

# DENYING GENOCIDE: LAW, IDENTITY AND HISTORICAL MEMORY IN THE FACE OF MASS ATROCITY CONFERENCE

The Program in Holocaust and Human Rights Studies  
and the World Policy Institute Conference  
Benjamin N. Cardozo School of Law

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## INTRODUCTION

In 2006, France's lower house of parliament, the National Assembly, adopted a bill that would have made it a crime to deny that the Turks committed genocide against the Armenians during and after World War I.<sup>1</sup> Almost simultaneously, Turkish writers and scholars, including Nobel Prize winner Orhan Pamuk, were being charged by Turkish authorities for precisely the opposite "crime": calling the killing of Armenians by Turks a genocide and, in the process, "denigrating Turkishness."<sup>2</sup> These two diametrically opposed events provided an illustrative backdrop to the *Denying Genocide: Law, Identity and Historical Memory in the Face of Mass Atrocity* conference at the Benjamin N. Cardozo Law School in December 2006, for which the following papers, and others that will appear in the Journal's next issue, were written. The use of law to combat denial was one of the conference's central themes; more specifically, what role can or should law play in determining the

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<sup>1</sup> See Thomas Crampton, *France Acts to Outlaw Denial of Genocide*, INT'L HERALD TRIB., Oct. 13, 2006, at 1, available at <http://www.iht.com/articles/2006/10/12/news/france.php>; see also Sévane Garibian, *Taking Denial Seriously: Genocide and Freedom of Speech in the French Law*, 9 CARDOZO J. CONFLICT RESOL. 479 (2008).

<sup>2</sup> In most cases, the defendants were later acquitted. See, e.g., Sebnem Arsu, *Court Drops Charges Against Author for "Insulting" Turkey*, N.Y. TIMES, Jan. 24, 2006, at A6, available at <http://www.nytimes.com/2006/01/23/international/europe/23end-turkey.html>; see also Sebnem Arsu, *Istanbul Court Clears Author of Insulting Turkish Identity*, N.Y. TIMES, Sept. 22, 2006, at A6, available at [http://www.nytimes.com/2006/09/22/world/europe/22turkey.html?\\_r=2&fta=&oref=slogin&oref=slogin](http://www.nytimes.com/2006/09/22/world/europe/22turkey.html?_r=2&fta=&oref=slogin&oref=slogin).

limits of historical debate? When are governments justified in limiting freedom of speech to protect other societal rights and interests? The conference also looked beyond the narrow legal questions to comprehend denial more broadly, seeking to understand the genesis of the battle of laws described above and the possibilities of dealing with denial through non-legal methods.

As became clear during the course of the conference, denial of genocide or other atrocities is a complex phenomenon, though it shares similar features wherever it arises.<sup>3</sup> While deniers can be single individuals (as in David Irving's denial of the Holocaust<sup>4</sup> or Noam Chomsky's minimization of the Srebrenica massacre<sup>5</sup>), and denial can refer to events in a country not one's own (as in the Holocaust denial of Iranian president Ahmadinejad),<sup>6</sup> it is frequently a wider phenomenon – a broad-based refusal by members of a society to accept responsibility for crimes committed in that society. At a time when many countries are emerging from periods of violence, denial can be viewed as part of the larger field of “transitional justice,” the study of how societies cope with the aftermath of violent periods in their history.<sup>7</sup> It is generally agreed today that such societies cannot move forward to a democratic and peaceful future without confronting and acknowledging the crimes of the past and the sufferings of victims.<sup>8</sup> Just how difficult this can be is most in evidence when societies choose simply to forget, to ignore, or to purposefully deny the crimes committed by themselves or their ancestors. When it involves genocide, such denial has been called the final phase of the crime itself – the ultimate

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<sup>3</sup> For an in-depth study of many forms of denial, see STANLEY COHEN, *STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING* (2001).

<sup>4</sup> See *infra* note 24.

<sup>5</sup> For one discussion of this, see Marko Attila Hoare, *Chomsky's Genocide Denial*, FrontPageMagazine.com, Nov. 23, 2005, available at <http://www.frontpagemag.com/Articles/Read.aspx?GUID=F9C674EB-B99B-43A4-BD24-592315EB795B>.

<sup>6</sup> See, e.g., *Holocaust Comments Spark Outrage*, BBC NEWS, Dec. 14, 2005, [http://news.bbc.co.uk/2/hi/middle\\_east/4529198.stm](http://news.bbc.co.uk/2/hi/middle_east/4529198.stm).

<sup>7</sup> There is a vast literature on transitional justice and the significance of historical memory. See, e.g., PRISCILLA B. HAYNER, *UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY* (2001); RUTI G. TEITEL, *TRANSITIONAL JUSTICE* (2000); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1998); GESINE SCHWAN, *POLITIK UND SCHULD: DIE ZERSTÖRISCHE MACHT DES SCHWEIGENS* (1997). For additional resources on the subject, see, e.g., GOVERNANCE AND SOCIAL DEVELOPMENT RESOURCE CENTER, available at <http://gsdrc.ids.ac.uk/go/topic-guides/justice/transitional-justice> (last visited Apr. 17, 2008).

<sup>8</sup> See *supra* note 7.

negation of the victims by negating their experience and their suffering.<sup>9</sup>

Initial questions addressed by the conference participants were the motivations for denial and the various manifestations of denial in different societies.<sup>10</sup> Societies unaccustomed to robust historical debate often confuse criticism of past acts with an attack on their national identity; hence the idea that such criticism “slanders” or “defames” the country. When Polish-American historian Jan Gross broke decades of societal silence by addressing Polish anti-Semitism and complicity in crimes against the Jews, a prosecutor threatened to take him to court under a law – passed as recently as 2006 – that prohibits accusing Poland of involvement in Nazi or communist crimes.<sup>11</sup> Countries may fear the political repercussions of admitting past crimes: Observers such as conference participant Taner Akcam have suggested that the Turkish government’s refusal to acknowledge Ottoman crimes against Armenians stems in part from a fear that discussion of the past will rekindle the same intergroup conflicts that tore apart the Ottoman Empire a hundred years ago.<sup>12</sup> Denial may also have a practical aspect: admission of crimes against fellow citizens may lead to demands for compensation (after all, the German government’s willingness to accept responsibility for Nazi crimes included millions of dollars of reparations payments).<sup>13</sup> Individual deniers may have psychological motives. In the following, Susan Derwin shows that

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<sup>9</sup> See, e.g., Gregory H. Stanton, *The Eight Stages of Genocide*, Briefing Paper (1998) available at <http://www.genocidewatch.org/8stages.htm>.

<sup>10</sup> For some articles and books that examine denial in detail in different countries, see, e.g., Sabrina P. Ramet, *The Denial Syndrome and its Consequences: Serbian Political Culture Since 2000*, 40 COMMUNIST & POST-COMMUNIST STUD. 41, 41–58 (2007); THE NEIGHBORS RESPOND: THE CONTROVERSY OVER THE JEDWABNE MASSACRE IN POLAND (Antony Polonsky & Joanna B. Michlic eds., 2003); TANER AKCAM, FROM EMPIRE TO REPUBLIC: TURKISH NATIONALISM AND THE ARMENIAN GENOCIDE (2004).

<sup>11</sup> See Siobhan Dowling, *Anti-Semitism Book could Land Polish Historian in Jail*, SPIEGEL ONLINE INT’L, Jan. 18, 2008, <http://www.spiegel.de/international/europe/0,1518,529320,00.html>; Craig Whitlock, *A Scholar’s Legal Peril in Poland*, WASH. POST, Jan. 18, 2008, at A14, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/17/AR2008011703411.html>. Professor Gross spoke about his earlier research and the Polish response on a panel at the conference; at the time, the book that would trigger the threat of legal action had not yet appeared in Poland. The prosecutor later decided not to press charges.

<sup>12</sup> See Taner Akcam, *Denial as a Security Concept*, 10 CARDOZO J. CONFLICT RESOL. (forthcoming 2008).

<sup>13</sup> On German reparations, see NICHOLAS BALABKINS, WEST GERMAN REPARATIONS TO ISRAEL (1971); NANA SAGI, GERMAN REPARATIONS: A HISTORY OF THE NEGOTIATIONS (1980); CONSTANTIN GOSCHLER, WIEDERGUTMACHUNG: WESTDEUTSCHLAND UND DIE VERFOLGTEN DES NATIONALSOZIALISMUS (1945-1954) (1992).

those who commit genocide may be attempting to erase their own perceived vulnerabilities in those they torture and kill, and suggests that deniers may have similar motives.<sup>14</sup> Sometimes, as in the case of Ahmadinejad, denial functions as a tool of political incitement – based very simply in hate.<sup>15</sup>

Whatever its motives, denial has concrete consequences for both societies and individuals. In volatile situations, as Karen Eltis points out in the following, it may in fact lay the groundwork for future genocides.<sup>16</sup> Even where this is not an immediate danger, denial affects both the victims of mass crimes and the societies in which it occurs. Victims suffer the emotional pain that results from the negation of their experience. Denial is frequently used, as Eltis shows, as a means of promoting hatred and vilification of minority or vulnerable social groups, and thus poisons public discourse.<sup>17</sup>

Few would argue that outright denial of genocide or mass crimes has any positive value. But does this justify limiting the freedom to express an opinion? Should a historian who disagrees with the definition of the killings in Armenia, or for that matter during the Holocaust or in Rwanda, as genocide be subjected to criminal penalties, particularly in a country far from the one in which the actual crime occurred? Should it make a difference whether the disagreement is sincerely meant or whether its motivation is patently racist? Or is free speech the paramount right? Here opinions differ. In the United States, with our tradition of robust debate and optimistic belief in the ultimate victory of truth, many are disturbed by the idea of limiting speech – even the most hateful speech – because we disagree with its content.<sup>18</sup> Americans tend to believe, as Justice Brandeis asserted, that the antidote to problematic

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<sup>14</sup> See Susan Derwin, *The Psychic Life Of Denial*, 9 *CARDOZO J. CONFLICT RESOL.* 453 (2008).

<sup>15</sup> See, e.g., Yigal Carmon, *The Role of Holocaust Denial in the Ideology and Strategy of the Iranian Regime*, *International Institute for Holocaust Research, Insights and Perspectives*, [http://www.l.yadvashem.org/about\\_holocaust/holocaust\\_antisemitism/carmon.pdf](http://www.l.yadvashem.org/about_holocaust/holocaust_antisemitism/carmon.pdf) (last visited Apr. 17, 2008); Anne Applebaum, *Tehran's Holocaust Lesson*, *WASH. POST*, Dec. 12, 2006, at A27, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/12/11/AR2006121101163.html>.

<sup>16</sup> Karen Eltis, *A Constitutional Right to Deny and Promote Genocide? Preempting the Usurpation of Human Rights Discourse Toward Incitement from a Canadian Perspective*, 9 *CARDOZO J. CONFLICT RESOL.* 463 (2008).

<sup>17</sup> See *id.*

<sup>18</sup> This view was well illustrated in the Court of Appeals decision in *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), which upheld the National Socialist Party of America's right to march in the largely Jewish suburb of Skokie, Illinois. The Court quoted approvingly the district court's assertion that "[H]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas" *Id.* at 1203 and added, "... if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises." *Id.* at 1210.

speech is more speech.<sup>19</sup> Indeed, the Supreme Court has greatly restricted the possibility of placing legal restrictions on speech that does not cause imminent harm.<sup>20</sup> In Europe, in contrast, perhaps because of the continent's bloody recent history, most countries' laws, as well as regional human rights documents, make room for restrictions on speech that violates the rights of others – including their dignity – or that is seen to seriously endanger the democratic order; thus speech that is racist or anti-Semitic, or promotes hostility to a particular group, is widely criminalized, and a number of countries prohibit Holocaust denial.<sup>21</sup> Still, the Armenian genocide denial law did not ultimately prevail in France, and an attempt to adopt a European-wide law forbidding denial of certain mass crimes, including genocide, was adopted only in watered-down form.<sup>22</sup>

The pieces by Karen Eltis and Sevane Garibian both make strong arguments for restrictions on free speech in the case of at least certain types of genocide denial, based, among other things, on the responsibilities that accompany freedom of speech and the damage to democracy of genocide denial.<sup>23</sup> Other speakers at the conference, including Deborah Lipstadt, who prevailed in a British court after being sued by David Irving for calling him a Holocaust denier, resisted the idea of using law to limit the expression even of extreme opinion on historical issues.<sup>24</sup> Some, such as Rene Lemarchand,

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<sup>19</sup> See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

<sup>20</sup> See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

<sup>21</sup> On laws criminalizing Holocaust denial, as well as other forms of hate speech, see Michael J. Bazyler, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, *International Institute for Holocaust Research, Insights and Perspectives*, [http://www1.yadvashem.org/about\\_yad/departments/audio/Prof\\_Bazyler.html](http://www1.yadvashem.org/about_yad/departments/audio/Prof_Bazyler.html) (last visited Apr. 17, 2008). A detailed list of such laws is also found in OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *COMBATING HATE CRIMES IN THE OSCE REGION: AN OVERVIEW OF STATISTICS, LEGISLATION, AND NATIONAL INITIATIVES 105-158* (2005), [http://www.osce.org/publications/odihr/2005/09/16251\\_452\\_en.pdf](http://www.osce.org/publications/odihr/2005/09/16251_452_en.pdf).

<sup>22</sup> Dan Bilefsky, *EU Adopts Measure Outlawing Holocaust Denial*, *INT’L HERALD TRIB.*, Apr. 19, 2007, <http://www.iht.com/articles/2007/04/19/news/eu.php>.

<sup>23</sup> See Eltis, *supra* note 16; Garibian, *supra* note 1.

<sup>24</sup> For Professor Lipstadt's views on free speech and denial, see her blog, at <http://www.iht.com/articles/2007/04/19/news/eu.php.lipstadt.blogspot.com/>. See also Deborah Lipstadt, *Denial Should be Defeated by Facts, not Laws*, *SPIKED*, July 16, 2007, available at <http://www.spiked-online.com/index.php?/site/article/3609/>.

whose contribution will appear in the next issue of the Journal, pointed out that such laws can be used – as in the case of Rwanda – to silence political opponents, and that these laws themselves can block the necessary steps toward successfully dealing with the past.<sup>25</sup>

A final theme of the conference addressed non-legal alternatives for confronting denial. Truth commissions, like those of South Africa and growing numbers of countries around the world, provide a means of revealing truths and creating a widely accepted historical record without the compulsion of law.<sup>26</sup> Education, a crucial means of combating historical amnesia, has pitfalls of its own, as states must determine what “official” history to teach and how to teach it. In Massachusetts, Turkish-Americans took the state’s department of education to court when it removed material from a curriculum on genocide that denied the Armenian genocide.<sup>27</sup> In Germany, educators must determine how to teach the Holocaust to immigrant students who feel little connection to German history and to third and fourth generation German youngsters to whom these events seem increasingly distant.<sup>28</sup> Not surprisingly, no single solution applies to every country and every case; while genocide denial has similar features wherever it occurs, combating it requires a range of measures and tools.

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<sup>25</sup> Rene Lemarchand, *Genocide, Memory and Ethnic Reconciliation in Rwanda*, 10 *CARDOZO J. CONFLICT RESOL.* (forthcoming 2008).

<sup>26</sup> For general information, see the website of the International Center for Transitional Justice, <http://www.ictj.org>.

<sup>27</sup> Shelley Murphy, *Suit Challenges How Armenian Genocide is Taught*, *BOSTON GLOBE*, Oct. 28, 2005, at B4, available at [http://www.boston.com/news/education/k\\_12/articles/2005/10/28/suit\\_challenges\\_how\\_armenian\\_genocide\\_is\\_taught/](http://www.boston.com/news/education/k_12/articles/2005/10/28/suit_challenges_how_armenian_genocide_is_taught/).

<sup>28</sup> See, e.g., Uwe Bergmeier, *Pädagogische Arbeit zur NS-Geschichte mit Jugendlichen aus Migrantenfamilien*, *Pädagogik*, in *Gedenkstätten: Beiträge zur Fachtagung “Pädagogik in Gedenkstätten*, Oct. 12-15, 2000 (Haus der Wannsee-Konferenz, Berlin), <http://www.ghwk.de/deut/tagung/bergmeier.htm>. See generally OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *EDUCATION ON THE HOLOCAUST AND ON ANTI-SEMITISM: AN OVERVIEW AND ANALYSIS OF EDUCATIONAL APPROACHES 132–146* (2005), available at [http://www.osce.org/documents/odihr/2005/06/14897\\_en.pdf](http://www.osce.org/documents/odihr/2005/06/14897_en.pdf).