

THE UNIVERSITY OF SYDNEY
FACULTY OF ARTS AND SOCIAL SCIENCES
School: Department of Hebrew, Biblical and Jewish Studies
Course: JCTC2606: The Holocaust: History and Aftermath
Tutor: Suzanne Rutland

BETWEEN TRUTH AND REASONABLE DOUBT: HISTORICAL AND LEGAL 'TRUTH' IN THE AUSTRALIAN WAR CRIMES TRIALS

Question: With reference to the Australian War Crimes Trials, examine the tensions between historical and legal 'truth' in the context of Holocaust trials.

TABLE OF CONTENTS:

INTRODUCTION.....	P. 1
I TRIALS AND TRUTH IN CONTEXT.....	P.2
II THE TENSION DEFINED.....	P.4
A LEGAL TRUTH: THE COURTROOM AS CLASSROOM?.....	P.5
B HISTORICAL TRUTH: THE COURTROOM AS DISTORTION?.....	P.6
III THE TENSION AT PLAY.....	P.10
A THE AUSTRALIAN EXPERIENCE: WAR CRIMES TRIALS.....	P.10
B THE MALLEABILITY OF HISTORICAL AND LEGAL TRUTH: HOLOCAUST DENIAL....	P.11
IV CONCLUSIONS.....	P.12
BIBLIOGRAPHY.....	P.13

Mitchell James Cleaver
Student Number: 311 211 690
Contact Details: +61 (02) 9542 3569
mcle1257@uni.sydney.edu.au

BETWEEN TRUTH AND REASONABLE DOUBT: HISTORICAL AND LEGAL 'TRUTH' IN THE AUSTRALIAN WAR CRIMES TRIALS

Professor Konrad Kwiet: This is my opinion – and I can only express an opinion since there is no written record on the execution of the ghetto of Serniki.

Michael David QC: But this is your historical opinion, is it?

Professor Konrad Kwiet: It's my historical opinion, it's based on the knowledge of surrounding pit killings at the same time, and the time factor, as well as the geographic and logistic factors, must indicate that the units stationed in the environment of Serniki must have conducted the pit killing of Serniki.

[...]

Michael David QC: Historians and lawyers have different criteria. You might have realised that.

Professor Konrad Kwiet: I have realised that.¹

This essay will examine historical and legal conceptions of truth and the tensions that arise between them in Holocaust trials.² Whilst expert historical evidence is invaluable, if not essential, to a Holocaust trial, fundamental differences in principle and procedure lie behind this superficial 'interdependence' of law and history.³ Both history and law make factual findings. These 'truths' are the products of the assumptions, methods, and objectives of the respective discipline. Historical and legal truth are thus the result of institutional processes and one need not therefore 'judge that one is authentic and the other fake', nor that 'they are [both] equally valid'.⁴ They simply have distinct 'objectives and ways of operating' in their shared pursuit of the objective truth.⁵ Holocaust trials bring history into the courtroom; neither discipline escapes unscathed.

This essay will argue that an informed understanding of the nature and function of history and law, and their respective approaches to ascertaining truth, is crucial to any academic appraisal of Holocaust trials. Whilst the Australian experience will be the primary case study, this paper will employ a comparative approach and draw from criminal and civil legal proceedings from a variety of jurisdictions. After contextualising the Australian trials, historical and legal conceptions of truth will be defined. Two phenomena, namely (i) the use of legal proceedings as tools for Holocaust

1 *Director of Public Prosecutions (Cth) v Ivan Timofeyevich Polyukhovich*, (Unreported, Supreme Court of South Australia, Cox J, 4 March 1993), trial transcript, quoted in David Fraser, *Daviborschch's Cart: Narrating the Holocaust in Australian War Crimes Trials* (Lincoln: University of Nebraska Press, 2010), pp. 122, 143.

2 On a proposed taxonomy of Holocaust trials, see Fraser, *Daviborschch's Cart*, pp. 10-1; Michael Marrus, 'History and the Holocaust in the Courtroom' in Ronald Smelser, *Lessons and Legacies V. The Holocaust and Justice*. (Evanston: Northwestern University Press 2002).

3 Erich Haberer, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes' *Holocaust and Genocide Studies* 19 (2005), p. 491.

4 David Hirsch, *Law Against Genocide: Cosmopolitan Trials* (London: Glasshouse, 2003), p.146.

5 *Ibid.*

awareness and education, and (ii) the distortion to history and the law that might result from such action, will be critically examined. Particular focus will be placed upon the adduction and manipulation of expert historical opinion and the implications for the disciplines of law and history. Two questions underpin this paper's discussion, one empirical, one normative: firstly, how does the tension between historical and legal truth play out in practice? Secondly, if this interplay has the potential to damage or distort, to what extent should it be desired? Through recourse to the 'rules and discourse' of both disciplines, this essay will examine the tensions that arise when Holocaust trials bring 'justice legally applied' and 'truth historically defined' into sharp relief.⁶

I TRIALS AND TRUTH IN CONTEXT

As a construct, the Holocaust is firmly within the scope of historical inquiry. Behind the term, however, lies objective reality: brutal acts of vilification, the wrongful acquisition of property, forced deportation, forced labour, dehumanisation, and finally, mass-murder and genocide. It follows from this that the Holocaust as an historical event is inextricably tied to the law, a system by which society expresses and imposes its judgment.⁷ Legal judgment recognises the atrocities of the Holocaust, holds individuals accountable for their actions, and legally acknowledges society's abhorrence thereof. Recourse to the law precludes the scathing indictment that Australia is 'a welcoming sanctuary' for 'mass killers and torturers'.⁸

In the aftermath of the Second World War, the significance of legal proceedings to future generations of historians, legal scholars, and politicians was immediately recognised. Contemporaries speak of hearings 'as dispassionate as the times and the horrors' will permit and of a record leaving 'reasons and motives clear'.⁹ Though not an active participant at Nuremberg, Australia took part in the International Military Tribunal for the Far East and conducted its own trials.¹⁰ The reality, however, is that between 1945 and the establishment of the Special Investigations Unit (SIU) in 1987, Australia lacked infrastructure 'to assess or investigate

6 Ibid, p. 510.

7 See generally Brown, David, et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney, Federation Press, 5th Edition, 2011) pp. 41-52, 73-4, 76-93.

8 Mark Aarons, *War Criminals Welcome: Australia, A Sanctuary For Fugitive War Criminals Since 1945* (Melbourne: Schwartz Publishing, 2001), p. 2.

9 Robert H. Jackson, 'Justice Jackson's Report to the President on Atrocities and War Crimes, June 7, 1945' in Simone Gigliotti, Berel Lang, eds., *The Holocaust: A Reader* (Malden: Blackwell Publishing, 2005), p. 301.

10 Leslie Caplan, *The Road to the Menzies Inquiry: Suspected War Criminals in Australia* (Darlington: Australian Jewish Historical Society, 2012), p. 28.

allegations that Nazi war criminals' had entered Australia.¹¹ Substantially amended in 1988,¹² the *War Crimes Act 1945* provided the legislative framework for domestic prosecution.¹³ The Australian War Crimes Trials did not deal with war criminals in the sense of Göring, Höss or Eichmann.¹⁴ In practice, the investigations generally focused upon 'lower-level functionaries' and collaborators from Eastern Europe.¹⁵ Only three cases would come before the courts: those pertaining to Ivan Polyukhovich, Michael Berezowsky and Heinrich Wagner.¹⁶

The truth of the Holocaust is not merely of political or historical interest. When survivors fled to Australia, their burden was not in the abstract; it was not merely as victims of the Holocaust. It was as survivors of individual atrocities. Whilst some might argue that the Holocaust is impenetrable to historical inquiry,¹⁷ such inquiry is essential to the provision of legal justice. In welcoming both 'perpetrators and victims of Nazi persecution', Australia ensured its involvement in the broader controversies surrounding the appropriate means of understanding and addressing the Holocaust.¹⁸ More specifically, through establishment of the SIU and the commencement of legal

11 Australia, Attorney-General's Department, *Report of the Investigations of War Criminals in Australia* (Canberra: Australian Publishing Service, 1993), p. 14.

12 *War Crimes Amendment Act 1988* (Cth); see further, Australia, Parliament Senate, Senate Standing Committee on Constitutional and Legal Affairs, *Matters Relating to the War Crimes Amendment Bill 1987* (Canberra: Parliament of the Commonwealth of Australia, 1988).

13 Note that the institution of domestic proceedings was not the only course of action available; see generally, A.C. Menzies, *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (Canberra: Australian Government Publishing Service, 1987); Konrad Kwiet, 'A Historian's View: The War Crimes Debate Down Under', *Dapim: Studies on the Shoah* 24 (2010), p. 311; whilst other jurisdictions, such as Canada and the United States, instigated deportation and denaturalisation proceedings, their actions were in part influenced by constitutional limits on the promulgation of ex post facto laws, limitations absent from our own constitution; see *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; Irene Nemes, 'Punishing Nazi War Criminals in Australia: Issues of Law and Morality', *Current Issues in Criminal Justice* 4, no. 2 (1992-1993), p. 152; furthermore, as noted in the Menzies Report, deportation and denaturalisation would likely be statute barred, involve complex constitutional questions, or be otherwise impracticable, see further Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, pp. 551-3; Gillian Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?' (1987) *Melbourne University Law Review* 16, pp. 398-401; on the possibility of extradition, see Triggs, 'Australia's War Crimes Trials', pp. 382-402; Kwiet, 'A Historian's View: The War Crimes Debate Down Under', pp. 319-339; House of Representatives, *Hansard*, 26 November 1987, 2733 (Peter Reith).

14 For an overview of the major investigations, see Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, pp. 65-164.

15 Fraser, *Daviborschch's Cart*, p. 199.

16 Polyukhovich was acquitted by jury on both counts, the case against Berezowsky did not proceed past preliminary proceedings due to evidentiary issues, and the case against Wagner was dropped due to health issues; see Gideon Boas, 'War Crimes Prosecutions in Australia and other Common Law Countries: Some Observations' (2010) *Criminal Law Forum* 21, no. 2, pp. 319-20; note also that throughout the lifetime of the SIU, only four of twenty-seven briefs deemed to be of substance were officially passed to the Director of Public Prosecutions, insufficient evidence often the determinative factor; see Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, p. 5.

17 See generally, Mark Levene, 'Is the Holocaust Simply Another Example of Genocide?' *Patterns of Prejudice* 28, no. 2 (1994) pp. 3-26.

18 Tom Lawson, James Jordan, eds., 'Introduction' in *The Memory of the Holocaust in Australia* (Oregon: Vallentine Mitchell, 2008), p. 1.

proceedings against alleged war criminals, it played host to a collision of disciplines. At times amicable, at times directly hostile, at the heart of the tension between law and history are crucial differences regarding truth and the means for its ascertainment.

II THE TENSION DEFINED

Whilst history and the law both seek what one might term objective truth, they are constrained by institutional convention, the dominating ideological frameworks within which they operate, and the simple fact they pose different questions for different purposes. Both certainly make findings involving the 'critical apprehension of evidence in the ascertainment of facts'.¹⁹ Historical accounts, however, are typically concerned with 'explanation and understanding, not with judgment'.²⁰ Conversely, judicial pronouncements are authoritative, enforceable judgments on the rights, duties, and liabilities of individuals.²¹ Criminal proceedings seek 'to establish individual guilt, not historical causation'.²² From the outset therefore, one may discern a tension. A court is a place of conflicting personal, legal and political interests and is subject to rigorous rules of evidence and procedural fairness. The historian is not so constrained; her work is not 'framed by a knowledge or estimation of [the] political and legal consequences', but simply by a desire to deduce the truth from the relevant sources.²³ This tension of 'methods and objectives'²⁴ becomes strikingly apparent in the context of Holocaust trials where courtrooms become classrooms and historians act as expert witness.²⁵

19 Haberer, 'History and Justice', p. 489.

20 Henry Rousso, translated from the french and quoted in Richard Evans, 'History, Memory and the Law: The Historian as Expert Witness', *History and Theory* 41, no. 3 (October 2002), p. 334.

21 *Huddart, Parker & Co Pty Ltd v Moorhead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J).

22 Donald Bloxham, Devin Pendas, 'Punishment as Prevention?: The Politics of Punishing Génocidaires' in Donald Bloxham, Dirk Moses, *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), p. 635.

23 Evans, 'History, Memory and the Law: The Historian as Expert Witness', p. 334.

24 Bloxham, 'Punishment as Prevention?: The Politics of Punishing Génocidaires', p. 635.

25 For an overview of the debate regarding the appropriateness of historians acting as expert witness, see Vladimir Petrovic, 'Historians as Expert Witnesses in the Age of Extremes', doctoral dissertation (Budapest: Central European University, 2009).

A Legal Truth: The Courtroom as Classroom?

Legal truth is a construct, a product of the legal system within which it operates. Although termed *truth*, there is no guarantee that a court's findings will correspond to 'objective reality'.²⁶ Legal truth is simply the final adjudication upon admissible evidence.²⁷ Given the law's strict evidential requirements, legal pronouncements of guilt have profound cultural currency. Holocaust trials can therefore serve an educational function, being 'an important source of counter-revisionist evidence' which provides history with 'a true account of the events of the past'.²⁸

When an alleged war criminal's culpability is adjudged by the law, contested facts are reconciled, a version of past events is agreed upon, and one account is vindicated and publicly recorded. Legal categories, institutions, and definitions interact with popular ones; they mutually inform and transform one another.²⁹ Courtrooms are thus powerful tools of cultural change. Maoz argues that 'judicial determination per se has far-reaching consequences because of the great public confidence in its validity and the public's identification of that determination with the "real" truth'.³⁰ Given this connection, 'judicial historiography'³¹ becomes a potent construct that can contribute to 'historical and cultural understanding'.³² It can forge 'terms and concepts' which will help 'fill the conceptual vacuum created by the Holocaust'.³³ Indeed, much academic work still relies upon the documents tendered at Nuremberg.³⁴ Similarly, investigations undertaken by the various expert witnesses of the Irving libel trial have produced invaluable insights into the Auschwitz camps and Hitler's role in the Holocaust.³⁵ The Eichmann trial, though a world away, gave 'significant impetus to a shift in awareness and understandings' in Australia.³⁶

26 Asher Maoz, 'Historical Adjudication: Courts of Law, Commissions of Inquiry, and "Historical Truth"', *Law and History Review* 18, p. 569.

27 It is thus closely circumscribed by the rules of evidence, see, e.g., *Commonwealth Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Criminal Procedure Act 1986* (NSW).

28 Nemes, 'Punishing Nazi War Criminals in Australia', p. 155.

29 Jack M. Balkin, 'The Proliferation of Legal Truth', *Harvard Journal of Law and Public Policy* 26, no. 5 (2003), p. 9.

30 Maoz, 'Historical Adjudication: Courts of Law, Commissions of Inquiry, and "Historical Truth"', p. 569.

31 Haberer suggests that this phrase has a dual meaning, referring to both 'the judgmental writing of history' as well as 'the writing of history to meet legal requirements'; see Haberer, 'History and Justice', pp. 493, 512.

32 Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), p. 259.

33 Ibid.

34 For a critical analysis, see Donald Bloxham, *Genocide on Trial: The War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001).

35 Evans, 'History, Memory and the Law: The Historian as Expert Witness', p. 343.

36 David Ritter, 'Distant Reverberations: Australian Responses to the Trial of Adolf Eichmann' in Lawson, *The Memory of the Holocaust in Australia*, p. 67.

Notwithstanding the historic significance of the Nuremberg, *Eichmann*³⁷ and *Irving*³⁸ trials as unequivocal denunciations of Nazi atrocities and those who would deny their occurrence, the role of courtrooms as 'tools for Holocaust and genocide awareness and education' has been doubted.³⁹ The Australian trials hardly left an indelible mark on public discourse and awareness, attracting only 'occasional flurries of media attention'.⁴⁰ Furthermore, as the trials were conducted 'neither to confirm the historical truth of the Holocaust nor to combat the antisemitic views of Holocaust deniers', they were officially concerned with justice, not education.⁴¹ This echoes Arendt's assertion that 'the purpose of a trial is to render justice, and nothing else'.⁴² Whilst alluring in its simplicity, this mischaracterises the complexity of the relationship between law and society. Douglas agrees and disputes this harsh distinction between the historical, the legal, and the educational.⁴³ Holocaust trials serve multiple functions in a post-Holocaust society and reintroduce law into 'a space evacuated of legal and moral sense'.⁴⁴ On this view, the Australian trials constituted a symbolic affirmation of justice and the rule of law, however belated or unsatisfactory they were in practice. Even so, such trials blur 'the very boundary between the legal and extralegal'.⁴⁵ Conceding that such trials reinforce cultural and ethical norms or otherwise contribute to Holocaust awareness, in blurring such boundaries, does this interplay between history and the law distort the objective truth?

C Historical Truth: The Courtroom as Distortion

Truth and its exposure is paramount to an historian.⁴⁶ Whilst the same is true of a judge, the adversarial system prescribes partiality; practical legal realities can therefore distort the truth. Historical processes of establishing fact can be distinguished from legal processes, the latter being

37 *Attorney-General of the Government of Israel v Eichmann* (1961) 36 I.L.R. 5 District Court of Jerusalem.

38 *Irving v Penguin Books Ltd, Deborah E. Lipstadt* [2000] EWHC QB 115.

39 Kwiet, 'A Historian's View: The War Crimes Debate Down Under', p. 321; see Devin Pendas, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History and the Limits of the Law* (Cambridge: Cambridge University Press, 2005).

40 Caplan, *The Road to the Menzies Inquiry*, p. 92; on the public response, see generally David Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution* (Kent Town: Wakefield Press, 1994), pp. 14-25; Irene Nemes, 'Punishing Nazi War Criminals in Australia: Issues of Law and Morality', *Current Issues in Criminal Justice* 4, no. 2 (1992-1993), pp. 141-55.

41 Kwiet, 'A Historian's View: The War Crimes Debate Down Under', p. 321; as regards purpose, note also the preamble to the *War Crimes Act 1945* (Cth), as amended by the *War Crimes Amendments Act 1988* (Cth).

42 Hannah Arendt, *Eichmann in Jerusalem A Report on the Banality of Evil* (New York: Viking, 1963), p. 233.

43 Douglas, *The Memory of Judgment*, p. 3.

44 *Ibid.*

45 *Ibid.*

46 For the purposes of this essay, contentions as to the knowability of the past and the problematic interplay between source and historian can be set aside. It is assumed that the historian's ideal is to seek the objective truth and present it in as dispassionate a manner as is possible.

constrained by time, expense and the adversarial system, whilst the former is undertaken in the name of objectivity and is arguably subject to unlimited appeal.⁴⁷ Dean, an expert witnesses in the Berezowsky case, certainly subscribed to this view, retracting and revising already tendered expert opinion.⁴⁸ From an historian's perspective, Dean had simply adjusted his conclusions to account for new evidence. In a court setting, however, where the desire for justice must be balanced with the rights of an accused, this raised issues of evidence credibility and burdens of proof.⁴⁹

The historian is more than merely a detective of the past.⁵⁰ An historian certainly uncovers evidence, yet she must also evaluate it, drawing and defending conclusions whilst remaining open to new evidence.⁵¹ No separation between those uncovering the evidence and those drawing conclusions pursuant to it, might expose the past to distortion. The Australian trials addressed this in two ways. First, an independent, multidisciplinary body of professional historians and lawyers investigated allegations before referring formal briefs to the Director of Public Prosecutions (DPP). Secondly, through rigorous guidelines imposed upon the unit itself.⁵² The investigations were characterised by a duty to impartiality.⁵³ When the briefs were passed to the DPP, however, legal hurdles quickly presented themselves. For the historian, the age of evidence undermines reliability, not necessarily utility. In court, old evidence can be fatal. Polyukhovich argued that the proceedings constituted an abuse of process given the 'loss of vital witnesses' and the clear evidentiary problems with 50 year old oral testimony.⁵⁴ Whilst the case would go to trial, most charges were stayed on evidentiary grounds.⁵⁵ The presentation and legitimacy of historical inquiry was thereby determined

47 Aviezer Tucker, 'The Future of the the Philosophy of Historiography', *History and Theory* 40, no. 1 (February 2001), p. 50.

48 Fraser, *Daviborschch's Cart*, p.185.

49 The magistrate eventually held that the prosecution had failed to satisfy its evidentiary burden, the result being that the case could not proceed to trial; see further Fraser, *Daviborschch's Cart*, pp. 186-7.

50 Tucker, 'The Future of the the Philosophy of Historiography', p. 50.

51 Ibid.

52 See 'Operational and Organisational Philosophy of the Special Investigations Unit as at February 1989' in Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, pp. 601-608;

53 See, e.g., the comments of Mr. Greenwood, Director of the SIU, in which he describes the 'equal responsibility' to scrupulously follow leads which might prove allegations to be 'false or exaggerated'; Mr. Greenwood, Director of the Special Investigations Unit, quoted in Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, p. 21; note also the 38 cases in which allegations were deemed false following critical appraisal by the SIU; see Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, pp. 50-1.

54 Michael Kirby, 'War Crimes Prosecution – An Australian Update', *Commonwealth Law Bulletin* 19 (April 1993), p. 785; see also *R v Ivan Timofeyevich Polyukhovich* (Unreported, Supreme Court of South Australia, Cox J, 22 December 1992); this reflected the common law, rather than constitutional, right to a fair trial; *Jago v The District Court of New South Wales & Ors* (1989) 168 CLR 23; for discussion, see Kirby, 'War Crimes Prosecution – An Australian Update', pp. 781-7; on the impact of translation and cultural difference on the adduction of oral testimony in the context of the trials, see Fraser, *Daviborschch's Cart*, pp. 242-262.

55 For a detailed account of the trial, see David Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution* (Kent Town: Wakefield Press, 1994).

by 'technical legal considerations'.⁵⁶

Expert historical evidence can function as mere weapon in the adversarial system. This exploitation of history has been conceived of as 'asymmetrical and dysfunctional' and susceptible to being a 'subversion of justice' and mere 'debasement of history'.⁵⁷ Whilst the same factual matrix may be examined by a court and an historian, the former 'tackles historical problems on a narrow front'.⁵⁸ Complex historical forces are examined only to the extent to which they fit within the law's conception of human agency and the case at hand. Holocaust trials appropriate the past into a narrative which suits the party relying upon it. This undermines the historian's objective approach to 'understanding and explaining' human behaviour.⁵⁹ Furthermore, the law's proclivity for discrete legal categories, such as perpetrator and victim, forces legal understandings upon a past 'more complex, more ambiguous, more compromised' than might be recognised in court.⁶⁰

The Nuremberg Trials, being an attempt to 'submit mass atrocity to principled judgment' alongside an unflinching presentation of Nazi atrocities, highlights such notions well.⁶¹ Nuremberg functioned as a 'history lesson writ large', the intensive investigation producing an enormous body of work and contributing greatly to public awareness.⁶² Nevertheless, the prosecution case was argued on a single view of Nazi criminality, one necessitated by the legal terms of the indictments.⁶³ This fact, and the trials' sparse use of survivor oral testimony, effectively 'minimised the Holocaust, marginalised the victims, and misrepresented the complexity of the continent-wide implementation of the Nazi genocidal policies'.⁶⁴ This has been termed a 'Nuremberg historiography'.⁶⁵ The law can therefore shape the construction of historical narrative, narratives which may well be uncritically accepted and propagated for years to come. That is not to deny the importance of these trials in the ongoing academic examination of the Holocaust. Conceding the potential for distortion, one must still recognise that such trials produce exhaustive historical investigation which remains available for future interpretation.⁶⁶

56 Kwiet, 'A Historian's View: The War Crimes Debate Down Under,' p. 321.

57 Haberer, 'History and Justice', pp. 492, 509.

58 Evans, 'History, Memory and the Law: The Historian as Expert Witness', p. 330.

59 Ibid, pp. 335, 336-8.

60 Ibid, p. 334.

61 Douglas, *The Memory of Judgment*, p. 1.

62 Bloxham, *Genocide on Trial*, p. 17.

63 Nuremberg has been identified as the birth of the 'intentionalist' school; see Bloxham, *Genocide on Trial*, p. 204-5.

64 Haberer, 'History and Justice', p. 493.

65 Bloxham, *Genocide on Trial*, pp. xi, 204.

66 Haberer, 'History and Justice', p. 509.

The Australian experience is a case in point. Whilst much evidence could not be adduced at trial, the evidence itself remains open to the public and the historical fraternity.⁶⁷ For example, forensic work in Serniki, Gnivan and Israelovska determined 'the precise time of the execution, the killing techniques employed, the number of victims, their age, gender and type of injury, their possessions and final movements before death'.⁶⁸ Whilst legal justice may have been denied, an unprecedented historical record was produced. Previously inaccessible archives, witnesses and documents were recovered, analysed and now reside in museums.⁶⁹ Furthermore, the work of the SIU dealt with Eastern European collaborators, giving voice to previously unheard survivor accounts.⁷⁰ In the case of the Berezowsky trial, the key expert witnesses would go on to publish their findings.⁷¹ Despite differences in methodology, objective, and evidentiary philosophies, the co-operative work of the SIU, DPP, and the legal profession all attest to the importance of a multidisciplinary approach to addressing the Holocaust:

[The law] constitutes an effective counterweight to the widely-practiced emotional style of coming to terms with the past, which highlights certain major truths at the expense of historical exactitude regarding real facts and circumstances [...] The strict rules of judicial proceedings provide the standard of rationality of which we are in dire need.⁷²

In Buchheim's view, this interplay enriches history by demanding from it 'a particularly high degree of dispassionate and rational research'.⁷³ Haberer agrees and cites the war crimes trials at Ludwigsburg as an example of this approach, trials that in his view were paradigmatic of those held in Australia, the United States, and Canada.⁷⁴ The Australian experience affirms that the interplay between the historical and the legal brings about a 'unique relationship' between history and the law that is 'absolutely indispensable for the judicial process and, for the most part, beneficial to both'.⁷⁵

67 But note the difficulties resulting from legal privilege which has precluded access to the entirety of the SIU's work, see Fraser, *Daviborschch's Cart*, pp. 318-9.

68 Kwiet, 'A Historian's View: The War Crimes Debate Down Under', p. 336.

69 Haberer, 'History and Justice', p. 507-8; see also Fraser, *Daviborschch's Cart*, pp. 164-5.

70 On the major investigations of the SIU, see Attorney-General's Department, *Report of the Investigations of War Criminals in Australia*, pp. 65-164.

71 See, e.g., Jonathan Steinberg, 'The Third Reich Reflected: German Civil Administration in the Occupied Soviet Union, 1941-4' *English Historical Review* 110, no. 437 (1995), pp. 620-51; Martin Dean, 'The German Gendarmerie, The Ukrainian *Schutzmannschaft* and the 'Second Wave' of Jewish Killings in Occupied Ukraine: German Policing at the Local Level in the Zhitomir Region, 1941-44' *German History* 14, no. 2 (April 1996), pp. 168-92; but see Fraser, *Daviborschch's Cart*, pp. 189-91.

72 Hans Buchheim et al, *Anatomie des SS-Staates* (Freiburg im Breisgau: Valter-Verlag Olten, 1965), 1:7-8, translated from the German in Haberer, 'History and Justice', p. 510.

73 Ibid.

74 Haberer, 'History and Justice', p. 506.

75 Ibid, 'History and Justice', p. 490; it is important, however, to note the broader context of, and ongoing controversies regarding, the war crimes debate in Australia; see further Aarons, *War Criminals Welcome: Australia, A Sanctuary For Fugitive War Criminals Since 1945*.

Having examined the nature of historical and legal truth and contentions as to the effect and desirability of an interplay between the two, we turn now to examine more closely how this tension manifests itself in the courtroom.

IV The Tension At Play

A The Australian Experience: War Crimes Trials

In war crimes trials, expert historical evidence is decisive. It is tendered 'to determine the context, personal motives, nature, and specific circumstances of a crime'.⁷⁶ In Australian criminal proceedings, assertions of fact must be proved beyond reasonable doubt. This contrasts with the approach of an historian, for whom the scope of possible evidence is potentially broader as conclusions can be reached upon the balance of probabilities.⁷⁷

A judicial pronouncement is invariably equated by the public with moral judgment. For this reason, courts demand 'clear-cut, definite, and unambiguous statements', statements with which 'historians often feel uncomfortable'.⁷⁸ Whilst 'an historian deals in generalities', the court must remember that a single individual will bear 'the weight of any allegations'.⁷⁹ In the Australian trials, the prosecution was required to prove that the accused's acts constituted a war crime as defined by legislation.⁸⁰ An accused was not charged with murder, but rather murder 'under particular historical circumstances and for particular ideological, racial or political purposes'.⁸¹ The adduction of evidence to prove these further elements exerted great pressure upon traditional legal concepts, requiring 'a fine historical, jurisprudential and legal line to be walked in leading such evidence'.⁸² This tension is exemplified by the striking out of much of the prosecution evidence in *Polyukhovich*⁸³ as well as by additional limitations placed upon their expert evidence. The net result was that several inferences of a professional historian, drawn from close study of the evidence, were deemed inadmissible. The evidence dealt with local forest wardens' knowledge of and collaboration

76 Haberer, 'History and Justice', p. 496.

77 Evans, 'History, Memory and the Law: The Historian as Expert Witness', p. 330.

78 Ibid.

79 Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution*, p. 225.

80 The *War Crimes Act 1945* (Cth) s 7(1) provides that 'a serious crime is a war crime if it was committed (a) in the course of hostilities in a war, (b) in the course of an occupation, (c) in pursuing a policy associated with the conduct of a war or with an occupation, or (d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation'.

81 Fraser, *Daviborschch's Cart*, p. 92.

82 Ibid, p. 93.

83 *Director of Public Prosecutions (Cth) v Ivan Timofeyevich Polyukhovich* (Unreported, Supreme Court of South Australia, Cox J, 4 March 1993).

in pit killings in occupied Ukraine. Interviews, archival evidence and tendered documents suggested that forest wardens had collaborated in ghetto liquidations.⁸⁴ From a legal perspective, such evidence is deeply problematic given it 'might seep unconsciously into the jurors' consideration of the actual culpability' of the accused.⁸⁵ The historian, reasoning on the balance of probabilities, might well conclude that local forest wardens participated in pit killings, perhaps even in the event in question. The judge, requiring facts to be proven beyond reasonable doubt, would hesitate to conclude that *this* local forest warden participated, merely on the basis of such evidence.

B *The Malleability of Historical and Legal Truth: Holocaust Denial*

Historical narratives and the 'authority of an expert witness' can be manipulated by either side in Holocaust trials.⁸⁶ Apart from misconstruing expert opinion, it is always open to one party to assert that history is simply 'an unending debate in which nothing [can] ever be proven for certain'.⁸⁷ In the Irving libel trial,⁸⁸ Irving denied any 'generally understood sense of the Holocaust'.⁸⁹ Similarly, in the Canadian trials of Ernst Zündel, history was presented as 'inescapably interpretive' and 'enveloped in an impenetrable hermeneutic haze'.⁹⁰ The educational function of Holocaust trials was severely undermined as the defence sought to prove that Zündel's statements were 'both honest and true'.⁹¹ Through sophistry and 'legal dramaturgy', historical evidence was twisted to further ideology and undermine the historical method.⁹² Legal avenues of redress can serve as a forum for individuals to distort the objective truth for which both disciplines strive. Civil trials allow Holocaust deniers to 'behave as if the most tendentious and partisan hyperbole serves as a proper contribution to public debate and historical instruction'.⁹³ More broadly, Holocaust trials bring history into the courtroom where it is subject to the conflicting political and personal interests of the various parties. As expert historical evidence is a necessary precondition for a Holocaust trial, a tension is inevitable.

84 Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution*, pp. 224.

85 Fraser, *Daviborschch's Cart*, p. 93.

86 Ibid, p. 136; for instances of this in the Polyukhovich trial, see Bevan, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution*, p. 226.

87 Evans, 'History, Memory and the Law: The Historian as Expert Witness', p. 329.

88 *Irving v Penguin Books Ltd, Deborah E. Lipstadt* [2000] EWHC QB 115.

89 D. D. Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: W. W. Norton and Company, 2001), p. 112.

90 Douglas, *The Memory of Judgment*, p. 235.

91 Ibid, p. 224.

92 Ibid, p. 225.

93 Ibid, p. 235; on the Irving trial specifically, see Guttenplan, *The Holocaust on Trial: History, Justice and the David Irving Libel Case*.

IV Conclusions

Whether they pertain to war crimes or Holocaust denial, Holocaust trials will inevitably highlight a fundamental tension between the disciplines of law and history, namely their respective conceptions of truth and the means for its ascertainment. Whilst history and law both seek the objective truth, they are in practice constrained by their institutional ideologies, methods and objectives. Through close study of the Australian experience as contextualised by comparative analysis, this essay has examined the an inherent tension that exists in Holocaust trials. This tension between historical and legal conceptions of truth has been evaluated through considering the educational, as well as the potentially distorting, power of a court of law. It can be conceded that the 'carefully defined and circumscribed purposes' of legal proceedings will not always 'satisfy the wider remit of history'.⁹⁴ The conclusion must therefore be that courtrooms constitute but one part of 'negotiating the aftermath' of the Holocaust.⁹⁵

⁹⁴ Evans, 'History, Memory and the Law: The Historian as Expert Witness', p. 330.

⁹⁵ Bloxham, 'Punishment as Prevention?: The Politics of Punishing Génocidaires', p. 637.

BIBLIOGRAPHY

PRIMARY SOURCES

Attorney-General of the Government of Israel v Eichmann (1961) 36 I.L.R. 5 District Court of Jerusalem.

Commonwealth Evidence Act 1995 (Cth).

Criminal Procedure Act 1986 (NSW).

Director of Public Prosecutions (DPP) (Cth) v Ivan Timofeyevich Polyukhovich (Unreported, Supreme Court of South Australia, Cox J, 4 March 1993).

Evidence Act 1995 (NSW).

House of Representatives, *Hansard*, 26 November 1987.

Huddart, Parker & Co Pty Ltd v Moorhead (1909) 8 CLR 330.

Irving v Penguin Books Limited, Deborah E. Lipstadt [2000] EWHC QB 115.

Jago v The District Court of New South Wales & Ors (1989) 168 CLR 23

R v Ivan Timofeyevich Polyukhovich (Unreported, Supreme Court of South Australia, Cox J, 22 December 1992).

R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd (1970) 123 CLR 361.

Paul Gregory Malone v Mikolay Berezowsky (Unreported, Adelaide Magistrates Court, 25241/1991, Transcript of Proceedings, 602).

Polyukhovich v The Commonwealth (1991) 172 CLR 501.

War Crimes Act 1945 (Cth).

War Crimes Amendment Act 1988 (Cth).

SECONDARY SOURCES

Anderson, Ross, 'War Crimes and Australia' (1996) *Public Law Review* 7, no. 3, pp. 138-142.

Arendt, Hannah, *Eichmann in Jerusalem A Report on the Banality of Evil* (New York: Viking, 1963).

Australia, Attorney-General's Department, *Report of the Investigations of War Criminals in Australia* (Canberra: Australian Publishing Service, 1993).

- Australia, Parliament Senate, Senate Standing Committee on Constitutional and Legal Affairs, *Matters Relating to the War Crimes Amendment Bill 1987* (Canberra: Parliament of the Commonwealth of Australia, 1988).
- Balkin, Jack M., 'The Proliferation of Legal Truth', *Harvard Journal of Law and Public Policy* 26, no. 5 (2003), pp. 5-16.
- Bevan, David, *A Case to Answer: The Story of Australia's First European War Crimes Prosecution* (Kent Town: Wakefield Press, 1994).
- Buchheim, Hans, et al, *Anatomie des SS-Staates* (Freiburg im Breisgau: Valter-Verlag Olten, 1965).
- Boas, Gideon, 'War Crimes Prosecutions in Australia and other Common Law Countries: Some Observations' (2010) *Criminal Law Forum* 21, no. 2, pp. 313-330.
- Brown, David, et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Sydney, Federation Press, 5th Edition, 2011) pp. 1-16.
- Bloxham, Donald, *Genocide on Trial: The War Crimes Trials and the Formation of Holocaust History and Memory* (Oxford: Oxford University Press, 2001).
- Bloxham, Donald, Devin Pendas, 'Punishment as Prevention?: The Politics of Punishing Génocidaires' in Donald Bloxham, Dirk Moses, *The Oxford Handbook of Genocide Studies* (Oxford: Oxford University Press, 2010), pp. 617-37.
- Caplan, Leslie, *The Road to the Menzies Inquiry: Suspected War Criminals in Australia* (Darlington: Australian Jewish Historical Society, 2012).
- Dean, Martin, 'The German Gendarmerie, The Ukrainian *Schutzmannschaft* and the 'Second Wave' of Jewish Killings in Occupied Ukraine: German Policing at the Local Level in the Zhitomir Region, 1941-44' *German History* 14, no. 2 (April 1996), pp. 168-92.
- Douglas, Lawrence, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001).
- Evans, Richard, 'History, Memory and the Law: The Historian as Expert Witness', *History and Theory* 41, no. 3 (October 2002), pp. 326-345.
- Fraser, David, *Daviborschch's Cart: Narrating the Holocaust in Australian War Crimes Trials* (Lincoln: University of Nebraska Press, 2010).
- Guttenplan, D. D., *The Holocaust on Trial: History, Justice and the David Irving Libel Case* (London: W. W. Norton and Company, 2001).
- Haberer, Erich, 'History and Justice: Paradigms of the Prosecution of Nazi Crimes' *Holocaust and Genocide Studies* 19 (2005), pp. 487-519.

- Hirsch, David, *Law Against Genocide: Cosmopolitan Trials* (London: Glasshouse, 2003).
- Jackson, Robert H., 'Justice Jackson's Report to the President on Atrocities and War Crimes, June 7, 1945' in Simone Gigliotti, Berel Lang, eds., *The Holocaust: A Reader* (Malden: Blackwell Publishing, 2005), p. 301.
- Kirby, Michael, 'War Crimes Prosecution – An Australian Update', *Commonwealth Law Bulletin* 19 (April 1993), pp. 781-7.
- Kwiet, Konrad, 'A Historian's View: The War Crimes Debate Down Under', *Dapim: Studies on the Shoah* 24 (2010), pp. 319-339.
- Lawson, Tom, Jordan, James, eds., 'Introduction' in *The Memory of the Holocaust in Australia* (Oregon: Vallentine Mitchell, 2008).
- Levene, Mark, 'Is the Holocaust Simply Another Example of Genocide?' *Patterns of Prejudice* 28, no. 2 (1994) pp. 3-26.
- Maoz, Asher, 'Historical Adjudication: Courts of Law, Commissions of Inquiry, and "Historical Truth"', *Law and History Review* 18, pp. 559-606.
- Marrus, Michael, 'History and the Holocaust in the Courtroom' in Ronald Smelser, *Lessons and Legacies V. The Holocaust and Justice*. (Evanston: Northwestern University Press 2002)
- Menzies, A.C., *Review of Material Relating to the Entry of Suspected War Criminals into Australia* (Canberra: Australian Government Publishing Service, 1987).
- Nemes, Irene, 'Punishing Nazi War Criminals in Australia: Issues of Law and Morality', *Current Issues in Criminal Justice* 4, no. 2 (1992-1993), pp. 141-55.
- Pendas, Devin, *The Frankfurt Auschwitz Trial, 1963-1965: Genocide, History and the Limits of the Law* (Cambridge: Cambridge University Press, 2005).
- Petrovic, Vladimir, 'Historians as Expert Witnesses in the Age of Extremes', doctoral dissertation (Budapest: Central European University, 2009).
- Ritter, David, 'Distant Reverberations: Australian Responses to the Trial of Adolf Eichmann' in Tom Lawson, James Jordan, eds., *The Memory of the Holocaust in Australia* (London: Vallentine Mitchell, 2007), pp. 51-73.
- Steinberg, Jonathan, 'The Third Reich Reflected: German Civil Administration in the Occupied Soviet Union, 1941-4' *English Historical Review* 110, no. 437 (1995), pp. 620-51.
- Triggs, Gillian, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?' (1987) *Melbourne University Law Review* 16, pp. 382-402.
- Tucker, Aviezer, 'The Future of the the Philosophy of Historiography', *History and Theory* 40, no. 1 (February 2001), pp. 37-56.