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Genocide Scholars and Legislating to Outlaw the Denial of Genocide

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Debates about the desirability or wisdom of legislation to ban the denial of genocide show few signs of abating. What was once an issue about a particular genocide – the Holocaust - has now widened as other genocides both before and after that event have come into the frame. Whilst much of the attention has been focused on the Armenian genocide, largely because of highly contested efforts in France to pass legislation banning denial of this particular case, the debate now also embraces genocide that have occurred more recently.

Opposition to such legislation has come from many quarters but also includes a number of scholars, including of genocide itself. Banning genocide denial is seen by many to violate the principle of free speech. Even if not all societies give this principle over-riding priority, there are undoubtedly real problems with consistency. Should there be legislation everywhere against denial of all genocides and if not, why against some genocides and only in some societies? Such legislation may well be not only ineffective against determined deniers but even counter-productive, giving them a halo of martyrdom which could only increase the appeal of their "arguments". Such legislation too may be open to serious abuse, as in the case of Rwanda, where some have argued that it is being used for base political motives to muzzle opposition to an increasingly authoritarian state. It might lead too to dictating history to historians themselves, violating not only deniers' supposed right to freedom of expression but academic freedom too.

The opposition of genocide scholars is, however, slightly surprising and perhaps more problematic than it might first appear. There are, it will be argued here, also some compelling reasons why the demand for legislation should be taken very seriously by scholars of genocide. Some of this has to do with the history of how and when denial became an issue; some of it with the place that denial plays in the genocidal process; some it with the implications of denial for the world in which scholars themselves live and work; and some of it with the relationship that obtains or perhaps ought to obtain between students of genocide and the objects

of their enquiry, particularly the victims of genocide, survivors and their descendants.

Recognising denial as a problem

It might be helpful to begin with some self-reflection, in terms of when and how genocide scholars came to recognize that denial was an issue in the first place. As Henry Huttenbach (one of the pioneers of the discipline) has noted, genocide scholars were by no means at the forefront of efforts to deal with deniers. There was rather, as he notes, an "initial stubborn refusal on the part of too many mainstream researchers in the mid-1970s to take denial seriously despite early warnings …. Denial of the deniers had much to do with their initial success and brazen behavior. Only when their international ties and growing grass-roots success was demonstrated did academicians rise in force against deniers and, at the same time, embrace the cause of Roma and the Armenians, neither of whose denial had been a scholarly secret."[1]

Perhaps some of the reason for this reluctance to engage was an assumption that denial would be too easy to disprove. What deniers claim is so obviously untrue, so demonstrably false and unsubstantiated that it is not worth wasting time on or that, if scholars had drearily to be called upon to confront denial directly, their expertise would easily expose its inherent weaknesses and absurdity. Such confidence in the power of truth, evidence and reason may, however, be slightly misplaced, not least in our postmodern times. If postmodernists are to be believed, after all, there is no one truth out there but a complex connection between claims to truth and power, discourses which construct reality and accounts of the past in different ways. This may not lead to a full-blooded relativism in which anything goes, as it were, effectively legitimizing denial. There may still be grounds for choosing one version rather than another or one range of possible versions, and exclude denial, but clearly the argument is more complicated now than it might once have been[2].

But, from another angle, the connection between truth and power opens up another important consideration. The subject of genocide scholarship is after all, in many ways, the fate of people who had no power. There is a fundamental power imbalance at the heart of genocide, where the victims are at the mercy of forces (usually modern states) against which they have no effective recourse, which is why the Convention calls for them to be helped by others, even if this call was very largely ignored for decades and raises a whole set of highly contested questions.

This raises the question of whether genocide scholars can or should start their work from a wholly neutral, dispassionate initial position. Is there not some obligation to begin from some elemental solidarity with the victims of genocide, some sense that the work of genocide scholarship should be in some fundamental way victim-centred? It could be argued after all, as Paul Connerton has done, that a distinguishing feature of 20th (and now 21st) century

historiography, as it shifted away from providing narratives which legitimated a present political terminus, has been its focus on injustice, of which genocide is arguably the most acute form. Indeed he argues that one of the drivers of this process over the longer term has been the need to deal with bereavement, which is of course a mass phenomenon in genocide. From this perspective, writing the history of any genocide is a central part of a critical struggle against forgetting, and particularly forms of forgetting which annul, repress and erase the past of the bereaved, and leave them in a state of humiliated silence[3]. None of this is to argue that genocide scholars should cease to try to understand perpetrators. It is only to suggest that the effort to understand should be grounded in a prior empathy with the primary experience of victims and survivors, and be attentive to their voices, if we are to avoid what Saul Friedlander has rightly criticised as the "smugness of scholarly detachment and objectivity."[4]

Denial and the genocidal process

An important part of that experience is having to deal with denial, which is an integral part of the genocidal process, from beginning to end. Because legislation is aimed essentially at those who deny that a given genocide took place in the past, it is easy to ignore the extent to which denial is often there from the beginning. Although Gregory Stanton initially identified denial as the last of eight distinct stages of genocide, and as a mechanism which permits or legitimates a further genocidal attack (in which case of course it becomes the first stage in the next genocidal process), it is rarely absent from any part of the process. As Stanton puts it, denial "operates all through the other stages."[5] Perpetrators of genocide frequently deny that they are going to commit genocide, when they are planning to do so; they deny that they are committing genocide, when they are doing so; and they deny that they have committed genocide when they have finished (for the moment).

This was the case even before the Convention defined the crime which, of course, has made it more likely that perpetrators would want to deny what they were doing. In the early stages of their campaign of mass murder, the Nazis disseminated the fiction that it was the Poles who had already committed a genocide against the German people, whose violent reaction could thus be justified and help mobilize the large number of killers who would be required to carry out to implement their own plans[6]. As the Holocaust proceeded, they devoted a good deal of time and energy to persuading Jews that they were being transported to more "suitable" places and of course, infamously, that they were going to showers when they were being thrust into the gas chambers.

Subsequent perpetrators have often taken careful steps to hide what they are doing. In Serbia, for example, Radko Mladic advised his colleagues on how to present their agreed genocidal project in a way that could make it appear (albeit only to the willfully gullible) that their victims were provoking the measures that they had already planned[7]. More recently, in the case of Darfur, Stanton has himself used a template constructed by Israel Charny[8] to show the way in which

the government of the Sudan has engaged in various kinds of denial as it has carried out this current genocide. It has minimised the casualties of what it has redefined as a tribal rebellion; it has attacked the motivations of those who have called this a genocide; it has claimed that the deaths were inadvertent; it has insisted that victims are receiving good treatment[9].

Denial of this kind, during the genocidal process itself, aims to confuse and to sow doubt, both to make it hard for others to intervene and to aid the victims, and to isolate and disorient the victims themselves. It is often very effective, helping outsiders to collude and evade their responsibility, for their own geopolitical purposes. The United States (a serial colluder for many years), for example, acted swiftly to suppress information about the genocide in East Pakistan in 1971. Sometimes this collusion goes beyond the geopolitical and may be connected to denial of genocides which they too have perpetrated in the past, as when the right-wing Australian government denied the genocide in East Timor partly for fear that it might open the way to having to concede that Australia too had committed genocide against Aborigines[10].

This form of denial primarily affects the direct targets, the immediate victims. Denial after the event is no longer aimed at the same targets but at witnesses and survivors and descendants. In the case of witnesses (who may or not be survivors), the aim of denial is to avert conviction and punishment. This kind of denial is probably unavoidable. Anyone accused of a crime, to which they do not wish to admit, is likely to engage in denial as a defensive, self-protective measure.

Denial aimed at survivors and descendants on the other hand has a different purpose and is more connected to the original destructive process of the genocide itself. It aims more obviously to wound, to hurt and to maim in ways that have to be taken seriously because of what they mean not just for those targeted but for the society in which they (survivors and descendants) have to live.

Denial and Recognition

One way of thinking about this (that might commend itself to those troubled by the relativism of postmodernism) is through the prism of another way of understanding history, politics, ethics and law which has re-emerged in recent years. A number of writers[11] have argued persuasively that the question of recognition is central to how modern societies have developed, and to how and why rights have been won (and lost), which in the case of genocide is most fundamentally, as Hannah Arendt long ago pointed out, about the right to have rights at all[12].

The roots of this approach may be traced back to Hegel's famous discussion in the *Phenomenology of Mind* of masters and slaves, not exactly an irrelevant topic in this context. Whilst much of the focus of the recent upsurge in interest in recognition has been on the rights of minorities, on questions of culture and on

whether or not these have implications for material distribution[13], a core concern has been with the deep damage which can be inflicted through non- or mis-recognition. In the words of Charles Taylor,

> "a person or a group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confirming, demeaning or contemptible picture of themselves. Non-recognition or mis-recognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted or reduced mode of being…mis-recognition shows not just a lack of due respect. It can inflict a grievous wound, saddling its victims with a crippling self-hatred. Due recognition is not just a courtesy we owe people. It is a vital human need."[14]

Axel Honneth, for his part, has argued that recognition is vital to individuals and groups' self –confidence, self-respect and their self-esteem. He identifies ways in which each of these can be undermined by different kinds of disrespect: the first for example through rape and torture; the second through social ostracism; the third through devaluation of individual and collective life-styles[15].

Denial of genocide fits all of this quite closely. What is mirrored back to survivors and their descendants by deniers is a picture which impugns their integrity in the most elemental way, accusing them of lying about what happened to them on a fundamental issue, a matter literally of life and death. It denies the meaning of genocide, maddening [16] survivors by redefining what was done to them as something quite different, either not a crime at all or if a crime, one much less grave, or one committed by others, or (at best) equally by both "sides". It grotesquely distorts their experience, by turning their group from victims into perpetrators, or by making them responsible for provoking the very violence that was visited upon them. The memory of that violence is hard enough to bear, but the assault on collective memory itself strips members of the group of a vital capacity without which they are lost in the world, unable to make sense of where and who they are[17]. It undermines self-confidence, fostering a demoralising scepticism from others about both the immediate reality and the long-term effects of the extraordinary brutality (which we now understand to include rape especially)[18] that is central to genocide. Its assault on the dignity of victims encourages the continuation or return of the social ostracism which in many ways lays the foundation for the "social death" of the group, which Claudia Card has identified as central to the evil of genocide[19]. The contempt of deniers for victims is more than lack of respect; it is cumulatively a grievous wound to the group, compounding the original hurt. It destroys the possibility of healing and repair by blocking the process of mourning[20], keeping the wound open, and preventing any kind of closure.

Such considerations clearly animate the efforts by survivors and descendants to protest against deniers in the first place. One of the great strengths of the judgment of the Australian Federal Court on a case of Holocaust denial in 2003

was the way in which it clearly identified the way in which denial "engenders feelings of hurt and pain in the living ... a sense of being treated contemptuously, disrespectfully and offensively."[21]

The state, law and recognition

But should the state and law be drawn in to protect citizens from the hurt and pain caused by non- or mis-recognition? One answer might be that the state and law are already implicated in the process through which non- or mis-recognition occurred in the first place, that is in genocide itself. As Jennifer Balint has argued, because genocide is overwhelmingly a state crime, law is used in a variety of ways throughout the process. It has been used to provide the framework within which genocide can take place (as for the Jews at the hands of the German state under the Nazis); or to authorize what the state did retrospectively (as with the Armenians at the hands of the Ottoman Empire); or as a shield to block help from outside (by defining it as a purely internal matter of civil war in the case of the former Yugoslavia); or by its absence as any kind of shield (as in the case of Rwanda). Law, for Balint, is thus "companion, collaborator and bystander" to state genocide.[22]

For her, the corollary is that the law has to help repair the damage it has been party to, in the form of redress to the victims, in ensuring accountability and responsibility for the perpetrators, in facilitating reconstruction and reconciliation. But that must surely also involve protecting the group from the further harm of non or mis-recognition. It is difficult to see how the members of the group can feel safe again, feel that they can participate securely as equals again, in a society where they are not adequately recognised.[23]

For one of the distinguishing features of genocide for a number of scholars, what makes it a particular evil, is the loss of protection. For Hannah Arendt, a genocidal attack on a group is not only an attack on the rights of individuals in the society of which they were hitherto members, it is to destroy the right of all in the group even to have rights at all. The statelessness of victims of genocide in a world of nation states places them in an acutely vulnerable position; there is no legal, political or social institution to protect them. They are homeless in a deep, existential sense, abandoned by all. Larry May sees the destruction of the group in genocide in similar terms, as "a catastrophic assault on the person, both in terms of the destruction of the last bulwark protecting the rights of the individual but also in terms of the potential destruction of the self."[24] Claudia Card for her part sees the "social death" of the group as what distinguishes genocide from other forms of mass murder: it destroys a critical part of one's identity, much of what makes it possible for human beings to give meaning to their lives.

One objection to Card's argument is that individuals who physically survive genocide can recommence their lives somewhere else. But it is clear that survivors and descendants are not only haunted by the loss of so many of their fellow group members but are desperate to cling on to and restore life to the

group itself. A crucial part of that project of restoring life is remembering what happened to the group. However grim, it is a crucial part of the collective memory without which no group can exist. Denial is an assault on that collective memory. It is an assault from which the surviving members of the group and their descendants need to be protected.

Hate speech

It is in that sense that it can make sense to see denial as connected in important ways to hate speech. If democracy and a truly civil society rest on a fundamental level of mutual recognition, that all are (at least formally) equal members of the state and society, then hate speech targets and denigrates groups in a way that is designed to make their members appear as less than equal, as undeserving of respect and full citizenship. For Martin Imbleau, denial has a similar effect. "By conveying messages of contempt against a group, deniers dehumanize those targeted, thus precluding them from participating equally in society. Denial speech, just like hate speech, impairs the right to fully and equally exercise one's human rights."[25]

This is not to say that denial is exactly the same as hate speech. (Imbleau himself describes it as an "analog."[26]) But there are close connections[27]. Hate speech (like denial) has now also come to be seen by both genocide scholars and courts as an important part of the genocidal process. A major trial at the ICTR (the "Media Case Trial" of Nahamina, Barayagwiza and Ngeze) found that hate speech played a central role in the Rwandan genocide. Hate speech systematically denigrates others, enabling perpetrators to carry out their killing, thinking that others are not fully human and that they therefore deserve in some way what is happening to them. In the Rwandan case, this denigration took the form of comparing Tutsis to cockroaches; in Nazi Germany, the Jews were compared to vermin; similar kinds of dehumanising comparisons and identifications appear in many other genocidal ideologies. Without this preparation, it may not be possible to mobilize large numbers of (supposedly) ordinary men (and women) to kill, even if that is not a sufficient explanation.

Wibke Timmermann has argued persuasively that hate speech in such circumstances needs to be thought about as a crime against humanity, the crime of persecution, and that this has in fact been recognized by international tribunals. This was already true at Nuremburg where Julius Streicher was convicted on these grounds and then again at the ICTR in the *Ruggiu* case. She also reminds us that an early draft of the Genocide Convention sought to criminalise hate speech on these grounds[28]. Dropping it then may, as Imbleau has suggested, have created a gap which has had to be filled in other ways[29] and which have brought denial (which was also not specifically addressed in the Convention) back, as it were, into the frame.

It is striking how a number of measures and instruments developed since the Convention to deal with hate speech have focused on groups whose protection

was its primary concern. As Timmerman has also noted, the International Convention on the Elimination of all Forms of Racial Discrimination, to which 173 states are parties, specifically calls for the criminalisation of "all dissemination of ideas based on racial superiority or hatred"[30] (and racial groups are specifically identified as potential victims in the Convention). The European Union Council Framework decision of 2008 on "combating certain forms and expressions of racism and xenophobia by means of criminal law," makes specific reference not only to racial groups but to groups defined by reference (amongst others) to religion, national or ethnic origin. But it then goes further and specifically refers to "publicly condoning, denying or grossly trivialising crimes of genocide" (as well as crimes against humanity and war crimes) "when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group."[31] The Council of Europe's 2003 Additional Protocol on Cybercrime also refers specifically to "denial, gross minimization, approval or justification of genocide or crimes against humanity."[32]

If these measures on hate speech point to broadening the definition to encompass denial, then much legislation on denial also makes the connection. Not all states by any means have accepted that hate speech should encompass denial. A number of European states would not accept this extension, largely on grounds of free speech (including the United Kingdom, Spain, Italy, and Ireland, as well as Bulgaria and the Czech Republic)[33].

Nevertheless several European states have come to adopt legislation linking denial of genocide (primarily but not always exclusively of the Jews) to the issue of hate speech (particularly but not always only in a Nazi form) directed against groups identified in the Convention. The lead in many respects was taken, not surprisingly, by Germany where the Nazi party is banned, Nazi slogans are outlawed and so too is denial of the Holocaust. The 1985 Law on Public Incitement (subsequently revised more than once) specifically links the incitement of hatred to denial of the genocidal actions of the Nazis, invoking the definition of genocide in the Convention. The 1990 *Gayssot* law in France criminalises public expression of denial of the genocide of the Jews within the framework of a law aiming to "repress acts of racism, anti-Semitism and xenophobia"[34], which are seen, as Sévane Garibian has argued, to pose a threat not only to minority groups but to French democracy itself.[35]

It has been suggested that one of the reasons why many European states have adopted some form of legislation on denial of the Holocaust specifically has to do with the fact that the Holocaust took place on European soil.[36] Europe was, on this line of argument, reconstructed with a profound awareness of the catastrophe wrought by the Holocaust, although this has to be tempered by a recognition that in the immediate aftermath a concern with what had happened to the Jews was not high on the priorities of anyone else's list of priorities. The fate of the Jews was not the central issue in the Nuremburg Trials[37] and many states and societies (not only in Eastern Europe) evinced disquiet and often hostility at

their return.[38] What might be more accurate is to talk of a European democratic self-awareness, a sense of a Europe built on democratic foundations as the antithesis of Nazism's genocidal racism, xenophobia and anti-Semitism, though how much this was a conscious effort and to what extent it is better understood as a kind of founding myth is debatable.[39]

However, a sense of the significance of Holocaust denial as a problem for democracy has not been confined to Europe. The connection of denial to hate speech, and the threat it poses to citizens in a democratic society, also emerged in an important Supreme Court judgment in Canada, the *Keegstra* case which Karen Eltis, in her review of the Canadian experience, describes as "the leading case relevant to hate speech and genocide denial."[40] Here, the majority opinion upheld the conviction of a Holocaust denier, who had been prosecuted for promoting hatred. A core part of the reasoning was that hate speech in the form of Holocaust denial threatened what it termed the targeted group's "sense of dignity and belonging to the community at large." As Lorraine Weintrib argues, the majority opinion eventually (if somewhat tortuously) came round to the understanding that "an individual's feeling of acceptance into Canadian society correlates with that society's concern for the group with which the individual identifies. [for] the targets of wilfully promoted hatred, whose entry into the larger community may be thwarted" by denial.[41]

Free speech?

The minority view, by contrast, upheld the primacy of free speech which further south, in the United States, has generally been seen to take precedence over such considerations for the rights of groups denigrated by genocide denial. Here, freedom of expression is taken much more seriously than (at least in the *Keegstra* case) in Canada and far more generally in Europe, although as we have noted not all European states have been keen to adopt legislation on genocide denial. The concern with freedom of speech in the United States is perhaps not quite as long-standing as some have assumed but has been powerfully articulated, most famously in Justice Holmes's assertion that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate." Holmes believed, as do many others, that there ought to be a free market place of ideas and that the truth will emerge out of open competition between different points of view. Restrictions on free speech could only, if ever, be justified in the most extreme circumstances, when such speech presented what Holmes again called "a clear and present danger." Genocide denial, on this view, does not do so, however hurtful it may be to the feelings of survivors and descendants of victims. To ban denial is in fact more dangerous than denial itself, creating a slippery slope down which democracies venture at their peril. What is to stop other views being proscribed? How and where can the line be drawn between legitimate and illegitimate, acceptable and unacceptable speech?

One obvious answer to this is of course to be found in Holmes's own exception which suggests that a line can indeed be drawn. Denial does in some cases generate a clear and present danger to survivors and descendants of a genocide, or those who care for and support them, as in the case of the guard at the US Holocaust Museum in Washington in 2010 who was murdered by a denier.[42] The slippery slope in fact might well go in the other direction, as Henry Thierault has suggested.[43] The more space is given to deniers to propagate their views, the greater the danger that they will find listeners who might want to draw violent conclusions from what they have read or heard. Those who first identified denial as part of the genocidal process understood this from the beginning, when they focused on how denial, even if it might look like the last stage of one genocide, can actually prepare the way for another.

What is or ought to be illegitimate and unacceptable about denial is that it is a form of speech which undermines the well-being and security of others. It is free speech exercised without regard for the rights of others in a democratic society to be treated with respect and dignity. A different, less absolutist approach to free speech would recognise that along with the right to free speech come duties and responsibilities, principles articulated, as Sévane Garibian has pointed out in precisely this context, in both the European Convention of Human Rights and the United Nations International Covenant on Civil and Political Rights. She specifically cites Article 10 of the former which asserts that the exercise of freedom of expression "carries with it duties and responsibilities" and may be restricted to ensure "the protection of the reputation or the rights of others," as well as Article 19 of the latter which makes a similar point.[44]

None of this is to suggest that it is always easy to prove that there is intent on the part of deniers to cause this damage, although this is not a difficulty confined in the case of genocide to the question of denial. Courts have had to make judgments about intent in the absence of "smoking guns" and inferred it in various ways: from the actions taken against a given group in their context, from other acts of a grave kind that were taking place, from the scale of atrocities, from the systematic targeting of the group, and from the repetition of destructive acts carried against its members.[45]

Just as perpetrators, especially since the Convention, have often carefully hidden their tracks, deniers have become increasingly sophisticated and do not always openly advertise their hatred. Rather they pose, claiming the right of free speech, as seekers after the truth, challenging hitherto accepted facts, or purporting to find new ones, or challenging interpretations of a particular set of events as cases of genocide[46]. There may be a very few cases of what Thomas Hochmann has called *bona fide* denial where deniers are motivated by wishful thinking, or are suffering from delusions of one kind or another, or where they have been subjected to systematic indoctrination (in which case of course it is necessary to turn the attention to the organisations orchestrating this indoctrination in the first

place). But in what are clearly the majority of cases, what he classes as *mala fide* denial, judgments can be made about the methods employed to challenge and "create" facts, about what constitutes accepted, common knowledge, and about the racist motivations that lie behind denial.[47]

Law and history

In each of these, genocide scholars have in fact a valuable role to play in helping courts arrive at their judgments. They can help courts see the difference between serious and bogus historical research. Their work on particular genocides provides the accepted, common knowledge which many courts take as a given - what is known as taking judicial notice in the English speaking world or the principle of *Offenkundigkeit* in the German system.[48] They can provide evidence about how denial affects the victims, survivors and descendants of genocide throughout the genocidal process and enable courts to read racist motivations back from its effects, much as courts read genocidal intent back from its effects on the group more generally.

This is not to imply that scholars all have to agree about everything, that a prior condition for any court judgement is an absolute consensus among scholars that a given case was a genocide, although it is worth pointing out that in quite a good number of cases, and in cases that typically generate denial, there is quite a broad consensus. The very large majority of scholars agree, for example, that there was a genocide of the Jews in the Holocaust, that there was a genocide of the Armenians, that there was a genocide in Rwanda, and that there was a genocide in Bosnia. Scholars may disagree in these cases about why genocide took place; they may even disagree about the extent of the genocide; but they do not generally disagree about whether or not these were, at core, genocides.[49]

In these cases at least, it would appear that there need not be a fundamental antagonism between law and history but rather that law and history can work together quite effectively. They both seek to evaluate evidence conscientiously; they both seek to understand the motivations of actors, placing them in their context; they both seek to arrive at fair and balanced judgments.

There are of course important differences. One is that court judgments are definitive and final, whereas those of historians are more open-ended (if not necessarily in the eyes of the historians making them). It is perhaps part and parcel of the historian's trade to revise the conclusions of predecessors, to search for new evidence, or to look again at the evidence from a different point of view. This difference may be exaggerated, however. Court too can revise opinions when new evidence is found. A more decisive difference is that courts and historians make different kinds of judgments, or rather judgments which have different consequences. Courts make judgments about guilt, and these judgments have (or should have) real consequences for both perpetrators and victims.

When historians become anxious about law, it may be this dictating of judgments about guilt to perpetrators and victims, rather than the fear that law will dictate history to historians, which is the real concern. In those liberal societies where there are laws about denial, after all, there is no evidence that actual, serious historians have been told what they can and cannot write. (Illiberal societies are a different matter, to which we shall turn shortly).

The question that then arises is why this should be such a problem for genocide scholars. If there is a tension between history and law, it has been there from the very beginning. Genocide is not only a concept that scholars use to categorise a set of acts and process, it is a legal term to designate a crime, a crime moreover of an extreme gravity, the "crime of crimes."[50] It is a concept moreover that was devised by someone who was and had to be both a lawyer and a historian. In developing it, Lemkin moved back and forth between the two, trying to understand the nature of the phenomenon and to persuade others that it constituted a crime of a particular kind which, if it had (to use the terms adopted in the opening section of the Convention) "at all periods of history … inflicted great losses" now posed a grave threat to humanity itself.[51]

What happens when courts decide that a genocide has occurred is both that they draw on history to find guilt and that they add in turn to history. In the process, as Karen Eltis puts it, "law joins the voices that build historical narrative. Cases…become part and parcel of the historical record."[52] But the record that they establish is not only different to the one created by historians, in its (relative) finality; it transcends the work of scholars, upon which it nevertheless to some extent depends. When courts and tribunals decide that the "crime of crimes" has been committed, as they did over the Holocaust,[53] Rwanda and the former Yugoslavia, they are establishing a truth which is of profound moral and political significance. It is a truth to which all citizens in a democratic society, within which scholars themselves live and work, ought to attend.

The level of attention may vary, of course, depending on the moral and political significance of the particular genocide *to* that society or set of societies. It may be of significance to the citizens of a nation state, at whose hands the genocide has been committed. In Germany and Austria, where the nation state organised the genocide of the Jews, denial of that genocide is a further attack upon the victim group who the state should protect from further hurt. It may be of significance to a set of states on a continent. In Europe, where the same genocide was carried out, beyond the borders of the nation state which organised it, the Jews again should be protected from denial by a set of states. It may be of significance transnationally, where one society has responsibilities to members who have fled there from a genocide committed somewhere else, which is a powerful reason why denial of the Armenian genocide has become an issue in French and American politics.

Framing the question of legislation about denial in terms of its moral and political significance to citizens inside a given state or set of states can in turn help address the question of consistency, raised earlier. Why are there laws about denial of some genocides and not others? Is there not the serious risk of a slippery slope here? Would not legislation about denial of one genocide generate an endless proliferation of demands for recognition of endless other genocides?

One answer to this of course is that, although genocide is a rather more frequent phenomenon than many might think, there is not an endless list. There are, however, certainly other genocides than the Armenian, or the Holocaust, or the Rwandan or the Bosnian cases, which have been the ones cited so far here. Why should, for example, the genocide of the Aboriginals or that of native Americans not be recognised and why should the descendants of the victim groups in such cases not be afforded the same protection as Jews in Germany and Austria and in many European states and (as proposed in France) as Armenians?

The argument developed here suggests that there could be an answer to this question in terms of the needs of the victim group, the support they can obtain from scholars, and the moral and political case that they are then able to put in a democratic society. If they can establish, (as they surely can in each of these cases), that denial affects their sense of self-worth, and if they can draw (as they surely can in each of these cases) on the support of scholars who have demonstrated conclusively that genocide did take place, then their case is surely quite compelling. They deserve the protection of the law, law informed by the work of scholars but whose decisions transcend the confines of the academy.

Where they have not yet been able to obtain recognition and protection (and none of these groups yet has) suggests an additional flaw to the market –place model of free speech alluded to above, because it assumes free and fair competition between expressions of views which may not always be the case. The market place of ideas may, as Stanley Fish has argued, be politically structured[54], advantaging some voices over others in advance, as any market place advantages those who have more access to resources (cultural as well as material) than others. One of the key issues raised by recognition theory been the extent to which in any democratic society, attention needs to be paid to the voices of marginalised groups, who do not have the same access to resources as dominant groups, for reasons which are in turn closely connected to the genocides whose recognition they seek. It is in many ways precisely because they experienced genocide that Native Americans and Aboriginals in Australia find themselves marginalised.

These are not only questions of scholarship, though they are that too. They are moral and political questions which require answers which can be informed by scholarship but go beyond it. What scholars can do is provide the evidence and the argument that supports those who seek protection from deniers. Many

scholars of course do this, implicitly or explicitly. They do so, as is clear from the moral passion which informs their work, because they do in fact feel a solidarity with the subjects of their study, a solidarity which probably grows the more they uncover the reality of the genocide they are studying. This is not an accident but has to do with a primary identification with victims that lies or should lie at the heart of genocide scholarship itself. Those who have uncovered the genocide of Native Americans or of Aboriginals do not write in a smug or neutrally "objective" voice but with a quite appropriate commitment and engagement not just to the rights of others, but to their rights to have rights, not only in the past but in the present.

The problem of abuse

That in turn can help set limits to what laws about denial can or should do. Like all legislation it can be used or abused. None of what has been argued here is to legitimate the abuse of denial legislation to revoke the rights of citizens in a democratic society. If or when such legislation is abused, genocide scholars have a further role to play which is to challenge the abuse, not in the name of some abstract academic freedom but because it violates the spirit of genocide scholarship itself and its grounding in solidarity with victims of injustice. One of the strongest objections to legislation on denial in recent years has been over what has been happening recently in Rwanda, where the government passed a law in 2002 against what it called "divisionism." This has been roundly criticized on the grounds that that "divisionism" has no clear meaning, even after a limited clarification in 2008[55] and that it is itself extremely dangerous for Rwandan democracy because it is being used by the government to silence dissent.[56]

These are serious problems, although they do need to be placed in the context of a society which has suffered the worst genocide since the Holocaust; where the victims, now in power, form a mutilated minority of the population; where perpetrators still pose a serious external threat; and (of particular significance in the context of this discussion) where the perpetrators are actively pursuing a sustained campaign of denial.[57]

Nevertheless, it is clear that there are serious dangers with the abuse of laws against denial. Who is to prevent them being abused? At bottom this is, as Adam Jones puts it, the old problem of who judges the judges, which is not a problem by any means confined to genocide.[58] It is not a problem which can be solved only by genocide scholars but it is a problem which they can also address. Just as genocide scholars can provide the evidence for law to do justice to victims in determining against deniers that genocide did indeed take place, so too can they provide some of the resources to check abuse in this case. They can show precisely in a case where laws against denial are being abused that there is no systematic and denial of a plan to commit genocide, nor of the facts of the case, nor of the category of the victim, nor is there evidence of a connection with would-be continuers of the genocide.

But they cannot do this kind of work effectively if they are already committed, *a priori*, to opposing criminalisation of denial *tout court*, on principle. They will not be believed by courts, nor by victims, because they will have given, by such an attitude, no indication of a fundamental solidarity with the victims of genocide, as members of a shared democratic space, as fellow members of civil society. This solidarity, it has been suggested here, is a crucial aspect of their work as genocide scholars. In writing the histories of genocide, scholars restore and protect the memory of survivors and the collective memory of descendants. Their histories enable survivors and descendants to connect with a past which deniers seek to destroy. Their histories hold open the possibility of some kind of closure and repair for the deep trauma that genocide inflicts.

It may well not be the case even so, even where genocide scholars have the credibility that derives from such solidarity, that they can prevent the abuse of denial legislation on its own. But it is important to recognise that the abuse of denial legislation does not take place in a vacuum. If and when it happens (and actually there are remarkably few cases to consider), it is likely to be taking place in a society where other democratic norms are not well-established or under attack. The struggle to protect or secure these norms goes much wider than the question of denial. It may then be that, in such societies, where democratic norms are not well-established, where there are good grounds for thinking that laws against denial might well be abused because other laws are also being abused, and democratic rights more generally are not secure, that the time is not yet right for such legislation. This is a matter, however, of judgment, not of adopting a principled hostility to denial in all cases, in all conditions and in all circumstances.

Such judgment needs to be informed by an awareness that genocide scholarship has from the outset combined advocacy and detachment. As Roger M Smith, Erik Markusen and Robert Jay Lifton argued in a famous article about denial many years ago, genocide scholarship entails obligations, both to expose denial wherever it rears its head but also, as they put it, "to bear witness to historical truths—to the full narrative of mass murder and human suffering."[59]

Conclusion

To the extent that denial continues to inflict suffering on the victims of genocide and their descendants, where those who feel the pain and hurt of non or mis-recognition seek the protection of law, and where there no good grounds for thinking that the law will be abused to deprive others of their rights, it may well be appropriate to express solidarity and lend them support rather than defend a freedom of speech which is being abused by perpetrators or their supporters.

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[1] Henry Huttenbach, 'The Psychology and Politics of Genocide Denial: A Comparison of Four Case Studies', in Levon Chorbajian and George Shirinian, eds., *Studies in Comparative Genocide*, London: Macmillan, 1999, pp. 216-229.

[2] For a careful argument as to why postmodernism does not legitimate denial, see Lawrence McNamara, 'History, Memory and Judgment; Holocaust Denial, the History Wars and Law's Problems with the Past', *Sydney Law Review* , vol.26, 2004, esp.380-385.

[3] Paul Connerton, *The Spirit of Mourning – History, Memory and the Body,* Cambridge: Cambridge University Press, 2001.

[4] Saul Friedlander, *The Years of Extermination – Nazi Germany and the Jews, 1939-1945*, London: Weidenfeld and Nicholson, 2007, p.xxvi.

[5] http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html

[6] See Peter Fritzsche's telling account of Edwin Dwinger's fictional reportage *Death In Poland* which appeared in Germany in 1940 and provided what we can now see as a startlingly accurate description of what in fact the Nazis were themselves already doing to Poles and, especially, Jews. *Life and Death in the Third Reich,* Cambridge, Mass: The Belknap Press of Harvard University Press, 2008, pp.1-4

[7] Edina Becirevic, 'The Issue of Genocidal Intent and Denial of Genocide: A Case Study of Bosnia and Herezegovina', *East European Politics and Societies*, 2010, vol. 24, no.4.

[8] Charny's template appears in the *Encyclopaedia of Genocide* vol. 1, p.168, Santa Barbara, California : ABC-Clio, 1999.

[9] Gregory Stanton, 'The 12 Ways to Deny a Genocide' http://www.genocidewatch.org/aboutgenocide/12waystodenygenocide.html

[10] Ben Kiernan, 'Cover-Up and denial of Genocide – Australia, the USA, East Timor and the Aborigines', *Critical Asian Studies,* 2002, vol.42, no. 2.

[11] The most important of these are probably Charles Taylor and Axel Honneth. See in particular, Taylor's *Multiculturalism and the Politics of Recognition*, New Jersey: Princeton, 1992; and Honneth's *The Struggle for Recognition: The Moral Grammar of Social Conflicts*, Cambridge: Cambridge University Press, 1995. For more recent contributions which give some sense of the terrain now covered by these arguments, see the collection of essays in Hans-Christoph Schmidt am Busch and Christopher F. Zurn eds., *The Philosophy of Recognition – Historical and Contemporary Perspectives*, Maryland: Lexington Books, 2010.

[12] Hannah Arendt, *The Origins of Totalitarianism*, 3rd ed., New York; Harcourt,Brace, Jovanovich, 1973, p.298.

[13] See the important debate between Honneth and Nancy Fraser in *Redistribution or Recognition- A Political-Philosophical Exchange* , London: Verso, 2003.

[14] Taylor, 'Multiculturalism' pp.25-6.

[15] There is a good discussion of these issues in Robin N. Fiore and Hilde Lindemann Nelson eds., *Recognition, Responsibility and Right - Feminist Ethics and Social Theory*, Lanham, Md.: Rowman & Littlefield, 2003.

[16] On the maddening aspect of denial, see Israel Charny, 'The Psychological Satisfaction of Denials of the Holocaust or Other Genocides by Non-Extremists or Bigots, and Even by Known Scholars', *Idea – A Journal of Social Issues*, vol. 6 no.1, 2011, p.3 , http://www.ideajournal.co./articles (accessed 11/07/2011).

[17] It is not for nothing that Vidal-Nacquet talked of the "assassins of memory". See his *Assassins of Memory: Essays on the Denial of the Holocaust*, New York: Columbia University Press, 1992.

[18] Frances T. Tilch, 'Rape as Genocide' in Sam Totten ed., *The Plight and Fate of Women During and Following Genocide – A Critical Bibliographic Review* vol. 7, New Jersey: Transaction Publishers, 2008.

[19] Claudia Card, 'Genocide and Social Death', *Hypatia,* vol. 18 no.1, 2003.

[20] See Marc Nichinian, *The Historiographic Perversion*, New York: Columbia University Press, 2009, p.47

[21] Jones v.Toben FCA 1150, September 17th 2003, para 93, cited in Ludovic Hennebel and Thomas Hochmann, 'Introduction', *Genocide Denial and the Law*, Oxford: Oxford University Press, 20011, p.xlv.

[22] Jennifer Balint, *Genocide, State Crime and the Law - In the Name of the State*, London: Routledge, 2012, p. 12.

[23] On the notion of adequate recognition, see Arto Laitinen, 'On the Scope of "Recognition": The Role of Adequate Regard and Mutuality', in Busch and Zorn, *Philosophy of Recognition,* pp.319-342.

[24] Larry May, *Genocide – A Normative Account*, Cambridge: Cambridge University Press, 2010 p.71.

[25] Martin Imbleau, 'Denial of the Holocaust, Genocide and Crimes against Humanity- a Comparative Overview of Ad Hoc Statutes', in Hennebel and Hrochmann, *Genocide Denial,* p. 276.

[26] Imbleau, 'Denial', p.269.

[27] For a more assertive view that denial *is* indeed a form of hate speech, see Raphael Cohen-Almagor, 'Holocaust denial is a Form of Hate Speech', *Amsterdam Law Forum, VU University Amsterdam,* 33, 2009-10. ojs.ubvu.vu.nl/alf/article/105/189 (accessed 29/05/2010)

[28] Wibke Timmermann, 'Counteracting Hate Speech as a Way of Preventing Genocidal Violence' *Genocide Studies and Prevention* vol. 3, no. 3, 2008, pp. 353-374.

[29] Imbleau,'Denial', pp.270-1.

[30] Timmermann, 'Counteracting Hate Speech', p.355.

[31] *Council Framework Decision 2008/913/JHA*, art. 1 (1) (a), (c) and (d).

[32] Council Of Europe, *Additional Protocol on Cybercrime, Concerning the Criminalisation of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems*, Article 6.

[33] Rightly in the view of Laurent Pech, who distinguishes in this respect between what he calls militant and other democracies, in 'The Law of Holocaust Denial in Europe' in Hennebel and Hochmann, *Genocide Denial,* pp.183-234.

[34] For a succinct account of these and other laws banning Holocaust denial (16 in all), see Jacqueline Lechtholz-Zey, 'The Laws Banning Holocaust Denial', *Genocide Prevention Now*, no. 9, Winter 2012 .

[35] Sévane Garibian, 'Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law' *Cardozo Journal of Conflict Resolution* vol. 9, pp.481-2; on "the bases of a democratic society" as a fundamental concern in the *Gayssot* law, see n.12.

[36] Robert Kahn goes so far as to argue that "Europe's past experience with Nazi hate necessitated Holocaust denial law", 'Holocaust Denial and Hate Speech' in Hennebel and Hochmann, *Genocide Denial,* p.101.

[37] See Donald Bloxham, *Genocide on Trial: The War Crimes Trials and the Formation of Holocaust History and Memory*, Oxford: Oxford University Press, 2001.

[38] See the wide-ranging set of accounts in David Bankier ed., *The Jews Are Coming Back – The Return of Jews to Their Countries of Origin after World War Two*, Jerusalem: Yad Vashem; Berghahn Books, 2005.

[39] Lothar Probst, 'Founding Myths in Europe and the Role of the Holocaust', *New German Critique*, no. 90, 2003, pp. 45-58.

[40] Karen Eltis, 'A Constitutional "Right" to Deny and Promote Genocide? Pre-empting the Usurpation of Human Rights Discourse towards Incitement from a Canadian Perspective', *Cardozo Journal of Conflict Resolution* vol. 9, p.472.

[41] Lorraine Eisenstat Weinrib, 'Hate Promotion in a Free and Democratic Society: *R. v. Keegstra'*, McGill Law Journal, vol. 36, 1990-1991, p.1428.

[42] There is a brief account of this tragic case by Deborah Lipstadt (generally not a proponent of denial legislation) in her preface to her account of *The Eichmann Trial,* New York: Schocken Books, 2011.

[43] Cited in Garibian, 'Taking Denial Seriously', p. 479, n. 45.

[44] See Garibian, 'Taking Denial Seriously' n. 9 and n.10, p.481.

[45] See Florian Jessburger, 'The Definition and the Elements of the Crime of Genocide' in Paolo Gaeta ed., *The UN Genocide Convention – A Commentary*, Oxford: Oxford University Press, 2009. The ICTY Appeals Chamber specifically stated in its judgment on Srebrenica (the *Krstic* case) that "genocidal intent may be inferred". Case no IT-98-33-A Appeals Chamber Judgment para 33.

[46] Just as with hate speech, denial can take different forms. Adam Jones has usefully distinguished between several different kinds. One has to do with *facts* – numbers, proportions;

another has to do with *categorisation* (whether the Convention for example covers the putative victim group); another has to do with *analysis of the process and explanation* – the presence or absence of central planning , the context in which the supposed genocide takes place (civil war or revolution); a third has to do with *claims about the groups*, including claims about the suspected perpetrator and their experience before, during and after the supposed genocide (attributing or reattributing responsibility for wrongs, even genocide itself). See his careful exposition in *Genocide – a Comprehensive Introduction,* London: Routledge, 2006, pp.351-4. Efforts have been made by some courts to distinguish between these different kinds of denial, banning some but not others. In Spain, the constitutional court argued that there was a difference between "simple denial" and "positive value statements". "By simple denial, the court referred to "denial of the facts" and it specifically argued that freedom of speech had to be protected in the context of "the search for historical truth". "Positive value judgments" on the other hand involved "publication of ideas or doctrines that praise the wrong or extol the wrongdoer". As Pablo Salvador Coderch and Antoni Rubi Puig have noted, however, there is something of a paradox here, inasmuch as "in the freedom of speech tradition….opinions have always been much protected than false statements of fact….moreover, statements of fact tend to be empirically testable…while opinions are not"[46]. 'Genocide Denial and Freedom of Speech, *In Dret: Revista para el Analisis del Direcho* www.indret.com October 2008, p.17 (accessed 26/5/2010). In German courts opinions are generally protected while denial of known facts is not. See Jennifer Allen and George H. Norris 'Is Genocide Different? Dealing with Hate Speech in a Post-Genocide Society', *Journal of International Law & International Relations,* vol. 7, 2011, p.20.

[47] Thomas Hochmann, 'The Deniers' Intent' in Hennebel and Hochmann, *Genocide Denial,* pp.279-230.

[48] For varying uses of this principle in different legal systems, see Robert A. Kahn, *Holocaust Denial and the Law – A Comparative Study*, Basingstoke: Palgrave, 2004.

[49] This is not to ignore, of course, those scholars who are uncomfortable either with the specific definition of genocide in the Convention or those who, like Christian Gerlach, would prefer to do without it altogether. In neither case, however, are scholars likely to use these concerns to give any support to denialists. For Gerlach's somewhat idiosyncratic perspective, see his *Extremely Violent Societies- Mass Violence in the 20th Century World*, Cambridge: Cambridge University Press, 2010.

[50] The term specifically used by the International Criminal Tribunal for Rwanda in *Prosecutor v. Kambanda*, Judgment and sentence, ICTR – 97-23-S (4 September 1998), para.16.

[51] On Lemkin as a historian, see Dominik J. Schaller and Jürgen Zimmerer (eds), *The Origins of Genocide: Raphael Lemkin as a Historian of Mass Violence*, London: Routledge 2009.

[52] Eltis, 'A Constitutional "Right"', p.467

[53] If the Nuremburg tribunal did not use the term genocide in prosecuting and convicting leading Nazis, the term was not wholly absent from the proceedings. Other trials around that time moreover did use this term. But of even more importance was the Eichmann Trial which did charge and convict the defendant for the crime of genocide. For all her controversial criticism of the trial, Hannah Arendt did think this was of vital importance.

[54] Stanley Fish, *There's No Such Thing As Free Speech And It's a Good Thing, Too*, Oxford: Oxford University Press, 1994.

[55] According to Jennifer Allen and George Norris, "before 2008, not a single judge interviewed by Human Rights Watch was able to define divisionism despite having adjudicated and convicted defendants on that charge" in 'Is Genocide Different?', p.26.

[56] See for example Helen Hintjens, 'Post-genocide Identity Politics in Rwanda', *Ethnicities,* 2008, vol.8, no.1, pp.5-41.

[57] See Tom Ndahiro, 'Genocide Laundering, Historical Revisionism, Genocide Denial and the Role of the *Rassemblement Républicain pour la Démocratie au Rwanda'*, in Phil Clark and Zachary D. Kaufman eds., *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and beyond*, In London : C. Hurst, 2008.

[58] Jones, *Genocide,* p. 351.
[59] Roger W. Smith, Eric Markusen and Robert Jay Lifton, 'Professional Ethics and the Denial of Armenian Genocide, *Holocaust and Genocide Studies,* 1995, vol. 9, no. 1, p.17.