seriously look at again were piled high on my desk. Books, some with the

15. CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 & THE FINAL SOLUTION IN POLAND* (1992).

16. *R. v. Sawoniuk*, 2 Crim. App. R. 220 (C.A. 2000).

17. LIPSTADT, *supra* note 1.

yellow post-it notes I had used while writing the book still on them, were packed up to be sent off to England. It was a tedious job and I deeply resented having to do it. As I reached the end of the process, Julius and James, anxious that there be no question about my having fully complied with the rules of the discovery process, arranged for an American lawyer who specialized in libel, to come to my home to review the process by which I had prepared the discovery list. I expected his visit to be a perfunctory one. When he left five hours later, I was completely exhausted. He had opened files at will to see if there was anything there that could even remotely be connected with the case that I had not sent to London.

One afternoon during a visit to London, Evans and I met in my hotel and walked over to the University of London in order to hear the historian John Lukacs speak about his new book, *The Hitler of History*.¹⁸ I looked forward to the lecture for two reasons. I wanted to get to know Evans a bit and thought this might allow me that opportunity. I was also anxious to hear Lukacs because his book severely castigated Irving for the way he mangled history, particularly in relation to Hitler. After the Gordon Craig review, it was refreshing to read Lukacs' unequivocal description of Irving as an "unrepentant admirer of Hitler,"¹⁹ who engaged in frequent "twisting"²⁰ of documentary sources. Irving was an "apologist"²¹ and "rehabilitator"²² of Hitler whose opinions had an "unsavory character."²³ Lukacs castigated those historians, critics, and reviewers who relied on Irving's researches and gave him "qualified praise."²⁴ Had they bothered to examine Irving's sources, they would have found that his work was filled with "unverifiable and unconvincing assertions."²⁵ The book, already out in the United States, had not yet appeared in a British edition. At the lecture, Lukacs told me that the British edition might be delayed. Irving was threatening to sue. Lukacs made it clear that his publisher, Macmillan, was watching my case closely. As we left the lecture, I told Evans that Irving's threats against Lukacs exemplified why it was so important to fight this battle: "Unless someone stands up to Irving and refuses to be cowed by his threats, he will keep doing

18. JOHN LUKACS, *THE HITLER OF HISTORY* 26, 132, 178, 229–30 (1997).

19. *See generally id.*

20. *See generally id.*

21. *See generally id.*

22. *See generally id.*

23. *See generally* LUKACS, *supra* note 18.

24. *See generally id.*

25. *See generally id.*

this to every author who exposes him for what he is. He'll shut down any book which is critical of him."

During another visit, Julius, Evans, Browning, and I had dinner together. Browning was then testifying in the war crimes trial of Anthony Sawoniuk. Browning, who had seen how Holocaust deniers operate in the courtroom during the Zündel trial, believed that Irving saw the trial as a "platform" to gain publicity and support from his followers. Browning understood our reluctance to call survivors as witnesses. "The Zündel trial was horrible for them. The survivors who testified were not the only ones who suffered. Even spectators sitting in the gallery found it painful to watch what was done to them on the stand." Evans shared his observations based on his months of looking at Irving's work. "Every time I look at Irving's historical work I find a complete falsification. All veneer of respectability slips away as soon as you begin to do the research." Looking at me, Evans said, "Based on our research thus far, I think that Deborah was much too kind to him. He seems to do everything she says he does."

As we talked about the historical evidence, I reflected on the clash of cultures that faced us. An argument that would be readily embraced in a scholarly setting might have to be set aside in the forensic setting. I spent most of my life in the academic world, knew that culture well, and was comfortable in it. I worried about the forensic world, but I knew our case would be strong. There were, however, so many variables and unknowns. One prejudiced or even iconoclastic judge or juror could bring us down. Arguments, which would have trumped all others in the scholarly world, had to be set aside because of the vagaries of a jury.

Throughout the summer, Mischon de Reya and Davenport Lyons, Penguin's solicitors, poured over Irving's discovery list, the list of those documents which, because they had some relationship to the case, he was required to share with us prior to the trial. It consisted of close to 1500 items. When I first saw it, I was overwhelmed both by its size and by the fact that, at first glance, it seemed to be filled with items that bore no connection with my case. Could this, I wondered, be a boilerplate list, one that he used for other legal actions? He was preparing to sue the journalist Gitta Sereny, who in 1996 had written a critical review of his book *Goebbels*²⁶ in *The Observer*.²⁷ The list contained items that related to her case and not to mine. James worked together with the other lawyers in a careful perusal of what was on his list. I was amazed at the work that went

26. DAVID IRVING, *GOEBBELS: MASTERMIND OF THE THIRD REICH* (1997).

27. See generally Gitta Sereny, *Spin Time for Hitler*, *THE OBSERVER*, Apr. 21, 1996 (reviewing DAVID IRVING, *GOEBBELS: MASTERMIND OF THE THIRD REICH* (1997)).

into the preparation of this application for the additional materials. The lawyers had made note of the many items that had nothing to do with our case. James explained why this was important. "In England, the loser pays the costs. When we win and it comes time to assess our costs we will bill him for the time spent separating the wheat from the chaff, that which pertains to our case and that which had no connection to our case."

James and the others did something else that was far more important. First, they looked for what was missing on the list. Even though we had, at first, been taken aback by the size of his list, we soon recognized that it was very incomplete. Responses to letters were there without the original letter. References were made to enclosures that had been sent to Irving, but the enclosures were missing. Then, in what was the most crucial step, they composed a twenty-page "wish list," consisting of items they believed were in Irving's files but were not included on his discovery list. This included his correspondence with leading Holocaust deniers, anti-Semites, and neo-Nazis. In addition to the items missing from his discovery list, we asked for access to his complete collection of video and audiotapes. We were anxious to show a jury that what he said in "public" in his books when he was playing the part of historian was dramatically different from what he said in "private" when he was talking to his most ardent followers, many of whom seemed to share his political ideology. We also asked for access to his personal daily diary. We argued that the diaries would help us prove that he indeed did keep company with neo-Nazis and radical right-wingers. Such evidence would buttress our argument that there was a relationship between his historical falsifications and his political ideology; there was a motive. We wanted these materials for building my defense, but asking for them might have an unintended consequence. We assumed that this would be the material Irving would be most ardent to keep out of the eyes of the public. If this material contained information on Irving's connections with extremists and neo-Nazis, he would want, we speculated, to keep it out of the public domain. He would then, we presumed, calculate that it was better to drop the case than to allow this material to see the light of day.

In September 1998, Julius, James, and the Davenport Lyons lawyers went into court to challenge his list as it now stood, and to present the application for the additional materials. I asked Julius if he wanted me to be present. Much to my surprise he told me no. "We want him to drop the case. Your presence at a hearing will appeal to his sense of theatricality. It might give him an inflated sense of importance and make him less inclined to drop the matter." Pre-trial hearings are presided over by a Master. James described him as "a sort of junior judge." Our Master was, much to my

amusement, named Master Trench. Given the nature of the battle that occurred at this hearing, it was probably an appropriate name. Irving assiduously fought to keep all these materials out of our hands. He was, he complained to the court, being forced to disclose his “stock and trade.” We were, he charged, on a “fishing expedition.” At first, Master Trench seemed sympathetic to Irving’s contentions and he questioned the broad sweep of our application. Julius explained that the all-inclusive character of our list was a response to the manner in which Irving had structured his charges. Irving’s accusations were exceptionally broad and we were, therefore, obligated to respond in kind. Irving made the sweeping argument that I had damaged, if not destroyed, his career and his reputation as an historian. We, thus, were obligated to prove the precise nature of that career. In order to do so, we had to examine far more than the historical materials he used in the preparation of his books.

Throughout this hearing, which stretched from one day into the next, whenever Master Trench agreed to one of our requests and Irving saw that he had lost, he would complain that this action was part of the global conspiracy against him. He accused “the enemies of truth,” Irving’s euphemism for the Jews, of being out to destroy him. James, who called me to give me a detailed description of the proceedings, described it as his “last line of defense.” It reminded James as sounding “like the desperate act of a desperate man.” James continued:

The problem for Irving is that he can make the conspiracy claim now. He won’t be able to make it when the expert reports come in. Historians such as Richard Evans, Chris Browning, Robert Jan van Pelt and the others can hardly be accused of being part of the conspiracy. He’s going to have to find a better challenge for them.

At the end of the hearing, Master Trench agreed to virtually all our requests including the right to inspect the diaries. It was such a sweeping victory that even Julius, who generally adopted a low-key attitude and took our successes in almost studied stride, allowed just a trace of excitement to creep into his voice when he called me. He described Master Trench’s order as an “outstanding” development. James, who called a few moments after Julius, made no effort to contain his excitement. “We had a fantastic day in court. Master Trench’s order is so wide we will not only get the items we ask for, we will probably obtain materials we did not think we would get. Irving is going to have to strip his files bare. A great burden has been placed on him.” Master Trench also took the unusual action of requiring Irving to sign an

affidavit that his discovery was complete and compelled him to pay for the costs of the work entailed in the discovery application. Thrilled by James's report, I asked, "So will this get him to drop the case?" My excitement about our success was tempered a bit by James's response. "When we began this challenge to his discovery list, I thought it would. Now I don't think so. A rational man might drop matters now. If he doesn't do so, then we will have to depend on the expert witness reports and the interrogatories to get him to drop out." We were about to end the conversation when James added:

Oh yes, I was so excited by our successes that I forgot to tell you. At the hearing, Anthony, who makes a point of avoiding getting into any conversation with Irving, suggested to him that since this case was so 'complex and intricate' it would be better if it was heard by just a judge and not a jury. Irving agreed and Master Trench will issue the order: No jury, just a judge.

I was pleased that the variable of an unknown group of people who would be obligated to read reams of material had been removed from this case.

The other reason I was pleased at this development was that a jury would only render a verdict. A judge would give a written judgment, laying out the reasons for his or her decision. It would provide a perfect opportunity for a ringing indictment of Irving and his historical lies. When I expressed my satisfaction about this to another British jurist I knew, he had a warning ready for me. "Deborah, don't be disappointed if the judgment is not the sweeping condemnation of Irving you want." He proceeded to explain that British judges are masters at practicing judicial restraint. "They might say," he explained, "'I did not find this witness helpful.' Everyone associated with the legal process will recognize that as a euphemism for 'This witness lied to me.' Those outside the legal process will not read it as that."

Master Trench had given us the right to the diaries but placed strict limits on our use of them. Because they contained highly personal information, only the lawyers and those experts who were working on the topic of Irving's connection with neo-Nazis could see them. If they found something that pertained to the work of another expert, they could pass that section on. No one else, myself included, could inspect the diaries. While this stipulation protected Irving from having people troll through his personal diaries, it did not offer him complete sanctuary. Any portion of the diary that we introduced into court became part of the public record. As the

experts began to review the material from Irving's personal files and diaries, I was surprised to learn of his interaction with key American personalities. During his visits to the United States, he had established contact with the former Ku Klux Klan leader, David Duke. Duke and Irving not only played tennis together but exchanged lists of their major donors, apparently assuming that donors who supported one of them would be inclined to support the other. Irving edited Duke's book, *My Awakening*.²⁸ The book was replete with so many racist and antisemitic diatribes that I found it difficult to read. I was sitting with Julius and James, reviewing the material from the diaries and the list of documents we had from Irving's files, when I came across the information about Irving's speaking engagements before the American extremist group, the National Alliance. The National Alliance advocated that the United States be divided into racial regions; whites would live in the choicest ones and people of color (that included Jews) in the others. Its founder was William Pierce, who was the author of *The Turner Diaries*,²⁹ which had become the "Bible" of far right wing extremists. He advocated that extremists fight the government of the United States by engaging in "leaderless revolution," i.e. that they operate as small cells that could not be traced back to any large overarching organization.³⁰ Irving's diaries and correspondence revealed that he was in regular contact with German neo-Nazis and extremists. During the two-year period immediately following the unification of Germany, he regularly traveled to the former East Germany where he had participated in a series of neo-Nazi rallies and given talks to groups the German government labeled as extremist.

Irving then went to court and demanded that I, too, have to sign an affidavit attesting to the honesty of my discovery procedure. Master Trench agreed. James believed that the only reason Master Trench did so was because Irving was representing himself. "He wants to give him as much leeway as possible. If Irving had counsel, you may not have had to complete such a form." James explained that, "it really was not a big deal." All I had to do was go to a British embassy or consulate and swear before an embassy official that I had turned over all pertinent documents to my adversary. I complied, but as I did so I thought of how my life had been disrupted by this case.

28. DAVID DUKE, *MY AWAKENING: A PATH TO RACIAL UNDERSTANDING* (1998).

29. ANDREW MACDONALD, *THE TURNER DIARIES* (1996). Andrew MacDonald is a pseudonym used by William Pierce. See *Q & A on The Turner Diaries*, at http://www.adl.org/presrele/Militi_71/2737_71.asp (last viewed Jan. 25, 2003).

30. *Id.*

Though I could not talk to the press about the discovery materials from Irving's files, there were still other things I could discuss with reporters, who were beginning to call for interviews. I was anxious to explain to them that Irving was not to be trusted as a historian and that this trial was not about competing versions of history. In early 1999, over lunch in a small Bloomsbury bistro near the Mishcon offices, I asked Anthony what topics I should avoid when talking to the press. He looked at me and, in his blunt fashion, said, "All of them. Just don't talk to the press. Period." When I asked why, Julius argued that David Irving craved publicity. If I refused to cooperate, most reporters would drop the story, thereby denying Irving the attention he so wanted. Furthermore, Julius continued, "British judges hate it when a case on which they are scheduled to sit is litigated in the press prior to coming to trial." I began to mull over his view. After lunch, as I made a quick detour to the British Museum, I realized that when a lawyer tells a client something it is not an "opinion" or a "suggestion." It is far more than that. I knew that I was used to talking to the press. I did it well. It seemed silly not to allow me to use my talents in this regard. I knew, however, that I also had to follow my lawyer's instructions in this regard. As an academic, I was not used to taking orders about what I could and could not say, particularly when it related to my professional work. Academia was, in fact, all about the freedom to think and write as one wished, within the confines of one's discipline. Thinking about this, I realized that one of the hardest aspects of this whole saga would be ceding control to someone else. This could well become the professional fight of my life, and because it was in an unfamiliar arena, I could not lead the charge.