DOES IT MATTER *HOW* ONE OPPOSES MEMORY BANS? A COMMENTARY ON LIBERTE POUR L'HISTOIRE

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This Article examines Liberté pour l'Histoire, *a group of French historians who led the charge against that nation's memory laws and, in the process, raised unique arguments not found elsewhere in the debate over hate speech regulation. Some of these arguments—such as a focus on how the constitutional structure of the Fifth Republic encouraged memory laws—advance our understanding of the connection between hate speech bans and political institutions. Other arguments, however, are more problematic. In particular,* Liberté *historians struggle to distinguish the Holocaust (which is illegal to deny) from the Armenian Genocide (which is not). The* Liberté *historians are also hostile toward multiculturalism. While this reflects the French culture in which the historians operate, it is normatively unappealing. This is especially true given the existence of other, more inclusive European arguments against hate speech regulation, such as those of Danish cartoon publisher Flemming Rose and Maltese Judge Giovanni Bonello.*

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I. INTRODUCTION

In 2005 several leading French historians established *Liberté pour l'Histoire* ("*Liberté*") to oppose a spate of laws punishing the denial of historical events such as the Armenian Genocide and the Atlantic slave trade.[1] The larger debate over memory laws—especially outside of France—has focused on the slippery slope argument: If France bans Armenian Genocide denial, what's next?[2] This approach to memory laws meshes nicely with the dominant libertarian tradition in the United States, which, following Justice Brandeis, sees the best response to speech as more speech.[3]

The *Liberté* arguments against French memory laws depart from this libertarian consensus in four ways.[4] First, the historians distrust the

1. In 1990 France passed the Gayssot Law, which bans Holocaust denial. While there were concerns at the time about the creation of official histories, the memory law issue did not crest until a decade later. *See generally* David Fraser, *Law's Holocaust Denial: State, Memory, Legality* in GENOCIDE DENIALS AND THE LAW, 3, 3–48 (Ludovic Hennebel & Thomas Hochmann eds., 2011). *See infra* Part II for a description of the specific laws.

2. *See, e.g.*, Timothy Garton Ash, *This Is the Moment for Europe to Dismantle Taboos, Not Erect Them*, THE GUARDIAN, Oct. 18, 2006, http://www.theguardian.com/commentisfree/2006/oct/19/comment.france.

3. *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

4. My analysis draws on the website of *Liberté pour L'Histoire,* http://www.lph-asso.fr/index.php?lang=en. In particular, I rely on the three "fundamental texts" as described on the website. René Rémond, *History and the Law*, LIBERTÉ POUR L'HISTOIRE (2006), http://www.lph-asso.fr/index.php?option=com_content&view=article&id=154&Itemid=184&lang=en); Pierre Nora, *Historical Identity in Trouble*, LIBERTÉ POUR L'HISTOIRE (2006), http://www.lph-asso.fr/index.php?option=com_content&view=article&id=152&Itemid=182&lang=en); Francoise Chandernagor, *The Historian at the Mercy of the Law*, LIBERTÉ POUR L'HISTOIRE (2008), http://www.lph-asso.fr/index.php?option=com_content&view=article&id=150&Itemid=179&lang=en. I also rely on Pierre Nora's report to the twenty-first meeting of the International Congress of Historical Sciences held in Amsterdam on June 23, 2010. *See* Pierre Nora, *History, Memory and the Law in France* (1990-2010), LIBERTÉ POUR L'HISTOIRE (posted on the *Liberté* website Jan. 14, 2011, http://www.lph-asso.fr/index.php?option=com_content&view=article&id=159%3Apierre-nora-qlhistoire-la-memoire-et-la-loi-en-france-1990-2008q&catid=53%3Aactualites&Itemid=170& lang=en.

marketplace of ideas the libertarian position relies on. Instead, they seek to insulate the historian from a political marketplace of partisan lobbying and ethnic politics.[5] Second, the *Liberté* approach to memory bans is uneven: While they grudgingly tolerate the French ban on Holocaust denial, the *Liberté* historians are much more comfortable rejecting bans on other genocides or crimes against humanity—at times in language casting doubt on the underlying historical events.[6] Third, *Liberté* historians also oppose a broad range of multicultural commemorations and, in effect, support censorship of a significant segment of French society in the name of freedom of speech.[7] Finally, *Liberté* writers often relate their opposition to memory laws to a specific idea of France. For them, memory laws are not simply a threat to freedom of speech but also a threat to the historians' role in guarding France's national identity.[8]

My Article seeks not only to understand the *Liberté* arguments but also to critically challenge them. In particular, I ask if there are more inclusive ways of opposing French memory laws. Consider, for example, the European Court of Human Rights Justice Giovanni Bonello, who has advocated for an American-style protection of offensive speech across Europe.[9] Bonello takes this position without opposing multiculturalism; to the contrary, he combines his libertarian position with a consistent concern for the rights of ethnic and racial minorities across Europe.[10] Why can't the *Liberté* historians take the same approach—especially with the Armenian Genocide?[11] This raises a second set of questions: What is the source of this resistance to multiculturalism? Does it rest on personal,

5. *See infra* Part IV.B.
6. *See infra* Part IV.C.
7. *See infra* Part IV.D.
8. *See infra* Part IV.E.
9. In this regard, consider European Court of Human Rights Judge Giovanni Bonello, who has advocated for an American-style protection of offensive speech. *See* Ceylan v. Turkey, 30 Eur. Ct. H.R. 73 (1999) (calling for adoption of the American incitement to "imminent lawlessness" standard in Europe based on *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969)).
10. *See* Tonio Borg, *The Dissenting Opinions of Judge Giovanni Bonello*, in WHEN JUDGES DISSENT: SEPARATE OPINIONS OF JUDGE GIOVANNI BONELLO AT THE EUROPEAN COURT OF HUMAN RIGHTS, 441, 442–43, 447–48 (Mario Schiavone ed., 2008) (describing Bonello's rulings in cases involving human rights and the Roma).
11. Let me make a caveat here. I am not referring to all *Liberté* historians, or to everyone who has posted on the *Liberté* website. Indeed, a recent article by Paulo Lobba on the *Liberté* website takes a nuanced approach to the question of genocide denial. *See* Pablo Lobba, *The Fate of the Prohibition Against Genocide Denial*, LIBERTÉ POUR L'HISTOIRE (Feb. 5, 2014), http://www.lph-asso.fr/index.php?option=com_content&view=article&id=194%3Ale-destin-de-la-penalisation-du-negationnisme-par-paolo-lobba&catid=53%3Aactualites&Itemid=170&lang=en (suggesting that genocide denial could be punished where there is a "tangible" harm, such as incitement of hatred or violence). Instead, I focus on the early "fundamental" texts of the group.

political, social and cultural factors? Or are such attitudes inevitable given the nature of the laws *Liberté* historians are opposing?

In the next section, I sketch the rise of memory laws in France and *Liberté*'s campaign against them.[12] To provide a baseline for what follows, I offer a brief summary of classic libertarian arguments one could use against memory laws.[13] The bulk of the essay describes, with a critical eye, the *Liberté* arguments against memory laws with a special emphasis on the Armenian Genocide and multiculturalism.[14] The conclusion returns to the question of *how* to oppose hate speech bans.[15] Here I contrast the *Liberté* historians' closed, nationalistic approach with the more inclusive defenses of speech exemplified by Justice Bonello and, to take another example, Danish journalist Flemming Rose.[16]

II. FRENCH MEMORY LAWS AND THE RISE OF *LIBERTÉ POUR L'HISTOIRE*

A. Hate Speech and Holocaust Denial

The French memory laws occupy a unique place in the universe of hate speech regulation. Most bans on hate speech focus on harm.[17] The connection can be direct, as when a code criminalizes the instigation of violence against a specific group, or indirect, as when the statute bans speech that spreads hatred (which can lead to harm).[18] Even though libertarians criticize these laws as unduly restrictive of speech, the laws

12. *See infra* Part II.
13. *See infra* Part III.
14. *See infra* Part IV.
15. *See infra* Part V.
16. *Id.* Flemming Rose is perhaps best known for his role in the Danish Cartoon controversy, but he also fashioned a novel theory of freedom of speech in his 2010 memoir, *The Tyranny of Silence*. Rooted in brave speakers who challenge taboos, this theory may prove more effective in spreading opposition to memory laws—especially to groups traditionally excluded from the dominant national identity. *See* FLEMMING ROSE, THE TYRANNY OF SILENCE (2014). *See also* Robert A. Kahn, *Flemming Rose's Rejection of the American Free Speech Canon and the Poverty of Comparative Constitutional Theory*, 39 BROOK. J. INT'L L. 657, 679 (2014) (for a description on how Muslims should be able to joke about Jews, Danes about Swedes and Norwegians, and whites and blacks about each other).
17. *See* JEREMY WALDRON, THE HARM IN HATE SPEECH (2012) (for a general defense of hate speech laws).
18. *See also* Steven J. Roth, *The Laws of Six Countries: An Analytical Comparison* in UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 177 (Louis Greenspan & Cyril Levitt eds., 1993) (for a description of different approaches that Canada, France, Germany, Israel, the United Kingdom, and the United States take on hate speech regulations).

themselves can be hard to use.[19] This relates to the nature of hate speech. While some statements ("Let's kill the ___") appear on their face to constitute incitement to hatred or violence, other statements ("Auschwitz is a myth") are harder to place.[20] This is especially true when hate speakers use coded language to spread their message while avoiding liability.

One response to these difficulties is to make some speech acts *per se* criminal. For example, Germany has criminalized the swastika; likewise Virginia, Georgia and other southern states in the United States ban cross burning.[21] These laws take the burden off the prosecution by supplying an inference that the speech act in question is intrinsically hateful. Thus the swastika is always a sign of totalitarianism and genocide, and the burning cross always represents Ku Klux Klan-instigated violence.[22] Likewise, one can view Holocaust denial as inherently signifying approval for National Socialist racial ideology.[23]

In another way, however, Holocaust denial is different. Denial of the Nazi mass murder of Jews not only spreads hate; it is also a statement about a historical event. The challenge of reconciling these two meanings can be shown by comparing German and French Holocaust denial bans. Germany enacted its ban months after court rulings suggesting that bare Holocaust denial (i.e. a statement denying the gas chambers, number of Jews killed, or absence of genocidal intent not accompanied by additional statements targeting Jews or Zionists as the source of the Holocaust "lie") was not incitement to racial hatred.[24] The denial ban passed in 1994 is part of § 130 of the Penal Code, which covers hate speech. In 1995 the new law was enforced against a neo-Nazi group that used the phrase

19. *See, e.g.*, ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 17–22 (2004) (for a discussion on how German courts struggled to determine whether bare Holocaust denial harmed human dignity in a way sufficient to justify prosecution under hate speech laws).

20. *See* Robert A. Kahn, *Offensive Symbols Where to Draw the Line: An American Perspective*, in MEDIA FREEDOM AND REGULATION IN THE NEW MEDIA WORLD (A. Koltay ed., 2014) (for more on the relationship between genocide denial and hate speech).

21. *See* Virginia v. Black, 538 U.S. 343 (2002). *See also* Robert A. Kahn, *The Legal Regulation of Cross Burning and Holocaust Denial in Comparative Perspective*, 83 U. DET. MERCY L. REV. 163 (2006).

22. The Supreme Court in *Virginia v. Black* modified this inference by holding that states may only penalize cross burning when evidence suggests it was done with "intent to intimidate." 538 U.S. at 363. Justice Clarence Thomas, in a lengthy dissent, would keep the inference; for him, cross burning is always done with an intent to intimidate. *Id*. at 398 (Thomas, J., dissenting).

23. *See* Robert A. Kahn, *Holocaust Denial and Hate Speech*, in GENOCIDE DENIALS AND THE LAW 77, 77–108 (Ludovic Hennebel & Thomas Hochmann eds., 2011).

24. See KAHN, *supra* note 19, at 20–21 for an overview.

"Auschwitz Myth" as an organizing tool.[25] Viewed in its entirety, Germany's Holocaust denial ban fits comfortably into a militant democracy-style restriction of hate speech aimed at protecting the state against a Nazi revival.[26]

On its surface, the 1990 French Gayssot Law looks similar. Starting in 1979, French deportees and civil rights groups sued Robert Faurisson, a Lyons III literature professor who discovered the "good news" that Auschwitz contained no gas chambers.[27] While Faurisson was convicted under multiple legal theories, the trial was controversial because of court rulings that distinguished Faurisson's research of "scientific nature" from the offensive way he publicized it.[28] But the Gayssot Law was not a direct response to these rulings—the last of which was in 1983. Instead, it was part of a larger initiative aimed at stopping the growing power of Jean Marie Le Pen's National Front.[29] Finally, while the German law is limited to denying the Holocaust, the Gayssot Law bans questioning crimes against humanity (including the Holocaust) established by the London Charter of 1945—a potentially broader category.[30]

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25. *Id*. at 77–83.

26. The phrase "militant democracy," which dates from the fall of the Weimar Republic in Germany, refers to the concept that the state has a special obligation to defend itself against those who would destroy it. *See* Svetlana Tyulkina, Militant Democracy 13 (2011) (unpublished S.J.D. dissertation, Central European University), *available at* http://www.etd.ceu.hu/2012/tyulkina_svetlana.pdf. While the concept has never caught on in the United States, it plays a much larger role in Europe where both the European Convention on Human Rights and national constitutions of some member states have provisions excluding rights of those who would undermine them. *See also* Robert A. Kahn, *Why Do Europeans Ban Hate Speech: A Debate Between Karl Loewenstein and Robert Post*, 41 HOFSTRA L. REV. 545, 557–63 (2013).

27. *See also* KAHN, *supra* note 19, at 31–37.

28. *Id*. at 36. The civil plaintiffs relied on a variety of legal theories including incitement to hatred and falsification of history (under a general tort provision establishing liability for those who harm others by failing in their professional duties). *Id*. at 32. Controversy arose when Faurisson used the process against him to put the Holocaust on trial and deepened when a variety of French courts seemed unable to condemn Faurisson's point of view as history. *Id*. at 33–35. For instance, the trial court in the tort lawsuit found Faurisson guilty but refused to take a position on whether Faurisson falsified history. *Id*. at 35. The appellate court affirmed but, once again, refused to characterize Faurisson's claims themselves, focusing instead on how he presented them. *Id*. at 36.

29. *See* KAHN, *supra* note 19, at 102–08 (describing the politics surrounding the passage of the Gayssot Law).

30. Because the London Charter formed the basis for the Nuremberg trials, the Gayssot Law applies to Holocaust denial. The definition in the Charter could, however, include other instances of crimes against humanity, including the Armenian Genocide. Human Rights Committee, Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, para. 2.3, U.N. Doc.CCPR/C/58/D/550/1993 (12/16/1996), at http://www.unhchr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/4c47b59ea48f7343802566f200352fea.

The difference was seen at the time. Pierre Vidal-Naquet, a French historian of ancient history, whose "Paper Eichmann" essay was one of the first public responses to Faurisson, supported the hate crime prosecutions but not the new law.[31] Even at the time, the Gayssot Law was seen as leading the establishment of an official truth.[32]

The fear of state-created truths would blossom a decade later. During the 1990s, however, the Gayssot Law was still viewed primarily as a hate speech law. In 1990 Robert Faurisson boldly challenged the law in a statement that called the Holocaust a "fairy tale."[33] Yet he was convicted after a trial that went much more smoothly than the earlier prosecutions.[34] Other French deniers were prosecuted as well.[35] In 1996 the United Nations Human Rights Committee upheld the Gayssot Law.[36] A concurring opinion by Justices Evatt and Kretzmer justified this result because of the role Holocaust denial plays in the spread of anti-Semitism in France.[37] At this time, it was still possible to see the Gayssot Law like its German counterpart—as a narrow ban on Holocaust denial. Over time, the debate over these laws became quite familiar. Supporters stressed the importance of protecting the memory of the Holocaust in countries that had witnessed Nazi crimes.[38] Opponents like Ronald Dworkin argued that liberty deserves protection, even if it comes at a "high cost."[39]

B. The Rise of the French Memory Laws

Over time, this pattern began to change. In 1994, four years after the passage of the Gayssot Law, a group of Armenian citizens sued American

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31. PIERRE VIDAL-NAQUET, ASSASSINS OF MEMORY (1992). Vidal-Naquet was active in *Liberté* before his death in 2006.

32. *See* KAHN, *supra* note 19, at 105–08. Opponents compared the new law to Stalinism, in part because the law's supporter, Jean Claude Gayssot, belonged to the hard left French Communist Party. *Id*.

33. *Id.* at 108.

34. *Id*. at 108–11 (describing the trial). In particular, there were fears that the Faurisson would use the trial to repeat the offense—denying the Holocaust—in front of a large audience. This is what happened; but unlike in the early 1980s, the court did not offer any evaluation of Faurisson's view about history. Instead, it affirmed the legislature's power to ban denial. *Id*. at 109–10 (describing trial and court ruling).

35. KAHN, *supra* note 19, at 111–15.

36. *Faurisson v. France*, Communication No. 550/1993 U.N. Doc. CCPR/C/58/D/550/1993 (Nov. 8, 1996).

37. *Id*. para. 6 (concurring opinion of Justices Evatt and Kretzmer).

38. *See Sévane Garibian, Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law*, 9 CARDOZO J. CONFLICT RESOL. 479 (2008).

39. Ronald Dworkin, *The Unbearable Cost of Liberty*, 3 INDEX ON CENSORSHIP 43, 46 (1995).

historian Bernard Lewis over a statement he made in *Le Monde* denying the Armenian Genocide under § 1382 of the French civil code—the same section Jewish groups and civil rights organizations had used to sue Faurisson in 1979.[40] In addition, the Armenian groups tried, unsuccessfully, to use the Gayssot Law to sue Lewis.[41] These efforts represented a move away from viewing the Gayssot Law as an anti-Nazi measure—whatever else Lewis may be, he is not a Nazi. Rather the case reflects an emphasis on the intrinsic harm of genocide denial, which now deserves punishment not because of specific fears of extremist activity but because it is morally wrong.

This shift opened the door to more, broader memory laws. In 2001 the French passed a law "recognizing" the Armenian Genocide.[42] While not explicitly mentioning (or punishing) denial, the law is significant because of why the Gayssot Law prosecution against Bernard Lewis failed. The Gayssot Law makes it illegal to question events deemed "crimes against humanity" by the Nuremberg Tribunal. The Armenian Genocide was not covered by the Tribunal; therefore, the prosecution against Lewis was dismissed.[43] One then can view the 2001 recognition law as an attempt to establish something equivalent to the Nuremberg Tribunal that might then, in theory, let prosecutions proceed.[44]

A second 2001 law was much closer to the Gayssot Law in spirit. The Taubira Law, introduced by a French delegate from Guyana, passed unanimously.[45] It extends the definition of crimes against humanity to include the Atlantic slave trade.[46] In particular, it requires that "the curriculum and the research programs in history and the humanities . . . give the slave trade and slavery the consequent place they deserve."[47] Building on this momentum, the 2005 Mekachera Law expressed "the gratitude of the nation" toward "its repatriated French citizens" and "the positive role of the French presence overseas."[48] The law was enacted by a

40. Yves Ternon, *Freedom and Responsibility of the Historian: The Lewis Affair*, *in* REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 237, 244 (Richard G. Hovannisian ed., 1998).

41. *Id*. at 245.

42. Fraser, *supra* note 1, at 42.

43. Ternon, *supra* note 40, at 245.

44. Other motivations include encouraging Armenian Genocide awareness, especially in Turkey. *See* Fraser, *supra* note 1, at 42–43.

45. The Taubira law is described by Rémond, *supra* note 4. *See also* Nora, *History, Memory and the Law in France (1990–2010)*, *supra* note 4.

46. *See* Rémond, *supra* note 4.

47. *Id*.

48. The law is described in Chandernagor, *supra* note 4.

conservative majority, concerned about the far right *Front National* (FN).[49] In the first round of the 2002 presidential elections, Jean-Marie Le Pen, the FN candidate, received more votes than the sitting center-left Prime Minister Lionel Jospin, and only four percentage points less than Jacques Chirac, the center-right sitting prime minister.[50]

In June 2005 a group of descendants of slaves from Reunion, Guyana, and the Caribbean (*Collectifdom*) raised the stakes by suing French historian Oliver Pétré-Grennouilleau under the Taubira Law.[51] At issue was a book on the global slave trade Pétré-Grennouilleau had published the previous year.[52] The book won an award and, as a result, Pétré-Grennouilleau gave an interview in the *Journal du Dimanche* in which he viewed the slave trade in the "broadest sense" (i.e. as including non-Western forms of slavery) and refused to call the Atlantic slave trade a genocide.[53]

More memory laws were under consideration. By 2006 the French National Assembly was considering proposals to ban denial of the Ukrainian genocide of 1932–33, the genocide in the Vendeé (1792–93), and the World War II-era genocide against the Sinti and the Roma.[54] Competing proposals took up the French war in Algeria: One would make it illegal to deny crimes of humanity committed against Algerians during the war; the other would make it illegal to deny crimes against humanity committed by Algerians during that same period.[55] There was talk of banning denial of crimes against humanity committed during the Crusades.[56]

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49. *Id*.

50. *See Le Pen Upset Causes Major Shock*, CNN, Apr. 22, 2002, http://edition.cnn.com/2002/WORLD/europe/04/21/france.election/?related. None of the candidates did especially well: Chirac had 20% of the vote, Le Pen finished with 17%, while Jospin took third place with 16%. While Chirac won his run-off with Le Pen convincingly with 82% of votes, his victory was weakened by the nature of his second round opposition. *See Jacques Chirac Wins by Default*, THE ECONOMIST, May 9, 2002, http://www.economist.com/node/1127414 (describing center-left supporters who chose to vote for a "thief" over a "fascist" and suggesting that Chirac, following his reelection, needs to show "*la France profonde*" that Parisian elites would not ignore them).

51. Chandernagor, *supra* note 4.

52. *Id*.

53. *Id*.

54. *Id*.

55. *See* Chandernagor, *supra* note 4 (for a list of the proposals).

56. *Id*.

C. The Historians Strike Back

The Mekachera Law, the lawsuit against Pétré-Grennouilleau, and the growing number of memory law proposals triggered a reaction by French historians. After a forum entitled "No to Teaching an Official History," the historians circulated a petition against the provisions in the Mekachera Law requiring historians to recognize the positive contributions of French colonialism.[57] This led to the establishment of the Vigilance Committee Against the State Use of History.[58]

A separate group of nineteen French historians signed a broader petition against memory laws as a whole. The petition read as follows:

> History is not a religion. Historians accept no dogma, respect no prohibition, ignore every taboo.
>
> Historical truth is different from morals. The historian's task is not to extol or to blame, but to explain.
>
> History is not the slave of current issues.
>
> History is not memory.
>
> History is not a juridical issue. In a free state, neither the Parliament nor the judicial courts have the right to define historical truth. State policy, even with the best care . . . is not history policy. [59]

The signatories featured leading lights in French society including Pierre Nora, René Rémond, Pierre Vidal Naquet, and Elizabeth Badinter.[60] But the historians did not simply sign a petition, they also formed an association—*Liberté pour l'Histoire*—with Rémond as its first president.[61] When Rémond passed away in 2007, Pierre Nora took over as president—a position he still occupies as of 2015.

The group operates on several levels. Part of its work involves raising consciousness. The group maintains a website that outlines the memory laws and the major arguments against them.[62] The website posts information about developments in other countries (for instance, it has a

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57. Nora, *History, Memory and the Law in France (1990–2010)*, *supra* note 4.
58. *Id.*
59. *See Appeal 2005*, LIBERTÉ POUR L'HISTOIRE, http://www.lph-asso.fr/index.php?option=com_content&view=article&id=2&Itemid=13&lang=en.
60. *Id.*
61. Nora, *History, Memory and the Law in France (1990-2010)*, *supra* note 4.
62. *See* LIBERTE POUR L'HISTOIRE, http://www.lph-asso.fr/index.php?lang=en.

section about Russian memory laws).[63] But *Liberté* also lobbies the French government. These efforts have been quite successful. In 2005 the French Constitutional Council struck down the part of the Mekachera Law requiring that public schools highlight the positive contributions of the French colonial experience.[64]

In 2007 the European Union issued a Framework Decision requiring member states to take measures necessary to assure that "condoning, denying or grossly trivializing crimes of genocide" are punishable."[65] The idea of requiring European states to take some action against genocide denial had been in the air since 2001. The member states have responded in a variety of ways: Some states, often in Eastern Europe, passed genocide denial laws; others, like Germany, already had such laws.[66] A third group of states—Denmark, the Netherlands, and the United Kingdom—argued that currently existing laws were sufficient to "punish" genocide denial.[67]

In France, the Framework Decision posed a challenge. The Gayssot Law only covers those "crimes against humanity" defined as such by the Nuremburg Tribunal. Was this enough to satisfy the new EU ruling? To sort this out, France appointed a special commission on memory laws headed by Bernard Accoyer.[68] With advice from *Liberté*, the commission stated that France would only punish denial of those "crimes against humanity" (and genocides) defined as such by the international tribunal. This position—which echoed the Gayssot Law—placed France in accord with the Framework Decision.[69] It also sent a message to French politicians: Only crimes against humanity defined as such by a legal tribunal could be subject to memory laws.[70] This position ruled out bans on denial of the crimes committed in the Crusades, the slave trade, and the

63. *Id*.

64. Chandernagor, *supra* note 4.

65. *See also* Luigi Cajani, *Adoption of the European Framework Decision, 17 May 2011*, LIBERTE POUR L'HISTOIRE (May 25, 2011), http://www.lph-asso.fr/index.php?option=com_content&view=article&id=162%3Aadoption-de-la-decison-cadre-europeenne-au-17-mai-2011&catid=53%3Aactualites&Itemid=170&lang=en.

66. *Id*.

67. *Id*.

68. Nora, *History, Memory and the Law in France (1990–2010)*, *supra* note 4. *See also* Robert Badinter, *Is This the End for the Historical Memory Laws*, LIBERTÉ POUR L'HISTOIRE (Dec. 4, 2012), http://www.lph-asso.fr/index.php?option=com_content&view=article&id=182%3A-intervention-de-robert-badinter-a-lassemblee-generale-de-liberte-pour-lhistoire-2-juin-2012&catid=53%3Aactualites&Itemid=170&lang=en.

69. Badinter, *supra* note 68.

70. *Id*.

Armenian Genocide. This last point was particularly timely given the October 2006 passage by the National Assembly of Gayssot-like provisions covering the denial of the Armenian Genocide.[71]

These were heady days for *Liberté*. The tide of memory laws had crested and began to subside. Part of the Mekachera Law was struck down. The Armenian Genocide proposal passed the National Assembly but—in 2006—went no further. The Accoyer Commission proposed a standard that would limit the scope of future memory laws. (One might ban denial of Rwandan genocide, or crimes against humanity in the former Yugoslavia, as well as future acts but the pre-1945 past was secure). When *Collectifdom* decided to withdraw its lawsuit against Pétré-Grennouilleau, arguing that legal action was no longer productive, Pierre Nora saw another example of the influence of the historians.[72]

Speaking before a congress of historians in Amsterdam in 2010, *Liberté* president Nora allowed himself a note of triumph. Why was the battle over memory laws so extensive in France?[73] To this, Nora conceded that the French political system had encouraged the passage of memory laws.[74] But that same system ironically helped *Liberté* oppose those laws.[75] Here Nora singled out the central Paris location of the *Liberté*'s offices, the ease of incorporating, and the access *Liberté* historians had to "political figureheads."[76] Times were good.

To be sure, there were bumps in the road. The Accoyer Commission was supposed to prevent the adoption of further memory laws, but it could not stop the passage of the 2011 Boyer Law, which extended the provisions of the Gayssot Law to the denial of the Armenian Genocide.[77] This threat was removed in 2012 when the French Constitutional Council struck down the proposed ban.[78]

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71. Mark Tran, *French MPs Pass Armenian Genocide Bill*, THE GUARDIAN (Oct. 12, 2006, 7:28 AM), http://www.theguardian.com/world/2006/oct/12/france.turkey.

72. According to Nora, *Collectifdom* dropped the case because of the "widespread" and "energetic" response of French historians.

73. Nora, *supra* note 4.

74. *Id*.

75. *Id*.

76. *Id*.

77. French Senate Passes Bill Criminalizing Armenian Genocide Denial, *Armenian Weekly*, Jan. 23, 2012, at 1.

78. Constitutional Council, Decision No. 2012-647, decided Feb. 28, 2012. For a critical overview, *see* Thomas Hochmann, *La question mémorielle de constitutionnalité (à propos de la décision du 28 février 2012 du Conseil constitutionnel)* 4 ANNUAIRE DE L'INSTITUT MICHEL VILLEY 133 (2012) (Fr.).

The following year, the European Court of Human Rights decided *Perinçek v. Switzerland*, which struck down the application of Switzerland's genocide denial law to a Turkish national who repeatedly at academic conferences described the Armenian Genocide as "an international lie."[79] The Swiss courts had convicted him under a national law making it illegal to deny genocide with racist intent.[80] In overturning the conviction as a violation of the freedom of expression guaranteed under Article 10 of the European Convention,[81] the Court held that there was no a "consensus" that what happened to the Armenians was a genocide, something distinguishing it from the Holocaust.[82] While the ruling has been widely criticized,[83] and a rehearing took place in 2015,[84] the decision suggests *Liberté* has made some headway in convincing European courts about the dangers of memory laws.

The tide had turned. What arguments did *Liberté* use to achieve its successes?

III. STANDARD LIBERTARIAN ARGUMENTS AGAINST GENOCIDE DENIAL BANS

Let's begin by saying what they were not. From an American perspective, the *Liberté* arguments are strange in two ways. First, while an American might be inclined to lump the memory laws together, the sharpest critics of the slave trade or Armenian Genocide denial bans struck

79. Perinçek v. Switzerland, APP. NO. 27510/08, Eur. Ct. H.R. (2013). The case was decided in French. There was, however, an English-language press release. European Court of Human Rights Press Release ECHR 370 (2013), Criminal Conviction for Denial that the Atrocities Perpetrated Against the Armenian People in 1915 and Years After Constituted Genocide Was Unjustified (Dec. 17, 2013) [hereinafter Press Release], http://hudoc.echr.coe.int/eng-press?i=003-4613832-5581451.

80. Press Release, *supra* note 79. The applicant was charged under Section 261bis of the Swiss Criminal Code.

81. *See* Eur. Conv. On H.R., Article 10.

82. Press Release, *supra* note 79, at 2.

83. *See* Uladzislau Belavusau, *Armenian Genocide v. Holocaust in Strasbourg: Trivialization in Comparison Verfassungsblog*, Constitution Blog (Feb. 13, 2004), http://www.verfassungsblog.de/en/armenian-genocide-v-holocaust-in-strasbourg-trivialisation-in-comparison/#.VOuqBOktF9A (chiding the Court for "ignor[ing the] simple fact that all genocides are a matter of contested recognition"); Thomas Hochmann, One Century Later: Freedom of Speech and the Denial of the Armenian Genocide, CritCom: *A forum for research and commentary in Europe* (Feb. 20, 2015), http://councilforeuropeanstudies.org/critcom/one-century-later-freedom-of-speech-and-the-denial-of-the-armenian-genocide (arguing that the Court failed to consider the "hateful content" requirement of the Swiss law).

84. Press Release, Registrar of the Court, Grand Chamber Hearing in the Case of Perinçek v. Switzerland (Dec. 17, 2013).

a different tune when it came to Holocaust denial and the Gayssot Law.[85] Second, a standard defense of freedom of speech turns on the marketplace of ideas; by contrast *Liberté* emphasized the historian's role in protecting the collective vision of the past from pressure by politicians and their (pushy) constituents.[86] To highlight these differences, this section takes up standard (non-*Liberté*) arguments in favor of freedom of speech and against genocide denial bans.

Traditional defenses of freedom of speech rest on the premise that more speech is better—even if the reasons for this differ. For example, the marketplace of ideas metaphor draws on the ideas of Oliver Wendell Holmes and John Stuart Mill to view open debate as enhancing the search for truth.[87] Later in the twentieth century, the defense of speech shifted from truth to democracy—as Robert Post argued that a democratic state can only be truly legitimate if everyone can express his or her views.[88] Personal autonomy is another perceived benefit of open debate—a position advanced by C. Edwin Baker[89] and in Europe by Flemming Rose and Salman Rushdie.[90]

In addition to seeing speech acts as intrinsically valuable, traditional free speech supporters also rely on a series of arguments about the harms of censorship. Limiting speech, for example, requires an excessive trust of the government.[91] When the restrictions involve protecting minority groups (i.e. hate speech) the government winds up using the laws against those same groups.[92] Then there is the problem of the slippery slope.[93]

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85. *See infra* Part IV.C.

86. *See infra* Part IV.B, D, and E.

87. Kahn, *Flemming Rose's Rejection of the American Free Speech Canon*, *supra* note 16, at 667. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (raising the marketplace of ideas metaphor); JOHN STUART MILL, ON LIBERTY (1859).

88. *See, e.g.*, Robert Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. R. 267 (1991) (discussing campus hate speech laws from the perspective of democratic dialogue theory); Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72 (2007) (applying democratic dialogue theory to the Danish cartoon controversy). For a critique, *see* Kahn, *Why Do Europeans Ban Hate Speech*, *supra* note 26, at 571–81.

89. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989).

90. I discuss the Rose/Rushdie defense of speech at length in Kahn, *Flemming Rose's Rejection of the American Free Speech Canon*, *supra* note 16, at 690. As the title suggests, Rose and Rushdie's defense of speech differs from the traditional canon—especially in the emphasis it places on the way censorship silences the potential speaker (as opposed to taking up what the audience can handle). But Rose and Rushdie agree that the speech act itself is valuable—something that, as we shall see, distinguishes them from the *Liberté* historians.

91. *Id*. at 668.

92. *Id*. *See* Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal*, 1984 DUKE L.J. 484, 554–55 n.359 (1984) (describing how the 1965 Race Relations Act in the United Kingdom was used to punish trade unionists, members of minority groups and anti-Nazi activists).

Restriction of neo-Nazi or Klan speech will, over time, lead to the restriction of other, less offensive speech. Finally there is a sense, expressed by Lee Bollinger and Flemming Rose, that restrictions on speech in one way or another take away from what makes us human—for Rose it involves a denial of our innate need to tell stories,[94] and for Bollinger it forecloses the possibility of the "tolerant society," a society that accepts difference because it is exposed to it.[95]

From this perspective, the French memory laws are easy to criticize. While one can question whether tolerating deniers will enhance the marketplace of ideas, to the extent one trusts open debate, the cost of including deniers in it should be small.[96] Likewise, a society that wants everyone—including Holocaust deniers—to accept the decisions reached by society (especially on issues of commemoration of the Holocaust, reparations and anti-discrimination laws) should allow deniers to express their opinion. Finally, to the extent human beings have a need to tell stories, society should not prevent deniers from telling such stories about the Holocaust (or the Armenian Genocide, or the slave trade) even if these stories are untrue.

Added to this are concerns about censorship. If a society bans Holocaust denial (or denial of the slave trade) on the theory that the society is still anti-Semitic or racist, what is to prevent that society from enforcing speech bans in a discriminatory manner? Given that the Race Relations Act was used against minority groups (and the Sherman Anti-Trust Act used against unions) is it a stretch to see the Gayssot Law used against Holocaust survivors or Jews?[97] Opponents of memory laws would

93. Lee Bollinger refers to this vision of speech as the "fortress model" under which any breach of the fortress of speech protection is seen to have dire consequences. *See* LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 76–103 (1986).

94. *See* Kahn, *Flemming Rose's Rejection of the American Free Speech Canon*, *supra* note 16, at 676.

95. BOLLINGER, *supra* note 93, at 10 ("[F]ree speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters).

96. For a dissenting view see Fredrick Schauer, *Social Epistemology, Holocaust Denial, and the Post-Millian Calculus*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 129, 140 (Michael Herz and Peter Molnar eds., 2012) (given that some people still believe "that President Obama was born in Kenya and that President Bush knew in advance about the 9/11 attacks," Mill's normative argument from truth appears less compelling).

97. While this argument may seem far-fetched, here are some examples. As noted above, a German court convicted a neo-Nazi group for using the phrase "Auschwitz myth." Kahn, *supra* note 19, at 77–83. Would the same phrase also be punishable in a scholarly discussion about representations of the Shoah? Or, to take another example, does Robert Bellini's film *Life is Beautiful* deny the Holocaust by suggesting that the concentration camps were a game? Let me be clear, I am not saying

also rely on the slippery slope argument—as Timothy Garton Ash already has in connection with the ban on the Armenian Genocide: If France can ban this, what can't France ban?[98] Finally, both Bollinger and Rose would have little trouble viewing memory laws as restrictions on what makes a person or society fully human.

In response, a *Liberté* supporter might object that the traditional arguments ignore compelling harms posed by memory laws and that, as a result, some memory laws may slip through the cracks. There is an element of truth here. A traditional civil libertarian might concede that genocide denial laws are tolerable when horrific events have left the society torn at the seams—as, for example, with Germany immediately after World War II. Deborah Lipstadt generally opposes genocide denial bans but understands why countries like Germany, Austria and France choose to ban denial.[99] Shifting from space to time, Peter Teachout argues that Germany's restrictions on genocide denial may have been defensible in the 1940s and 50s, but are less so today.[100]

In crafting their compromise positions, Lipstadt and Teachout still generally agree with Justice Brandeis that the best response to bad speech is more speech. The *Liberté* position is quite different.

IV. THE *LIBERTÉ* CASE AGAINST MEMORY LAWS

That the *Liberté* historians, in opposing memory laws, do not follow the standard libertarian model is not surprising—indeed, one can ask if there even is a single model of libertarian opposition to hate speech bans.[101] What is different—at least from an American perspective—is the tone. There is a harshness, one that turns the Armenians and descendants

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that these arguments carry weight. In fact, I find them unconvincing. But they are the type of claims a traditional free speech advocate to might make.

98. Garton Ash, *supra* note 2. Here *Liberté* makes an argument that fits into the general civil libertarian pattern of speech protection. As we shall see, this is not all that the *Liberté* historians say about the Armenian Genocide. *See infra* Parts IV.B & C.

99. Robert A. Kahn, *Holocaust Denial and Hate Speech*, *in* GENOCIDE DENIALS AND THE LAW, 93–94 (Ludovic Hennebel & Thomas Hochmann eds., 2011).

100. Peter Teachout, *Making Holocaust Denial a Crime: Reflections on European Anti-Negationist Laws, from the Perspective of US Constitutional Experience*, 30 VT. L. REV. 655, 689–92 (2006). Even Robert Post is open to the idea that in some countries democracy is not strong enough to sustain a fully democratic public discourse, although he remains skeptical. *Interview with Robert Post*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 11, 25 (Michael Herz & Peter Molnar eds., 2012).

101. *See* Kahn, *Flemming Rose's Rejection of the American Free Speech Canon*, *supra* note 16, at 687–94 (suggesting that Flemming Rose has constructed a theory of free expression that does not rely on the classic examples of the United States free speech canon).

of slaves who support memory laws into ethnic lobbyists who, by their censorious conduct, threaten to unravel (or contaminate) the pristine national past. On this view, the role of the historian is to protect history from intrusions from the political sphere.[102] Before taking up what the *Liberté* historians say about ethnic lobbying,[103] the Armenian Genocide,[104] multicultural commemorations[105] and French identity,[106] let me start with a more neutral theme about how the structure of political institutions can threaten freedom of speech.[107]

A. Memory Laws and Political Structures

Why, alone among stable Western democracies, does France punish denial of memory (even if some states, like Germany and Austria, punish Holocaust denial)? While *Liberté* historians offer cultural reasons for this French exceptionalism, they also look to institutions.[108] During the Fourth Republic (1946–1958) French politicians used non-binding resolutions to grandstand and, at times, force votes of no confidence—which is one reason why there were so many different governments during these years.[109] As a result, the Fifth Republic made it illegal for parliament to pass non-binding resolutions.[110] While this may have helped foster political stability, it had a perverse effect when it came to commemorating genocides and opposing genocide denial.[111] While other states could give voice to the harms of genocide (or crimes against humanity) by passing non-binding resolutions, in France the parliament was limited to passing laws.[112] To that end, *Liberté* lobbied successfully for the return of non-binding resolutions—another illustration of its lobbying prowess.[113]

One can object to this explanation. The 2001 recognition of the Armenian Genocide looks more like a "resolution" than a "law." The ban on non-binding resolutions did not prevent the establishment of a number

102. This recalls a saying about librarians at the *Staatsbibliotek* in Berlin when I was a graduate student in the mid-1990s: "The role of the librarian is to keep the people out and the books in."
103. *See infra* Part IV.B.
104. *See infra* Part IV.C.
105. *See infra* Part IV.D.
106. *See infra* Part IV.E.
107. *See infra* Part IV.A.
108. Chandernagor, *supra* note 4.
109. *Id*.
110. *Id*.
111. *Id*.
112. *Id*.
113. Nora, *History, Memory and the Law*, *supra* note 4.

of commemorative holidays. For example, July 16th was dedicated to the fight against anti-Semitism, while May 10th was dedicated to the memory of the slave trade.[114] In addition, if the inability to pass non-binding resolutions explains the enactment of memory laws, why were only four such laws passed?

On another level, however, the connection between political institutions and speech restrictions has merit. Preventing politicians from "blowing off steam" by passing symbolic legislation may well encourage speech restrictions.[115] *Liberté* also made other institutional arguments. Memory laws were passed as "private bills," which allowed them to bypass the Council of State, which could have acted as a road block.[116]

The concern with the structure of political institutions is novel for opponents of hate speech regulation who, when they discuss politics at all, tend to express skepticism about the ability of governments to protect speech.[117] Perhaps one can structure a constitutional democracy to minimize the need for hate speech laws.[118] At the same time, *Liberté*'s emphasis on political structures points the way to other, more questionable arguments about politics and memory laws.

B. Defending History from (Ethnic) Lobbyists

Liberté demonizes politics and lobbying even though they have been pretty good lobbyists themselves. Some *Liberté* objections strike a global chord. René Rémond's comment that "totalitarian regimes" are known for their attempt to "twist history to their advantage"[119] fits into the larger claim heard across North America and Europe that genocide denial laws

114. *Id*. July 16th commemorates the day in 1942 when the roundups of Jews began in Paris. May 10th is the date the French adopted the proposal for a day of remembrance of the slave trade, slavery and its abolition. *See* France.fr: The Official Website of France http://www.france.fr/en/institutions-and-values/remembrance-slave-trade.html (last visited Sept. 12, 2015).

115. Chandernagor, *supra* note 4.

116. *Id.*

117. For an overview of this argument, *see* Robert Post, *Hate Speech*, *in* EXTREMIST SPEECH AND DEMOCRACY 122, 137 (James Weinstein & Ivan Hare eds., 2009).

118. One could, for example, argue that Holocaust denial bans are more likely to occur in countries with inquisitorial legal systems in part because of the difficulty in reconciling the norms of adversarial justice with the tactics of Holocaust deniers. *See* Robert A. Kahn, *Imagining Legal Fairness: A Comparative Perspective*, *in* NEW APPROACHES TO COMPARATIVE POLITICS: INSIGHTS FROM POLITICAL THEORY (Jennifer Holmes ed., 2003).

119. Rémond, *supra* note 4. Chandernagor makes similar comments. *See* Changernagor, *supra* note 4 (calling memory laws "the preserve of totalitarian regimes, whether Fascist or Communist").

improperly establish an "official truth."[120] But *Liberté* historians go further. In addition to calling memory law supporters totalitarians, they also taint memory law supporters for their association with a rough and tumble world of politics. This is unique.

For example, Francoise Chandernagor refers to "specific groups" who, "charged with emotion," become the "clientele" of demagogic politicians.[121] She complains about "organizations, factions" and "pressure groups" whose legislative products are worthy of "contempt" because they are "slapdash."[122] Here she mentions a supporter of the 2006 Armenian Genocide bill who spent days amending the bill, often switching the prison term from one to five years and back again.[123] Likewise, she faults the Taubira Law, which calls on educators to give a "consequent" place to the slave trade, for not defining that term.[124]

An American might use the sloppiness of the memory legislation to show why the state cannot be trusted to enact such laws. But Chandernagor seems to argue that memory laws should be opposed simply because they are "slapdash"; the speech they prohibit seems secondary. Reading her essay, one gets the sense that Chandernagor would accept Armenian Genocide denial ban if only the proponents had stuck with a five year prison term.

Nor is Chandernagor the only *Liberté* historian unhappy with memory law supporters. For Rémond, memory laws are "an expression of a typically contemporary mindset." He worries about "replacing a collective understanding of the past" with "the disgruntlement of special interest groups."[125] Unnamed "religious or ethnic communities" are, in the name of recognizing their "particular past experience," taking "history as a whole hostage."[126] This applies especially to the "utterly incorrigible" politicians who reintroduced a ban the Armenian Genocide even after *Liberté* took a stand against this "exploitative view of history."[127]

Pierre Nora strikes a similar note. After acknowledging that recognizing suffering and protecting victims are legitimate concerns, he

120. The opposition to the Gayssot Law in the National Assembly was explicitly political. In part this was because the bill was proposed by a Communist Party delegate the year after the fall of the Berlin wall. For more, *see* KAHN, *supra* note 19, 107–08.
121. Chandernagor, *supra* note 4.
122. *Id*.
123. *Id*.
124. *Id*.
125. Rémond, *supra* note 4.
126. *Id*.
127. *Id*.

warns about "the pressure of groups with a shared past." These groups, in the name of history for "minorities," seek to "dominate" the view of the past.[128] They do this by "infiltrat[ing] the political sphere" through "electoral blackmail" and "personal physical threats"—a circumstance that leads Nora to question whether he is still talking about historical memory.[129]

To American ears this is strange. Threats of physical harm against representatives of the people have no place in a constitutional democracy; but doesn't freedom of speech allow for a wide variety of electoral expression including blackmail? To take a fairly recent example from the United States: In 2013 Republicans in the House of Representatives forced a government shutdown (and threatened a default on the debt ceiling) to convince President Obama to make changes to the Affordable Care Act.[130] While polls show that most Americans opposed the Republicans' tactics, no one questioned their *right* to take this course of action.[131] To put a gloss on Nora's comment—after hearing about electoral blackmail, infiltration and domination—I wonder if he is still talking about freedom of speech.

C. Liberté and the Armenian Genocide

Liberté writers are especially wary of supporters of an Armenian Genocide denial ban. Chandernagor, explaining why the 2006 Armenian Genocide ban passed with less than 100 votes, suggested that most deputies skipped town to avoid facing the "vociferous groups" backing the law.[132] Nora's mention of physical violence may refer to the debate over the Armenian Genocide—although he does not make this clear.[133] Chandernagor, Rémond, and Nora emphasize the lack of any connection

128. Nora, *Historical Identity in Trouble*, *supra* note 4.

129. *Id*.

130. Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013).

131. Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES, Oct. 16, 2013 (noting that "the shutdown sent Republican poll numbers plunging").

132. Chandernagor, *supra* note 4.

133. Interestingly the main supporter of the 2011 Armenian Genocide bill, Valerie Boyer, was the subject of a death threat shortly after she introduced the bill. *French MP Receives Death Threats*, HURRIYET DAILY NEWS, Dec. 28, 2011, http://www.hurriyetdailynews.com/french-mp-receives-death-threats.aspx?pageID=238&nID=10181&NewsCatID=351.

between France and the Armenian Genocide.[134] Something about the debate over the Armenian Genocide denial ban gets under their skin—what is it?

Liberté's opposition to the Armenian Genocide denial ban could come from a principled objection to *all* hate speech laws. For those, like Flemming Rose, who take this view, the memory law debate is easy.[135] However, none of the *Liberté* historians take such a broad position. For example, Chandernagor tolerates speech "as long as it is not offensive, hateful or racist."[136] In terms of the Framework Decision, *Liberté* takes the same the position as the United Kingdom and the Netherlands, who refuse to enact Holocaust denial bans because they already ban racist hate speech. So even if most Americans oppose hate speech laws, *Liberté* does not.

This makes the Holocaust denial ban in the Gayssot Law a harder issue for *Liberté*. The organization did not form in 1990 when France enacted the Gayssot Law. Nor did it form in 1996 when a controversy arose when Abbé Pierre, a Catholic priest who worked with the poor, and who was a very popular figure in French society, gave his support to Roger Garaudy, a Gayssot Law defendant.[137] Instead, it took a lawsuit against a fellow historian for Nora, Chandernagor and Rémond to act.[138] The same applies to *Liberté* as an institution; from the very beginning the group struggled with Holocaust denial. For example, the December 12, 2005, *Appeal* describes Gayssot Law as one of the provisions that "violat[ed] the principles" of the petition.[139] Yet the version of the *Appeal* currently on the *Liberté* website lacks this language.[140] Early *Liberté* articles likewise take an ambiguous position. Chandernagor concedes the Gayssot Law it is not "the most poorly worded" of the memory laws, but views it as a "Pandora's Box."[141] Rémond warns that the Gayssot law can lead to less legitimate laws.[142] Pierre Nora, writing in 2011, spoke of how the law was

134. For example, Nora writes "France had nothing to do with the extermination of the Armenians in 1915." Nora, *Historical Identity in Trouble*, *supra* note 4.

135. *See* Kahn, *Flemming Rose's Rejection of the American Free Speech Canon*, *supra* note 16, at 676, 678.

136. Chandernagor, *supra* note 4.

137. For an overview, *see* KAHN, *supra* note 19, at 116–17. There were, however, a number of op-eds against the Gayssot Law in leading French newspapers. *Id*.

138. *See supra* Part II.C.

139. *See* Mickaël Ho Foui Sang, *Legislation, Collective Memory and History: When the French Legislature Deals with the Past*, 3 SORTUZ: OÑATI JOURNAL OF EMERGENT SOCIO-LEGAL STUDIES 95 (2011) (describing the 2005 version of the *Appeal*).

140. *See Appeal 2005*, *supra* note 59.

141. Chandernagor, *supra* note 4. Note the similarity to the slippery slope argument here.

142. Rémond, *supra* note 4.

seen as "the thin edge of the wedge" and how those with foresight—such as Pierre Vidal-Naquet—had the wisdom to oppose the law.[143]

By 2010, however, the tune had changed. While *Liberté* continued "to be wary of the Gayssot law" and "regret[s] it intellectually speaking" the organization "does not campaign for its suppression" according to President Nora, and "does not wish to challenge it" because such a challenge would be seen as "authorizing and even encouraging the denial of the Jewish genocide."[144] Robert Badinter, past president of the Constitutional Council and long-time legal opponent of Robert Faurisson, took a similar stance.[145]

Liberté's grudging support for the Gayssot Law is an odd stance for a group troubled by state-created history. One can as a civil libertarian worry about "encouraging the denial of the Jewish genocide" while rejecting a legal response. Robert Post has argued that bans on Holocaust denial should be "rare"[146]—he can say this (at least in the United States) without being suspected of anti-Semitism. *Liberté* historians could have taken a similar position. Instead, they restrict their support of genocide denial bans to the Gayssot Law. In the process, they struggle with the Armenian Genocide which, because of its similarities to the Holocaust (for example, both genocides have inspired an active group of deniers) and the large Armenian community in France, has become a flashpoint in the memory law debate.

In distinguishing the Gayssot Law from other memory laws, *Liberté* relies on two arguments. First, *Liberté* distinguishes the Gayssot Law based on the speaker's purpose. While deniers of the Armenian Genocide or the Atlantic slave trade have many motives, the main reason for promoting Holocaust denial is to spread anti-Semitism. As Badinter puts it, the Gayssot Law was enacted to combat racism and xenophobia or, more particularly, to avoid a Nazi return to power.[147] Likewise, Nora justifies his agnostic stance on the subject by asserting that the "Gayssot Law was certainly not voted [i.e. directed] against historians."[148] Other memory laws, no matter how justified they may be, lack the same anti-Nazi purpose.

143. Nora, *History, Memory and the Law*, *supra* note 4.
144. *Id.*
145. Badinter, *supra* note 68.
146. Post, *supra* note 117, at 127.
147. Badinter, *supra* note 68.
148. Nora, *supra* note 4.

Second, *Liberté* relies on a technical argument. The Gayssot Law only applies to "crimes against humanity"[149] ruled as such by an international tribunal. This, says Badinter, reduces the issue to one of "res judicata."[150] Requiring an adjudicated crime against humanity restricts the potential scope of memory laws while insulating historians from the power of conflicting legislative majorities to restrict historical inquiry.[151]

But how well do Badinter's two points about underlying hatred and res judicata co-exist with one another? Does the fact that a "crime against humanity" is adjudicated by an international court mean that the denial of the crime must be motivated by hatred? Consider the recent Trayvon Martin case in the United States in which George Zimmerman, a citizen on neighborhood patrol, chased down an African-American teenager and then shot him.[152] Zimmerman claimed he fired in self-defense, and a jury acquitted him.[153] Now assume someone denies that George Zimmerman pursued Trayvon, or claims, falsely, that Trayvon had a gun. These denials, aside from being painful to the Martin family, could be read as supporting a racist agenda. But does this finding of racism depend on whether Zimmerman was actually convicted?[154]

This is where the Armenian Genocide comes in: Between 1915 and 1923 over one million Armenians were killed as part of a plan of forced relocation and extermination.[155] Although the term "genocide" was coined after World War II (a formulation that might, interestingly enough, prevent

149. Badinter, *supra* note 68.

150. *Id.*

151. *See* Jean-Noel Jeanneney, Lecture at the University of Melbourne: the Civic Responsibilities of Historians (Apr. 29, 2008), http://www.lph-asso.fr/index.php?option=com_content&view=article&id=115%3Aj-n-jeanneney-qles-responsabilites-civiques-des-historiensq&catid=4%3Atribunes&Itemid=4&lang=en.

152. Lizette Alvarez and Carol & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES, July 13, 2013**,** http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html?_r=1.

153. *Id*.

154. In fact it might seem to. If a jury had convicted Zimmerman, it would behave been harder to deny that Zimmerman chased after Trayvon (or that Trayvon had a gun). But does this make someone who, despite the verdict, denies that Zimmerman chased Trayvon a racist? The same issue comes up in Holocaust denial. Does the mass of evidence presented at Nuremberg trials (and elsewhere) mean that anyone who denies the Holocaust is anti-Semitic? Or is there a space for the harmless "kook" who, without racist motivations, denies what everyone else accepts as true?

155. For more on the Armenian Genocide, *see* Roger W. Smith, Eric Markusen & Robert Jay Lifton, *Professional Ethics and the Denial of the Genocide*, in REMEMBRANCE AND DENIAL 271, 272–74, *supra* note 40, at 272–74. *See generally* Vahakn Dadrian, *The Armenian Genocide: Review of its Historical, Political, and Legal Aspects*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 135 (2011).

the Holocaust from being called a genocide),[156] Hitler was quoted as saying in 1939: "Who remembers the Armenians?"[157] War crime trials followed the collapse of the Ottoman Empire but these were suspended with Kemal Ataturk's establishment of modern-day Turkey.[158] To this day, the Turkish government not only refuses to label the events of 1915-18 as genocide; the government also denies the occurrence of many of that period's key events and the underlying facts, including numbers of Armenians murdered and the reasons they were killed.[159] Furthermore, many Armenians fled to France in the aftermath of the genocide.[160]

These facts explain why French Armenians tried to sue Armenian Genocide deniers under the Gayssot Law and, when this failed, pushed for a specific ban on denying the Armenian Genocide.[161] For its part *Liberté* accepts hate speech bans and, more grudgingly, the Gayssot Law. Following the Accoyer Commission, *Liberté* distinguishes the Gayssot Law as only involving crimes adjudicated by an international court—a line that excludes most memory laws. If *Liberté* accepts a ban on Armenian Genocide denial, they lose a bright-line rule that could distinguish Holocaust denial bans, which they accept, from memory laws about Algeria, slavery and the Crusades, which they oppose.

At the same time, excluding the Armenian Genocide has led *Liberté* historians to make strange claims about Armenians, the Armenian Genocide and genocide denial laws in general. For example, Rémond treats the Armenian Genocide denial ban as an attempt to trivialize the

156. *See The Man Who Coined Genocide Spent His Life Trying to Stop it*, NPR, Oct. 14, 2014, http://www.npr.org/2014/10/18/356423580/the-man-who-coined-genocide-spent-his-life-trying-to-stop-it. The article summarizes an interview with Edet Belzberg, director of the documentary *Watchers of the Sky* which describes the life of Rafael Lemkin, the person who coined the term in 1943. According to Belzberg, Lemkin followed the situation of the Armenians in the Ottoman Empire closely and was moved by his meeting with Soghomon Tehlirian, a survivor of the genocide.

157. Smith et al., *supra* note 155, at 282–83 (describing Hitler's remark and efforts to deny it).

158. Richard G. Hovannisian, *Denial of the Armenian Genocide in Comparison with Holocaust Denial* in REMEMBRANCE AND DENIAL, *supra* note 40, at 219–21.

159. *See* Smith et al., *supra* note 155, at 272–73. This is much like Holocaust deniers who argue: No gas chambers. No planned extermination. No six million victims. *See* Hovannisian, *supra* note 40, at 203–04 (comparing Holocaust denial with Armenian Genocide denial). Additionally, during the 1980s the Institute of Turkish Studies, funded by Turkey, attempted to promote denial in the United States. *Id*. at 274–85. Turkey's interest in the genocide denial issue continues to this day. See *Turkey Linking Major Arms Purchase to Armenian Genocide Recognition*, ASSYRIA INT'L NEWS AGENCY, Feb. 22, 2015, http://www.aina.org/news/20150221203851.htm (describing how Turkey is waiting to purchase a multi-billion dollar air defense system to see how potential sellers mark the hundredth anniversary of the start of the Armenian Genocide).

160. For an overview, *see* MAUD S. MANDEL, IN THE AFTERMATH OF GENOCIDE: ARMENIANS AND JEWS IN TWENTIETH-CENTURY FRANCE (2003).

161. *See* Ternon, *supra* note 40, at 244–45.

Holocaust,[162] a point that suggests the Holocaust and Armenian Genocide are somehow in competition with each other. His competitive frame of mind is odd given that Chandernagor faults the Gayssot Law for encouraging "intense competition on the area of historical memory."[163] While Rémond admits "the Turks killed hundreds of thousands of men and women in appalling circumstances," he takes issue with the label "genocide."[164]

Chandernagor and Badinter make a narrower argument. They claim that it is anachronistic to use the "genocide" label with the Armenians because in 1915 the term did not exist.[165] The use of the "anachronism" argument lets them avoid what Rémond takes up directly: What does it mean to refuse to call the murder of hundreds of thousands an act of genocide? Here Rémond comes perilously close to the official Turkish position that the Armenian Genocide did not happen.

To be fair, Rémond's concern about the Armenian Genocide may have another source. During the historians' debate of the 1980s, German historians and academics used the Armenian Genocide—described as such—to place the Holocaust in context, thereby making the Nazi crimes against Jews appear less important.[166] One can, as a historian, object to this comparison or argue that all genocides are unique. This, however, differs fundamentally from asking whether the Armenian Genocide took place.[167]

Another *Liberté* argument rests on geographic nexus—unlike the Holocaust, which saw 80,000 French Jews deported to their deaths, the Armenian Genocide took place in Ottoman Empire, not France.[168] This is historically accurate. But the floodgate arguments that follow—if the Armenian Genocide is covered, why not the massacres of Native Americans in North and South America[169]—miss an important point about the nature of geographical connections, one that only has become more prominent in the Internet age.

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162. Rémond, *supra* note 4.
163. Chandernagor, *supra* note 4.
164. Rémond, *History and the Law*, *supra* note 4.
165. Badinter, *supra* note 68; Chandernagor, *supra* note 4.
166. For an overview of the debate, *see* CHARLES S. MAIER, THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY (rev. ed. 1998).
167. Oddly, however, Rémond neglects the simpler step of using the difficulty of defining genocide to argue against *all* genocide denial bans.
168. For a discussion of the Holocaust in France, *see* SUSAN ZUCCOTTI, THE HOLOCAUST, THE FRENCH AND THE JEWS (1999).
169. Ash, *supra* note 2.

Consider Israel, a country that bans Holocaust denial.[170] Israel did not take part in the Holocaust. To use Rémond's wording Israel was "not involved in the slightest"[171] in that horrific event, and yet it bans denial. Rémond never, to the best of my knowledge, took a position on Israel's denial law. Perhaps he would oppose it. But it is more likely he would reply by saying that, as the Jewish state, Israel has a special connection to the Holocaust; he might also add that a large number of survivors moved to Israel.[172]

If true, however, this argument may prove too much. There is a large Armenian population in France, roughly the same size as the 450,000 Jews living in France.[173] Rémond might reply that France lacks the historical connection with Armenia that Israel has with the Jewish people. But one result of the Armenian Genocide was the removal of the Armenians from their historical homeland; all that remained was a small rump state which was absorbed into the Soviet Union in 1922.[174] Until the collapse of the Soviet Union seventy years later, the Armenian diaspora played a major role in representing Armenian interests worldwide. At the center of these efforts was the French-Armenian community, which was reinforced by a wave of genocide survivors who settled in France in the 1920s.[175] Is denial of the Armenian Genocide less worthy of denial because, until 1991, there was no Armenian state to oppose the deniers? To the extent the argument takes this course, it rewards the perpetrators of genocide for a job well done.

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170. Denial of Holocaust (Prohibition) Law, 5746-1986, SH No. 1187 P. 196 (Isr.), *available at* http://www.mfa.gov.il/mfa/aboutisrael/history/holocaust/pages/denial%20of%20holocaust%20-prohibition-%20law-%205746-1986-.aspx.

171. Rémond, *supra* note 4.

172. *See* TOM SEGEV, THE SEVENTH MILLION: THE ISRAELIS AND THE HOLOCAUST (2000) (describing the role of Holocaust survivors in shaping Israeli society).

173. For example, a report from ArmenianDispora.com places the Armenian Population in France at 450,000. *See Armenian Population in the World*, http://www.haias.net/news/_armenian-population.html) (last visited Sept. 12, 2015). Another report on World Jewish Population for 2012 issued by the Berman Institute of the University of Connecticut, places the number of "core" Jews in France at 480,000. *See* Berman Institute—North American Jewish Data Bank—University of Connecticut, *World Jewish Population*, *available at* http://www.jewishdatabank.org/studies/downloadFile.cfm?FileID=2941.

174. *See* Levon Marashlian, *Finishing the Genocide: Cleansing Turkey of Armenian Survivors*, 1920–23, *in* REMEMBRANCE AND DENIAL 113, *supra* note 40, at 113.

175. Tigran Yergivian, *The Armenian Identity in France in the Grip of Memorialization*, REPAIR ARMENO-TURKISH PLATFORM: STANDPOINT OF THE ARMENIAN DIASPORA, June 10, 2014, http://www.repairfuture.net/index.php/en/identity-standpoint-of-armenian-diaspora/the-armenian-identity-in-france-in-the-grip-of-memorialization.

Other *Liberté* members showed more tact in making their arguments. For example, Robert Badinter, while opposing the Armenian Genocide denial ban, expressed more sympathy toward the Armenians. Unlike Chandernagor, who mocked the argument that denial of a genocide is way of participating in it,[176] Badinter understands how "profoundly sensitive" Armenians are about 1915.[177] He knows it from his own experience with Faurisson: "[W]hen you are confronted directly as a secondary victim, at one remove, of genocide denial, and you hear someone say that this never happened, when your father, your grandmother, your uncle and many of your cousins disappeared and you have never been able to find them—this is intolerable."[178] This explains, according to Badinter, why the Armenians are "so combative."[179]

And yet Badinter still calls on *Liberté* to remain vigilant against renewed efforts by Armenians to pass a genocide denial ban.[180] The similarities between the Holocaust and Armenian Genocide are clear. In both cases revisionism is "odious."[181] The two cases depart, however, when it comes to the consequences of denial. Here Badinter finds nothing comparable in the Armenian context to the connection between Holocaust revisionism and anti-Semitism. In my view, this is a cleaner way to approach the issue, even if the 2007 murder in Turkey of Armenian journalist Hrant Dink by a seventeen-year-old Turkish nationalist shows a possible connection between denial and incitement to hatred in the Armenian case as well.[182]

Here Badinter makes an argument American libertarians might recognize, even as they rejected it as insufficiently protective of speech: Genocide denial should only be punished when it is the equivalent of hate speech.[183] Likewise, the geographic argument—the Armenian Genocide took place in Turkey, not France—could fit into the classic libertarian concern about slippery slopes. However, when the debate shifts to the slave trade and colonialism, the *Liberté* arguments move into uncharted waters.

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176. Chandernagor, *supra* note 4.
177. Badinter, *supra* note 68.
178. *Id*.
179. *Id*.
180. *Id*.
181. *Id*.
182. *Fury in Turkey at Editor's Murder*, BBC, Jan. 19, 2007, http://news.bbc.co.uk/2/hi/europe/6281193.stm.
183. As noted above, this is an increasingly popular position in Europe. *See* Lobba, *supra* note 11; Hochmann, *supra* note 78.

D. All Speech Is Good (Except for Supporters of Multiculturalism)

The vaguely written Taubira and Mekachera Laws should be easy targets for a civil liberties group: What does it mean to give slavery its "consequent" place in the history books? How does one present colonialism in a positive light? And the laws' scopes are wide—in addition to restricting historical inquiry they cover school teaching.[184] One could, for example, appeal to academic freedom along the lines Robert Post has advanced in the United States.[185] Yet the *Liberté* historians chose to take on multiculturalism in a way that limits the appeal of their arguments and calls into question their commitment to freedom of expression.

Consider Pierre Nora. He begins his 2006 essay against the Taubira Law on a positive note, describing the "recognition of the history of minorities and their gradual emancipation," a movement that led to an explosion of research topics for historians including "oral history, labor history, rural history and women's history[.]"[186] He speaks of a "revolution" running from the 1970s to the 1990s, one he compared to the "liberal romantic" revolution of the nearly nineteenth century.[187] But alas the promise of "a happy future" was not destined to last.[188] Instead of modestly asking that their vision be "recognized, respected and integrated into the overall picture of collective and national history" the new groups "imposed a partial and distorted viewpoint on the general interpretation of the past. . . ."[189]

Nora explains how the French government canceled the celebration planned for the 200th anniversary of the battle of Austerlitz because of objections about Napoleon's colonial policy.[190] He sees a "runaway inflation" of victim-based commemoration that criminalizes the past. Followed to its extreme, a focus on memory suppresses "every kind of historical intelligence and reasoning."[191] Memory ignores "temporal differences," incorrectly assuming that "values and standards" guiding

184. *See supra* Part II.B.
185. ROBERT POST, DEMOCRACY, EXPERTISE AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE (2013).
186. Nora, *Historical Identity in Trouble*, *supra* note 4.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.*

moral interpretation "did not themselves have a history but had existed for all eternity."[192]

On one level, Nora's comment about the failure to grasp "temporal differences" is valid. A society should be judged against its own standards, and as he points out, these standards are not fixed.[193] But the point can be pushed too far. For example, Nora warns that the "ominous broadening of crimes against humanity" can lead to "absurd results" when applied to "human beings entirely unlike us." History should honor the victims and the conquered but a "[H]istory entirely rewritten from [their] perspective . . . is a denial of history."[194]

The problem is that many people are "entirely unlike us." Consider the Nazis—do they fall into this category? If so, does this mean we cannot pass judgment on them because their "values and standards" were different? From another perspective, does Nora need to make this argument at all? Isn't it enough to say that a ban on Atlantic slave trade denial hampers intellectual freedom? Why go further and oppose not only the laws, but also the commemorations of the victims and conquered?

To be fair, there are other arguments. For instance, Chandernagor asks how the Taubira Law would be applied. Who, for example, counts as a descendent of a slave (and as such could sue under the law)?[195] Chandernagor, who has white skin but is a descendant of a freed slave, wonders if she could sue.[196] She also argues that the Taubira and Mekachera laws violate Article 34 of the French Constitution which holds that only the executive can regulate education.[197] This is just the type of institutional separation of powers argument that enriches our comparative understanding of how societies deal with speech regulations.

But in general *Liberté* historians follow Nora. For example, Rémond makes the claim (odd for a free speech advocate) that it would be better to repeal both laws (Taubira and Mekachera) or keep both.[198] Repealing one without the other, by contrast, would distort history.[199] In particular, repealing only the requirement to cast colonialism in a positive light without lifting the ban on denying the harms of the Atlantic slave trade

192. *Id*
193. *Id.*
194. *Id*.
195. Chandernagor, *supra* note 4; *see* Rémond *supra* note 4 (making the same general point).
196. *Id*.
197. *Id*.
198. Rémond, *supra* note 4.
199. *Id*.

would create the improper impression that colonialism was only a negative experience.[200] This is all the more so, given the role—according to Rémond—of colonialism in abolishing the slave trade.[201]

Strangely, *Liberté* rarely takes up the other beneficiaries of the Mekachera Law—the repatriated French population. One could, for example, ask who this category includes: The right wing voting *pied noir* who the bill's sponsors were trying to pull away from Jean Marie Le Pen? Or the *harkis*, the native Algerians who, at the end of the Algerian War for Independence retreated to France with the *pied noir* and now face discrimination?[202] Perhaps one reason for this omission is that the "repatriation" provision does not fit into the larger *Liberté* narrative of minority backed speech restrictions symptomatic of what Chandernagor calls the "French virus" of "accusation and self-flagellation."[203]

Nora also minimizes the role of memory laws in protecting *pied noir* memory (and colonialism). Uncomfortable about critiques of colonialism that prevent national celebrations, he asks why France, of all European powers "implicated in the colonial enterprise" internalized the new anti-colonial accusations.[204] Nora has some interesting thoughts on this subject which we will explore in the next section;[205] but Nora can only reach this conclusion by picking and choosing among the memory laws.[206] The Mekachera Law in particular is hard to cast as an expression of multicultural guilt.

E. Guarding the National Past

Perhaps the largest departure from the standard discourse concerns the historian's role. Much of what *Liberté* says here is quite thoughtful. For instance, Jeanneney distinguishes between those who used their skills as historians to conduct "contemporary analyses of great contemporary civic importance" from the broader question of the professional duty of

200. *Id*.

201. Rémond's willingness to make the broad claim that colonialism ended the slave trade stands in contrast to his reluctance to treat the deaths of hundreds of thousands of Armenians as a deliberate act of genocide. *Id*.

202. For more, *see* Nancy Honicker, *"Douche France" . . . Growing Rough Around the Edges*, 29 THE KENYON REVIEW 81 (2007).

203. Chandernagor, *supra* note 4.

204. Nora, *Historical Identity in Trouble*, *supra* note 4.

205. *See infra* Part IV.E.

206. The same point goes for proposed laws as well. One could, for example, view the proposed laws about the Crusades and French crimes against humanity in this way. But does it describe the proposed laws about the Ukrainian genocide? Or those about the Vendeé?

historians of preserving the past.[207] Jeanneney traces this duty to the Dreyfus Affair, during which historians were called on to sort out a conflict between two competing visions of the nation—one based on the national interest, the other based on individual rights.[208] According to Jeanneney, this awakened "the determination to intervene in public life as historians."[209]

From a comparative constitutional perspective, Jeanneney shows how a historical controversy—the debate over the innocence or guilt of Captain Alfred Dreyfus—shaped current discourse over memory laws. One could make similar arguments about past events in other discursive communities.[210] Moreover, his focus on the "nation" highlights some peculiar aspects of *Liberté*'s case against memory laws. Defenses of hate speech often focus on the speech act—can society tolerate it? (If we ban cross burning, what comes next?) Less frequently, they focus on the speaker: Do speech restrictions harm individuals by preventing them from telling stories about their experiences?[211]

The *Liberté* position differs in two respects. First, it focuses on the audience's right to hear, a less frequent defense of free speech.[212] Second, the way the *Liberté* defines the "audience" is quite different; rather than an atomized set of individuals, Jeanneney focuses on a collective entity: the "nation."[213]

The connection between history and the nation is deep. Indeed, "history will always remain the nation becoming aware of itself."[214] Jeanneney recounts how Ernest Lavisse, author of the *History of France*, a common textbook at the start of the Third Republic, described the historian's job as

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207. Jeanneney, *supra* note 151.

208. *Id*. For more on the Dreyfus Affair, *see* LOUIS BEGLEY, WHY THE DREYFUS AFFAIR MATTERS (2009).

209. Jeanneney, *supra* note 151.

210. For example, one could view the post-*Brandenburg* restriction on hate speech laws in the United States as reflecting the American experience with McCarthyism during the 1950s or with the civil rights movement in the 1960s. For the latter interpretation, *see* SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY (1994).

211. *See* Kahn, *Flemming Rose's Rejection of the American Free Speech Canon, supra* note 16, 675–78.

212. This type of argument appears in cases of informal censorship. For example, a college newspaper that refuses to run an add denying the Holocaust has limited the information available to its audience. *See also* Miss. Gay All. v. Gouldelok, 536 F.2d 1073 (5th Cir. 1976) (holding that under the First Amendment a newspaper cannot restrict advertisements about meeting time of gay student group).

213. Jeanneney, *supra* note 151.

214. *Id*. (quoting Alphonse Aulard, a historian of the French revolution, in 1903).

separating what favors the nation from what gets in the way.[215] This, however, need not prevent historians from being objective. Rather, as Gabriel Monod, a nineteenth century historian quoted by Jeanneney put it: history "in a mysterious and sure way" works toward "the greatness of the nation" and "the progress of humanity."[216] Here we find a historical version of Adam Smith's invisible hand.

Rémond, Nora and Chandernagor share this view. For instance, Chandernagor speaks despairingly of the "collapse" of the "national narrative," something she attributes to memory laws.[217] Likewise, Rémond, in isolating the harm caused by memory laws, speaks of "the fragmentation of the collective historical memory."[218] For his part, Nora asked whether a "human community or nation can do without an organic relationship to the past and a positive relationship to their history."[219] Nora went a bit further, tracing the "current national malaise" in France "ill at ease with its history."[220]

These concerns require the historian to act. For Nora, the historian bears a civic responsibility to engage in a "struggle" for "the survival of intellectual freedom and civil liberties in a democratic state."[221] Rémond sees historians as acting "in the name of the right of every citizen to have access to unbiased knowledge of history."[222] This role belongs uniquely to historians—not because they have a monopoly of history, but because of their competence.[223] As Rémond puts it, a politician can express his or her views but cannot propose memory laws without personally investigating an event the way a historian would.[224]

What, however, if the result of "unbiased" history shows the nation in a less than glorious light? What if Monad's "invisible hand" does not work? The *Liberté* historians have specific concerns about France as well as a commitment to the historical method.[225] How do they resolve this tension?

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215. *Id*.
216. *Id*. (quoting Gabriel Monad).
217. Chandernagor, *supra* note 4.
218. Rémond, *supra* note 4.
219. Nora, *Historical Identity in Trouble*, *supra* note 4.
220. *Id*.
221. *Id*.
222. Rémond, *supra* note 4.
223. *Id*.
224. *Id*. Strangely, Rémond appears to suggest that memory bans would be acceptable if only politicians first studied the historical period in question *See id*.
225. *See supra* note 206 and accompanying text (highlighting the importance of French identity) and notes 210–12 (describing the professional duties of historians).

To put this in broader terms: One of the features of classic American free speech theory is its thinness. The arguments about truth, democracy and personal autonomy do not require a particular account of the good life, although some, like Bollinger, see positive results flowing from the toleration of speech.[226] Instead, the approach—especially in the United States—is to tolerate speech first, and ask about consequences later.[227] How do the *Liberté* historians resolve this tension?

One strategy is to view multiculturalism as the cause of France's ills. On this view, one can protect the nation while, at the same time, defending freedom of speech. But instead of blaming multiculturalism (and the memory laws) entirely on minority groups, Nora views it as a problem deeply rooted in French culture.[228] He identifies a "pathological relationship between France and its past," which he traces to its "centuries-old claim and commitment to universality."[229] This reflects itself in an "obsession with national unity" and the fabrication of a "spotless self-image."[230] When France experienced a series of "shocks" (the Revolution, the Occupation and decolonization), the "lies, falsifications [and] obstructions" committed by the state to protect the national image made the past appear "bleaker than it really was."[231] Worried there may be "skeletons in the closet," France has become a nation of "virtual penitents" building on "two thousand years of Christian remorse" to effect a "sweeping indictment and proscription of France."[232] This, in turn, reflects weakness: "[O]ur pain free age" consigns the past to a "chamber of horrors" precisely because it is violent."[233]

For *Liberté*, memory laws restrict freedom of speech and express national weakness. By opposing the laws, *Liberté* defends freedom of speech, while restoring France's national collective past—a past tarnished by the move towards what Chandernagor refers to as "self-flagellation."[234] In one respect, Nora's image of France is the flip side of Lee Bollinger's tolerant society, which is strengthened through exposure to offensive

226. *See* BOLLINGER, *supra* note 93, at 10.
227. *See supra* Part III.
228. Nora, *supra* note 4.
229. *Id*.
230. *Id*.
231. *Id*.
232. *Id*.
233. *Id*.
234. Chandernagor, *supra* note 4.

speech.[235] By contrast, a French culture of "spotlessness" and image regulation has created weak citizens who now apologize for themselves.[236]

Yet the use of multiculturalism as a foil itself raises questions. Is the Mekachera Law really an expression of multiculturalism? What about the proposals to ban denial of the Armenian Genocide? Moreover, was the opposition to Austerlitz celebration really about guilty "native" French citizens, upset that national image has been called into doubt? Isn't it also a reflection of French citizens of Caribbean ancestry upset about the persistence of racism well into the Fifth Republic? Citation Needed If the latter is true, why isn't *Liberté* encouraging them, while gently nudging them to choose research, education and inquiry over state censorship? Skipping a celebration of Austerlitz (or sitting through a demonstration during that celebration) is a small price to pay for winning a new group of supporters to freedom of expression.

Liberté may be getting the message. In a 2012 press release opposing the Armenian Genocide denial ban, *Liberté* explained that the ban would "provok[e] Turkish nationalism to extreme reaction" by making the "official denial permanent" and hampering "the courageous struggle by thousands of Turkish citizens and intellectuals to bring about the necessary recognition of past crimes."[237] Instead of treating the Armenian Genocide as a second class, or historically questionable event, the press release makes an argument for free inquiry over censorship.[238]

There is another problem with *Liberté* approach, one rooted in the claim that memory laws are anachronistic because "crimes against humanity" is a twentieth-century concept.[239] As Mickaël Ho Foui Sang points out, what passes for objectivity in history, and the norm of judging the past on its own merits, has itself changes over time.[240] By becoming guardians of the national past the historians—at least in their *Liberté* work—have masked "the political nature of the choice" between

235. *See* BOLLINGER, *supra* note 93, at 10.

236. Here Nora echoes Geert Wilders' critique of Dutch elites who sacrifice national identity in the name of tolerance.

237. Press Release by Pierre Nora of *Liberté pour L'Histoire*, Jan. 24, 2012, http://www.lph-asso.fr/index.php?option=com_content&view=article&id=171%3Acommunique-de-presse-de-pierre-nora-au-nom-de-liberte-pour-lhistoire&catid=5%3Acommuniques&Itemid=15&lang=en.

238. *Id*. (describing how by "provoking Turkish nationalism" the proposed genocide denial ban "hampers the courageous struggle by thousands of Turkish citizens and intellectuals to bring about the necessary recognition of past crimes.")

239. Chandernagor, *supra* note 4.

240. Mickaël Ho Foui Sang, *Legislation, Collective Memory and History*, *supra* note 139, at 102.

competing views of the historical past.[241] From an American perspective, this is a high price to pay for banishing memory laws, especially given the availability of other, more inclusive arguments against them.

V. CONCLUSION: *HOW* (NOT) TO OPPOSE HATE SPEECH LAWS

From a descriptive perspective, the *Liberté* arguments expand the debate over hate speech regulation in several ways. But are these arguments normatively desirable? Do they help or hurt the case against European hate speech laws? Let me offer some observations.

Let's begin with the positive. *Liberté* clearly adds to the debate over hate speech regulation with its emphasis on how political structures shape the possibility of hate speech laws. The institutions *Liberté* singles out—the inability of politicians to make non-binding resolutions and the use of private member laws—suggest steps opponents of memory laws (and perhaps hate speech laws more generally) can take to achieve their objectives. The lessons learned from *Liberté*'s experience could apply to speech restrictions in other countries.[242]

Other implications are mixed. Distinguishing the Gayssot Law from proposals to ban Armenian Genocide denial has proved difficult.[243] While the difficulty of line drawing is a common insight, the essays by René Rémond show the ease with which arguments about genocide denial bans can turn into arguments about genocides (their magnitude, their relevance for the country considering the ban, etc.). Indeed, at times, the argument went beyond minimizing the Armenian Genocide to negative comments about Armenians—who become dangerous, violent lobbyists forcing their views on French society.[244]

This leads to another problematic aspect of the *Liberté* discourse. Concerned about protecting "the national past," the historians express great disdain for the "multicultural" supporters of the memory laws.[245] Departing from the traditional argument that the best response to bad speech is more speech, *Liberté* views calls for memory laws from Armenians and descendants of slaves as ritual pollution that prevents the

241. *Id.*

242. Here, as always, the question of legal transplantation remains. Allowing politicians to enact non-binding resolutions could have an impact in France without having the same impact in Germany, Italy, or Hungary.

243. *See supra* Part IV.C.

244. *See supra* Part IV.B.

245. *See supra* Part IV.D.

transmission of French identity to future generations. This argument is novel. While supporters of protecting hate speech, like Lee Bollinger, focus on society's ability to tolerate offensive speech,[246] the *Liberté* historians argue that hearing offensive speech can be a social good. Perhaps an American needs to see a KKK demonstration to remember the national history of slavery and segregation; in France, uninhibited discussion of the Atlantic slave trade or the French colonial experience could lead to a more healthy view of French national identity. But the *Liberté* historians are not consistent; a true commitment to speech would also encompass those members of France who call for multicultural events and protest France's legacy of colonialism.

Here the *Liberté* discourse is troubling. Let me give a comparative example. A few years ago Danish cartoon publisher Flemming Rose released his memoir, *The Tyranny of Silence*, which defends the decision to run the cartoons as part of a larger account of freedom of speech.[247] At the time, there was only an English-language excerpt available.[248] Given Rose's role in publishing the cartoons, I was not expecting to like the excerpt. By contrast, I was very impressed by the lineup of historians on the *Liberté* website. René Rémond's *Religion and Society in Modern Europe* is a masterpiece[249]; Pierre Nora's work in Holocaust studies is very well respected.[250]

After studying the *Liberté* essays and *The Tyranny of Silence*, I find myself drawn to Rose's romantic theory of speech protection.[251] The focus on the human subject's need to tell stories is easy to understand, as is his concern about the impact of censorship on the speaker. To be sure, Rose's theory has its problems—taken to its logical extreme, his theory would undercut *all* restrictions on speech. But for all the anti-immigrant harshness in Danish society in run up to the publication of the Danish cartoons, Rose's theory of speech protection is inclusive[252]—at least

246. BOLLINGER, *supra* note 93, at 10.

247. Rose, *Flemming Rose's Rejection of the American Free Speech Canon*, *supra* note 16.

248. The Cato Institute published the English language edition in 2014. When I wrote my article, the Rose's book was only available in Danish, Swedish and Russian. *See* Kahn, *Flemming Rose's Rejection of the American Free Speech Canon*, *supra* note 16, 658 n.3.

249. RENÉ RÉMOND, RELIGION AND SOCIETY IN MODERN EUROPE (1999).

250. *See, e.g.*, PIERRE NORA, REALMS OF MEMORY: RETHINKING THE FRENCH PAST, VOL. 1—CONFLICTS AND DIVISIONS (1996).

251. *See* Kahn, *Flemming Rose's Rejection of the American Free Speech Canon, supra* note 16, at 670–72, 672–74, 675–77 (describing Rose's personal role in hate speech controversies, his struggles with doubt and his portrait of the bold speaker who stands up to censorship).

252. This both applies to his willingness to tear down all insult taboos in *The Tyranny of Silence* as well as his statements at the time of the Danish cartoon controversy that he was attempting to draw

compared to Pierre Nora and René Rémond both of whom use the memory law debate to go after multiculturalism. (Is it really necessary to object to establishing May 10th as a day of recognition of the slave trade in an article about freedom of expression?").

Others may disagree and find the *Liberté* historians more convincing. But something leaves me uneasy. I undertook the project of examining the Euro-American debate over hate speech bemoaning the "thin" nature of the American objections to hate speech laws. Europe seemed so much more interesting. But like a traveler drawn to home cooking after a long trip abroad, as I read through the *Liberté* materials the merits grew on me of simple, general arguments against speech restrictions—ones that extol expression without insulting potential recipients of the message.[253]

It does matter *how* one opposes hate speech laws. Europe has a history of racism and genocidal violence. While it is tempting to say things have changed since 1945, the current spate of hatred directed towards the Roma,[254] the rise of the anti-Semitic *Jobbik* party in Hungary,[255] and the support for ritual slaughter bans[256] in a variety of European countries gives ample reason to be wary. Hate speech laws express this realty—even if they are not the most effective solution to the problems of hate speech and neo-Nazi revival. As Nora himself recognizes, in this atmosphere opposing hate speech laws can give the wrong impression, which is why he cannot bring himself to oppose the Gayssot Law.[257] But rhetoric he and his colleagues use in opposing French memory laws is quite harsh. Read the wrong way, it suggests that people of Armenian or Caribbean ancestry

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Danish Muslims into a national tradition of satire. *Id*. at 678 ("any" restriction on speech leaves the speaker unfree); Robert A. Kahn, *Flemming Rose, The Danish Cartoon Controversy, and the New European Freedom of Speech*, 40 CAL. W. INT'L L.J. 253, 280–82 (2010) (exploring the extent to which is a Danish tradition of satire). *Id*. My comments about *The Tyranny of Silence* are based on the English language excerpt on Rose's website. *See supra* note 248.

253. But can such an approach can work in Europe? (Or at least in France?). Once a society commits to banning a broad range of speech, is it possible to exclude a given type of speech without also suggesting that the group excluded from the speech code (Armenians, descendants of slaves, or colonialists) are also excluded from the society at large?

254. Ashley Cowburn, *Why is Europe Failing to Protect its Roma Population from Hate Crimes?*, NEW STATESMAN, Apr. 9, 2014.

255. Marcin Goettig & Christian Lowe, *Hungary's Anti-Semitic Jobbik Party is Spreading Across Eastern Europe*, BUSINESS INSIDER, Apr. 9, 2014.

256. *See, e.g.*, *Denmark Bans Kosher and Halal Slaughter as Minister Says Animal Rights Come Before Religion*, INDEP. Feb. 18, 2014 (describing ritual slaughter ban in Denmark); Caroline Wyatt, *Should Ritual Slaughter be Banned in the UK?*, BBC NEWS, Feb. 15, 2015. For a critique *see*, Robert J. Delahunty, *From Babylon to Denmark, Canon & Culture: Christianity & the Public Square*, Mar. 28, 2014, http://www.canonandculture.com/from-babylon-to-denmark (calling Denmark's ban "purposeless" and "irrational").

257. Nora, *History, Memory and the Law in France*, *supra* note 4.

are not authentically French. Even read sympathetically, it creates a stereotypical ethnic censor, in the process failing to distinguish sincere anti-racism from a desire to censor public discourse. A more inclusive opposition to hate speech restrictions, one based on human commonalities rather than differences, is more likely to win supporters in an increasingly diverse Europe that remains less than a lifetime removed from the Nazi past.

In closing, let me return to European Court of Human Rights Judge Giovanni Bonello. He took a strikingly American perspective on free speech, requiring the incitement to imminent lawlessness standard of *Brandenburg v. Ohio*.[258] Yet, when he retired in 2010, no one could doubt his commitment to minority groups across Europe.[259] His skepticism of speech restrictions came packaged within a broader opposition to racism and protection of ethnic, racial and religious rights.[260] At times, the *Liberté* historians seem to get this—Nora opens his 2006 essay by highlighting the advances of multiculturalism. But as a whole, Nora, Chandernagor, and Rémond's opposition to memory laws spills over into opposition to the groups who propose them. Is this inevitable or simply unfortunate?

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258. *See supra* Part II.

259. Tonio Borg is instructive. Borg, *supra* note 10. On the one hand, he "admit[s]" that he finds Bonello's position on speech "hard to stomach" because it "would legitimize the expression of racial opinions" such as Holocaust denial. *Id*. at 444. But Borg also describes Bonello as someone who would prefer "to sustain the Davids against the Goliaths of this world," *id*. at 451, something one cannot say about the *Liberté* historians.

260. One could object and say that the comparison is unfair given that Bonello's speech dissents did not come in the context of hate speech laws. Indeed, while the *Ceylan* case involved Article 312 §§ 2–3 of the Turkish Criminal Code, which bans incitement of hatred based on ethnicity, regional origin, or social class, the facts involved pro-union speech (seen as incitement to class hatred), rather than the more traditional situation where a hate speech defendant is charged with making racist, anti-Semitic or xenophobic speech. *See* Ceylan, *supra* note 9, § 1.