

Holocaust History And The Law: 1985-1995

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Perhaps I was among the first dressed in 'zebra' clothes to appear in that place called Trzebinia; I immediately found myself the centre of a dense group of curious people, who interrogated me volubly in Polish. I replied as best I could in German: and in the middle of the group of workers and peasants a bourgeois appeared, with felt hat, glasses and a leather briefcase in his hand - a lawyer.

He was Polish, he spoke French and German well, he was an extremely courteous and benevolent person: in short, he possessed all the requisites enabling me finally, after the long year of slavery and silence, to recognize in him the messenger, the spokesman of the civilized world, the first that I had met.

I had a torrent of urgent things to tell the civilized world: my things, but everyone's, things of blood, things which (it seemed to me) ought to shake every conscience to its very foundations. In truth, the lawyer was courteous and benevolent: he questioned me, and I spoke at dizzy speed of those so recent experiences of mine, of Auschwitz nearby, yet, it seemed, unknown to all, of the hecatomb from which I alone had escaped, of everything. The lawyer translated into Polish for the public. Now, I do not know Polish, but I know how one says "Jew" and how one says "political"; and I soon realized that the translation of my account, although sympathetic, was not faithful to it. The lawyer described me to the public not as an Italian Jew, but as an Italian political prisoner.

I had dreamed, we had always dreamed, of something like this, in the nights at Auschwitz; of speaking and not being listened to, of

finding liberty and remaining alone. After a while I remained alone with the lawyer; a few minutes later he also left me, urbanely excusing himself.

Primo Levi (1966:47)

Fifty years ago, as the Allies advanced towards Berlin, one after the other concentration and death camps were liberated. Liberation. What a deceiving word. Yes, liberation from the immediate murderous presence of the nazis - but was instant liberation and freedom possible? Will any survivor ever be liberated from memories? Will any Jew ever be liberated from the knowledge that the Jewish nation was to be exterminated? Still - it was liberation. It was liberation for those who staggered out of the factories of death only to become 'displaced people', for most nowhere to go, no place to return to, interned in new camps - and sometimes in the old ones. Displaced not only geographically but temporally too: severed from their past, not allowed to start a future. Liberation meant that they were not singled out for death anymore. But so many still died and so many still could not start living, could not go home.

The moment of liberation also meant having to deal with what had happened. Something had to be done to restore some kind of moral equilibrium by punishing the perpetrators. Indeed the (first) institutional way of remembering was through the trials.

At Nuremberg the Holocaust was history in the sense that it was a past event (anything that is not now but before now is 'past') and in the sense that any trial deals with the past, whether it is the history of a contract, a tort or a crime. This was the case in the Eichmann trial as well. It was living history, relevant to every citizen, directly affecting their perception and understanding of the present. But, as Hannah Arendt already observed at the time, the Eichmann trial was the last of the numerous successor trials. (Arendt 1963: 242) After the Eichmann trial in 1961, for some fifteen years no war criminal was prosecuted by the former Allies. In this fifteen years the narrative of the Holocaust became the narrative of Holocaust history. Through the agencies of the media, popular culture (especially films), through politics and through law the history of the Holocaust was re-presented. A paradigm shift could be observed in historiography, politics and in law.

The war crimes trials of the last fifteen years exemplified two major aspects of the same shift in the field of law: the denial of the universality

of the Holocaust in the Barbie case and the question of how to deal with Holocaust denial in the Zundel case. Later, the Australian Polyukhovich case presented a third aspect: the geographical and historical distance between the Holocaust and the legal process. Yet all three cases have this in common: they represent the encounter of Holocaust history and the law.

MODERNITY AND THE HOLOCAUST

What is the meaning of the Holocaust for Western civilisation? Is it an ever-present potentiality of modernity, as Bauman suggests? Was it the culmination (and combination) of a culture, imbued with hatred and cruelty, in which the articulation of the separateness and superiority of the ideology and the institution (Christianity and the Church) was achieved through the degradation and vilification of the 'other': Jews and Judaism.

The meaning of the Holocaust to Western civilisation has to be central. Through the conduits of religion, culture, and modern society the hatred of Jews arches across two thousand years. Inasmuch as Christianity was central to western culture, the hatred of Jews in culture was central. Enlightenment ideals did not necessarily provide immunity from hatred.¹ Modern ideologies, which developed since (nationalism, populism, fascism and nazism), contain this anti-Jewish, anti-Judaic kernel, some more, others less explicitly, but always accessible and looming. All issues of modernity could be (and were) symbolised by Jews.² Politically and socially the essentially modern issues often appeared synonymous with Jewish issues. Jews were at the centre at the modern trial: the Dreyfus affair, which re-focussed the issue of antisemitism in the modern world. We remember the Dreyfus affair so much because it was paradigmatic not only for Jews and not only for the French. It was an essentially modern trial, where issues of modernity and figures embodying issues of modernity were acted out and articulated.

Lyotard, the political philosopher of postmodernity, argues that modern history and science produced two 'grand narratives' as legitimacy themes: a political and a philosophical. The political narrative legitimates the state and knowledge because it promises emancipation. The philosophical narrative holds out the promise of a totality of science and culture through speculative knowledge. According to Lyotard both narratives have failed: they led to Auschwitz and the Gulag. There is no new higher theory to replace them - nor is a new theory desirable.³

THE UNIVERSALISM OF THE HOLOCAUST

What is the meaning of the Holocaust for non-Western culture? For the third world? It could be perceived as an issue for Western civilisation, after all it 'belongs' to Western Civilisation.⁴ Yet already in 1959 Adorno observed:

Today the fascist fantasy undeniably blends with the nationalism of the so-called underdeveloped countries...(Adorno 1963: 123)

By linking of the Holocaust to the state of Israel, Holocaust denial transcends the obvious nazi and neo-nazi (including skinhead) groupings and surfaces in non-Western world. This is behind the strange political alliances. Nazis found haven in Arab countries and (neo-)nazis and Islamist terrorists found common ground in their hatred of Jews and Israel.⁵ Nazis, who seek to reclaim the 'honour' of nazism by denying the Holocaust and arguing that it was a Jewish 'invention', supported Saddam Hussein and opposed the Gulf War.⁶ Books on Holocaust denial (alongside Mein Kampf) are printed and sold in Damascus and Cairo and are promoted and distributed by the Ku Klux Klan. Holocaust denier Butz was invited to speak to Farrakhan's Nation of Islam. In 1992 the world anti-Zionist conference was scheduled to have Farrakhan, the Black Muslim leader, alongside with Faurisson, Leuchter and Irving and representatives of the paramilitary Russian Pamyat, Hezbollah and Hamas.⁷ (Lipstadt 1993: 14, 126) What all these diverse groups had in common was their hatred of Jews.

But there are other aspects of this phenomenon. Modernisation is a western concept. In western society the problems of modernity appeared as connected, or at least connectable, to Jews and Jewish issues. The third world perceives western modernisation as a threat to identity which now has to be re-claimed and developed in spite of the influence of western culture. For those who are reclaiming their own identity, (and not only Islamists or fundamentalists) it is a ready-made connection to use those ideologies (or parts of those ideologies) which attacked modernity through Jews. Modernity, developed within and through Western culture, was and is diffused with antisemitism - and postmodernity is informed and determined by modernity.

In postmodern (post-colonialist) context Jews are perceived as symbolising the white enemy, the white slave-trader and keeper; colonialism and colonialists; the pornographer and the perverter of culture; American imperialism and corruption (and vice versa: all these are symbolised by Jews).

The 'shared' hatred also serves as a kind of legitimation. Through the patterns of antisemitic images, by attributing the ills of modernity to Jews, non-Westerners can generate support and acceptance for their own political agendas. Holocaust denial is the platform where the radical right of Western societies and the Third World meet.⁸

THE KLAUS BARBIE TRIAL AS POSTMODERN PARADIGM 1987

Because the Barbie trial did become a media event, it had the weakness of the media; it was sentimentalized and trivialized, distorted and valued for the wrong reasons. And because it was a media event, it penetrated French national consciousness. If you went to the coiffure, you talked about the Barbie trial, if you read the newspapers, you read about the Barbie trial; and if you sat at the family dinner table, chances are you talked about the Barbie trial, whether you lived in low income housing in the northern suburbs of Paris or in a chateau in Sologne. The Barbie trial was an event of major cultural importance, whose process, finally was as important as its result. It has influenced the teaching of French history, it has challenged French jurisprudence, and it has affected every debate about politics and culture to have come in its wake. (Kaplan 1992: xxix)

The representation of the Shoah was vastly different in the Nuremberg trials and in the Barbie trial. While the Nuremberg trials and the Eichmann trial still had a single narrative - that of the Holocaust - the Barbie trial allowed questioning the relevance of the Holocaust. In the Barbie case the postmodern plurality of narrative appeared in the trial. Gestapo chief Barbie, 'the butcher of Lyon', was the murderer of the greatest martyr of the French Resistance, the slaughterer of Jewish children of Izieu. After the war, he lived in Bolivia as the brutal henchman of the hated dictator. But through Verges, Barbie's lawyer, other causes came into forefront of French consciousness as well. Verges used and exploded the myth of the Resistance and exposed the real proportions of collaborations with the Nazis. The war in Algeria and the Arab Israeli conflict were also made part of the trial.⁹

The Barbie trial made the past into a current event - not only because what he stood on trial for had happened forty six years earlier, but also because the Holocaust was put alongside current issues, such as the war in Algiers

and the Arab-Israeli conflict. The script of the Bitburg incident provided a *carte blanche* of shady legitimacy for Verges' tactic of washing away the difference between victim and perpetrator.¹⁰ The defence made the trial an occasion to champion third world causes and to accuse the French state of political and moral hypocrisy.

Evoking not so much the actual Dreyfus Affair, but rather the memories of it, in his book about the Barbie trial, *Remembering in Vain*, Finkelkraut quotes Charles Peguy, one of the brilliant essayists in the pro-Dreyfus camp.¹¹ While telling about the Dreyfus trial to a young student, Peguy realizes that it is frozen into history:

yet the relationship of past to present in Peguy's discourse on memory is still relatively clear. The present moves; the past remains still. The Klaus Barbie story, by contrast, confuses decades, political positions, moral stands... inexplicable alliances ensue. Verges, left-wing champion of Third World causes, is defending the right-wing nazi and charging the socialist French state with political and moral hypocrisy. (Kaplan 1992: xxiii)

The comparison between the Dreyfus trials and the Barbie trial isn't just about the unity of the Dreyfus narrative and the confusion of the Barbie narrative. Finkelkraut calls Peguy's view of history 'modern' because Peguy was telling the story and the student learned about the past. 'He was becoming informed. He was learning. Alas, he was learning history.'¹² But in the Barbie trial what is the story told? What the Barbie trial poignantly brought to the surface was that 'news' obscures history - in fact 'news' is inverse to history. If the Dreyfus affair was the epitome of the modern trial, Verges, the defence-attorney of Barbie succeeded -with not a little help from the prosecution and politics - in orchestrating and staging the essential postmodern trial: with the issues of postmodernity taking centre stage.¹³ It was postmodern

because it was fortythree years after the fact; postmodern because the man on trial seemed only a shadow version of the actual Butcher of Lyons...; postmodern, because his defense lawyer was defending him on the basis of history that occurred after his own crimes; postmodern, because both the defense and the prosecutor were fragmented and even disagreed among themselves about which victims and what events they were representing...the Barbie trial was a postmodern trial because everything in it was at odds: the histories of the prosecuting groups, the motives of the

defendant and the defenders, the huge gap of time itself between the event and the trial. (Kaplan 1992: xxi-xxii, my emphasis)

In the Barbie trial we witness the localisation and pluralisation of narratives. The issues introduced by the defence were legitimate: there was (is) a myth about the vast numbers of French resistance and the war in Algiers was a colonialist war. However the trial was the trial of a perpetrator of mass-murder in the Holocaust. The narratives of Verges' were used to diminish the Holocaust, to diminish the crime. Verges sought to delegitimise and ultimately to obliterate the narrative of the Holocaust altogether. Viewing the moral issue and ethico-political justice involved in the breakdown of the 'grand narrative', Heller and Feher warned:

If total moral relativism, which is undeniably one of the options of postmodernity, gains the upper hand, even the assessment of mass deportation and genocide becomes a matter of taste. (Heller: 9)

'THE THOUSAND DARKNESSES OF MURDEROUS SPEECH' - HOLOCAUST DENIAL AND THE LAW

he who lies to kill the truth, he who sheds truthblood, tomorrow would shed my blood and yours (Helene Cixous)

The denial of the Holocaust is not simply a different view of history. It is more than denial of history, or denial of facts. Holocaust deniers deny that crime has been committed. Answering the old question *cui prodest*, it is easy to see that it benefits those who want to rehabilitate nazism and victimise Jews.

The basic tenets of Holocaust denial are that the Holocaust did not happen, it is a myth, a hoax, invented by the Jews, who invented it for money, to victimise Germans and to create the state of Israel (as if the creation of a nationstate was such an unheard and undesirable event). The 'real victims' are the German people, Palestinians and Christians generally while the real perpetrators, the real 'nazis' are Jews: nazi Zionists.¹⁴ Ergo, the nazi thesis was correct: Jews are a threat to the whole world. Holocaust denial, in the footsteps of nazi hatred of Jews, use traditional antisemitic imagery: money and conspiracy to rule the world.

As Deborah Lipstadt pointed out, the basic assertions of rudimentary

Holocaust denial fall into three distinct categories. First, by declaring that there was no plan for genocide and arguing technological impossibility they aim to absolve the nazis and whitewash nazism. Second, by arguing that Jews died either of natural causes (sickness) or were executed for sabotage and for other criminal activity, they legitimate the killings. Third, it is claimed that the hoax is in the interest of Israel and Jews worldwide, who do it for various gains (financial and political). (Lipstadt 1993: 99)

Holocaust denial increased in scope and intensity from the mid-1970s:

It is important to understand that the deniers do not work in a vacuum. Part of their success can be traced to an intellectual climate that has made its mark in the scholarly world during the past two decades. (Lipstadt 1993: 17)

By the beginning of the 1980s some historians observed a change in progress. Lucy Dawidowicz, in *The Holocaust and the Historians*, published in 1980, examined ways in which the Holocaust was trivialised and exploited. Yehuda Bauer, in his seminal article 'Whose Holocaust?', published in 1980, argued that the meaning of the Holocaust was being flattened, albeit 'with the best of intentions'. Dawidowicz and Bauer discerned a change in the meaning of the Holocaust in political culture. But the brazenness of the Bitburg visit and the accompanying statements and polemics signalled a new phase.¹⁵ It was at Bitburg that President Reagan announced:

'They [those buried at Bitburg] were victims just as surely as the victims in the concentration camps.' (Hartman 1986: 240)

Just like that. The vital distinction between the victim and the perpetrator was washed over and the uniqueness of the Holocaust negated, to become like other crimes: 'normal', controllable, under control, nothing to unduly worry about. The visit mitigated the horror of the camps, not by denying it but by using equalising comparisons. Washing together the victim and the perpetrator is the first step in destroying memory. 'And it is as good as if it never happened', utters the devil in Goethe's *Faust*, as Adorno reminds us, 'to reveal his innermost principle: the destruction of memory'. (Adorno 1986: 117)

The Bitburg incident was simultaneously a symptom and an action generating shift. In the new phase, ushered in at Bitburg, concepts, which hitherto belonged outside of legitimate scholarship and politics were openly

expressed and became part of social and political ethos. Through Bitburg (and the Historikerstreit) Holocaust denial was obliquely legitimised.¹⁶

THE ZUNDEL TRIAL, 1985-1988

Ernst Zundel, a large-scale distributor of antisemitic literature, was charged in 1984 under Canadian legislation with stimulating antisemitism through the publication and distribution of hate material. Zundel asserted that the killing of six million Jews was a fraudulent invention by Jews. Initially, Sabina Citron, a Holocaust survivor who brought the first charges against Zundel, sought to lay a complaint under criminal law.¹⁷ However, in Canada the consent of the attorney general is needed to prosecute and the attorney general felt that the section of the criminal code was unenforceable and the prosecution would lose. Citron found a section of the criminal code, which made an offence for someone to willfully spread false news causing or likely to cause racial or religious intolerance.¹⁸ Zundel was convicted for publishing false news detrimental to the public interest. The conviction was reversed in 1987.¹⁹ The retrial of the case found Zundel guilty and sentenced him to nine months in jail.

The defense sought to argue that the Holocaust never happened. The courts did not take judicial notice of the Holocaust as a historical fact. Judicial notice is a principle of evidence which allows courts to acknowledge matters which are common knowledge and about which reasonable people would agree. Two constitutional courts of West Germany held for instance that the Holocaust was *Offenkundig*, that is, an obvious matter. Although in many war crimes suspect cases in the US and elsewhere there have been findings about the Holocaust and the courts could use those cases, neither in Zundel nor Keegstra was judicial notice of the Holocaust taken.²⁰ Had the Crown prosecutor, at the beginning of the trial asked the court to take judicial notice, the court may have done so. But the case was unprecedented and the Crown was not only unprepared for, but in a certain way outmanoeuvred by, the defense. (*Symposium*, 1988: 68-9)

This aspect, the haphazard quality of the law, that the potential outcome of the case depends on the skill of the lawyer, on presentation and quick-wittedness, is (still) a perplexity, especially for somebody coming from the non-adversarial civil law system (as I do). In the case of these crimes, i.e. genocide, the denial of genocide and the incitement to genocidal hatred, it shows up the inability of the ordinary law to deal with these non-ordinary crimes.

Zundel's lawyer, Doug Christie, was well prepared. He defended scores of Holocaust deniers, neo-nazi and nazi war criminals.²¹ Zundel and Christie were assisted by Robert Faurisson and by David Irving, who both flew to Toronto to testify as expert witnesses for the defense. Both Irving and Faurisson suggested that Leuchter should be invited by the defense as expert witness. The Zundel case became an international convention of Holocaust deniers. Faurisson, Leuchter and Irving forged an alliance. As a result of their meeting in Toronto, during Zundel's trial, Leuchter set out for a week's 'research' in Poland, and published his 'findings' in *The Leuchter report: An Engineering Report on the alleged Execution Gas Chambers at Auschwitz, Birkenau, and Majdanek, Poland.* (Lipstadt 163-166) Leuchter's qualifications as an expert witness had to be determined by the court. He was exposed as a fraud and Judge Ronald Thomas ruled that Leuchter could not serve as an expert witness:

His opinion on this report is that there were never any gassings or there were never any exterminations carried out in this facility. As far as I am concerned, from what I heard, he is not capable of giving that opinion. He is not in a position to say, as he said so sweepingly in this report, what could not have been carried on in these facilities.²²

In August 1992 the Canadian Supreme Court overturned Zundel's conviction. The court ruled that the prohibition against false news likely to harm a recognisable group is too vague and possibly restricted legitimate forms of speech. Faurisson himself was convicted for proclaiming the Holocaust was a lie - but Noam Chomsky argued for Faurisson's right to free speech and declared that Faurisson's book (for which he wrote the Preface) was based on legitimate research and not on antisemitism.²³ For the deniers to have somebody like Noam Chomsky, who is ready to describe denial as a free speech issue, as a matter of opinion to be defended by the institutions of democracy and liberalism, has been a major feat in legitimation.²⁴

In many countries the denial of the Holocaust is criminalised. The deniers' response is to present themselves as martyrs on the altar of freedom of speech.²⁵

THE ISSUE OF FREE SPEECH

There are remedies for false advertising and sanctions against offensive pornography. But none for Holocaust Denial. I am concerned that the government's real message is: "We don't care about these kinds of wrongs." (Symposium 1988: 84)

Freedom of speech is one of the fundamental freedoms of democratic societies. But as Justice Lionel Murphy eloquently said, it is not an absolute:

Free speech is only what is left after due weight has been accorded to the laws relating to defamation, blasphemy, copyright, sedition, obscenity, use of insulting words, official secrecy, contempt of court and of parliament, incitement and censorship. (Einfeld 1987: 188)

On the other side of free speech is the right to protection of those who suffer through this freedom.

The Skokie case represented what could be called the ultimate expression of pragmatic schizophrenia. The case was about the right of a nazi organisation to hold a march with swastikas and other nazi symbols through the town of Skokie, in a predominantly Jewish neighbourhood with a great number of survivors. The district court's decision, which held that three local village ordinances trying to stop the march was unconstitutional, was affirmed.²⁶ The message to the anguished was:

Accept the freedom of your abusers. This best protects you in the end. Let it happen. You are not really being hurt. (MacKinnon 1994: 75)

The judge advised the Jewish citizens of Skokie that 'it is their burden to avoid the offensive symbol' [i.e. the swastika].²⁷ Underneath the insistence on defending the right to reprehensible conduct lies the pretence that the position of the abused and the abuser is the same: that the freedoms and rights to be protected are more important than the harm and the abuse of the action. Freedom of speech must be read together with an equality of rights and abstracted from it. There has to be a notion of freedom from certain kinds of expressions (Symposium 1988: 79-80).²⁸ The judges who upheld the right of nazis to march, ignored that the march (and the symbols) re-enacted the original experience of abuse. Because, as MacKinnon pointed it out, defending the abuse as right also is abuse. (MacKinnon 1994: 74)

Skokie and Zundel were both secondary Holocaust cases in the sense that the main issue was not the Holocaust but its memory. They were about our understanding of the Holocaust as history incorporated in the present, the Holocaust as an abstract concept, an interpretation. They were about the reflection of the Holocaust, rather than the Holocaust. These were not war

crimes trials. The central issues were representation and the symbols of the Holocaust. The defendants, or, rather, the actors were abusers of memory, not war criminals, perpetrators themselves. But in Canada and the United States, and for that matter, in Australia, there were (are) scores of perpetrators of genocide un-prosecuted, un-tried.

For forty years there were no war crimes trials in any of the formerly Allied countries. There was a secret understanding between the Allies: no more trials.²⁹ (The Eichmann trial was unstoppable because it was in the hands of Israel. Israel would not have bowed to any pragmatic political considerations.) For some forty-odd years nazi torturer-murderers lived in peace. In this forty years the Holocaust -for non-Jews- became impersonal, distant history.

WAR CRIMINALS AND IMMIGRATION - PARALLEL PATTERNS

In 1948 the governments of the United States and Great Britain agreed to end the war crimes trials.³⁰ This agreement affected both Canada and Australia, as members of the Commonwealth. Although there were assorted allegations surfacing intermittently that nazi war criminals had entered Australia, until 1987 the government ignored these.³¹

[C]hanging political positions affected the way in which the Australian government treated Germans, former nazis and war criminals.... Somehow in the confusion that embroiled post-war Europe, together with the increasing fear of communism, the desire to punish other than the most major war criminals diminished. (Report, 13)

After the war the official policy of Australia discouraged Jewish immigration and allowed, indeed preferred 'white' Europeans, among them war criminals, to settle in Australia.³² In Allan Ryan's chilling summary of how nazi war criminals came to settle in America, it was:

by and large not a story of intelligence collaboration. It is much more shocking.... We invited Nazi war criminals to come into this country because we passed a law that made it easy for them to do so throughout the 1950s, 1960s and 1970s. (Symposium 1988: 19)

Ryan lists four legal provisions which allowed preference to war criminals over Jews.³³ His description of the US Displaced Persons Act of 1948 also fits Australian post-war policies:

[the act was] written to exclude as many concentration camp survivors as possible and to include as many Baltic and Ukrainian and ethnic German Volksdeutsche as it could get away with. (Ryan 1984: 17)³⁴

Canada, like the US and Australia, also tried to keep down the number of Jewish immigrants. Those survivors who entered the country illegally were deported (Symposium 1988: 40). In Canada the Deschenes Report exposed not only a pattern of governmental inaction but 'a reasonable apprehension of obstruction of justice'.³⁵ In all these countries, the official policy of emigration was asymmetrically favouring nazis over Jews. For forty years there were no investigations until in the mid-eighties these countries officially acknowledged that war criminals were granted citizenship.³⁶

THE QUIET NEIGHBOUR: THE POLITICS OF PROSECUTION

It's been a tragedy to watch. As his neighbours said a long time ago, 'He is a lovely man whatever he may or may not have done fifty years ago.' They said, 'He is a lovely old bloke and he's suffered'. (David Stokes, lawyer for the defense in Australia's single war crimes trial)³⁷

When in 1961 the Soviet Union requested the extradition of Viks, who, as chief of Security Police in Tallin, Estonia, was responsible for the murder of thousands of people, Australia refused. Garfield Barwick, Attorney-General and acting External Affairs Minister, who made the decision, explained what he saw as a dilemma:

On the one hand, there is the utter abhorrence felt by Australians for those offences against humanity to which we give the generic names of war crimes. On the other hand, there is the right of this nation, by receiving people into this country, to enable men to turn their backs on past bitternesses and to make a new life for themselves and for their families in a happier community... [Those] who have been allowed to make their homes here, must be able to live, in security, new lives under the rule of law... [W]e

think the time has come to close the chapter. (Report, p 215)

That Australia became a haven for murderers and mass murder was re-presented as simple 'past bitterness', some kind of two sided affair, a squabble maybe. War criminals were given the chance to become 'ordinary men' again. As Christopher Browning wrote, killers, who were 'ordinary men' before becoming genocidal murderers did go back to their ordinary lives and lived as good neighbours and conscientious workers. Aided by the official policy, the war criminals did settle in and became nice next door neighbours and were allowed to become old pensioners. This was exactly how numerous politicians and journalists saw these men: peaceful old pensioners, harassed by vengeful Jews.

War crimes investigations in Australia started in 1986 with a radio program on Australia's national ABC, exposing numerous murderers. As a direct outcome, a Royal Commission was set up to investigate the matter. Under the leadership of Menzies it found that indeed, war criminals reside in Australia. The Menzies Report recommended that a small unit be established to investigate the allegations and that if the War Crimes Act of 1945 was amended to allow war crimes to be dealt with Australian Courts, the unit be given the task of assembling evidence. In 1987, the War Crimes Amendment Bill was introduced to Parliament.³⁸

Writing about the Eichmann trial, international jurist Julius Stone observed what he called a most striking paradox:

This paradox is that the most persistent vocal protests surrounding this case have been protests against the trial, rather than the fact that such hideous crimes were possible. (Stone 1961: 6)

All one has to do is substitute 'war crimes legislation' instead of 'trial' and the observation is a true description of Australia in the wake of the Menzies Report. The media was abuzz with letters and interviews while the two houses of the Parliament debated whether genocidal killers should be brought to justice. Archbishop of Melbourne David Penman counselled against the Bill:

Will we become a nation who can exercise forgiveness and mercy or will we become people committed to vengeance? (Bevan 1994: 22)

The Archbishop did not argue that law should not be used against 'ordi-

nary' murderers: only those murderers who murdered Jews. He was in fact saying: Jews as victims do not warrant prosecution. Victims of other crimes are worthy of criminal retribution - victims of the Holocaust are not worthy. What compounds this sentiment is the antisemitic imagery of 'vengeful Jews': to be vengeful is 'un-Christian' and thus deplorable. To seek out the perpetrators of the Holocaust is not pursuit of justice but Jewish vengeance as opposed to Christian forgiveness. (One shudders to conclude: does that mean that the Archbishop forgave the Holocaust?)

In the Parliament one senator moved that the Senate notes the

concern that the legislation 'might cause divisiveness in the Australian community'. (Hansard, December 1988, p. 3430)

The national president of the Returned Services League, Brigadier Alf Garland said:

You can't try people for 1940s crimes with a 1980s' morality. We are now making people guilty of crimes that at the time they did not know were crimes. (Bevan 1994: 22)

Murder was a crime even in nazi Germany. Murder was never de-criminalised by the nazis - instead, Jews were deemed outside of law by nazi doctrine and legislation. But no nazi law declared that the murder of Jews was not murder.

Although Australia has a criminal system without statute of limitations, Justice Kirby tentatively offered an alternative to the prosecution of war criminals:

Others will say that it would have been better to have spent the money on the famine victims in Somalia or perhaps built a hospital in the Ukraine to help the children who are victims of Chernobyl as a more enduring memorial to those suffered in war crimes. Each reader must decide. (Kirby 1992: 115)

HISTORY, JUSTICE AND THE LAW

The purpose of a trial is to render justice, and nothing else; even the noblest of ulterior purposes - the making of a record of the Hitler regime which would withstand the test of history," as Robert G. Storey, executive trial counsel at Nuremberg, formu-

lated the supposed higher aims of the Nuremberg Trials- can only detract from the law's main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment... Hence, to the question most commonly asked about the Eichmann trial: What good does it do? there is but one possible answer: It will do justice. (Arendt 1963: 233-4)

There are some who argue that trials are educational. In the trials the victims are witnesses and the perpetrators are accused. Reaffirming who were the victims and who were perpetrators in the face of the growing trend of Holocaust denial, is terribly important.

Trials produce contemporaneous documents, with an authenticity sometimes lacking in post-event materials. (Tatz 1995: 31)

Irwin Cotler argues similarly:

In my view, the whole question of bringing suspected Nazi war criminals to justice is inextricably bound up with the whole question of Holocaust Denial in this sense: Every time we bring a suspected Nazi war criminal to justice, we repudiate by the legal process the Holocaust Denial movement. Conversely, every time we abstain, for whatever reason, and do not bring suspected Nazi war criminals to justice, it allows the inference to be drawn that if there were no criminals, it's because there were no crimes. (Symposium 1988: 70)

Gerschom Scholem wrote that the significance of the Eichmann trial was that it revealed to the world the meaning of the dehumanisation the nazi movement preached and practiced. (Scholem 1976: 299) The Barbie trial was regarded as a 'pedagogic trial' (by the French government), 'an enormous national psychodrama' (social historian Ladurie), 'a proper history lesson', the true significance of which is 'symbolic' (by Simon Wiesenthal).³⁹ Binder wrote that the Barbie trial, 'France's most important trial, ten-thousand times a murder trial' was 'important above all as culture'. Barbie came to symbolize 'causes that transcend his crimes'. (Binder, p 1323) Henry Friedlander argued that the trials in East and West Germany and Austria have been of enormous help to historians. He said: 'what makes the trials in German court so valuable, is not the rate of conviction, which is low, and not the size of the sentences, which are minuscule, it is the historical work done by the prosecutors and the courts.' (Symposium 1988: 5)⁴⁰

All these are important considerations. Yet the reason we should prosecute is because a crime was committed. It is imperative to prosecute because the alternative is not to prosecute. And not to prosecute means that there is nothing to prosecute for: the action was not a crime.

Trial is an articulation by the state that some kind of evil is believed to have occurred... Trial is about as much of a public declaration as we can get that there are moral and ethical values which society wishes, or needs to sustain. (Tatz 1995: 31)

Whether evidence presented in a trial can be used as historical documents or not, is not self-evident (pun non-intended). Certainly, the Nuremberg and the Eichmann (and other) trials and investigations did create such evidence. But in Australia's Polyukhovich trial legal evidence and historical evidence came into conflict.

THE HISTORIAN AND THE JUDGE - THE POLYUKHOVICH CASE, 1991-1993

The single war crimes trial in Australia took place in South Australia with Ivan Polyukhovich, a former Ukrainian as defendant. In the Ukraine, similarly to the Baltic states, the Germans were assisted by many locals who sometimes staged their own anticipatory massacres or joined the Germans and helped in the perpetration of the 'final solution'. Under the War Crimes Amendment Act 1988, Ivan Polyukhovich was charged with participating in the murder of some eight hundred fifty people at the village of Serniki in the Ukraine.⁴¹ The committal hearings were interrupted by Polyukhovich's challenge to the Constitutional validity of the war crimes legislation. The High Court of Australia, in a majority decision, endorsed the legislation, and Polyukhovich stood trial in Adelaide.⁴²

The involvement of foresters in the murder of Jews was crucial to the trial. Polyukhovich's lawyers argued that Polyukhovich was but a simple forester and as such had nothing to do with the Jews. However, historian Konrad Kwiet's research showed that foresters did play an integral part.⁴³ The German army used them as scouts in early battles with partisans, as they provided invaluable help through their knowledge of the local woods. According to Kwiet's research, foresters had been involved in the execution of the 'final solution'. They supervised Jews working as slave-labourers at the sawmills. After ghetto liquidations they helped to find and kill Jews who escaped into the forest. Special arrangements were put into place

for foresters to take part in the rounding up, guarding and killing of Jews. 'These killings did not appear to be subject to the usual restrictions on the use of weapons', wrote Kwiet. (Bevan 1994: 224) Even further, Kwiet unearthed the name 'Johann Poluchowich' on application forms for ration cards, described as a member of the Forestry Protection Commando. Civil authorities issued papers to local employees stressing their wholehearted commitment to the German war effort. As the Germans were forced to retreat, the Poluchowiches retreated with them. In March 1944 there is evidence of 'Johann Polichowich' being issued with a workbook in Stade, Germany.

It was up to the judge to decide how much of Konrad Kwiet's research was admissible evidence. (Bevan 1994: 224-5) The jury was staying in the jury-room for almost two days while in the courtroom lawyers sorted out what professor Konrad Kwiet was allowed to say. During the one week of giving evidence, Professor Kwiet was 'constantly interrupted and constantly sent out of the courtroom'.

They were not interested in historical truth. My whole report was changed and modified to comply with the rules of evidence operating in South Australia. [Where the trial took place.]⁴⁴

Justice Cox warned professor Kwiet not to stray outside the guidelines he eventually imposed.

'I was already warned about this approach,' Kwiet answered the judge.

'That's right,' Cox told him. 'The battle is over now and it is most important Professor Kwiet, I want to emphasise this, that in your answers you keep within the limits of that formula. Did you hear? You heard the formula? I will repeat it because it could be very serious if you strayed outside it.'

'I want to say something more to Professor Kwiet,' the judge said. 'That formula is the result of a lot of debate you have heard... It is my responsibility to say what may or may not be said in evidence and there are limits according the rules which bind me, bind the parties and bind the witnesses, and it is very important in front of the jury that these guidelines be obeyed by counsel and by the witness. So do you understand you can't go outside that?'

'This is the strict limits in which I have to answer?' asked Kwiet.

'Yes', said Cox.

'Even if I disagree?'

'Yes you probably disagree. You probably think the evidence shows more than that.'

'That's correct,' Kwiet said.

Cox said that he didn't think there was enough evidence to allow a jury to hear all of Kwiet's views and that was the end of the matter. Kwiet asked whether, rather than saying there was no record of a forester taking part in a pit killing, he could say 'no record had been found'. But Cox thought that would carry a sinister overtone. (Bevan 1994: 225-6)⁴⁵

Restrained by the guidelines, Professor Kwiet was allowed to tell the jury that the historical documents tendered in court showed that in their program of exterminating the Jews, the Germans had sometimes been helped by local people, and not just by the police. He could say that there were recorded instances of local forest wardens or guards helping this way, but no recorded instances of local forest wardens or guards taking part in a pit killing. (Polyukhovich was accused of participating in the pit killing at Serniki.) (Bevan 1994: 225) He was not allowed to say that foresters participated in shooting Jews, 'because I could not document that Polyukhovich was shooting Jews. Historical documents were only used to prove that there was war, there was occupation, that Jews were shot in forests'.⁴⁶

Not allowing relevant facts to be told to jurors is not unique to the Polyukhovich trial. In common law there are specific rules that exclude from the jury's consideration facts that are logically relevant to the issue. (Stone 1991: 33-34) Indicting the common law system in his scathingly titled 'Trial by Voodoo', Evan Whitton argues that the system is not interested in truth at all. Courts are not concerned with getting fact: the law simply does not seek the truth. (Whitton 1994: ix)⁴⁷

Polyukhovich was acquitted.⁴⁸

THE HOLOCAUST 'ON ICE'

The Holocaust-related trials and cases of the last ten years, Zundel, Skokie, Polyukhovich and Barbie represent slightly different aspects of law and of politics but they all belong what can be called the normalisation of the Holocaust. The Polyukhovich case is possibly less obviously sinister than the other cases. Its importance lies in the very marginality it argued as defence. As in the Barbie trial, in the Polyukhovich case the role of the defendant was marginal, the main characters of the case were lawyers and witnesses. As to the main 'narrative' of the Polyukhovich case, it was not the Holocaust but the geographical and chronological distance of the events and, even more importantly, the Australian legal system. The Polyukhovich case (and the whole war crimes process) evidenced the perception that the Holocaust (and European history) has only marginal relevance to Australian society.⁴⁹

There is a further sameness to all these cases, to Zundel, Barbie, Skokie and Polyukhovich: the inadequacy to deal with evil as praxis, evil in an institutionalised form.

The most potent scene in the *Music Box*, the film about a war criminal and his eventual trial, is when the war criminal's daughter finally confronts her father. She found out that he is indeed the horrible nazi he is accused to be and did all the horrible acts he is accused of. The confrontation takes place at her son's (his cherished grandchild's) birthday party, in a beautiful room, full of beautiful furniture and objects of art. The daughter shouts out her revulsion and that she will not let him to see her son ever again. The old man storms out of the room, declaring that nobody and nothing is going to stop him from seeing his grandson. We see him through the large glass windows of the room, which open to the garden, where the boy is playing with his birthday gift: a pony. The old man takes the reins and starts to walk around with the boy: he is teaching him. And the mother stands powerless, behind the glass wall of the room filled with the beautiful things western civilisation has produced. The power is with the old pensioner, the good neighbour, the old nazi. He is beyond her reach, beyond civilisation.

Rule of law, due process, democracy, freedom of speech, human rights: the pinnacles of western civilisation are impotent against evil as praxis without moral imperative and coherent political will. Instead of being treated as criminals, genocidal murderers were integrated into society. When finally prosecuted (belatedly and reluctantly), western law floundered as it faced crime beyond crime.

By reducing the Holocaust into 'ordinary' crime to fit the legal system, law writes Holocaust history. Filtered through the legal process what emerges is a narrative of Holocaust history according to the requirements of what the law can handle. As Professor Kwiet's struggle with the judge demonstrated: the past is re-written, controlled by the law. This is post-histoire through law.

Bitburg, the trials of Barbie and Zundel, and the Historikerstreit all happened within a few years of each other. These events were simultaneously signposts and agents in the process in which the Holocaust became an abstract concept, theorised and generalised history, with both the tragedy and the evil diluted and normalised. Perhaps the epitome of this was when during the 1995 Professional Ice Skating Championship, in a stylish grey costume adorned with Hebrew letters, a contestant danced to the music of Schindler's List. Possibly the inevitable trivialisation: the Holocaust on ice.

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NOTES

1 Rousseau, for instance, believed that women were inferior to men and therefore did not deserve the same rights as men. (Antisemitism and misogyny are closely related. Both are based on the superiority of one and the inferiority of the other.) Racism, the social hierarchy based on a (faulty) biology, was also developed within modernity. The American Constitution, based on the 'full rights of man', recognised slavery. Later, for a number of decades in the turn of this century, the American eugenics movement was based on the hierarchy of races and, in what Lifton describes as 'racial-eugenic passion', large numbers of criminals and mental patients were sterilised. (Lifton 1986: 23) Communist ideology also tolerated racism. An Institute for Racial Biology was established in Moscow between 1931 and 1938: a joint German-Soviet 'venture'. (Proctor 1988: 21) Richard Weisberg pointed out that 'Western egalitarianism and liberality embraced racial ostracism and ultimate genocide more effusively than had the still seemingly neobarbarous and deeply romantic German states.' (Weisberg 1984: 2)

2 It is one of the historical commonplaces that Voltaire exposed Christianity through attacking the Old Testament, enlightenment philosophy itself already carried on the Christian tradition of the hatred of Jews and thus the seeds (germs?) of political anti-semitism were already sown. See: Katz 1980: 34-47 and Hertzberg 1986.

3 'The nineteenth and twentieth century have given us as much terror as we can take. We have paid a high enough price for the nostalgia for the whole and the one, for the reconciliation of the concept and the sensible, of the transparent and the communicable experience...Let us wage war on totality, let us be witnesses to the unrepresentable; let us activate the differences and save the honour of the name.' (Lyotard 1984: 81-2) [my emphasis] Saving the honour of the name means giving a voice to the 'unrepresentable'. In order to create a theory of justice, Lyotard identifies the political project of postmodernism as the total opposition to all totalising techniques.

4 Already during the Second World War there were linkages: El-Huseini, the Imam of Jerusalem rushed to Berlin, where as an 'honorary Aryan' urged Hitler to kill all Jews. After the war nazis found refuge in Arab countries.

5 Among the more notorious nazis Alois Brunner and Franz Stangl stand out, both finding haven in Syria. Brunner was responsible for the deportation of over hundred thousand Jews from Slovakia, Vienna and Salonika. Stangl, the commandant of Treblinka later moved to Brazil. (Rosenbaum 1993: 80-1)

6 See for instance: 'ZOG's war in the Middle East' in, *Perseverance* (November 15, 1990) 11/30: 4-5; also in the same issue, 'Kuwait, a detonator?' 3-4. The acronym ZOG stands for Zionist Occupational Government, meaning Israel. The word 'perseverance' was the call of the Hungarian nazi Arrowcross party. The journal was registered by Australia Post until 1991, when it ceased publication. The standard fare of *Perseverance* was Holocaust denial and and Israel-bashing.

7 Robert Faurisson is a former professor of literature at the University of Lyons-2, whose writings center around the thesis that the gassing of Jews is a 'gigantic politico-financial swindle whose beneficiaries are the state of Israel and international Zionism.' Fred Leuchter is a self-appointed gas-chamber 'expert' who wrote an infamous 'report' based on 'scientific tests' conducted by him at Auschwitz and Majdanek, proving that the gas-chambers there could not have been used for killing. David Irving started as writer of

popular historical books. He became more and more extreme, openly associating with (neo)nazis and the Ku Klux Klan. (Irving also believes that women have only a little percentage of the brainpower of men and that women should be 'subservient to men'.) He is best known for his early book (Hitler's war) in which he expounded that Hitler did not know about the Final Solution. The Zundel trial (see below) was a turning point in Irving 'moderate' denial practices. He declared that from here on he is conducting a 'one-man intifada' against the official history of the Holocaust. (*Lipstadt*, pp 8-13, 160, 179)

8 'The Holocaust is the Jewish flame of Olympus, maintained by a world-wide financial power with the aid of the media... How can you tell Palestinians to commit memory the dramas of the past, when they are living through far more unbearable ones? What difference is there between a gas chamber and a cluster bomb that falls on an Arab house on a night of Ramadan?' (*Algerie-Actualite* No. 1127, week of May 21-27, 1987, quoted by Fienkielkraut 1992: 79, fn 22) The imagery is all western: Greek mythology, the Olympic games, the nineteenth century czarist forgery of The Protocols of the Elders of Zion and it reaches into the twentieth century through the reference to the power of the media, which, after all is in the hands of the Jews. Classic, modern and postmodern concepts in one sentence. The next sentence tries to relativise, and diminish the Holocaust and the third sentence turns the victim into perpetrator, into victimiser. But of course it is not the Holocaust survivor who fights in today's Israeli army - maybe a survivor's grandchild. By comparing the horror of a cluster bomb to the totality of evil and cruelty that sought to destroy and torture all Jews - to those, who know their history, the relevance of the cluster bomb inevitably weakened (not at all a desirable outcome) and the ignorant or those who think the Jews deserved their fate anyway, well, those will not give more sympathy to the Palestinians, but will use them and their cause simply against the Jews. (For an incisive analysis of modern antisemitic imagery, see Cohn 1967)

9 In the 1980s there was a wave of terrorism in France: the targets were public places: the airport, a department store and a Jewish delicatessen was bombed amongst others. A number of these terrorist actions were claimed by a group which demanded the release of one of their colleagues, Ibrahim Abdallah, who was in prison convicted for terrorism. His lawyer was Jacques Verges.

10 During his 1985 visit to West-Germany, President Reagan flew from Bergen Belsen to the Bitburg cemetery to lay a wreath at the graves of Waffen SS and Wehrmacht. The impact of the Bitburg visit was enormously relevant: both as a symptom and as a message. It made relativisation and 'normalisation' of the Holocaust *comme-il-faut*, acceptable. It articulated something officially which until then would have been unheard of apart from obscure groups with c/overt Nazi or fascist leanings. The Bitburg incident signified a shift in intellectual climate and in popular perception.

11 The main themes of 'Remembering in Vain' are 'crimes against humanity', the Third World rhetoric of the defense and the ethics of memory. Fienkielkraut's previous two books, *Le Juif imaginaire* (The imaginary Jew, published in 1980) and *L'Avenir d'une negation* (The future of a negation, published in 1982) are respectively about the search of identity by descendants of Holocaust survivors and about Holocaust denial. The three books form a trilogy.

12 Charles Peguy, quoted by Fienkielkraut 1992: 1

13 In *The Jew Accused - Three Antisemitic Affairs*, Lindemann charted three such tales

of modernity. In many ways the tales Lindemann describes were identical to that of the Barbie trial. The issues in the intense dramas in *The Jew Accused* went beyond "justice" and "truth", (both in the narrower, legal and the wider, philosophical sense) and were compounded by political and ideological agendas and undercurrents. Questioned were the legal system, the forces of history, modernity, assimilation and of course the connecting tissue of in the Affairs: antisemitism.' (Ranki 1992: 86)

14 E.g. Faurisson: 'gigantic politico-financial swindle whose beneficiaries are the state of Israel and international Zionism' and whose 'chief victims are Palestinians and Germans'. (Lipstadt 1993: 9)

15 'The long term consequences of the Bitburg visit cannot be fully estimated yet. But I agree with the opinion of Jewish friends and colleagues, who fear that the Bitburg events have served to establish a new political style of aggressive innocence and harmlessness and to make it acceptable. This style is used to assert that one does not want to be reminded of past history any more, that one should let bygones be bygones.' (Funke 1985: 72)

16 The Historikerstreit, the war of the historians, was an arid debate in which some historians argued that Nazi policies regarding the Jews were defensive reactions to 'Asiatic deeds' and in no way any different to the 'normal', widespread atrocities of war. The Historikerstreit was taking place among historians and outside of Germany the debate was not widely publicised. However, the arguments used by historians like Nolte and Hillgruber filtered down to public consciousness and contributed in three major ways to the relativisation and normalisation of the Holocaust. Firstly, being articulated by mainstream and well-respected historians, the concepts it carried were imbued with a certain legitimacy. Secondly, as the consequent radicalisation of Nolte (and on a different level but to a certain extent of Irving) shows it carried more than the political germs of Holocaust denial. 'These historians are not crypto-deniers, but the result of their work are the same: the blurring of boundaries between fact and fiction and between the persecuted and the persecutor', wrote Lipstadt, discussing the relationship between relativism and denial. (1993: 215) Thirdly, through the media the concepts were carried into mainstream public thinking.

17 Canada's Hate Propaganda Act R.S.C. ch. C-28.1-3 (1st Supp 1970) provides:

- (1) Everyone who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of
 - (a) an indictable offence and is liable to imprisonment for two years
- (2) Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of
 - (a) an indictable offence

18 This was the same section (s 177) of the Canadian Criminal Code under which Keegstra (a teacher who for some twelve years taught in an Alberta high school that Judaism was an evil religion, Jews caused all troubles in the world and that the Holocaust was a hoax) was prosecuted. In the Keegstra case the main issue was International Jewish conspiracy and only subsidiarily Holocaust denial, whereas in Zundel, the main issue was Holocaust denial dissemination and only subsidiarily international Jewish conspiracy. (Professor Irwin Cotler, *Symposium* 1988: 68)

19 The reasons for the reversal: 1) the judge did not allow defence counsel the proper

scope in questioning during voir dire regarding pre-trial publicity, 2) the judge gave erroneous jury instructions regarding the required mental state of the defendant and 3) the judge admitted a graphic film on the concentration camps into evidence even though it contained prejudicial hearsay.

20 Ironically, pointed out Cotler, had the court had taken judicial notice of the Holocaust, it may well have resulted in Zundel's acquittal because the only thing that the jury would have had to resolve was whether Zundel had a reasonable belief that the Holocaust never occurred. (*Symposium* 1988: 69)

21 Doug Christie also (successfully) defended Imre Finta, Canada's first war crimes defendant. Christie flew to Adelaide to offer his advice to Polyukhovich's lawyers. They met for lunch with some other lawyers present. After a short comparison of the Canadian and the Australian legislation, Christie embarked on 'exposing' the Holocaust 'hoax'. At this point Polyukhovich's two defence lawyers left the meeting with a polite excuse. The tactics offered by Christie were not options they considered. (Bevan 1994: 73)

22 Zundel case, p. 9056. Leuchter was further discredited when it was found that not only he was not an engineer but that he also lied about his expertise in building gas chambers. (Lipstadt 1993: 170-2)

23 Chomsky argued that he saw no proof that would lead him to conclude that Faurisson was an antisemite. 'The Commissars of Literature,' *New Statesmen*, Aug. 14 1981: 13 quoted by Lipstadt 1993: 240.

24 For a detailed account and analysis of Chomsky's role see: Seidel 1986. According to Seidel, Chomsky committed an 'act of gross irresponsibility'. (1988: 104) However, there are certain sinister aspects which point beyond this evaluation. One is the fact, related by Seidel, based on personal communication with Pierre Vidal-Naquet, Professor Arno Mayer of Princeton university discussed Faurisson's book and the Preface with Chomsky a month before it was published, 'so that he knew exactly in what context it was being used'. (Seidel 1986: 102) According to Chomsky he did not know that his 'opinion' would be published as preface.

25 In Australia one of the leading figures of Holocaust denial is a lawyer, John Bennett, who was the founder of the extreme right Australian Civil Liberties Union. He publishes yearly a legal advice handbook, called *Your Rights*, sold at newsagents. Hidden among straightforward information and legal advice, the publication contains Holocaust denial literature. ('Antisemitism in Australia', June 1993 report by Jeremy Jones, Executive Vice-President, Executive Council of Australian Jewry.)

26 *Village of Skokie v National Socialist Party*, 51 Ill App 3d 279, 366 NE 2d 347 (1977) affirmed in part and revised in part, 69 Ill 2d 605, 373 NE 2d 21 (1978); *Collin v Smith*, 578 F. 2d 1197 (1978), 439 US 916 (1978) As Catherine MacKinnon described it, the right of the nazis was upheld by judges who were 'piously intoning how much they abhorred what the nazis had to say, but how legally their hands were tied and how principled they were allowing it.' (MacKinnon, p. 59)

27 *Village of Skokie v National Socialist Party*, 373 NE 2d 21 (1978), p. 21

28 Professor Cotler suggests certain criteria which should be taken into consideration in deciding the limitations of speech e.g. does the speech constitute an assault on the inherent dignity on the individual or group, resulting in substantial harm or injury?

(Symposium 1988: 80)

29 [Canada] Commission of Inquiry on War Criminals, also known as The Deschenes Report, December 1986.

30 [Canada] Commission of Inquiry on War Criminals, (The Deschenes Report) December 1986 Vol. 1 on page 27.)

31 These allegations and their sources are meticulously listed on over one hundred pages in the Report, (173-287). It was an open secret anyway: 'Within a week of my arrival in Australia in January 1961, I knew roughly how many Nazi war criminals were in Australia, several of them by name. So did the Jewish council to Combat Fascism and Antisemitism. So did anyone who cared to know.' (Tatz 1995: 27)

32 See Rutland 1991: 35-58; Bartrop 1990: 69-78; Aarons 1989; *Report of the Investigations of War Criminals in Australia* 1994. For American policies, see: Ryan 1984; and for American and Canadian Policies; *Symposium* 1988: 1-91, especially 17-47.

33 By specifying that four out of ten visas had to go to Baltic nationals (many of who enthusiastically collaborated with the nazis, staging their own 'anticipatory pogroms'); preference to agriculturalists, farmers and foresters (benefiting especially Ukrainians, many of who also collaborated); preference to Volksdeutsch (German ethnic population outside of Germany, who were in every country occupied by Germany a fifth column); and a stipulation which effectively barred Jews: anyone who was not in a DP camp by December 22, 1945 could not apply (most of the concentration and death camps weren't liberated) (*Symposium* 1988: 19)

34 The Australian method is described by Suzanne Rutland: 'after 1945 the government did use the question 'Are you Jewish?' to discriminate against European Jewish immigrants'. (Rutland 1991: 54)

35 Cotler lists the following: 1) the secret agreement not to prosecute after 1948 (see above); 2) the Canadian government knowingly provided sanctuary to Vichy collaborators, including D'Bonnenville, Barbie's right hand man. 3) Attempts to prosecute war criminals were treated as 'pandering to Jewish revenge' thus turning a human rights issue into a Jewish issue; 4) the destruction of immigration files after the first extradition case in 1983; 5) a 'clear and unequivocal policy of no investigation'. (*Symposium* 1988: 40)

36 Following the Deschenes Commission of Inquiry, Canada introduced legislation which allowed the prosecution of war crimes and crimes against humanity against any individual. (An Act to Amend the Criminal Code, the Immigration Act 1976 and the Citizenship Act, 35-36 Eliz., Ch 37, 1.91 (1987) Imre Finta, a former Hungarian was the first (and so far the last) to be prosecuted. He was acquitted on all charges. The US approach to Nazi war criminals has been denaturalisation, deportation and extradition.

37 The quote is from David Bevan, who followed the Polyukhovich case for three years as a court reporter for the Adelaide Advertiser and later as a reporter for the ABC. (The Polyukhovich case was heard in Adelaide.) Using his own eyewitness accounts and the court transcripts, he wrote *A Case to Answer*, the only book about the Polyukhovich case.

38 The Special Investigation Unit (SIU).

39 Cited by Binder 1989: 1322

40 The work of the Special Investigations Unit in Australia also produced valuable and important history. In fact, the first forensic archeology of modern genocide was developed

by Professor Richard Wright in Serniki, where the massacre Polyukhovich was accused of took place. At the Serniki gravesite in the Ukraine, 553 bodies were examined. The process was filmed and later it was cut to a one hour documentary.

41 Initially he was charged with the murder of twenty five people and being concerned in the massacre of the Jews of Serniki, (the so-called pit killing) altogether nine offences. This was later changed to thirteen offences. At the committal hearing the Polyukhovich was committed for the six murders. The director of the public prosecutions re-lay the charges with involvement of the pit-killing and two additional murders. (Bevan 1994: xii)

42 The Full Court of the High Court (with five judges and one dissenting) held that the legislation operated on the past conduct of persons who, at the time of the commission of the conduct had no connection with Australia, did not detract from its character as a law with respect to Australia's 'external affairs' at the time it was enacted. *Polyukhovich v The Commonwealth of Australia* (1991) 172 CLR 501.

43 Professor Kwiet is an historian, specialising in the Holocaust and German history. He was the chief historian working for the SIU. The following is based on my personal interview (9 June 1995) with Professor Kwiet and on Bevan's book.

44 Interview.

45 Bevan quotes direct speech from the court record. (Bevan 1994: ix)

46 Interview.

47 Whitton's explanation of the title of his book: "Voodoo" refers here to procedures and rules that conceal relevant evidence, obscure the truth and tilt the law in favour of the individual and against the community.' (Whitton 1994: x)

48 Two other people were prosecuted under the war crimes legislation. Mikolay Berezowski, coincidentally also a resident of South Australia was charged with being knowingly concerned in the willful killing of 102 Jews. The case against Berezowski had been dismissed by the magistrate during the committal hearings. Heinrich Wagner, the third man whose prosecution was sought, was allegedly involved in the murder of 123 people, among the 19 children. The case against Heinrich Wagner was stopped on the basis that he was too ill. Evidence was produced that a trial would put his life at risk. This was the outcome of the long investigation of the SIU. Since then, the Unit has been disbanded. Some five hundred suspected war criminals never had to face the law. Many of them died peacefully in the previous forty years. Now that the SIU is dissolved there is nothing to interfere, to disturb their peace.

49 Justice Michael Kirby, who argued against the war crimes amendments earlier, explained the position of the law: 'In short, whilst the executive branch of the government, in the form of the Director of Public Prosecutions or otherwise, might, in the name of the Crown, prosecute offenders, the judicial branch reserves itself the inherent right to stay such prosecutions if they could not take place without relevant unfairness to the person accused. Obviously, long delay, the loss of vital witnesses, lapse of memory and other such considerations pertinent to war crimes prosecutions would be relevant to the determination of a stay of application. Clearly the decision in *Jago* [common law right to fair trial] was vital to the resolution of the application in South Australia to have a permanent stay provided against the prosecution of Mr Polyukhovich in 1992 for offences in which he was allegedly involved 50 years earlier and of which he was not charged for another

48 years.' (Kirby 1992: 113) Justice Kirby, in the same article, cites 'severe economic difficulties' in explaining the closure of the SIU. (Kirby 1992: 113)