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DAVIBORSHCH'S CART

Narrating the Holocaust in Australian War Crimes Trials

DAVID FRASER

UNIVERSITY OF NEBRASKA PRESS
LINCOLN AND LONDON

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A chronicler who recites events without distinguishing between major and minor ones acts in accordance with the following truth: nothing that has ever happened should be regarded as lost for history. To be sure, only a redeemed mankind receives the fullness of its past—which is to say, only for a redeemed mankind has its past become citable in all its moments. Each moment it has lived becomes a *citation à l'ordre du jour*—and that day is Judgment Day.

WALTER BENJAMIN

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crimes files deposited at the State Library of New South Wales. David Bevan trusted me with his precious file of photographs, for which I am in his debt.

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As always, without Kathryn, none of this would be possible.

The usual caveat remains. I alone am responsible for what follows.

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A Note on Language

In his moving account of the search for the stories of the fate of the members of his family killed in the Shoah, Daniel Mendelsohn offers a telling anecdote: "There is a joke that people from this part of Eastern Europe like to tell, which suggests why the pronunciations and spellings keep shifting; it's about a man who's born in Austria, goes to school in Poland, gets married in Germany, has children in the Soviet Union, and dies in Ukraine. *Through all that*, the joke goes, *he never left his village*!"[1]

The tragic events recounted in the three legal proceedings that took place in South Australia in the late 1980s and the early 1990s occurred in German-occupied Ukraine between 1941 and 1944. Australian attempts to prosecute the three individuals whose stories are the subject of this book—Ivan Polyukhovich, Heinrich Wagner, and Michael Berezowsky—began at the time of the Cold War, continued into the period of glasnost and perestroika, and then proceeded following the breakup of the Soviet Union and the creation of an independent Ukraine. As the joke recounted by Mendelsohn indicates, the ethnic and linguistic nature of the area in which the relevant events hap-

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pened is and was complex. Government structures fell consecutively under the Austro-Hungarian Empire, Poland, the Soviet Union, Nazi Germany (not to mention neighboring areas that were occupied by Romanian forces during World War II), the Soviet Union, and an independent Ukraine. The towns and villages where the killings of Jews occurred included a Jewish population, as well as Ukrainians, Poles, Russians, and ethnic Germans, the Volksdeutsche.

This ethnic, cultural, religious, political, and linguistic mix informs the historical events that are central to the accounts that follow. But the multiethnic nature of the area also raises a practical problem for the telling of the tale today.[2] Family names, given names, and nicknames of various individuals had and have different versions in Yiddish, German, Ukrainian, Polish, and Russian. Many of the eyewitnesses in the Australian cases give testimony alternatively in Ukrainian and Russian or a mixture of both. Some of the survivors who fled to Israel gave evidence in Hebrew. Similarly, place names changed according to the usage not just of the population but also of the official state language, which shifted according to geopolitical reality. These names were then translated into English for the purposes of Australian legal proceedings. Sometimes villages physically disappeared as the result of war. Jewish areas and their populations were eradicated as part of the Final Solution. Evidence of a historical Jewish presence was destroyed or allowed to disappear.[3] In other instances place names were changed as a new regime took over. In the renderings of these names of individuals and places, I have adopted the practice of repeating, whenever possible, the formulations used in English translations by Australian authorities throughout the criminal investigations, depositions, and committal hearings, unless common and accepted usage demands otherwise.

Unfortunately, even this official usage in the various legal proceedings was variable, as different translators were involved and as translations of names and places into English occurred from original documents and statements in German, Russian, and Ukrainian. There was never a formally agreed translation process in the three

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cases in Adelaide, and linguistic difficulties informed all efforts to prosecute and defend the accused. Where there are multiple spellings and renderings of place names, for example, deployed in a variety of official sources, I have attempted to adopt the most commonly used version of the usage likely to be most familiar to readers or to the relevant protagonists.

The accused in the Australian cases were not citizens of the German Reich. Technically, they were not Nazis. Nonetheless, common usage refers to the prosecutions as "Nazi war crimes trials," rather than the more cumbersome but more accurate "Nazi collaborationist war crimes trials." I use the phrases interchangeably, as appropriate.

I use the phrase and description *war crimes trials* in the discussion throughout the book. Yet in two of the three cases, those of Berezowsky and Wagner, formal legal proceedings stopped at the committal stage, though for different reasons. Only the case of Ivan Polyukhovich went before an Australian jury. Nonetheless, for the sake of both brevity and broader access and understanding, I use the more general *trial* to describe all proceedings involving the three individuals charged with offenses under the Australian War Crimes Act. In the more detailed discussion of each of the three cases, the more correct *committal* or *trial* is used when required to render an accurate account.

Finally, a few words about legal terminology are necessary. American readers familiar with criminal procedure will recognize the term *voir dire* in relation to the process of examining potential members of the jury to determine whether they are acceptable to both sides. In Australia the term is used to describe a process within a committal (preliminary hearing) or a trial to decide a legal question, such as the admissibility of a certain piece of evidence. The process sometimes takes place by way of oral argument by the lawyers for each side, while on other occasions a witness is examined and cross-examined to determine the nature and content of his or her potential testimony. In a voir dire during a trial the argument and/or examination takes place in the absence of the jury because it concerns only matters of law.

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Introduction

The Long and Winding Road from Ukraine to Australia

THREE STORIES FROM THE SHOAH IN UKRAINE

Daviborshch's Cart

The lightning attack of Operation Barbarossa in late June and early July 1941 led to the rapid advance of German troops into Ukraine amid the retreat in disarray of the Red Army. Special extermination units of the SS, the Einsatzgruppen, accompanied the German advance, killing tens of thousands of Ukrainian Jews in the first wave of mass shootings.

One year after the arrival of German forces, as workers on the collective farms toiled in the fields throughout the region, the second wave of mass killings of Ukraine's Jewish population began. The remaining Jews in the village of Israylovka, later renamed Berezovatka, were rounded up by Ukrainian police, the Schutzmannschaft, in the final mass *Aktion*. As the Russian and Ukrainian inhabitants of Israylovka looked on from the doorsteps and windows of their houses, their neighbors, the Jews, were marched two kilometers to a ravine, which served as a killing pit, near the neighboring village of Kovalevka, where they were shot by Ukrainian forces.

The same day local police were given a list of names of so-called mixed-race (*Mischlinge*) children in Israylovka. They were the progeny

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of Jewish fathers and Ukrainian mothers. The fathers were for the most part absent, having joined the Red Army and retreated eastward before the German advance a year earlier. The Ukrainian policemen instructed the mothers to bring their children to the local administration building for registration.

On this bright, sunlit summer morning in 1942 a twenty-year-old Ukrainian man, Nikolay Nikitovich Daviborshch, was going about his usual business. Too frail to have been drafted into the local police, Daviborshch was employed on the local collective farm. He made deliveries of water on his cart, a two-wheeled gig pulled by a twin team of horses. This day started out much like any other for Daviborshch as he made his way to Israylovka with a cart filled with water barrels. Events would soon change his life forever. As he began his work in the village, he was accosted by two Ukrainian police officers, Zhilun and Gering, and told to bring his cart right away to the village administration building. After changing his team of horses, Daviborshch took his cart to the town hall. There he was confronted by a scene of heartbreak and hardship that would haunt him for the rest of his life.

The mothers of the *Mischlinge* and their children were brought from the town officials' offices, where they had come, as instructed by the police, for "registration." Amid screams and cries of horror the children were torn from their mothers' arms, grabbed, and thrown into the back of Daviborshch's cart. The women were beaten back by the police. Soon Daviborshch's cart, which measured three meters long by one meter wide, was filled with wailing children. They ranged in age from four months to eleven or twelve years old. Among the children of Israylovka for whom this would be the last summer day of their young lives were the four offspring of Nadezhda Lozhkina; the four young children of Nina Kigel; three children of Kharitina Rybkina; three more belonging to Dusya Flesher; the only child of Yarina Fel'shtayn; three youngsters of Klavdiya Gurevich; and Volodya and Tolya, the two children of Tat'yana Shul'kina.

Once the children had been loaded into the cart by the police, Daviborshch, who had sat silently throughout this part of the ordeal,

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accompanied by Zhilun, who sat behind him in the cart, and other police on horseback ordered the horses to begin the journey to the ravine near Kovalevka. Following directions from guards posted on the road near the site, Daviborshch drove his cart off the road to an area about five or six meters from the pit. Local police grabbed the children from the cart and dragged them to the edge of the pit. As they threw them in, they began shooting. Daviborshch was ordered to leave. Fifty years later, as he recounted the events of that summer day in 1942, he still trembled from the memories. "I was afraid of everybody. I was sitting on that cart and I thought I would be shot with the others."

In 1991 Heinrich Wagner, one of the local police identified as having been present at the pit that day, near a ravine on a road leading from Israylovka to Kovalevka, in the Ustinovka district of the Kirovograd region of Ukraine, was arrested by Australian police and charged in Adelaide, South Australia, with killing both the adult Jews and the *Mischlinge* children. It was alleged that he killed the youngest child by throwing her in the air and shooting as she fell into the pit. The information filed before the Supreme Court of South Australia in the case in the January Sessions of 1993 alleged that Wagner, sometime between 1 May and 31 July 1942, had committed a war crime that "involved the wilful killing of about (a) 104 persons and (b) 19 children aged between about 4 months and 11 years of age."[1]

Khokum's Shed

In September 1942 Dmitry Ivanovich Kostyukhovich was a nineteen-year-old member of the Ukrainian partisans. He had been sent to his native village of Serniki, in the Rovno district, together with his friend Sidor Alexeievich Polyukhovich, to gather information for his commanding officer. The fighters had recently received intelligence that the Jews of Serniki were to be killed. Kostyukhovich visited his aunt at her house on the outskirts of town near the Stubla River. His aunt's property bordered another farm (*khutor*) owned by a local Jew, Moishe Aaron. Just beyond these properties nearer the river

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was an outbuilding, a shed, on land belonging to another Serniki Jew, known as Khokum.

Kostyukhovich and his comrade spent a night and the following day sheltering in the farm building. On the second day, from his vantage point in Khokum's shed, he witnessed the *Aktion* in which German troops and local police rounded up the inhabitants of Serniki's recently established ghetto, about eight hundred Jews. Ukrainian police removed the Jews from their homes. The ghetto clearance was characterized by frenzied screaming and crying. The Ukrainians used their rifle barrels to marshal the reluctant and panicked Jews. The Germans waited nearby, while the local police gathered the Jews of Serniki into columns. While the Jewish population of the area was being marched to a spot in the forest outside Serniki, where they would be shot and killed in a large pit dug especially for the occasion, as in dozens of other Ukrainian towns, villages, and hamlets, Kostyukhovich and Sidor Polyukhovich watched the unfolding terror happening below them through the hole in the wall of Khokum's shed.[2]

While the procession began its march, two youngsters, probably aged fifteen, broke away from the group and ran toward the bridge and the river in an attempt to escape the fate that would soon befall their fathers, mothers, brothers, sisters, aunts, uncles, cousins, and neighbors. One of the men guarding the convoy turned and pointed his rifle at the running boys. He calmly shot one then the other. Neither one moved again. The shooter was identified by Kostyukhovich as Ivanechko, Ivan Timofeyevich Polyukhovich, a local man who worked as a forest ranger for the German occupation authorities. The column continued along the road to the forest. The boys' bodies were collected and loaded into a cart later that day by two members of the Ukrainian police. A few days later Kostyukhovich returned to the forest outside Serniki with several of his partisan comrades. They saw the freshly covered pit area. The ground on the surface was soaked with blood still seeping up from below.

On Australia Day (Australia's national holiday, the equivalent of the United States's Fourth of July), 26 January 1990, Ivan Timofeyevich

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Polyukhovich was arrested in Adelaide and charged with participating in the pit shootings of about eight hundred of Serniki's Jews. The information charged that Polyukhovich, "between about the first day of September 1942 and about the thirtieth day of September 1942 near the village of Serniki in the Rovno District in the Ukraine, Europe, was knowingly concerned in the murder of about eight hundred and fifty persons, whose names are not known but who are described as the Jews from the Serniki Ghetto, such killings being wilful killings, and did thereby commit a war crime contrary to Section 9 of the War Crimes Act 1945."[3]

Schors Street, Gnivan, May 1942

In May 1942 Mikhail Abramovich Raykis was a twelve-year-old Jewish boy living with his mother, his three sisters, and younger brother in the village of Gnivan, in the Tyrov district of the Vinnitsa region, Ukraine. Around two hundred Jews remained in the village. Others, including Raykis's father, had disappeared during the first killing wave. One night a German soldier knocked on the family's door and ordered them all to get dressed and hurry outside. Mrs. Raykis, Sonja, and her three daughters, Betia, Liza, and Masia, complied. Mikhail's younger brother crept under his bed, but his whimpering brought the German soldier back to the house and his hiding place. He was dragged outside to join the female members of the Raykis family. Mikhail stood silently behind the bedroom door and escaped the notice of the Germans. He fled out the back of the house and hid in woods that bordered his family's home and the town. He stayed there all night, and through his young terrified eyes watched as the Jews of Gnivan stood or sat on the ground outside the local government office building, the former Soviet Council headquarters. Through the night German soldiers and members of the Schutzmannschaft, stood guard, heaping abuse on their terrified wards, swearing at them and yelling at the mothers to quiet their crying infants. Guard dogs barked, and bright lights shone until dawn on the terrified Jews of Gnivan.

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At first light they were ordered into columns and marched along the road, which would be named Schors Street in the development of the village in the postwar era. The cobble road made a turn as it left the built-up area and led to the nearby forest. Among the local police who accompanied the Jews to their deaths in the forest on the outskirts of Gnivan was Mikolay Berezowsky, head of the local detachment. As the column of Jews was herded at gunpoint toward the pit, Berezowsky, walking back and forth from one side of the group to the other, hurled abuse at them, "Bloody Jews, parasites!" Young Mikhail followed all of this, hidden among the bushes and trees. The Jews came to a pit, where they were stripped and gunned down. Raykis remembered Berezowsky: "They feared him as if he were a spirit."

In August 1991 Mikolay Berezowsky was arrested at his home in Adelaide and charged by Australian police with the murders of the five members of the Raykis family who perished that night in Gnivan and with the killings of several other of his Jewish neighbors. The charges alleged that Berezowsky "was by his own acts, directly knowingly concerned in or party to the murder of one hundred and two Jewish people being described as the Jews of Gnivan, comprising mainly women and children and some elderly males, most of whose names cannot be ascertained but including the following: (i) Sonya Froymovna Raykis, aged about 40 years and her daughters Betya Abramakovich, aged about 21 years, Liza Abramovna Raykis, aged about 18 years, Manya Abramovna Raykis, aged about 16 years, and her son Filya Abramovich Raykis, aged about 5 years."[4]

HISTORY TRUTH LAW: THE SHOAH, UKRAINE, AND AUSTRALIAN WAR CRIMES TRIALS

The chapters that follow track in greater detail some of the most important aspects of the long and complex path that led from the forests, marshes, villages, and shtetls of Ukraine, from Volhynia and Galicia, from Serniki, Israylovka, and Gnivan, in the harsh years of German occupation, to the quieter, more peaceful, sunny climes of Adelaide, South Australia, in the early 1990s.

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In the sixty-odd years that have followed the trials of major German war criminals before the International Military Tribunal at Nuremberg to the establishment of the International Criminal Court, a vast academic literature has followed (and caused) the creation of "international criminal law" as a separate discipline and area of professional expertise. The prosecutions of Anthony Sawoniuk in the United Kingdom and Imre Finta in Canada have received significant attention in studies of national criminal justice responses to the presence of alleged Nazi war criminals in those two countries.[5] Sawoniuk was a member of a local police unit in Belarus and was convicted of murder under the operative provisions of the United Kingdom's War Crimes Act of 1991. Finta, a member of the Hungarian Gendarmerie, was charged under the provisions of Canada's Criminal Code for his participation in rounding up, confining, and deporting Hungarian Jews to Auschwitz but was acquitted following the decision of the Canadian Supreme Court on a technical legal question. Both of these cases are noteworthy and deserving of the attention they have received. Each involved the prosecution of Holocaust-related crimes fifty or more years after the event. Each followed a political decision by the elected representatives of these countries that new legislation was required to bring perpetrators who had escaped their homelands to justice in their adopted countries, where they had lived for many years free from trouble or worry about their pasts.

The three Australian cases deal with similar issues. All three accused men had worked under the occupying German forces in Ukraine and were alleged to have participated in mass atrocities against their Jewish neighbors. After intense political and legal debate, Australia, like Canada and the United Kingdom, passed new legislation in order to permit these prosecutions to go forward many years after the tragedy of the Shoah.[6] Yet for some reason, perhaps attributable to the tyranny of distance, the physical isolation with which Australians live every day, or the intellectual isolation and ignorance that arise from Australia's geography, even the most extensive, detailed recent literature dealing with various international and national efforts to

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prosecute Holocaust perpetrators remains silent about the Australian experience.[7] By examining the untold stories of Australia's attempts to create a system to try these war criminals, this book addresses that omission.

This book integrates three distinct yet overlapping areas of interest. First and foremost, it examines the law, tracing the little-known story of the way in which Australia's national Parliament came to introduce the legislation amending its existing war crimes legislation. Second, there are several interrelated tales of police and forensic investigation to identify perpetrators, to locate them in Australia, and to uncover the physical evidence and eyewitness testimonies in Ukraine and elsewhere that would serve as the bases for the three cases. Finally, there are the stories of the cases themselves—of the rules of evidence and the confrontation with facts more than a half-century old; of eyewitnesses who had never left their native villages in Ukraine flying to Australia, staying in a beachside hotel in an Adelaide suburb, and being confronted, through court interpreters, with the forensic skill of Australian lawyers; of the rules relating to "prior inconsistent statements" in South Australian criminal proceedings and the issue of the "protocols" of postwar Soviet investigations and trials of traitors to the Motherland; of the conflict in war crimes trials between legal consequences and goals, innocence or guilt, and the desire to "prove" something more: the reality of survivors' suffering, the enormity and horror of the Shoah, and the eternal truth of justice.

The second genre involved in the complex stories of these Australian war crimes trials, history, then comes to the fore as "the historical study and judicial investigation of the Holocaust have been inextricably intertwined, as historians and lawyers have used the fruits of one another's labors."[8] The tale of the efforts to bring Holocaust perpetrators who had found a safe haven in postwar Australia is largely a historical saga. In addition to the issues surrounding investigations into the flaws in immigration policy and practice that allowed these individuals to come to Australia in the first place, Australian prosecutors had to rely on historical expertise not only to establish the

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necessary technical elements of the war crimes offenses—that is, war, occupation, an extermination plan—but they also needed to establish the identity and culpability of the individuals accused. Konrad Kwiet and a team of historians undertook unprecedented and historically significant research efforts to determine these identities. Archives were identified and documents examined with the fine-tooth comb of professional historians' expertise. Most significantly perhaps, for the first time Western historians were granted virtually unfettered access to previously restricted Soviet archival holdings.

Other important issues about historical methodology and discursive practices also arose in the course of the Adelaide proceedings. At a basic level a historian who testified in these cases did so as an expert witness. As such, he or she did not "belong" to either the prosecution or the defense but instead acted as an expert for "the Court." Moreover, as the proceedings evolved, it became clear, especially in the Polyukhovich case, that there was a conflict between the perception of the facts and the broader demands of "truth" held, for example, by Kwiet, the chief historical expert at trial, and Justice Brian Cox (Cox J), the trial judge. In the end, after lengthy and heated evidentiary proceedings, Kwiet was asked to testify not about what happened in Serniki but about his expert opinion about what occurred and who was involved, a subtle but vital distinction in the circumstances.

An important subgenre of historical inquiry has emerged, post-Nuremberg, a subgenre in which historians now study war crimes trials as historical events in themselves. Two types of professional practice and focus are in play. The first is that these trials—the documents, witness testimonies, and statements that emerge from them, the forensic anthropological and medical evidence uncovered—serve as new sources of historical knowledge about the Shoah. The second potential result of these Holocaust trial studies is that the killing of European Jews by the Nazis and their local collaborators may take a back seat to the study of the trials as primary phenomena. In such cases the issues of memory and forgetting, truth and justice, which have heretofore been central to the positioning of war crimes trials

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within historiography and broader political and social practice, while not entirely forgotten, may be redefined and therefore constructed as the subjects of new types of understanding.[9]

The third genre that arises in the context of Australia's war crimes trials is, somewhat ironically perhaps, fiction. While they operate from different perspectives, with their distinct goals and methodologies, both law and history are to a certain extent concerned if not with "truth," then at least with facts. Fiction may well be concerned with explorations of various concepts of truth, but it usually does so without significant concern for fact as understood by lawyers and historians. Yet it was precisely a form of fiction that was presented as being grounded in fact, in relation to war crimes trials and the history of the Shoah in Ukraine, that arose in Australia at the same time as the cases of Berezowsky, Polyukhovich, and Wagner took place, affecting the wider Australian society significantly. The controversies surrounding Helen Demidenko's fictionalized account of her Ukrainian-Australian immigrant family, *The Hand That Signed the Paper* (1994), raised the same questions and public debates about law and justice, identity and belonging, memory and amnesia, that had surrounded the introduction of the War Crimes Act Amendment Bill in the Australian Parliament and the three cases in Adelaide.[10] An account of the Australian experience of Nazi collaborationist war crimes trials would be incomplete without taking into account the interactions between and among the professional practices of the judge, the historian, and the author.[11]

LAW AND HISTORY IN ADELAIDE

Noted Holocaust historian Michael Marrus has proposed a taxonomy of six types of legal/historical encounters with the Shoah-international trials, the most well-known of which is the International Military Tribunal at Nuremberg; trials held by the victors, from Soviet proceedings at Krasnodar and Kharkov to the "zonal trials" held in the four Allied occupation zones in Germany (and in Austria); successor trials, proceedings that took place before national tribunals in

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various countries of formerly occupied Europe; Holocaust-related trials of Jews by Jews for crimes of collaboration (ghetto police, e.g.); so-called third-party trials in countries not directly involved in Nazi atrocities against the Jews (Canada, Australia); and the final category of Holocaust denial proceedings.[12]

This book addresses the stories surrounding the Australian experience in these fifth category proceedings and tangentially the Soviet prosecutions of war criminals in the wartime period and its aftermath as well as subsequent prosecutions in Ukraine in the 1950s and beyond. The discussion will outline the historical background and political debates that led to the adoption by the Australian Parliament of legislation permitting the pursuit before Australian courts of those accused of Holocaust-related offenses committed during World War II. The chapters that follow will also examine issues of history, memory, and forgetting and of the conflicts between historical knowledge and legal processes as they manifested themselves in the concrete and forgotten context of Australia's war crimes trial program in the late 1980s and early to mid-1990s. These issues and the disciplinary intersections and disjunctions will be elucidated through a study of important aspects of the legal and historical record established throughout the brief but momentous history of Australia's war crimes trial program.

This book fills in the gap in the scholarly record, a gap that runs the risk of entrenching a historical and legal "forgetfulness–forgetfulness without memory."[13] Such a combined amnesia/amnesty characterizes scholarship about war crimes trials and the way in which international legal and historical experts have ignored the Adelaide cases and the Australian experience more broadly. This forgetfulness also typifies attempts to come to grips with the interdisciplinary gaps and overlaps that are embodied in the cases of Berezowsky, Polyukhovich, and Wagner.

The Belgian philosopher Paul Ricoeur, in dealing with the issues raised by the multiplicity of methodologies and disciplines that are confronted in relation to specific aspects of the Shoah, focuses on

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the key concept of judgment. Each genre—law, history, and literature—deals with notions of memory, forgetting, and responsibility through its particular frame of deploying "facts" in the process of forming judgment.[14] More important, each genre's methodology and capacity for judgment can be and is influenced by those of the other disciplines. Law is compelled by the very nature of the criminal trial to narrow its focus, to concentrate on issues of proof, admissibility of evidence, and its ultimate and defining characteristic of determining individual culpability. Moreover, the rules of the trial require a balance between prosecution and defense, under which all aspects of each side's case must be treated with at least equal respect (putting aside the important question of burden of proof) and from which judgment must be withheld until the final stage. These inherent limits within legal practice only become clearly understandable as limits if one sheds light on the evidence, on the events under judgment in a case, through the lens of historical analysis. Law then becomes understandable in a wider frame only as history. Law is "fixed" by the trial process, with its institutional focus on individual responsibility, whereas history itself must remain open to "new evidence" and must address a plurality of sources that are subjected to different rules of analysis.

At the same time, history must cope with the tensions and difficulties inherent not just in the facts and facticity of the Holocaust but with the limits that arise in the process of imposing, or coming to, moral judgment internal to all explanatory and even descriptive taxonomies in relation to the Shoah.[15] When faced with complex versions and explanations of a particular pit killing in Ukraine, for example, evidence must be sorted, versions compared, and a determination of historical truth asserted. Omer Bartov argues, "The historian cannot escape acting as judge in this context."[16]

The final relevant genre, literature, is also a complex yet limited undertaking. Literary renderings of the Shoah, especially those that deal with victims' suffering or perpetrator behavior and/or motivations, are subjected to limits and conflicts with historiographical

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discursive and narrative practices. Each of these areas of overlap and disjuncture occurs most commonly in relation to the issue of "testimony"—legal, historical, and fictional—a key component of the chapters that follow.

Former perpetrators, Ukrainian police officers such as Zhilun, former victim/survivors such as Mikhail Abramovich Raykis, and bystanders such as Dmitry Ivanovich Kostyukhovich all have different testimonial standpoints and experiences, all of which, in combination with others, constitute the narrative of the Shoah in Ukraine that was distilled, however imperfectly, in the Adelaide war crimes cases. Each witness lived through and was trying to work through, in the psychoanalytic, ontological, and epistemological senses, different experiential realities, all of which tell a story about the killing of Ukraine's Jews under Nazi occupation.[17] The other participants in the criminal justice processes in Adelaide, the police and forensic scientists, the magistrates and judges, the solicitors and barristers, the historians, each received these facts, statements, and testimonies and in turn used them according to the demands of their own disciplinary knowledge and role in the system itself. Authors of fiction and literary critics further this process by rendering historical fact within the more open-ended conventions of their genre, allowing perhaps through this translation access to history and law to new and different readers.

The question that was raised throughout the Australian war crimes trials experience and which informs much of this book is one of "translation," not just in the technical sense but perhaps more significantly in its ethical manifestation. In all instances the foundational elements of the cases and debates surrounding the prosecution of alleged war criminals must all be (re)situated at the level of the ethical.[18] How can we translate these individual experiences, with the frailties of memory, the traumatic nature of the events in question, the passage of time, the foibles of individual psychology, the self-interest of the witness, and the rules of evidence—into an ethically, historically, and

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legally, sound and accurate and acceptable account of the fate of the Jews of Serniki, Gnivan, and Israylovka?

An Italian proverb offers a warning and a frame for reading all of the historical and legal record that informs the rest of this book: *Tradurre è tradire*—to translate is to betray.

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