AN ESSAY ON PROFESSOR FRONZA'S PAPER: SHOULD HOLOCAUST DENIAL BE CRIMINALIZED?

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Many of the essays in this book examine the ways in which national and international legal systems protect or adapt to particular attributes of cultural, linguistic, ethnic, and racial minorities. In contrast, instead of addressing issues of affirmative protections, Professor Fronza's paper focuses on the difficult relationship between law and memory as a society and its culture struggle to deal with the aftermath of mass atrocities.[1] The context for her discussion is the Holocaust of World War II.[2] Specifically, she considers whether Holocaust negation should be subject to criminal sanctions in Italy.[3] Professor Fronza argues that while legislatively mandated days of Holocaust remembrance are appropriate, Holocaust denial should not be criminalized.[4]

Professor Fronza's Essay develops her arguments in the context of freedom of expression. According to Professor Fronza, "[f]orms of intolerance like negationism raise many questions with regard to both the value being protected and the appropriate form of protection; this protection, in turn, needs to be both opportune from a political standpoint, and legitimate from a constitutional perspective."[5] In her view, the discussion of freedom of expression is linked to the protection of minority groups in the following way: the "paradigmatic example of the difficulty of balancing fundamental rights: in this case, a balance must be struck between the freedom of expression on the one hand, and the rights to nondiscrimination, to the protection of the public order, and to the respect of the freedom of others on the other hand."[6]

Although Professor Fronza's Essay focuses on the legal aspects of Holocaust denial and raises questions of how best to strike a balance between freedom of expression and criminal repression of speech, the implications of her discussion reach far beyond the particular context she has chosen. The subject of her Essay compels one to consider more broadly

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1. Emanuela Fronza, *The Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609, 609 (2006).
2. *Id.*
3. *Id.* at 610–11.
4. *Id.* at 624–25.
5. *Id.* at 614–15.
6. *Id.* at 615 n.19.

how a culture and its legal system should respond to the aftermath of mass atrocities expressing the darkest impulses of the human soul. Of particular concern are mass atrocities perpetrated by a culture's majority against that culture's minorities. Examples abound: the mass murder of Armenians during the early years of the twentieth century, the rape of Nanking, the Cambodian killing fields, the slaughter in Rwanda, and the killings in Darfur. Mass atrocities poison a culture's morals,[7] particularly when the atrocities are understood to express the will and values of a cultural majority.

A culture willing to confront its past to save its future must consider how best to marshal its resources to pursue justice and preserve truth,[8] to strike a balance between remembering and forgetting,[9] and to shape and preserve the culture's collective memory as one way to forestall the recurrence of heinous events.[10] The complex analysis that the circumstances require originates at the intersections of social policy, politics, values, and culture.[11]

When a country's legal system is invoked as part of a cultural response to mass atrocities, one must pause to consider: (1) what the legal system is being asked to accomplish and to what extent the uses of legal process and the application of legal rules are appropriate to achieving those goals; and (2) if a legal response is appropriate, what is the larger significance of a sovereign government's decision to preserve cultural memory by regulating speech?

In inquiring how a legal system may best respond to the aftermath of mass atrocities, one may first consider the values and goals being advanced or given primacy in a given situation and the interests being served. There are many possible, often overlapping, and sometimes conflicting goals: validating the lives, dignity, and suffering of the victims; protecting the free and open expression of ideas; insuring transparency of expression; protecting the public order; healing a torn society; punishing transgressors; protecting historical truth; preserving cultural memory; and preventing the

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7. *See generally* Richard J. Goldstone, *Foreword* to MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE at ix, ix (1998) (mentioning how the perpetrators of such acts make excuses for their actions and how bystanders ignore the calls for justice from the victims).

8. *See id.* at 8 (discussing how a person or victim must decide on how to bottle their anger and move from a feeling of revenge towards forgiveness).

9. *Id.* at 118.

10. *See id.* at 118–19 (discussing the many various viewpoints on how memory should be used to shape the future).

11. Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1186 (N. D. Cal 2001)

repetition of acts so heinous they are irreconcilable with the idea of a civilized society. One must also consider the extent to which the legal system is equipped to achieve those goals and whether resort to legal process or to regulation of speech or to some combination of the two can effectively achieve the desired societal objectives.

Legal process ordinarily has an important role to play in responding to violent events. Trials based on the rule of law followed, as appropriate, by the imposition of sanctions are an accepted and effective means of providing justice to victims of violence, of securing accountability of actors perpetrating violence, and of arriving at the truth of the events leading to a particular aspect of the broader conflict.[12] Neither objective, however, is easily accomplished when individual trials are used to provide redress to the victims of mass atrocities.[13] Providing justice to all victims of violence would necessarily involve a trial of each individual perpetrator followed by the appropriate punishment of those who are found guilty.[14] A fully individualized process is, however, usually not possible in situations involving mass violence because the sheer numbers of victims and perpetrators may overwhelm the legal process.[15] Further, although truth seeking plays a central role in trials based on the rule of law, the objective of a particular trial is not to discover or preserve the truth of the events as a whole but to examine a particular component of the larger truth in order to achieve justice in a specific instance. Since trials develop only a part of or a particular version of the truth, once a trial is over and its records filed away, its truth lies in the repository of history and recedes into fading memory unless recalled to the present by discussion and debate. While it may be true that convening a large number of individualized trials extending over periods of years may provide redress in particular instances, this extended use of legal process may also impede a country's ability to begin building its future. The numbers of participants and the range and complexity of objectives and consequences of using legal process to deal with mass atrocities create a set of problems very different from those associated with providing redress to an individual for a personal wrong.[16] Consequently, nations have sought additional ways to accomplish justice: trials of selected individuals, usually political actors, as representative of the whole;[17] truth

12. MINOW, *supra* note 7, at 9.

13. Richard J. Goldstone, *Foreword* to MINOW, *supra* note 7, at ix.

14. *Id.*

15. *Id.* at ix–x.

16. *Id.*

17. *See generally* MINOW, *supra* note 7, at 25–51 (presenting how these trials have worked throughout history since the Nuremberg and Tokyo trials).

commissions;[18] apologies;[19] reparations;[20] and regulation of speech.[21] The need for a multiplicity of approaches suggests that a legal-process-based approach may either be too limited or may accomplish some objectives to the detriment of others.

The invocation of legal process based on prohibitions of violent acts is but one of the ways a legal system can respond affirmatively to horrific events. Civil or criminal regulation of speech is another. A society may choose to use positive law to silence offensive expression, to forbid denial of documented fact, or to establish affirmatively what that culture's truth is. In the alternative, it may adopt a libertarian approach and leave speech largely unregulated. Or it may choose another path entirely. The process of choosing requires a society to identify what values to promote—free expression of ideas, including those based on erroneous information, or preservation of fact-based cultural memory, which may also be erroneous—and whose perspectives to protect: those of the oppressors or those of the victims. It must also determine how best to balance or accommodate competing goals.

Regulation and punishment of unacceptable expression may be viewed as a means of insuring, in a public way, that objective, historical truth is preserved and protected against both revision and negation.[22] Laws prohibiting denial of documented fact may serve to preserve those facts in cultural memory. Honest, unflinching cultural memory can help ward off the danger of repeating the past. Further, regulation of the content of speech may not only preserve cultural memory but also insure that the voices of the victims are heard and thereby promote the healing of those who were the victims of mass atrocities.

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18. *See generally id.* at 52–90 (describing how truth commissions work in the context of a few that have occurred over the years).

19. *See generally id.* at 112–16 (illustrating how apologies have been used over the past years to rectify wrongs).

20. *See generally id.* at 91–117 (explaining how reparations and the principles of restorative justice have been used throughout the years to make up for past wrongs).

21. *See generally* Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181, 1184–85 (N.D. Cal. 2001) (discussing an order of a French court that required Yahoo! to prohibit certain racist propaganda from being sold on its auction site and that restricted Yahoo! from providing French citizens with access to certain websites that contain racist propaganda); Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 336–37 (1998) (discussing how various countries throughout the world have enacted hate speech statutes).

22. Pascale Bloch, *Response to Professor Fronza's The Punishment of Negationism*, 30 VT. L. REV. 627, 634 (2006).

There is, of course, always the danger that an "official truth" may, itself, become an instrument of intolerance and, at its worst, rather than provide solace and reassurance to victims, instead protect the perpetrators. For example, Turkish novelist Orhan Pamuk was charged with violating article 301 of the Turkish Penal Code, effective June 2005, which forbids "[p]ublic denigration of Turkishness."[23] Pamuk's conviction was based on his speaking about the Armenian Genocide perpetrated by the Turks.[24] In contrast, a libertarian approach values freedom of expression, including reprehensible expression, in order to arrive at truth by the process of free exchange of ideas in a public forum.[25] Thus, "[a] system of free expression . . . has value because it enables the public . . . to arrive at truth and make wise decisions, especially about matters of public import."[26] Ongoing processes of open discussion and debate play a crucial role in achieving and preserving truth to enable a culture to confront its past, a confrontation that in turn shapes a culture's future. Participatory building of cultural memory may help ward off the recurrence of heinous acts.

Too much freedom in expressing too many views may, however, lead to unintended consequences. A reprehensible communication may silence the minority group that is the object of the expression, diminish the range of ideas being shared and thus the quality of the discussion, and result in a wrong or distorted memory or version of the truth.[27] Further, as Minow concluded, "Americans in particular have 'become addicted to memory,' making modern American politics 'a competition for enshrining grievances.'"[28] A consequence is that "[t]he surfeit of memory is a sign not of historical confidence but a retreat from transformative politics."[29] Excessive expression of individual grievances may signal a retreat from the healthy debate envisioned by the libertarian ideal. Too much individualized memory may flourish. Too little collective cultural memory may survive.

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23. Law No. 5237 of Sept. 26, 2004, T.C. Resmî Gazete [Official Gazette of Republic of Turkey], Oct. 12, 2004, tit. 2, pt. 4, § 3, art. 301; Yigal Schleifer, *Turkish Writers Take Stand for Free Speech*, CHRISTIAN SCI. MONITOR, Feb. 7, 2006, at 4.

24. Schleifer, *supra* note 23.

25. *See Yahoo!, Inc.*, 169 F. Supp. 2d at 1187 ("[T]he fundamental judgment expressed in the First Amendment [of the U. S. Constitution] that it is preferable to permit the non-violent expression of offensive viewpoints rather than to impose viewpoint-based governmental regulation upon speech.").

26. Kübler, *supra* note 21, at 369 (alterations in original) (quoting Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 424 (1996)).

27. *See id.* at 367 (discussing the "silencing effect" and its impact on how it may result in a certain segment of the community not communicating with the rest of society).

28. MINOW, *supra* note 7, at 118 (quoting Charles S. Maier, *A Surfeit of Memory? Reflections on History, Melancholy and Denial*, HIST. & MEMORY, Fall/Winter 1993, at 136, 140, 147).

29. *Id.* at 186 n.2 (quoting Maier, *supra* note 28, at 150).

Forgetting or ignoring the larger, social impact of horrific events may lead to their repetition. Refusing to remember may leave the victims marginalized and vulnerable and reinforce their hatred of oppressors and their desire for retribution and revenge.

One should also consider the cultural context in which alternatives are considered and choices are made. What are the implications of choosing one approach over the other in the context of a common law or civil law legal system? Although "[Western legal systems], give[] prominence to individualism, liberalism and individual rights,"[30] there are important differences among these legal systems with respect to how law is viewed. Comparativist René David has asked, to what extent is there viewed a "coincidence between law, which is [viewed as] justice, and legislation, which is the will of the legislators."[31] For David, the central aspect of the civilian legal system's approach to law is that a legal rule helps:

> to assure better social justice or a more stable economic or moral order. It allows public opinion and the legislators to intervene more efficiently in order to correct certain forms of behaviour and even to orient society towards certain goals. That such is a function of law conforms to the tradition according to which law is seen as a model of social organization. This policy-directing and not purely litigious aspect of law is today confirmed and reinforced because we now expect the law to assist in the creation of a society very different from that of the past.
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> This concept of the legal rule in the Romano-Germanic family is the fundamental basis of codification such as it is conceived in continental Europe.[32]

If, in a civilian legal system, a central role of law and of a legal rule is "to assist in the creation of a society very different from that of the past,"[33] for a citizen in a civil law country, the absence of positive law on the issue of negationism may have a real and symbolic significance very different from that signaled by the absence of positive law on the same subject in the U.S. common law system. Further, if the civil law legal system is viewed as evidence "that a single, complete, coherent, and logical system of law to govern all legal relationships is possible, and that the human mind is

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30. RENÉ DAVID, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY § 20, at 24 (trans. John E. C. Brierley, 2d ed. 1978).

31. *Id.* § 77, at 96.

32. *Id.* § 70, at 88.

33. *Id.*

capable of thinking it out,"[34] in a civil law system the absence of positive law on a subject as important as Holocaust denial may be viewed as a dark hole in the constellation of social policy that law advances.

Further, to the extent that achieving predictability of outcomes and stability is given greater weight in civilian legal systems than is developing flexible responses to a given situation, the absence of positive law sanctioning negationism may be perceived as a lack of governmental commitment to effect positive social change and may undermine the victims' desire for stability in the present and predictability of future outcomes. The actual and symbolic significance of the presence of positive law regulating a reprehensible form of speech may be particularly significant in countries in which the government was a perpetrator of the wrongs at issue. Thus, for the victim living in a country in which the government, the institution created to protect its citizens, was in fact a perpetrator, the creation of a day of memory, though important, may not convey the same cultural sense of moral outrage and seriousness as would the invocation of the prohibitions of the criminal justice system. The use of the legal system to make a strong, affirmative statement about the wrongs of the past and the mandates for the future may seem more compelling when the sovereign as protector has become the sovereign as predator.

In this context, then, a legal rule criminalizing speech denying or negating a form of mass atrocity may be viewed as an important part of the broader social engineering role of the law, a sign that the ship of state has left the moorings of the past and charted a course toward a better future, navigating according to identifiable legal guidelines. Although the uncertainties of the future are always real and the tides of public opinion ebb and flow, the presence of a legal rule provides some certainty in the process of charting a new social course.

In contrast, in a common law system, the absence of positive law on the issue of negationism may not transmit the same kind of negative signal. Legislative acts are only one source of law in the U.S. common law legal system, which is based on the idea that legislative competence must be derived from constitutional provision.[35] Judge-made law also plays a prominent role.[36] In contrast to legislative enactments, the development of

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34. NADIA E. NEDZEL, LEGAL REASONING, RESEARCH, AND WRITING FOR INTERNATIONAL GRADUATE STUDENTS 3 (2004) (quoting Woodfin L. Butte, *Stare Decisis, Doctrine, and Jurisprudence in Mexico and Elsewhere*, *in* THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW AND IN MIXED JURISDICTIONS 311, 315 (Joseph Dainow ed., 1974) ("[T]hat a single, complete, coherent, and logical system of law to govern all the relationships . . . is possible . . . , and that the human mind is capable of thinking it out . . . .")).

35. DAVID, *supra* note 30, §§ 390, 396, at 392, 396.

36. *See id.* § 390, at 392 (mentioning how "American law is essentially 'judge-made'").

law by judicial decisions follows a serpentine path that twists and turns, retreats and advances, and winds back upon itself as it slowly develops broadly applicable legal principles. Even when a statute controls a particular situation, consideration of caselaw interpreting the statute plays an important role in the resulting judicial decision. Thus the meaning of a statute is finally determined only in the context of judicial decisions interpreting the statute.[37] Consequently, since positive law is only one source of law and as the development of legal rules through judicial decisions is incremental by its very nature, citizens of a common law system may not have well-developed expectations of or need for the same level of predictability, stability, and governmental affirmation as may citizens living in civil law countries.

Another component of the U.S. legal system should also be considered. From its constitutional beginnings, the United States has viewed itself as a pluralistic system. It is a nation created from groups originating in different cultures and speaking different languages. The federal Constitution's Bill of Rights reflects that pluralistic heritage, as does its constitutional federal structure, formed to accommodate the different and often competing interests of fifty states, federally recognized Indian tribes, and U.S. territories. Although pluralism is the constitutional norm in the United States, it is not necessarily the constitutional norm in other Western legal traditions, where, for example, ideas of national indivisibility and solidarity are strong.[38] In addition, from the time of the adoption of the current U.S. Constitution, the idea of government, whether federal or state, has been considered to be limited. Thus, the U.S. legal system is based on the premises of strong protections of individual natural rights, with a strong tradition of protection of minority voices against the imposed voice of a dominant majority, and of individual cession of particularized rights to a limited government. When one considers these attributes in the context of regulating speech, the U.S. legal system's tolerance of uncertainty in the law as a price to be paid to achieve flexibility and its underlying skepticism about developing coherent bodies of law suggest that a U.S. citizen's response to a statute criminalizing Holocaust denial is likely to be very different from the response of someone reared in the civil law tradition.

In the spirit of the conference as a whole, one may ask whether, in this context, as in the others discussed in the conference papers generally, it is possible or even appropriate to fashion a single legal response to Holocaust denial, even when consideration is limited to Western, industrialized,

37. *Id.* § 414, at 413.

38. VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 789–90 (1999).

democratic countries. Differences in historical, cultural, and legal contexts and differences in citizens' expectations about the role law plays may make it impossible to arrive at a single transnational solution that appropriately meets the needs of the cultures to which it applies.