

## RESPONSE TO PROFESSOR FRONZA'S *THE PUNISHMENT OF NEGATIONISM*

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### INTRODUCTION

This Essay is a response to Emanuela Fronza's Essay entitled *The Punishment of Negationism: The Difficult Dialogue Between Law and Memory*.<sup>1</sup>

Many reasons inspired this response: first of all, while the Symposium was intended to present accommodation of diversities in pluralistic societies, I have been surprised that Emanuela Fronza decided to present a paper about "[t]he [p]unishment of [n]egationism."<sup>2</sup>

Indeed, the preparation of the Symposium announced:

The more recent international, supranational and domestic legal instruments try to develop legal solutions promoting diversity and peaceful living-together, requiring neither full assimilation into the majority nor (even involuntary) segregation of the minorities, and trying to strike a balance between the individual and the collective dimensions of rights.<sup>3</sup>

And the questions in criminal law mentioned: "Criminal response to diversity (e.g., the criminal repression of homosexuals, prohibition of ethnic/religious political parties or associations, criminal answer to the "clash of cultures", etc.)."<sup>4</sup>

Whereas all participants emphasized the role and rationalization of affirmative actions in constitutional law, international law, company and labor law, private law, criminal law, Emanuela Fronza decided to examine the justification of punishment of negationism.<sup>5</sup> The choice of that topic may appear questionable in comparison with the general line of the

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1. Unfortunately, this response is not the result of a discussion with Emanuela Fronza who could not attend the first conference of the *Permanent Forum for Transnational and Comparative Legal Dialogue*.

2. Emanuela Fronza, *The Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609 (2006).

3. Permanent Forum for Transnational and Comparative Legal Dialogue, "Accommodating Differences": Present and Future of the Law of Diversity I (Apr. 20, 2005) (on file with Vermont Law Review).

4. *Id.* at 2.

5. Fronza, *supra* note 2, at 609.

Symposium, not only because negationist opinions and theories are extremely controversial, but also because negationists allege that they are *victims of discrimination* caused by the criminal punishment of their opinions presented as a violation of the right to freedom of opinion and expression.<sup>6</sup> Thus, the rationale of Emanuela Fronza's Essay is puzzling since the Symposium has been oriented towards *affirmative action against discrimination*.

Moreover, Emanuela Fronza's comments and critiques of the criminal laws that punish negationism of the Holocaust are based on various grounds that call for rectifications and that are developed hereunder. Above all, the topic is a serious and sensitive one since it also concerns many other victims of genocides such as Jews, Indians, slaves, and Armenians, some of who obtained recognition by memorial laws as well as punishment by criminal laws for the denial of past conduct and exterminations.

Indeed, the purpose of this Essay is neither to present the Holocaust nor to make differentiations between a variety of past and present genocides.<sup>7</sup> This Essay deals with the Holocaust because, as a matter of fact, the antagonists to criminal laws that punish negationism tend to present their arguments based on the Holocaust, just like Emanuela Fronza does in her Essay.<sup>8</sup> As a matter of fact though, the area under discussion and dispute is much broader and it should not be limited only to punishment of negationism of the Holocaust since negationism and revisionism of historic facts and records may also concern other genocides and crimes against humanity.

In any event, Emanuela Fronza decided to limit her presentation to the punishment of negationism of the Holocaust. Like many opponents of criminal laws on negationism, she bases her criticism on the grounds that such laws endorse official representations of the past and obstruct the reconsideration of explanations based on a review of the past, which is the necessary, scientific, activity of historians.<sup>9</sup> She also claims that punishment of negationism is a violation of the overwhelming international and constitutional principle of freedom of expression.<sup>10</sup>

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6. See Fronza, *supra* note 2, at 621–22 (arguing that countries should not punish negationism since they are in effect choosing one ideology over another).

7. Claude Lanzmann, *Universalité des victimes, singularité des événements historiques*, 61 LES TEMPS MODERNES 1 (2005/2006).

8. Fronza, *supra* note 2, at 609.

9. *Id.* at 621–22.

10. *Id.* at 623.

Unfortunately, that presentation is one-sided and does not give exact and complete information of the background related with criminal laws on negationism. I am grateful that the *Vermont Law Review* decided to publish this Essay hereunder on punishment of negationism of the Holocaust in order to clarify the debate on important grounds exposed hereunder.

#### I. DEFINITION OF NEGATIONISM AND REVISIONISM

It is important to notice that, in her presentation, Emanuela Fronza forgets to mention that negationists and revisionists of the Holocaust are contested, because they are not authentic and bona fide historians and use fallacious methods and opinions for promoting anti-Semitic opinions.

##### A. *Revisionism and Scientific Interpretations of History*

According to Emanuela Fronza, negationism as opposed to revisionism is defined as the negation of “the very existence of the Holocaust,” disregarding any agreed historiographical norm, turning around the issue of the relationship between the genocide and the historical reality.<sup>11</sup> She compares and opposes negationism with revisionism which “does not deny the Holocaust but rather aims to challenge the conventional view of responsibility for it by relativizing the issue of the extermination and contesting the interpretation of the events.”<sup>12</sup> From those definitions and comparisons, Emanuela Fronza states that every historian or social scientist *cannot but be structurally a revisionist*.<sup>13</sup>

The presentation of negationism and revisionism is not exact, since negationists and revisionists must be plainly differentiated from scientific historians. As a matter of fact, the term “negationism” was created in 1987 by a French historian, Henry Rousso, who specializes in the history of World War II.<sup>14</sup> That terminology was intended to make a clear distinction

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11. *Id.* at 614.

12. *Id.* at 613.

13. *Id.*

14. HENRY ROUSSO, *LE SYNDROME DE VICHY: (1944-198 . . .)* 166 (1987). Henry Rousso published various books on World War II, some of them are translated into English: HENRY ROUSSO, *LA COLLABORATION* (1987); HENRY ROUSSO, *LE SYNDROME DE VICHY: DE 1944 À NOS JOURS* (2d ed. 1990), *translated in* *THE VICHY SYNDROME: HISTORY AND MEMORY IN FRANCE SINCE 1944* (Arthur Goldhammer trans., Harvard Univ. Press 1991) [hereinafter ROUSSO, *THE VICHY SYNDROME*]; HENRY ROUSSO, *LE SYNDROME DE VICHY*, *supra*; HENRY ROUSSO, *LES ANNÉES NOIRES: VIVRE SOUS L'OCCUPATION* (1992); HENRY ROUSSO, *PÉTAIN ET LA FIN DE LA COLLABORATION: SIGMARINGEN 1944-1945* (1984); HENRY ROUSSO, *UN CHÂTEAU EN ALLEMAGNE: LA FRANCE DE PÉTAIN EN EXIL SIGMARINGEN, 1944-1945* (1980); HENRY ROUSSO & ERIC CONAN, *VICHY, UN PASSÉ QUI NE PASSE PAS* (2d ed. 1996), *translated in* *VICHY: AN EVER-PRESENT PAST* (Nathan Bracher trans., Univ. Press of

between negationists who intend to present falsifications of the reality of historic events and discredit testimonies and misrepresentations, as opposed to historians who use precise and scientific methods for analyzing, explaining, and updating historical facts with newly discovered information.<sup>15</sup>

Negationists tend to present themselves as “historians” and “revisionists” in order to get legitimacy while they rewrite history by using fallacious methods ignoring or distorting essential and authentic facts of the Holocaust.<sup>16</sup> As a matter of fact, they convey the belief that the Holocaust did not exist or that it did not occur as it is described by the majority of historians. They reject that the Nazis had a specific and deliberate policy for exterminating Jews and Gypsies.<sup>17</sup> They pretend that Jews provoked Hitler who was obliged to declare war on the states where they were economically and politically dominating.<sup>18</sup> They contest the number of Jews killed and their victimization.<sup>19</sup> They deny that gas chambers were used in extermination camps for killing Jews . . .<sup>20</sup>

Even though Holocaust denial is widely viewed as unrealistic, revisionists tend to distort its existence by casting doubts on evidence from eyewitnesses and survivors, by using selective facts, deriding the extermination of the victims,<sup>21</sup> and insisting on fallacies based on the destruction of proof by the Nazis in order to review interpretations of the existence of the Holocaust and its causes.<sup>22</sup>

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New England 1998); ERIC CONAN & HENRY ROUSSO, *VICHY, UN PASSÉ QUI NE PASSE PAS* (1994).

15. ROUSSO, *THE VICHY SYNDROME*, *supra* note 14, at 151.

16. *Id.*

17. MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* 100–01 (2000)

18. *Id.* at 40.

19. *Id.* at 100–01.

20. *Id.* at 100.

21. The French politician of the Front National, Jean-Marie Le Pen used that method when he declared on September 13, 1987, that gas chambers were a detail in history. *Foes Twisted His Remarks, Le Pen Says*, L.A. TIMES, Sept. 19, 1987, § 1, at 3; Steven Greenhouse, *French Rightist Belittles Gas Chambers*, N.Y. TIMES, Sept. 16, 1987, at A3.

22. In this Essay, I do not intend to present or develop the negationist/revisionist theories. I only intend to provide some of the famous allegations that extermination of the Jews was not what Hitler did; for example, that he had to take health measures like using gas chambers for eliminating lice and not human beings. For more information about these theories, see generally PIERRE VIDAL-NAQUET, *Un Eichmann de papier*, in *LES ASSASSINS DE LA MÉMOIRE: “UN EICHMANN DE PAPIER” ET AUTRES ESSAIS SUR LE RÉVISIONNISME* 11, 33 (1987), *translated in* *ASSASSINS OF MEMORY: ESSAYS ON THE DENIAL OF THE HOLOCAUST* 1, 21–22 (Jeffrey Mehlman trans., Columbia Univ. Press 1992) [hereinafter VIDAL-NAQUET, *LES ASSASSINS DE LA MÉMOIRE*]; Nadine Fresco, *Les “révisionnistes” négateurs de la Shoah*, in *19 ENCYCLOPAEDIA UNIVERSALIS* 1003, 1003–04 (1992); Nadine Fresco, *Nouveaux visages du vieil antisémitisme*, in *ACTES DU COLLOQUE DE LA COUR D’APPEL DE PARIS* 17–36, available at <http://digbig.com/4qhxx> [hereinafter Fresco, *Nouveaux visages*].

Whereas the historic review of facts, explanations, and interpretations are part of the normal activity of historians, Holocaust revisionists use misrepresentation and omissions of facts so that they are not admitted by other historians. In an introduction to his book *Les assassins de la mémoire*, Pierre Vidal-Naquet declared that

a dialogue between two men, even when they are divergent, presupposes a common ground, a common respect, that is the truth. But with “revisionists,” that ground does not exist. . . .

Therefore I gave to myself a rule: one may, and one must discuss about “revisionists”; one may analyze their texts as one does the anatomy of a lie; . . . but one does not discuss with revisionists.<sup>23</sup>

Consequently “revisionists” are understood as “negationists” in order to differentiate them from “historical revisionists” since their goal is either to prove that the Holocaust did not exist or to introduce confusion regarding the victims and German executioners regardless of historical and scientific methodology and evidence. For those reasons, the term “revisionism” is often considered confusing since it conceals misleading ideologies that purport to avoid disapproval by presenting “revisions” of the past based on pseudo-scientific methods, while really they are a part of negationism.

### B. Revisionism and Anti-Semitism

In addition, and above all, Emanuela Fronza does not mention that negationists and revisionists of the Holocaust contribute to the diffusion of provocations to anti-Semitism. While negationism and revisionism are not scientific ideologies, they convey anti-Semitic opinions. Many negationists and revisionists’ writings, statements, and declarations show that, instead of being neutral, they include or refer to right and left extremist opinions that convey discrimination and prejudices on Jews by falsifying historical facts on World War II and Nazi crimes.<sup>24</sup>

As such, for instance, they imply or state openly that the Holocaust is the result of a deliberate Jewish *conspiracy* created to advance the interests of the Jews at the expense of other peoples.<sup>25</sup> They also declare that the

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23. PIERRE VIDAL-NAQUET, *Avant-propos*, in VIDAL-NAQUET, *LES ASSASSINS DE LA MÉMOIRE*, *supra* note 22, at 7, 9–10.

24. ROUSSO, *THE VICHY SYNDROME*, *supra* note 14, at 151–52.

25. *See, e.g.*, ROGER GARAUDY, *THE FOUNDING MYTHS OF MODERN ISRAEL* 165, 171 (Institute for Historical Review trans., Inst. for Historical Review 2000) (discussing how certain myths

Holocaust is a Jewish and Zionist myth and a for-profit business.<sup>26</sup> As a consequence, negationist and revisionist statements participate in racist and discriminating ideologies.<sup>27</sup>

Although they already appeared before and after World War II, those opinions have extended in Europe and in the United States since the 1970s.<sup>28</sup> In France, the negationist and revisionist declarations were more openly developed in 1978 in newspapers when the French magazine *L'Express* published an interview entitled *In Auschwitz Gas Was Only for Lice* from Louis Darquier de Bellepoix, the former director of the Commissariat Général aux Questions Juives (General Commission to Jewish Questions) between 1942 and 1944.<sup>29</sup>

The most important developments in France arose in December 1978 and January 1979 with the “Faurisson affair,” when Robert Faurisson who was an associate professor in literature at the university of Lyon II, published letters in the newspaper *Le Monde* where he stated that the Nazi genocide was a Zionist invention and that gas chambers used by the Nazis did not exist.<sup>30</sup> As a result of various declarations he was found guilty of

were pushed for political purposes and how the focus on the Holocaust has cheapened the deaths of the many Soviets and Germans that occurred during World War II).

26. *Id.* at 163. For instance, Roger Garaudy was condemned to a twenty-thousand-dollar fine by the Criminal Court of Paris for racial defamation and for contestation of crimes against humanity in his book, *Les Mythes fondateurs de la politique israélienne*, (The founding myths of Israeli Politics) where one chapter was called “[l]e mythe des ‘six millions.’” ROGER GARAUDY, *LES MYTHES FONDATEURS DE LA POLITIQUE ISRAÉLIENNE* 151 (1996), translated in GARAUDY, *supra* note 25; *Author Fined for Denying Holocaust*, JERUSALEM POST, Mar. 1, 1998, at 6. He was also condemned to pay damages to associations defending against racial and religious discriminations and representing deported persons. Daniel Lack, *First Judicial Precedents Interpreting the New Provisions of the Swiss Penal Code Prohibiting Racial Discrimination*, JUSTICE (Int’l Ass’n of Jewish Lawyers and Jurists, Tel Aviv, Isr.), Mar. 1998, at 27, 30.

27. For a general presentation, see Fresco, *Nouveaux visages*, *supra* note 22.

28. One of the authors in France after the war was Maurice Bardèche, collaborationist Robert Brasillach’s brother-in-law, who published two books between 1948 and 1950 called: *Nuremberg ou la Terre promise (Nuremberg or the Promise Land)* and *Nuremberg II ou les Faux monnayeurs (Nuremberg II or the False Money-makers)*. MAURICE BARDÈCHE, *NUREMBERG OU LA TERRE PROMISE* (1948); MAURICE BARDÈCHE, *NUREMBERG II OU LES FAUX MONNAYEURS* (1950). He developed the theory that the French delegation to the Nuremberg trial made a mistake in translating German invoices for gas as being gas for extermination, while the German text mentioned purification, which meant using the gas for destroying lice on prisoners. BARDÈCHE, *NUREMBERG OU LA TERRE PROMISE*, *supra*, at 38. Another famous author was Paul Rassinier who wrote in 1950 *Le Mensonge d’Ulysse (Ulysses’ Lie)*, which presented survivors of the Holocaust as liars. PAUL RASSINIER, *LE MENSONGE D’ULYSSE, REGARD SUR LA LITTÉRATURE CONCENTRATIONNAIRE* (1950). For another book by Paul Rassinier, see PAUL RASSINIER, *LES RESPONSABLES DE LA SECONDE GUERRE MONDIALE* (1967). About those authors, see generally FLORENT BRAYARD, *COMMENT L’IDÉE VINT À M. RASSINIER: NAISSANCE DU RÉVISIONNISME* (1996); NADINE FRESCO, *FABRICATION D’UN ANTISÉMITES* (1999).

29. Philippe Ganier-Raymond, “*A Auschwitz, on n’a gazé que les poux*”, *L’EXPRESS*, Nov. 4, 1978, at 76.

30. Letter from Robert Faurisson, Professor of Literature, University of Lyon II, to *Le Monde*,

defamation and incitement to racial hate and given a suspended three-month prison term, and a 3.6 F million fine that was later eliminated.<sup>31</sup>

Many racist and anti-Semitic manifestations developed between 1980 and 1990 as they were enhanced by extremist theories of the right wing political parties close to fascist and Nazi propaganda. As such, in France, Jean-Marie Le Pen in 1987 provoked a scandal when he mentioned that gas chambers were “a detail in the history of the Second World War.”<sup>32</sup>

Profanations of the Jewish cemetery in Carpentras and declarations by Jean-Marie Le Pen were utmost manifestations that showed the necessity to adopt additional preventive and punitive measures. French judges had difficulties punishing revisionists’ assertions as defamations or insults when they were not published in newspapers or tracts including anti-Semitic declarations or provocations.

In other European countries, like Great Britain, several authors also presented themselves as historians and developed denial-of-the-Holocaust theories. In 1996, David John Cardwell Irving,<sup>33</sup> the author of several best-selling books about the military history of World War II sued, for defamation and libel, Deborah Esther Lipstadt, an U.S. historian and author of the book *Denying the Holocaust: The Growing Assault on Truth and Memory*, and her publisher Penguin in a British court, because she accused him of Holocaust denial and Nazi propaganda.<sup>34</sup> He lost in 2000 after evidence was brought in court that he used historical misrepresentation to refute the Holocaust and expose anti-Semitic ideology.<sup>35</sup> In line with that evolution, in the United States, the Institute for Historical Review (IHR) was created in 1979 in California and became one of the major negationist institutions in that country.<sup>36</sup>

As a result, in that context, negationism and revisionism of the Holocaust are generally considered as an expression of anti-Semitic theories. Because of that, they have been declared illegal and criminal

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*Le débat sur les “chambres à gaz”*, LE MONDE, Jan. 16, 1979, at 13; Letter from Robert Faurisson, Professor of Literature, University of Lyon II, to Le Monde, “*Le problème des chambres à gaz” ou “la rumeur d’Auschwitz”*”, LE MONDE, Dec. 29, 1978, at 8.

31. Mark Weber, *French Courts Punish Holocaust Apostasy*, J. HIST. REV., Mar./Apr. 1998, at 14, 15.

32. *Foes Twisted His Remarks, Le Pen Says*, *supra* note 21.

33. Fronza, *supra* note 2, at 615 n.20.

34. RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL 2–6 (2001); D.D. GUTTENPLAN, THE HOLOCAUST ON TRIAL 1–2 (2001); DEBORAH E. LIPSTADT, HISTORY ON TRIAL: MY DAY IN COURT WITH DAVID IRVING xvii–xxi (2005).

35. GUTTENPLAN, *supra* note 34, at 1, 273, 278–83.

36. One of the U.S. leaders is Arthur Butz who wrote *The Hoax of the Twentieth Century*, published by IHR. A. R. BUTZ, THE HOAX OF THE TWENTIETH CENTURY (1976). In that book, Butz states that the skepticism about the Holocaust is that the Jews are “still there.” *Id.* at 10.

offenses in various countries. Thereafter, negationists and revisionists pretend that they are deprived of freedom of opinion and expression.

## II. MEMORY AND LEGAL REACTIONS TO NEGATIONISM OF HOLOCAUST

Emanuela Fronza refers to several international and European conventions as well as national statutes creating a remembrance day for the Holocaust and punishing denial of the Holocaust.<sup>37</sup> On the basis of a distinction between law, history, and memory, Emanuela Fronza presents various attacks against criminal punishment of negationism for the following reasons.

Emanuela Fronza compares criminal laws and laws on the remembrance. She considers that when the legislature imposes a remembrance day, “the intervention is limited to a solemn invitation to remember a significant moment, and to impose on the civic memory the moral obligation not to forget.”<sup>38</sup> Emanuela Fronza thinks that the technique of memorial laws “produces a constructive dialogue” and she considers that “the intervention is limited.”<sup>39</sup> “In this way, synergies are fostered among protagonists, testimonies, intellectuals, and researchers, who are led to confront each other about what has happened and what could happen.”<sup>40</sup>

On the other hand, according to Emanuela Fronza, criminal laws “render the law-memory relationship more difficult” because criminal law is “invasive and limit individuality.”<sup>41</sup> She adds that “[c]riminal laws and trials are characterized by a language and a logic that is distinct from those of memory formation and historical research.”<sup>42</sup>

But, that presentation denies the important function of the rule of law and the significant task of justice to not only preserve history and memory but also protect the honor and the recollection of the victims of genocides when survivors and witnesses disappear. Moreover, criminal laws fix important limits to negations and falsifications of the Holocaust, the major crime of the twentieth century. Many barriers must be set for negations and falsifications of history since negation of the past is a danger for the present and the future of our society.

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37. Fronza, *supra* note 2, at 611–12.

38. *Id.* at 620.

39. *Id.* (emphasis omitted).

40. *Id.*

41. *Id.*

42. *Id.* at 620–21.

In 1992, during a symposium held in Paris, on the tenth anniversary of the French law Gayssot, a sentence by a French author was referred to: “the one who denies the genocide destroys the memory of the victims and prepares the repetition of collective deaths.”<sup>43</sup>

For those reasons, criminal laws have been considered in various countries as important measures in order to contribute to the recognition of moral values in social behavior. They complete penalties for defamation and insult<sup>44</sup> that prove to be insufficient for punishing negationists or revisionists when they refrain from including provocations to anti-Semitism or religious hate in their statements and analysis.

It is interesting to note that criminal laws on negationism may have a deterrent effect on revisionists. During a symposium held in 2000 at the Court of Appeals of Paris for the tenth anniversary of the French law Gayssot, information was given by the French Ministry of Justice that only twenty-nine condemnations were decided between 1992 and 2000, which amounted to three sentences per year.<sup>45</sup> Among the condemnations, eight decisions ordered imprisonment with suspension so that the punishment was more infamous than fines.<sup>46</sup> The statistics tend to show that criminal punishment was viewed also as a preventative measure that might dissuade negationists to express publicly their ideology.

However, since 2000, public declarations and manifestations of racism and anti-Semitism have increased in France and in several other countries.<sup>47</sup> In that context, judges have been inclined to pronounce more severe condemnations. David John Cardwell Irving was sentenced to three years of prison by the Austrian courts after he denied the existence of gas chambers.<sup>48</sup> In France, for the first time, on May 17, 2006, the Court of appeals in Lyon upheld a judgment that sent Georges Theil to prison for after he made public declarations that gas chambers were impossible and

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43. Denis Salas, *Le droit peut-il contribuer au travail de mémoire?*, in LA LUTTE CONTRE LE NÉGATIONNISME: BILAN ET PERSPECTIVES DE LA LOI DU 13 JUILLET 1990 TENDANT À RÉPRIMER TOUT ACTE RACISTE, ANTISÉMITTE OU XÉNOPHOBE 36, 44 (2003) (quoting YVES TERNON, DU NÉGATIONNISME: MÉMOIRE ET TABOU 14 (1999)).

44. See Fronza, *supra* note 2, at 621 n.51 (“Other provisions in criminal codes, such as those addressing injury or defamation, address these situations.”).

45. Matthieu Bourrette, *Les poursuites: statistiques des condamnations et typologie des procédures*, in LA LUTTE CONTRE LE NÉGATIONNISME: BILAN ET PERSPECTIVES DE LA LOI DU 13 JUILLET 1990 TENDANT À RÉPRIMER TOUT ACTE RACISTE, ANTISÉMITTE OU XÉNOPHOBE 53, 57 (2003).

46. *Id.*

47. See RAPPORT DE LA COMMISSION NATIONALE CONSULTATIVE DES DROITS DE L’HOMME 11 (2006), <http://digbig.com/4qhsj> (mentioning that despite a decrease in racist, anti-Semitic, and xenophobic acts in 2005 the number of these acts occurring is still higher than it was during 1995–1999).

48. *Holocaust Denier Irving Is Jailed*, BBC NEWS, Feb. 20, 2006, <http://digbig.com/4qkby>.

could only be a phantasm.<sup>49</sup>

On May 22, 2005, Bruno Gollnisch, a leader of the Front National and professor of Japanese civilization at the University of Lyon III, was suspended for five years from that university with suppression of half of his remuneration.<sup>50</sup> This occurred because of his declarations on October 11, 2004, referring to gas chambers and his critical conclusions of the Nuremberg court and also because of a report presented by the historian Henry Rousso about the presence of negationists in the University of Lyon III.<sup>51</sup> An appeal was filed against the decision of the judge of investigations of the criminal chamber at the Court of Lyon, on March 2006, to dismiss the claims against Bruno Gollnisch based on his contesting that these are crimes against humanity.<sup>52</sup>

Famous trials gave general publicity to punishments of negationists or revisionists. In France, Roger Garaudy was found guilty in 1998 of Holocaust denial and racial defamation, and he had to pay a fine of 120,000 F (\$40,000) for his 1995 book, *The Founding Myths of Israeli Politics*, which echoed the views of French Holocaust denier Robert Faurisson and declared that during the Holocaust, Jews were not killed in gas chambers.<sup>53</sup>

In Austria on February 20, 2006, David John Cardwell Irving was sentenced to three years' imprisonment in accordance with the Austrian Federal Law on the prohibition of National Socialist activities (officially termed *Verbotsgesetz*, "Prohibition Statute") for having denied the existence of gas chambers in Nazi concentration camps in several lectures held in Austria in 1989.<sup>54</sup>

Thus, criminal laws against negationism and revisionism may be combined with other legal methods such as laws on remembrance days, for sustaining memory and history against false historians, negationists, and revisionists.

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49. Frances Harrison, *Where Holocaust Denial Is Welcomed*, BBC NEWS, Dec. 16, 2006, available at <http://digbig.com/4rcnm>.

50. *French Far-Right Leader to Appeal*, BBC NEWS, Jan. 19, 2007, available at <http://digbig.com/4rcnp>.

51. *Id.*

52. *Id.*

53. GARAUDY, *supra* note 25, at vii–ix, 104–07; *Author Fined for Denying Holocaust*, *supra* note 26.

54. Bundes-Verfassungsgesetz [B-VG] [Constitution BGBl No. 1/1930, as last amended by zuletzt geändert wird [Verbotsgesetz-Novelle 1992] [Constitution] BGBl. No. 148/1992 (Austria); *Holocaust Denier Irving is Jailed*, BBC NEWS, Feb. 20, 2006, available at <http://digbig.com/4rcnq>.

*A. Compliance of Legal Reactions with National Constitutions and International Conventions on Freedom of Expression and Opinion*

Emanuela Fronza refers to other criticisms of criminal laws by negationists or revisionists who claim that they are deprived of freedom of opinion and expression. Emanuela Fronza argues that criminal laws impose an official and unique interpretation of history,<sup>55</sup> and historians should benefit from complete freedom for their scientific activities and research of facts and explanations.

She adds that: “If the repugnant, immoral character of such ideas is thus mentally eliminated, nothing externally visible or socially injuring remains in the negationist attack. Immorality should never be raised as the sole justification for the coercive intervention of the state in the life of its citizens.”<sup>56</sup>

She presents criminal punishment of negationism as an unacceptable infringement of freedom of opinion and states that the freedom is recognized as an international and constitutional human right that should not be denied on alleged grounds of public policy and social order against negationism.<sup>57</sup> “Immorality should never be raised as the sole justification for the coercive intervention of the state in the life of its citizens.”<sup>58</sup> That intervention is analyzed as a serious and unjustified limit to freedom of opinion and expression.<sup>59</sup>

1. Punishment of Negationism/Revisionism Is Not Imposing an Official History

Many opponents to the punishment of negationism and revisionism allege that legal systems impose an official presentation of the past and that states interfere with historical research and activities.<sup>60</sup>

That argument was also mentioned recently by French historians, politicians, teachers, and representatives of the former colonies after the vote by the French Parliament of paragraph four in the law of February 23, 2005, asking teachers and textbooks to “acknowledge and recognize in particular the positive role of the French presence abroad, especially in North Africa.”<sup>61</sup> The hostility was such that the controversial paragraph of

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55. Fronza, *supra* note 2, at 621.

56. *Id.* at 622.

57. *Id.* at 623.

58. *Id.* at 622.

59. *Id.* at 623.

60. *Id.* at 620–21

61. Law No. 2005-158 of Feb. 23, 2005, Journal Officiel de la République Française [J.O.]

the law was finally repealed by President Jacques Chirac at the beginning of 2006.<sup>62</sup>

They also challenged the laws on negationism and slavery on the ground that freedom of opinion will benefit historians who should be able to confront their ideas and explanations of the past. However, it is necessary to point out that criminal laws on punishment of negationism are quite different from laws that impose an opinion for approval or disapproval of historical events.

First, they concern crimes that are defined as crimes against humanity. Second, they have a specific purpose in relation to history and memory, since they refer to opinions that are promoting anti-Semitic or racist propaganda, and for that reason those opinions are not only immoral but also illicit as contrary to public policy. Third, the decisions of the judges are based on established, historic facts and judicial activity should not raise more criticism than when they appreciate defamation or insult toward individuals. On the contrary, analyzing the negation and/or contestation of the Holocaust as well as other crimes against humanity is even more necessary in order to protect collective and social values, memories of victims, and respect for survivors.<sup>63</sup>

When Emanuela Fronza states that “[t]he laws on negationism, efficient and symbolic, are often pushed by the tidal force of public opinion,”<sup>64</sup> she seems to forget that criminal laws are also valuable for their deterrent and preventive effects on public opinion and behavior. Misrepresentations by negationists and revisionists have dangerous effects upon naive and misinformed persons’ beliefs, and they contribute to racism and anti-Semitism. As such, negationism and revisionism are prohibited as an expression of anti-Semitic propaganda. As a consequence, criminal laws are part of the various measures that must protect history and memory against bad faith and falsifications when survivors are disappearing.

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[Official Gazette of France], Feb. 24, 2005, p. 3128, art. 4.

62. Domenica Raizon, *Chirac revient sur “le rôle positif” de la colonisation*, RFI Actualité, Jan. 26, 2006, <http://digbig.com/4qjak>.

63. Nicolas Bernard, *La “loi Gayssot”, sanctionnant pénalement le discours négationniste, est-elle conforme à la Constitution?*, Feb. 17, 2003, ch. 2, § 2, <http://digbig.com/4qjae>.

64. Fronza, *supra* note 2, at 623.

## 2. Freedom of Opinion and Expression Is Not Absolute

In some countries, like the United States, criminal punishment of negationism is viewed as an infringement of freedom of opinion.<sup>65</sup> Yet freedom of opinion and expression is limited when it contains misrepresentations that produce injuries to other individuals or groups of people.<sup>66</sup>

According to Emanuela Fronza, French law Gayssot passed on July 13, 1990 is presented as “[t]he conduct that constitutes the offense of negationism is defined in the French Code by reference to other judgments.”<sup>67</sup> However, that presentation is not exact since the law Gayssot prohibits contestations of the existence of crimes against humanity with reference to international statutes.<sup>68</sup>

Indeed, the law Gayssot, passed on July 13, 1990, introduces article 24 in the law of July 29, 1881, on press and communication.<sup>69</sup> That article provides for penalties for racial and religious discrimination.<sup>70</sup> It defines the offense as follows:

Shall be punished by penalties provided by paragraph 6 of article 24 those who shall contest by the methods mentioned in article 23 the existence of one or various crimes against humanity, defined by article 6 of the charter of the international military court annexed to the London Agreement of August 8, 1945, and which are performed either by the members of an organization declared guilty under article 9 of that charter, or by a person declared guilty by a French or an international court.<sup>71</sup>

The last paragraph provides that: “the court may also order: the postage and publicity of the decision in accordance with article 51-1 of the Penal Code.”<sup>72</sup>

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65. Peter Teachout, *Making “Holocaust Denial” a Crime: Reflections on European Anti-Negationist Laws From the Perspective of American Constitutional Experience*, 30 VT. L. REV. 645, 648 (2006).

66. *Id.* at 670–73.

67. Fronza, *supra* note 2, at 621 (citing Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333).

68. Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333.

69. *Id.*

70. Law of July 29, 1881, J.O., July 30, 1881 p. 4201.

71. Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333.

72. *Id.*

The definition of crimes against humanity is clearly specified with reference to the description of crimes committed by the Nazis by the Court of Nuremberg that have been adopted in the Statute of the Court of Nuremberg dated August 8, 1945, and later on in the United Nations Resolution of February 13, 1946.<sup>73</sup> That definition was adopted in the French law of 1990 in order to provide French judges with a precise reference to crimes against humanity.<sup>74</sup> As a consequence, judges may only punish falsifications of the Holocaust while opinions on the existence of the Holocaust and explanations on the crimes are not punished when they do not present bad faith and misrepresentation.

For instance, the Court of Paris admitted critics of the proceedings used in the Nuremberg Court.<sup>75</sup> Discussions about the numbers of Jews exterminated has never been considered as a negation or a revision to be punished under the law Gayssot. On the other hand, the French Supreme Court decided that an excessive diminution of the victims of the Holocaust must be punished when it is made with bad faith.<sup>76</sup> On September 12, 2000, the Criminal Chamber of the Supreme Court held that contestation of crimes against humanity, even though it is presented with doubts or insinuations or qualified as research for historical truth, tends to deny the crimes against humanity committed by the Nazis against Jews and is punishable by the law dated July 29, 1881.<sup>77</sup>

In addition, article 24 refers to article 23 so that negationism or revisionism is not punished in France as an opinion, but it is an offense when it is expressed in public places or public meetings by speech, writings, drawings, paintings, emblems, pictures, or transferred by audiovisual means.<sup>78</sup> Therefore, French law condemns only the public expression and transmission of negationism.<sup>79</sup>

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73. G.A. Res. 3(I), U.N. Doc. A/50 (Feb. 13, 1946); Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, Nuremberg, Aug. 8, 1945, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 279.

74. Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333; Jean-Claude Gayssot & Charles Lederman, *Une loi contre l'antisémitisme militant*, LE MONDE, June 26, 1996.

75. Tribunal de Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Oct. 22, 1996, *Légipresse* 1997, III, n. 139.

76. Cour de cassation, chambre criminelle [Cass. Crim.] [highest court of ordinary jurisdiction, criminal chamber], June 17, 1997, D. 1998 50, note Jean-Philippe Feldman.

77. Cour de Cassation, Chambre criminelle [Cass. crim.] [highest court of ordinary jurisdiction], Sept. 12, 2000.

78. Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333.

79. Michel Troper, *Droit et négationisme: La loi Gayssot et la Constitution*, 54 ANNALES, HISTOIRE, SCIENCES SOCIALES 1239, 1253 (1999).

In addition, several attacks against the law Gayssot and a number of criminal laws on negationism in various countries have been refused by constitutional courts, by the European Commission of Human Rights, and by the United Nations Committee of Human Rights since they were considered valid restrictions on freedom of speech.

At the European level, a famous case was introduced against France by a French negationist Pierre Marais in 1996 after he was condemned by French courts for a negationist publication in a review called *Revision*.<sup>80</sup> He claimed that the law Gayssot was a violation of article 10 of the European Convention of Human Rights that recognizes the right to freedom of expression and opinion.<sup>81</sup> However, the Commission held that the exercise of that freedom was subject to legal restrictions provided that they were necessary measures in a democratic society.<sup>82</sup> The Commission considered that the law Gayssot had legitimate purposes and intended to preserve peace among the French population by protecting the public order and the reputation and the rights of individuals.<sup>83</sup> Looking at the publication that was casting doubts on the existence of gas chambers, the Commission decided that Pierre Marais's writings were infringements of justice and peace, fundamental values protected by the Convention.<sup>84</sup>

Later on, in 2000, Roger Garaudy filed a suit against France based on violation of article 10 of the Convention after his condemnation for negationism.<sup>85</sup> He also invoked article 17, which prohibited abuse of right.<sup>86</sup> The European Court of Human Rights decided that the law Gayssot was a legitimate restriction on freedom of expression and opinion and that article 17 was not applicable.<sup>87</sup> The ECHR had previously decided that the denial of clearly established facts, such as the Holocaust, would be removed from the protection of article 10 by article 17 of the Convention.<sup>88</sup>

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80. Marais v. France, App. No. 31159/96, 86-A Eur. Comm'n H.R. Dec. & Rep. 184, 185–86 (1996).

81. *Id.* at 186.

82. *Id.* at 189–90.

83. *Id.* at 190.

84. *Id.*; Patrick Wachsmann, *La jurisprudence récente de la Commission européenne des droits de l'homme en matière de "négaționisme,"* in LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME: DÉVELOPPEMENTS RÉCENTS ET NOUVEAUX DÉFIS 101 (Institut des hautes études européennes, Droit et Justice No. 19, Jean-François Flauss & Michel de Salvia eds., 1997).

85. Garaudy v. France, 2003-IX Eur. Ct. H.R. 333, 339–41.

86. *Id.* at 341.

87. *Id.* at 361–62.

88. Lehideux v. France, 1998-VII Eur. Ct. H.R. 2864, para. 47.

On the international level, Robert Faurisson, who was removed from his university chair on the basis of his views under the law Gayssot, challenged the statute as a violation of international law before the United Nations Human Rights Committee.<sup>89</sup> But the Committee upheld the law Gayssot as a valid restriction on free speech in order to prevent anti-Semitism, and because it was not a violation of article 19 of the International Agreement on Civil and Political Rights.<sup>90</sup>

Protection of honor, dignity, and reputation, preservation of memory and defense of peace in democratic societies, and elimination of anti-Semitic, Nazist, and racist ideologies are fundamental values for our societies that may justify restrictions to freedom of expression. In several countries, those values have also been defended by constitutional courts for validating criminal laws on punishment of negationism.<sup>91</sup> Several laws have extended the offense to negation of all genocides and, recently, in France a draft law was proposed for that extension.<sup>92</sup>

Another concern now is the application of those punishments to racist and anti-Semitic propaganda since there are more than four thousand negationist sites on the Internet. For that purpose, an additional protocol was adopted by the Council of Europe Committee of Ministers on November 7, 2002, under the title *Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems*.<sup>93</sup> Article 5 of the Protocol requires participating states to criminalize the diffusion of racial material and insults through computer systems.<sup>94</sup> Article 6 specifically covers the denial of the Holocaust and genocides recognized as such by international courts set up since 1945 by international legal instruments and states as follows:

Article 6 – Denial, gross minimisation, approval or justification of genocide or crimes against humanity

1 Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences

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89. Human Rights Committee (HRC), *Comm'n No. 550/1993: Robert Faurisson v. France*, paras. 2.1, 2.5–3.1, U.N. Doc. CCPR/C/58/D/550/1993 (adopted on Dec. 16, 1996).

90. *Id.* para. 9.6–9.7.

91. Troper, *supra* note 79, at 1253.

92. Senate extraordinary session 2004-2005, proposal no.° 507 regarding criminal punishment of public contestation of crimes against humanity and proposal no.° 2778 at the National Assembly, on December 22, 2005.

93. Additional Protocol to the Convention on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems, *opened for signature* Nov. 23, 2001, Europ. T.S. No. 189 (entered into force Jan. 28, 2003).

94. *Id.* art. 5.

under its domestic law, when committed intentionally and without right:  
distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

2 A Party may either  
a require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise.<sup>95</sup>

#### CONCLUSION

While there is an irrevocable tendency to acknowledge crimes against humanity in the twenty-first century, the struggle must continue against racism and discrimination. Remembrance days are only one aspect of the memory of the past for the society; punishment of negationism or revisionism as survival or revival of racism and discrimination is a tribute to a better future in our societies.

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95. *Id.* art. 6.