

# From Revisionism to “Revisionism”

## *Legal Limits to Historical Interpretation*

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Contrary to radical postmodern approaches, there are limits to the representations of the past. Even if one subscribes to the trend which sends the traditional distinctions between facts and values, description and interpretation, to the junkyard of historiography, several rather lively “reality checks” ought to be taken into account, both within the craft and outside it. However, one might embrace the postmodern argumentation insofar as it indicates the fuzziness of the distinction between scholarly and unscholarly historical interpretations. It might even seem that apart from risking the collective rage of fellow historians, or breaking certain rules of formal logic and elementary physics, not much remains to differentiate between advancing a preposterous argument and suggesting a bold historiographical hypothesis. In the light of those epistemological uncertainties, the proposed subtopic, focusing on the “border between legitimate reexamination of historical narratives and attempts to rewrite history in a politically motivated way that downgrades or denies essential historical facts,” stands out as an interesting but by no means easily approachable problem.

Indeed, how does one cross the limit? By borrowing and adjusting the title from the famous conference on the Holocaust in history, organized in 1990 by UCLA under the disturbing name “Probing the Limits of Representation,” this paper carries the gist of that gathering into the legal realm, in an attempt to examine the involvement of the courts in distinguishing between legitimate and illegitimate historiographical interpretations.<sup>1</sup> The paper analyzes the ways in which various proceedings are influencing the demarcation between revisionism (reexamination of views on the past) and “revisionism” (denying the mass crimes of the 20th century). The workshop on revision of Central European history lends itself very well to such scrutiny, as Holocaust denial stands out as both the most malignant and the most persistent tendency among the “revisionist” projects. The attempts to revise this part of Central European history have attracted considerable legal attention and brought the heavy hand of the law into an

issue whose sensitivity challenges the traditional notions of value-free historical scholarship. In order to contribute to the understanding of such a development, this paper revisits the inherent connection between historical revision and the law. The emergence of revisionism through criticism of the Versailles treaty is examined, as well as legitimate and less legitimate forms of revisions of the Nuremberg and other Second World War-related trials. The paper further sketches the variety of legal reactions to certain revisionist attempts, arguing that this activity has significantly contributed to shaping the border between revisionism and “revisionism.” The dynamics of this demarcation are scrutinized in different legal contexts typical of various national jurisdictions. The impact of this courtroom activity on historiography is illustrated, and some possible avenues are indicated for coping with this process, through which the edges of credible academic discourse are cut, for better or for worse.

### 1. HISTORICAL REVISION BETWEEN NONCONFORMISM AND DENIAL

Ambiguities surround the term revisionism, loaded with meanings, denoting both legitimate reassessment of the past and illegitimate manipulation of it. Setting the terminology straight by differentiating between revisionism (provocative, controversial nonconformist questioning of entrenched beliefs) and “revisionism” (denial of crimes, distortion of the truth apologetic of extreme policies) would seem sensible, but it is a surprisingly slippery task.<sup>2</sup> The border between the two is in fact unstable, and powerful instruments outside academia often tip the balance, the primary example being the law; across the world a number of self-proclaimed revisionists are caught up in the webs of legal proceedings. Some of them are in jail. *Freedom for Europe’s Prisoners of Conscience!*, demands Mark Weber, head of the USA-based revisionist Institute for Historical Review, commenting on the imprisonment of some of the leading figures of contemporary revisionism, such as Ernst Zündel, David Irving and Germar Rudolf, claiming that they are victims of suppression of the freedom of academic expression.<sup>3</sup> However, there is more to it. More than simple victims of crime of thought, revisionists operate, and have always operated, at a sensitive junction between history and law. The current wave of their legal predicaments might be seen as one stage in the long-lasting, structurally-entangled relationship between revisionism and the law, central to the understanding of both legitimate and illegitimate revisionist undertakings.

How did this connection emerge? To begin with, revisionists (legitimate as well as illegitimate) need to have something to revise. Any subject of their revision is more than just a conventional scholarly interpretation of the past. They challenge something bigger—the “official” truth, a paradigm sanctioned by political authorities, guarded by legal decisions and maintained by the majority of allegedly opportunistic academics. This dynamic is typical of revisionist discourse and makes it easy to differentiate between a regular scholarly debate, conducted in the form of an informed dialogue between academics, and a politically saturated exchange. High-profile legal proceedings and landmark courtroom decisions, as examples of a legally imposed truth, are thus prone to becoming a starting point of their revision. The term was in fact used for the first time to describe intellectuals who were fighting for the revision of the Dreyfus case. It also entered historiography in a similar context, as it was initially used to describe the activities of a number of interwar historians (Sidney Fay, Harry Elmer Barnes, Charles Beard, Alfred von Wegerer, Pierre Renouvin...) challenging the famous Article 231 of the Versailles Treaty.<sup>4</sup> According to this and related parts of the Versailles Treaty, Germany was solely responsible for the outbreak of the war, and revisionist historians attempted to show that this decision rested on a highly selective and misguided historical interpretation. To counter it, they launched a scholarly debate (known as *Kriegsschuldfrage*—the Question of War Guilt) which is in fact still open and remains a valid subject for research.<sup>5</sup> Nonconformism towards governmental narratives and suspicion towards propaganda were typical features of early revisionism.

Structurally similar, albeit manifestly very different developments occurred in the aftermath of the Second World War, whose juridical follow-up was much more thorough and took on various forms of legal and extra-legal retribution.<sup>6</sup> The criminalization of Nazi Germany, and its allies and collaborators, resulted in a number of proceedings, in the course of which more and more factual knowledge was gathered about the atrocious aspects of *Neuordnung Europas*. Following defeat on an unprecedented scale, the Third Reich was dismantled, its archives seized and utilized to furnish evidence for the trials to come. In the midst of this frenzied activity stands the Trial of Major War Criminals before the International Military Tribunal in Nuremberg (20 November 1945–1 October 1946). The protagonists of the great trial had no doubts about the historical importance of their work. “We cannot here make history over again. But we can see that it is written true,” concluded Telford Taylor, one of the prosecutors.<sup>7</sup> His colleague, Robert Kempner, dubbed the proceedings the “great-

est historical seminar ever held.”<sup>8</sup> Nuremberg stands for the quintessential attempt at what might be called juridical memory making, namely the attempt to influence collective memory via high-profile proceedings in which law, politics, memory and history intertwine in a memorable public event, producing a particular outlook on the past.

As the years went by, it became clear that Nuremberg had left an ambiguous legacy. On the one hand, it was hailed as a new beginning for international criminal justice. Not only did it inspire subsequent proceedings against Nazi war criminals, but it has certainly assisted the creation of the ad hoc International Criminal Tribunals for Yugoslavia and Rwanda, and ultimately, the emergence of the International Criminal Court. On the other hand, being the first of its kind, conducted in the haste of an immediate postwar context, the proceedings at Nuremberg created a number of questionable precedents in international criminal law. Procedural faults were legion, and easy targets for barrages of political, legal and historical criticism. Skeptical voices labeled it an exercise in victors’ justice, and yet another imposition of the official truth. Various aspects of the proceedings were scrutinized and directly or indirectly criticized by reputed legal scholars, political scientists and historians. As early as 1961, A. J. P. Taylor provoked lively debate with his *Origins of the Second World War*. His interpretation of the causes of the war was very remote from the framework offered by the Nuremberg Judgment, and was boldly subtitled *A Revisionist View*.<sup>9</sup> Many serious studies of the Nuremberg proceedings since then have maintained a critical edge towards what Mark Osiel recently named called “Nuremberg’s conspiratorial outlook on history.” Michael Marrus concurs that “as most of the historians would agree... this interpretation has not withstood the research of a subsequent generation of scholars.”<sup>10</sup> Nuremberg is indeed a topic on which reasonable, well-informed people have many doubts.

Fishing in this murky water was bliss for the newly emerging, significantly different brand of revisionism. It is no wonder that most researchers into the history of Holocaust denial usually single out Maurice Bardéche’s book *Nuremberg or the Promised Land* (1947) as its point of departure.<sup>11</sup> Without the benefit of much scholarly argumentation, but with a very clear political agenda, authors like Bardéche set out to undermine the impact of the postwar trials and revise their findings. Criticizing Nuremberg alongside well-reputed scholars gave the new revisionism badly needed legitimacy. However, unlike benevolent critiques, they were using selective, guided attacks in order to exculpate the Nazi policies that were buried in the Nuremberg trials. Shielded to some extent by the Cold War-

generated equation of the crimes of Communism with those of National Socialism, they produced many frighteningly successful distortions of otherwise convincing arguments. The participation of Soviet representatives in the Nuremberg proceedings prompted the revisionists to claim that the trial was not only victors' justice, but not justice at all. The inability of the Nuremberg prosecutors to establish the exact number of murdered Jews was misused for repeated reductions of the death toll. The non-existence of the written order signed by Hitler regarding the Final Solution of the Jewish question was evoked as an argument *ex silentio* that he knew little or nothing about the death camps.<sup>12</sup> The attack on the Nuremberg and related trials lay at the heart of what Pierre Vidal-Naquet labeled "an assassination of memory" and Deborah Lipstadt calls a "growing assault on truth and memory."<sup>13</sup>

The new revisionists consciously promoted themselves as inheritors of interwar revisionism. The presentation of the Institute for Historical Review states: "Devoted to truth and accuracy in history, the IHR continues the tradition of historical revisionism pioneered by distinguished historians such as Harry Elmer Barnes, A. J. P. Taylor, Charles Tansill, Paul Rassiner and William H. Chamberlin."<sup>14</sup> However, the differences were striking. Unlike the interwar debate on the question of German guilt, which did advance factual knowledge on the outbreak of the First World War, and did contribute to a wider understanding of causality in history, the new revisionism had far less to offer. Whereas the interwar revisionist historians were questioning the dictum of a peace treaty, which was a political imposition in a legal document, postwar revisionists were attacking the core of postwar legal proceedings. Whereas most other scholars concentrated on criticizing the concept of crime of conspiracy and crimes against peace as defined at Nuremberg, new revisionists extended this skepticism to investigations into crimes against humanity and war crimes, casting doubts on their findings. Academic nonconformism in the spirit of "speaking the truth to power" was transformed into an outright denial of human suffering. Suspiciously, among the ranks of the new revisionists one could seldom find reputable professional historians; instead, mavericks of different brands took over the floor. Nevertheless, in the light of the deepening crisis of historical scholarship shaken by relativism, strengthened by the so-called "Hitler's wave" of the early 1970s, they gained significant visibility. Initially the work of several marginalized individuals, their approach developed in the course of the 1970s into a recognizable standpoint on the margins of this extremely controversial and sensitive field.

## 2. THE LONG HAND OF THE STATE: DEFINING “REVISIONISTS”

Ironically, it was precisely the limited success of the new revisionists of the late 1970s and 1980s which put in motion a set of legal mechanisms against them, and has assigned to them the derogatory label of “revisionists.” In fact the authors of revisionist literature regularly come into collision with the law. Maurice Bardéche himself was sentenced to a year in prison, although he never went to jail. However, with growing global sensitivity towards the crimes of the Second World War, enhanced through the second generation of Holocaust related trials (The Ulm trial, the Eichmann trial, the Frankfurt-Auschwitz trial and so on), new sentiments were powerfully augmented by controversies like the one over President Reagan’s visit to the Bitburg cemetery, and the tables have turned against the revisionists. The shaken social consensus started calling for the legal protection of public memory, and there were tools available. Contrary to popular belief, freedom of speech in the public sphere is far from unlimited in functioning democracies. Many aspects of expression are, in one way or another, suppressed in public life. Certain ways of addressing the past are also illegal in a number of countries. This is particularly the case with the denial of mass atrocities, above all with Holocaust denial. A number of countries have criminalized Holocaust denial or other ways of contesting the existence of crimes against humanity. Expressed in formulations which differ significantly, Holocaust denial constitutes a crime in Austria, Belgium, the Czech Republic, France, Germany, Lithuania, Poland, Portugal, Romania, Slovakia, Spain, Switzerland and Israel. Where direct criminalization was absent, as in the United Kingdom, Canada, the United States and elsewhere, legislation concerning hate-speech and incitement to racial hatred also paved the way for a new wave of Second World War related trials, concerned with the aberrant memory or inadequate representation of those events.

However, the vigor with which these mechanisms are applied varies from jurisdiction to jurisdiction. Germany has a long tradition of legally combating revisionism, which might be seen as an insistence on discontinuity between the Federal Republic and the Third Reich, as well as the determination never again to allow the judicial system to become the mere bystander of a prospective *Machtergreifung*. Hence, such proceedings have become a matter of routine under article 185 of the Penal Code, which punishes behavior violating the honor of the complainant or under article 130 (3), which explicitly prohibits incitement to racial hatred. In addition, from the *Zionist Swindle* case (1977) onwards, the denial and

minimization of the number of Jewish victims of the Nazi regime specifically constitutes a crime. In 1985, the law colloquially called *Gesetz gegen die "Auschwitz-Lüge"* (Law against the "Auschwitz Lie") was passed and has been upheld in trials like the *Deckert* case, in which the leader of the National Democratic Party, Günther Deckert, was found guilty of incitement to racial hatred and the *Holocaust Denial* case in which the German Supreme Court ruled, after a neo-Nazi rally, that the right to freedom of speech does not protect Holocaust deniers.<sup>15</sup>

Similar historical experience probably guided Austria in the same direction, with a zeal which shows no signs of withering six decades after the Second World War. On 20 February 2006, David Irving, a British self-styled revisionist historian, was sentenced to three years in prison for Holocaust denial, under Austria's 1947 law prohibiting the "public denial, belittling or justification of National Socialist crimes."<sup>16</sup> The law under which Irving was found guilty dated from 1945, but was severed in 1992 to combat the revival of the ideology of the NSDAP through explicit criminalization of the denial and minimization of National Socialist crimes. In the reasoning of the court, this is exactly what Irving was doing in the course of lectures he held in Austria in 1989.

A comparable practice developed somewhat later in France, as Henry Rousso labeled it, the "Vichy syndrome" was long dormant.<sup>17</sup> However, as one of the many after-effects of the 1968 rebellion, the issue of appropriate remembrance of the Second World War reappeared, strengthened by the burden of more recent instances of crimes committed in the course of decolonization. The anti-Jewish policy of the Vichy government became an issue of contention in a number of cases, beginning with the trial of Klaus Barbie in 1987. Barbie's skilled lawyer, Jacques Vergès, based his defense on stretching the notion of crimes against humanity to the conduct of the French authorities in Indochina and Algeria, and in effect suggested a powerful alternative reading of the recent history of France.<sup>18</sup> In a subsequent wave of moral-revisiting of French history, the high profile of revisionists became an embarrassment to France, leading to a legislative reaction—in 1990 Parliament passed the so-called Gayssot law, which was furthering the 1972 Holocaust denial law and criminalized the contestation of crimes against humanity.<sup>19</sup> One of the first defendants under that law was Robert Faurisson, a professor of literature at the University of Lyon and the most vocal Holocaust denier in France, who unsuccessfully appealed against the verdict of the United Nation's Human Rights Committee. However, the Gayssot law does not necessarily concern only mavericks in scholarship,

like Faurisson, Vincent Reynouard or Roger Garaudy, but also right-wing politicians like Jean-Marie Le Pen.

European countries are generally in the forefront of the criminalization of harmful interpretations of the past, which are deemed to be a means of spreading hate-speech and inciting racial and ethnic hatred. Their commitment to combating this phenomenon is apparent in a set of initiatives started recently by the Council of Europe through the *Additional Protocol to the Convention on cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems*. Article 6 of this Protocol obliges the signatories to penalize “distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimizes, approves, or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognized as such by final and binding decisions of the International Military Tribunal, established by the London Charter of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognized by that Party.”<sup>20</sup> The intention is to regulate this realm as well, for the Internet has become one of the main battlefields for deniers and defenders of the memory of the Holocaust.

The involvement of the state in this debate had, and still has, many opponents in very different quarters. Revisionists are naturally very much against such laws, but such activities are disapproved of by many liberals too. Criticism is strong in countries with a long tradition of the constitutional protection of free speech, and particularly in common law countries—criminalization of the Holocaust denial has never been discussed seriously in the United States, and Great Britain has recently dropped the idea of introducing it. The exception in this respect is Canada, where a denier, Ernst Zündel, was put on trial. However, even his verdict was eventually quashed by the Supreme Court on the basis of protection of free speech.<sup>21</sup> One of the great controversies regarding revisionism was sparked off when Noam Chomsky’s essay *Some Elementary Comments on the Rights of Freedom of Expression* prefaced Robert Faurisson’s *Memoire en defense*. Chomsky’s argument was that, although he does not concur with Faurisson’s thesis, he feels the need to defend his right to express it.<sup>22</sup> Even the most vocal fighters against Holocaust denial, like Deborah Lipstadt, have many reservations about such laws: “As an American, I’m a staunch believer in free speech. I recognize, however, that the situation in Germany is different and that there might be room there for a law against Holocaust denial, but there is also a practical aspect to my general

opposition to laws against Holocaust denial. When speech is restricted, it becomes 'forbidden fruit' and more interesting to people."<sup>23</sup> Other tactical issues are also at stake. The trials lend the revisionists, as noted by Ernst Zündel himself, a million dollars' worth of publicity, through which they can also count on some public sympathy, claiming to be persecuted thinkers and comparing themselves, as Robert Faurisson did, with Galilei: "Did Galileo Galilei have the facts right? Do we, the Revisionists, have the facts right? ... That is the question."<sup>24</sup>

Many public figures who otherwise do not think revisionists have the facts right are championing the retraction of such laws and showing concern about the tendency towards restrictive legislation in Europe.<sup>25</sup> Professional historians are particularly engaged in working for their revocation. A group of 19 historians in France has recently protested against all "historic laws."<sup>26</sup> The gist of their argument is captured by Timothy Garton Ash, who commented on the French Parliamentary 2005 law on colonialism: "No one can legislate historical truth. In so far as historical truth can be established at all, it must be found by unfettered historical research, with historians arguing over the evidence and the facts, testing and disputing each other's claims without fear of prosecution or persecution."<sup>27</sup> The other way of addressing the legitimacy of a certain interpretation of the past is available and advocated as a less harmful alternative. Holocaust denial could be sanctioned indirectly, through civil proceedings in which individuals or groups file complaints against the alleged offenders on the grounds of causing mental harm, or producing and distributing offensive publications. A *cause célèbre* in this respect in the United States was the 1981 *Mermelstein case* in which a Holocaust survivor, Mel Mermelstein, sued the Institute for Historical Review following their announcement of a reward to anyone who could prove that Jews were put to death by gassing in Auschwitz.<sup>28</sup> The Institute lost in a way which constituted a major juridical defeat for revisionists, for the Californian court admitted the Holocaust into evidence as judicial notice, proclaiming it an event so well-known and indisputable that it need not be proven in court.

The huge success in the *Mermelstein case*, which was both preceded and followed by similar ventures in both continental and common law, indicated that criminal law is not indispensable in combating denial. If criminal action aims at delegitimizing many facets of revisionism, civil suits aim at delegitimizing them, frequently with equal success. "Once someone is labeled as a Holocaust denier that person becomes illegitimate, and rightly so," claims Jewish Professor Neil Gordon who recently won a suit against his colleague Steven Plaut, who alleged him to be "a fanatic anti-

Semite.”<sup>29</sup> This aspect of libel defamation undoubtedly made litigation over revisionism develop in rather unexpected directions towards the end of the century, and showed that civil cases also have their weaknesses. Quarrelling scholars address the court to resolve their claims. This option is open to “revisionists” as well as to others, and is particularly utilized in their attempt to present themselves as credible revisionists, rather than contemptible deniers. Revisionist historian David Irving tried to play this card by suing Deborah Lipstadt in 1996 for calling him a Holocaust denier. Mainstream academia has also seen a number of similar initiatives. One of the legal after-effects of the Goldhagen debate was a libel threat by Daniel Goldhagen against Ruth Betinna Birn, whom he decided to sue unless she retracted her devastating review of his book *Hitler’s Willing Executioners*. Writing about the Holocaust and writing about writing about the Holocaust, already subject to very different interpretations, have become a true intellectual minefield.<sup>30</sup>

### 3. THE COURT SPEAKS: OVER THE EDGE OF THE ACADEMIC DISCOURSE

Many revisionists have been prosecuted, and some of them have gone to jail. But does this have an impact on conventional historiography? It depends. Although cases regarding revisionists are sometimes conducted in an isolated courtroom context, their ability to influence scholarship should not be underestimated, as the following examples show. Whether the cases involve criminal or civil suits, there are a number of ways in which the proceedings can break out of the courtroom and directly or indirectly involve scholars. As the law invades their realm, tensions regarding authority arise. Are the courts in a position to judge history? Can they assess the work of historians? How should historians react in such situations? Scholars could attract the attention of the public prosecutor or civil claimants for their views and findings, which would not only put them in danger of punishment, but would put the judges in the strange position of rendering judgments over the quality of their historical interpretation, producing peculiar text in which legal form transmits the historiographical content.

In 1994, one of the best known American Orientalists, Bernard Lewis, stood trial in Paris for an interview in which he cast doubts on the appropriateness of the term “genocide” for the 1915 massacre of Armenians in the Ottoman Empire, which he referred to as “the Armenian version of this event.”<sup>31</sup> He was indicted under the Gaysot law, but acquitted on the

basis of the interpretation of the court, which defined crimes against humanity in accordance with the definition of the London Charter of 1945 and was hesitant to stretch the notion to prior events. However, Lewis was sued in a civil case in three separate suits by the French Forum of Armenian Associations. The French court claimed not to be interested in resolving either historical issues or historiographical method:

The Court is not called upon to assess or to state whether the massacres of Armenians committed from 1915 to 1917 constitute or do not constitute the crime of genocide ... in fact, as regards historical events, the courts do not have as their mission the duty to arbitrate or settle arguments or controversies these events may inspire and to decide how a particular episode of national or world history is to be represented or characterized... in principle, the historian enjoys, by hypothesis, complete freedom to relate, according to his own personal views, the facts, actions and attitudes of persons or groups of persons who took part in events the historian has made the subject of his research.<sup>32</sup>

However, in spite of those reservations, in order to assess whether Lewis had injured the Armenian community or was simply doing his job, legal scrutiny of his scholarly activity was necessary:

Whereas, even if it is in no way established that he pursued a purpose alien to his mission as a historian, and even if it is not disputable that he may maintain an opinion on this question different from those of the petitioning associations, the fact remains that it was by concealing elements contrary to his thesis that the defendant was able to assert that there was no "serious proof" of the Armenian genocide; consequently, he failed in his duties of objectivity and prudence by expressing himself without qualification on such a sensitive subject; and his remarks, which could unfairly revive the pain of the Armenian community, are tortious and justify compensation under the terms set forth hereafter.<sup>33</sup>

Lewis lost one of the suits, and paid the sum of one franc as compensation for an offense towards the sentiments of the Armenian community. Clearly, the court was both in the position of rendering judgment over the appropriateness of his scholarship, and under obligation to do so.

The other type of interaction between academics was displayed in *R. vs. Ernst Zündel*, a 1985 criminal case in Canada in which a neo-Nazi publisher was accused of "spreading false news" after publishing an essay entitled *Did 6 Million Really Die?*<sup>34</sup> The prosecutor built his case on an attempt to prove that Zündel was purposefully spreading false news. He was bound to prove that Zündel was aware of the truth—that he knew about the Holocaust and maliciously misguided the public. As the judge declined to accept the existence of the Holocaust as a judicial notice, it

became a necessity to prove that the Holocaust occurred and was to be believed in beyond reasonable doubt by an average person. In addition to the customary sorts of evidence, such as documents and eyewitness testimonies, the prosecution embarked on a less standard venture—bringing historians into court as expert witnesses. The expert witness for the prosecution was no other than Raul Hilberg, one of the best known Holocaust scholars. Zündel’s lawyer, Dag Christi, set out to defend his client by relativizing the epistemological value of knowledge about the past. In order to convince the jury that “history is only an opinion,” and that there are no firm criteria for preferring one opinion over the other, he dismissed historical expert testimonies as hearsay, and exposed Hilberg to highly abusive cross-examination.<sup>35</sup> However, he commissioned expert historical testimony for his own client from none other than Robert Faurisson.

Consequently, the trial offered the strange spectacle of a debate between the experts brought by the defense and those provided by the prosecution. The complex case dragged from the first hearing to the Supreme Court and back for a retrial. During the retrial, Hilberg’s place was taken by another prominent expert on the period, Christopher Browning.<sup>36</sup> The defense also strengthened their ranks, bringing David Irving to the witness box. Needless to say, such skirmishes increased the fame of revisionists. Eventually, Zündel was found guilty. The case went to appeal and was sent for retrial owing to procedural faults. In a retrial, he was found guilty again, and this time the verdict was confirmed on appeal, but was eventually reversed by the Supreme Court on the grounds of protection of free speech. The ultimate failure unintentionally delivered the message that the Holocaust is a debatable event in scholarship, which did create many doubts about the feasibility of the venture.

However, a case in which the courtroom exposure of historians reached a peak, and which combined aspects of both the Lewis and the Zündel cases, was *David Irving versus Penguin Books Ltd. and Deborah Lipstadt*. The case was brought on the basis of a writ filed by David Irving in 1996, in which he claimed to have been defamed by Deborah Lipstadt, an American social scientist. Lipstadt labeled David Irving a Holocaust denier in her book *Denying the Holocaust*. He sued both her and her publishers, demanding compensation for his damaged reputation, and the trial began in 2000. According to British libel law, the burden of proof rests with the defendants, who were obliged to prove that the accusation was false. This meant that they had to prove that Irving was a Holocaust denier—a complex task. In order to convince the judge that Irving denied the Holocaust, the defendant had to show what the Holocaust was, prove that

Irving was familiar with the facts regarding the Holocaust, and that he had purposefully twisted or ignored crucial facts in order to deny it. As summarized by Irving himself, the defendants had to show "...first, that a particular thing happened or existed; second that I was aware of that particular thing as it happened or existed, at the time that I wrote about it from the records then before me; third, that I then willfully manipulated the text or mistranslated or distorted it for the purposes that they imply."<sup>37</sup> And that was exactly what the defense intended to do. In addition to the submission of an enormous amount of written evidence, one way was to call upon expert witnesses. The defense commissioned no less than five reports by prominent historians and social scientists (Richard Evans, Robert Van Pelt, Christopher Browning, Peter Longerich, Hajo Funke).<sup>38</sup> Irving also called upon historians such as John Keegan and Cameroon Watt to testify on his behalf. The outcome was "something new: a Holocaust trial without victims and without perpetrators... in which history is judged, as well as made."<sup>39</sup>

Irving was in fact fighting a battle to retain the title of respected, or at least relevant, revisionist historian. He objected to being labeled a Holocaust denier, claiming that at no time had he denied the mass murder of Jews by the Nazis, not resisting however the temptation to use the same strategy of globalizing the Holocaust as had been attempted by Verges in the Barbie trial—he stated that "the whole of World War II can be defined as a Holocaust."<sup>40</sup> To counter this, some of the expert reports of the prosecution were about the Holocaust; the others were about Irving, and his extreme right-wing politics and scholarship. Even more than in the Zündel case, historians were debating the appropriateness of an interpretation of the past. The quality of Irving's method was torn to pieces by Professor Richard Evans, who subjected Irving's entire opus to careful scrutiny and identified a number of factual errors, distortions, manipulations, and mystifications. He simply denied him the title of historian:

It may seem an absurd semantic dispute to deny the appellation of "historian" to someone who has written two dozen books or more about historical subjects. But 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 a historian ... Irving is essentially an ideologue who uses history for his own political purposes; he is not primarily concerned with discovering and interpreting what happened in the past, he is concerned merely to give a selective and tendentious account of it in order to further his own ideological ends in the present. The true historian's primary concern, however, is with the past. That is why, in the end, Irving is not a historian.<sup>41</sup>

As the attempts by Irving to refute Evans' findings in the course of cross-examination failed, his reputation as a scholar was badly damaged—nor was it salvaged by the unwilling and unenthusiastic testimonies of his own expert witnesses.

Interestingly enough, both of the otherwise bitterly opposed sides agreed on one thing: that the trial was not about history, but about the way Irving was interpreting it. Irving stated that “this trial is not really about what happened in the Holocaust.” The defense attorney proclaimed that “this is obviously an important case, but that is not however because it is primarily concerned with whether or not the Holocaust took place or the degree of Hitler's responsibility for it.” The judge also maintained that “this trial is not concerned with making findings of historical facts.” He reemphasized this position in the opening of the judgment: “it is not for me to form, still less to express, a judgment about what happened. That is a task for historians.”<sup>42</sup> However, as in the Lewis case, the judgment contained a strongly historicized verdict, worth quoting at some length, for it undoubtedly captures the moment in which a revisionist was transformed into a “revisionist” and the border of academic discourse was deemed to have been crossed:

I have found that most of the Defendants' historiographical criticisms of Irving set out in section V of this judgement are justified. In the vast majority of those instances the effect of what Irving has written has been to portray Hitler in a favourable light and to divert blame from him onto others ... Mistakes and misconceptions such as these appear to me by their nature unlikely to have been innocent. They are more consistent with a willingness on Irving's part knowingly to misrepresent or manipulate or put a “spin” on the evidence so as to make it conform with his own preconceptions. In my judgment the nature of these misstatements and misjudgments by Irving is a further pointer towards the conclusion that he has deliberately skewed the evidence to bring it into line with his political beliefs ... The double standards which Irving adopts to some of the documents and to some of the witnesses appears to me to be further evidence that Irving is seeking to manipulate the evidence rather than approaching it as a dispassionate, if sometimes mistaken, historian ... In my view the Defendants have established that Irving has a political agenda. It is one which, it is legitimate to infer, disposes him, where he deems it necessary, to manipulate the historical record in order to make it conform with his political beliefs ... 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 unwarrantedly 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.<sup>43</sup>

These long quotations are only excerpts from a devastating verdict over 300 pages long, which was clearly in favor of the defendants and disastrous for Irving's reputation. In the aftermath of the trial he spent some time recuperating as an academic outcast, desperately trying to retrieve some of his credentials, and radicalizing his standpoint in a way which eventually brought him to a Vienna prison cell, in which he apparently wrote a book about his clashes with the law entitled *Irving's War*.<sup>44</sup> Since the end of 2006, Irving has been free, but it seems that his career as a scholar has come to an end.

The Irving–Lipstadt case attracted considerable media attention. Much of it focused on the phenomenon of legal limitations on historical interpretations.<sup>45</sup> Numerous comments showed unease over the courtroom demarcation between legitimate and illegitimate revision. David Robson noted that “a libel court is somewhere to fight battles, score points and collect damages. But for seekers of light, understanding and historical truth, it is very often not the place to look.” Neal Ascherson observed that in a trial “fragments of history are snatched out of context, dried, treated and used as firelighters to scorch an adversary ... for establishing what really happened in history, English libel court is the worst place in the world.” Daniel Jonah Goldhagen wrote that “the ruling of a court has no bearing on historical fact: the court is a place where legal issues are adjudicated according to the particular standards of a given country, not where historical issues are decided according to the different and well-established standards of historical scholarship.”<sup>46</sup>

Richard Evans expressed a different, more optimistic view, enumerating the reasons why the court seemed an appropriate place to fight this methodological battle. He argued that during legal proceedings the participants are not subject to constraints of time and space, as is frequently the case in academic debates. Further, he claimed that in court, unlike in scholarly debate, it is not so easy to evade the debated questions. Finally, he pointed out that the rules of evidence in court, at least in civil cases, are not so unlike the historical rules of evidence.<sup>47</sup> This view is however, countered by a short remark by Simone Weil, warning that “one cannot impose a historical truth by law.” Can one? The cases summarized above show that one can. But should it happen? The question remains open for discussion. It would surely be tempting to assess the best ways to combat revisionism, or to work out whether trials are the proper way to do so. However, this issue is beyond the scope of this paper, for it is likely to remain, in the words of Michael Marrus, a “serious question, upon which the people of goodwill seriously disagree.”<sup>48</sup> It is worth mentioning though, that 2007 has started

with precisely such disagreements, following the German initiative for the criminalization of the Holocaust denial at the level of the European Union and the Resolution of the United Nations General Assembly calling upon member states to suppress Holocaust denial.

### CONCLUSION

As Napoleon once said, “history is the version of the past events that people have decided to agree upon.” It would be professional blindness to maintain that the people in question are necessarily historians. They might easily be jurists or politicians. And they reach agreement in accordance with their own disciplinary requirements. The complexities of the cases described above demonstrate that the legal delineation between legitimate and illegitimate interpretations of the past is a global venture which takes very different shapes in particular local contexts. Hence generalized conclusions would most likely fail to honor the complexity of the entanglement between history and the law. They would also lack sensitivity towards the circumstances in which particular cases appear and would not give substantial information on the influence court activity actually has on communities of historians. However, outlining some general trends and posing a question or two might provide avenues for more structured discussion.

It is fairly obvious that criminal prosecution of Holocaust denial is more likely to happen within the realm of continental legal traditions. Although one of the most interesting such cases took place in Canada, the problems it encountered and the eventual extradition of Zündel to Germany, where he was promptly locked away and now awaits a verdict, support this conclusion. Similarly, the legal entanglements of David Irving, who served as an expert witness in the Zündel case, lost a libel suit, his money, and his reputation in Great Britain, but remained a free man until his arrest in Austria in November 2005, strongly indicate that leniency towards revisionism is more likely to be found in common law countries. How is this so? Several possible interpretations might be put forward for discussion. It is hard to neglect the fact that the borders of Hitler’s Fortress Europe largely corresponded to the borders of continental Europe, whereas the classic common law countries, such as Great Britain and the United States, remained out of his grasp. Might it be that the countries which had more immediate experience of Nazi occupation and domestic collaboration have a particular take on the issues of the revision of

that part of their past, whereas the more remote position of the non-continental jurisdictions allows them a more relaxed approach? That argument, however, could also be historically turned around into the research question: why was the German conquest so successful precisely in the realm of continental law?

Further inspection of the legal context of the cases brings us closer to the relevance of the trials for historiography. Why do some of the trials roll on in silence, whereas others constitute public events? In this respect, the difference between adversarial and inquisitorial legal procedure is revealing. In an inquisitorial proceeding, generally typical of continental law (with the notable exception of France), the role of the judge in the process is immense. The judge is not only the arbiter of the case, but also a very active fact-finder, as the underlying philosophy of the inquisitorial trial is a common quest for the truth, upon which a certain law is to be applied. In contrast, the typical adversarial, common-law based trial presupposes the detachment of the judge, who is primarily supposed to observe that the rules and procedures are properly observed by the contesting parties. In such cases, the truth is supposed to evolve from frequently disparate accounts given by the parties. The consequences of these differences are important. In an inquisitorial trial considerable segments of the case are handled in written form, frequently *in camera*, whereas the adversarial case is usually characterized by a public demonstration of the evidence and has a theatrical aspect to it. Hence cases handled in the inquisitorial legal system are not likely to turn the courtroom into a history classroom. The adversarial system has that potential, displayed both in criminal and civil cases, as demonstrated in the Zündel and Irving cases.

Juridical activity in the delineation of proper scholarship is an important reminder of a simple fact too easily neglected by contemporary epistemological debates. Historiography does not operate in isolation from the rest of society. It represents a social practice which is entangled, harmonized or contrasted, and finally, accountable to the other powerful factors which shape our reality. Wrestling with the problem of the proper interpretation of the past, the courts could not allow themselves abstract detachment. By and large, they had to resort to a strikingly plain criterion. What was necessary was to assess the intentions of the accused. If he was committing factual mistakes or errors in judgment in good faith, mere carelessness would not make him a denier. Bad intentions and deliberately deluding the public would. This differentiation between benevolent and malevolent writing, which bravely ignores Roland Barthes' dictum on the death of the author, is in fact not as unsophisticated as it may seem. It

rests on a minimalist, yet effective epistemological presupposition that in a given system one might not necessarily have to know the truth to be able to recognize a lie. Such a demarcation line was drawn in distinguishing revisionists from “revisionists.” At the same time, this line represents the edge of the credible academic position.

### NOTES

- 1 Contributions by the participants of that conference are published in the collective volume: Saul Friedlander, ed., *Probing the Limits of Representation: Nazism and the “Final Solution”* (Cambridge, Mass: Harvard University Press, 1992). The link between postmodernism and Holocaust denial was further tackled and refuted by Robert Eaglestone, *Postmodernism and Holocaust Denial* (Cambridge: Icon Book, 2001).
- 2 The dilemmas of distinguishing the narrow and wider understanding of historiographical revisionism are exposed in Brigitte Bailer-Galanda, “Revisionism” in *Germany and Austria: the Evolution of a Doctrine*, [www.doew.at/information/mitarbeiter/beitraege/revisionism.html](http://www.doew.at/information/mitarbeiter/beitraege/revisionism.html), (25 September, 2006). The sort of revisionism scrutinized in this article is increasingly being labeled as “revisionism” (in the USA) or negationism (in France). For a detailed account on negationism see Valérie Igounet, *Histoire du négationnisme en France* [History of negationism in France] (Paris: Seuil, 2000).
- 3 Mark Weber, *Freedom for Europe’s Prisoners of Conscience! Irving Zundel, Rudolf Still in Prison* (16 November, 2006), [www.ihr.org/news/061112\\_prisoners\\_of\\_conscience.shtml](http://www.ihr.org/news/061112_prisoners_of_conscience.shtml) (22 October, 2006).
- 4 Article 231 and related parts of the Versailles treaty were based on the findings of the international “Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties,” *American Journal of International Law*, Vol. 14, No. 1 (January–April, 1920): 95–154.
- 5 For more about the impact of this debate, see Anthony D’Agostino, “The Revisionist Tradition in European Diplomatic History,” *The Journal of The Historical Society*, Vol 4, No. 2 (2004): 255–287. The complex web of interdependency between such scholarly attempts and predominant political moods is revealed in contributions by Holger H. Herwig, Herman Witthens, Ellen L. Evans and Joseph O. Bazlen, collected in: Keith Wilson, ed., *Forging the Collective Memory. Government and International Historians through Two World Wars* (Providence, Oxford: Bergham Books, 1996), pp. 87–177.
- 6 Comparative overviews of the postwar retribution in Europe: Claudia Kuretsidis-Haider and Winfried R Garscha, eds., *Keine “Abrechnung.” NS-Verbrechen, Justiz und Gesellschaft in Europa nach 1945* [No “Settlement.” NS crimes, justice and society in Europe after 1945] (Leipzig, Wien: Akademische Verlagsanstalt, 1998); Klaus-Dietmar Henke, et al., *Politische Säuberung in Europa* [Political cleansing in Europe] (Munich: München Verlag 1991); István Deák, Jan T. Gross, and Tony Judt, eds., *The Politics of Retribution in Europe: World War II and its aftermath* (Princeton, NJ: Princeton University Press, 2000).
- 7 Quoted in Robert E. Connot, *Justice at Nuremberg* (New York: Carroll & Graf, 1988), p. xiii.

- 8 Lawrence Douglas, *The Memory of Judgement. Making Law and History in the Trials of the Holocaust* (New Heaven, London: Yale University Press, 2001), p. 2.
- 9 A.J.P. Taylor, *The Origins of the Second World War* (Middlesex: Penguin Books, 1961), pp. 68–72.
- 10 Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (New Brunswick, London: Transaction Publishers, 2000). Michael Marrus, “History and the Holocaust in the Courtroom” in: Ronald Smelser, ed., *Lessons and Legacies V. Holocaust and Justice* (Evanston, Illinois: Northwestern University Press, 2002), p. 235.
- 11 Maurice Bardèche’s entrance into the limelight is analyzed by Igounet, *Histoire du négationnisme en France*, pp. 37–60. He is singled out as the forerunner of contemporary revisionists both by Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (New York: Free Press, 1992), p. 50, and by Bailer-Galanda, “Revisionism” in *Germany and Austria*.
- 12 Revisionists did find a foothold in this approach, whose last word is David Irving’s *Nuremberg: The Last Battle* (London: Focal Point, 1996). This book delivered sharp blows both to the legality and the legitimacy of the Nuremberg proceedings, and is in dire need of factual scrutiny as many aspects of the book were criticized by the established scholar on Nuremberg, Ann Tusa, *Guilty on Falsifying History*, [www.nizkor.org/ftp.cgi/people/i/irving.david/press/Electric\\_Telegraph.961109](http://www.nizkor.org/ftp.cgi/people/i/irving.david/press/Electric_Telegraph.961109) (20 October, 2006).
- 13 Both authors attempted to systematize the typical strategies of denial: Pierre Vidal-Naquet, *Assassins of Memory. Essays on the Denial of the Holocaust* (New York: Columbia University Press, 1992), pp. 18–24; Deborah Lipstadt, *Denying the Holocaust*, pp. 21–27.
- 14 IHR, *A Few Facts About the Institute for Historical Review*, [www.ihr.org/main/about.shtml](http://www.ihr.org/main/about.shtml) (5 October, 2006)
- 15 About the legal fight against revisionism in Germany via criminal law, see Robert A. Kahn, *The Holocaust Denial and the Law* (New York: Palgrave, 2004), pp. 65–84. About the role of the “Auschwitz lie” in revisionist discourse, see Brigitte Bailer-Galanda, Wolfgang Benz, Wolfgang Neugebauer, eds., *Die Auschwitzleugner: revisionistische Geschichtslüge und historische Wahrheit* [Layers about Auschwitz: revisionist historical lies and the historical truth] (Berlin: Elefant Press, 1996). The law against the “Auschwitz lie” is commented on and debated in Eric Stein, “History Against Free Speech: The New German Law Against the ‘Auschwitz’ and Other ‘Lies’,” *Michigan Law Review*, Vol. no. 85 (1986); “On the ‘Auschwitz Lie’,” *Michigan Law Review*, Vol. 87, No. 5 (April, 1989): 1026–1032.
- 16 More about the juridical dealing with the Nazi past in Austria in several contributions in Claudia Kuretsidis-Haider, Winfrid R. Garscha, eds., *Keine “Abrechnung,”* pp. 16–128.
- 17 Henry Rousso maintains that the postwar purge of Nazi collaborators and Vichy loyalists was followed by widespread public oblivion regarding the issues of the Second World War, which in turn reappeared with particular forcefulness after 1968, and again in the late 1980s. The main phases of this development are outlined in his *The Vichy Syndrome* (Cambridge, Mass: Harvard University Press, 1991), pp. 220–227.
- 18 Verges’s strategy is analyzed in Douglas, *The Memory of Judgement*, pp. 207–9. Among the examples of such reactions in juridical terms, French General Paul Aussaresses, veteran of the Algerian war, was convicted in 2002 for justifying the implementation of torture during his operations in Algeria in his memoirs. The grounds for

- his conviction were found in a 1881 law on the media. The case is analyzed by Stiina Löytömäki, "Legalization of the Memory of the Algerian War in France," *Journal of the History of International Law* Vol. 7, (2005): 157–179.
- 19 Legifrance, *Loi Gayssot*, [www.legifrance.gouv.fr/WAspad/UnTexteDeJorF?numjo=JUSX9010223L](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorF?numjo=JUSX9010223L) (20 October, 2006). Gayssot Law is commented on and its application is described in: R. Kahn, *The Holocaust Denial and the Law*, pp. 94–117. The circumstances under which it was passed are described in Igounet, *Histoire du négationnisme en France*, pp. 444–446. The text of the law: Legifrance, *Loi Gayssot* [www.legifrance.gouv.fr/WAspad/UnTexteDeJorF?numjo=JUSX9010223L](http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorF?numjo=JUSX9010223L) (20 October, 2006).
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  - 23 Jerusalem Centre for Public Affairs, *Denial of the Holocaust and Moral Equivalence. An Interview with Deborah Lipstadt* (1 August, 2003) [www.jcpa.org/phas/phas-11.htm](http://www.jcpa.org/phas/phas-11.htm) (20 October, 2006).
  - 24 Robert Faurisson, *Letter to Christopher Hitchens*, October 5, 1994, [www.vho.org/aaargh/engl/FaurisArch/RF941005.html](http://www.vho.org/aaargh/engl/FaurisArch/RF941005.html) (20 October, 2006).
  - 25 For a recent critical overview see Gerard Alexander, "Illiberal Europe," *Weekly Standard* Vol. 11, issue 28, (10 April, 2006), [www.weeklystandard.com/Content/Public/Articles/000/000/012/055sbhvq.asp](http://www.weeklystandard.com/Content/Public/Articles/000/000/012/055sbhvq.asp) (20 October, 2006).
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  - 28 About the case: R. Kahn, *The Holocaust Denial and the Law*, pp. 22–31.
  - 29 Ira Moskowitz, "U.S.-born Professor Guilty of Libeling Colleague," *Haaretz* (9 June, 2006).
  - 30 The variety of approaches to Nazism is masterfully analyzed in Ian Kershaw, *The Nazi Dictatorship. Problems and Perspectives of Interpretation* (New York: Oxford University Press, 2000).
  - 31 The case of Bernard Lewis became an important tool in on-going Turkish and Armenian wars of memory. Consequently, Internet information on the event shows considerable bias. Noteworthy exception: *The Bernard Lewis Trial*, [www.ids.net/~gregan/lewis.html](http://www.ids.net/~gregan/lewis.html) (20 October, 2006).
  - 32 The Bernard Lewis Trial, "Judgment Rendered 21 June, 1995," p. 12, [www.ids.net/~gregan/dec\\_eng.html](http://www.ids.net/~gregan/dec_eng.html) (20 October, 2006).
  - 33 *Ibid.*, p. 14.
  - 34 About the case: R. Kahn, *The Holocaust Denial and the Law*, pp. 85–94; Deborah Lipstadt, *Denying the Holocaust*, pp. 157–177.
  - 35 Excerpts from Hilberg's cross-examination appear in Lawrence Douglas, *The Memory of Judgement*, pp. 230–238.

- 36 Christopher Browning talks about his experience in the witness box in *Holocaust Denial in the Courtroom: The Historian as Expert Witness*, [www.plu.edu/~lutecast/2004/20041014-lemkin.html](http://www.plu.edu/~lutecast/2004/20041014-lemkin.html).
- 37 Abundant material on the case is available at Holocaust Denial on Trial, Transcripts, Day 01, *Opening Statements by Richard Rampton and David Irving*, p. 34, [www.hdot.org/ieindex.html](http://www.hdot.org/ieindex.html).
- 38 All the reports are accessible on Holocaust Denial on Trial, *Evidence*, (Richard J. Evans, *David Irving, Hitler and the Holocaust Denial*; Hajo Funke, *David Irving, Holocaust Denial, and his Connections to Right Wing Extremists and Neo-National Socialism in Germany*; Christopher Browning, *Evidence for the Implementation of the Final Solution*; Peter Longerich, *Hitler's Role in the Persecution of the Jews by the Nazi Regime and The Systematic Character of the National Socialist Policy for the Extermination of the Jews*; *The Van Pelt Report*) [www.hdot.org/ieindex.html](http://www.hdot.org/ieindex.html) (20 October, 2006).
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- 41 Holocaust Denial on Trial, Richard Evans, David Irving, *Hitler and Holocaust Denial*, 6.21 [www.holocaustdenialontrial.org/evidence/evans006.asp](http://www.holocaustdenialontrial.org/evidence/evans006.asp) (20 October, 2006).
- 42 Quotes from D.D. Guttenplan, *The Holocaust on Trial*, pp. 29, 34, 30, 274. Irving's mistakes during the trial are analyzed by Yale F. Edeiken, *Irving's War*, [www.holocaust-history.org/irvings-war/](http://www.holocaust-history.org/irvings-war/) (20 October, 2006).
- 43 Holocaust Denial on Trial, *Judgment*, XIII, Findings on Justification 13141, 13.144. 13.151, 13.162, 13.167, [www.hdot.org/ieindex.html](http://www.hdot.org/ieindex.html) (20 October, 2006).
- 44 David Irving, *Vienna Imprisonment*, [www.codoh.com/irving/irvvienna.html](http://www.codoh.com/irving/irvvienna.html) (20 October, 2006).
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- 46 These critical approaches are assembled in Richard Evans, *Lying about Hitler*, pp. 186–187.
- 47 *Ibid.*, pp. 188–191.
- 48 Michael Marrus, “History and the Holocaust in the Courtroom,” p. 227.

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