

# THE PUNISHMENT OF NEGATIONISM: THE DIFFICULT DIALOGUE BETWEEN LAW AND MEMORY

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## INTRODUCTION

Recently, law and memory have met, overlapped, and intersected on numerous yet problematic occasions. An example of this intersection between law and memory is found in Italy's Law 211 of July 20, 2000, introducing January 27 as the "the day of remembrance of the Holocaust" (*giornata della memoria della Shoah*) in the Italian calendar of official commemorations.<sup>1</sup> Another such example is the resolution adopted on November 1, 2005, by the General Assembly of the United Nations, designating January 27 as Holocaust Remembrance Day.<sup>2</sup>

Two main modalities of legal intervention emerge from the intersection between law and memory—in particular, memory of the events of the Second World War: one is represented by the adoption of national laws that *invite* the citizens to remember; the other by criminal laws adopted at the supranational and national level that punish the negation, minimization, or justification of the Holocaust.<sup>3</sup> Within this second category, we must distinguish two moments: the legislative moment, and the moment of the trial. In the legislative moment, the legislator forbids a certain behavior and establishes a penalty for violation. The moment of trial, which may or may not occur, seeks to reaffirm the *shared memory* that the negationism questions. In this second moment, the law becomes a space where a mnemonic order is recomposed out of events from the past by means of a rejection of the acts of negation of the memory.

The two modalities of intersection between memory and law correspond to two distinct mnemonic activities that concern citizens. In the case of the "day of remembrance," the state or the international community dedicates a certain day to remembering. It serves as a public invitation that says, "*we need to remember.*" In the case of laws punishing negationist behavior, however, the state oversees a commonly accepted mnemonic reconstruction of the past, and imposes the imperative, "*we need to remember in a certain way.*"

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1. Legge 20 July 2000, Racc. Uff. n. 211, *available at* <http://digbig.com/4rfgs> (follow "Lug." hyperlink under heading "2000"; then follow "L. 211/00" hyperlink).

2. G.A. Res. 60/7, ¶ 1, U.N. Doc. A/RES/60/7 (Nov. 1, 2005).

3. *See infra* Part I.B (defining and discussing the crime of negationism).

Before analyzing these two distinct situations, it is helpful to lay out several brief, general considerations of the complex relationships between law and history and between law and memory.<sup>4</sup> The reflection imposes a reconsideration of the relationship between law and values. Without a doubt, positive law safeguards values, but the intersection between ethical–social norms and law is complex. Criminal laws serve to demarcate the fundamental values of society. The law and the penalties constitute techniques of protecting what society considers worthy of being collectively protected. In this context, the question arises: should “collective memory” be considered a protected interest? The very fact that criminal law has been deployed at both national and international levels to punish negationism suggests that the activity of *remembering* or of *remembering the past in a certain way* are considered protected interests worthy of safeguarding by legal means.

The phenomenon of *memory imperatives* is not a new one.<sup>5</sup> In various eras, what was to be remembered and what to be forgotten were imposed by the political power by means of law.<sup>6</sup> A well-known example is the prohibition against public commemoration of the grave crimes committed in Athens during the dictatorship of the thirty tyrants who were consequently offered amnesty in 403 AD.<sup>7</sup>

This Essay first examines the two distinct situations in which legal and jurisdictional intervention safeguard both the process of *remembering* and the *memory of the past* by instituting days of remembrance—in particular of the Holocaust during the Second World War. The Essay then inquires into

4. This Essay discusses the relationship between law and memory, as opposed to law and history, because memory refers to the entire social process of reelaboration of the past in a more comprehensive way than done in history and historiography. On mnemonic phenomena, see MAURICE HALBWACHS, *LA MÉMOIRE COLLECTIVE* (1950); MAURICE HALBWACHS, *LES CADRES SOCIAUX DE LA MÉMOIRE* (1952), translated in *The Social Frameworks of Memory*, in *ON COLLECTIVE MEMORY* 35 (Lewis A. Coser trans., Univ. of Chi. Press 1992); PAUL RICOEUR, *LA MÉMOIRE, L'HISTOIRE, L'OUBLI* (2000); TZVETAN TODOROV, *LES ABUS DE LA MÉMOIRE* (1995); TZVETAN TODOROV, *MÉMOIRE DU MAL TENTATION DU BIEN: ENQUÊTE SUR LE SIÈCLE* (2000), translated in *HOPE AND MEMORY: LESSONS FROM THE TWENTIETH CENTURY* (David Bellos trans., Princeton Univ. Press 2003); Fiamma Lussana, *Memoria e memorie nel dibattito storiografico*, 41 *STUDI STORICI* 1047 (2000); Yosef H. Yerushalmi, *Réflexions sur l'oubli*, in *USAGES DE L'OUBLI* 7 (Yosef H. Yerushalmi et al. eds., 1988).

5. See A. Lollini, *Le rôle (pre)constituant de la Commission Vérité et Réconciliation. Le renouvellement du constitutionnalisme en Afrique du Sud*, 449–70 (2003) (unpublished thesis, Ecole des Hautes Etudes en Sciences Sociales, Paris) (discussing other examples of law imposing upon memory).

6. FRANÇOIS OST, *LE TEMPS DU DROIT* (1999).

7. See generally NICOLE LORAUX, *LA CITÉ DIVISÉE: L'OUBLI DANS LA MÉMOIRE D'ATHÈNES* (1997); Nicole Loraux, *De l'amnistie et de son contraire*, in Yerushalmi, *supra* note 4, at 23–47. On the story of the amnesty in Athens, see Helmut Quaritsch, *Über Bürgerkriegs- und Feind-Amnestien*, 31 *DER STAAT* 389 (1992); Antonio Natalicchio, “Μή μνησχαζεν” *l'amnistia*, in 2 *I GRECI: STORIA CULTURA ARTE SOCIETÀ* 1305 (Gioulino Einaudi ed., 1997); Lollini, *supra* note 5, at 358–59.

the reasons why the national and supranational legislatures tend towards criminal laws to protect this aspect of the collective memory.

One fundamental question remains. If historians and philosophers have always underscored the importance of collective memory, the fact that attention to memory is also present in the realm of law points to a profound aspect of both Italian society and, more generally, European societies in the aftermath of the Second World War. The memory of the events of the Second World War, particularly in the last decade, is presented as a value worthy of legal safeguard and calls for an inquiry into the *role* of memory within the Italian social and political system.<sup>8</sup>

Even if in this Essay we take a critical approach to the punishment of negationism, I would like to underline two fundamental elements. Firstly, I do not question the historical and factual truth of the Holocaust. Secondly, I only analyze the consequences of punishing ideas even when they are unacceptable, manifestly untrue, and heinous.

#### I. THE LAW AS A SPACE FOR MEMORY

It has already been highlighted how the law, by establishing both days that invite citizens to remember, and special norms within criminal codes, becomes a *space* in which the collective memory is defined.<sup>9</sup> Though both situations constitute moments of dialogue between law and memory, they will be examined separately.

##### *A. The Past Has Not Passed: January 27 as the Day of Remembrance of the Holocaust*

By means of the Law 211 of July 20, 2000, Italy has marked the January 27 in its official calendar as a day dedicated to the “memory” of “the Holocaust, the racist laws and all those who opposed barbarity.”<sup>10</sup> In line with similar laws in other European countries (France adopted a law in 2000 that institutes a national day for the remembrance of the victims of

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8. See Klaus Dahmann, *No Room for Holocaust Denial in Germany*, DEUTSCHE WELLE, Dec. 23, 2005, available at <http://digbig.com/4qtqc> (referencing the symbolic moment of the Historiker-Streit in Germany in the context of the recent negationist comments made by Iranian President Mahmoud Ahmadinejad).

9. See Oliver King, *David Irving Arrested in Austria*, GUARDIAN UNLIMITED, Nov. 17, 2005, available at <http://digbig.com/4qtqd> (discussing the arrest of Holocaust-denier David Irving).

10. Legge 20 July 2000, n. 211, Gazz. Uff. 31 July 2000, n. 177, available at <http://www.parlamento.it/leggi/eletenum.htm>. For the text of the law and the debates in the Parliament, see <http://www.parlamento.it>; see also Goffredo De Pascale, *Viaggio di una legge*, DIARIO DEL MESE, 2001, vol. 6, supp. No. 4, at 12.

racist and anti-Semitic crimes committed by the French state and in honor of the “Justs” of France),<sup>11</sup> Italy has issued a general invitation to its citizens to promote initiatives and commemorate in order “not to forget.”<sup>12</sup>

Such an event acquires a symbolic value, establishing a sovereign interpretation of the past, with all the ambiguities that such an act of sovereign command inevitably carries with it. The day of remembrance indicates the intention to mark the past, interweaving the past with the present, collective memory with history, by means of a legal instrument. It becomes, thus understood, an invitation to cast one’s eyes—at least for a day—towards the ungraspable horror of the Holocaust. We can consider this law as a “light” exercise of sovereignty as long as such imposition remains limited to being merely an occasion to pay tribute to archives of testimonies and experiences. This tribute is useful for the collective memory, but it is not capable, in itself, of imposing conscious choices in the present.<sup>13</sup>

Yet, what strikes one most, is not so much the choice the European States or the United Nations have made in establishing a day of remembrance but the timing of its adoption particularly in Italy. In contrast to other laws that institute days of remembrance for significant dates for Italy, this law was adopted more than fifty years after the end of the Second World War. It is necessary to ask why this intervention to safeguard the memory and its object took place after such a long time. Two determinant factors appear: on the one hand, the events (the object of the mnemonic activity) began long ago and those who actually experienced them have begun to disappear;<sup>14</sup> on the other hand, the contemporary body politic seeks to emancipate itself from the past or, perhaps, sees in the past its own foundation.

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11. See Law No. 2000-644 of July 10, 2000, *Journal Officiel de la République Française* [J.O.] [Official Gazette of France], July 11, 2000, p. 10483, available at <http://digbig.com/4rfjd> (inviting all French citizens to remember crimes against humanity every year on June 16th).

12. G.A. Res. 60/7, ¶ 1, U.N. Doc. A/RES/60/7 (Nov. 1, 2005), (designating January 27 as Holocaust Remembrance Day).

13. JACQUES LE GOFF, *HISTOIRE ET MÉMOIRE* (Gallimard 1988).

14. ANNETTE WIEVIORKA, *L'ÈRE DU TÉMOIN* (1998).

### B. The Crime of Negationism

Another form of the intersection between law and memory has been identified as the crime of negationism.<sup>15</sup> This second form of intervention differs from the day of remembrance primarily in that legal intervention is not limited to extending an invitation to remember, but seeks to establish through the imposition of a criminal sanction, a *single* interpretation of history. Furthermore, this form of intervention safeguards the collective memory through criminal law—a form of law that carries with it a potent symbolism. Initially, however, it is important to explain the meaning of the term “negationism.” It must be distinguished from “revisionism,” a phenomenon with which negationism is often associated.

Distinguishing between a revisionist and negationist view is possible in the context of studies on the Second World War. The revisionist perspective 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. From this perspective, however, every historian and social scientist is structurally a revisionist insofar as the historian’s activity implies the use of paradigms and theoretical models. Questioning given interpretations is unavoidable and is itself part of the scientific work of the historian. The negationist

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15. For a historical perspective on negationism, see ALAIN BIHR ET AL., *NÉGATIONNISTES: LES CHIFFONNIERS DE L'HISTOIRE* (1997); ALBERTO BURGIO, *L'INVENZIONE DELLE RAZZE: STUDI SU RAZZISMO E REVISIONISMO STORICO* (1998); DOMENICO LOSURDO, *IL REVISIONISMO STORICO: PROBLEMI E MITI* (3d ed. 1997); VALENTINA PISANTY, *L'IRRITANTE QUESTIONE DELLE CAMERE A GAS: LOGICA DEL NEGAZIONISMO* (1998); PIER PAOLO POGGIO, *NAZISMO E REVISIONISMO STORICO* (1997); PIERRE VIDAL-NAQUET, *LES ASSASSINS DE LA MÉMOIRE: "UN EICHMANN DE PAPIER" ET AUTRES ESSAIS SUR LE RÉVISIONNISME* (1987), *translated in* ASSASSINS OF MEMORY: ESSAYS ON THE DENIAL OF THE HOLOCAUST (Jeffrey Mehlman trans., Columbia Univ. Press 1992); Carlo Ginzburg, *Beweis, Gedächtnis, Vergessen*, *WERKSTATTGESCHICHTE*, Dec. 2001, at 50, 50–60. On the negationist phenomenon in German-speaking countries, see TILL BASTIAN, *AUSCHWITZ UND DIE "AUSCHWITZ-LÜGE": MASSENMORD UND GESCHICHTSFÄLSCHUNG* (1994); WOLFGANG BENZ, *LEGENDEN LÜGEN VORURTEILE* 36–38 (1992); DEBORAH E. LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* (1993); MARKUS TIEDEMANN, *"IN AUSCHWITZ WURDE NIEMAND VERGAST": 60 RECHTSRADIKALE LÜGEN UND WIE MAN SIE WIDERLEGT* (1996); THOMAS WANDRES, *DIE STRAFBARKEIT DES AUSCHWITZ-LEUGNENS* (2000); WAHRHEIT UND "AUSCHWITZLÜGE": ZUR BEKÄMPFUNG "REVISIONISTISCHER" PROPAGANDA (Brigitte Bailer-Galanda et al. eds., 1995); GERHARD WERLE & THOMAS WANDRES, *AUSCHWITZ VOR GERICHT: VÖLKERMORD UND BUNDESDEUTSCHE STRAFJUSTIZ* (1995). On the same phenomenon in France, see FLORENT BRAYARD, *COMMENT L'IDÉE VINT À M. RASSINIER: NAISSANCE DU RÉVISIONNISME* (1996); NADINE FRESCO, *FABRICATION D'UN ANTISÉMITES* (1999); VALÉRIE IGOUNET, *HISTOIRE DU NÉGATIONNISME EN FRANCE* (2000); PISANTY, *supra*, at 7–12, 33–44, 72–81, 144–52; YVES TERNON, *DU NÉGATIONNISME: MÉMOIRE ET TABOU* (1999); VIDAL-NAQUET, *supra*; Valérie Igounet, *Un négationnisme stratégique*, *LE MONDE DIPLOMATIQUE*, May 1998, at 17, available at <http://digbig.com/4qtst>; see also Emanuela Fronza, *Profili penalistici del negazionismo*, 42 *RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE* 1034 (1999) (providing a comparative analysis of the crimes of negationism).

perspective, in contrast, denies the very existence of the Holocaust, disregards settled historical norms, and distorts the relationship between the Holocaust and historical reality. Negationism refers to the radical doctrines that deny Nazi Germany's genocide of the Jews, the Roma, or other "subhuman" populations, describing it as a mere myth, lie, or fraud. The core of the negationist ideology is the denial of the existence of gas chambers.<sup>16</sup>

The negationist phenomenon is currently manifest in many European countries, triggering an alarm signal in the collective conscience. Evidence of the *perturbative force* of negationism is reflected by the strength and character of the reaction to it, as reflected in criminal laws punishing negationism that have been passed by both national and supranational governing bodies.<sup>17</sup> Supranational institutions condemn the negationist phenomenon by means of legal instruments that authorize and outline the criminal charges that states can impose for such conduct. In addition, most national laws that punish such conduct are based on ad hoc norms. The alarming resurgence of episodes of negationism has pushed many European legislatures—among them Germany, France, Belgium, Spain, and Austria—to introduce new normative instruments aimed at confronting such phenomena.<sup>18</sup> Prior to these legislative interventions, acts of negationism could not be punished in all their various forms.

Studying how societies repress negationism provides fertile ground for reflecting not only on the difficult relationship between law and memory but also on the current expansionist conception of criminal law at both national and international levels. Forms of intolerance like negationism

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16. MICHAEL SHERMER & ALEX GROBMAN, *DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT?* xv (2000). Negationists seek to construct an alternative reality through the systematic use of propaganda and the repetition of statements allegedly founded on "alternative" sources, which eventually become a part of the documentary resources. The main rhetorical strategy, and the place where revisionism and negationism intersect, becomes the relativization and justification of history, with the subsequent distortion and weakening of the relevance of even the most tragic events.

17. For example, numerous international instruments have been adopted to respond to racial discrimination. In Europe, it is important to distinguish between the initiatives of the Council of Europe and those of the European Union. In an European Union instrument, the Council asks the member states to reprimand the "public denial of the crimes defined in Article 6 of the [Statute of the Nuremberg Tribunal] insofar as it includes behaviour which is contemptuous of, or degrading to, a group of persons defined by reference to colour, race, religion or national or ethnic origin." Council Joint Action 96/443/JHA, Concerning Action to Combat Racism and Xenophobia, tit. I, § (A)(c), 1996 O.J. (L 185) 5; see European Union, <http://www.europa.eu.int> (listing the European Union's initiatives); see also Fronza, *supra* note 15, at 1045–48 (discussing European Union initiatives). On the Council of Europe's initiatives and the important jurisprudence related to Article 10 of the European Convention, which protects freedom of expression, see Council of Europe, <http://www.coe.int>.

18. See *infra* notes 35–45 and accompanying text.

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.<sup>19</sup> In European countries where the negationist offensive has become particularly widespread, criminal laws have been passed that identify the protected interests as public order, honor, reputation, and public peace.

The widespread phenomenon of negationism has manifested itself in many guises and with varying intensity throughout history. Countries in which negationism appears at the most alarming level include Germany, followed by France and Austria and, to a lesser extent, Belgium and Italy.<sup>20</sup> Yet in spite of supranational human rights norms (universal and European) and the general principles embodied in national constitutions and criminal codes, not all states have chosen to create a specific offense punishing negationism.<sup>21</sup>

In Italy, negationism is punished by a constitutional provision as well as additional statutes. Article 3 of the Italian Constitution encompasses the principle of nondiscrimination, while Article 21 contains

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19. A thorough discussion of the delicate inquiry into crimes of opinion is beyond the scope of this Essay. It is sufficient here to recall that the state repression of negationist affirmations is a 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. This tension illustrates, therefore, the fundamental ambiguity of the right to free expression of thought, considered in the Italian jurisprudence as “the cornerstone of the democratic system.” Corte cost., sez. un., 26 Mar. 1969, n.49, *Giurisprudenza Costituzionale* 1969, 576, available at <http://digbig.com/4rfje>. The Constitutional Court has made numerous pronouncements on the limits of the freedom of thought, repeatedly affirming the illegitimacy of criminal laws that punish mere expressions of thought. See, e.g., Corte cost., sez. un., 16 Mar. 1971, n.49, *Giurisprudenza Costituzionale* 1971, 525, available at <http://digbig.com/4rfjh>; Corte cost., sez. un., 6 July 1966, n.87, *Giurisprudenza Costituzionale* 1966, 1090, available at <http://digbig.com/4rfjj>; Corte cost., sez. un., 19 Feb. 1965, n.9, *Giurisprudenza Costituzionale* 1965, 61, available at <http://digbig.com/4rfjk>.

20. For a discussion of the “geography” of negationism, see *Irving v. Penguin Books, Ltd.*, No. 1996-I-1113, [2000] EWCA QB 115, slip op. para. 2.4 (Apr. 11, 2000), <http://digbig.com/4rged>. For discussion on the process, sentence, and session transcripts of the case, see *Holocaust Denial on Trial*, <http://www.holocaustdenialontrial.org/ieindex.html>. An interesting inquiry could be had through the examination of attitudes toward negationism in the Middle East shown by various Palestinian authors. See, e.g., Pierre Vidal-Naquet, *Qui sont les assassins de la mémoire?*, in *RÉFLEXIONS SUR LE GÉNOCIDE: LES JUIFS, LA MÉMOIRE ET LE PRÉSENT* III 271, 271–91 (1995). This does not take into consideration the case of the United States, as illustrated in the role of the Center for Historical Review.

21. For an overview of this argument, see Decreto-Legge 26 Apr. 1993, Racc. Uff. n.122; Legge 25 June 1993, Racc. Uff. n.205; SERGIO MOCCIA, *LA PERENNE EMERGENZA: TENDENZE AUTORITARIE NEL SISTEMA PENALE* 69–83 (1995); Luigi Stortoni, *Le nuove norme contro l'intolleranza: legge o proclama?*, *CRITICA DEL DIRITTO*, Jan. 1994, at 14; Emanuela Fronza, *Osservazioni sull'attività di propaganda razzista*, 10 *RIVISTA INTERNAZIONALE DEI DIRITTI DELL'UOMO* 32, 38–42 (1997); see also ROBERT FAURISSON, *IL CASO FAURISSON* (1982); CESARE SALETTA, *PER IL REVISIONISMO STORICO CONTRO VIDAL-NAQUET* (1993) (discussing cases of leftist negationism in Italy).

the freedom of expression.<sup>22</sup> Law 962, passed in 1967, concerns the prevention and the punishment of the crime of genocide.<sup>23</sup> Law 654, passed in 1975, authorized the ratification of the United Nations Convention on the Elimination of All Forms of Racial Discrimination in 1976.<sup>24</sup> The Convention prohibits the diffusion of racist ideas and the incitement of racial discrimination.<sup>25</sup> Law 223, passed in 1990, prohibits the diffusion of publications that could generate intolerance.<sup>26</sup> Law Decree 122 of 1993 addresses “[u]rgent measures in matters of racial, ethnic and religious discrimination.”<sup>27</sup> Finally, the Single Text of the dispositions concerning the regulation of massive immigration on the condition of the alien (Testo unico delle disposizioni concernenti la disciplina dell’immigrazione e norme sulla condizione dello straniero) defines “discrimination” on racial, ethnic, national, or religious grounds.<sup>28</sup>

Negationism is also expressly punished in Germany,<sup>29</sup> France,<sup>30</sup>

22. COST. arts. 3, 21.

23. Legge 9 Oct. 1967, Racc. Uff. n. 962.

24. Legge 13 Oct. 1975, Racc. Uff. n. 654.

25. International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195.

26. Legge 6 Aug. 1990, Racc. Uff. n. 223.

27. Decreto Legge 26 Apr. 1993, Racc. Uff. n. 122.

28. Decreto Legislativo 25 July 1998, Racc. Uff. n. 286.

29. *See generally* ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 1–2, 160 (2004); MARKUS WEHINGER, KOLLEKTIVBELEIDIGUNG – LOKKSVERHETZUNG: DER STRAFRECHTLICHE SCHUTZ VON BEVÖLKERUNGSGRUPPEN DURCH DIE §§ 185 FF. UND § 130 STGB (Nomos, Universitätschriften No. 149, 1994); Daniel Beisel, *Die Strafbarkeit der Auschwitzlüge*, 15 NEUE JURISTISCHE WOCHENSCHRIFT 997, 1000 (1995); Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 4 GERMAN L.J. 1 (2003), available at <http://digbig.com/4qwca> (discussing the significance of the “Holocaust Lie Case,” Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 241 (F.R.G.)); Hans Dahs, *Das Verbrechensbekämpfungsgesetz vom 28.10.1994 – ein Produkt des Superwahljahres*, 48 NEUE JURISTISCHE WOCHENSCHRIFT 553, 553–57 (1995); Simone Dietz, *Die Lüge von der “Auschwitzlüge” – Wie weit reicht das Recht auf freie Meinungsäußerung?*, 28 KRITISCHE JUSTIZ 210 (1995); Fronza, *supra* note 15, at 1051–56; Stefan Huster, *Das Verbot der “Auschwitzlüge”, die Meinungsfreiheit und das Bundesverfassungsgericht*, 49 NEUE JURISTISCHE WOCHENSCHRIFT 487, 487–91 (1996); Klaus Vogelgesang, *Die Neuregelung zur sog. “Auschwitzlüge” – Beitrag zur Bewältigung der Vergangenheit oder “widerliche Aufrechnung”?*, 38 NEUE JURISTISCHE WOCHENSCHRIFT 2386, 2386–89 (1985); Gerhard Werle, *Der Holocaust als Gegenstand der bundesdeutschen Strafrecht*, 45 NEUE JURISTISCHE WOCHENSCHRIFT 2529 (1992).

30. *See* KAHN, *supra* note 29 (briefly alluding to the prosecution of negationism in France). *See generally* Jean-Philippe Feldman, Le délit de contestation de crimes contre l’humanité et la 17 chambre du Tribunal de grande instance de Paris (sur trois jugements du 27 février 1998), D. 1999 chronique 8, 8–12; Lawrence Douglas, *Régenter le passé: le négationnisme et la loi*, in LE GÉNOCIDE DES JUIFS ENTRE PROCÈS ET HISTOIRE 1943–2000, at 213, 213–42 (Florent Brayard ed., 2000); Jean-Philippe Feldman, *Peut-on dire impunément n’importe quoi sur la shoah?*, 75 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 229, 229–271 (1998); Fronza, *supra* note 15, at 1060–61; Michel Troper, *Droit et négationisme: La loi Gayssot et la Constitution*, 54 ANNALES, HISTOIRE,



Austria,<sup>31</sup> Belgium,<sup>32</sup> Spain,<sup>33</sup> Portugal, and Switzerland.<sup>34</sup> A general outline of relevant legal provisions in these countries follows:

- *Germany*: Section 130, chapter 3, of the Penal Code (Strafgesetzbuch).<sup>35</sup>
- *France*: Article 24 bis, Law of July 29, 1881, on the freedom of press (“Loi Gayssot”).<sup>36</sup>
- *Austria*: Law of February 26, 1992, which modifies the constitutional law on the national-socialists (Bundesverfassungsgesetz vom 6 Februar 1947 über die Behandlung der Nazionalsozialisten).<sup>37</sup> Section 3 institutes the offense of negation and the minimization of the genocide committed by the national-socialists.<sup>38</sup>
- *Belgium*: Law of March 23, 1995: “For the punishment of the negation, the minimisation, or the justification or approval of the genocide committed by the German national-socialist regime during the Second World War.”<sup>39</sup>

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SCIENCES SOCIALES 1239, 1239–55 (1999); Patrick Wachsmann, *Liberté d'expression et négationnisme*, 12 REVUE TRIMESTRIELLE DES DROITS DE L'HOMME 585, 585–99 (2001); France Jeannin, *Le Révisionnisme: Contribution à l'étude du régime juridique de la liberté d'opinion en France* (1995) (unpublished thesis, Université Paris 2).

31. See Winfried Platzgummer, *Die strafrechtliche Bekämpfung des Neonazismus in Österreich*, 49 ÖSTERREICHISCHE JURISTEN-ZEITUNG [ÖJZ] 753 (1994); Brigitte Bailer-Galanda, *Die österreichische Rechtslage und der “Revisionismus”*, in WAHRHEIT UND “AUSCHWITZLÜGE”: ZUR BEKÄMPFUNG “REVISIONISTISCHER” PROPAGANDA, *supra* note 15, at 218–36.

32. For a commentary on this legislation and its jurisprudential application see Fronza, *supra* note 15, at 1061–63.

33. See STC, Nov. 11, 1991 (B.J.C., No. 214, p. 444).

34. ALEXANDRE GUYAZ, *L'INCRIMINATION DE LA DISCRIMINATION RACIALE* (1996); *see also* MARCEL ALEXANDER NIGGLI, *RASSENDISKRIMINIERUNG* (1996); Karl-Ludwig Kunz, *Zur Unschärfe und zum Rechtsgut der Strafnorm gegen Rassendiskriminierung*, 116 SCHWEIZERISCHE ZEITSCHRIFT FÜR STRAFRECHT 223 (1998).

35. Einundzwanzigstes Strafrechtsänderungsgesetz [Twenty-First Law Modifying the Criminal Law], June 15, 1985 BGBl. I at 965 (codified at Strafgesetzbuch [StGB] [Penal Code], § 130, ch. 3) (F.R.G.).

36. Law of July 29, 1881, J.O., July 30, 1881, p. 4201; Law No. 90-615 of July 13, 1990, J.O., July 14, 1990 p. 8333.

37. Bundes-Verfassungsgesetz [B-VG] [Constitution BGBl. No. 1/1930, as last amended by BGBl. No. 148/1992 (Austria).

38. *Id.* § 3.

39. Law of Mar. 23, 1995, Moniteur Belge, Mar. 30, 1995, p. 7996 (Belg.).

- *Spain*: Article 607 of the Penal Code (Código Penal), entitled Genocide, punishes the diffusion of ideas concerning negation, the negation and justification of acts of genocide, and calls for the rehabilitation of regimes or institutions that engage in acts or practices resulting in such crimes.<sup>40</sup>
- *Portugal*: Article 240(2)(b) of the Criminal Code, entitled Racial or Religious Discrimination, punishes those who defame or injure a person or a group because of their race, skin color, ethnic or national origins, or religion.<sup>41</sup> The Code specifically punishes those who deny war crimes, crimes against peace, or crimes against humanity.<sup>42</sup>
- *Switzerland*: Article 261 of the Criminal Code punishes those who publicly deny, minimize, or justify genocide or other crimes against humanity.<sup>43</sup> The law targets assaults on public peace and human dignity, but it does not make specific reference to the national-socialist regime.<sup>44</sup> The Swiss legislation refers to all crimes against humanity, regardless of who commits them, or whether the crimes are defined as such by a national or international legal instrument.<sup>45</sup>

Countries that have introduced ad hoc laws differ with regard to the definition of the criminal act of negationism. Occasionally, definitions are phrased to include acts that could qualify as revisionism, and not as a straight denial of facts. For example, the German Criminal Code makes reference to “approval or justification,” while the French Code uses the term “contestation.”<sup>46</sup> Thus, not all European laws punish solely negationist behavior. Moreover, the definition of the prohibited conduct varies both in form and justification from state to state. Germany punishes only the manifestations likely to disturb the public peace, while in Belgium and France the denial of the Holocaust constitutes an offense in any circumstance.<sup>47</sup> Nevertheless, in the European context, it is possible to

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40. C.P. art. 607.

41. C.P. art. 240(2)(b).

42. *Id.*

43. Strafgesetzbuch [StGB] [Criminal Code] Dec. 21, 1937, 54 AS at 757 (1938), as amended by Gesetz, June 18, 1993, AS 2887 (1994), art. 261bis (Switz.).

44. *Id.* art. 261bis.

45. *Id.*

46. Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333; StGB § 130, ch. 2.

47. Law of Mar. 23, 1995, Moniteur Belge, Mar. 30, 1995, p. 7996 (Belg.); Law of July 29, 1881, J.O., July 30, 1881, p. 4201 (Fr.); Law No. 90-615 of July 13, 1990, J.O., July 14, 1990 p. 8333 (Fr.).

identify common characteristics among the heterogeneous normative responses. In particular, three verbs are used repeatedly—with the exception of the French legislation—to describe negationist conduct: *deny*, *justify*, and *minimize*. A brief clarification of their meaning will highlight how certain laws can punish not only the denial of certain events, but also their justification and approval, thereby running the risk of punishing those who reinterpret or dispute those historical events without, however, denying them.

- To *deny*: The author fundamentally contests the existence of this event and simply pretends that it did not take place.<sup>48</sup> For example, those who maintain that the national-socialist regime never intended to eliminate the Jewish people *deny* the genocide.
- To *justify*: The event is justified as a reaction to an earlier massacre, for example, or to some other previous event. The actions committed against a determined group are not contested, but evidence is brought to attest to their legitimacy or inevitability. For example, those who refer to a grave massacre as an act of legitimate defense against a hostile population or group *justify* the genocide.
- To *minimize*: The event is relativized, suggesting that “it is one among so many other massacres.” The legislator enters the realm of scientific publications that interpret (sometimes gratuitously relativizing) the significance of crimes against humanity, contesting their monstrous and violent character. For example, those who refer to the existence of gas chambers as merely a historical detail *minimize* the genocide.

The *object* of negationism is focused on the Holocaust in the majority of the laws under examination, and not to all other acts of genocide or to other crimes against humanity. (This is not, however, the case in Spain, Portugal, or Switzerland.) Therefore, on the basis of such laws, the denial of other genocides or crimes against humanity could not be punished. However, in other legal systems, the object is extended to include all other crimes against humanity and genocides. It also includes (as defined by provisions in the Spanish Criminal Code, for example) the diffusion of ideas that deny or claim to rehabilitate the regimes or the institutions that engage in genocidal practices. Another element typical in the definition of all these autonomous criminal offenses is the requirement that the conduct

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48. See Beisel, *supra* note 29, at 1000; Platzgummer, *supra* note 31, at 762.

be displayed publicly.

Some legislation also seeks to limit the scope of the application of these normative dispositions by requiring that the prohibited activities are likely to disturb the public peace (the German Code), or by making reference to the definition of crimes against humanity as contained in the Statute of the Nuremberg Tribunal (the French Code).

### *C. Law and Memory: A Difficult Dialogue*

The above pages have shown that there are various situations in which the law, and in some cases criminal law intervenes and enters into dialogue with memory, and becomes the custodian of significant moments that form the constitutive tissue of our society. When the law identifies various moments as significant to collective memory, an undefined field of dialogue opens between law and memory—discourses of a distinct nature.

As discussed above, the two aspects of this relationship need to be distinguished and analyzed separately. In the first case—that is, in the case of the national or international law that invites *everyone to remember*—the intersection between law and memory, even though delicate, appears nevertheless to employ a technique that produces a *constructive* dialogue. The legislature imposes on citizens the duty to remember. Such a choice (due to the timing and the instrument employed) highlights the political difficulty in legislating with regard to certain aspects of our history. However, 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. 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. These are cultural processes that develop the shared, civic conscience. They are unavoidably slow processes, and moreover, they do not have immediate bearing on the political realm.

In the second case, by contrast, where the legal instrument chosen by the legislature is criminal law, the dialogue between law and memory becomes much more complex. The specific character of criminal law and the criminal trial, as well as the symbolism that accompanies these, are generally well understood. The elements and the specific characteristics highlighted above—primarily the indisputable symbolic force of criminal law—have a powerful impact on the collective imagination and, in the case under consideration, render the law-memory relationship more difficult. They make the protection of collective memory problematic as well, in that they are invasive and limit individuality. Criminal laws and trials are

characterized by a language and a logic that is distinct from those of memory formation and historical research.<sup>49</sup> For example, criminal law and the trial ascertain individual responsibility with regard to specific facts. Moreover, the criminal law and trial, characterized by an epilogue enacted by means of a sentence, is notable for its static and univocal dimension, in strong opposition to the dynamic and pluralist essence of collective memory and historical interpretation.

Furthermore, the criminal offense of negationism raises the question of the relationship between ethical–social and legal–criminal norms and the need to distinguish the border between ethics and law. This risk appears to take place precisely in those situations where, among the ensemble of infinite interpretations of historical facts (and of historical schools), the state elevates *one* interpretation to the level of criminal law protection, and consequently promotes it as the *one* official, unique interpretation. Therefore, the assessment of the trial judge rests not so much on the reconstruction of the facts but rather on the interpretation of those facts. What is judged, in other words, is the denial, minimization, or justification of *those* events. Even when an interpretation is generally accepted, the criminal law should not protect that interpretation, nor should it punish assertions that question it. In such a situation, the law essentially protects an ideology. The provision contained in the French Criminal Code, for example, appears in this sense paradigmatic. The conduct that constitutes the offense of negationism is defined in the French Code by reference to other judgments.<sup>50</sup> Thus, the selection of *one* historical interpretation among the infinite possible ones as the protected interest does not appear acceptable: only where such assertions bring prejudice to the interests or rights of another, or where they are offensive to a group, should they be punishable.<sup>51</sup>

The tribunal will inevitably find itself, in this case, sanctioning one interpretation as official and discrediting the idea that more than one historical school exists. Yet, in truth, a multitude of historical schools

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49. See *supra* note 4 (listing sources that discuss the transmission of memory by dynamic selection). The memory of the Nazi Genocide must be a monumental memory, since “the memory as such gets organised by monuments, by poles of reference around which get gathered the discontinuous traumas of the memory, directly or handed down; where the events become experience, they become internalised and incorporated as elements of the world view, like culture.” STEFANO LEVI DELLA TORRE, *MOAICO: ATTUALITÀ E INATTUALITÀ DEGLI EBREI* 68–71 (1994). Carlo Ginzburg notes that evidence (in legal sense) is never a sufficient protection against the menacing forces that erode the memory of the Holocaust. *Id.*

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

51. Other provisions in criminal codes, such as those addressing injury or defamation, address these situations.

exists. 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. A democratic state with secular criminal laws (understood as a temporary legal construction underpinned by specific principles such as the choice of method, rather than the choice of values or ideology) should never define and foreclose an entire system of ideas and interpretations, once and forever.<sup>52</sup> Secularism, as a method of rational inquiry (not as a set of normative-prescriptive criteria) does not in itself presuppose any particular world view; instead, it embraces a pluralist, cultural attitude. The problem, in such situations, is whether the legislative means are appropriately fitted to the ends; the state, in order to fight dangerous ideas, should not become authoritarian. It is a contradiction in terms; at the axiological level, it diminishes respect for fundamental liberties meant to be protected by this same norm. In other words, people should not be criminally prosecuted for what they are or want, but only for what they do. The normative perspective with freedom as its centerpiece considers the addressee of the legal norm as a citizen and not as an enemy, recognizing that a citizen's mental autonomy should not be punishable through criminal laws.

Such laws create a situation in which the criminal law instrument intervenes in an exemplary and expressive way. As opposed to other means, criminal law is a powerful and prestigious instrument, and it provides an immediate and effective reaction to the social panic caused by the rise of the negationist perspective—a *short route* by which to launch a powerful political and symbolic message, channeling the emotional needs for punishment that are often characteristic of public opinion. But the *short route* represents the least efficient route by which to link law and memory. The negationist legislation, in practice, has a political-criminal purpose distinct from that which it claims to have: it addresses primarily the citizens rather than the authors of the crime of “negationism;” it becomes a gesture, a symbol, that takes a position on a series of ethical and political perspectives.<sup>53</sup>

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52. Norberto Bobbio, *Cultura laica: una terza cultura?*, in CATTOLICI, LAICI, MARXISTI ATTRAVERSO LA CRISI 28 (1978).

53. The symbolic function is without doubt one of the characteristics of the criminal law. See generally FRANCO BRICOLA, *Tecniche di tutela penale e tecniche alternative di tutela*, in SCRITTI DI DIRITTO PENALE 1475 (1997); PENA Y ESTADO (Juan Bustos Ramírez ed., 1995); CLAUS ROXIN, STRAFRECHT ALLGEMEINER TEIL § 2 (1997); MONICA VOß, SYMBOLISCHE GESETZGEBUNG: FRAGEN ZUR RATIONALITÄT VON STRAFGESETZGEBUNGSAKTEN (1989) (providing a critical discussion of the “symbolic-expressive” dimension of the criminal law); Helga Cremer-Schäfer & Heinz Steinert, *Symbolische und instrumentelle Funktionen des Strafrechts*, NEUE KRIMINALPOLITIK, No. 3, at 26, 26–

In fact, the symbolical meaning of these norms reflects a vast and incontestable social consensus that rejects atrocious acts (i.e., the truth of the Holocaust).<sup>54</sup> This meaning confers a high level of external legitimacy upon the symbolic social norm. The laws on negationism, efficient and symbolic, are often pushed by the tidal force of public opinion. The social consensus, however, does not alone legitimize the option of criminally punishing negationist conduct. As criminal laws near the final stage of the drafting process, the legislature needs to make a selection from among the possible penalties called for by the social consensus, thus performing the difficult task of judging the social consensus. Where it would be too difficult to identify a value worthy of protection or to reconstruct the act as an offense to a protected interest, the legislature should resist the urge to respond to the pressures of the social consensus, to avoid illegitimately limiting, by means of these laws, a constitutional freedom that, even though not absolute, reinforces the value of tolerance.<sup>55</sup>

This expressive-political use of legal norms should attract our attention. In a democratic system, the criminal laws must respect the constitutional guarantees that overarch any choice of incrimination, thereby establishing limits on the law's punitive function. The numerous laws that allow punishment of negationist and revisionist assertions carry the risk of no longer representing the best interest of citizens, but instead, furthering authoritarian tendencies within the state. A critical examination of the fundamental legal principles is necessary before a normative construction—

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29 (1989); Winfried Hassemer, *Das Symbolische am symbolischen Strafrecht*, in Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001, at 1001, 1001–19 (Bernd Schünemann et al eds., 2001); Winfried Hassemer, *Symbolisches Strafrecht und Rechtsgüterschutz*, 9 *NEUE ZEITSCHRIFT FÜR STRAFRECHT* [NSLZ] 553, 553–59 (1989); Jens Christian Müller, *Die Legitimation des Rechts durch die Erfindung des symbolischen Rechts*, 25 *KRIMINOLOGISCHES J.* 82, 83 (1993); Peter Noll, *Symbolische Gesetzgebung*, 100 *ZEITSCHRIFT FÜR SCHWEIZERISCHES RECHT* 347 (1981); Carlo Enrico Paliero, *Il principio di effettività del diritto penale*, 33 *RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE* 430 (1990); Arndt Schmehl, *Symbolische Gesetzgebung*, 24 *ZEITSCHRIFT FÜR RECHTSPOLITIK* 251 (1991); Massimo Donini, *Il volto attuale dell'illecito penale* [The criminal law of the future], printed lecture delivered at the IV Training Course in Criminal Law, Salerno-Napoli 17–19 (Sept. 2003) (highlighting the abuse of the symbolical function of the criminal law). The criminal legal process can be a moment with a powerful symbolic value. See SALVATORE SATTA, *IL MISTERO DEL PROCESSO* (1994) (suggesting that the criminal process is itself a form of sanction, independent of the penalty ordered by the judge).

54. Criminal law possesses powerful resources with regard to symbolic communication, and this turns the criminal law terrain into a place of encounter between ethical and social concepts. It thus appears that political ends are in fact pursued, extending beyond the purported ends the criminal law seeks to protect. This arguably constitutes a danger for the general principles of criminal law and its function as a guarantor of rights. Luigi Stortoni, in *COMMENTARIO DELLE "NORME CONTRO LA VIOLENZA SESSUALE"* (LEGGE 15 FEBBRAIO 1996, N. 66) 473, 475 (Marta Bertolino & Alberto Cadoppi eds., 1996).

55. Carlo Enrico Paliero, *Consenso sociale e diritto penale*, 35 *RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE* 849 (1992).

particularly one based on a moral assessment—can be justified. One must bear in mind that the criminal law addressing protected interests can be liberal in its structure, but still have a most illiberal content.

#### CONCLUSION

The crime of negationism shows how the intersection between law and memory raises complex questions. From this analysis it is clear first, there exists the opportunity to use (or not to use) the law as a custodial place for safeguarding collective memory and, more generally, collective values. Second, interventions designed to safeguard memory can vary in form and structure.

The reflection emphasizes the distinction between laws protecting the collective memory through invitations to remember an event, on the one hand, and criminal law and process that punishes negationist behavior, on the other. Italian Law 211 and the United Nations Resolution, both establishing days of remembrance, invite citizens to remember the Holocaust. These constitute examples of the first form of intervention, protecting collective memory without the use of criminal laws. These laws inviting citizens to remember initiate interesting, constructive processes and constitute a step on the *long route* towards the awakening of the civic conscience.

In contrast, a more difficult and articulated discourse is required when analyzing *criminal law* provisions concerning negationism. These normative provisions lead to a paradox, or *aporia*, within the legal system. Although punishing negationist acts can serve as a means to fight negationism, some argue that it is counterproductive to rely on criminal laws and penalties.<sup>56</sup>

In the immediate aftermath of the Second World War, a movement emerged among European states to codify new constitutions and create international legal instruments to guarantee the protection of fundamental rights. These instruments rejected atrocious acts such as genocide and recognized new fundamental rights. Since 1945, many of the values that characterized the post-war period have become crystallized in the ethical–juridical system in constitutions, national laws, and international legal instruments. In some ways, the laws are a reaction to the unfortunate ideas that caused the homicidal drift of the totalitarian regimes. Values actively shared among cultures (for example, equality among citizens) lie at the

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56. Criminal laws can act as a double-edged sword; the negationist authors could use the argument of repression and portray themselves as objects of a special legislation that criminalizes dissent.



*foundation* of post-war national and international law. These instruments represent a protective reaction to the endemic presence of those ideologies that had the Holocaust as their ultimate consequence. Examples of these legal instruments include the Universal Declaration of Human Rights of 1948, the Convention for the Prevention and Punishment of Genocide, and, in Europe, the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>57</sup>

Negationism denies the events that form the basis of this reaction; it negates the ethical–political universe born after the Second World War. Such a phenomenon does not impact the established powers and extant structures deeply, but rather it affects an *ethical and constituent pact* underlying the uniform rejection of the ideologies that dragged Europe into the horrors of the war and totalitarianism. As embodied in the above-mentioned national and international legal instruments, this ethical pact represents a common commitment among European states to denounce the foundational event. By and large, these criminal laws specifically target negation of the Holocaust. The aporia, therefore, results from a profound attack on a constitutive moment, while, at the same time, the criminal law is unable to fully confront the phenomenon.

Thus, European states should consider proceeding down the *long route* of encouraging remembrance and commemoration rather than the *short route* of criminalizing negationism. It is necessary to help encourage, even by means of a day of remembrance, visibility of the living relationships between distinct temporal experiences, past and present. This, in turn, will push our contemporaries towards a clear position of conscience that is not always easily reached—namely, the threshold of awareness that any event that occurred once could happen again. Rethinking history should not mean limiting oneself to negating or minimizing the Holocaust, but neither should it mean circumscribing those crimes to a criminal degeneration of a past closed forever. In fact, we look to the past in order to orient ourselves in the present. Becoming aware that all of these events were possible—indeed, occurred—in Europe, brings to light “the banality of evil,”<sup>58</sup> a disquieting truth that pushes scholars toward an entirely new analysis of political phenomena, both of the past and of the present.

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57. European Convention on Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948); Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, 78 U.N.T.S. 277.

58. See generally HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL (1963) (elaborating on the “banality of evil” concept).

When confronted with the phenomenon of negationism, it seems problematic to respond with criminal laws that search for truth by means of a “legal truth;”<sup>59</sup> these laws would only provide a false solution and risk becoming the very evil that they seek to condemn. It thus appears impossible to identify the protected interest through norms that punish negationism for the protection of a historical truth. Nobody, in fact, has a duty to protect historical truth, nor should anyone be punished for failing to do so. Moreover, these laws could lead to distorted “truth,” as judges are forced to become the arbiters of history in such situations.<sup>60</sup>

Instead, addressing negationism requires a political commitment to civic awareness. It requires a long, intellectual dialogue that is profound and complex, and reconstitutes the common, shared feeling generated by the condemnation of atrocities. Negationist phenomena impose a duty on citizens of all generations to rethink history and to reaffirm the values on which the common feeling is based. It is necessary, in other words, to recognize the Holocaust and other atrocities as belonging to our era, and to actively participate and reconfirm the common and final condemnation of those atrocities, being ready to pay the costs that derive from the willingness not to forget, and to develop a critical rethinking of the past.

Western democracies cannot “forget” the tragic history of the Holocaust. Moreover, they must clearly mark the formal and substantive elements of discontinuity and fracture so as to be visible for the community. Remembering collectively cannot be drawn unless complex processes of participation and empathy that can be activated through *long routes*.

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59. “Truth” need not necessarily be a legal truth. On the contrary, starting from the moment in which the truth becomes a legal truth, it becomes susceptible to being instrumentalized. “The contestation of the existence of the Holocaust should not be denied by a law, because the historical truth should never be transformed into an official truth”. See Ginzburg, *supra* note 15.

60. On the dangers and risks of entrusting the decision on a question of history and not of law to tribunals, see PIERRE VIDAL-NAQUET, *Les Assassins de la memoire*, in VIDAL-NAQUET, *supra* note 15, at 134, 183, according to which requiring a decision on history means accrediting the idea that there exist two historical schools, and one can disprove the other. See BURGIO, *supra* note 15, at 184–85 (supporting the use of censorship against those who spread racist ideas, but also describing the illusion of successfully fighting negationism through criminal laws). On the relationship between the judge and the historian, see CARLO GINZBURG, *IL GIUDICE E LO STORICO: CONSIDERAZIONI A MARGINE DEL PROCESSO SOFRI* (1991), translated in *THE JUDGE AND THE HISTORIAN: MARGINAL NOTES ON A LATE-TWENTIETH-CENTURY MISCARRIAGE OF JUSTICE* (Anthony Shugaar trans., Verso 1999); Piero Calamandrei, *Il giudice e lo storico*, 16 *RIVISTA DI DIRITTO PROCESSUALE CIVILE* 105 (1939); Giuseppe Capograssi, *Giudizio processo scienza verità*, 5 *RIVISTA DI DIRITTO PROCESSUALE* 1 (1950); see also LUIGI FERRAJOLI, *DIRITTO E RAGIONE: TEORIA DEL GARANTISMO PENALE* 18–66 (1989) (citing further bibliographical references). For an interesting study on truth, the development of the concept of freedom of speech, and the practice of *parrhesia* in Antiquity, see MICHEL FOUCAULT, *DISCOURSE AND TRUTH: THE PROBLEMATIZATION OF PARRHESIA* (1985).