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The Holocaust and the Law: A Model of ‘Good History’?

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Lynne Humphrey was awarded a PhD by Royal Holloway, University of London in January 2018. This article is based on her doctoral research and reflects her interests in the theories and politics of historical inquiry as well as its practical application in trials relating to ‘the Holocaust’.

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Abstract

This article aims to contribute to debates on ‘what is history’ by evaluating the rationale of ‘empiricist-analytical’ and ‘narrative-linguistic’ theories of history through its practice in Holocaust-related trials. Mindful of a ‘consensus of critique’, that explicitly warns against bringing historical inquiry into the courtroom, it poses two main questions: (1) can the law produce ‘good history’ as demanded by these theories of the academic form and (2) which of these theories are most appropriate as explanations of the history-law relationship? Focusing on the criminal cases brought against Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the civil case instigated by David Irving (2000), it argues that judicial reconstructions of ‘the Holocaust’ may have been ‘cooked’ in accordance with case-specific remits but they were also empirically accountable, ‘credible’ and ‘truth-full’ in content. The law is therefore capable of acting as a model of ‘good history’ as academically required. Furthermore, in identifying the primacy of the discursive (legal) over the empirical, it argues that the practises of judicial historying lend support to the rationale of the ‘narrative-linguistic’ genre. The article then engages with these findings to comment on the validity of empiricist and narrativist explanations of academic historying beyond the courtroom.

Key Words: empiricist-analytical; narrative-linguistic; history-law relationship; historiography; holocaust-related trials.

An Investigation into ‘What is History?’

As an ever-expanding body of literature confirms, debates between ‘realist’ and post-foundational theories on ‘what is history’ persist, even if they are ignored by a majority of practising historians (Pihlainen, 2013, p245). It is also clear that initial fears of ‘intellectual

barbarians at the disciplinary gates' (Evans, 1997, p8), and a resulting 'pomophobia' (Southgate, 2003) once pervading the academy, have been supplanted as postist 'sensibilities' (culture, identity, language, power) have been incorporated into everyday historiographical practise (Stone, 2012, p9). Therefore, Tom Lawson (2010) is partly correct when concluding that historians are, to a certain extent, 'all postmodernists now' (p3). But his claim is largely related to their method and certainly does not extend to their theoretical affiliation or consciousness. Rather, even if such 'sensibilities' have established 'a place ... at the disciplinary table' (Finney, 2013, p187), the rationale of an identified 'empiricist-analytical' genre (Munslow, 2001; Eaglestone, 2004, p6) remains dominant in the postmodern age. As such, what constitutes 'good history' remains contested between the majority of historians adhering to Rankean conventions and form and those convinced by not only post-foundational critiques in general but the rationale of an identified 'narrative-linguistic' genre in particular (White, 1987, p82) that challenges its disciplinary claims and authority. In other words, disputes remain between those defending the corresponding competence, and even truth, of historical scholarship and those agreeing with Hayden White that, since 'the past' is ontologically distinct, and therefore inaccessible, historians must preconceive and prefigure the content of its traces into familiar plot-lines (comedy, romance, satire, tragedy) that are 'as much *invented as found*' (pp58-66). According to Stanley Fish, it is a quarrel that has survived "every sea-change in the history of Western thought ...", with those highlighting the fictive processing of all historiography consistently on the losing side (Cited in Jenkins, 1995, p131).¹

Although previous notions of an intractable debate have become 'cliched' at best' (Eaglestone, 2004, p10), a comparative study of empiricist and narrativist voices suggests that on the subject of 'what is history' four distinctions of explanation prevail: (1) It is accepted by all that past realities existed, but disputes remain over the 'presence' of the past (Munslow,

2014, p571) when reconstructed as historiography. Consequently, academic history has either a “matching” function' *with* the past (empiricist) or a “making” function' *as* the past (narrativist) (Stone, 2003, p229). (2) It is agreed that empirical accuracy and accountability is essential to historiography, but distinctions remain over the primacy of evidential (past) content or the discursive (present-centric) form. Therefore, historical knowledge is either bounded by its past sources and texts (empiricist) or emplotted as stories '*of a particular kind*' that 'float free' of their content (narrativist) (Eaglestone, 2001, p26; Jenkins, 1991, pp5-6). (3) All voices accept the ‘netted’ (positioned) authorship of historiography (Fulbrook, 2002, p29), but disputes remain over the mechanisms of adjudication. Verification of the cognitive credibility of contested interpretations is therefore sited in either evidential constraint (empiricist) or the historian's “elective affinities” (argument, hypothesis, ideology) (narrativist) (Munslow, 2003, p168). (4) All voices recognise that the once-acclaimed history/fiction division is 'an oversimplification', but distinct differences remain over the former's 'realist' authority and esteem (Munslow, 2013, pp260-261). Academic scholarship is therefore either a superior form of knowledge of ‘the past’ (empiricist) or no more 'truth-full' than other forms of historying (narrativist) (Munslow, 2003, p194; McCullagh, 2008, p277).

The endurance of these explanatory distinctions may be testament to the hegemonic longevity of the ‘empiricist-analytical’ genre that has governed and privileged the history discipline since the nineteenth century (Boldt, 2014). It may also be testament to a lack of communication between empiricist guardians, who tend to focus on the research stage of historical knowledge, and narrativist critics, who tend to focus on its fictive reconstruction (Jenkins, 1999a, pp93-94; Munslow, 2011, p579; Pihlainen, 2016a, p148).² It may likewise be testament to the absence of an embedded theoretical approach in history degree courses, rather than the inclusion of separate modules relating to specific categories of explanation (class,

gender, race) or detailing the skills of the historian's craft (Gunn and Rawnsley, 2006; Munslow, 2015a; Donnelly and Norton, 2017). But their endurance invites further investigation. And, given the separation of empiricist and narrativist focus, an investigation that combines what Aviezer Tucker identifies as the 'infrastructure' (evidential input) and 'superstructure' (completed output) of historical knowledge (Cited in Ahlskog, 2018, pp89-90).

As one such investigation, doctoral research was undertaken that applied empiricist and narrativist theories to the main practise of academic historians, namely, the translation of evidentiary traces into empirically accountable, 'credible' and 'truth-full' accounts *of or as* 'the past' (Munslow, 2003, p194; Stone, 2003, pp15-16; Eaglestone, 2004; McCullagh, 2004; Tosh, 2015). Reflecting what is arguably the key site of dispute between empiricist and narrativist voices, of specific interest to this research was identifying the primacy of either past evidential 'presence' (empiricist) or present-centric discourse (narrativist) in the scholarship produced. Crucial to this investigation, therefore, was the study of the same past event as it evolved as historiography across a range of contemporary (discursive) contexts in which the relevant evidential traces had been variously framed and shaped. The specific past event selected was 'the Holocaust' and the discrete contexts were a number of legal trials in which its historiography, with the help of established historians, has been variously framed and shaped, as well as authorised as 'true', since 1945.

The focus on 'the Holocaust' is not only appropriate but essential to an evaluation of empiricist and narrativist theories given its foregrounded utility in the ensuing debates. It is common knowledge that recourse to the Holocaust has been an intentional response by those defending the realist claims of the prevailing 'empiricist-analytical' genre. As Richard Evans

infamously asserted, 'Auschwitz was not a discourse ... The gas chambers were not a piece of rhetoric' (1997, p124). Rather, 'Auschwitz was inherently a tragedy' and could not be preconceived, and subsequently emplotted, 'as a comedy or a farce' (Ibid). Similarly, John K. Roth argued that relativism had met its match in the Holocaust, 'for there is a widely shared conviction that the Holocaust was *wrong*' (2005, p11). In other words, "absolute moral standards" were both obvious and necessary when faced with the evidence of its genocide (Bartov, 1996, pp9-10). According to Michael Dintenfass (2000, p1), the evoking of the Holocaust was the most telling sign of the seriousness of the challenge of the narrativist critique, while Dan Stone highlighted its status as the empiricists' "court of last resort" (2003, pxviii). Consequently, the Holocaust is the one site through which history's latest critique and defence has been visibly confronted.

The focus on legal trials may not appear to be the most obvious, or appropriate, form through which the theory and practise of academic history can or should be examined. Although both history and the law are investigative in purpose, and governed by empiricist rationale and techniques, comparative analysis of both disciplines indicate that their distinctions of objective, practise and utility outweigh any acclaimed similarities of craft (Douglas, 2001; Rousso, 2002; Pendas, 2006; Wilson, 2011). Indeed, an expanding literature, arguably constituting a 'consensus of critique' (Wilson, pp1-2; Bilsky, p122), has long warned of the dangers of bringing historical inquiry into the courtroom precisely because history and the law are discrete disciplines. And yet, despite forceful opposition from such well-known figures as Hannah Arendt (1963) and Henry Rousso (2002), the courtroom has constituted an important site of historian collaboration and framing of 'the Holocaust'. Thus, despite these, and more recent, critics there is general agreement that in trials relating to its crimes and record: 'Jurists could not do without history, and, in the service of justice, historians [have] fashioned

and refashioned the historiography of the Holocaust' (Haberer, 2005, p487). Indeed, according to Lawrence Douglas (2001), important histories of the Holocaust could not have been written without the documentary material accumulated by the law (p2). Since Holocaust-related trials have been integral to the evolution of these histories, it is suggested that they constitute both an applicable and key discursive context through which the relevant history can and should be investigated.

History and the Law: A Methodology of 'Good History'?

The trials selected were the criminal cases of Adolf Eichmann (1961) and Ernst Zündel (1985, 1988) and the civil case instigated by David Irving against Deborah Lipstadt and Penguin Books (2000). In the case of Zündel the two trials in 1985 and 1988 were included in the research since the latter was a retrial of the former and therefore the cases were distinct in form but inextricably linked in both content and objective. None of these trials are methodologically obvious or inherently necessary to the remit of the investigation. But, collectively, they provide a range of diverse (legal) contexts pertinent to its re-evaluation of Holocaust history. Indeed, the only feature all trials have in common is that they were governed by the Anglo-American genre of law.³

Disparities begin with the backgrounds and charges relating to the main characters. It is common knowledge that Eichmann was indicted as a key perpetrator of the Holocaust, while both Irving and Zündel were known advocates of its denial. More specifically, Eichmann was charged in Israel with four essential crimes: 'crimes against the Jewish People'; 'crimes against humanity'; 'war crimes'; and 'membership of a hostile organisation' (Vol. I, pp3-8).⁴ The intention of the 1961 trial was not to prove the facts of the Holocaust but to expose to a world audience its genocidal reach and Eichmann's role as a leading '*genocidaire*' (Cesarani, 2005,

p357). Indeed, as implied by the Prosecution, the “one hand” directing the slaughter (Landsman, p80). Infamously, Israeli criminal law was purposely extended to accommodate the extraordinary crimes of the Holocaust, and in so doing contravened Anglo-American rules governing ‘hearsay’ as well as retroactive and extraterritorial cases (Vol. I, pp5-60). As redress to the exclusion of the survivor voice in previous trials, beginning with the International Military Tribunal (1945-1946), Israeli law also explicitly conformed ‘to the needs of the community of victims, potential victims and survivors’ (Bloxham, 2004, p406).

The later trials in Canada and London were indicative of a transfer of official focus away from the crimes of perpetration to safeguarding the historical record. In what would have been anathema to the court and world audience of 1961, these trials reflected the “growing assault” of Holocaust denial (Lipstadt, 1994) and subsequent academic and state attempts to rebut its lies and unmask its political agenda. As a known purveyor of Nazi literature, Zündel was finally brought to trial in Canada in 1985 for disseminating “false news”, after previous attempts at halting his propagation of antisemitic/Holocaust denial tracts (1982, 1983) had proven unsuccessful (Kahn, p6). More specifically, he was charged with publishing the antisemitic pamphlet, ‘Did Six Million Really Die?’, knowing that its claims were false and therefore ‘likely to cause mischief to the public interest in social and racial intolerance, contrary to the Criminal Code’ (Vol. 1, 1985, pp190-191). In contrast, Irving initiated a civil case, and more specifically a libel case, that forced Deborah Lipstadt (author) and Penguin Books (publisher) into court in London in 2000, to defend the truth of charges written and published that he was a Holocaust denier, a neo-fascist and a falsifier of history.⁵ More specifically, the Defence team, led by Richard Rampton, aimed to show how Irving, driven by his obsession with Adolf Hitler, and with his motives manifest in the right-wing, neo-Nazi audiences and company he addresses and consorts, ‘is not an historian at all but a falsifier of history. To put

it bluntly, he is a liar' (Day 1, p89). In the wake of Lipstadt's critique of an 'intellectual climate' responsible for fostering Holocaust denial (1994, p17) it is suggested that the Defence team also intended to reassert 'the Western rationalist tradition' (Ibid) of professional (empiricist-analytical) history. Subsequently, its strategy of unmasking aimed to extend to the conventions and rules of the historian's craft.

As indicated above, the trials were sited in different countries (Israel, Canada, the UK) and in different decades (1960s, 1980s, 2000). And, since no trial is a blank page, (Bloxham, 2001, pvii), each case had been framed and shaped by a range of national and international developments impacting on an evolution of consciousness of 'the Holocaust' since 1945 (Yablonka, 2004; Weitz, 2009; Bialystok, 2000; Erwin, 2016; Pearce, 2008; Cesarani, 2010). Its scholarship had also increased exponentially in both content and as explanation (Stone, 2010, pp296-299). Consequently, each trial made compromises with the history and politics of their respective hosts and was informed by extra-legal debates and theories surrounding Holocaust historiography. These four trials further encompassed, and represented, the transformation of the 'survivor' as not only foundational evidence of the Holocaust but as a form of moral authority beyond its genocide (Eichmann). As the numbers of direct witnesses declined, and the scholarship of the Holocaust increased, the later trials also represented the extended use of historians as both expert and witness by proxy (Zündel, Irving) (Waxman, 2006, p6; Douglas, 2014, p14).

In court the trials were governed by different substantive law (criminal and civil), legal statutes, foundations of evidence (documentation, eyewitness, historian expertise), standards of proof ('beyond reasonable doubt' and 'on the balance of probability'), evidentiary rules (conventional and relaxed) and 'triers of fact' (Judge and jury). Each trial also represented different didactic aims, with intended history lessons accompanied by extra-historical and

extra-legal objectives that ranged from 'national pedagogy' (Wilson, p4), and, as noted above, the foregrounding of the survivor voice (Eichmann), to confronting the lies of Holocaust denial (Zündel, Irving) and the reaffirmation of historical method (empiricist) and scholarship (Irving). Beyond the courtroom, and despite 'the truth' of the Holocaust being established and authorised in all four cases, the trials were further distinguished by different reputations.

The Eichmann trial was, and continues to be, celebrated as a 'triumph of didactic legality ... [that] ... transformed the destruction of the European Jews into *the* emblematic event of the twentieth century' (Douglas, 2001, p178). Indeed, it has long been credited with creating "the Holocaust" (p6; Felman, 2001, pp233, 234). Conversely, conventional wisdom records the Zündel trials as a warning of 'the perils of relying on legal dramaturgy as a means of buttressing the integrity of history' (Douglas, 2001, p225). More specifically, in the safeguarding of its own rules, these trials were accused of being prime examples of how the law often fails to 'do justice' to the very history it has been enlisted to protect (p256). Infamously, these rules curtailed survivor testimony, through the strict application of 'hearsay', and therefore in many instances removed its evidence from the legal record. They also equated the expertise of established historians (Raul Hilberg, Christopher Browning) with reputed Holocaust deniers (Robert Faurisson, David Irving). In contrast, the London trial has been designated as a disciplinary and didactic success. According to David Hirsh (2003, p138), it produced a newly authoritative narrative that reaffirmed academic historiography, while D.D. Guttenplan concluded that the facts of the Holocaust were now 'safer' (2002, p307). Its 'Judgement' was heralded by Richard Evans (2002, p270) as not only a victory over Irving and the narrative of denial, but 'a victory for history, for historical truth and historical scholarship'. Notably, regardless of the absence of any legal standards relating to historical scholarship (Schneider, 2001), its authorisation of established (empiricist) craft was celebrated as 'a

triumph ... over the “extraordinary” “irresponsibility” of postmodernism’, and, implicitly, the narrativist critique (Finney, 2005, p158).

It is therefore clear that these four trials constitute an appropriate landscape of diverse cases and contexts pertinent to the comparative study of Holocaust history in and across courtrooms. Comparative study is further possible because, regardless of legal case and context, four historiographical subjects, integral to Holocaust scholarship, were commonly foregrounded in each trial: (1) the evolution of extermination policy; (2) the Einsatzgruppen mass shootings in the Eastern Occupied Territories, 1941-1942; (3) the use of homicidal gas chambers at Auschwitz-Birkenau; and (4) the total number of Jewish victims.⁶ Utilising the respective trial transcripts as primary source material, which in most Anglo-American legal cases provide a verbatim record of proceedings, it is possible to focus on the judicial processing of these four historiographical subjects from the initial stage of evidential admissibility to cross-examination (fact determination), and, in the Eichmann and Irving trials, to fact-finding and authorised Judgement.⁷ Consequently, once extracted from the ‘tiresome proceduralism’ (Wilson, 2011, p11) of Anglo-American law, it is possible to identify if and how each courtroom replicated the role and standards of the historian in translating the evidential traces relevant to each historiographical subject into empirically accountable, ‘credible’ and ‘truth-full’ accounts/representations.

As already indicated, the study of Holocaust-related trials, including the Eichmann, Zündel and Irving trials, is a familiar methodology that has informed an expanding body of literature appraising the history-law relationship in Anglo-American courtrooms, but also other forms of legal litigation cases relating to genocide (Wilson, 2011, Bilsky, 2012, Bevernage, 2013, Delafontaine, 2015). It has likewise informed the afore-mentioned ‘consensus of

critique', which, alongside fears of a 'show trial' (Arendt, 1963, p21), brings attention to the inadequacy of ordinary criminal law when dealing with the extraordinary crimes of the Holocaust and the political (mis)appropriation of its past and record (Bloxham, 2001; Rousso, 2002; Pendas, 2006; Priemel and Stiller, 2012). It has even been suggested by critics that the law is incapable of delivering justice to the victims and survivors of the Holocaust since it legalised every stage of its perpetration (Fraser, 2005). But, foremost, is the critique that, since framed and shaped through the case-specific demands of each legal case, knowledge of the Holocaust has been distorted (Bloxham, 2004), its crimes diminished and reduced to 'background noise' (Fraser, 2005, p315), its survivors derided, silenced and inherently 'racialised' (Herman, 2008), its perpetrators abstracted and even civilised, and its histories 'cooked' (Wilson, 2011, p169). It is therefore not surprising that critics have concluded that the law is a flawed and inherently 'dysfunctional' model of historical inquiry (Haberer, 2005, p492). Explicit throughout this critique is that Holocaust-related trials have not produced 'good history' as academically required.

However, despite its extensive reach, the relevant scholarship has not specifically examined the processing of historical inquiry across the plethora of trials investigated. Studies have tended to focus on legal procedure, political context and the flawed narratives both presented and authorised, but little attention has been placed on how historians and jurists have reconstructed accounts/representations of the Holocaust that were subsequently found to be 'true' 'beyond reasonable doubt' (criminal) or 'on the balance of probability' (civil). In other words, studies have accused the law of failing to reach the standards of academic scholarship without examining the very means by which it replicates the demands of its craft. Moreover, the assessment of judicial competence during such trials has been approached from a range of perspectives, including legal propriety, the securing of justice, pedagogy and 'representational

efficacy' (Pendas, 2006, p288). However, it has not been evaluated through the lens' of contested theories relating directly to the function and method of academic historying. Studies have also tended to focus on the limitations and outputs of individual trials, with little attention given to a comparative analysis of historying across courtrooms. In the re-evaluation of the Eichmann, Zündel and Irving trials these methodological omissions were redressed. Thus, four key questions guide its focus: (1) although governed by discrete 'facts in issue' did each courtroom establish empirically accountable evidence *of* or *as* 'the Holocaust'? (2) although case-specific, were the authorised findings relating to the shared historiographical subjects 'truth-full' in content? (3) although variously filtered and shaped were the findings also compatible and consistent (and therefore 'credible') across trials? and (4) although legally organised were the authorised accounts/representations of each historiography limited by the past traces or primarily preconceived and prefigured by narratives that 'floated free' of their content? Ultimately, did the collaborative reconstruction of the Holocaust in and across each courtroom signify a 'matching function' *with* the past (empiricist) or a 'making function' *as* the past (narrativist)?

History and the Law: A Model of 'Good History'?

Several findings were established. Most obviously, it was expected, and reaffirmed, that diverse claims relating to the four historiographical subjects would be foregrounded in accordance with the 'facts in issue' determining and governing each trial. Thus, in 1961 the evolution of a policy of extermination, the mass shootings of Jews by the Einsatzgruppen in the former occupied territories of the Soviet Union, the use of homicidal gas chambers at Auschwitz-Birkenau and the total murder of millions of Jewish citizens in Europe up to 1945 was not in doubt. Rather, the focus was on verifying Eichmann's authority, geographical reach and leading role in all of these stages in the 'Final Solution of the Jewish Question'.

Consequently, disproportionate attention was placed on the bureaucracies and chains of command in which Eichmann had operated, specific duties he had carried out, countries he had been sited, and cases of decision-making he had noticeably shaped. In the later courtrooms, in response to specific denier charges, long-established facts accepted in Holocaust historiography since 1961 had to be reaffirmed. More specifically, in response to denier claims that there had not been an intentional policy of extermination against European Jewry orchestrated by the Nazi leadership, disproportionate attention was now placed on the authority and continued command of Adolf Hitler in both the evolution of this policy in general and the Einsatzgruppen mass shootings in particular. Likewise, in response to denier claims that gas chambers had not been used to kill large numbers of Jewish civilians, or had the capacity to do so, disproportionate attention was not only awarded to the genocidal intent and practices of the Auschwitz-Birkenau camp in the trials of 1985, 1988 and 2000, but its murder and violence was now largely obscured within mechanistic debates over gassing and incineration capacity and process. In response to denier charges that the murder of six million Jewish citizens of Europe was both impossible and the invention of post-war propaganda (Vol. XXI, 1985, pp31, 146-147, Vol. XXXVI, 1988, p10387; Judgement, para. 8.20), the horror and incredulity at the genocide expressed and witnessed in 1961 was submerged in the later trials within calculations of its numerical feasibility.

It was also obvious that an evidential base had been determined and established in support of the various claims presented. This base differed in content, form and volume across subject and trial and was both mutually and variously interpreted. Indicative was the use of Hans Frank's diary in 1961 (Governor General of the 'Generalgouvernement') as proof of internecine struggles over control of the 'Jewish Question' in Nazi-administered Poland (Vol. V, p2156), in 1985 and 1988 as evidence of the deliberate murder of millions of Jews (Vol.

XXI, 1985, p215; Vol. XXXVI, 1988, p10426) and in 2000 as corroboration of both an emerging policy of extermination and Hitler's complicity and direction (Judgement, para's 5.129, 6.35, 6.84). Instructions from Hitler to General Jodl (Chief of the Army Leadership Staff), dated 3 March 1941, were authorised by the Judges in the Eichmann trial as evidence of the murderous objectives of the Einsatzgruppen (Vol. V, p2147), and in the Irving trial as evidence of Hitler's intimate involvement in an intended ideological war against "Jewish-Bolshevism" (Judgement, para. 6.28). The testimony of Rudolf Höss (Commandant of Auschwitz-Birkenau) was variously utilised in 1961 to prove Eichmann's direct input in the transfer of Auschwitz-Birkenau from a slave labour to an extermination camp (Vol. V, p2162), while in 2000 it was foregrounded as evidence of the capacity of its crematoria to systematically gas and burn 'at least two and a half million' people, predominantly Jews (Judgement, para. 7.29).

Comparative analysis identified the breadth and diversity of evidence available to historians and jurists, as well as the items found to be of probative weight (establishing proof) across historiographical subject and legal context. It also confirmed a growing reliance on historian expertise and testimony, acting as evidence by proxy of both documentation (1985, 1988) and eyewitness testimony (1988, 2000). Despite the volume of documentation both referenced (Zündel) and submitted (Eichmann, Irving), it was arguably surprising that there was little overlap of foregrounded evidence across the four courtrooms regardless of the historiography reconstructed. Distinctive cases would of course be expected to 'cherry pick' from the relevant data-stream in accordance with their specific charges (Schneider, 2001, pp1542, 1544), but it was likewise expected that, amongst the documentation commonly known to historians, there would have been a greater sharing of evidence. This sharing was especially expected in the trials in which Christopher Browning had testified in response to

largely similar denier charges (1988, 2000). Consequently, despite thousands of documents both referenced and submitted, only three items were mutually foregrounded by the relevant Judges in all four courtrooms: the Einsatzgruppen reports (1941-1942), Hans Frank's diary and Heinrich Himmler's 4 October 1943 speech to SS officers in Posen. Furthermore, despite the volume of documentation referenced and submitted across the trials, as well as its privileged status in both history and Anglo-American law (Waxman, 2006; Carter-White, 2009; Lawson, 2010), it was likewise surprising that eyewitness testimony remained an essential source of evidential proof. Indeed, the similarity, and therefore corroboration, of testimony, both perpetrator and survivor, was striking across all four trials and especially when detailing the murder process at Auschwitz-Birkenau.

It was also expected, and reaffirmed, that discrete facts would be established by each trial and adjudicated as 'true' in accordance with those 'in issue'. Hence, those authorised in 1961 focused disproportionately on Eichmann and in the later trials on Hitler. Indicative were the findings by the Judges in Israel that once instigated by Hitler, and intended as early as 1939 (Vol. V, p2119), Eichmann had not only been a willing and 'principal offender' in the 'Final Solution of the Jewish Question' but 'amongst those who pulled the strings' (p2182). He had also been integral in relaying the orders of the Einsatzgruppen (p2160). But, most damning, it was found that Eichmann had been integral in the decision to supplement the mass shootings with the use of gas in mobile vans, since recognised by him as a "cleaner" and more "efficient" method of mass murder (pp2174-2176). Equally damning, it was found that Eichmann, jointly with Höss, had been responsible for the introduction of 'Zyklon-B' (hydrogen cyanide) into the gas chambers at Auschwitz-Birkenau (p2177). In contrast, and in response to specific denier charges, Judge Grey in 2000 found that 'until the latter part of 1941, the solution to the Jewish question which Hitler preferred was their mass deportation' (Judgement, para. 13.26). He also

accepted that 'the programme of shooting Jews in the East was systematic ... originated in Berlin and was organised and co-ordinated from there' (para. 13.57). Furthermore, 'even if not wholly irrefutable', he found that Hitler was not only aware of the transition of policy from mass shootings to gassing (initially in the 'Reinhard camps'), but that he had been 'consulted and approved the extermination' (para. 13.67). The role of Eichmann was obviously marginal, if not absent, in these findings. However, less expected was that, with few exceptions, the facts found in the various trials were not incompatible in either content or interpretation.

Similarly, the foregrounded accounts/representations relating to each historiographical subject may have been discretely framed and shaped, but they were informed by an extensive record of facts and interpretations that, again with few exceptions, were not inconsistent across the four trials. Indicative was the consistency of record relating to the evolution of extermination policy. Thus, regardless of the determinacy of distinct 'facts in issue', it was agreed in each courtroom that this policy had been ideologically-driven, and, although opinion differed over its intent or incremental evolution, that its key stages had progressed from cultural and economic exclusion to forced emigration, 'Kristallnacht' and its aftermath, forced deportations to 'the East', ghettoisation, mass shootings, mobile gassing vans and finally fixed gassing chambers and crematoria in the 'Operation Reinhard' camps and at Auschwitz-Birkenau. Moreover, and once again with few exceptions, the accounts/representations authorised, and their surrounding record, were consistent with the content of established scholarship of the Holocaust prevailing at the time of each trial (Hilberg, 1961; Browning, 1985, 1992; Dwork and Jan van Pelt, 1996) and remain familiar in present-day historiography (Longerich, 2010; Cesarani, 2016).

As indicated, the elevation of Eichmann's authority at all stages of the 'Final Solution' in 1961 was the most obvious exception. Indeed, as stated by his Defence Counsel, Robert Servatius, the explicit conclusion of the Prosecution's case was that Eichmann 'rather than Hitler, Himmler or Goering was the great culprit' (Vol. V, p2046). However, in this trial the findings of prevailing scholarship were clearly reflected in its reaffirmation of a grand narrative of the premeditated extermination of European Jewry and the framing of its key perpetrator as not only criminal but depraved and somehow distinguishable from the majority of humanity (Vol. 1, pp62-116). Similarly, the shift of focus in Holocaust scholarship after 1961, from 'intention' to 'function' as an explanatory framework for the transgression to extermination, was clearly represented in the later trials. Likewise, historians' debates over the precise dating of this transgression was not only reflected in the later trials but clearly represented in 2000 through the evidence of Christopher Browning (fall of 1941) and Peter Longerich (spring/summer 1942) (Day 17, pp85-86; Day 24, p142). The later trials also reflected the greater foregrounding and iconic status of Auschwitz-Birkenau since 1961 (Hayes, 2003; Cesarani, 2016, ppxxv-xxvi), and therefore its prominence in Holocaust denial.

Subsequently, although accompanied by discrete facts, the trials in Israel and London reaffirmed the truth 'beyond reasonable doubt' (Eichmann) or 'on the balance of probability' (Irving) of: (1) a complex, pervasive and systematic policy of extermination, initiated and continuously authorised by Hitler and perpetrated through political, professional and state infrastructures across occupied and influenced Europe; (2) the central instruction and subsequent discriminate shootings of up to 1.5 million citizens, predominantly Soviet Jews, by the Einsatzgruppen in the Eastern Occupied Territories between June 1941 and December 1942; (3) the intentional and homicidal utility of gas chambers at Auschwitz-Birkenau, and the subsequent murder, desecration and physical removal of hundreds of thousands of

predominantly Jewish men, women and children up to 1944; and (4) the total genocide at 1945 of between five and six million European citizens, predominantly Polish, simply because they were identified as Jews. These same facts were likewise foregrounded at the Zündel trials by Judges Locke (1985) and Thomas (1988) in their respective 'Charge to the Jury'. However, since their deliberations are not publicly recorded, the exact findings of each jury remain known only to these ultimate 'triers of fact'.

It is therefore shown that, regardless of legal case and context, as well as the dominance of Anglo-American practice in each courtroom, the transference of Holocaust scholarship to non-historians, and, in the Zündel trials, the diminution of its experts, the historian's voice and established scholarship not only reached the higher standards of legal proof but maintained influence over the content and narratives authorised relating to all four historiographical subjects. It is likewise shown, that despite being framed and shaped by extra-historical remits, each trial had reconstructed empirically accountable, consistent, and, since based on established facts, 'truth-full' narratives of each subject. And in so doing, although the 'truth' (and therefore 'credibility') of these narratives was adjudicated in accordance with the charges underpinning each legal case, they had reached the basic demands of both empiricist and narrativist theories of academic history. It is therefore suggested that, contrary to the existing 'consensus of critique', the courtroom proved capable of constituting a model of 'good history' across the Eichmann, Zündel and Irving trials.

Judicial History: A Model of Empiricist or Narrativist 'Good History'?

However, given the persistent distinctions underpinning empiricist and narrativist theories, it is not satisfactory to merely identify that legal reconstructions relating to 'the Holocaust' met the basic demands of academic history in all four trials. As a contribution to on-going

historiographical debates, it would also be useful to evaluate whether empiricist or narrativist theory is the most appropriate explanation of the 'good history' produced in each courtroom. The consistency of facts, record and foregrounded narratives relating to each of the four historiographical subjects suggest that an instrument of stability, or at least constraint, was in operation across the discrete legal contexts. As indicated, according to empiricist theory this constraint is sited in the content of the past traces regardless of their discursive and extra-historical reconstructions. As such, the consistency of both facts and narratives across discrete trials suggests that the history-law relationship is not only a model of 'good history', but, in accordance with empiricist demands, operates as a 'matching' function *with* the relevant past, in this case *with* the Holocaust.

And yet, factual and narrative consistency does not explain the adaptability of the past traces in accordance with the extra-historical contexts and demands of each legal case. In particular, it does not explain why items of evidence found to be foundational in 1961 were either ignored at the later trials or afforded alternative explanations. For example, Hitler's speech to the Reichstag, on 30 January 1939, authorised as evidence of intent prior to any killing in the Eichmann trial, was, by 2000, deemed probative of Hitler's antisemitic fervour but not as 'a programme, a blueprint to kill European Jews during the next years' (Judgement, para.6.7). Hermann Göring's appointment letter to Reinhard Heydrich, dated 31 July 1941, was identified in 1961 as 'one of the basic documents in the history of the extermination' (Vol. V, p2124), and yet, by 2000, it was merely referenced during Browning's testimony as authorisation to carry out a 'feasibility study' for a 'Final Solution' (Day 17, pp145-146). The 'Wannsee Protocol' was identified in 1961 as evidence of the 'central event in the history of the Final Solution' (Vol. V, p2127), while, by 2000, although still vital proof of bureaucratic complicity, it was interpreted by Browning as evidence of an 'implementation conference' at

which no decisions were made and no indication that Hitler had been aware of its agenda (Day 17, p137).⁸

Factual and narrative consistency likewise does not explain why the 'Einsatzgruppen reports' had both extended their evidential reach and status beyond the actual shootings and resulting 'blood-bath' in 1961 (Vol. 1, p93) to proof of official policy (1985, 1988, 2000), Hitler's complicity (2000), standardised killing practice (2000) and the focus on Jewish civilians as intended target (1985, 1988, 2000). Nor does it explain the foregrounding of Auschwitz-Birkenau since 1961 or the evidential focus on its gassing and incineration capacity and process in 1985, 1988 and 2000. Changes in evidential focus and reputation are inherent to academic scholarship and accepted practise by both 'empiricist-analytical' and 'narrative-linguistic' voices. However, when evidential content, interpretation and reputation is so obviously determined by the demands of extra-historical perspectives, in this case various legal cases, then they are clearly being preconceived and prefigured in accordance with narratives that 'floated free' of the relevant past traces.

Factual and narrative consistency also masks the ambiguity of the past traces. Certainly individual 'truth statements' were found in the data-stream, which allowed historians and jurists to 'fact-check' specific claims, but their limitations were obvious when attempting to reconstruct broader historiographical findings. Thus, in Hitler's speech to the Reichstag on 30 January 1939, there are clear references to European Jewry but, as indicated above, his intentions at that stage remain inconclusive and contested. Likewise, in Göring's letter to Heydrich, dated 31 July 1941, the latter was clearly instructed 'to bring the Jewish question to as favourable conclusion [*sic*] as possible under the present circumstances' (Vol. I, pp318-319) and yet, again as indicated above, debates still ensue over its exact intent and purpose. Copies

of the Einsatzgruppen reports clearly indicate the killing of thousands of Soviet Jews month after month from June 1941, but they do not provide definitive knowledge of, for example, the authority and/or initiatives involved in their escalation from August 1941 to include Jewish women and children. Even when utilising statistical data, the trials showed how numerical evidence not only tells us very little about the key historiographical questions relating to how and why millions of Jewish men, women and children were murdered, but disputes still ensue amongst historians over the totality of between 5 and 6 million deaths. And, as Raul Hilberg insists: 'The numbers matter' as each discrepancy relates to unaccounted-for Jewish lives (Guttenplan, 2002, pp303, 304).

Rarely referenced in the Eichmann trial, evidential fallibility was intentionally foregrounded in the later courtrooms, in response to a deliberate strategy and tactic of Holocaust denial, and specifically raised and verified by Judge Gray in 2000. Hence, in what would have been unimaginable to the courtroom in Israel, Gray accepted that the documentary evidence implicating Hitler in the command of the Einsatzgruppen was 'sparse', and in the gassing programme 'not wholly irrefutable' (Judgement, paras. 6.27, 13.67). On the subject of homicidal gas chambers at Auschwitz-Birkenau he accepted that not all of the evidence 'is altogether reliable' and this applied 'with particular force to the evidence of the eye-witnesses' (para. 7.75). Gray likewise acknowledged that 'the documentary evidence, including the photographic evidence, was capable of more than one interpretation' (ibid). Furthermore, he found 'few overt references to gas chambers at Auschwitz in contemporaneous documents', while 'the physical evidence remaining at the site of Auschwitz provided little evidence to support the claim that gas chambers were operated there for genocidal purposes' (paras. 7.127, 7.118). Although Gray ultimately found that a 'convergence of evidence' far outweighed the vulnerabilities of individual categories, his formal consideration of Irving's critiques clearly

exposed the disciplinary disparities relating to the law's demand for evidential stability (paras. 13.75, 13.78). But it also exposed the 'circumstantial' foundations of knowledge integral to key features of Holocaust historiography (Vol. XXXVI, 1988, pp10432-10433; Day 16, p121; Day 17, pp57-58; Day 25, p149). The ability of the past traces to accommodate and support a variety of credible interpretations is inherent to academic history and acknowledged by the advocates of both 'empiricist-analytical' (Evans, 1997) and 'narrative-linguistic' theories (Munslow, 2008). But, crucially, the recognised ambiguity of the past traces reaffirmed both the necessity and primacy of preconceived and prefigured narratives (legal and historiographical) that 'floated free' of their content.

Factual and narrative consistency also masks the various revisions authorised across the four trials. Of course, revisions of both content and interpretation are expected when determined by discrete 'facts in issue'. The most obvious revision was the elevation of Eichmann at all stages of the 'Final Solution' in 1961 and the subsequent marginalisation of his role in the later trials. Conversely, the leadership of Hitler in 'converting Nazi ideological thought into concrete action ...' (Judgement, para. 6.28) was both foregrounded and reinstated into the relevant historiographies in 1985 and 1988 but especially in 2000. As already noted, likewise obvious was the revision of the certainty of Hitler's premeditated 'intention' and top-down leadership in 1961 by the more convoluted and 'cumulative radicalisation' of decision-making (Mommsen, 1986) as explanatory framework of extermination policy at the later trials. More specifically, acceptance in 1961 of a direct order of extermination by Hitler had, by 1988 (Vol. XXXVI, p10433) and 2000, translated into 'signals' or 'incitements' from Hitler (Day 16, p41; Day 17, pp26-27; Day 24, p109; Day 25, p148). But the most obvious revision was the transference of extra-historical, and therefore legal, focus away from the criminality of the individual perpetrator in 1961 to the rebuttal and unmasking of Holocaust denier strategy, tactic

and pseudo-scholarship by the 1980s (Kahn, 2000). Thus, in the later trials, the past traces of the Holocaust were filtered and shaped by not only Anglo-American law and specific 'facts in issue' but by a 'miasma of denial' (Lipstadt, 2011) that would have been inconceivable in 1961. Consequently, the later trials not only illustrated the extra-historical evolution of Holocaust denial but demonstrated the primacy of its narratives over the past traces that subsequently preconceived and prefigured their interpretation and utility in the courtrooms of 1985, 1988 and 2000.

Factual and narrative consistency further masks the 'cooked' (case-specific) reconstructions of each historiography in accordance with the demands of legal case and context. Although most obvious in Israel in 1961, in the elevation of Eichmann as key perpetrator, it was likewise apparent in the later trials in their focus on the rebuttal and unmasking of specific charges foundational to Holocaust denial. Consequently, despite meeting the criteria of 'good history', knowledge of the Holocaust was inevitably distorted, and its complexities inevitably minimised, in all four trials. Given that each trial reconstructed empirically accountable, consistent and 'truth-full' accounts/representations relating to each historiographical subject, it is shown that 'cooked' is not the same as empirically inaccurate, false or fictional. But it is a concept that very clearly acknowledges that each historiography was inevitably preconceived and prefigured through discursive narratives that 'floated free' of their relevant data-stream. This leads to the conclusion that, although the consistency of accounts/representations across the four trials indicated the apparent 'matching' function of judicial historying, the determinacy of the present-centric form over the content and utility of the past traces demonstrated the primacy of its 'making' function. Consequently, it is suggested that although the law can produce 'good history' in accordance with prevailing 'empiricist-

analytical' demands and techniques, its methods and outputs in the Eichmann, Zündel and Irving trials are most appropriately explained through the lens of the 'narrative-linguistic' genre.

Historying Beyond the Courtroom: A Model of Empiricist or Narrativist 'Good History'?

The question now posed is whether narrativist theory is not only the most appropriate explanation of judicial historying but is similarly the most appropriate explanation of academic historiography produced beyond the courtroom. It has been suggested that both historians and jurists reconstruct 'the Holocaust' through the contemporary translation of evidentiary traces into empirically accountable, 'credible' and 'truth-full' accounts/representations. In the courtroom it has been shown that the law clearly operates as a discursive context in which the case-specific demands of each trial govern and guide ('cook') the required translation through narratives that inevitably precede and prefigure the relevant past traces. The history discipline is not so transparent of its process since the prevailing empiricist (Rankean) conventions conflate academic historying *with* the past (Munslow, 2014; Pihlainen, 2014). Yet, since it is accepted by empiricists, as well as narrativists, that historiography is ontologically distinct from 'the past', then its evolution similarly has to operate within present-centric contexts. And in so doing, the demands of its chosen (empiricist) genre, as well as the 'netted' affinities and interests of its practitioners (cultural, ideological, political), has to guide, and therefore inevitably precede and prefigure, any visit to 'the past', including 'the Holocaust'. Consequently, as in the courtroom, the traces selected by the historian as appropriate evidence must be framed and shaped through narrative decisions that 'float free' of their content (Munslow, 2015a, p174).

It has also been clearly shown that in the courtroom the discursive form of legal case acts as the criterion of adjudication, and, in the case of Holocaust denial, 'disconfirmation'

(Fulbrook, 2002, pp182-185). The history discipline similarly defers to rules that adjudicate between 'good' (academic scholarship) and 'bad' (myth, propaganda) history. Likewise, Holocaust denial has long been exposed by historians as incapable of conforming to even 'the most basic requirements of historical writing, that of empirical accuracy in its individual statements' (Stone, 2003, p4). It is therefore easy to confirm that denier accounts/representations are not 'credible' since they are neither empirically accountable nor 'truth-full' in content. However, what happens when faced with competing accounts/representations that reach these basic demands of 'good history' in a discipline that cannot rely on prescribed 'facts in issue' as guidance? In such cases, there have been many attempts by empiricist guardians to identify a form of adjudication that is somehow elevated beyond the historian's 'discursive networks' (Pihlainen, 2016a, pp150-152). Whether labelled as 'mediating levels of reason' (Fulbrook, 2002), 'rational warrant' (Kuukkanen, 2015), 'determined inference' (Ahlskog, 2018), or simply 'common sense' and experience, the aim is to distinguish (and privilege) academic scholarship as less subjective, and therefore, more 'truth-full', than other forms of historying (Pihlainen, 2016b). However, although the desire for realist foundations is understandable, Alun Munslow (2014, p571) is correct to claim that historians are being deceptive and irresponsible when continuing to insist that they can be perspectival and yet somehow, through mechanisms of adjudicatory reasoning, remain nonpartisan. Rather, regardless of empiricist demands and techniques guiding their research, there can be no independent means, or 'vantage point' (Ermath, 2011, p94) through which the credibility (or appropriateness) of competing narratives can be distinguished beyond aesthetic, ideological or political preferences (Stone, 2017). Or, as Robert Eaglestone noted (2004, p11), beyond the historian's 'ethical sense of truth'. And it is because of the historian's 'ethical sense of truth', and not any inherent narrative style residing in the past traces, that the Holocaust has been overwhelmingly emplotted as tragedy.⁹

Indeed, Holocaust historiography acts as clear evidence of the ‘netted’ and ‘present-centric’ authorship of a past event. It is obvious that this historiography is not a body of work that merely ‘fact-checks’ the content of the past traces relating to the genocide (Ermath, 2011, pp45, 92, 95; Southgate, 2017). Likewise, as the magnitude of its scholarship proves, a single, universal, far less transcendental, narrative does not exist. But, nor can it. As revealed in the consistent debates surrounding Holocaust historiography, its past is regularly appropriated and revised as new material is accessed and familiar material is re-evaluated and re-interpreted in accordance with changes in methodology and perspective. Whether labelled as 'netted', present-centric, or 'cooked' all historiography subsequently distorts and minimises the complexities of the Holocaust, while its past traces are infinitely applied and emplotted. Since these practices of historiography are common knowledge it is unclear why expectations of the law by those voices critical of its (mis)use of the Holocaust are somehow greater than those of the history discipline. Rather, demands made of the law to 'do justice' to the complexities of the Holocaust are not only unreasonable, given its case-specific content and form, but are contradictory to its reconstruction by academic historians. It is therefore suggested that in the production of 'cooked' histories the law in the Eichmann, Zündel and Irving trials proved to be no more flawed a methodology, or form of historical inquiry, than the history discipline. In fact, it is further suggested that Anglo-American law is a more honest method of historying since, as the 'narrative-linguist' genre demands (Munslow, 2014), it admits its case-specific, and therefore preconceived and prefigured, reconstructions *as* the past.

Although many practising historians continue to either ignore, or are oblivious to, the theoretical choices prevailing over her/his empiricist craft, the inevitable primacy of the narrative form over the content of the past traces indicates that academic historying, both inside

and outside the courtroom, reconstructs representations *as* the past and *as* the Holocaust. Consequently, it is concluded that 'narrative-linguist' theory is the most appropriate explanation of not only judicial historying but of all historiography and not only in these postmodern times.

Notes

¹ Historiography is accepted as both the method and outputs of the history discipline.

² According to Alun Munslow the research stage of history is taken for granted by narrativist critics since getting the data right is an integral part of all social analysis (Munslow, 2011, p579).

³ Other legal genres, for example the 'continental' model, may have amended or altered the findings. The selection of different trials may have also amended or altered the findings.

⁴ The 'hostile organisations' being the 'Schutzstaffeln der NSDAP' (SS), 'Sicherheitsdienst des Reichsführers SS' (SD) and 'Geheime Staatspolizei' (Gestapo).

⁵ Irving formally listed four other defendants (bookstore employees) but action against them was not pursued. His charges of libel referred to statements made in Lipstadt's book, *Denying the Holocaust*, pp8, 14, 111, 161-163, 170, 179-181, 213, 215, 221, 232-234.

⁶ The Einsatzgruppen comprised four SS and police units authorised to murder specifically targeted Polish (1939) and Soviet (1941) citizens but predominantly Jewish men and then women and children in the latter's occupied territories.

⁷ Although it was Deborah Lipstadt who had been forced into court reference to the common usage of the 'Irving trial' is used throughout the article.

⁸ Comprising the minutes of a meeting held in Wannsee (Berlin) of Nazi civil servants, SS and Party officials, chaired by Heydrich on 20 January 1942.

⁹ Hayden White was specifically challenged on this point and consequently amended his critique of historical realism to award evidence of the 'Third Reich' with a degree of stability of both form and morality missing from the traces of other past events (White, 1992; Jay, 1992). See also debates over the film, *Life is Beautiful*, directed by Roberto Benigni in 1997, in which daily life in a concentration camp is presented through the comedic trope (Wright, 2000; Flanzbaum, 2001).

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