



*"Holocaust Denial on Trial": An Analysis of Deborah Lipstadt's Approach*

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“Holocaust Denial on Trial”: An Analysis of Deborah Lipstadt’s Approach

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## Abstract

Analysing the methods of countering Holocaust denial in a comparative manner proves a most helpful platform to assess historical methodology and practice. This research seeks to evaluate the differing agendas and perspectives between historical and legal approaches to refuting Holocaust denial from the *David Irving v. Penguin Books Ltd. and Deborah Lipstadt* libel trial.

This research finds that the *Irving v. Penguin* defence team effectively used the court as a framework to test Irving's historical methods of evidence manipulation against the historical record. It is argued that this legal framework and the process of arbitration in law increases the accountability of historical writing, as exemplified in the four historian's expert reports presented for the defence. Based on these reports, the *Irving v. Penguin* case has further practical application for wider historical research practices, as the historian's ability to produce verifiable and justifiable conclusions are defended.

This research contributes to the knowledge of methods and approaches of countering Holocaust denial and provides a basis to assess the unique and, at times, inter-dependent relationship between history and law, in its use of historical material evidence. The three approaches to Holocaust denial investigated in this research are: Deborah Lipstadt's methods and assumptions, the methods of the defence barristers of *Irving v. Penguin* and the methods of the four professional historians as expert witnesses appearing in court.

The trial's focus on Irving's methods, centralised Irving's political agenda and delegitimising his reputation as an historian. Thus, the *Irving v. Penguin* trial is analysed as a case which clarifies the parameters of acceptable historical scholarship. Research into methods of countering the denial opens-up windows of analysis into the ways that historians can respond to wider phenomenon like negationism. This research provides helpful lines of enquiry to understand the wider issues of truth, verification and falsification of historical evidence.

## Acknowledgments

I owe a huge debt to Lance Cooper, partner of The Cooper Firm in Atlanta, Georgia, for providing the opportunity to work as a legal research intern at the firm before I began my research in September 2017. This provided a foundational understanding of legal strategies, the process of discovery, collecting and organising source material, as well as enabling me to refine my research and analytical skills in a legal setting. Working at a US-based firm was essential to gain a greater awareness of the American culture in which Professor Deborah Lipstadt operates, and to understand her criticisms of English libel law compared to US law.

While in Atlanta, I was able to conduct research at Emory University in preparation for the Masters degree. I am especially thankful to Professor Deborah Lipstadt for kindly agreeing to meet with me to discuss my research in September 2017. Her input and advice at such an early stage in the research was critical, as it prompted new questions to consider in this thesis. Most especially, I am indebted to Professor Lipstadt for being so willing to put me in contact with a number of individuals from the defence team of the *Irving v. Penguin* case, for interviews, which proved fruitful.

As a result, gratitude and thanks are owed to both Richard Rampton QC and Heather Rogers QC, for taking valuable time out of their schedules to meet with me for an extended interview in May 2018, to discuss the legal aspects of the *Irving v. Penguin* case and its implications. I am grateful to them both for their patience in answering my many questions and for their sage legal insights which proved invaluable to this research. Special thanks to Heather Rogers for continuing to keep me informed with current British legal cases involving Holocaust deniers, which has helped me to draw connections with contemporary legal activity in Chapter 6. To Joseph Fowler, partner at Hartley, Rowe & Fowler (Atlanta, Georgia), I owe my thanks for his advice and his helpful legal mindset which enabled me to frame my questions in preparation for my interview with Richard Rampton and Heather Rogers.

Thanks to Professor Nik Wachsmann for my contact with him and for his enthusiasm for my research. Professor Wachsmann served as a researcher to Professor Richard J. Evans in the *Irving v. Penguin* case, so I am thankful to have been able to attend his workshop on “Sources, Archives, Evidence and the Teaching of the Holocaust” at the Wiener Library in December 2017, which provided useful additional training in research practices for this Masters degree.

With particular thanks to the Wiener Library London and to the archivist Howard Falksohn, who took the time to discuss the *Irving v. Penguin* case with me and suggested further resources available at the library. Many thanks to the staff at Emory University and at the Robert W. Woodruff Library for granting access to library resources during my time in Atlanta. Other libraries whose resources have been invaluable are: Leopold Muller Jewish and Hebrew Studies Library, Oxford; The Bodleian Library, Oxford; Cambridge University Library; Sheffield Western Bank Library (Holocaust Special Collection).

Finally, I would like to acknowledge the support of my supervisors, Professor Niels Petersson and Dr Robbie Aitken, throughout my research at Sheffield Hallam University. I am especially thankful to them for their advice and feedback, which I have sought to implement as best as possible. Their understanding and patience, particularly during the late stages of research, is commendable. It is with a debt of thanks that I acknowledge John Hobson for his willingness and his flexibility to proofread this thesis. I am thankful for his feedback and support.

# Chapter 1

## Introduction

### 1.1 Approach to Research

Countering Holocaust denial proves a most helpful platform to assess historical methodology and practice. This thesis attempts to understand the nuances between historical and legal approaches to refuting Holocaust denial, taking the *David Irving v. Penguin Books Ltd. and Deborah Lipstadt* libel trial as a case study. While Deborah Lipstadt's historical research concentrated on the ideological and anti-Semitic roots of Holocaust denial, the *Irving v. Penguin* trial in contrast, sought to deconstruct Irving's denial from a different perspective. The trial approached denial from the premise that Irving's misinterpretation of historical evidence was motivated by his anti-Semitic ideology, which superimposed his views onto the evidence. The use of historians as expert witnesses during the trial, therefore, provided new opportunities for historians to refute denial from the perspective of historical methodology. They found that Holocaust denial falls short of the basic standards of historical scholarship, as Richard Evans' research stresses, the *Irving v. Penguin* trial is analysed as a case which clarifies the parameters of acceptable historical scholarship.<sup>1</sup>

Taking an interdisciplinary approach, the analysis of both legal and historical approaches of Lipstadt, her barristers and the expert witnesses, sheds new light on the interdependent relationship between history and law. The three methods of countering Holocaust denial, investigated in this research are: first, Deborah Lipstadt's approach to denial from her

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<sup>1</sup> Richard J. Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial*, (New York: Basic Books, 2002).

historical perspective; second, the defence barristers' approach to denial and their use of evidence in a court setting and third, the historical approach of these expert witnesses to refute denial in court. This research serves as a window to understand how historians have responded to phenomena like negationism or Holocaust denial, which provides helpful lines of enquiry into the wider issues of historical truth and the process of verifying historical evidence.

The term "countering" Holocaust denial is used generally throughout this thesis, to encompass both the methods of refuting the denial arguments, through a direct refutation of their sources, as well as indirect methods of outlining and explaining their motives to challenge denial's credibility. The latter approach to countering Holocaust denial, is characterised by Deborah Lipstadt's research, while the *Irving v. Penguin* expert witness reports, which were designed to counter Irving's claims in particular, take the former approach. When examining the legal approach to Holocaust denial in Chapter 4, "countering" has been used more cautiously because the legal strategy was designed to prevent the trial from turning into a debate on Irving's interpretation of the Holocaust. For the sake of clarity, however, each chapter specifies the unique approaches which are compared and analysed in Chapter 6.

## 1.2 Aims and Objectives for Research

Having briefly analysed previous approaches to Holocaust denial, the overall questions which inform this research are outlined as follows: To what extent do history and law differ in their use of historical evidence? To what extent does the acting as an expert witness in court hinder or enhance historical analysis? How do the legal standards of proof impact on the expert reports? Drawing from concepts in historical theory, the trial clarified the extent to which historians' paradigms affect their interpretation of historical evidence. Is it possible, therefore, to distinguish between established facts and the interpretation of Holocaust history? Deborah Lipstadt's research on Holocaust denial and her defence's legal strategy in the *Irving v. Penguin* trial, draws together these questions on historical scholarship and practice in this thesis.

The purpose of this research is to examine different perspectives to Holocaust denial from within history and law. Chapter 2 briefly summarises Irving's position as an historian before the trial provides some context on the claimant, the defendants and the libel law. Based on Lipstadt's writings and her subsequent involvement in the trial, Chapter 3 investigates how Lipstadt countered Holocaust denial in her book *Denying the Holocaust*, within an academic setting.<sup>2</sup> This is significant to investigate Lipstadt's wider world-view to understand her approach to Holocaust denial. This chapter lays the ground-work to assess the different historical methods of countering Irving's denial, in contrast to the methods employed by historians during the trial. Chapter 4 investigates how the legal strategy of the *Irving v. Penguin* trial was constructed to counter denial within English libel law. It investigates how a barrister's forensic approach to countering Irving's Holocaust denial in court, differs from an historian's approach. This chapter discusses the unique nature of

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<sup>2</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (New York: Plume 1993).

advocacy in this trial, in which the historian's work becomes accountable to the scrutiny of both parties and to the judge.

Chapter 5 evaluates the role of the historian as an expert witness, analysing the use of their expert reports for the defence. Similar to the legal approach examined in Chapter 4, Chapter 5 turns to examine whether the court created an environment for the historians to adopt a more rigorous and forensic analysis of the evidence to meet the demands of the defence. It further analyses how the four historical reports by professional historians, Robert Jan Van Pelt, Richard Evans, Peter Longerich and Christopher Browning, differed from Deborah Lipstadt's approach to denial both in purpose and methods. The conclusions from this research suggest further possibilities for historians to glean from the historical and legal methods of the *Irving v. Penguin* trial, which are analysed and discussed in Chapter 6.

This research finds that the defence team effectively used the court as a necessary framework to test Irving's historical methods of evidence manipulation against the historical record. It is argued that this legal framework and the process of arbitration in law increases the accountability of historical writing.<sup>3</sup> The case strengthened the historian's ability to produce verifiable and justifiable conclusions, because the legal standards of proof were applied to their analysis of the documentary evidence. Yet how applicable is this approach to wider historical practice if it was contained within a legal setting? The historian Robert Jan Van Pelt who served as one of the expert witnesses, argues that historians were able to produce a forensic and systematic rebuttal of denial because they "converged evidence" to verify the historical record.<sup>4</sup> It is this method of convergence, which is intended to "enhance the validity of research findings", is applicable to further historical research.<sup>5</sup>

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<sup>3</sup> Conversation with Richard Rampton QC and Heather Rogers QC, 10 May 2018, Temple London.

<sup>4</sup> Robert Jan Van Pelt, *Irving v. Penguin, Van Pelt: The Van Pelt Report*, (2000), Part Four: Concerning Denial, § VII Auschwitz and Holocaust Denial, footnote 556.

<sup>5</sup> Michael Shermer and Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why*

### 1.3 Research Methodology and Sources

Evaluating methodologies informs this research on Holocaust denial. The basis from which we construct knowledge, particularly knowledge of the past, can be shaped by personal world-views or paradigms rather than by the documentary evidence. This thesis outlines the importance of analysing historians' methodologies, which includes their approach to the source material, their presuppositions and their methods of writing history. Can a combined historical and legal approach be used to counter Holocaust denial more effectively?

Three types of data are consulted for this research are as follows: First, a sample of written literature by Deborah Lipstadt forms the majority of the source material for Chapter 2 – treating her work as primary material in this research. Second, the 33-day trial transcripts, the judgment, the witness statements and the expert witness reports by historians Richard Evans, Peter Longerich, Robert Jan Van Pelt and Christopher Browning, and political-scientist, Hajo Funke, are analysed as the evidence for the third and fourth chapters. As Sandra Mathison suggests, the combination of sources forms a triangulated method which “provides evidence for the researcher to make sense of ... social phenomenon” like denial.<sup>6</sup>

A third area of analysis, which triangulates this method is through the semi-structured interviews conducted with Deborah Lipstadt in September 2017 and Richard Rampton QC and Heather Rogers QC in May 2018. These interviews were designed to provide the legal input and perspective needed to understand the technicalities of the case further. The primary purpose of these interviews was to discuss the aims of this research, to gain advice and to provide an opportunity to clarify aspects of my research with experts in the field. The questions and issues raised in these interviews informed my approach to this research,

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*Do They Say It?* (Berkeley: University of California Press, 2000), p. 32-33, 117; Sandra Mathison, “Why Triangulate?” *Educational Researcher*, 17:2, (March, 1988), p. 13.

<sup>6</sup> Sandra Mathison, “Why Triangulate?” *Educational Researcher*, 17:2, (March, 1988), pp. 15.

however, the interviews were not a means of data collection. This is to avoid opinions verbally expressed eighteen years after the *Irving v. Penguin* trial, forming the evidence that is used in this research. Any post-trial commentary by the Deborah Lipstadt and the expert witnesses has been extracted from their published accounts of the trial.

It is worth noting the purpose of oral history methodology and some potential pitfalls of oral history which have been accounted for in this research. While oral history methodologies are useful and have provided a three-dimensional picture of the *Irving v. Penguin* case for this research, Andrea Harjek helpfully notes that “the subjective nature of oral data and the intersubjective relation of the interviewer and interviewee can lead to wrong or incomplete information, requiring supplementary and comparative research of written documents”.<sup>7</sup> This research has sought to combine the use of primary documentary evidence, the trial transcripts, written expert reports from the trial, with personal interviews and with secondary literature on the subject. This is to provide as multi-faceted approach to the evidence as possible, without compromising the integrity of the research by relying on oral data. Furthermore, methodological plurality, or combining historical and legal approaches, helps to build up a “fuller and more comprehensive picture” of the methods of countering Holocaust denial.<sup>8</sup> This is particularly the case when evaluating the trial transcripts and expert witness reports of the *Irving v. Penguin* trial, as these documents provide further insight into the legal framework of countering denial.

This research refers to documents of the original trial documents, statements and transcripts as well as secondary literature, including newspaper reports of the trial, and any gleanings summarised from the two interviews conducted with Deborah Lipstadt in September 2017, and Rampton and Rogers in May 2018. This research treats Deborah

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<sup>7</sup> Andrea Harjek, “Oral History Methodology”, *Sage Research Methods Cases*, (London: Sage Publications, 2014), p. 13.

<sup>8</sup> Patrick McNeill, Steve Chapman, *Research Methods*, Third Edition, (New York: Routledge, 2005), p. 23.

Lipstadt's work, as primary documents, since her work is the subject of analysis and therefore is an original source. Similar treatment is given to the published expert reports from the trial, which are examined as primary documents in Chapter 5. The trial documents have been digitised on Holocaust Denial On Trial's website, to increase accessibility for researchers, as part of a project between Emory University and the Tam Institute for Jewish Studies.<sup>9</sup> When referring to denial literature or speeches cited in the trial, these are extracted primarily from the transcripts themselves, or from Deborah Lipstadt's *History on Trial*, and Richard Evans, *Lying About Hitler* which have published large portions of the source material included in the process of discovery. Other citations of Irving's work are either quoted directly from the passages discussed during the trial, or directly from his published books. In these cases, clear footnotes of the original source and the publication where it was found, accompany any of these primary sources.

In terms of references to the sources and claims made by Holocaust deniers for this research, Irving's books have been consulted and referenced accordingly. However, due to the research focus on Irving, other arguments by deniers which were provided as brief examples to substantiate an argument, are referenced from the secondary literature from which they were reproduced. References to the beliefs and views held by other Holocaust deniers such as Arthur Butz, Ernst Zündel and Robert Faurisson are either taken from their interviews in the press, which expressed their personal views, or extracts from their own publications which have been mostly cited in Deborah Lipstadt's *Denying the Holocaust* (1994), Michael Shermer and Alex Grobman's *Denying History* (2000), and Kenneth S. Stern's *Holocaust Denial* (1993).

Critical analysis of both the historical and the legal approaches to countering Holocaust denial is not only necessary, but long overdue. Historians have contested issues

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<sup>9</sup> Holocaust Denial On Trial, [www.hdot.org/](http://www.hdot.org/). For more information about the project, see [www.hdot.org/about](http://www.hdot.org/about) (last accessed 01.08.2018).

relating to the reliability of evidence and the impact of the historian's subjectivities on their conclusions. The process of verifying the historical record in response to denial and an analysis of the historical and legal approaches to countering Holocaust denial is essential to provide balance to these arguments. The literature review takes a thematic approach to assess the gaps in existing literature, and how the legal strategy in the *Irving v. Penguin* trial and the historical approach to countering Holocaust denial, are useful to further research on contemporary Holocaust denial.

## 1.4 A Brief Literature Review

Let us turn to a brief discussion of the methods that historians have employed to counter denial within historical discourse. A variety of approaches range from *ad hominem* criticisms to in-depth analysis of their arguments, to analysing the rhetorical tactics of deniers.<sup>10</sup> The development of the field which began to counter Holocaust denial during the 1980s and 1990s focussed on the theoretical challenges to history, identifying the political and anti-Semitic agenda which influenced the movement. Among the first historians to tackle Holocaust denial were the Holocaust historians Yisrael Gutman in *Denying the Holocaust* (1985) and Gill Seidel's *The Holocaust Denial: Antisemitism and the New Right* (1986), which provided a general overview of its ideological roots.<sup>11</sup>

The French historian Pierre Vidal-Naquet published *Assassins of Memory* (1992), as a direct response to the French denier Robert Faurisson, and took a historiographical and theoretical approach to countering denial.<sup>12</sup> Having concentrated his critiques on relativism and deconstructionism which helped to foster Holocaust denial in France, Vidal-Naquet summarised his approach to countering their arguments “as one might with a sophist... who seems like a speaker of truths”, deniers’ arguments have to be “dismantled piece by piece” to prove their falsity.<sup>13</sup> Moreover, Vidal-Naquet argued that to substantially “demolish a discourse takes time and space”, often of the kind that historians do not afford.<sup>14</sup> Similarly,

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<sup>10</sup> For further references to some of the more critical responses to individual Holocaust deniers in the press, see Alan Bayless, “Holocaust Trials Can Make Hatemongers Appear as Victims”, *Wall Street Journal*, 9 April, 1985, p. 1; Douglas Wertheimer, “Butz Is Back: Northwestern Holocaust Denier Marks an Anniversary With A Page on The Internet's World Wide Web”, *Baltimore Jewish Times*, 229:7, 14 June, 1996, p. 88.

<sup>11</sup> Yisrael Gutman, *Denying the Holocaust* (Jerusalem: The Hebrew University, 1985); Gill Seidel, *The Holocaust Denial: Antisemitism and the New Right* (Beyond the Pale Publications, 1986), fuller list of early publications in Richard J. Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial*, (New York: Basic Books, 2002), p. 109.

<sup>12</sup> Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust*, (New York: Columbia University Press, 1992).

<sup>13</sup> *Ibid*, p. 3.

<sup>14</sup> *Ibid*, p. 51.

Lawrence Douglas observes an initial “reluctance” among “serious academics to study the structure of deniers’ arguments” and to assign much of their time to refute denial.<sup>15</sup> In this respect, few historians attempted the task of systematically deconstructing the arguments of Holocaust deniers and their claims to revise the historical record in a systematic way.

Tracing the roots of denial to anti-Semitism, Kenneth Stern in *Holocaust Denial* (1993) published a number of interviews by deniers, reviewed their methods of gaining legitimacy in academic and public circles, and listed the major publications of deniers to increase an awareness of the pseudo-scholarly literature which was beginning to circulate on American campuses.<sup>16</sup> Stern argues that “Holocaust denial is not about historical truth. It is about anti-Jewish hatred as part of a political agenda – and should be confronted as such”.<sup>17</sup> Instead of focusing on the methodological flaws in Holocaust deniers’ arguments, Stern concentrates his attention on confronting denial by revealing its anti-Semitic apparel. Both Stern and Lipstadt’s approach sought to remove the academic credibility that deniers were seeking by arguing that “professional deniers are not Holocaust scholars, but anti-Semitic imposters”.<sup>18</sup> James Najarian adopts a similar argument which centres on the rhetoric of Holocaust denial. He argues that the pseudo scholarly methods of the deniers and their attempt to create “a second “version of history”, finds ground in “ideals of free speech and reasonable inquiry” in history.<sup>19</sup> In response to these approaches, Alexander Karn argues that as historians “our commitment to objectivity is our best riposte to the deniers”.<sup>20</sup> What was lacking in the early literature on the growing and complex phenomenon of denial, however,

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<sup>15</sup> Lawrence Douglas, “The Memory of Judgment: The Law, the Holocaust, and Denial”, *History and Memory*, 7:2, (Fall-Winter 1995), p. 109.

<sup>16</sup> Kenneth S. Stern, *Holocaust Denial*, (New York: The American Jewish Committee, 1993).

<sup>17</sup> *Ibid*, p. xii.

<sup>18</sup> *Ibid*, p. 59.

<sup>19</sup> James Najarian, “Gnawing at History: The Rhetoric of Holocaust Denial”, *The Midwest Quarterly*, 39:1, (Autumn, 1997), pp. 79-81.

<sup>20</sup> Alexander Karn, “Toward a Philosophy of Holocaust Education: Teaching Values without Imposing Agendas”, *The History Teacher*, 45:2, (February 2012), p. 228

was a systematic approach which would expose the insupportable methodology on which deniers relied.

However, in 2000, Michael Shermer and Alex Grobman's research combined a historical and theoretical approach to deconstruct deniers' arguments through methods of corroborating and converging documentary evidence.<sup>21</sup> Shermer argued in 1994 that tactics of deniers often rely "on what might be called *post hoc rationalization* – an after-the-fact reasoning to justify contrary evidence".<sup>22</sup> Analysing these tactics in practice, Shermer argues that the denier will demand that a "single proof" be found to prove that the gas chambers existed, for example, and will then take the evidence presented to them to find an alternative explanation; however extreme or implausible.<sup>23</sup> In practice, deniers take:

"an eyewitness account by a survivor who says he heard about gassing Jews while he was at Auschwitz. The revisionist says that survivors exaggerate and that their memories are unsound. Another survivor tells another story different in details but with the core similarity that Jews were gassed at Auschwitz. The revisionist claims that rumors were floating throughout the camps and many survivors incorporated them into their memories".<sup>24</sup>

How then does an historian respond to such methods of denial? Shermer and Grobman suggest that combining different types of documentary evidence, helps to narrow the denier's ability to question the evidence. This nuanced historical approach lays the groundwork for understanding the methods of convergence used by both historians and lawyers in the *Irving v. Penguin* trial.

Christopher Norris argues that this flawed history is the product of the "misreading and manipulative use of evidence, the suppression of crucial facts and the creation of certain selective amnesia".<sup>25</sup> Irving was found to have adhered to similar methods in his work. A

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<sup>21</sup> Michael Shermer and Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?* (Berkeley: University of California Press, 2000), p. 34.

<sup>22</sup> Michael Shermer, "Proving the Holocaust: The Refutation of Revisionism and The Restoration of History," *Skeptic*, 2:4 (1994), p. 42f.

<sup>23</sup> Michael Shermer, quoted in Robert Jan Van Pelt, *Irving v. Penguin, Van Pelt: The Van Pelt Report*, (2000), Part Four: Concerning Denial, § VII Auschwitz and Holocaust Denial, footnote 556.

<sup>24</sup> *Ibid*, p. 42f.

<sup>25</sup> Christopher Norris, *Deconstruction and the Interests of Theory*, (Norman: Oklahoma, 1989), p. 16; quoted in, Richard J. Evans, *In Defence of History*, (London: Granta, 1997), p. 238.

legacy of the *Irving v. Penguin* trial was that it clarified the role of the historian and acceptable standards of scholarship. As the historian G. R. Elton suggests, “knowledge of the sources and competent criticism of them... are the basic requirements of a reliable historiography”.<sup>26</sup> Discrediting Holocaust denial must begin, therefore, by challenging their knowledge of the source material and their ability to consider different perspectives when arriving at their conclusions. As Judge Gray argued, the issue of the reliability of Irving’s views could not be separated from his manipulation of “the historical record in order to make it conform with his political beliefs”.<sup>27</sup> Equally renowned for his theoretical reflection on historical practice, E. H. Carr’s argument applies to the court’s assessment of Irving’s standards of scholarship, that: “good historians will rise above the limitations of their own time... by recognizing the nature and extent of their own prejudices” and that they “will write better history if they are self-conscious about their political and intellectual starting point”.<sup>28</sup> Evans applies these postulates to his analysis of Irving’s historical methods in his expert report, which stems from a commitment to understanding historical practice.<sup>29</sup>

Characterising the mainstream interpretation of the role of the historian, in opposition to Leopold von Ranke’s positivist view, Charles A. Beard wrote in 1935 that “no historian can describe the past as it actually was”.<sup>30</sup> Instead their “selection of facts, his emphasis, his omission, his organisation, his method of presentation – bears a relation to his own personality and the age and circumstances in which he lives”.<sup>31</sup> Beard’s awareness of these various subjectivities argues that historical interpretation is guided by present assumptions, and therefore affects historians’ interpretation of the past. Yet, while personal subjectivities

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<sup>26</sup> G. R. Elton, *The Practice of History*, Fourteenth Edition, (London: William Collins, 1990), p. 87.

<sup>27</sup> Mr Justice Charles Gray, *Irving v. Penguin, Judgment*, § 13.162.

<sup>28</sup> Richard J. Evans, an introduction to E. H. Carr, *What Is History?* (Basingstoke: Palgrave, 2001, originally published, 1961) p. xxx

<sup>29</sup> Richard J. Evans, *In Defence of History*, (London: Granta, 1997), pp. 2-9.

<sup>30</sup> Charles A. Beard, “That Noble Dream” (1935), in F. Stern ed., *The Varieties of History*, (New York: Vintage Books, 1973), pp. 323-26, quoted in Michael Shermer and Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?* (Berkeley: University of California Press, 2000), p. 25.

<sup>31</sup> *Ibid*, p. 25.

influence the historian, it is important to stress a distinction between the ideas which are formed through interpretation and the evidence from which historians base their arguments. To apply this to methods of countering denial, the Italian historian Arnaldo Momigliano argues that “the historian has to assume some ordinary commonsense criteria for judging his own evidence”.<sup>32</sup> Thus, a conscientious approach to historical research is essential to be able to verify the historical record when it is challenged.

Quentin Skinner argues for a distinction between historical facts and their interpretation, and highlights how “false beliefs point to failures of reasoning.”<sup>33</sup> In a similar approach, Norman Denzin argues that if “facts are objective” then “they are different from interpretations, which are subjective and hence cannot be proven but only made more or less credible.”<sup>34</sup> The defence barristers during the *Irving v. Penguin* trial frequently made this distinction to separate between Irving’s sources and his methods of distorting the evidence, reducing the credibility of his findings. However, it is clear from the trial that Holocaust denial is more than a failure in reasoning, it is a deliberate distortion of evidence to support its claims and is rooted not just in a questionable ideology, but in a flawed methodology. These debates provide a broad conceptual basis for understanding the criteria from which the historians as expert witnesses, and subsequently Judge Gray, evaluated Irving’s Holocaust denial through a methodological lens. The trial marked a crucial difference from the way the historians had previously approached denial in historical discourse, opening up new methods of deconstructing denial with a more in-depth, forensic focus on Irving’s sources.

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<sup>32</sup> Arnaldo Momigliano, *Settimo Contributo Alla Storia Degli Studi Classici e Del Mondo Antico*, (Rome, 1984), p. 268; in Carlo Ginzburg, “Checking the Evidence: The Judge and the Historian”, *Critical Inquiry*, 18:1, (Autumn, 1991), p. 91.

<sup>33</sup> Quentin Skinner, *Visions of Politics: Regarding Method, Volume 1*, (Cambridge: Cambridge University Press, 2002), p. 2.

<sup>34</sup> Norman K. Denzin, “The Facts and Fictions of Qualitative Inquiry”, *Qualitative Inquiry*, 2:2, (June, 1996), p. 231.

Analysing this relationship between historians and their involvement in defamation cases, Antoon De Baets' research provides fruitful lines of inquiry to assess the historiographical advantages of the *Irving v. Penguin* trial. Although Irving attempted to use defamation law to censor criticism of his work, De Baets concludes that defamation cases can cause historians to reflect on historical practice in two ways.<sup>35</sup> First, "if the historians' position is confirmed by the judge, they may feel that their scholarship and professional responsibility are strengthened" and second, that "if the judge disagrees with their position", as Judge Gray did of Irving, "and if that position is indeed untenable, historians should, at the very least, conduct better and more responsible research in the future."<sup>36</sup> Both concepts are applicable to the *Irving v. Penguin* case, in which Lipstadt's criticism of Irving was confirmed and Richard Evans' paradigm of a measure of objectivity in historical practice was strengthened. Wendie Ellen Schneider's legal insights on *Irving v. Penguin*, re-iterates that the case put "historical methodology on trial", and therefore, vindicates the "conscientious historian" in their role as expert witnesses.<sup>37</sup>

When researching the relationship between Holocaust denial and the law, current literature has mainly gravitated towards the problematic issues of censorship and legal intervention in historical enquiry.<sup>38</sup> These are not debates which can be discussed in detail here, but it is important to understand how this literature perceives the role of the law in Holocaust trials. Gunter Lewy argues that genocide denial laws in Europe define "official" forms of truth to therefore shape the memory of the past.<sup>39</sup> Similarly, Marouf A. Hasian

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<sup>35</sup> Antoon De Baets, "Defamation Cases Against Historians", *History and Theory*, 41:3, (October, 2002), p. 346.

<sup>36</sup> *Ibid*, p.357-358.

<sup>37</sup> Wendie Ellen Schneider, "Past Imperfect: *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B. 11 April), appeal denied (18 December, 2000)", *Yale Law Journal*, 110:8, (June, 2001), p. 1532.

<sup>38</sup> See Robert C. Post, ed. *Censorship and Silencing: Practices of Cultural Regulation*, (Los Angeles: Getty Research Institute, 1998), pp. 67-88; Russell L. Weaver, Nicolas Depierre, Laurence Boissier, "Holocaust Denial and Governmentally Declared Truth: French and American Perspectives", *Texas Tech Law Review*, 41:495 (2009), pp. 495-517.

<sup>39</sup> Gunter Lewy, *Outlawing Genocide Denial: The Dilemmas of Official Historical Truth*, (Salt Lake City: University of Utah Press, 2014), p. vii.

criticised the *Irving v. Penguin* trial for its method of countering denial from a methodological perspective because, he argues, the law sought to govern “particular views of history or historiographic methods” which were judged in a court as “the” standard in history.<sup>40</sup> Lawrence Douglas, however, distinguishes that there is a “crucial difference between using the law to clarify or elucidate the historical record,” and “relying upon the law to police a history.”<sup>41</sup> Often, these debates fail to recognise that, first *Irving v. Penguin* was brought by Irving himself, and that the purpose of libel laws is different to that of criminal cases that they assess. Thus, the trial was an exercise of “safeguarding historical truth”, rather using the law to establish that truth.<sup>42</sup>

Few accounts of the trial, the judgment and its significance to historical practice, have analysed the case in as great a depth as the post-trial publications of the expert witnesses’ reports. Richard Evans in *Lying About Hitler* (2000), is a condensed version of his expert witness report presented for the defence in the *Irving v. Penguin* trial.<sup>43</sup> Evans removes any remaining credibility of Holocaust denial by focusing on Irving’s historical “method”, which he suggests the media reports paid little attention to, producing a “distorted” picture about the trial.<sup>44</sup> Eaglestone identifies that Evans’ report was so convincing because he was able to demonstrate the “ontological division between the past and the discourse about the past” in order to prove how Irving’s “interpretation” deviated from the historical evidence.<sup>45</sup> Peter Longerich’s *The Unwritten Order* (2001) summaries his methods of proving “Hitler’s almost continuous involvement” in the Final Solution by “collecting the many individual decisions

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<sup>40</sup> Marouf A. Jr. Hasian, Canadian Civil Liberties, Holocaust Denial, and the Zündel Trials”, *Communications and the Law*, 43, (September, 1999), pp. 133-134.

<sup>41</sup> Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust*, (New Haven: Yale, 2001), p. 256.

<sup>42</sup> Lawrence Douglas, “The Memory of Judgment: The Law, the Holocaust, and Denial”, *History and Memory*, 7:2, (Fall/Winter, 1995), p. 101.

<sup>43</sup> Richard J. Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial*, (New York: Basic Books, 2002).

<sup>44</sup> *Ibid*, p. xii.

<sup>45</sup> Robert Eaglestone, *The Holocaust and the Postmodern*, (Oxford: OUP, 2008), p. 244.

made with regard to the ‘Jewish question’” which forms an “overall picture” of Nazi policy.<sup>46</sup> Although, Hitler had not issued a physical written order for the annihilation of the Jews in Europe, “there is clear evidence that reveal his essential commitment to radicalise persecution to the extreme”.<sup>47</sup> Robert Jan Van Pelt’s *The Case for Auschwitz: Evidence from the Irving Trial* (2002), is an example of Shermer and Grobman’s “convergence of evidence” and Christopher Browning’s *The Origins of the Final Solution: The Evolution of Nazi Jewish Policy September 1939-March 1942* (2003), and Deborah Lipstadt’s personal account of the trial published as *History on Trial: My Day in Court with a Holocaust Denier* (2005), all cover the trial in significant documentary detail.

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<sup>46</sup> Peter Longerich, *The Unwritten Order: Hitler’s Role in the Final Solution*, (Charleston: Tempus Books, 2001), p. 11; Heinz Peter Longerich, *Longerich Report: The Systematic Character of the National Socialist Policy for the Extermination of the Jews*, (2000). Found at: [www.hdot.org/longsys/](http://www.hdot.org/longsys/); Heinz Peter Longerich, *Longerich Report: Hitler’s Role in the Persecution of the Jews by the Nazi Regime*, (2000). Found at: [www.hdot.org/longrole\\_toc/](http://www.hdot.org/longrole_toc/).

<sup>47</sup> Heinz Peter Longerich, *Longerich Report: Hitler’s Role in the Persecution of the Jews by the Nazi Regime*. § 20.6.

## 1.5 Summary

This research serves as a guide to understand the methods of countering Holocaust denial from the *Irving v. Penguin* trial and provides practical application to current research as denial continues to evolve in the present political milieu.<sup>48</sup> It is hoped that the conclusions drawn from this thesis, particularly regarding the standards of academic scholarship, might serve as an analytical framework to apply to other areas of historical enquiry also. Limited to the scope of the *Irving v. Penguin* trial, there is a narrow focus on analysing the methods of the defence barristers, Richard Rampton and Heather Rogers in their presentation of the case, and the five expert witnesses of Richard Evans, Peter Longerich, Christopher Browning, Robert Jan Van Pelt and Hajo Funke. The conceptual approach adopted in this research assesses Holocaust denial within the framework of reliability and issues of verifying historical fact in research.

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<sup>48</sup> CST, “Anti-Semitic Incidents Report: January-June 2018”, Executive Report, (2018), [www.cst.org.uk](http://www.cst.org.uk).

## Chapter 2

### Context of the *Irving v. Penguin* Libel Trial

#### 2.1 The Claimant and the Defendants in *Irving v. Penguin*

*Irving v. Penguin* was a unique trial because it was the first instance that a Holocaust denier sued an academic and professional historian for libel.<sup>49</sup> In two previous legal cases against leading Holocaust deniers Robert Faurisson in France and the German–Canadian Ernst Zündel, it was the state that brought the case for denying the Holocaust. Uniquely, *Irving v. Penguin* was a civil libel trial brought by Irving, a Holocaust “revisionist”, against Lipstadt and her publisher Penguin Books. Irving claimed material and reputational damage for the words Lipstadt published about him in her book *Denying the Holocaust: The Growing Assault on Truth and Memory* (1993).<sup>50</sup> Irving alleged that the book contained multiple defamatory statements which he believed were part of a “well-funded and reckless worldwide campaign of personal defamation” against his reputation and career.<sup>51</sup> Similarly, he argued that the instances which Lipstadt wrote about Irving were part of “a concerted attempt to ruin his reputation as an historian.”<sup>52</sup> After four years of research and legal preparation, the case was tried in the British High Court of Justice on 11 January 2000.<sup>53</sup>

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<sup>49</sup> Deborah E. Lipstadt, “*Irving v. Penguin UK and Deborah Lipstadt: Building a Defense Strategy*”, *Nova Law Review*, 27:2, (January, 2002), p. 245.

<sup>50</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (New York: Free Press, 1993).

<sup>51</sup> David Irving, *Irving v. Penguin*, “Statement of Claim”, 5 September, 1996; quoted in Deborah E. Lipstadt, *History on Trial*, (New York: Harper Perennial, 2006) p. xxi.

<sup>52</sup> Mr. Justice Charles Gray, *Irving v. Penguin*, *Judgment*, § (I) 1.2.

<sup>53</sup> *David Irving v. Penguin Books Ltd. and Deborah Lipstadt*, No. 1996-I-1113, 2000 WL 362478 (Queen’s

Deborah E. Lipstadt (1947–) is a Jewish American historian and Dorot Professor of Modern Jewish History and Holocaust Studies, who has been teaching at Emory University, Atlanta, Georgia since 1993.<sup>54</sup> Among a number of academic and professional appointments, which include consulting for the United States Holocaust Memorial Council, Lipstadt has written five books and over 30 articles relating to various aspects of Holocaust history, contemporary responses to the Holocaust and the persecution of the Jews.<sup>55</sup> Lipstadt began her career specialising in American press reaction to the suffering of the Jews between 1933 and 1945.<sup>56</sup> Approached by two renowned and respected Holocaust historians Yehuda Bauer and Yisrael Gutman, Lipstadt was asked to write about the growing phenomenon of Holocaust denial.<sup>57</sup> *Denying the Holocaust* was later published by Plume, a branch of Penguin Books UK, in 1994.<sup>58</sup> Lipstadt critiqued a number of key Holocaust deniers, one of whom was the British historical writer, David Irving. Lipstadt outlined Irving's method and argued that his work was synonymous with the Holocaust denial movement as a whole. Lipstadt, therefore, effectively deconstructed Holocaust denial within her seminal academic work.

David John Cawdell Irving (1938–), known as David Irving, is a British independent writer of military and Second World War history who published books and biographies on the Nazi German leadership. Irving published his most well-known work, *Hitler's War*, in 1977 (republished in 1991), in which he argued that "Hitler's own role in the "Final Solution

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Bench Division, 11 April), appeal denied (18 December, 2000); HCJ/ QBD *Irving v. Penguin* Day 1, "Initial Proceedings", p. 1 Lines 1-5.

<sup>54</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January 1999), § 7;

Also see: Emory University, Department of Religion, Faculty, <http://religion.emory.edu/home/people/faculty/lipstadt-deborah.html> (last accessed 31.07.2018).

<sup>55</sup> *Ibid*, § 19; Lipstadt's Witness statements from the trial is digitised on the Holocaust Denial on Trial website, [www.hdot.org/ws-dlipstadt/](http://www.hdot.org/ws-dlipstadt/), (last accessed 03.09.2018).

<sup>56</sup> Deborah E. Lipstadt, *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945* (New York: The Free Press, 1986).

<sup>57</sup> Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 16.

<sup>58</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (New York: Plume, 1994).

of the Jewish problem” has never been examined.”<sup>59</sup> Therefore, he styled himself as providing a valuable service to scholarship by deviating from what he claimed was the “inter-historian incest” of historiography on Hitler.<sup>60</sup> Irving summarised his approach as viewing history “through Hitler’s eyes, from behind his desk”, which he contends “was bound to yield different perspectives.”<sup>61</sup> By presenting his work as an alternative, under-researched, “perspective”, Irving sought to disguise an ideological and historically unsound thesis as a legitimate scholarly attempt to understand the “other side” of the war. The publisher of Irving’s *Churchill’s War* (1987) endorsed Irving for his “theories” which, they claimed, were “developed from original source material – diaries, letters, documents and archives” and provided “a controversial view of history”.<sup>62</sup>

Academic and popular responses to Irving’s publications were overly receptive to his “controversial” views. In a review of Irving’s *Goebbels: Mastermind of the Third Reich*, published in the *New York Review of Books*, Gordon Craig wrote: “the fact is that he knows more about National Socialism than most professional scholars in his field”, and they “owe more than they are always willing to admit to his energy as a researcher and to the scope and vigor of his publications”.<sup>63</sup> Despite Irving’s notions about Hitler and the Final Solution, being “offensive to large numbers of people”, Craig went on to claim that “such people as Irving have an indispensable part in the historical enterprise and we dare not disregard their views”.<sup>64</sup> This implies that Irving’s work is controversial, yet, he argues, it is equally useful to historians because “it will stimulate new discussion and research”.<sup>65</sup> Craig was not alone in his endorsement of Irving from an academic perspective. The respected historian Hugh

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<sup>59</sup> David Irving, *Hitler’s War*, (London: Viking Press, 1977), p. xiii.

<sup>60</sup> *Ibid*, p. xiii.

<sup>61</sup> *Ibid*, p. xvi.

<sup>62</sup> David Irving, *Churchill’s War*, (Bullsbrook: Veritas, 1987), p. iii.

<sup>63</sup> Gordon A. Craig, “The Devil in the Details”, *The New York Review of Books*, 19 September, 1996.

<sup>64</sup> *Ibid*.

<sup>65</sup> Marion Graeffin Doenhoff letter to the editor, reply by Gordon A. Craig, “*Hitler’s Willing Executioners*”: An Exchange”, *The New York Review of Books*, 23 May, 1996.

Trevor-Roper, in his analysis of Irving in 1977, wrote: “no praise can be too high for his indefatigable scholarly industry”.<sup>66</sup> Yet, Trevor-Roper raised issues which Craig did not, responding to Irving’s reliance on the so-called “solid primary sources” by questioning: “How reliable is his historical method? How sound is his judgement? We ask these questions particularly of a man who, like Mr Irving, makes a virtue – almost a profession – of using arcane sources to affront established opinions”.<sup>67</sup> Nonetheless, Irving’s “scholarly” reputation quickly vanishes when his conclusions and sources are investigated further.

Those who were likely to endorse Irving’s “scholarly approach” or his primary document research, were, for the most part those who gave Irving’s work only a superficial overview. However, more scrupulous analyses were discerning of Irving’s ideological impositions on historical sources. Although Irving’s views were attracting increasing attention, his work was beginning to be critiqued and challenged by historians as early as 1979. Among the foremost of Irving’s critics was Charles W. Sydnor who, when analysing *Hitler’s War*, questioned the veracity of Irving’s claim that Hitler did not order the Final Solution. This is exemplified when Irving claimed that:

“Precisely when the order was given and in what form has, admittedly, never been established ... The incontrovertible evidence is that Hitler ordered on November 30, 1941, that there was to be ‘no liquidation’ of the Jews (without much difficulty, I found in Himmler’s private files his own handwritten note on this). On several subsequent dates in 1942 Hitler made—in private—statements which are totally incompatible with the notion that he knew that the liquidation program had in fact begun”.<sup>68</sup>

Sydnor identified that within a “cultish” growth of historiography on Hitler’s personal life, career and policies, there was a “wide disparity of ability and expertise” evident in Irving’s work, compared to established historians in the field.<sup>69</sup> Irving’s thesis, therefore, attracted attention as it appeared distinct from the standard works on Hitler and the Third Reich,

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<sup>66</sup> Hugh Trevor-Roper, “Hitler: Does History Offer a Defence?”, *The Sunday Times* (London, England), Sunday, 12 June, 1977, Issue 8034, p. 35.

<sup>67</sup> Hugh Trevor-Roper, *Ibid*, p. 35.

<sup>68</sup> David Irving, *Hitler’s War*, (London: Viking Press, 1977), p. xiv

<sup>69</sup> Charles W. Sydnor Jr., “Selling of Adolf Hitler: David Irving’s *Hitler’s War*”, Review Article, *Central European History*, 12:2, (June, 1979), p. 169.

particularly those by Martin Broszat and Sir Ian Kershaw. Sydnor discerned that Irving's views were the product and "outgrowth of Mr. Irving's long fascination with Hitler and Nazi Germany", which motivated his "fully revisionist portrait of Adolf Hitler".<sup>70</sup> Identifying four major pitfalls in Irving's work, Sydnor highlights the omissions, misrepresentation, mistranslation and his use of invalid or questionable source material, as forming the "crux" of his flawed arguments on Hitler and the Holocaust.<sup>71</sup>

John Lukacs' wider historiographic review in *The Hitler of History* (1998), critically analysed Irving, noting a "gradual progression" from "partial exoneration" of Hitler, to becoming "an unrepentant admirer of Hitler".<sup>72</sup> Lukacs records the worrying receptivity of Irving's work among historians, particularly since his books had reached best seller lists in Germany, and was heralded as a "master historian of the Third Reich".<sup>73</sup> Viking Press, the publisher of *Hitler's War* suggested that Hitler was "assuredly de-demonized" but that his books would "stand athwart the annals of Nazi Germany and World War II from this time forward".<sup>74</sup> A similar endorsement was given by historian John Keegan in 1996 when he wrote that *Hitler's War* was "certainly among the half-dozen most important books on 1939–45".<sup>75</sup> Irving's reputation among scholars was perplexing, particularly since "few reviewers and critics of Irving's books, including professional historians... bothered to examine them carefully enough".<sup>76</sup>

How does an historian whose work was met with both praise and criticism, come to be described by the historian Yehuda Bauer as "the mainstay of Holocaust denial in

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<sup>70</sup> Charles W. Sydnor Jr., "Selling of Adolf Hitler: David Irving's *Hitler's War*", Review Article, *Central European History*, 12:2, (June, 1979), p. 171.

<sup>71</sup> *Ibid*, pp. 181-191.

<sup>72</sup> John Lukacs, *The Hitler of History*, (New York: Vintage Books, 1998), p. 26.

<sup>73</sup> *Ibid*, p. 27.

<sup>74</sup> *Ibid*, p. 27.

<sup>75</sup> *Ibid*, p. 27.

<sup>76</sup> *Ibid*, p. 229.

Europe”?<sup>77</sup> As the political scientist Hajo Funk records, Irving’s gradual progression from soft “revisionism”, to admiration of Hitler and conversion to Holocaust denial, was based on his associations with right-wing political groups.<sup>78</sup> A defining moment in Irving’s public denial came in 1988, when he testified at the Ernst Zündel trial that there was no “overall Reich policy to kill the Jews”, that “no documents whatsoever show that a Holocaust had ever happened” and that the gas chambers at Auschwitz were, therefore, “an impossibility”.<sup>79</sup>

The UK-based international publishing company Penguin Books Ltd., who published Lipstadt’s book in July 1994, received Irving’s writ to withdraw publication in November that year. By September 1996, Irving filed a suit against both Deborah Lipstadt and Penguin Books.<sup>80</sup> Richard Rampton of One Brick Court, was hired to represent Lipstadt and Heather Rogers QC, an expert in media and defamation law, was assigned as co-counsel for the defence, representing the first defendant, Penguin UK. It is understood that Irving, rather than filing a suit immediately after the first publication in the US, waited to file his lawsuit in the UK because British libel laws favour the Claimant.<sup>81</sup> Since British libel laws place the burden of proof on the defendant, Mark Grief argues that Irving’s suit attempted “to gag his critics”.<sup>82</sup> Nonetheless, the defence transformed the trial into “a public airing” of his methods.<sup>83</sup>

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<sup>77</sup> Don. D. Guttenplan, *Holocaust on Trial: History Justice and the David Irving Libel Case*, (London: Granta, 2001), p. 59.

<sup>78</sup> Hajo Funke, *Funke Report: David Irving, Holocaust Denial, and His Connections to Right Wing Extremists and Neo-National Socialism (Neo-Nazism) in Germany*, (2000) § 4.4.1; see also, John Lukacs, “A Historian Explains Why A Leading Voice of ‘Holocaust Denial’ Lost His Libel Case: The Price of Defending Hitler”, *Newsweek*, New York, 24 April, 2000, p. 4.

<sup>79</sup> Deborah E. Lipstadt, *The Eichmann Trial*, (New York: Schocken Books, 2011), p. xv; Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. xx.

<sup>80</sup> Richard J. Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial*, (New York: Basic Books, 2001), p. 6.

<sup>81</sup> Richard J. Evans, “Irving v. Penguin Books and Deborah Lipstadt”, in Peter Cane and Joanne Conaghan (eds.), *The New Oxford Companion to Law*, (Oxford: OUP, 2008).

<sup>82</sup> Mark Grief, “History in the dock”, *The Times Literary Supplement*, (London, England), Friday, 13 July 2001, p. 28.

<sup>83</sup> *Ibid*, p. 28.

Defamation law states that “a publication is defamatory if it is likely to ‘injure the reputation of another by exposing’ the person ‘to hatred, contempt or ridicule’”.<sup>84</sup> The legal concept of defamation deals with the broader issues of “libel”, which is reputational damage as a result of published material, and “slander” which refers to verbal accusations.<sup>85</sup> In the UK, it does not constitute libel if the defendant proves that the published material is true. British libel law assumes that the potential defamatory words expressed are false and would cause damage, and therefore, need to be proven otherwise in court.<sup>86</sup> In order for Lipstadt’s assessment of Irving to be proven true, Irving’s reliance on evidence to claim that the Holocaust was a “hoax” had to be examined to respond to Lipstadt’s assessment that Irving was a Holocaust denier. Furthermore, Lipstadt’s specific statements about Irving were likely to carry general implications as to his character and his historical methods, therefore, the defence could not argue that Irving had misinterpreted the meaning of Lipstadt’s words.<sup>87</sup> Under an exception in Section 5 of the 1952 Defamation Act, the defence opted instead to prove “justification”, which argued that the truth of Lipstadt’s specific statements did not need to be proved if the implications, that Irving is a Holocaust denier, could be proved.<sup>88</sup> Lipstadt’s historical analysis of Irving was deemed libellous because it could influence the general reader of her book to form a negative impression of Irving. This libel trial uniquely posed between two historians, therefore, challenged lawyers and historians to distinguish

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<sup>84</sup> Andrew T. Kenyon, *Defamation: Comparative Law and Practice* (Oxon: UCL Press, 2007), p. 33.

<sup>85</sup> Antoon de Baets, “Defamation Cases Against Historians”, *History and Theory*, 41:3 (October 2002), p. 347.

<sup>86</sup> Brian Neill, Richard Rampton, Heather Rogers, Timothy Atkinson, Aidan Eardley, *Duncan and Neill on Defamation*, Third Edition, (London: LexisNexis 2009), pp. 21, 36-37.

<sup>87</sup> Deborah E. Lipstadt, “*Irving v. Penguin UK and Deborah Lipstadt: Building a Defense Strategy*”, *Nova Law Review*, 27:2, (January 2002), p. 249.

<sup>88</sup> Conversation with Richard Rampton QC and Heather Rogers QC, 10 May 2018, Temple London. Further, Mr Justice Charles Gray, in *Irving v. Penguin, Trial Judgment*, 13.164, stated that “the Defendants are entitled, if and to the extent that may be necessary, to take advantage of the provisions of section 5 of the Defamation Act 1952.” Section 5 states that: “In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of 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 plaintiff’s reputation having regard to the truth of the remaining charges”, The Defamation Act 1952; See Mr Justice Charles Gray, *Irving v. Penguin, Trial Judgment*, 4.8.

between “legitimate criticism” in historiography and “prejudiced vilification”.<sup>89</sup> The significance of the *Irving v. Penguin* trial lay in the defence’s strategy to counter Irving’s claims by applying both legal and historical methods in order to establish that distinction.

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<sup>89</sup> Therese O’Donnell, “Judicialising History or Historicising Law: Reflections on *Irving v. Penguin*”, *Northern Ireland Legal Quarterly*, 62:3, (Autumn, 2011), p. 292.

## Chapter 3

# Deborah Lipstadt's Approach to Holocaust Denial: A Historical Perspective

“We are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it”

- Thomas Jefferson.<sup>90</sup>

“You are mistaken if you believe that anything at all can be achieved by reason. In years past I thought so myself and kept protesting against the monstrous infamy that is anti-Semitism. But is it useless, completely useless.”

- Theodor Mommsen.<sup>91</sup>

### 3.1 Introduction

Logic and reason reach their limit when faced with the phenomenon of Holocaust denial. Quoting Thomas Jefferson and Theodor Mommsen’s aphorisms in the first pages of *Denying the Holocaust*, Deborah Lipstadt signals that her approach to denial is based on her wider commitment to academic discourse because it represents the “free pursuit of ideas”.<sup>92</sup> Having focused her analysis on the anti-Semitic and politically charged motives for denying the Holocaust, Mommsen’s principle suggests there is a limit to the scholarly approach to

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<sup>90</sup> Thomas Jefferson (1743-1826) in a letter to William Roscoe, 27 December, 1820, quoted in Dumas Malone, *The Sage of Monticello: Jefferson and His Time*, Vol. 6, First Edition, (Boston: Little Brown, 1981), pp. 417-418.

<sup>91</sup> Theodor Mommsen (1817-1903), quoted in Alan M. Dershowitz, *The Vanishing American Jew: In Search of Jewish Identity for the Next Century*, (New York: Touchstone, 1998), p.106.  
Both passages are extracted from page 1 of Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York: Plume, 1994), because they accurately summarise Lipstadt’s position on how she counters Holocaust denial.

<sup>92</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), pp. xiii-xiv.

countering denial with reason. Lipstadt argues that denial is the “apotheosis of irrationalism” and, therefore, “cannot be countered with the normal forces of investigation, argument, and debate” as one would normally engage in historiography.<sup>93</sup> Rather than engaging in direct rebuttals of the key arguments of deniers, *Denying the Holocaust* took an alternative approach by outlining the pseudo-scholarly revisionist appearance of deniers. The analysis of the methodology of deniers was therefore brief, “lest it appear that I believe that serious consideration must be given these people’s claims.”<sup>94</sup> Since Lipstadt was among some of the first scholars to produce an account of the origins of denial and its “impact on contemporary culture”, her work is central to understanding her method of responding to the claims of deniers from a historical perspective.<sup>95</sup>

How effective, however, was Lipstadt’s historical approach in achieving her objective of proving that denial “was a tissue of lies with no historical standing at all”?<sup>96</sup> This chapter serves as an introduction to understanding the nature of Holocaust denial, outlining the way in which Lipstadt challenges Holocaust denial’s ideological premises. To do this, the chapter is divided into three sections. Section 3.2 provides a general overview of Lipstadt’s previous publications to identify some key assumptions, paradigms and influences which shape Lipstadt’s approach to history. This lays the groundwork to discuss Lipstadt’s approach to Holocaust denial in her book in Section 3.3, which approaches denial from within historical discourse. Section 3.4 analyses Lipstadt’s approach to countering Irving’s Holocaust denial in particular. This chapter seeks to fill a gap in current literature which has failed to adequately analyse Lipstadt’s publications in any comparative form. In contrast to the methods of countering Holocaust denial from the trial, Lipstadt’s paradigm also reveals her approach to

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<sup>93</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 20.

<sup>94</sup> *Ibid*, p. 252.

<sup>95</sup> *Ibid*, p. 31.

<sup>96</sup> Deborah E. Lipstadt, *The Eichmann Trial*, (New York: Schocken Books, 2011) p. xxii.

Holocaust. Furthermore, her involvement in the *Irving v. Penguin* trial provides a link between the historical and the legal arenas.

### 3.2 An Overview of Lipstadt's Paradigm and Approach to History

History, Lipstadt argues, “shapes our worldview”, it “gives you context for understanding” the present.<sup>97</sup> Yet, to what extent does Lipstadt's world-view shape her approach to Holocaust denial? Lipstadt's approach to Holocaust history reveals her scholarly interests, her perceptions of the past and its relationship to the present. To analyse an historian's interpretation of history, it is important to first identify the perspective from which they approach the historical material. An applicable framework can be extracted from social-science research, which locates the paradigm or world-view of an individual, to explain the “basic set of beliefs that guide action.”<sup>98</sup> In other words, you must go to the source of their assumptions and ideological influences to be able to accurately interpret how historians arrive at their conclusions. By applying Quentin Skinner's philosophy that, “a principle makes a difference to the action”, Lipstadt's principles “will need to be cited in an attempt to explain” her approach to denial.<sup>99</sup>

One of the ways to interpret an historian's world-view is to situate their work within the framework of epistemology and methodology, which identifies the basis for their knowledge and how they present and test their assumptions about the past.<sup>100</sup> While the focus is primarily on Lipstadt's approach to Holocaust deniers, it also assesses the ideological standpoints of Holocaust denial, as Lipstadt unpicks their underlying anti-Semitic agenda within her own research. Thomas Kuhn has also drawn researchers to the utility of paradigms

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<sup>97</sup> Caroline Ciric, “Professor Spotlight: Deborah Lipstadt”, *The Emory Wheel*, 2 September 2015, <http://emorywheel.com/professor-spotlight-deborah-lipstadt/>, (last accessed 10.09.18).

<sup>98</sup> Norman K. Denzin and Yvonna S. Lincoln, *The Sage Handbook of Qualitative Research*, (London: Sage, 2011), p. 91.

<sup>99</sup> Quentin Skinner, *Visions of Politics: Regarding Method, Volume 1*, (Cambridge: Cambridge University Press, 2002), p. 146.

<sup>100</sup> Victor Jupp, ed., *The Sage Dictionary of Social Research Methods*, (London: Sage, 2006), pp. 92-93, 175.

as a framework for historical research in his influential research, *The Structure of Scientific Revolutions*.<sup>101</sup> Kuhn assesses that a paradigm is not something you can falsify or verify but a summary of the key assumptions held by an individual or group.<sup>102</sup> Lipstadt's paradigm is extracted from her "text", in order to assess the validity of her methods. In this case, Lipstadt's world-view naturally influences the evidence she uses to construct her argument and, therefore, enables an analysis of the approach she takes to that source material. The extent to which a scholar's perspective, research expertise and interests can affect the interpretation of the evidence, and whether they allow these subjectivities to influence their research, becomes clearer when applying this framework of analysis.

An historian's paradigm is complex and multifaceted and cannot be in discussed in full detail here. For the purpose of this research, however, three key themes in Lipstadt's paradigm help to provide a framework from which to analyse her approach to Irving's denial. Based on the analysis of Lipstadt's articles and books published between 1982 and 2017, a key underlying assumption held throughout is that the Holocaust is tightly connected to Jewish identity and memory. This paradigm also impacts on practices of Holocaust remembrance and collective memory and is central to Lipstadt's approach to Holocaust denial.

Lipstadt described her research on Holocaust history as an "attempt not just to shed light on the event itself but also to illumine the manner in which it has reverberated in American society and culture."<sup>103</sup> Therefore, Lipstadt's approach to the Holocaust is interpreted within the paradigm of its impact on society today. Much of Lipstadt's earlier research focused on identifying instances of anti-Semitism in American political culture and

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<sup>101</sup> Thomas Kuhn, *The Structure of Scientific Revolutions*, (Chicago: University of Chicago Press, 1962); Richard J. Evans, *In Defence of History*, (London: Granta, 2000), pp. 35-36, 42-43.

<sup>102</sup> Richard J. Evans, *In Defence of History*, (London: Granta, 2000), pp. 42-43.

<sup>103</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January 1999), § 25.

in the press during World War II and in post-war American life.<sup>104</sup> While studying and living in Israel in 1967-68, at the time of the Arab-Israeli War, Lipstadt recognised the “deep imprint of both the Holocaust and Israel on the psyche of the Jewish people.”<sup>105</sup> Lipstadt’s first publication *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945* (1986) argues: “had the American press and other western observers understood the central role of anti-Semitism in Nazi ideology, they would have been less perplexed by the violence” towards the Jews in the early years of the Nazi regime.<sup>106</sup> *Beyond Belief* investigates the press as they attempted to interpret Hitler’s Nazi Germany to an American audience, as they witnessed the events of the Holocaust unfold. This paradigm is summarised in earlier articles published in *Society*, *Jewish Social Studies* and *Modern Judaism*, which criticised what could have been done by the Allies and influential religious leaders to prevent the deportation of the Jews.<sup>107</sup> Notably, this research drew from a particular area of historiography which was influenced by the work of David Wyman and Arthur Morse in the late 1960s.<sup>108</sup>

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<sup>104</sup> In particular see: Deborah E. Lipstadt, “A Road Paved with Good Intentions: The Christian Science Monitor’s Reaction to the First Phase of Nazi Persecutions of Jews”, *Jewish Social Studies*, 45:2, (Spring, 1983), pp. 95-112; Deborah E. Lipstadt, “America and the Holocaust”, *Modern Judaism*, 10:3, (October, 1990), pp. 283-296; Deborah E. Lipstadt, “America and the Memory of the Holocaust, 1950-1965”, *Modern Judaism*, 16:3, (October, 1996), pp. 195-214; Deborah E. Lipstadt, “Pious Sympathies and Sincere Regrets: The American News Media and the Holocaust from Krystalnacht to Bermuda, 1938-1943”, *Modern Judaism*, 2:1, (February, 1982), pp. 53-72; Deborah E. Lipstadt, *Holocaust: An American Understanding*, (New Brunswick: Rutgers University Press, 2016) for Lipstadt’s analysis of the impact of the Holocaust on Jewish and American culture since the Second World War.

<sup>105</sup> Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 10.

<sup>106</sup> Deborah E. Lipstadt, *Beyond Belief: The American Press and the Coming of the Holocaust, 1933-1945*, (New York: Free Press, 1986), p. 40.

<sup>107</sup> Deborah E. Lipstadt, “Pious Sympathies and Sincere Regrets: The American News Media and the Holocaust from Krystalnacht to Bermuda, 1938-1943”, *Modern Judaism*, 2:1, (February, 1982), pp. 53-72; Deborah E. Lipstadt, “A Road Paved with Good Intentions: The Christian Science Monitor’s Reaction to the First Phase of Nazi Persecutions of Jews”, *Jewish Social Studies*, 45:2, (Spring, 1983), pp. 95-112; Deborah E. Lipstadt, “Moral Bystanders: The Papacy and the Holocaust”, *Society*, (March/ April 1983), pp. 21-26; Deborah E. Lipstadt, “Witness to the Persecution: The Allies and the Holocaust: A Review Essay”, *Modern Judaism*, 3:3, (October, 1983), pp. 319-338.

<sup>108</sup> For more on this theme of American apathy see, Arthur Morse’s *While Six Million Died: A Chronicle of American Apathy*, (New York: Random House, 1967); David Wymann’s, *Paper Walls: America and the Refugee Crisis, 1938-1941*, (Amherst: University of Massachusetts Press, 1968). A recent research paper which was influenced by Lipstadt’s views on this is: Henry Feingold “The Surprising Historic Roots of Holocaust Denial”, in Debra Kaufman, ed., *From the Protocols of the Elders of Zion to*

Lipstadt's overall argument that the American public were unwilling to act on their knowledge because the Holocaust seemed "beyond the bounds of credulity", suggests an earlier form of Holocaust denial.<sup>109</sup> To demonstrate this point, *Beyond Belief* cited various periodicals and newspaper reports, such as *Commonweal*, which published: "the situation of the Jews in Germany is deplorable beyond words... Don't be deceived by false denials concerning the persecution of the Jews under the Hitler regime."<sup>110</sup> Again, quoting the *New York Times* in 1933: "more shocking than the practice of Nazi terror is denial of such terror. Just when Hitler is saying that terror never existed."<sup>111</sup> When evaluating Lipstadt's commitment to proving the relationship between anti-Semitism and denial later in her book *Denying the Holocaust*, *Beyond Belief* seems to reflect a wider assumption of Holocaust denial in American culture.

Memory and remembrance of the Holocaust is a continuous theme in Lipstadt's writings, focusing on the way that the Holocaust has been reported, remembered and re-interpreted.<sup>112</sup> Her book, *The Eichmann Trial* (2011) published 50 years later, portrays her own perceptions of the significance of this trial on the Jewish community.<sup>113</sup> Lipstadt interprets Jerusalem's events in 1961 as a "watershed moment", stating that "the trial and the debate about it all served to alter dramatically how Americans would understand the Holocaust for decades thereafter."<sup>114</sup> Lipstadt's interpretation the 1961 trial is shaped, in summary, by the following factors: her experience of the Irving trial, the symbolic

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*Holocaust Denial Trials: Challenging the Media, the Law and the Academy*, (London: Valentine Mitchell, 2007), p. 67.

<sup>109</sup> Deborah E. Lipstadt, "The American Press and the Persecution of German Jewry: The Early Years 1933-1935", *The Leo Baeck Institute Year Book*, 29:1, (January 1984), p. 30.

<sup>110</sup> Deborah E. Lipstadt, *Ibid*, p. 44.

<sup>111</sup> *New York Times*, 24 June 1933; quoted in Deborah E. Lipstadt, "The American Press and the Persecution of German Jewry: The Early Years 1933-1935", *The Leo Baeck Institute Year Book*, 29:1, (January 1984), p. 44.

<sup>112</sup> Anthony Julius, "Review of Deborah E. Lipstadt, *The Eichmann Trial*", *Association for Jewish Studies Review*, 35:1 (April, 2011), Back Matter.

<sup>113</sup> Deborah E. Lipstadt, *The Eichmann Trial*, (New York: Schocken Books, 2011).

<sup>114</sup> Deborah E. Lipstadt, *Holocaust: An American Understanding*, (London: Rutgers University Press, 2016), p. 46.

significance of Eichmann's trial, the intentionality and role that Eichmann played in the Final Solution, and the power of eye-witness testimony which was brought against Eichmann during the trial.

With Arendt's controversial yet profound influence over the early scholarship on the Holocaust and on Eichmann's trial, claiming that it was with "submissive meekness with which the Jews went to their death," Lipstadt's analysis of Eichmann's intentionality and his commitment to Nazism, rejects Arendt's philosophy of the "Banality of Evil."<sup>115</sup> Therefore, given Lipstadt's commitment to preserving the memory of the Holocaust, her book refocuses the Eichmann trial for current scholars and reinstates its significance for bringing the perpetrators of the Final Solution to justice. This stance reveals aspects of Lipstadt's paradigm in the way that the book unfolds in its criticism of Arendt and other previous "myths" of Jewish passivity.<sup>116</sup> These examples demonstrate how Lipstadt's focus on anti-Semitism as a driving force for Holocaust denial, has roots in other interpretations of the Eichmann trial and of American responses to the Holocaust during the Second World War also.

To conclude on this theme, Eichmann's trial seems to have held a more personal significance on Lipstadt's interpretation of history, and especially in connecting the significance of this trial to Holocaust denial trials. Lipstadt reflected that "it would take me a number of years to understand fully that the horrors for which Eichmann was being tried had sprung from the self-same anti-Semitic soil... I never dreamed that from this soil would also come a movement that would have a dramatic impact on the course of my own life and would entrap me in a complex legal battle."<sup>117</sup> Having examined the Eichmann trial manuscripts

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<sup>115</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, (New York: Viking Press, 1963), pp. 11, 61.

<sup>116</sup> Yael S. Feldman, "Not as Sheep Led to Slaughter"? On Trauma, Selective Memory, and the Making of Historical Consciousness", *Jewish Social Studies*, 19:3, (Spring/ Summer, 2013), p. 142.

<sup>117</sup> Deborah E. Lipstadt, *The Eichmann Trial*, (New York: Schocken Books, 2011), p. xiv.

during the course of the *Irving v. Penguin* trial, Lipstadt wrote: “I found myself comparing what I was experiencing to what had happened in Jerusalem in 1961... One of these men helped wiped out one-third of world Jewry. The second has dedicated himself to denying that truth of this.”<sup>118</sup>

A second assumption that can be drawn from Lipstadt’s work, is her argument that the Holocaust is an entirely unique event, and that comparative genocide studies are a form of denial, because they attempt to interpret the victims of genocide *en masse*. The uniqueness paradigm, fiercely defended by Elie Wiesel when he wrote that the Holocaust is “never to be comprehended”, suggests a wider paradigm of memory preservation, as anti-Semitism continues to manifest itself in subsequent generations.<sup>119</sup> Nonetheless, Lipstadt echoes the arguments of Yehuda Bauer, that the consecration of Holocaust memory through teaching, is essential to remembering preserving the memory of the Holocaust.<sup>120</sup> One aspect of this assumption is that the Holocaust is an entirely unique event, and cannot be compared to any other genocide, which has implication on the way history is taught. The Holocaust, Lipstadt argues, has a unique capacity to provide “ethical, moral, and political lessons” for the present.<sup>121</sup> From this assumption, Lipstadt concludes that the denial of the Holocaust takes many forms and is not limited to revisionists who deny the gas chambers at Auschwitz or Hitler’s role in the Final Solution. The uniqueness paradigm, Dan Stone argues, is “a matter of ideology, with the sole goal of perpetuating the Holocaust as an event of sacred historical significance.”<sup>122</sup> Daniel Blatman analyses that this paradigm rests on “the belief that

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<sup>118</sup> Deborah E. Lipstadt, *The Eichmann Trial*, (New York: Schocken Books, 2011), p. xix.

<sup>119</sup> Elie Wiesel, “Trivializing the Holocaust: Semi-Fact and Semi-Fiction”, *New York Times*, 16 April 1978.

<sup>120</sup> Yehuda Bauer quoted in Alan Rosenberg and Evelyn Silverman, “The Issue of the Holocaust as a Unique Event”, in Michael N. Dubkowski and Isidor Wallimann, eds., *Genocide in Our Time: An Annotated Bibliography with Analytical Introductions*, (Ann Arbor: Pierian Press, 1992), p. 48; Deborah E. Lipstadt, *Holocaust: An American Understanding*, (New Brunswick, Rutgers University Press, 2016), p. 135.

<sup>121</sup> Deborah E. Lipstadt, “Deniers, Relativists and Pseudoscholarship”, *Dimensions*, 14:1, (May, 2000), p. 44.

<sup>122</sup> Daniel Blatman “Holocaust Scholarship: Towards A Post-Uniqueness Era”, *Journal of Genocide Research*, 17:1, (December, 2014), p. 23.

preserving the unique status of the Holocaust constitutes a sort of barrier against the growth and resurgence of antisemitism.”<sup>123</sup> Addressing the way that the Holocaust has been taught in many North-American schools, Lipstadt contested that certain historians were rejecting the widely-used “Facing History and Ourselves” American school history curriculum “because it did not present the Nazi ‘point of view’”.<sup>124</sup> Having analysed the same critiques within the media and with academia regarding the deniers’ claims to presenting the “other side”, Lipstadt suggests that denial takes many different forms and impacts the wider issues of historical representation and memory within education also.

On closer examination, representation of the Holocaust are regular themes in Lipstadt’s work. In her latest book, *Holocaust: An American Understanding* (2016), her focus on post-war American literature, media, and film in particular, sheds light on the response to the Holocaust in the 1950s and 60s. Examining the way that the Holocaust affected American culture, Lipstadt explains that the decision to commemorate the Holocaust in a national memorial, under President Carter in 1978, was a significant moment in the shaping of memory.<sup>125</sup> It is evident from Lipstadt’s witness statement for the *Irving v. Penguin* trial, that memorialisation and commemoration plays a significant role in her research on the Holocaust. Lipstadt’s visit to a burial site at Czernowitz, the Soviet Union in 1972, which stated that it: “held the remains of 800 victims of the Fascists and that the victims were Russians, Georgians, Bukovinians, Ukrainians, etc.”, but “Jews were not mentioned.”<sup>126</sup> Having witnessed this “skewed” history, Lipstadt concluded that the nationalist approach of

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<sup>123</sup> Daniel Blatman “Holocaust Scholarship: Towards A Post-Uniqueness Era”, *Journal of Genocide Research*, 17:1, (December, 2014), p. 23.

<sup>124</sup> Deborah E. Lipstadt, “Not Facing History”, *The New Republic*, 212:10, (6 March, 1995), p. 26.

<sup>125</sup> Deborah E. Lipstadt, *Holocaust: An American Understanding*, (New Brunswick, Rutgers University Press, 2016), pp. 101-102.

<sup>126</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January 1999), § 40-43.

the Soviet memorial indicated that Holocaust denial takes various forms; which includes the “white-washing” of the intended victims of the Holocaust.<sup>127</sup>

During the process of curating the United States Holocaust Memorial in 1978, Elie Wiesel, a Holocaust survivor and scholar who served as chair on the Holocaust memorial commission, wrote a report on existing memorials in Eastern Europe.<sup>128</sup> Wiesel observed in the New York Times Magazine that memorials in Eastern Europe:

“refer to victims in general, of every nationality... [whereas] we speak of Jews. They mention all the victims of every nationality, of every religion, and they refer to them en masse. We object: Of course they must all be remembered, but why mix them anonymously together?... [Jews] alone were fated to total extermination not because of what they had said or done or possessed but because of what they were.”<sup>129</sup>

Here, Wiesel echoes Lipstadt’s own fears in 1972 of the “de-Judiazing” of the Holocaust and memory.<sup>130</sup> Lipstadt contends that the Holocaust was a “seminal moment in Jewish history” which must be “understood and remembered”, with “the highest level of scholarship” to do so.<sup>131</sup>

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<sup>127</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January 1999), § 42, 49.

<sup>128</sup> Deborah E. Lipstadt, *Holocaust: An American Understanding*, (New Brunswick, Rutgers University Press, 2016), p. 101.

<sup>129</sup> Elie Wiesel, “Pilgrimage to the Country of Night”, *New York Times Magazine*, 4 November, 1979; also quoted in, Deborah E. Lipstadt, *Holocaust: An American Understanding*, (New Brunswick, Rutgers University Press, 2016), p. 106.

<sup>130</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January 1999), § 43; See also, Yehuda Bauer, Donald Bloxham, Jeffrey Herf, Yair Auron, Annegret Ehmann & Gavriel D. Rosenfeld, “Research Forum - Holocaust and Genocide”, *Dapim: Studies on the Holocaust*, 25:1, (August, 2013), p. 360.

<sup>131</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January 1999), § 49.

### 3.3 Deborah Lipstadt's Approach to Holocaust Denial in *Denying the Holocaust*

Lipstadt's scholarly approach to Holocaust denial, reflects her commitment to defending the memory of the Holocaust. How then does this paradigm impact on her research on Holocaust denial? "My approach" to Holocaust denial, Lipstadt describes: "is akin to a scholar who writes about people who are flat earthers or 'conspiracy theorists.' That scholar would devote herself to trying to understand how they reach their 'conclusions,' assess whether they truly believe their arguments to be accurate and analyse the public's reaction to them. She would not spend time proving the earth is round or disproving their conspiratorial claims."<sup>132</sup> The way that Lipstadt has dealt with the phenomenon of Holocaust denial, particularly in her book *Denying the Holocaust*, can be analysed by breaking down her method as follows: identifying anti-Semitism as the root of Holocaust denial; critiquing the methodology of Holocaust denial; analysing the American response to Holocaust denial, the first amendment and free speech; evaluating standards of scholarship; understanding the impact of Holocaust denial on historical memory. These categories reflect how *Denying the Holocaust* centred on revealing the deniers' "motives for action" as Skinner suggests, using this as a basis to delegitimize the movement, without engaging in their debates. Arguing, therefore, that identifying "the threat denial poses to both the past and the future" is essential to constructing a method of countering their arguments.<sup>133</sup>

The root of Holocaust denial, according to Lipstadt, lay in three areas: "antisemitism, corrupt deconstructionism and anti-Zionism."<sup>134</sup> Examining the literature produced by Holocaust deniers with titles such as *Debunking the Genocide Myth* and *Did Six Million Really Die? The Truth at Last* and, *The Myth of the Six Million*; the agenda to deny the

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<sup>132</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January 1999), §111.

<sup>133</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 29.

<sup>134</sup> Deborah Dash Moore, "Deborah Lipstadt", *Jewish Women: A Comprehensive Historical Encyclopaedia*, 1 March 2009, Jewish Women's Archive, <<https://jwa.org/encyclopedia/article/lipstadt-deborah>>.

Holocaust was clear.<sup>135</sup> Shermer and Grobman argue that Lipstadt's research illuminated the "strong conspiratorial streak" of the claims of Holocaust deniers.<sup>136</sup> Deniers, who had modelled their views on the staunchly anti-Semitic propaganda pamphlet *Protocols of the Elders of Zion*, claimed that the Jews were "conspiring" for world economic and financial domination.<sup>137</sup> Stephen Eric Bronner suggests that "the Jew" became "any enemy required by the anti-Semite", and thus the *Protocols* is reflected in denial arguments also.<sup>138</sup> Employing these anti-Semitic stereotypes, deniers such as Richard Harwood asserted that "the 'Holocaust lie' was perpetrated by Zionist-Jewry's stunning propaganda machine for the purpose of filling the minds of Gentile people the world over with such guilt feelings about the Jews that they will utter no protest when the Zionists robbed the Palestinians of their homeland with the utmost savagery."<sup>139</sup> Lipstadt drew attention to George Lincoln Rockwell, founder of the American Nazi Party, who claimed that the Holocaust was "a monstrous and profitable fraud", concluding therefore, that denial appeals to those "nurtured in the soil of antisemitism".<sup>140</sup>

Central to de-legitimising Holocaust denial claims was to ask what sources, if any, do deniers use to substantiate their arguments? What ideological influences do deniers bring to bear on these sources? Lipstadt not only focuses on the ideological roots of denial, but also their methodology – their reliance on evidence which has been proved to be

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<sup>135</sup> Paul Rassinier, *Debunking the Genocide Myth*, (Newport Beach: Noontide Press, 1977); Richard E. Harwood (pseudonym for Richard Verrall), *Did Six Million Really Die? The Truth at Last* (Uckfield: Historical Review Press, 1974); David Hoggan, *The Myth of the Six Million*, (Newport Beach: Noontide Press, 1974).

<sup>136</sup> Michael Shermer, Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say it?* (Berkeley: University of California Press, 2000), p. 80.

<sup>137</sup> *Ibid.*, p. 80-81.

<sup>138</sup> Stephen Eric Bronner, "Libelling the Jews: Truth Claims, Trials, and the Protocols of Zion", in Debra Kaufman, ed., *From the Protocols of the Elders of Zion to Holocaust Denial Trials: Challenging the Media, the Law and the Academy*, (London: Vallentine Mitchell, 2007), p. 17.

<sup>139</sup> Richard Harwood, "Holocaust's Story an Evil Hoax", *"Holocaust" News*, (London), 1, (1982), p. 1; Michael Shermer, Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say it?* (Berkeley: University of California Press, 2000), p. 80.

<sup>140</sup> Arnold Forster, "The Ultimate Cruelty", *ADL Bulletin*, (June 1959), p. 2; in Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 66; Deborah E. Lipstadt, *The Eichmann Trial*, (New York: Schocken Books, 2011), p. xx.

methodologically, forensically and scientifically flawed. Noting that “if you appear looking like a neo-Nazi, people know exactly how to categorize you”, Lipstadt suggests that deniers seek to gain legitimacy, therefore, by “posing as serious historians” and “historical revisionists” to promote denial.<sup>141</sup> The methods of deniers “mixed truth with fiction, accurate with fabricated quotes, and outright lies with partially correct information” in an attempt to alter perceptions of the Holocaust.<sup>142</sup> Highlighting their methods Lipstadt wrote: “whatever sources deniers cannot twist they ignore, particularly when they contradict their most basic contentions.”<sup>143</sup>

By providing a summary of the flawed methods of denial literature, Lipstadt wrote: “these works demonstrate how deniers misstate, misquote, falsify statistics and falsely attribute conclusions to reliable sources. They rely on books that directly contradict their arguments, quoting in a manner that completely distorts the authors' objectives. Deniers count on the fact that the vast majority of readers will not have access to the documentation or make the effort to determine how they have falsified or misconstrued information.”<sup>144</sup> Therefore, Lipstadt’s research contributed to an understanding of the denial movement and the “direct link between the attempt to rewrite history and the attempt to push a certain political agenda.”<sup>145</sup>

Having analysed the ideological methodological premises of Holocaust denial, how then does an academic engage with Holocaust denial from a historical perspective? How does Lipstadt refute denial if it is illogical and unreasonable? Lipstadt records how the academic

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<sup>141</sup> Deborah E. Lipstadt interview in, Paige P. Parvin, “Final Word”, *Emory Magazine*, (Summer, 2005). Accessible at [http://www.emory.edu/EMORY\\_MAGAZINE/summer2005/final\\_word.htm](http://www.emory.edu/EMORY_MAGAZINE/summer2005/final_word.htm) (last accessed 31.08.18).

<sup>142</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 119.

<sup>143</sup> *Ibid*, pp. 127-128.

<sup>144</sup> Deborah E. Lipstadt, *Denying the Holocaust, The Growing Assault on Truth and Memory*, (New York, Plume, 1994), p. 111.

<sup>145</sup> Deborah E. Lipstadt interview published in, Paige P. Parvin, “Final Word”, *Emory Magazine*, (Summer, 2005). Accessible at [http://www.emory.edu/EMORY\\_MAGAZINE/summer2005/final\\_word.htm](http://www.emory.edu/EMORY_MAGAZINE/summer2005/final_word.htm) (last accessed 31.08.18).

community based their response to denial on the First Amendment right to free speech, free enquiry and free expression.<sup>146</sup> This has had significant impact on public perceptions of Holocaust denial and on Lipstadt's approach to countering Holocaust deniers. While not fully endorsing a "free-speech" paradigm, Lipstadt reflects the wider values of the First Amendment in her scholarly efforts arguing that: "they have the right to publish their articles and books and hold their gatherings. But free speech does not guarantee them the right to be treated as the "other" side of a legitimate debate."<sup>147</sup> "I am not advocating the muzzling of the deniers. They have the right to free speech, however abhorrent. However, they are using that right not as a shield, as it was intended by the Constitution, but as a sword."<sup>148</sup>

While the centrality of a commitment to the first amendment forms part of her world-view, Lipstadt takes a more calculated approach refuting the claims of Holocaust deniers, particularly after having witnessed a number of university campus newspapers print explicit Holocaust denial advertisements in 1993.<sup>149</sup> Lipstadt recalls an advertisement which ran in the New York State University newspaper, which claimed that there is "no proof of homicidal gassing chambers" and that historians who challenge them, "work to suppress revisionist research."<sup>150</sup> A similar advertisement printed at Brandeis University claimed that the Washington Holocaust Memorial Museum was "false and manipulative", Brandeis' president argued that it would be a "violation" of the "principle of free speech" to suppress these ads.<sup>151</sup> Similarly, they responded: "there are two sides to every issue" and "the issue of freedom of expression outweighed the issue of the offensive nature of the advertisement";

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<sup>146</sup> Deborah E. Lipstadt, "Deniers, Relativists and Pseudoscholarship", *Dimensions*, 14:1, (May, 2000), p. 47.

<sup>147</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 20.

<sup>148</sup> *Ibid*, p. 31.

<sup>149</sup> See *The Justice*, Brandeis University, (7 December, 1993); *Michigan Daily*, (6 October, 1993), in Deborah E. Lipstadt, *Denying the Holocaust*, *op. cit.*, p. xiv – xv.

<sup>150</sup> *Ibid*, p. xiii.

<sup>151</sup> Anon., "Brandeis Roiled by Holocaust Ad", *New York Times*, (12 December, 1993), p. 44.

thus, effectively, endorsing deniers by citing a right to free-speech.<sup>152</sup> This demonstrates environment in which Lipstadt was writing her book, and one which informed her approach to denial also.

The preface to *Denying the Holocaust* highlights the challenges that academics face when confronted with “the misguided notion that everyone’s view is of equal stature”.<sup>153</sup> Lipstadt went on to suggest that American society and academia have “created an atmosphere that allows Holocaust denial to flourish.”<sup>154</sup> That denial was flourishing among academics is perhaps an overstatement which lacked qualification in the book. However, Lipstadt’s concern that deniers were gaining some credibility was argued on the basis of those who were promoting denial on the basis of academic tolerance and expression. Providing the notorious example of Noam Chomsky at MIT who had written the introduction to Robert Faurisson’s denial publication, seems to provide some legitimacy to this notion of academic tolerance.<sup>155</sup> It is from this example that Lipstadt assessed the particular danger of deniers in the academic field, assessing the case of Arthur Butz, a Holocaust denier and a professor at Northwestern University, who had expressed “the same attitude and used the same methodology that has characterized all Holocaust denier literature up to this point”, and had used an “aura of scholarly objectivity” to defend these views within academia.<sup>156</sup>

Lipstadt’s method of dealing with Holocaust denial was, in part, a response to the increasing attention that deniers were receiving in the US. When Lipstadt refused a television producer’s request to be part of a public debate with the Holocaust denier, as an act of publicity for her book, the producer responded: “I certainly don’t agree with them, but don’t

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<sup>152</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. xiv.

<sup>153</sup> *Ibid*, p. xv.

<sup>154</sup> *Ibid*, p. xv.

<sup>155</sup> Seth S. King, “Professor Causes Furor by Saying Nazi Slaying of Jews Is a Myth”, *New York Times*, 28 January 1977, p. 10; Deborah E. Lipstadt, *op. cit.*, p. 19-20.

<sup>156</sup> *Ibid*, pp. 138-139.

you think our viewers should hear the *other side*?”<sup>157</sup> Despite the intention to use a debate-platform to “unmask” deniers’ views, Robert A. Kahn evaluates that when an historian faces “an opponent who is free to change factual positions as the situation warrants”, their attempts to counter denial in such a setting, would be futile.<sup>158</sup> Lipstadt’s non-interaction with denial, either verbally or in print, she argues, would only “risk giving their efforts the imprimatur of a legitimate historical option.”<sup>159</sup> Therefore, her method of dealing with deniers reflects her overall approach in *Denying the Holocaust*, that to engage with their debates in any depth, would provide “the legitimacy and a stature that they in no way deserve.”<sup>160</sup>

“There is a critical difference between debate and analysis... It is far better to analyze who these people are and what it is they are trying to accomplish. Above all, it is essential to expose the illusion of their reasoned inquiry that conceals their extremist views. It is only when society comprehends this group’s real intentions that we can be sure that history will not be reshaped to promote a variety of pernicious objectives.”<sup>161</sup>

Through establishing standards of scholarship, Lipstadt argued that a more effective method in her book is “to expose the illusions of reasoned inquiry that conceals their extremist views.”<sup>162</sup> Lipstadt investigated denial in America and Europe, at a time when very little had been written about the nature, origins and ideological roots of Holocaust denial. By identifying the key proponents of denial and their publications, *Denying the Holocaust* provided a timely analysis as denial literature began “entering the mainstream” of historical discourse in the late 1980s.<sup>163</sup> When a denier claims to be “a real scholar”, “objective” and simply “revisionist” in their approach, how does an historian counter a movement that contradicts the historical record?<sup>164</sup> Lipstadt’s research has implications on standards of

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<sup>157</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 2.

<sup>158</sup> Robert A. Kahn, “Rebuttal Versus Unmasking: Legal Strategy in R. v. Zündel”, *Patterns of Prejudice*, 34:3, (March, 2008), p. 9.

<sup>159</sup> Deborah E. Lipstadt, “Deniers, Relativists and Pseudoscholarship”, *Dimensions*, 14:1, (May, 2000), p. 49

<sup>160</sup> Deborah E. Lipstadt, *Denying the Holocaust*, *op. cit.*, p. 1.

<sup>161</sup> *Ibid*, p. 49.

<sup>162</sup> *Ibid*, p. 33.

<sup>163</sup> *Ibid*, p. 138.

<sup>164</sup> For an example of these claims see, The Institute of Historical Review, “About: Our Mission and Record”, <http://www.ihr.org/main/about.shtml>; Theodore J. O’Keefe, “New Books Seek to Discredit

historical scholarship, particularly because Holocaust deniers' claims to scholarly, professional research is overstated. Their handling of evidence can be better categorised as "a veneer of scholarship", consisting of footnotes, references and formatting which appear to be the norm for academic writing.<sup>165</sup> Lipstadt argues that "the historian's role is to act as a neutral observer", their interpretation is "determined by how well it accounts for the facts", but "the historian brings to this enterprise his or her own values and biases."<sup>166</sup> Historians, according to Lipstadt, do not allow "personal or popular opinion to skew objective information", this "is how real historians operate."<sup>167</sup> As a method of countering Holocaust denial, Lipstadt's suggested standards of scholarship was more of a guide to de-legitimise their notions of scholarly objectivity.

To what extent was Lipstadt's approach to countering Holocaust denial effective in addressing these methodological errors in historical practice? When Lipstadt wrote that the denial of the Holocaust was an "assault on truth and memory", she argued that denial forms part of a much larger phenomenon in history, which relates to the deliberate suppression of the facts. Truths which do not fit into the desired political or ideological paradigm of the individual, therefore, become problematic or "inconvenient" to their own arguments.<sup>168</sup> Analysing denial from the perspective of its neo-Nazi political and anti-Semitic roots revealed this. The Holocaust historian, David Cesarani contends that denial is like a "double murder" of the victims of the Holocaust because of the attempt to eradicate the history the

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"Growing Threat" of Holocaust Denial", Book Reviews, *Journal of Historical Review*, 6, (December/November, 1993), p. 28. Theodore O'Keefe is one of directors of the Institute for Historical Review, the Holocaust denial organisation established in California, USA. O'Keefe writes against key historical texts which refute Holocaust denial.

<sup>165</sup> Professor Henry Huttenbach quoted in Kenneth S. Stern, *Holocaust Denial*, (New York: The American Jewish Committee, 1993), p. 59.

<sup>166</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 25.

<sup>167</sup> Deborah E. Lipstadt, *History on Trial: My Day in Court with a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 68.

<sup>168</sup> Catherine Hall and Daniel Pick, "Feature: Denial in History, Thinking About Denial", *History Workshop Journal*, Issue 84, (Oxford: OUP, 2017), p. 15

Holocaust.<sup>169</sup> While most of her critiques of the denial movement were concerned with general summaries of their tactics in general, Lipstadt analysed the flaws in their writings and argued that denial cannot constitute acceptable scholarship. Accounts of the past are constructed through the selection of sources, organised into a coherent argument, and interpreted through the historian's lens or paradigm. In some ways, their world-view enables historians to interpret the evidence which they have uncovered. In doing so, there is a process of creating accounts of the past which may expand on current research or may uncover new trajectories for further research. Lipstadt argues that "the validity of historical interpretation":

"Is determined by how well it accounts for the facts... Only when society – particularly that portion of society committed to intellectual inquiry – comprehends the full import of this groups intentions will there be any hope that history will not be reshaped to fit a variety of pernicious motives."<sup>170</sup>

Stephen C. Feinstein's view that *Denying the Holocaust* serves as "a handbook for refutation" against the claims of Holocaust denial, is perhaps too generous an assessment from a historical perspective.<sup>171</sup> The aims of the book were limited to addressing public perceptions of denial in the academic sphere and to narrating the origins of denial and their methods. There was, however, a distinct lack of examples to substantiate the generalisations made, despite their well-formed assertions. Gavriel D. Rosenfeld argues that *Denying the Holocaust* was not only "an exposition and refutation of Holocaust denial", it addressed the wider issues of the politics of memory and "the more subtle attempts to normalize the Holocaust in Germany by demonstrating the fallacies of comparing it to Stalinist terror and the Armenian and Cambodian genocides".<sup>172</sup> It is this book's broader agenda to outline the motives of

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<sup>169</sup> David Cesarani, "The Denial Continues", *Times Literary Supplement*, 6 May 1994, (London), p. 12, Issue 4753.

<sup>170</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), pp. 25, 28.

<sup>171</sup> Stephen C. Feinstein, "Review: Denying the Holocaust: The Growing Assault on Truth and Memory, Deborah Lipstadt", *Shofar*, 13:1, Special Issue: Perspectives on Zionism, (Fall, 1994), p. 158.

<sup>172</sup> Gavriel D. Rosenfeld, "The Politics of Uniqueness: Reflections on the Recent Polemical Turn in Holocaust and Genocide Scholarship", *Holocaust and Genocide Studies*, 13:1, (Spring 1999), p. 36.

deniers, rather than to analyse their methods in detail, which characterises Lipstadt's approach to countering Holocaust denial.

### 3.4 Countering David Irving's Holocaust Denial

Since this research investigates historical and legal approaches to countering Holocaust denial, focusing on the *Irving v. Penguin* case, it is important to turn to Lipstadt's treatment of Irving in her book, which formed the basis of his libel complaint. Having analysed Lipstadt's world-view, how did this influence her approach to Irving? Was Lipstadt's criticism of Irving unique compared to the assessment of Irving by other historians, as discussed in Chapter 2? Did she approach Irving's work from an academic historical perspective? As discussed above, Lipstadt's generalised approach to Holocaust denial, extended to her assessment of Irving also.

The following passages which discuss Irving in *Denying the Holocaust*, indicate Lipstadt's focus on the "pernicious motives" of deniers, to challenge their credibility, rather than specifically analysing denial's arguments.<sup>173</sup> Irving, as an independent historian, seemed to pose a particular threat to history because he was a "writer of popular historical works" and was likely to have a platform among scholars and readers which other deniers did not have.<sup>174</sup> Lipstadt described Irving as an untrustworthy historian because he was someone who "proposed extremely controversial theories about the Holocaust."<sup>175</sup> Examining Irving's method, she wrote: "familiar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda", and that "he is most facile at taking accurate information and shaping it to confirm his conclusions."<sup>176</sup> In her book, Lipstadt described Irving as "one of the most dangerous spokespersons for Holocaust denial" because he had

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<sup>173</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (London: Penguin Books, 2016), p. 28.

<sup>174</sup> *Ibid*, pp. 9-10

<sup>175</sup> *Ibid*, p. 126.

<sup>176</sup> *Ibid*, p. 204.

gained a reputation among scholars outside of the denial circles.<sup>177</sup> Irving was mentioned in only 15 of 316 pages (Penguin, 2016 edition) and “occupied a relatively minor role” in the book.<sup>178</sup> But how central was Irving to Lipstadt’s assessment of Holocaust denial? On page 14, Lipstadt wrote that Irving was among a number of other speakers at “a world anti-Zionist conference” in 1992 and that those “scheduled to participate were representatives of a variety of anti-Semitic and anti-Israel organisations”, which associated Irving with anti-Semitic activity.<sup>179</sup> On page 111, Lipstadt mentioned briefly that “David Irving, the right-wing writer of historical works... who had frequently proposed extremely controversial theories about the Holocaust, including the claim that Hitler had no knowledge of it, has become a Holocaust denier”.<sup>180</sup>

Similarly, Lipstadt criticises Irving through the words of other historians and commentators, including Hugh Trevor-Roper when discussing his work. Stating on page 180 that “scholars have described Irving as a ‘Hitler partisan wearing blinkers’ and have accused him of distorting evidence and manipulating documents to serve his own purposes”.<sup>181</sup> Continuing, Lipstadt notes that historians recognise and dissent to Irving “skewing documents and misrepresenting data in order to reach historically untenable conclusions, particularly those that exonerate Hitler”.<sup>182</sup> These passages, while both general to denial and specific to Irving, seek to remove the academic appearance of Holocaust denial literature.

Using Irving’s own words and statements, Lipstadt compiled her evidence from his speeches and publications to reveal Irving’s anti-Semitism. From suggesting that Auschwitz

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<sup>177</sup> Richard J. Evans, “Irving v. Penguin Books and Deborah Lipstadt”, in Peter Cane and Joanne Conaghan eds., *The New Oxford Companion to Law*, (Oxford: OUP, 2008); Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 204.

<sup>178</sup> The pages which mentioned Irving in *Denying the Holocaust* are pp. 9-10, 17, 126, 180-182, 202-203, 204, 241, 242, 249, 263, 265; Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, §118.

<sup>179</sup> Deborah E. Lipstadt, *Denying the Holocaust*, *op. cit.*, p. 17.

<sup>180</sup> *Ibid*, p. 126.

<sup>181</sup> *Ibid*, p. 180.

<sup>182</sup> *Ibid*, p. 180.

is a commercial “tourist attraction”, to claiming that Germany’s post-war reparations were part of a Jewish conspiracy, Irving wrote: “nobody likes to be swindled, still less where considerable sums of money are involved”, Irving was echoing the age-old anti-Semitic trope.<sup>183</sup> Lipstadt described him as “an ardent admirer of the Nazi leader”, who described himself as a “moderate-fascist” and who “seems to conceive himself as carrying on Hitler’s legacy”.<sup>184</sup> Combined, these passages portray a common theme against Irving, which is best summarised by Lipstadt’s assessment on page 181, that “Irving is one of the most dangerous spokespersons for Holocaust denial. Familiar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda”.<sup>185</sup> While this assessment proved to be true, as a result of the research into Irving’s methods during the trial, it was not explored or qualified in any detail in *Denying the Holocaust*.

Irving’s political activity, Lipstadt argued, was linked to his Holocaust denial. Noting that: “Irving, long considered a guru by the far right, does not limit his activities to England. He has been particularly active in Germany, where he has regularly participated in the annual meetings of the extremist German political party Deutsch Volks Union. In addition, he has frequently appeared at extremist sponsored rallies, meetings and beerhall gatherings. Irving’s self-described mission in Germany is to point ‘promising young men’ throughout the country in the ‘right direction.’”<sup>186</sup> Furthermore Lipstadt sought to demonstrate the extent of the offence of Irving’s political anti-Semitism by explaining that Germany, Austria, Italy and Canada were beginning to block his entry.<sup>187</sup>

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<sup>183</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, London: Penguin Books, 2016), p. 179; also quoted Irving in HCJ/ QB *Irving v. Penguin*, Day 8, Monday 24 January 2000, p. 31, lines 16-21.

<sup>184</sup> *Ibid.*, p. 180.

<sup>185</sup> *Ibid.*, p. 181.

<sup>186</sup> *Ibid.*, pp. 9-10.

<sup>187</sup> *Ibid.*, p. 249.

Lipstadt continued that Irving, “a self-described ‘moderate fascist’”, who “established his own right-wing political party, founded on his belief that he was meant to be a future leader of Britain... seems to conceive himself as carrying on Hitler's legacy.”<sup>188</sup> Lipstadt identified that during Irving's testimony at the Zündel trial, he “declared himself converted by Leuchter's work to Holocaust denial and to the idea that the gas chambers were a myth”, despite the “lack of technical expertise of the many holes that had been poked in [Leuchter's] findings.”<sup>189</sup> Irving believes that “Leuchter's testimony could provide the documentation he needed” to support his denial.<sup>190</sup> Lipstadt offers some criticism of Irving's methods here, but she did not go much further than to describe Irving's endorsement of the report.

One aspect of Lipstadt's critique of Irving, was to outline how other historians, newspapers and official governments had responded to his claims to further challenge Irving as a professional historian in contrast to his anti-Semitic and historically inaccurate views. In Lipstadt's witness statement, she suggests that while Irving's “notoriety” as a denier was “quite substantial” (in 1999), this was not the case when researching deniers for the book.<sup>191</sup> By quoting the House of Commons' 1989 discussion of “David Irving and Holocaust denial”, which labelled Irving a “Nazi propagandist and long time Hitler apologist”, Lipstadt contended that “one might have assumed that would have marked the end of Irving's reputation in England, but it did not.”<sup>192</sup> Irving's statement that “the whole of World War Two can be defined as a Holocaust”, not only undermines the uniqueness of the mass murder of the Jews, it attempts to absolve Nazi Germany of its crimes.<sup>193</sup> Lipstadt drew attention to Irving's subtle form of denial in his early publication, *The Destruction of Dresden* (1963),

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<sup>188</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 180.

<sup>189</sup> *Ibid.*, p. 202.

<sup>190</sup> *Ibid.*, p. 181.

<sup>191</sup> Deborah E. Lipstadt, *Irving v. Penguin: Witness Statement of Deborah E. Lipstadt*, (January, 1999), §117.

<sup>192</sup> House Of Commons, Early Day Motion, No.99, “David Irving and Holocaust Denial”, (20 June 1989), Session 1988-1989; Deborah E. Lipstadt, *Denying the Holocaust*, *op. cit.*, p. 202.

<sup>193</sup> David Irving, *Goebbels*, p. 379, quoted in Richard J. Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial*, (New York: Basic Books, 2002), pp. 110-111.

which attempts to morally equalise the Holocaust with the casualties of the Allied bombing of Dresden in 1945. Lipstadt describes Irving's methods of creating "immoral equivalencies", as an attempt to absolve the crimes of the Third Reich.<sup>194</sup>

Again, the politics of memory play a significant role in Lipstadt's analysis of Irving and the receptivity of his work among scholars. Irving, according to Lipstadt, applied "a double standard to evidence", and "demands 'absolute documentary proof'" to prove Hitler's responsibility in the Final Solution, "but he relies on highly circumstantial evidence" for his own arguments.<sup>195</sup> Exemplifying the challenge that denial poses to altering the past, Lipstadt highlights how Irving's Hitler-centric approach, appealed to German scholar, Ernst Nolte, who used Irving's arguments to cast German history "in a different light."<sup>196</sup> Interpreting therefore, that Nolte had adopted Irving's views to distort the memory of the Holocaust in a complex attempt to reconcile Germany with its Nazi past, Lipstadt challenges denial for its political dimensions. Lipstadt highlights that history is increasingly politicised, because adopting Holocaust denial becomes part of a process of suppressing the truth to alter the memory of a nation's past.<sup>197</sup> Brian O'Connor's research on the Adorno trial analyses that this aspect of denial removes a "guilt-complex" which becomes "somehow disconnected from the events, as though there was nothing *really* to be guilty about".<sup>198</sup> Irving's version of history, therefore, became pragmatic and useful to serve a political purpose for other sympathisers. Emphasising this aspect of Irving's Holocaust denial is reflective of Lipstadt's wider commitment to the preservation of Holocaust memory.

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<sup>194</sup> Deborah E. Lipstadt, *Denying the Holocaust, The Growing Assault on Truth and Memory* (London: Penguin Books, 2016), pp. 96, 126.

<sup>195</sup> *Ibid.*, p. 204.

<sup>196</sup> *Ibid.*, p. 126.

<sup>197</sup> For a more in-depth discussion of the politics of memory and Holocaust denial, see Jan Ruger, Nikolaus Wachsmann, eds., *Rewriting German History: New Perspectives on Modern Germany*, (Basingstoke: Palgrave Macmillan, 2015), p. xii; and Bill Niven, "Questions of Responsibility in Past and Present: New Research Into the Holocaust", *German Politics*, 13:1, (August, 2006), p. 134.

<sup>198</sup> Brian O'Connor, "Adorno on the Destruction of Memory", in Susannah Radstone, Bill Schwarz, eds., *Memory: Histories, Theories, Debates*, (New York: Fordham University Press, 2010), p. 135.

In response to her study of denial, Lipstadt's historical approach advocates for an increase in educational programmes on the Holocaust to improve historical awareness. Education, she argues, holds "one of the keys to a defence of the truth."<sup>199</sup> Other methods which are discussed relate to promoting Holocaust museums as a means of educating the wider public about the Holocaust. Challenging the notion of criminalising Holocaust denial adopted in many European countries, Lipstadt suggests, with some foresight in 1993, that deniers "transform the legal arena into a historical forum, something the courtroom was never designed to be" and that "they transform the deniers into martyrs on the altar of freedom of speech."<sup>200</sup> The "blurring of boundaries between fact and fiction and between persecuted and persecutor" was, Lipstadt argued, a particular feature of Irving's denial.<sup>201</sup> Despite her brief analysis of deniers' methods, and despite their conclusions having been discredited on a number of fronts, Lipstadt contends that denial still has a "fatal attraction."<sup>202</sup> Responding to Mommsen's adage at the beginning of this chapter, *Denying the Holocaust* concludes that "truth is far more fragile than fiction", therefore, "reason alone cannot protect it."<sup>203</sup>

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<sup>199</sup> Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 247-248.

<sup>200</sup> *Ibid.*, p. 248.

<sup>201</sup> *Ibid.*, p. 243.

<sup>202</sup> *Ibid.*, p. 205.

<sup>203</sup> *Ibid.*, p. 205.

### 3.5 Summary

Pierre Vidal-Naquet's insights into the nature of Holocaust denial suggests that, in comparison, true historians do not "attempt to write and think through history."<sup>204</sup> Lipstadt's reflections in *The Eichmann Trial* echo this view, that historians' "personal experiences constitute facets on the prism through which their view of the past events is refracted."<sup>205</sup> Lipstadt has, in part, sought to demonstrate this by analysing denial's ideological and anti-Semitic roots. Her historical approach is, however, limited to the confines of the aims of her book. Taking a general overview of denial, the success of Lipstadt's research lays in challenging the reputation of Holocaust deniers, who disguised themselves as Holocaust revisionists, to prove the connection between the anti-Semitic roots of Holocaust denial and its proponents. This chapter has sought to provide an outline of Lipstadt's approach and contribution to the study of Holocaust denial, to understand the nature of Lipstadt's scholarly investigation.

In retrospect, it is Lipstadt's response to her experiences in the Irving trial that indicates the intended purpose for her book and her research on Holocaust denial, which was not only to inform and to educate, but to preserve memory. In history, Lipstadt described her experience of having upheld the truth of the Holocaust as having the "privilege to do *hesed shel emet*, to stand up for those who did not survive or who could not stand up for themselves."<sup>206</sup> Thus, the personal and scholarly emphasis on denial in Lipstadt's research, indicates that her approach to Holocaust history is perhaps less an objective analysis than it is a calculated response to the threat of denial on the preservation of memory. Conscious of the limitation of this chapter, Lipstadt's paradigm and historical approach has been examined to

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<sup>204</sup> Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust*, (New York: Columbia University Press, 1992), (translated by Jeffrey Mehlerman). p. 111.

<sup>205</sup> Deborah E. Lipstadt, *The Eichmann Trial*, (New York: Schocken Books, 2011), p. xxvii.

<sup>206</sup> Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), pp. 289-290.

open-up lines of enquiry into her contribution to the study of Holocaust denial. New insights into the paradigms discussed in this chapter will become clearer with the upcoming publication of her book *Anti-Semitism: Here and Now*, which should reveal greater insights into Lipstadt's historical paradigm and her interpretation of Holocaust history, through an American scholarly lens.<sup>207</sup>

It should be qualified that a further analysis of Lipstadt's overall research, therefore, enables researchers to understand that her approach was part of a wider historical paradigm of preserving the integrity of Holocaust history. Denying the Holocaust provided a chronological and theoretical basis to understand the origins of Holocaust denial, which became a key text in a growing field of research in 1993. However, as an expert in the post-war American responses to the Holocaust, and not the Holocaust or denial itself, the book therefore, focused much of its analysis on the anti-Semitic nature of denial contending that such an ideological movement is a threat to reasoned enquiry. The methods used to counter denial, therefore, took a more culturally sensitive outlook, applying American values of freedom of expression, combined with freedom of inquiry to suggest that denial should be combatted through education. Lipstadt's framing of Holocaust denial as an extreme theory with no historical basis limits the application of her work to historians who wish to apply historical methods in research to challenge deniers from a methodological perspective.

For the purpose of this research, when examining methods of countering Holocaust denial, denial is analysed as more than a politically motivated movement, it is methodologically flawed. *Denying the Holocaust*, Evans argues, "did not pull its punches when it came to convicting deniers of massive falsification of historical evidence,

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<sup>207</sup> Deborah E. Lipstadt, *Anti-Semitism: Here and Now*, (New York: Schocken Books, 2019). Scheduled for publication 14 February 2019.

manipulation of facts, and denial of the truth.”<sup>208</sup> Thus, Lipstadt’s focus on the anti-Semitic nature of denial provides only a partial analysis of how to counter Holocaust denial. The extent to which Lipstadt’s approach to refuting Holocaust denial was an effective method, is examined further in contrast to the legal and historical approaches adopted during the *Irving v. Penguin* trial, as analysed in Chapter 4.

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<sup>208</sup> Richard J. Evans, *Lying About Hitler: History, Holocaust and the David Irving Trial*, (New York: Basic Books, 2002), p. 10.

## Chapter 4

# The Legal Approach to Holocaust Denial: The Use of Historical Evidence by Barristers in a Court of Law

“Only ask us to do things which move the case forward. This is not a sentimental journey. It’s for forensics”.

– Richard Rampton, Queen’s Counsel.<sup>209</sup>

### 4.1 Introduction

When examining and comparing methods of countering Holocaust denial from the *Irving v. Penguin* trial, it is important to clarify what is meant by the defence’s legal approach. For the purpose of this research, the legal approach refers to the barristers’ use of historical evidence in court, their techniques of refuting Irving, and the legal standards of proof which operated within the framework of British libel law. These three aspects of the Richard Rampton’s approach in court are understood by investigating the defence’s legal strategy, the application of the legal strategy during the trial and the “standards of proof” which drove their forensic approach to the evidence. The “forensic” approach to Holocaust denial, as understood in this context, refers to the systematic methods of refuting Irving’s libel allegations with the documentary evidence, and the types of acceptable evidence that were used to construct the case.

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<sup>209</sup> Richard Rampton to Robert Jan Van Pelt, at the site of Auschwitz during the research for the case, quoted in Deborah E. Lipstadt, *History on Trial: My Day in Court with a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 61.

To provide some legal background as to the way the defence responded to Holocaust denial claims, the trial of Holocaust denier Ernst Zündel is a helpful case to contextualise the strategy adopted by the defence to address Irving's libel allegations. The mis-use of historical evidence in cases against Holocaust deniers and the danger of evidence manipulation by barristers in court, was characteristic of *R v. Zündel* in 1988. The case was fought to discredit reliable witnesses and to challenge the credibility of the historical record. Ernst Zündel was a German-born Canadian who became a "notorious" Holocaust denier and neo-Nazi sympathiser, distributing and printing pro-Nazi pamphlets and propaganda, including literature produced by Holocaust deniers such as Richard Harwood.<sup>210</sup> It was his republishing of Harwood's *Did Six Million Really Die?* which led to Zündel's indictment, first in 1985 and again in at a re-trial 1988. Zündel was charged under the Canadian Criminal Code as having spread "false news", that the content of the publication was false and that it "injured the public interest of racial and social tolerance".<sup>211</sup>

A major aspect of the Zündel trial which proved detrimental to the prosecution case, was that the Judge allowed the French Holocaust denier Robert Faurisson to provide expert witness testimony for Zündel, in opposition to Raul Hilberg, considered "one of the world's foremost experts" on the Holocaust.<sup>212</sup> The symbolic significance of this court decision, as Lawrence Douglas argues, was that in "certifying Faurisson as an expert" it suggested that both he and Hilberg "defined an entirely plausible parsing of the historical record".<sup>213</sup> The impact of the Zündel trial on perceptions of legal and historical memory has attracted

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<sup>210</sup> Guenter Lewy, *Outlawing Genocide Denial: The Dilemmas of Official Historical Truth*, (Salt Lake City: University of Utah Press, 2014), p.103; Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (New Haven: Yale University Press, 2001), p. 213.

<sup>211</sup> Guenter Lewy, *Outlawing Genocide Denial*, *op. cit.*, p. 104.

<sup>212</sup> Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study*, (New York: Palgrave, 2004), p. 21; Marouf A. Hasian, "Canadian Civil Liberties, Holocaust Denial, and the Zündel Trials", *Communications and the Law*, 43, (September, 1999), p. 49; Mark D. Kielsgard, *Responding to Modern Genocide: At the Confluence of Law and Politics*, (New York: Routledge, 2016), p. 181

<sup>213</sup> Lawrence Douglas, *The Memory of Judgement*, *op. cit.*, p. 239.

criticism because the trial seemed to increase the academic “credentials” of deniers.<sup>214</sup> Within this context, constructing a libel defence for the Irving trial was a complex process of crafting a suitable and ethically appropriate legal strategy, that would de-legitimise Irving’s scholarly reputation and prove his wilful denial of the Holocaust.

Robert A. Kahn’s research suggests that legal approaches to countering Holocaust denial can be divided into two categories: “rebuttal” and “unmasking”.<sup>215</sup> A “rebuttal” legal strategy will simply “defend the facticity of the Holocaust against the skeptical onslaught of the ‘revisionists’, responding with documentation to each attack”, which can risk “creating the appearance of a debate between deniers and non-deniers”.<sup>216</sup> This strategy was characteristic of the Zündel trial, and is an approach which Lipstadt warns against.<sup>217</sup> A second legal approach of “unmasking” the motives of Holocaust deniers “undermines” denial by revealing the agenda to suppress historical truth, deliberately distorting the evidence to serve its anti-Semitic dissemination.<sup>218</sup> When applying Kahn’s concept of “unmasking” and “rebuttal” approaches to the *Irving v. Penguin* case it becomes clear the legal strategy did more than just uncover and refute Holocaust denial. An examination of the legal team’s forensic approach to the evidence adds a third dimension to the way that lawyers and barristers use evidence court.

This chapter investigates the way that the defence barristers, Richard Rampton QC and Heather Rogers QC, used historical evidence in a court of law for the express purpose of proving that Irving was an anti-Semite and that he came to his conclusions through his methods of distortion and falsification of his sources. Since the *Irving v. Penguin* trial

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<sup>214</sup> Marouf A. Hasian, “Canadian Civil Liberties, Holocaust Denial, and the Zündel Trials”, *Communications and the Law*, 43, (September, 1999), p. 55.

<sup>215</sup> Robert A. Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zündel”, *Patterns of Prejudice*, 34:3, (March, 2008), p. 3.

<sup>216</sup> *Ibid*, pp. 9, 3.

<sup>217</sup> See Chapter 3, Section 3.3 of thesis for more on Lipstadt’s approach. See also, Deborah E. Lipstadt, “Deniers, Relativists and Pseudoscholarship”, *Dimensions*, 14:1, (May, 2000), p. 44.

<sup>218</sup> Robert A. Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zündel”, *op. cit.*, p. 9.

focused on Irving's approach to the evidence, the court's definition of what constitutes legitimate evidence and its standards of proof provided the ideal test-space to examine Irving against the weight of historical evidence. Section 4.2 begins by outlining the defence's legal strategy, to outline their methods of countering Irving. Section 4.3 evaluates the forensic perspective which helped to prepare and present the case in court. Section 4.4 analyses how Richard Rampton used evidence in court, drawing from the trial transcripts, investigating how the court acts as a framework which enables historical evidence to be tested and verified, by applying legal standards of proof. A concluding summary is outlined in section 4.5.

## 4.2 A Summary of the Defence Legal Strategy

The carefully constructed legal strategy for the *Irving v. Penguin* trial tells us as much about the commitment to defending the historical record as it does about their method of countering Irving's libel claims. The defence constructed their case to serve two purposes: first, that of proving that Lipstadt's assessment of Irving was correct and, second, that this assessment was not, therefore, libellous. In order to do this the defence focused on Irving's falsification of historical evidence to prove that he uses unsound historical methods. Under English libel law, the responsibility to prove the truth of the words expressed against Irving as the claimant is placed on the defendant, which is known as the "burden of proof".<sup>219</sup> Defending why Lipstadt was correct, within libel law, however, was more complex.

Based on Irving's Statement of Claim, the "obvious strategy", according to Lipstadt's solicitor Anthony Julius, was to "confront Irving" with the "available evidence which was immense at the time" and produce documents, photographs and eye witness testimony to prove Irving's assessment of the Holocaust was incorrect – therefore, justifying Lipstadt's assessment of Irving.<sup>220</sup> However, Irving's Holocaust denial depended, in part, on his repeated attempts to ridicule and question the reliability of survivor testimony.<sup>221</sup> Therefore, his previous brazenness towards survivors raised ethical questions as to whether this was an appropriate approach to the case. Not only was this an ethical consideration, it was a forensic one also. Since Irving was acting as a litigant in person and would be representing himself without a legal team, he would have the opportunity to cross-examine witnesses. Julius

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<sup>219</sup> Richard J. Evans, *Lying About Hitler: History, Holocaust and The David Irving Trial*, (New York: Basic Books, 2002), p.28; Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. xx-xxii.

<sup>220</sup> Anthony Julius, "Denial: In Defence of Truth", Transcript of Interview by Alex Krasodomski-Jones at Mishcon de Reya, [www.mishcon.com/denial](http://www.mishcon.com/denial), (last accessed 09.02.2018), 01:18–02:20 minutes.

<sup>221</sup> See Irving's response to a Holocaust survivor in Calgary Alberta, 1991: "How much money have you made from that piece of ink on your arm, which may indeed be real tattoo ink?", and his speech in Tampa Florida 1995: "Every survivor is living proof that there was no Nazi extermination programme"; quoted in Richard J. Evans, *Lying About Hitler*, *op. cit.*, pp. 132-133.

argues: “why would we want to put Irving in the position where he was given the opportunity to consider and respond to the evidence that we were offering him and then engage with us as if he was one expert in controversy with another group of experts”.<sup>222</sup> Alternatively, the legal strategy was directed in a way which would restrict Irving’s ability to debate the facts which were presented to him, and in turn would put his own work under scrutiny.

The legal team’s carefully constructed response to the libel allegations focused on Irving’s anti-Semitic paradigm and his methods of writing history. Julius explains, “we stayed inside his castle so to speak and demonstrated what faulty foundations it was built on”.<sup>223</sup> Similar to Lipstadt’s historical approach in her book, Julius explained that the defence would argue that “Irving (1) does not follow established historical procedures and (2) subordinates the truth for ideological purposes. (3) his writings and comments about the Holocaust are we will contend, designed to spread anti-Semitism and engender sympathy for the Third Reich”.<sup>224</sup> In this respect, eye-witness testimony was not sought in this case, because it was Irving’s historical distortions and his methodology that would be under scrutiny. The defence stressed that this was not a trial about whether the Holocaust happened. It was about whether Irving’s interpretations of the sources were accurate and reliable. This is a marked a departure from previous criminal trials. The legal strategy was designed so that “Lipstadt’s allegations of manipulation and falsification could be tested” and proved true.<sup>225</sup>

The defence sought to prove that the several instances in which Lipstadt mentioned Irving in her book could be taken as a single allegation which communicates a “common sting”.<sup>226</sup> In other words, the defence could condense the “libellous” – that Irving is a

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<sup>222</sup> Anthony Julius, “Denial: In Defence of Truth”, Transcript of Interview by Alex Krasodonski-Jones at Mishcon de Reya, [www.mishcon.com/denial](http://www.mishcon.com/denial), (last accessed 09.02.2018), 02:03–02:20 minutes.

<sup>223</sup> *Ibid*, 02:48 – 02:55 minutes.

<sup>224</sup> Deborah E. Lipstadt, “*Irving v. Penguin UK and Deborah Lipstadt: Building a Defense Strategy*”, *Nova Law Review*, 27:2, (January 2002), p. 249.

<sup>225</sup> Richard J. Evans, *Irving v. Penguin, Evans Report*, (2000), § 1.5.9

<sup>226</sup> Brian Neill, Richard Rampton, Heather Rogers, Timothy Atkinson, Aidan Eardley, *Duncan and Neill on Defamation*, Third Edition, (London: LexisNexis 2009), p. 116, § 12.21–12.23.

Holocaust denier – and therefore, pursue that line of argument throughout.<sup>227</sup> The demands of a libel trial, as Duncan and Neill outline in their summary of defamation law, only require the defence to prove that the words were “substantially true”.<sup>228</sup> Summarising this unique aspect of English libel law, Judge Gray wrote that: “the more serious the allegation the less likely it is that the event occurred and hence the stronger should be the evidence before the court”.<sup>229</sup> This standard would be used to determine “if the truth of the defamatory imputations made against Irving has been established”.<sup>230</sup> Thus, Lipstadt did not have to prove that every allegation was correct in her book, but that the inference that Irving is a Holocaust denier was a true assessment.<sup>231</sup> The legal team were, therefore, careful to construct their case to be as “air-tight” as possible, in order to avoid a repetition of the Zündel trial and remove the possibility for Irving to debate the Holocaust. As the trial progressed, Irving’s repeated attempts to challenge and question the evidence presented to him was met by an equally determined, yet decidedly more skilful defence barrister, whose rebuttals were focused and effective. Approaching the denial claims from a legal mind-set, Rampton reminded Irving that “you have entered the arena” and therefore, “my job is about undermining your position by reference to what you should have looked at”.<sup>232</sup>

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<sup>227</sup> Brian Neill, Richard Rampton, Heather Rogers, et. al., *op. cit.*, pp. 116–117, § 12.22–12.25; Mr Justice Charles Gray, HCl/ QB *Irving v. Penguin*, *Judgment*, § 4.7.

<sup>228</sup> *Ibid*, p. 109, § 12.07.

<sup>229</sup> Mr Justice Charles Gray, HCl/ QB *Irving v. Penguin*, *Judgment*, § 4.10.

<sup>230</sup> *Ibid*, § 4.10.

<sup>231</sup> In Conversation with Richard Rampton QC and Heather Rogers QC, 10 May 2018, London.

<sup>232</sup> HCl/ QB, *Irving v. Penguin*, Day 6, Wednesday 19 January 2000, p. 44, lines 11-12.

### 4.3 A Forensic Legal Approach: Preparing and Presenting the Case

A forensic approach to historical evidence takes two forms. First it relates to an unemotional use of documentary evidence to construct their case, often employing very technical data in the form of expert reports. Second, the term “forensic” can also describe the legal method which is by nature systematic and stream-lined to the exact specifications of the libel case. Analysing the barrister’s legal approach in *Irving v. Penguin* from this dual perspective highlights the differences between history and law that the case was “not a sentimental journey”, but one which sought to separate memory from facts.<sup>233</sup> In 1999, Rampton, Rogers and Penguin’s solicitors Mark Bateman (Davenport Lyons) and Veronica Byrne (Mishcon de Reya) visited Auschwitz-Birkenau and the archive with Lipstadt and Van Pelt, to examine the documentary evidence for the gas chambers which formed much of Van Pelt’s report.<sup>234</sup> That legal standards of proof differ from the historian, Lipstadt contrasted her own perceptions of the preparation for the case in *History on Trial*:

“‘Isn’t it time trustworthy experts did an extensive scientific study of this place?’ I was stunned by Rampton’s apparent conviction that we needed a scientific study to ‘prove’ the gas chambers were killing factories. Unable to contain myself, I burst out, ‘why do we need scientific studies? We have the evidence’”.<sup>235</sup>

Not only does this indicate that the defence were concerned with forensic and scientific analysis of Auschwitz, it suggests that the law places significant value on the ability to prove beyond doubt, especially when confronted with Irving’s denial of the historical evidence.

A second aspect of the legal “forensic” approach to Irving’s denial during the trial was how it synthesised the mass of historical documents and expert reports into a stream-lined and organised legal strategy. The defence’s reliance on documentary evidence, rather than witness testimony, demonstrates that the forensic legal approach uses “standards of

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<sup>233</sup> Richard Rampton, in Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 61, quoted at the beginning of this chapter.

<sup>234</sup> Robert Jan Van Pelt, *The Case For Auschwitz: Evidence From the Irving Trial*, (Bloomington: Indiana University Press, 2016), p. 400.

<sup>235</sup> Richard Rampton (question) and Deborah Lipstadt (response) quoted in Deborah E. Lipstadt, *History on Trial*, *op. cit.*, p. 62.

proof” to test the reliability of the evidence they present in court. When Rampton stated to the court: “I prefer the original documents” to work with because there may be aspects of testimony which are “mistrustful” and are difficult to prove against the historical evidence.<sup>236</sup> Furthermore, Rampton used various methods of preparing for the case, including legal interrogatories, which lay out the written cross-examination of Irving. Rampton’s preparation consisted of lists of historical sources and evidence he could refer to, to refute each denial argument. Van Pelt records that these interrogatories were made up of around 113 questions, over 100 focused on Irving’s reliance on the methodologically un-sound 1988 Leuchter Report.<sup>237</sup> Rampton’s questions were based on the historian’s expert reports, particularly of Van Pelt, which shaped the examination of Irving’s “evidence”.

The legal approach was stream-lined to countering Irving’s denial to address the main issues of Irving’s libel claims, by focusing on three or four key areas of his Holocaust denial. Since the expert reports provided far more evidence than the court could analyse in the 33-day trial, Rampton and Rogers’ preparation for the case was selected to serve a legal purpose. Conscious of the constraints of the court to deal with the vast amounts of historical material, Rampton aptly summarises their legal approach to Irving during the trial:

|                   |  |
|-------------------|--|
| “MR JUSTICE GRAY: | Looking at Kristallnacht, not the aftermath of Kristallnacht, there are several points made in Evans and Longerich, I think, which I do not think you cross-examine too specifically... but does that mean they have gone out of the case, or what?  |
| MR RAMPTON:       | It is very difficult. I am very conscious of the amount of time that this case could take. That means I am also conscious of the amount of money it could cost my clients, never mind court time and the time of all the people involved. I have taken the view, right or wrong, that, if I have three or four, or maybe two or three, or even five or six, dead cert winners, to use a colloquialism, in any particular topic, I am not going to spend a lot of time having argy-bargy about minor points with Mr Irving”. <sup>238</sup> |

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<sup>236</sup> HCJ/ QB, *Irving v. Penguin*, Day 13, Tuesday 1 February 2000, p. 23 lines 17-20.

<sup>237</sup> Robert Jan Van Pelt, *The Case For Auschwitz: Evidence From the Irving Trial*, (Bloomington: Indiana University Press, 2016), p. 412; HCJ/ QB, *Irving v. Penguin*, “Interrogatories”, part one, section 4-5.

<sup>238</sup> HCJ/ QB *Irving v. Penguin*, Day 13, Tuesday 1 February 2000, p. 22 lines 7-26.

#### 4.4 The Use of Evidence by Barristers in Court

Consider, therefore, how Rampton processed the evidence produced by the expert witnesses into a format which could be used for his oral defence in court. It is essential to turn briefly to analyse the methods and the presentation of the case, to examine the legal approach and the forensic strategy in practice. Choosing to examine Irving by taking him through the documents in chronological order, Evans argues, “built up a narrative of Nazi anti-Semitism that was designed to trap Irving in the logic of historical events.”<sup>239</sup> In analysing Rampton’s cross-examination of Irving, the legal approach to countering Holocaust denial focused on proving three key elements. First, to prove intent, that Irving was conscious of the historical record when he denied the Holocaust. Second, the defence were to prove that his falsified history was ideologically driven, motivated by his commitment to Hitler and his anti-Semitism. Third, to prove Irving’s distortions, by providing multiple examples of his misquotation, mistranslation and other systematic errors which would prove he manipulated sources to fit his agenda. As Judge Gray outlined in his judgment, it was the responsibility of the defence to “establish that the misrepresentation by Irving of the historical record was deliberate in the sense that Irving was motivated by a desire borne of his own ideological beliefs to present Hitler in a favourable light”.<sup>240</sup> The defence therefore would prove that his errors were not innocent “mistake[s] or misapprehension” but deliberate falsification.<sup>241</sup>

First, to prove intent, Rampton demonstrated that Irving consciously deviated from the historical record to serve a political purpose. The defence therefore responded to Judge Gray’s assessment that “if the charge of misrepresentation and falsification of the historical

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<sup>239</sup> Richard J. Evans, *Lying About Hitler: History, Holocaust and The David Irving Trial*, (New York: Basic Books, 2002), p. 199.

<sup>240</sup> Mr Justice Charles Gray, H CJ/ QB *Irving v. Penguin, Judgment*, § 13.138.

<sup>241</sup> *Ibid*, § 13.138.

evidence is substantially made out, there remains the question whether it was deliberate”.<sup>242</sup>

To demonstrate Irving’s intent, Rampton drew the court’s attention to Irving’s speech in Calgary, Alberta in September 1991, in which Irving proclaimed that:

“Until 1988, I believed that [there] had been something like a Holocaust. I believed that millions of people had been killed in factories of death. I believed in the gas chamber. I believed in all the paraphernalia of the modern Holocaust... But [in] 1988, when I came to Canada and gave evidence in the trial of Ernst Zündel as an historian, I met there people who knew differently and could prove to me that the story was just a legend”.<sup>243</sup>

Rampton, paraphrasing the findings of the Leuchter report, suggested that Irving adopted the view that the “‘gas chambers’ could never have been gas chambers, because, according to Leuchter, the concentration of hydrogen cyanide needed to kill humans was higher than that needed to kill lice”.<sup>244</sup> This uncritical adoption of Leuchter’s findings proved to be symptomatic of Irving’s wider distortions.

In the preparation for the case, the barristers outlined the centrality of the Leuchter report to Irving’s denial of the use of gas chambers at Auschwitz to kill the Jews. In the “Defendant’s Statement of Case”, Rogers summarised Van Pelt’s conclusions: “that the Leuchter Report did not constitute evidence (still, less compelling evidence)” and that Irving “was full aware of the fact that the Leuchter Report did not constitute proper evidence. His decision to rely upon it to support his ‘conversion’ to the view that there were no homicidal gas chambers in Auschwitz was not the act of an historian or scholar, but demonstrates his commitment to the cause of Holocaust denial”.<sup>245</sup> Irving’s conscious and public “conversion” to Holocaust denial through the methodologically and scientifically flawed Leuchter Report, indicates his intent to utilise documents to suit his agenda, despite any historical or scientific validity.<sup>246</sup> As Van Pelt highlights, Judge Gray would be conscious that “as a historian, Irving

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<sup>242</sup> Mr Justice Charles Gray, HCl/ QB *Irving v. Penguin, Judgment*, § 13.4

<sup>243</sup> HCl/ QB *Irving v. Penguin*, Day 2, Wednesday 12 January 2000, p. 225, lines 4-8, 17-20.

<sup>244</sup> HCl/ QB *Irving v. Penguin*, Day 32, Wednesday 15 March 2000, p. 21, lines 3-6.

<sup>245</sup> HCl/ QB *Irving v. Penguin*, “Defendant’s Statement of Case”, § 3, lines 21–22, quoted in Robert Jan Van Pelt, *The Case For Auschwitz: Evidence From the Irving Trial*, (Bloomington: Indiana University Press, 2016), p. 425.

<sup>246</sup> Hajo Funke, *Funke Report: David Irving, Holocaust Denial, and His Connections to Right Wing*

could be held accountable not only for what he had considered but also for what he ought to have considered” as evidence to support his views.<sup>247</sup> Thus, Irving’s intentional use of the falsified and invalid findings of Leuchter’s Report, contradicted the majority of historical evidence.

Second, to prove ideological motivations and, therefore, the relationship between Irving’s anti-Semitism and his Holocaust denial, the defence worked within a general framework of Irving’s racism. The strategic legal approach sought to draw attention away from Lipstadt’s allegations of Irving’s anti-Semitism, to widen the scope to his neo-Nazi associations. This was to demonstrate that his views were not just controversial, but they were motivated by a racialised world-view. Irving’s racism, the defence proved, was the paradigm from which he operated. Drawing the connection between members of neo-Nazi organisations and their anti-Semitism, Rampton cross-examined Hajo Funke on his report, asking: “do any of these neo-Nazi individuals, or groups of individuals, have a policy which is Nazi, but not anti-Semitic and anti-foreigner?”<sup>248</sup> Funke assured Rampton that, based on his research, “not any person in any situation” involved in the neo-Nazi organisations in Germany, could be “distanced from that kind of rhetoric, agitation, ideology” which share this “same world view”.<sup>249</sup> Effectively, the defence questioned, can a racist historian objectively write about history without their paradigm affecting their interpretation of the evidence? At the same time as presenting Irving’s racism before the court, the defence asked: “what is your task as an historian, Mr Irving? It is, is it not to give an objective, fair, interpretation to the cumulative effect of all the evidence”?<sup>250</sup>

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*Extremists and Neo-National Socialism (Neo-Nazism) in Germany* (2000), § 4.4 “Irving’s Conversion to Holocaust Denial”, § 4.4.1.

<sup>247</sup> Robert Jan Van Pelt, *The Case For Auschwitz: Evidence From the Irving Trial*, (Bloomington: Indiana University Press, 2016), p. 430.

<sup>248</sup> HCJ/ QB *Irving v. Penguin*, Day 27, Tuesday 29 February 2000, pp. 31-32, lines 26-2.

<sup>249</sup> *Ibid*, pp. 32, lines 3-9.

<sup>250</sup> HCJ/ QB *Irving v. Penguin*, Day 4, Monday 17 January 2000, p. 79, lines 21-24.

To provide some examples from the trial, Rampton spent considerable time examining Irving's National Alliance speeches, interviews with journalists, lectures and private diary entries and correspondence which would demonstrate Irving's overt racism. In a speech given at a London Clarendon Club in 1990, Irving proclaimed that the MP Lord Hailsham was "traitor No.1 to the British cause" because of his positive views on immigration, going on to speak of "cleaning up our own homeland again" to return to a "true-blooded" nation.<sup>251</sup> Irving insisted that these views were his "patriotism" for the old Britain.<sup>252</sup> In the same speech, he claimed that "every single defendant in the Guinness Shares Scandal was of a certain, uh, type", which was met with "applause" and "laughter", appealing to the anti-Semitic sympathies of his audience.<sup>253</sup> When the defence picked up on Irving's views that he felt "queasy" about black Englishmen playing on the national cricket team, he would respond to these allegations of racism with: "I employ ethnic minorities without the slightest hesitation".<sup>254</sup> Irving's anti-Semitism, it was argued by the defence, was part of his wider racist paradigm which significantly impaired Irving's objectivity as an historian. By casting the net wider to include Irving's speeches, interviews and diary entries, Lipstadt's assessment of Irving, that his denial was influenced by his association with right-wing extremists, was put into greater context. This tactical approach to Irving's Holocaust denial, "deflected attention away from Lipstadt's credentials and her defamatory remarks, and toward Irving's supposed extremism and fraudulent activities".<sup>255</sup>

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<sup>251</sup> David Irving, "We have Lost Our Sense of Destiny: A Speech", text of speech given by David Irving at the Clarendon Club on 22 June, 1990, (London: Focal Point Publications, 1990), pp. 3-14. Western Bank Library, Fascism GB Collection, PAM 329.8 (I), pp. 8, 13, 7.

<sup>252</sup> HCl/ QB *Irving v. Penguin*, Day 15, Thursday 3 February 2000, p. 10, lines 3-5.

<sup>253</sup> David Irving, "We have Lost Our Sense of Destiny: A Speech", *op. cit.*, pp. 3-14.

<sup>254</sup> HCl/ QB *Irving v. Penguin*, Day 15, Thursday 3 February 2000, p. 10, lines 17-26; Day 14, Wednesday 2 February 2000, p. 113, lines 8-9.

<sup>255</sup> Marouf Hasian Jr., "Holocaust Denial Debates: The Symbolic Significance of *Irving v. Penguin* and *Lipstadt*", *Communication Studies*, 53:2, (Summer, 2002), p. 137.

The following example from Day 12 of the trial, highlights the defence's treatment of Irving's evidence and their legal strategy in practice. Reiterating his claims of "aggravated libel", Irving sought to establish his claim that Lipstadt and Penguin were both party to a "broader endeavour" to ruin Irving's reputation and that he had been "the victim of an international endeavour to destroy [his] legitimacy as an historian".<sup>256</sup> Before Irving could finish his complaints, Judge Gray responded "let us see how the evidence turns out".<sup>257</sup>

On Day 12, an evolutionary psychologist was called as a witness to buttress Irving's claim of a Jewish international conspiracy; which magnified Irving's anti-Semitism to the court. Kevin MacDonald, a proponent of questionable theories on Jewish community behaviour, claimed that evolutionary psychology proves that "Judaism developed a conscious program of eugenics to improve scholarly ability".<sup>258</sup> Describing his work as focusing on "the segregation of the Jewish gene pool from surrounding peoples, resource competition between groups, and so on", MacDonald's highly anti-Semitic and stereotypical projections on the Jews, are also seen in his books *Separation and its Discontents* and *A People That Shall Dwell Alone*.<sup>259</sup> MacDonald's role was to testify for Irving, to try to "prove" that "the tactics Jewish organisations use to combat anti-Semitism" were actively trying to "suppress" Irving's work.<sup>260</sup> By examining McDonald, a professed academic, Irving sought to buttress his reputation and his claim to have been a victim of a Jewish conspiracy:

|                            |   |
|----------------------------|---|
| "PROFESSOR KEVIN MCDONALD: | ... obviously, <i>they</i> view you as a danger because of your intellectual — because of your writings.  |
| MR IRVING:                 | But a danger to what?   |
| PROFESSOR KEVIN MCDONALD:  | I believe <i>they</i> think it is a danger to their, what they view as an important, that their version of events be accepted as the truth, and that the dissent from certain of these tenets should be viewed as beyond the pale of rational discussion. |

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<sup>256</sup> HCJ/ QB *Irving v. Penguin*, Day 12, Monday 31 January 2000, p.7 line 5, p. 6 lines 21-23.

<sup>257</sup> *Ibid*, p. 7. Line 8.

<sup>258</sup> Kevin MacDonald, "Shuelvitz' Yellow Journalism", Culturebox, *Slate Magazine*, 27 January 2000, quoted in, Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), pp. 151–152.

<sup>259</sup> HCJ/ QB *Irving v. Penguin*, Day 12, Monday 31 January 2000, pp. 8-9.

<sup>260</sup> *Ibid*, pp. 9-10.

MR IRVING: Finally, in order to pre-empt a question Mr Rampton may wish to ask, do you consider me to be an anti-Semite from your knowledge of me?

PROFESSOR KEVIN MCDONALD: I do not consider you to be an anti-Semite.”<sup>261</sup>

This exchange, therefore, demonstrated to the Judge Gray and to Rampton that Irving’s reliance on “scholars” who had equally unsubstantiated theories regarding the Jews and was a demonstration of Irving’s unscholarly approach and his anti-Semitism.

In analysing the way that the defence dealt with Irving’s witnesses (the two historians, Sir John Keegan and Professor Watt, and the “psychologist” Professor Kevin MacDonald), Judge Gray noted in his judgment that “there was no cross-examination by the Defendants’ counsel of any of these witnesses”.<sup>262</sup> Rampton’s dismissal of Irving’s witnesses MacDonald, Keegan and Watt with “I have no questions” was a calculated response which demonstrates the defence’s legal strategy to not engage in a debate with Irving’s views or the witnesses who defended his cause.<sup>263</sup> This strategy first demonstrated to the Judge that there was nothing more Rampton needed to add, Irving had made his views clear to the judge in his own words, which only demonstrated that his case was weak. Second, to engage with MacDonald’s anti-Semitic theories and comments would suggest that his work had some academic worth. To ignore them, Lipstadt suggests, was “the optimum forensic tactic”.<sup>264</sup> To demonstrate MacDonald’s inability to prove Irving’s case, Judge Gray concluded “the assistance which I derived from his evidence was limited”.<sup>265</sup>

Since Judge Gray was the intended “audience” of the legal cross-examination, Rampton did not always respond to Irving if he made a particularly insidious claim. As long as the judge heard Irving’s own words and could make a logical inference as to his intent, his

<sup>261</sup> HCl/ QB *Irving v. Penguin*, Day 12, Monday 31 January 2000, p. 23, lines 12-26.

<sup>262</sup> Mr Justice Charles Gray, HCl/ QB *Irving v. Penguin*, Judgment, § 4.20.

<sup>263</sup> HCl/ QB *Irving v. Penguin*, Day 12, Monday 31 January 2000, p. 25 line 2 (McDonald); HCl/ QB *Irving v. Penguin*, Day 16, Monday 7 February 2000, p. 13 line 21 (Keegan); HCl/ QB *Irving v. Penguin*, Day 7, Thursday 20 January 2000, p. 53, line 9 (Watt).

<sup>264</sup> Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 159.

<sup>265</sup> Mr Justice Charles Gray, *Irving v. Penguin*, Judgment, § 3.6.

anti-Semitic and ideological views, or his manipulating the historical documents, then Rampton would respond with silence, indicating that this matter has been adequately proved in the court and did not need to be pushed further. Therefore, the court provided a legal framework to challenge Irving, as far as needed, to prove their case to the Judge. A by-product of Rampton's examination of Irving's intent, ideology and distortions, was to demonstrate his flawed methodology and un-scholarly approach, to delegitimise him as an historian. Irving attempted to justify the Leuchter Report's findings, arguing that the "videos tapes" of Leuchter conducting his illegal research at Auschwitz, "provide compelling visual evidence of the scrupulous methods" used.<sup>266</sup> Yet, it was the success of the defence's strategy to focus on his methods of research which enabled the court to discern what Irving considered compelling historical evidence.

Third, to prove Irving's distortions and manipulations, Rampton drew attention to multiple examples to demonstrate Irving's work had deliberately altered the historical record. In the opening statement for the defence on 11 January, Rampton began: "my Lord, Mr. Irving calls himself an historian. The truth is, however, that he is not an historian at all but a falsifier of history. To put it bluntly, he is a liar."<sup>267</sup> Continuing, Rampton summarised their findings: "lies may take various forms and may as often consist of suppression or omission as a direct falsehood or invention, but in the end all forms of lying converge into a single definition, wilful, deliberate misstatement of the facts."<sup>268</sup> Judge Gray concluded that Irving indicated intentional "mistranslation in order to exculpate Hitler", based on the examination of the two editions of *Hitler's War* in 1977 and 1991, which kept the mistranslations.<sup>269</sup>

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<sup>266</sup> HCJ/ QB *Irving v. Penguin*, Day 8, Monday 24 January 2000, p. 32. Lines 25-26.

<sup>267</sup> HCJ/ QB *Irving v. Penguin*, Day 1, Tuesday 11 January 2000, p. 89, lines 15-18.

<sup>268</sup> *Ibid*, p. 89, lines 18-22.

<sup>269</sup> Mr Justice Charles Gray, *Irving v. Penguin*, *Trial Judgment*, § 5.143.

Rampton examined one aspect of Irving's flawed methods on Day 8 of the trial. Irving had based his conclusions on survivor testimony from a single Nuremberg eye-witness account of Marie Vaillant-Couturier. The presiding Judge Biddle had expressed doubt on one aspect of her testimony regarding camp prostitution at Birkenau.<sup>270</sup> Irving changed Biddle's words from "this I doubt", to "*all* this I doubt", to try to prove that Biddle cast doubt on all eye-witness testimony regarding the conditions of the concentration camps.<sup>271</sup> This deliberate misquotation of Judge Biddle's assessment of one aspect of Vaillant-Couturier's testimony was a deliberate attempt to alter the evidence to suit his particular historical position. When asked to explain his distortions, Irving suggested that he "added the word "all" to make it more literate for an audience", which again sought to divert attention and rationalise his distortions.<sup>272</sup>

|                   |   |
|-------------------|---|
| "MR JUSTICE GRAY: | Can I just ask because I am not quite sure that I am following this? You interpret those three words in parenthesis, appearing where they do in the summary of this lady's evidence, as the judge casting doubt over the totality of it?" |
| MR IRVING:        | Up to that point, yes".   |
| MR RAMPTON:       | Mr Irving, you know perfectly well, do you not, that you have done what you have so often done? You have taken one little phrase which is applied to one proposition made by the witness..." <sup>273</sup>                               |

Again, Rampton provided evidence of Irving's pattern of removing passages of text from eye-witness testimony to produce very different versions of events in his cross-examination of Irving's "interpretation" of the 1923 Nazi Putsch. The defence found "significant discrepancies" between the eye-witness and documentary evidence and Irving's account of the 1923 Putsch.<sup>274</sup> As quoted in Irving's biography of Hermann Göring, Irving claimed that Hitler, after "learning that one Nazi squad had ransacked a kosher grocery store

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<sup>270</sup> For more information on Marie Vaillant-Couturier's testimony, see Nuremberg Trial Proceedings, Vol. 6, Forty-Forth Day, Monday 28 January 1946, Morning Session, at Yale Law School, The Avalon Project, <http://avalon.law.yale.edu/imt/01-28-46.asp>, (last accessed 22.08.2018); Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 129.

<sup>271</sup> HCJ/ QB, *Irving v. Penguin*, Day 8, Monday 24 January 2000, p. 24, lines 10-26.

<sup>272</sup> *Ibid.*, p. 25.

<sup>273</sup> *Ibid.*, pp. 19-20.

<sup>274</sup> Richard J. Evans, *Lying About Hitler: History, Holocaust and The David Irving Trial*, (Basic Books, 2002), pp. 48-49.

during the night, he sent for the ex-army lieutenant who had led the raid [and] dismissed him from the party on the spot”.<sup>275</sup> Irving’s selective wording, failed to mention that the lieutenant was in fact dismissed because he was not wearing the Nazi Party emblem, not because of his action of raiding a Jewish shop.<sup>276</sup> As Evans argues, Irving “tried to distance Hitler from all forms of violence against the Jews” in an attempt to cast Hitler in a “more favourable light than the document actually allows”.<sup>277</sup> This exclusion of information left the reader with the impression that Hitler was discouraging acts of violence against the Jews. During Rampton’s cross-examination, Irving excused himself by claiming “that was author’s licence”, and that sometimes you have to “help the reader along”.<sup>278</sup> To demonstrate the gravitas of these distortions, Rampton responded that this was an “illegitimate licence... with a record of history” and cannot be used to re-write events to favour your argument.<sup>279</sup>

Another method of distortion was Irving’s mistranslation of German words into English, to suit his Holocaust denial claims. Since Irving was fluent in German, he could not fall back on the notion that this was a mere mistake in translation; the distortions were deliberate. Rampton responded to Irving’s repeated attempts to rearrange the evidence: “no, Mr Irving... you were concerned that if left unvarnished... what Hitler said would appear to be fairly conclusive evidence that he intended the physical annihilation of the Jews.”<sup>280</sup> Defending his choice of wording, Irving responded by employing the relativist argument, “how would you decide what is the faithful rendering of a particular word in translation” anyway?<sup>281</sup> In order to demonstrate Irving’s repeated historical malpractice, Rampton’s questioning followed the logic that “an honest, upright, careful, meticulous, open minded

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<sup>275</sup> David Irving, *Göring: A Biography*, (New York: William Morrow & Company, Inc., 1989), p. 59; quoted in Richard J. Evans, *Evans Report*, § 4.3 (b) (iv) 1.

<sup>276</sup> For a summary explanation of Irving’s distortion of the 1923 Putsch, see Deborah E. Lipstadt, *History on Trial: My Day in Court With a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 164.

<sup>277</sup> Richard J. Evans, *Evans Report*, § 4.3 (b) (ii) 1; § 4.3 (b) (iv) 1.

<sup>278</sup> HCJ/ QB *Irving v. Penguin*, Day 12, Monday 31 January 2000, p. 63, line 21; p. 64, line 1.

<sup>279</sup> *Ibid*, p. 63, line 13.

<sup>280</sup> *Ibid*, Day 12, Monday 31 January 2000, p. 49, lines 11-15.

<sup>281</sup> *Ibid*, Day 18, Thursday 10 February 2000, p. 24, p. 24, lines 13-14.

historian” would not wilfully and consciously distort documents from their original.<sup>282</sup> Rampton argued that “it is not because we are not concerned in this court with proving or disproving what happened in Auschwitz. We are concerned with your state of mind”.<sup>283</sup> In other words Irving’s “standards” of truth were contradictory to the historical record.

On the final day of the trial (15 March 2000) Rampton closed his analysis of Irving by reiterating the “compelling” breadth of documentation on Hitler and his role in the Final Solution, which was presented by Dr Longerich and the expert reports. All of the evidence presented against Irving, “fairly read by an open-minded, careful historian, plainly implicate[s] Hitler”.<sup>284</sup> Longerich concluded: “it takes only a moment’s light reflection to realize that the contrary idea is both absurd and perverse” to endorse as a reliable historian.<sup>285</sup>

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<sup>282</sup> HCJ/ QB *Irving v. Penguin*, Day 13, Tuesday 1 February 2000, p. 135, lines 7-8.

<sup>283</sup> HCJ/ QB *Irving v. Penguin*, Day 8, Monday 24 January 2000, p. 78, lines 13-17.

<sup>284</sup> HCJ/ QB *Irving v. Penguin*, Day 32, Wednesday 15 March 2000, p. 19, lines 2-4.

<sup>285</sup> *Ibid*, p. 19, lines, 6-8.

## 4.5 Summary

While a select choice of evidence was used to target specific claims made by Irving, Rampton and Rogers' analysis was extensive, thorough and insurmountable. Analysing Irving's work, they anticipated his responses and prepared accordingly. The defence team were equipped to target each methodological and historical flaw in Irving's work by holding him accountable to the historical record. The legal approach, therefore, focused on drawing out the deliberate methodological errors in Irving's work. Summarising his approach to the case in the Judgment, Mr Justice Gray wrote:

“My task is to arrive, without over-elaborate analysis, at the meaning or meanings which the notional typical reader of the publication in question, reading the book in ordinary circumstances, would have understood the words complained of, in their context, to bear. Such a reader is to be presumed to be fair-minded and not prone to jumping to conclusions but to be capable of a certain amount of loose thinking”.<sup>286</sup>

Thus, Rampton's forensic approach to the documentary evidence, particularly when viewed in contrast to Lipstadt's approach, proved to be a vital component to countering Irving's Holocaust denial. This forensic approach to the defence's legal strategy was successful in clarifying Irving's motives and his methods. The final judgment assessed the defence's plea of justification, and concluded, in a much more condemnatory assessment of Irving than Lipstadt or any historian previously, that:

“Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler in an unwarrantably favourable light, principally in relation to his attitude towards and responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-semitic and racist and that he associates with right wing extremists who promote neo-Nazism. In my judgment the charges against Irving which have been proved to be true are of sufficient gravity for it be clear that the failure to prove the truth of the matters set out in paragraph”.<sup>287</sup>

It is this legal mindset of distinguishing between true and false uses of historical evidence which proved most effective in countering Irving. The conceptual legal framework, which took a forensic and systematic approach to assessing Irving's arguments, was a significant point of departure from previous historical analysis.

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<sup>286</sup> Mr Justice Charles Gray, HCl/ QB *Irving v. Penguin*, Judgment, § 2.13

<sup>287</sup> *Ibid*, § 13.167.

## Chapter 5

# The Historian as an Expert Witness: Applying Historical and Legal Methods

### 5.1 Introduction

Historians are witnesses to the past. Their reliability as witnesses, however, depends on their use of verifiable documentary evidence to account for the past. This is a useful comparison between historical practice and the legal arena, which raises the question, to what extent does an historian already act as a witness. During the Eichmann trial proceedings in 1961, the American historian Salo Baron was commissioned as an expert witness to provide the historical context of the Nazi regime to the court.<sup>288</sup> He declared: “I appear here as a witness, not an eye-witness or a jurist, but as a historian.”<sup>289</sup> Baron continued: “It is known that a historian who studies contemporary history is always confronted with a double problem. The first problem is: does one already have a historical perspective? ... The second problem is: does one have documents?”<sup>290</sup> In this sense, the historian as an expert witness faces the same challenges as they do when they write history for academic purposes: albeit for a different audience. In a legal setting, however, historians are not only accountable to the judge for the quality of their reports, they are under oath to defend the truth of their claims. The challenge,

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<sup>288</sup> David Cesarani, “On the “War” Between Holocaust Historians and Jewish Historians”, *The Jewish Quarterly Review*, 102:1, (Winter, 2012), p. 92; Henry Rousso, “Judging the Past: The Eichmann Trial”, in Richard J. Golsan, Sarah M. Misemer, *The Trial That Never Ends: Hannah Arendt’s Eichmann in Jerusalem in Retrospect*, (London: University of Toronto Press: 2017), p. 30.

<sup>289</sup> Salo W. Baron, quoted in Henry Rousso, “Judging the Past: The Eichmann Trial”, in Richard J. Golsan, Sarah M. Misemer, *The Trial That Never Ends*, *op. cit.*, p. 30.

<sup>290</sup> *Ibid*, p. 31.

therefore, to produce material that is historically accurate, conforms to the demands of the court and is useful to the defence's legal strategy, poses an unusual situation for the historian.

This chapter assesses the expert reports of historians Robert Jan Van Pelt, Christopher Browning Peter Longerich and Richard Evans and also briefly the report of political scientist Hajo Funke. Their reports demonstrate the need for the historian to produce verifiable evidence in written form, which at times, incorporate a legal and historical approach to countering Holocaust denial. The historians' contribution to the defence by producing both forensic and historiographical analysis in their expert reports, indicates the utility of the historian in cases against Holocaust deniers. There are grounds, based on the *Irving v. Penguin* trial, to suggest that historians acting in a legal capacity are especially fruitful in uncovering new documents which significantly contribute to a wider knowledge of Holocaust history. While this should not set a precedent to encourage historians to seek out opportunities to act in a legal setting, Browning suggests that when trials such as *Irving v. Penguin* arise, historians ought to "lend their expertise to enable the courts to reach informed verdicts", where possible.<sup>291</sup> The uniqueness of the role of the expert witness in *Irving v. Penguin*, was that it provided an arena for historians to challenge denial within the framework of the law and to utilise certain standards of proof to sharpen their historical analysis. It is through an examination of these expert reports that standards of scholarship are clarified.

Furthermore, this chapter argues that the expert reports were vital to the success of the case – and vindicate not only historical practice, but the ability for historians to reach a truthful account of the past. Wendie Ellen Schneider's analysis of the "conscientious

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<sup>291</sup> Christopher R. Browning, "Historians and Holocaust Denial in The Courtroom", Plenary Address, Oxford, 20 July 2000, in John K. Roth and Elisabeth Maxwell, *Remembering for the Future: The Holocaust in an Age of Genocide*, Volume 1: History, (New York: Palgrave, 2001), p. 778.

historian” is examined through the case study of the *Irving v. Penguin* trial.<sup>292</sup> This chapter is subdivided into three sections. Section 5.2 examines the role of historians as expert witnesses in the *Irving v. Penguin* trial. Section 5.3 analyses the expert reports, their approach to historical evidence and their key findings. It investigates how the reports clarified standards of historical scholarship as a result of the experts’ historical research. Section 5.4 assesses the significance of the expert witness in a legal setting and the application of their research to methods of countering denial.

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<sup>292</sup> Wendie Ellen Schneider, “Past Imperfect: *Irving v. Penguin Books Ltd.*, No. 1996-I-1113, 2000 WL 362478 (Q.B. 11 April), appeal denied (18 December, 2000)”, *Yale Law Journal*, 110:8, (June, 2001), p. 1532.

## 5.2 The Role of the Historian as an Expert Witness in the *Irving v. Penguin* Trial

The principles of English law suggest that “an expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise.”<sup>293</sup> The role of an expert witness can vary; however, their contribution to the court usually lends itself to one or more of the following:

“(a) assist a party to establish the facts and to assess the merits of a case and with its preparation; (b) give the court, as evidence, their expert opinion...; (c) give factual evidence on a subject, where, because of their expertise, their evidence will have greater weight than that of an unqualified witness... as to measurements they have made or examinations which they have carried out; (d) conduct enquiries on behalf of the court and report to the court as to their findings”.<sup>294</sup>

Applying these generally to the *Irving v. Penguin* case, the five expert witnesses, one of whom was a non-historian, were chosen to present their reports in court. They demonstrated their expertise by establishing (a) “the facts” of history, clarifying the evidence, (b) providing “expert opinion” on Irving’s use of historical documents, (c) giving “factual evidence” to counter his claims, and (d) producing an extensive “report to the court as to their findings”.

The commission of expert witnesses in *Irving v. Penguin*, four of whom were historians, depended entirely on the nature of the libel action. The defence’s legal strategy, as discussed in Chapter 3, opted to challenge Irving’s claim for libel by proving his flawed historical methodology and ideology. Therefore, employing witnesses whose professional careers centred on knowledge of Hitler’s role in the Final Solution, the gas chambers at Auschwitz, the centrality of anti-Semitism in Nazi policy and historical practice, would provide the legal defence with the necessary expertise to combat Irving’s denial in court.

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<sup>293</sup> Roderick Munday, *Evidence*, Eighth Edition, (Oxford: OUP, 2015), p. 338. Section 8.3. Munday cited Gage Law Journal’s summary of the expert witness’ role from the judgment of *The Ikarian Reefer* case [1993] 2 Lloyd’s Rep 68, 81.

<sup>294</sup> Interim Report, p. 181, quoted in S. H. Bailey, J. P. L. Ching, M. J. Gunn, *Smith, Bailey & Gunn on the Modern English Legal System*, Fifth Edition, (London, 2007), pp. 938-939.

Combined, the expert witnesses were chosen to provide their expertise to the court, as part of a “three-pronged” defence strategy.<sup>295</sup> The first responsibility for the expert witness, was to compile the available evidence to prove that Irving was a Holocaust denier. Thus, the political scientist Hajo Funke, from the Free University of Berlin, was commissioned to write a report on Irving’s anti-Semitic associations and his receptivity in Germany, so as to analyse the ideological roots of his Holocaust denial. It is worth outlining Hajo Funke’s contribution to the defence. He served as a “non-historian” expert witness and provided evidence of Irving’s association with right-wing groups. The political perspective substantiated the defence to prove that Irving was a Holocaust denier, therefore neutralising Irving’s libel claims.<sup>296</sup> As a political scientist, Funke’s expert evidence provided further proof of the connection between ideological extremism and the denial of the Holocaust. Furthermore, the report’s findings converged with Lipstadt’s historical perspective from her book *Denying the Holocaust*, indicating the ability for scholars to reach reliable conclusions based on the evidence, despite approaching the material from different disciplinary perspectives.

Few historians or commentators on the trial have analysed Funke’s report in any detail. Despite his testimony forming a smaller part of the trial, his conclusions were nevertheless central to the defence’s proof of justification. Following a similar line to Lipstadt, Funke proved the connection between Irving’s Holocaust denial and his anti-Semitism and right-wing associations to suggest that “the alliance” with the RWE in Germany “accorded wholly with Irving’s political tastes. Far from performing a passive

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<sup>295</sup> The expert reports mapped neatly into this “three-pronged defence” strategy. This strategy is explained further in, Richard J. Evans, *Lying About Hitler: History, Holocaust and The David Irving Trial*, (Basic Books, 2002), pp. 29-30; Hajo Funke, *Funke Report: David Irving, Holocaust Denial, and his Connections to Right-Wing Extremists and Neo-National Socialism (Neo-Nazism) in Germany* (2000), § 8.7 - 8.9.

<sup>296</sup> Hajo Funke, *Funke Report: David Irving, Holocaust Denial, and his Connections to Right-Wing Extremists and Neo-National Socialism (Neo-Nazism) in Germany* (2000).

function... Irving, like the message of denial he preached, was a catalyst” for political extremism.<sup>297</sup>

A second aspect of the defence was to analyse the mass of primary documents on the Holocaust, particularly on Hitler, the Final Solution and the gas chambers at Auschwitz, which provides the epistemological “basis for historical knowledge” on the Holocaust.<sup>298</sup> Robert Jan Van Pelt, a professor of architectural history at the University of Waterloo, an expert on the architectural evidence of Auschwitz and the gas chambers was commissioned to address Irving’ reliance on the Leuchter Report to deny the existence of homicidal gas chambers at Auschwitz.<sup>299</sup> Peter Longerich, a German Professor of Holocaust history from Royal Holloway University of London, was to produce two expert reports, one on the systematic and centralised nature of Nazi policy towards the Jews, and the second on Hitler’s role in the Final Solution.<sup>300</sup> Peter Longerich, acted as a specialist in “the Nazi Dictatorship, its structure, its origins and its legacy”.<sup>301</sup> Commissioned by the defence solicitors, Mishcon de Reya, Longerich was to provide expert testimony for the defence on Hitler’s role in the Nazi persecution of the Jews and to prove the systematic and centralised nature of the Final Solution.<sup>302</sup>

In a similar vein, the American professor Christopher Browning, of the University of North Carolina – Chapel Hill, provided expertise on the implementation of the Final Solution and the centrality of anti-Semitism in Nazi policy. Browning, whose work centres on the

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<sup>297</sup> Brief mentions of Funke’s report is found in Richard J. Evans, *Lying About Hitler, Lying About Hitler: History, Holocaust and the David Irving Trial*, (New York: Basic Books, 2002), p. 30; Robert Van Pelt, *The Case For Auschwitz: Evidence from the Irving Trial*, (Bloomington: Indiana University Press, 2016) pp. 399, 484, 492.

<sup>298</sup> Richard J. Evans, *Lying About Hitler*, *op. cit.*, p. 30.

<sup>299</sup> Professor Robert Jan Van Pelt is a professor at the University of Waterloo, Canada.  
<https://uwaterloo.ca/architecture/people-profiles/robert-jan-van-pelt>, (last accessed 28.08.2018).

<sup>300</sup> Peter Longerich, *The Unwritten Order: Hitler’s Role in the Final Solution*, (Charleston: Tempus Publishing, 2001), pp. 7-8.

<sup>301</sup> Peter Longerich, Longerich Report: *Hitler’s Role in the Persecution of the Jews by the Nazi Regime* (2000), “A Curriculum Vitae” § (i).

<sup>302</sup> Peter Longerich, *The Unwritten Order*, *op. cit.*, p. 8.

Final Solution, had testified in six previous Holocaust-related trials and was the most experienced in providing expert witness in a court of law.<sup>303</sup> Browning identified that his role was “to provide the court with historical background information on the nature of Nazi policies and occupation authorities in order to help it understand and assess the credibility of eye-witness testimony”.<sup>304</sup> Not dissimilar to the evidence provided for the *Irving v. Penguin* trial, Browning’s specific task was to examine the documentary evidence for the implementation of the Final Solution and the outworking of Nazi policy towards the Jews.<sup>305</sup> Addressing areas of Irving’s work which denied the systematic and centralised nature of the Final Solution, Browning investigated the evidence and purpose of the Wannsee Conference and “Operation Reinhard” to counter Irving’s denial.<sup>306</sup>

Finally, comprising the third prong of the defence, Richard Evans, the Cambridge University professor of History, was commissioned as lead expert witness, to analyse Irving as an historian: his methodology and his sources. Evans’ report would form the documentary basis for the defence against Irving. Evans was instructed by both Mishcon de Reya and Davenport Lyons as the lead historical witness whose role was to examine the reliability of Irving as an historian.<sup>307</sup> Competent in the German language and an expert in modern German history, Evans was also selected because of his research on historical objectivity, the role of the historian and his research on the influence of ideology on writing history, which Julius suggested was indispensable for this case.<sup>308</sup> Evans’ report was central to the defence

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<sup>303</sup> Browning acted as expert witness in six trials: Zündel case (Canada), Wagner case (Australia), the Grujicic case (Canada) and Kisluk case (Canada), and the Serafimovich case (UK) and the Sawoniuk case (UK); Christopher R. Browning, “The Personal Contexts of a Holocaust Historian: War, Politics, Trials and Professional Rivalry”, in Michael R. Marrus et al, ed., *Holocaust Scholarship: Personal Trajectories and Professional Interpretations*, (New York: Palgrave, 2015), p.62.

<sup>304</sup> *Ibid*, p.62.

<sup>305</sup> Christopher R. Browning, *Browning Report, Evidence for the Implementation of the Final Solution* (2000).

<sup>306</sup> *Ibid*, § (ii) “Purpose of the Expert Opinion Report”, 3-4.

<sup>307</sup> Richard J. Evans, *Evans Report: David Irving, Hitler and Holocaust Denial* (2000), § 1.2.1.

<sup>308</sup> Richard J. Evans, *In Defence of History*, (London: Granta, 2000); Richard J. Evans, *Lying About Hitler*, *op. cit.*, p. 8. For further works on these subjects by Evans, see his well-cited *In Defence of History*, (London: Granta Books, 1997).

because his analysis of Irving's methods would either justify or reject Irving's claim to being a reputable historian.

What contribution did these historians make to the legal defence against Irving? The London-based defence solicitors, Mishcon de Reya, wrote to Van Pelt in 1998 outlining the expected outcome of employing his expertise as follows: "you will be submitting a report on the gas chambers and exterminations at Auschwitz which will show that what Irving says about the camps in this respect is untrue".<sup>309</sup> These specific aims of the defence, directed Van Pelt's report, who specialises in the forensic evidence for Auschwitz, to combat Irving's more notorious claims that there were no gas chambers at Auschwitz.<sup>310</sup> Reflecting on his involvement in the case, Van Pelt identified that his role was to "write an expert opinion that was to present and analyse the evidence of Auschwitz as an extermination camp *qua* evidence".<sup>311</sup> From their expertise, Rampton and Rogers would then "distil" their findings into a coherent "case to be presented in court".<sup>312</sup>

Aimed at specifically addressing Irving's claims on history, the reports were structured to present the breadth of historical evidence on the major issues which Irving contradicts, providing the necessary context for the judge to assess Irving's claims. In this sense, Browning's examination of the documentation of the Nazi policy towards the Jews and Van Pelt's architectural evidence of the Auschwitz-Birkenau and the gas chambers, directly

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<sup>309</sup> Letter of Harriet Benson of Mishcon de Reya to Robert Jan van Pelt, 9 June, 1998, cited in the *Van Pelt Report*, Preface, § (3) Material Instructions, by Robert Jan Van Pelt, footnote 19.

<sup>310</sup> See Robert Jan Van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial*, (Bloomington: Indiana University Press, 2016) and his standard co-authored work on Auschwitz, Debórah Dwork and Robert Jan van Pelt, *Auschwitz: 1270 to the Present*, (London: W. W. Norton Company, 2002, originally published 1996).

<sup>311</sup> Robert Jan Van Pelt, "Dirty Work: A Personal Reflection on the Irving Trial" in Debra Kaufman et al., *From the Protocols of the Elders of Zion to Holocaust Denial Trials: Challenging the Media, the Law and the Academy*, (London: Vallentine Mitchell, 2007) p. 112.

<sup>312</sup> Robert Jan Van Pelt, *The Case For Auschwitz*, *op. cit.*, p. 410.

refuted denial by simply presenting the evidence for the Holocaust. Kahn's concept of a legal "rebuttal" can be similarly applied to the expert report's historical approach.<sup>313</sup>

Criticism of historians as expert witnesses often centres on how an historian can separate "factual evidence" from "opinion evidence" when employing their expertise to a legal setting. Roderick Munday's general assessment of the forensic expert witness raises the issue that expert witnesses "must confine their results and their report to facts only", which "assumes that a crisp distinction can be drawn between fact and opinion".<sup>314</sup> Since historians offer both factual and opinion evidence, in the form of interpretation and explanation of the documents in their wider context, this process of separation is more complex when appearing in court. Evans argues that historians tend to offer "varying degrees of certainty" based on the available evidence and "yet the law demands clear-cut, definite, and unambiguous statements of a kind with which historians often feel uncomfortable".<sup>315</sup> The role of the historian as an expert witness in this libel trial therefore challenges the concept of the objective historian and asks whether the legal framework demanded a more forensic approach to historical research. If this is the case, how does this affect our understanding of the historian and their research practices?

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<sup>313</sup> Robert A. Kahn, "Rebuttal Versus Unmasking: Legal Strategy in R. v. Zündel", *Patterns of Prejudice*, 34:3, (March, 2008), p. 9.

<sup>314</sup> Roderick Munday, *Evidence*, Eighth Edition, (Oxford: OUP, 2015), p. 320. Section 8.3.

<sup>315</sup> Richard J. Evans, "History, Memory, and the Law: The Historian as Expert Witness", *History and Theory*, 41:3, (October, 2002), p. 330.

### 5.3 The Expert Reports and Standards of Scholarship: Forensics and Research

Having discussed the purpose of the historians in the *Irving v. Penguin* trial and the necessary expertise that each brought to the case, it is important to examine how these reports sought to counter Irving's denial as historians for a specific legal purpose. Marc Bloch perceives that forensic analysis depends on the use of two kinds of documents, "non-intentional" and "intentional". The combined use of evidence during the trial ranged from memories, diaries, letters, and testimony written for a particular purpose, to non-intentional evidence which included architectural drawings of Auschwitz, the Einsatzgruppen reports which recorded death tolls of mass shootings, and the physical evidence of the camps themselves.<sup>316</sup> The historian's approach to constructing the expert witness evidence from both intentional and non-intentional documents, was a technique of refuting denial to determine whether Irving's account was reliable and representative of the available evidence.<sup>317</sup> Similar to triangulation in research, "convergence" of evidence tends to reduce the margin for error by preventing an historian's interpretation from overly imposing on the facts.<sup>318</sup> It is in this sense that the expert reports presented a forensic analysis of available historical evidence to challenge Irving's methods and his conclusions.

The following examples from the expert reports from the case help to understand this forensic approach further. Combined, the expert reports identified the three key elements of denial, which enabled them to systematically tackle Irving's methods. First, that Holocaust deniers deliberately distort evidence to mould their conclusions to what they would like history to represent. Second, that their work indicates the pre-eminence of their ideological

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<sup>316</sup> Marc Bloch, *The Historian's Craft*, (New York: Vintage, 1953), p. 61; Robert Jan Van Pelt, *Irving v. Penguin, Van Pelt: The Van Pelt Report*, (2000), Part Three, § IV, "Blueprint of Genocide", footnote 551.

<sup>317</sup> Robert Jan Van Pelt, *The Case For Auschwitz: Evidence from the Irving Trial*, (Bloomington: Indiana University Press, 2016), pp. 102-103, 318, 352, 354.

<sup>318</sup> Michael Shermer, Alex Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It*, (Berkeley: University of California Press, 2000), pp. 31-35.

views, which forces a false agenda onto the historical material. It was Funke's report which effectively argued that Irving's denial was a product of his neo-Nazi associations, which utilised the denial movement to "try to rehabilitate National Socialism as far as it is possible."<sup>319</sup> Third, that a reliance on methodologically flawed evidence and data, especially from the Leuchter Report, proves that their interpretations are historically invalid.

Quoting John Wilkins' treatise, Van Pelt sought to build his case on the levels of certainty that could be determined in historical research: "any prejudice to the Truth or Certainty of anything, that it is not to be made out of such kind of proof, of which the nature of that thing is not capable, provided it be capable of satisfactory proofs of another kind".<sup>320</sup> In other words, Van Pelt argued that through this forensic analysis of the existing evidence on Auschwitz, a level of "moral certainty" could be established.<sup>321</sup> Moral certainty however, is different to legal certainty. Historians often operate with cautions and nuance in their interpretation of evidence, drawing conclusion based on the "balance of probabilities".<sup>322</sup> Tristram Hunt argues that this "points to a deeper issue about the methodology of the lawyer as opposed to the historian and the tension between a focused search for guilt or innocence and the more diffuse challenge of presenting ahistorical synthesis."<sup>323</sup>

The concept of "the convergence of evidence" demonstrates how the expert witnesses sought to challenge Irving's reliance on single documents and "single proofs".<sup>324</sup> Van Pelt

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<sup>319</sup> HCJ/ QB *Irving v. Penguin*, Day 27, Tuesday 29 February 2000, p. 40 lines 21-23.

<sup>320</sup> John Wilkins, *Of the Principles and Duties of Natural Religion* (London: A. Maxwell, 1675), 22ff, quoted in Robert Jan Van Pelt, *Irving v. Penguin, Van Pelt: The Van Pelt Report*, (2000), Part Three, § IV, "Blueprint of Genocide".

<sup>321</sup> Robert Jan Van Pelt, *Irving v. Penguin, Van Pelt: The Van Pelt Report*, (2000), Introduction, Part Two, footnote 24.

<sup>322</sup> In conversation with Richard Rampton in May 2018, he raised the distinction between evaluating evidence against the balance of probabilities asking what the most likely version of events were based on the contemporary documents. See also; Richard J. Evans, "History, Memory, and the Law: The Historian as Expert Witness", *History and Theory*, 41:3, (October, 2002), p. 330.

<sup>323</sup> Tristram Hunt, "Whose Truth? Objective Truth and A Challenge For History", *Criminal Law Forum*, 15:2, (2004), pp. 198.

<sup>324</sup> Robert Jan Van Pelt, *The Case For Auschwitz: Evidence From the Irving Trial*, (Bloomington: Indiana University Press, 2016), p. ix.

argues that “our knowledge of the Holocaust depends on tens of thousands of individual pieces of information... of different kinds and classes. All those data converge to a conclusion. Even if one can point at erroneous information, inconsistencies and contradictions—normal occurrences in everyday historical practice—this does not mean that these disprove the existence of the gas chambers, or the Holocaust.”<sup>325</sup> To demonstrate this, Christopher Browning’s position in the functionalist versus the intentionalist historiographical debate indicates how historians can differ in their interpretation of finer details of evidence.<sup>326</sup> Browning made it clear that although his “extensive archival research” confirms that there was a systematic program of Jewish persecution in the Nazi regime, he argued that historians differ in their interpretation of “Hitler’s precise role in the decision-making process”.<sup>327</sup> Nonetheless, Section 19 in Longerich’s report on “Evidence for Hitler’s Leading Role in The Policy of Extermination After 1942”, substantiates and expand on Browning’s research to corroborate historical findings.<sup>328</sup> It is the collective findings of the reports, which provide substantial evidence to refute Irving’s Holocaust denial historical with evidence, and adds to the understanding of the kind of collaboration which is essential in historical research to reach tenable conclusions about the past.

The focus of expert reports on evaluating denial against standards of academic scholarship provided the court with a guild-line to measure Irving’s methods against. On Day 18 of the trial Evans, under cross-examination by Irving, countered Irving’s mistranslations by reiterating that “the first duty of an historian is to translate from a foreign language in

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<sup>325</sup> Robert Jan Van Pelt, *Irving v. Penguin, Van Pelt: The Van Pelt Report*, (2000), § Part 4, VII Auschwitz and Holocaust Denial.

<sup>326</sup> Browning’s position in these debates are discussed in Mary Fulbrook, *Historical Theory*, (London: Routledge, 2002), p. 5.

<sup>327</sup> Christopher R. Browning., *Browning Report, Evidence for the Implementation of the Final Solution* (2000), § (V), (A).

<sup>328</sup> Longerich, Heinz Peter, *Longerich Report: Hitler’s Role in the Persecution of the Jews by the Nazi Regime*, (2000), § 19.1.

terms that render faithfully the meaning of the original”.<sup>329</sup> As Johnathan Freedland argued: “the trouble with Irving is that he refuses to accept the basic rules of evidence... It is history itself which is on trial here, the whole business of drawing conclusions from evidence. If Irving is able to dismiss the testimony of tens of thousands of witnesses, where does that leave history?”<sup>330</sup> Therefore, to counter denial, certain boundaries and standards of scholarship were established, to challenge Irving’s basis for writing history. Evans’ report concluded that “if we mean by historian someone who is concerned to discover the truth about the past, and to give as accurate a representation of it as possible, then Irving is not an historian... Irving is essentially an ideologue who uses history... in order to further his own ideological ends in the present”.<sup>331</sup>

Evans analysed Irving’s work in a similar vein as Denzin’s standard rules of scholarship. The two disciplines of history and law both operate in a similar way, “in presenting the results of inquiry... facts must always be verified. The sources of facts must be revealed. Contradictory facts should be taken into account, and quotes should never be taken out of context”.<sup>332</sup> Evans investigated the sources upon which Irving relied, but found that “Irving makes it difficult for his readers to investigate the matter further. Footnotes are properly used by responsible historians to guide the interested reader to the sources on which each claim or statement in the text is based. However, Irving frequently transgresses this basic convention of historical scholarship”.<sup>333</sup> Evans, under cross-examination by Irving, suggested that there should be a distinction between “the attempt to arrive at an objective interpretation which is in accordance with the documents, on the one hand, and deliberate falsification and invention on the other” concluding that “Holocaust deniers belong to the

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<sup>329</sup> HCJ/ QB *Irving v. Penguin*, Day 18, Thursday 10 February 2000, p. 24, lines 8-9.

<sup>330</sup> Jonathan Freedland, “Irving Libel Trial: Court 73 Where History is on Trial”, *The Guardian*, (London), 5 February 2000, p. 1.3

<sup>331</sup> Richard J. Evans, *Irving v. Penguin, Evans Report: David Irving, Hitler and Holocaust Denial* (2000), “General Conclusion”, § 6.21.

<sup>332</sup> Norman K. Denzin, “The Facts and Fictions of Qualitative Inquiry”, *Qualitative Inquiry*, 2:2, (1996), p. 231.

<sup>333</sup> Richard J. Evans, *op. cit.*, § 4.3 (b) (iii) 1.

latter category”.<sup>334</sup> It is Van Pelt’s method of verifying the historical record which is central to understanding his approach to constructing his 700-page report. Committed to Karl Popper’s standards of falsifiability, Van Pelt regarded Popper’s method as “an essential tool in the testing of hypotheses” in history.<sup>335</sup> The applications which can be drawn from the methods of countering Holocaust denial from this trial are highly applicable to other areas of historical research also.

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<sup>334</sup> Richard J. Evans, in HCJ/ QB *Irving v. Penguin*, Day 19, Monday 14 February 2000, p. 15, lines 18-24.

<sup>335</sup> Robert Jan Van Pelt, *The Case For Auschwitz: Evidence from the Irving Trial*, (Bloomington: Indiana University Press, 2016), p. 69.

## 5.4 Defending History: A Combined Legal and Historical Approach

At a pre-trial hearing less than 2 months before the trial began, Irving requested that Judge Gray exclude Evans' report from the case because it "sought to define a historian when there was no objective standard for doing so".<sup>336</sup> Thus, Evans' comprehensive report on Irving's repeated historiographical and methodological errors sought to contrast his work against clearly defined parameters of professional historical scholarship. Not only was the trial significant in holding Irving accountable for his history, the standards of scholarship required of the expert witnesses to test Irving's assumptions suggests that *Irving v. Penguin* has applications to the wider debates on historical practice. Browning's reflections on the role of an expert witness highlights how the legal setting raised standards of scholarship for an historian. "The job of the historical expert witness", according to Browning, "was to set the standard of historical competence and integrity in their reports and courtroom testimony against which the deniers of the Holocaust could be measured and found wanting".<sup>337</sup>

The significance of *Irving v. Penguin*, in some ways, lay in the transition from the court's understanding of witness testimony from the Holocaust survivor to the historian as a representative of the survivor. As Lipstadt suggests, the case "represent[s] the passing of the torch of bearing witness from those who actually experienced the event to those whose tasks it is to write about, analyse and unpack its history".<sup>338</sup> The combined historical and legal approach suggests that the forensic nature of the expert reports was an effective method of countering Holocaust denial.

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<sup>336</sup> Deborah E. Lipstadt, *History on Trial: My Day in Court with a Holocaust Denier*, (New York: Harper Perennial, 2006), p. 71.

<sup>337</sup> Christopher R. Browning, "The Personal Contexts of a Holocaust Historian: War, Politics, Trials and Professional Rivalry", in Michael R. Marrus et al, ed., *Holocaust Scholarship: Personal Trajectories and Professional Interpretations*, (New York: Palgrave, 2015), p. 63.

<sup>338</sup> Deborah E. Lipstadt, "Perspectives from a British Courtroom: My Struggle with Deception, Lies and David Irving", Plenary Address, Oxford, 17 July 2000, in John K. Roth and Elisabeth Maxwell, *Remembering for the Future: The Holocaust in an Age of Genocide*, Volume 1: History, (New York: Palgrave, 2001), p. 769.

Therese O'Donnell suggests that “when historians appear as expert witnesses, they are not ‘doing history’ they are communicating historical expertise in another forum”.<sup>339</sup> Does this new forum of historical communication prohibit historical practice? The *Irving v. Penguin* case demonstrates that the expert reports were examples of exemplary historical research practices. Operating within the framework of libel law, the defence’s legal strategy required specific historical expertise to interpret Irving’s claims and to counter his methods. Thus, the two approaches to denial were inter-dependent to the cause of countering Holocaust denial. As Cicero argued: “the first law for the historian is that he shall never dare utter an untruth; the second is that he suppress nothing that is true.”<sup>340</sup> Here, Cicero takes a very literal and legal approach when describing the role of the historian. Questions as to the extent to which Irving “suppressed” truth for his own political purposes form the context for understanding methods of countering denial.

However, being “subjected to hostile cross-examination” as Evans and Van Pelt were especially, the historian has to be able to respond to immediate rebuttals to the evidence, without referring to literature or archival material to contemplate a thorough response.<sup>341</sup> Although they were well-versed on the content of their reports and the evidence surrounding their expertise, defending history takes on a new dimension in the courtroom. However, Evans’ experience of being cross-examined, which was published in *History and Theory*, highlighted that although historians are trained to defend evidence for their arguments:

“It is not the expert’s role to engage in advocacy, or to try to persuade the court to reach one particular verdict rather than another... the crucial point is that if there is information which may run counter to the case argued by the side commissioning the expert, the expert is not at liberty to suppress it. An expert has to tell the truth...”<sup>342</sup>

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<sup>339</sup> Therese O'Donnell, “Judicialising History or Historicising Law: Reflections on *Irving v. Penguin*”, *Northern Ireland Legal Quarterly*, 62:3, (Autumn, 2011), p. 291.

<sup>340</sup> Cicero, *De Oratore*, II,15, in Antoon De Baets, “Holocaust: Denying the Holocaust”, in Derek Jones, ed., *Censorship: A World Encyclopaedia*, Volume 1-4, (New York: Routledge, 2015), p. 1080.

<sup>341</sup> Richard J. Evans, “History, Memory, and the Law: The Historian as Expert Witness”, *History and Theory*, 41:3, (October, 2002), p. 330.

<sup>342</sup> *Ibid*, p. 330.

Longerich claimed that some criticisms of their reports under cross-examination were “foreseeable” and others were not. To defend historical truth “under severe scrutiny” and respond “on the spot”, was an “unusual” experience as an historian.<sup>343</sup> Longerich’s conclusion is helpful to apply to this research, summarising that the case was a “very illuminating experience because it demonstrated clearly that the persuasive power of a historical argument depends in essence on evidence obtained from contemporary documents of this time”.<sup>344</sup> Therefore, Irving’s rhetoric and oratory in the courtroom was insupportable because his reliance on faulty evidence was exposed.

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<sup>343</sup> Peter Longerich, Audio of Conference, London. “Four Talks Given at the Wiener Library Following the Irving vs Lipstadt Libel Trial”, The Wiener Library, Class Number: K4h(2). Tape 1 (134), 01:12:21 – 01: 14: 14.

<sup>344</sup> *Ibid*, 01:12:21 – 01: 14: 14.

## 5.5 Summary

Forensics, where appropriate, are an effective and legitimate means of historical enquiry and can be used to critically investigate historical methods. The *Irving v. Penguin* trial proved most effective in utilising the legal standards of proof to test Irving's claims. However, the historian's ability to distinguish forensic analysis of the historical evidence from the moral and symbolic implications of their research against Irving's Holocaust denial, demonstrated the difficulties in separating forensics from memory. The *Irving v. Penguin* trial demonstrated how historians were able to produce accurate and verifiable conclusions based on the convergence of documentary evidence. All four reports went beyond interpretive methods to produce forensically analysed historical research. One of the challenges for the historian, however, is that their research for the trial is "framed on the one hand by a judgement that knows a fact "beyond reasonable doubt," and on the other hand by the always receding horizon that promises unqualified certainty".<sup>345</sup> This does not deny the ability for historians to verify historical knowledge and understanding about Auschwitz, but it qualifies that there is a limit to the degree of certainty that an historian can provide on aspects which the documents do not support. Lipstadt, in her reflections in *History on Trial*, recalled that Van Pelt's "report not only laid waste to Irving's claims, but was a stunning example of what historians do".<sup>346</sup>

Mark Grief suggested "the trial allowed professional history to show its inner workings in public" which can be analysed as a significant turning point in the perceptions of historical research practices.<sup>347</sup> The significance of *Irving v. Penguin*, lay in the transition from the court's understanding of witness testimony from the Holocaust survivor, to the historian as a representative of the survivor. As Lipstadt argues, the case demonstrates that

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<sup>345</sup> Robert Jan Van Pelt, *Irving v. Penguin, Van Pelt: The Van Pelt Report*, (2000), § Introduction: Part Two.

<sup>346</sup> Deborah E. Lipstadt, *History on Trial: My Day in Court with a Holocaust Denier*, (New York, Harper Perennial, 2006), p. 133.

<sup>347</sup> Mark Grief, "History in the Dock", *The Times Literary Supplement*, (London, England), Friday, 13 July 2001, p. 28.

the task of the historian is to witness and to write, analyse and unpack historical material for the benefit of subsequent generations.<sup>348</sup> The combined historical and legal approach of the expert witnesses, suggests that the forensic nature of the expert reports was an effective method of countering Holocaust denial.

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<sup>348</sup> Deborah E. Lipstadt, "Perspectives from a British Courtroom: My Struggle with Deception, Lies and David Irving", Plenary Address, Oxford, 17 July 2000, in John K. Roth and Elisabeth Maxwell, *Remembering for the Future: The Holocaust in an Age of Genocide*, Volume 1: History, (New York: Palgrave, 2001), p. 769.

# Chapter 6

## Conclusion

### 6.1 Comparing Historical and Legal Approaches to Countering Holocaust Denial

There is a danger of loyalty to certain pre-suppositions in history which may not necessarily be backed up with evidence. Lipstadt, at times, demonstrated her personal and emotional attachment to the subject matter, which shapes her approach to Holocaust denial. Irving, as an extreme example, was completely guided by his ideological paradigm and was unable to view historical sources in an objective way. To what extent do historians also engage in their own forms of distortions? Perhaps, by leaning towards an interpretation of the evidence because it supports a certain world-view, or by selecting only the evidence which supports their assumption.

In contrast to Lipstadt's historical approach, the expert witnesses focused on proving the methodological flaws in Irving's claims, contributing to a wider knowledge of denial. While Lipstadt's approach took a general overview of Holocaust denial, concentrating her critiques on the ideology behind denial, Lipstadt's work did not provide enough detail of the claims she made about their mass falsification of evidence. Her work focused more on the impact that denial had on memory and the ideological and political aspects of denial which mean that she did not dig deep enough into the details of their methodological errors. This indicates her paradigm and shows that there are limits to the use of Lipstadt's work as a guide for refuting denial claims as historians. Furthermore, to compare the expert witnesses' historical approach with the more streamlined legal approach, it is Judge Gray's case

Judgment which helps to understand the defence's legal synthesis better. Judge Gray set out "the individual elements which make up that convergence of evidence... at some length" but (although not at such length as did van Pelt in his report)".<sup>349</sup> For the sake of clarity for the court, therefore, Judge Gray's systematic approach to the defence's arguments indicates that a legal synthesis of the evidence was much briefer than the historian's comprehensive analysis and focused on addressing the libel claims only.

What general applications can be extracted from a comparative analysis of the historical and legal approaches for the researcher? Ginzburg suggests that history and law both hold to an "evidential paradigm."<sup>350</sup> A disparity between history and law is their use of evidence to construct an argument. This thesis has stressed the interaction between history and law and how this produced a strong defence against Irving. Evans' claim that the trial, in fact, "vindicated history in the most emphatic way."<sup>351</sup> Comparing the structure of legal practice against historical practice, Peter Longerich reminds the reader in *The Unwritten Order* that historians can fall into the danger of drawing conclusions or speculating about the past when there is no evidence to support it. *Argumentum ex silentio*, or constructing an argument based on the absence of evidence or documents, characterised Irving's a-historical approach.<sup>352</sup> Irving's claim that Hitler never ordered the Final Solution rests on the misconception that "one can derive from the absence of a historical document a negative conclusion about events" and assumes that "what is not documented therefore never existed."<sup>353</sup> If the law deals with certainties, basing its arguments on the existing

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<sup>349</sup> Mr Justice Charles Gray, HCJ/ QB *Irving v. Penguin, Judgment*, § 13.72

<sup>350</sup> Carlo Ginzburg, "Checking the Evidence: The Judge and the Historian", *Critical Inquiry*, 18:1, (Autumn 1991), p. 79.

<sup>351</sup> Richard J. Evans, Audio of Conference, London. "Four Talks Given at the Wiener Library Following the Irving vs Lipstadt Libel Trial", The Wiener Library, Class Number: K4h(2). Tape 2 (135), 00:32:21- 00:34:52.

<sup>352</sup> Peter Longerich, *The Unwritten Order: Hitler's Role in the Final Solution*, (Charleston: Tempus Publishing, 2001), p. 8.

<sup>353</sup> *Ibid*, p. 8.

documentary evidence to build its case, how dissimilar were the legal and historical approaches in the *Irving v. Penguin* trial?

Justice Charles Gray stated in his judgment that there is a “distinction between my judicial role in resolving the issues arising between these parties and the role of the historian seeking to provide an accurate narrative of past events.”<sup>354</sup> Evans argues that “what the law regards as evidence, and what historians treat as such, are in some respects two very different things.”<sup>355</sup> This may be a true assessment if applied to the criminal proceedings of the Zündel trial, when Raul Hilberg’s expert testimony was rejected as “hearsay” because he could not produce a written document of Hitler’s order to annihilate the Jews.<sup>356</sup> In contrast, Rampton’s reliance on the historical evidence provided in the expert reports demonstrates a unique interdependence between lawyers and historians in their methods of countering denial. Since denial forces both the judge and the historian to ask which is the most likely version of events from the documents? Both, therefore, use the same process of constructing a case, based on that evidence.<sup>357</sup> Yet alongside different methods of arriving at their conclusions, a historical-legal approach share a commitment to standards of proof and the convergence of evidence.

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<sup>354</sup> Mr Justice Charles Gray, *The Irving Judgment*, *Irving v. Penguin Ltd.*, and *Lipstadt*, 11 April 2000. (Published 2000 by Penguin Books), Section 1 “A Summary of the Main Issues”, subsection 1.3.

<sup>355</sup> Richard J. Evans, “History, Memory, and the Law: The Historian as Expert Witness”, *History and Theory*, 41:3, (October, 2002), p. 333.

<sup>356</sup> Ernst Zündel, (TEZ-1985, 835), in Lawrence Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust*, (New Haven: Yale University Press, 2001), p. 236.

<sup>357</sup> Conversation between Melody Bidwell with Richard Rampton QC and Heather Rogers QC, Temple, London, 10 May 2018.

## 6.2 The Implications of the *Irving v. Penguin* Trial for Historical Research and Practice

Shelly Shapiro argues that “the court decision dealt a serious blow to deniers’ efforts to elevate denial to the level of serious scholarship and to have it recognized as a subset of the study of the history of the Holocaust.”<sup>358</sup> It was proved that Irving’s denial was not about “engaging in legitimate historical difference in interpretation of evidence”, it was an ideologically motivated wilful distortion of the facts.<sup>359</sup> Likewise, Lipstadt wrote that the trial was useful to the historian because it “allowed my lawyers to demand the release of reams of his [Irving’s] personal papers documenting his activities. We know far more about him now than we ever did before. We hoisted him on his own petard.”<sup>360</sup> Therefore, it has increased knowledge as to the nature of denial and has provided the opportunity to critique the methods of denial.

At Nuremberg, the British prosecutor Sir Hartley Shawcross stated that the 1945 war crimes trial would “provide a contemporary touchstone and an authoritative and impartial record to which future historians may turn for truth”.<sup>361</sup> While the Nuremberg and Eichmann trials were landmark cases of historical significance, which produced further evidence in the court to substantiate the accounts of the Nazi officials and their role in the Final Solution, thus shaping the memory of the past, *Irving v. Penguin* had a different goal. Although the threat of Holocaust denial is considered, especially by Lipstadt, as a threat to Holocaust memory and the historical record, *Irving v. Penguin* was not based on determining the truth about the Holocaust, it was about demonstrating the falsity of Irving’s history. Therefore,

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<sup>358</sup> Shelly Z. Shapiro, and Susan Lee Pentlin, “Holocaust denial: The Spectre of Irrationalism at the Millennium”, in John K. Roth, Elisabeth Maxwell, eds. *Remembering for the Future: The Holocaust in an Age of Genocide*, (London: Palgrave, 2001), p. 878.

<sup>359</sup> *Ibid.*, p. 878.

<sup>360</sup> Deborah E. Lipstadt, “The Holocaust is Never a Laughing Matter”, *Jewish Exponent*, (27 April 2000), p. 38.

<sup>361</sup> *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*, Volume 3, (Nuremberg: International Military Tribunal, 1947), p. 92.

there are grounds to argue that the *Irving v. Penguin* trial had far greater application to the practice of history than has been previously stressed.

Anthony Julius argues that the case had implications for the way historians engage with Holocaust denial, as it “drew a line under everything that proceeded it and represented a fresh start” in understanding methods of countering Holocaust denial.<sup>362</sup> In this sense, Julius concludes that *Irving v. Penguin* had “almost only historical value.”<sup>363</sup> In a court, as in history, “documents don’t speak for themselves, you have to have people to speak for them. And the people who speak for documents are historians. Historians are the custodians of the written record, in that sense, which is the past.”<sup>364</sup> Lipstadt argues that the expert reports’ “meticulous and detailed findings are a legacy of the trial and another demonstration of the impressive growth in the field of Holocaust studies. They constitute a stunning example of the proper way to fight Holocaust denial: with facts and evidence rather than emotion or law.”<sup>365</sup>

Peter Longerich, in reflecting on the impact of this trial for further research, suggested that: “I think we should not be too defensive and spend too much time reacting to arguments by Holocaust deniers. We should simply spend more effort into research and research strategies.”<sup>366</sup> While extra care in research practices is an important application from this case, it was Irving’s deliberate rather than ill-informed practices which were symptomatic of his Holocaust denial, and therefore a more robust rebuttal of its arguments were needed. While Holocaust denial continues on the fringes and may not be causing an immediate threat

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<sup>362</sup> Anthony Julius, Audio of Conference, London. “Four Talks Given at the Wiener Library Following the Irving vs Lipstadt Libel Trial”, The Wiener Library, Class Number: K4h(2). Tape 1 (134), 06:22 – 06:42.

<sup>363</sup> *Ibid*, 06:22 – 06:42.

<sup>364</sup> *Ibid*, 13:47 – 15:40.

<sup>365</sup> Deborah E. Lipstadt, *Holocaust: An American Understanding*, (New Brunswick: Rutgers University Press, 2016), p. 147.

<sup>366</sup> Peter Longerich, Audio of Conference, London. “Four Talks Given at the Wiener Library Following the Irving vs Lipstadt Libel Trial”, The Wiener Library, Class Number: K4h(2). Tape 1 (134), 01:18: 22 – 01: 20: 45.

to historical research at this moment in time, it is important to recognise that denial is part of a broader phenomenon of the suppression of truth, to serve a political and more convenient purpose. These subtle forms of denying the past, manifest in every aspect of historical research, as personal agendas and subjectivities, can dominate historian's paradigms and therefore their perceptions of the past.

Based on the research on *Irving v. Penguin*, the law seemed to help to challenge deniers' claims to be a legitimate historical "alternative". Since Holocaust denial incorporates an anti-Semitic world-view, European criminal laws have, however, linked Holocaust denial to the incitement of racial hatred. An example of this was Roger Garaudy, when he appealed to the French government, and later the European Court of Human Rights (ECHR), when he was convicted of "disputing crimes against humanity, defaming Jews and inciting discrimination and racial hatred."<sup>367</sup> The Equality and Human Rights Commission in the UK cites *Garaudy v France* to defend the use of Article 17 to neutralise Holocaust denial, which often seeks protection under the freedom of expression of Article 10.<sup>368</sup> Erik Bleich concludes that "Garaudy's freedom to deny the Holocaust was clearly outweighed by the harm that came from such statements."<sup>369</sup> While Lipstadt contends that no law or government intervention should be used against deniers, the European Holocaust denial laws suggest that there are limits to the expression of racial hatred which cannot be protected by law. This is an important qualification, because the *Irving v. Penguin* trial proved, in a different sense, that defamation law cannot be equally used to attempt to silence those who challenge their work.

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<sup>367</sup> Erik Bleich, "Freedom of Expression Versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe", *Journal of Ethnic and Migration Studies*, 40:2, (November, 2013), p. 284.

<sup>368</sup> Equality and Human Rights Commission, "Freedom of Expression", (February 2015), pp. 10-11. Access: [https://www.equalityhumanrights.com/sites/default/files/20150318\\_foe\\_legal\\_framework\\_guidance\\_revised\\_final.pdf](https://www.equalityhumanrights.com/sites/default/files/20150318_foe_legal_framework_guidance_revised_final.pdf)

<sup>369</sup> Erik Bleich, "Freedom of Expression Versus Racist Hate Speech: Explaining Differences Between High Court Regulations in the USA and Europe", *Journal of Ethnic and Migration Studies*, 40:2, (November, 2013), p. 284; Robert A. Kahn, "Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany", *U. Det. Mercy Law Review.*, 83:163, (2006).

Giorgio Resta and Vincenzo Zeno-Zencovich's research suggests that laws which defend "clearly established historical facts", as defined in Article 10 of the European Court of Human Rights, can provide "an effective instrument to drive out of the market place of ideas dealers that lack factual foundation and scientific legitimacy."<sup>370</sup> A caveat, however, is to ask to what extent the law should play a role in countering Holocaust denial. Surely it is the historian's role to "drive out" the falsity in the historical record from "the market place of ideas", as one of the fundamentals of historical research and writing. This dissertation has sought to argue that the methods used by historians and lawyers, both committed to the truth, are able to achieve similar results because of the way that they treat evidence. While the two disciplines are committed to establishing facts, the law should not be used as a proxy for historical discourse.

The examination of the methods of countering Holocaust denial from the *Irving v. Penguin* helps to clarify the nuances between Lipstadt's almost "absolutist" endorsement of the freedom of expression in the US, which offers no discrimination between types of speech, and the criminalisation of Holocaust denial in Europe which has been criticised by Laurent Pech as the "institutionalization of truth."<sup>371</sup> Nonetheless, this research contends that the law can be used effectively to neutralise Holocaust denial rather than to criminalise. This approach should have a significant effect on scholarly and historical perceptions of the *Irving v. Penguin* case. This neutralisation effect presents a more positive case for potential legal and historical interaction when countering Holocaust denial in the UK in the future.

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<sup>370</sup> Giorgio Resta and Vincenzo Zeno-Zencovich, "Judicial "Truth" and Historical "Truth": The Case of the Ardeatine Caves Massacre", *Law and History Review*, 31:4, (November 2013), p. 848.

<sup>371</sup> For reference to the American "absolutist commitment to free inquiry" see, Deborah E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, (London: Penguin Books, 2016), p. 30; Laurent Pech, "The Law of Holocaust Denial in Europe" in, Ludovic Hennebel and Thomas Hochmann, *Genocide Denials and the Law*, (Oxford: OUP, 2011), p. 230.

### 6.3 Findings and Applications for Further Research

Based on the brief examination of Rampton and the expert witnesses' methods and approaches to Irving's Holocaust denial, this research finds that the courtroom provided a unique "test-space" to challenge denial and to demonstrate the most meticulous research into methods and arguments of Holocaust deniers. The carefully crafted legal defence, addressing Irving's libel allegations by testing Irving as an historian, was an essential strategy to utilise this legal test-space to challenge Irving. Irving's reliance on documents which proved to be unverifiable in court highlights how the legal standards of proof provided a "forensic" environment and tested the verifiable conclusions.

The "convergence of evidence" is a helpful concept to apply to establishing historical facts and testing the interpretation of those facts. It is stressed that the foundation for the case lay in the expert reports, which utilised this specific strategy to verify its conclusions. The barrister's reliance on the expert reports as evidence against Irving in the courtroom indicates the inter-relationship between history and law throughout the *Irving v. Penguin* trial. Rampton, Rogers, Julius and Libson's meticulous preparation for the case demonstrated how they utilised a forensic and analytical approach to the evidence. This relationship between historians and lawyers strengthens the debate in favour of historical objectivity because the court created an environment which demonstrated higher standards of proof.

The case clarified aspects of the historical record, particularly regarding Auschwitz, through the expert reports, which served as a useful source of in-depth research into the methodological and ideological flaws of Holocaust denial. One of the impacts of the evidence produced at the *Irving v. Penguin* trial, was that it spurred on new areas of forensic analysis and research. An in-depth report was produced and published by Daniel Keren, Jamie McCarthy and Harry W. Mazal in 2004 which examined the forensic evidence for Auschwitz

and the holes in the roof of Krema II, which Irving sought to disprove during the course of the trial.<sup>372</sup> This increase in a forensic approach to historical research indicates that the case enhanced and encouraged researchers to question the basis for their knowledge and to utilise higher standards of proof in their research practices.

This research has sought to bring together debates about historical practice and the role of the law in combatting Holocaust denial, by suggesting that a combined approach which utilises aspects of both history and law was most effective in combatting Irving's denial. This thesis is concerned with identifying methods of countering Holocaust denial from within historical discourse, the courtroom and under cross-examination and the legal and the historical approach dealt with Irving's methodological and ideological distortions, as a premise for tackling the wider phenomenon of Holocaust denial. Concluding that careful and conscientious historians do not deliberately seek to alter the historical record, the *Irving v. Penguin* suggests that history is not just "narrative", as Munslow suggests.<sup>373</sup> By analysing the ideological motivations behind Holocaust denial, a more nuanced approach to historical practice helps to apply methods of countering denial to other areas of historical research. Applying the sociological concept of paradigms, it becomes easier to identify particular standpoints or agendas in history which drive interpretations of the past, often going beyond that which the evidence suggests. In this sense, there are certain narratives in history which can be traced, as Irving's was, by combining the use of evidence and contextual historical interpretation. Identifying the nuances in approaches to countering Holocaust denial from a legal and a historical perspective serves as a useful guide to historians who face present

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<sup>372</sup> Daniel Keren, Jamie McCarthy, Harry W. Mazal, "The Ruins of the Gas Chambers: A Forensic Investigation of Crematoriums at Auschwitz I and Auschwitz-Birkenau", *Holocaust and Genocide Studies*, 18:1, (Spring, 2004), pp. 68-103.

<sup>373</sup> Alun Munslow, *Deconstructing History*, Second Edition, (New York: Routledge, 2006), pp. 71-73. For more on the deconstructionist agenda in history, adopted by Munslow and Jenkins in particular see, Alun Munslow, *Deconstructing History*, (London: Routledge, 1997); Keith Jenkins, *Re-Thinking History* (New York: Routledge, 1991), p. xiii; Keith Jenkins, *Refiguring History* (London: Routledge, 2003).

challenges of historical negationists in other fields also. Can further research benefit from an interdisciplinary approach to historical evidence, and apply these concepts to historical practice?

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