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Free Speech, Official History and Nationalist Politics: Toward a Typology of Objections to Memory Laws

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FREE SPEECH, OFFICIAL HISTORY AND NATIONALIST POLITICS: TOWARD A TYPOLOGY OF OBJECTIONS TO MEMORY LAWS

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Abstract

The past two decades have seen an explosion of memory laws, especially in Eastern Europe, and an explosion of objections to them. According to critics, memory laws (1) violate freedom of speech; (2) create an official history; and (3) foster a narrow, particularistic politics. This Essay evaluates these competing arguments. The free speech objection lumps all memory laws together—regardless of content—and runs the risk of becoming an objection to hate speech bans more generally, something that limits its appeal outside of the United States. Opposing memory laws as official history is narrower, but it privileges the national history and historians who guard it. Furthermore, neither objection gets to the deeper, political threat posed by a newer generation of nationalistic memory laws arising in Eastern Europe. To highlight this threat, memory law opponents should object to the narrow, exclusionist politics that underlay many memory laws. In this regard, opponents should link memory laws to laws that seek to shape the nation by restricting immigration and indoctrinating immigrants. At the same time, the political objection will not generally appeal to the nationalists themselves, especially if it comes from those seen as liberals. Therefore, it is helpful for memory law opponents to supplement the political argument with arguments based on free speech and official history.

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INTRODUCTION

The past two decades have seen an explosion of memory laws—especially punitive ones. Paralleling this has been an explosion of wide-ranging objections to memory laws. One might, for instance, object to a genocide denial ban (or law a forbidding the disrespecting of the Red Army)[1] on free speech grounds; or one might oppose it as fostering bad politics. This essay rests on the premise that the arguments one chooses make a difference. In particular, I advance two points. First, the tendency to oppose memory laws on free speech grounds, or as state-enforced history, while important, does not get at the deeper, political threat posed by a newer generation of more particularistic memory laws.[2] Second, we can learn a great deal about memory laws—and how to oppose them—if we place them in the larger context of how states use law to enforce restrictive notions of national identity.[3]

In what follows, I first distinguish punishing genocide denial (and potentially other past statements) as hate speech[4] from memory laws *per se*.[5] Next, I lay out three categories of objections to memory laws:[6] (1) they *violate freedom of speech*;[7] (2) they *create an official history*;[8]and (3) in some instances, they *foster a narrow, particularistic politics*.[9] For each objection, I describe the nature of the argument and the problems it encounters. While the political objection is powerful, it leans on the *a priori* premise that a nationalistic, exclusionary form of politics is morally illegitimate. For that reason, the next section looks at other laws

1. The law, cited in NIKOLAY KOPOSOV, MEMORY LAWS: MEMORY WARS: THE POLITICS OF THE PAST IN EUROPE AND RUSSIA 10 (Peter Baldwin et al. eds., 2018) punishes the "dissemination of knowingly false information on the activities of the USSR during the Second World War."

2. This Essay owes a great debt to Koposov's MEMORY LAWS: MEMORY WARS, especially his distinction between Western (universal) and Eastern (particularistic) memory laws. *Id*. at 9–10.

3. To be sure, there is an important difference here. Memory laws, by definition, involve the past; identity-enhancing laws may turn on sense of belonging anchored in an idealized past, but they do not necessarily dictate how society views that past. *See* ANTHONY SMITH, THE ETHNIC ORIGINS OF NATIONS (1986) (discussing the role played by an idealized ethnic past in modern nationalist arguments).

4. This category clearly covers qualified denial, i.e. statements that blame the false genocide on the victim group ("The Holocaust is a Zionist hoax"). It *may* cover bare denial where the denial language is code for hate speech.

5. *See infra* Part I.

6. *See infra* Part II.

7. *See infra* Part II.A.

8. *See infra* Part II.B.

9. *See infra* Part II.C

motivated by exclusionary nationalism—especially anti-immigrant laws—that share a family resemblance to particularistic memory laws.[10] The conclusion recognizes the importance of the free speech and official history objections on pragmatic grounds, while highlighting the benefits of viewing memory laws through the prism of national identity.[11]

I. WHAT MEMORY LAWS ARE NOT

Before going into the objections to memory laws, there is a preliminary question: How do memory laws differ from other speech restrictions, such as hate speech bans? Writing in 2006 about negationism, Emanuela Fronza spoke of laws that "seek to establish through the imposition of a criminal sanction, a *single* interpretation of history."[12] According to Fronza, "people should not be prosecuted for what they are or want, but only for what they do."[13] Here Fronza highlights an important distinction between punishing speech to protect a given historical narrative and punishing those situations in which speech "bring[s] prejudice to the interests or rights of another, or where they are offensive to a group," something she favors.[14] This, in turn, mirrors the distinction between punishing bare denial of the facts of a genocide ("The Holocaust did not happen") and punishing qualified denial, in which the denial combines with language targeting a given group ("The Holocaust is a Jewish lie").[15]

There are some puzzles here for memory law scholars. Most would accept that qualified denial is hate speech, at least in countries with hate speech bans. The harder question is whether hate speech bans, when used against qualified denial, should count as "punitive memory laws." I would argue they should not. A hate speech ban may, in some circumstances, act as a *law affecting memory*, but it is not a memory law *per se* because punitive impulse does not come from protecting historical events, it comes from the goal of stopping hate. A hate speech ban does not distinguish between statements such as: "The Holocaust is a Jewish lie," "Jews run the world," and "Let's kill the Jews." Or, to take the argument to an extreme, consider a mugger who confronts a victim on a dark street and says, "Give me your money, or I'll break your lying-

10. *See infra* Part III.

11. *See infra* Part IV.

12. Emanuela Fronza, *Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609, 611 (2006).

13. *Id*. at 622.

14. *Id*. at 621.

15. For more on the bare versus qualified denial distinction, see Thomas Hochmann, *One Century Later: Freedom of Speech and the Denial of the Armenian Genocide*, CritCom (Feb. 21, 2015), http://critcom.councilforeuropeanstudies.org/one-century-later-freedom-of-speech-and-the-denial-of-the-armenian-genocide/.

about-the-Holocaust Jewish legs!" Punishing the mugger under a robbery statute is not what we traditionally think of when discussing memory laws.[16]

What, then, about laws that punish bare acts of genocide denial? Are they punitive memory laws? They often are, especially if the motivation for the ban stems from a desire to "apologize" for the genocide in question.[17] Likewise, a country that bans Holocaust denial to comply with the 2008 Framework Declaration is likely enacting a punitive memory ban. The harder cases emerge where the Holocaust denial ban is enacted to combat anti-Semitism by blocking one of its ways of transmission.[18] Is this the state favoring a given historical view, or merely punishing hate speech in a particularly clumsy way?[19] On one level, this is an empirical question: How prevalent is coded anti-Semitism in the country in question?

Let me give an example from a slightly different context. In the United States, the Supreme Court has banned cross burning when done with an intent to intimidate.[20] Dissenting, Justice Clarence Thomas argued that, in the United States context, cross burning is always intimidatory.[21] While the opinions in *Virginia v. Black* are dripping with memory,[22] the holding—that a state may punish cross burning when it intimidates others—is neutral vis-à-vis history. The goal is to protect citizens against intimidation, not to foster a singular meaning about the past. One can approach Holocaust denial bans—and some other genocide denial bans—from a similar perspective; are they primarily concerned about combatting hatred, or enforcing a singular version of the past?

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16. If, on the other hand, the mugger receives an enhanced sentence under a hate crime law, we have a closer case, even though here the statement is qualified rather than bare denial.

17. *See* ULADZISLAU BELAVUSAU, FREEDOM OF SPEECH: IMPORTING EUROPEAN AND US CONSTITUTIONAL MODELS IN TRANSITIONAL DEMOCRACIES, 172–73 (2013).

18. For connection between Holocaust denial and anti-Semitism, see DEBORAH LIPSTADT, DENYING THE HOLOCAUST, THE GROWING ASSAULT ON TRUTH AND MEMORY 32 (Basic Books 1993).

19. For the argument that Holocaust denial is hate speech, see Robert A. Kahn, *Holocaust Denial and Hate Speech*, *in* GENOCIDE DENIALS AND THE LAW 74 (Ludovic Hennebel & Thomas Hochmann eds., 2011) (describing Holocaust denial as past directed hate). Over the past few years, I have changed my views somewhat. I no longer think Holocaust denial is always prosecutable as hate speech, but I believe it can be in some instances. Rob Kahn, *Can the Law Understand the Harm of Genocide Denial?, in* DENIALISM AND HUMAN RIGHTS 215 (J. Willems, H. Nelson & R. Moerland, eds., 2016).

20. Virginia v. Black, 538 U.S. 338 (2003); for more, *see* Robert A. Kahn, *Did the Burning Cross Speak? Virginia v. Black and the Debate Between Justices O'Connor and Thomas over the History of Cross Burning, in* 35 STUDIES IN LAW, POLITICS, AND SOCIETY 75 (Austin Sarat ed., 2006).

21. *Virginia*, 538 U.S. at 388 (Thomas, J., dissenting).

22. *See* Kahn, *supra* note 20. Both Justice O'Connor, who wrote the majority opinion, and Justice Thomas make their case by describing the import of cross burning in American history.

There are advantages in viewing some Holocaust denial bans as hate speech laws in disguise. First, it helps resolve what I would call the "Gayssot problem," namely the tendency of the fiercest critics of most punitive memory bans to waffle when it comes to removing Holocaust denial bans. For example, French historian Pierre Nora, one of the leaders of *Liberté pour l'Historie*, is agnostic when it comes to removing the Gayssot Law.[23] The fear is that removal will unleash a torrent of anti-Semitism. Maybe his fears are justified; maybe they are not.[24] The same applies to the Gayssot Law itself. As a student of the prosecutions of Robert Faurisson, and the problems courts encountered in the early 1980s in hearing his case without "judging history,"[25] I can attest to how the Gayssot Law, by making the crime "questioning the Holocaust" rather than "falsifying history," made for smoother prosecutions in the 1990s.[26] That said, reading the legislative debates over the Gayssot Law's passage, I encountered very little about the Faurisson trials or the dilemmas facing potential prosecutors of deniers. Instead, the focus was on stopping Jean Marie Le Pen and sending a larger message that French society was opposed to genocide denial.[27] If, as an empirical matter, it is likely that Gayssot law was not enacted primarily to punish anti-Semitism, the disguised hate speech rationale still might explain why so many memory law opponents are unwilling to repeal it.

Second, the hate speech in disguise approach helps explain the position of those who support Holocaust denial bans but reject most other punitive memory bans.[28] As Aleksandra Glisczyńska-Grabias puts it: "Genocide denial may in fact constitute a mechanism for stirring up hate and excluding minorities by stigmatizing them as liars who have fabricated their suffering."[29] It does so by sending the message, "We

23. *See* Robert A. Kahn, *Does it Matter How One Opposes Memory Bans? A Critical Commentary on Liberté pour l'Histoire*, 15 WASH. U. GLOBAL STUD. L. REV. 55, 76 (2016) (quoting Pierre Nora, *History, Memory and the Law in France* (1990–2008); LIBERTE POUR L'HISTOIRE (Jan. 14, 2011), http://www.lph-asso.fr/index53e5.html?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=fr).

24. Interestingly, the fear that repeal will have negative effects against the minority group protected by the ban was voiced by Jewish and Muslim communities in Denmark during the Danish debate over repealing its blasphemy ban. *See* Rob Kahn, *Five Thoughts about the Repeal of Denmark's Blasphemy Ban*, 19 RUTGERS J. L. & RELIGION 120, 138–39 (2018).

25. *See* ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY, 33–35, 37 (2004).

26. *Id*. at 108–11.

27. *Id*. at 105–08.

28. *See* Grayżna Baranowska & Anna Wójcik, *In defence of Europe's memory laws*, THE FREE SPEECH DEBATE (Nov. 1, 2017), http://freespeechdebate.com/discuss/in-defence-of-europes-memory-laws/; Aleksandra Glisczyńska-Grabias, *Law and Memory*, MEMORY LAWS IN EUROPEAN AND COMPARATIVE PERSPECTIVE (Mar. 2018), http://melaproject.org/blog/249.

29. Glisczyńska-Grabias, *supra* note 28.

killed you, but that's ok. Nobody cares." Again, this is an empirical question. For Thomas Hochmann, writing about Armenian genocide denial, the question is whether such denial "threatens, in every case, to provoke sufficient harmful consequences."[30] The phrase "in every case" points to the nub of the issue. To the extent Holocaust denial is always coded anti-Semitism, a blanket ban might be justified; much as for Justice Clarence Thomas, a burning cross almost always intimidates. Answering this question affirmatively will be difficult, but it is a theoretical possibility.[31]

At the same time, using blanket denial bans to punish hate speech may not be wise social policy. Indeed, excluding disguised hate speech bans from the family of "punitive memory laws" may not be enough to escape the Gayssot dilemma. The existence of the Gayssot law (and other Holocaust denial bans) would still open up claims about why the Holocaust receives special billing.

What excluding disguised hate speech from the category of memory laws does do, however, is remove a powerful argument in favor of memory laws, one that applies almost exclusively to genocide denial bans—namely, that the law in question is not a memory law at all, but actually an effort to combat hatred. By excluding this type of situation from the memory law definition, the hate speech in disguise concept adds clarity to the arguments against memory laws. To return to Fronza, a disguised hate speech ban punishes speakers for "what they do;" by bypassing hate speech in disguise, memory law opponents can focus on those laws that punish speakers for "what they want" or "[what they] are."[32]

II. A PRELIMINARY TYPOLOGY OF OBJECTIONS TO MEMORY LAWS

There are three major objections to memory laws. First, people object to memory laws because *they violate free expression*[33]—an argument here could, in theory, cover hate speech as well as other speech restrictions, such as libel and obscenity. Second, critics argue that *memory laws create an official history*.[34] This, too, is a potentially broad argument because it suggests that all memory laws are equally bad to the extent that they impose a state backed history. Holocaust denial bans, in this regard, are no different from the 2014 Russian law making it illegal to question the feats of the Red Army. In addition, the official history objection is sometimes made on behalf of historians—as if they, rather

30. Hochmann, *supra* note 15.

31. To guarantee that only coded hate speech is punished, one can also require that the speech in question be "directed against" the minority group targeted by the denial. *Id*.

32. *See* Fronza, *supra* note 12, at 622.

33. *See infra* Part II.A.

34. *See infra* Part II.B.

than the state, should determine what the official history is. Finally, the freedom of speech and official history objections are focused on speech punitive memory laws. While these may well be the most problematic memory laws, not all laws affecting memory are punitive. [35]

The missing ingredient is politics—*some memory laws are objectionable because they promote a narrow, exclusionary image* of the state, nation or community enacting them.[36] In other words, we should follow Nikolai Koposov and be more skeptical of those memory laws where the state presents itself as a victim, as opposed to situations where the state is punishing the denial of its own crimes.[37]

The turn to politics allows us to reach beyond speech punitive memory laws to cover a variety of state-created memories in areas such as statues, street renaming, and the development of curricula in primary and secondary schools.[38] Simply put, memory laws can be "bad," even if they do not restrict speech. At the same time, the turn to politics connects memory laws (i.e. laws about commemorating past events) to a wider set of examples in which the state uses law to create a broader or narrower group identity.

In this respect, Koposov's typology of universal and particularistic memory laws mirrors a pre-existing dichotomy in the ethnicity and nationalism literature between broad and narrow forms of identity (e.g., civic versus ethnic nationalism).[39] In other words, the "bad" memory laws—which, as seen in Russia, Ukraine, and Poland, confine how society can describe its national past—have parallels with other places where law is used to reinforce national identity. To take two examples, Hungary's STOP Soros law penalizes those who assist (financially or otherwise) illegal immigration.[40] Meanwhile, in 2018, Denmark enacted a law for immigrants on welfare that separates immigrant children from their parents and forbids the children from traveling to their home

35. *See* Eric Heinze, *Epilogue: Beyond 'Memory Laws': Towards a General Theory of Law and Historical Discourse*," *in* LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 413, 418 (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2017).

36. *See infra*, Part II-C.

37. Koposov, *supra* note 1, at 9–10.

38. *See* Uladzislau Belavusau & Anna Wójcik, *Renaming streets. A key element of identity politics*, *New Eastern Europe* (Apr. 26, 2018), http://neweasterneurope.eu/2018/04/26/renaming-streets-key-element-identity-politics/.

39. *See* Robert A. Kahn, *The Danish Cartoon Controversy and the Exclusivist Turn in European Civic Nationalism*, *in* 8 STUDIES IN ETHNICITY AND NATIONALISM, 524, 525 (2008) (describing the dichotomy between good/Western/civic nationalism and bad/Eastern/ethnic nationalism).

40. *See* Tom Szigeti, *Hungarian Parliament Passes 'Stop Soros' Amendments Modifying Judiciary*, HUNGARY TODAY (June 21, 2018), https://hungarytoday.hu/hungarian-parliament-passes-stop-soros-anti-ngo-laws-amendments-modifying-judiciary-and-banning-homelessness/.

countries.[41] These laws share political similarities to Koposov's "bad" memory laws, even though they focus on the present rather than the past. I will take up these laws later in the essay.

For now, however, let me return to the three objections listed above (free speech, official history and bad politics). How do they fare as reasons oppose memory bans? Which objection(s) speak with the most salience to the current run of memory bans in Eastern Europe and Russia? Which objection(s), if any, speak to the problems that arise from the use of non-punitive memory laws? In what follows, I describe the pros and cons of each objection. As we will see, while each objection has its strengths, all three arguments have weaknesses.

A. *Objections Based on Freedom of Speech*

On one level, free speech arguments are easy. To the extent one is a free speech absolutist along the lines of Flemming Rose or Salman Rushdie, opposing memory laws is uncontroversial.[42] The same is true if one takes the slightly more speech-restrictive position echoed by the United States Supreme Court in *Brandenburg v. Ohio*.[43] In *Brandenburg*, the Court held that speech bans are only legitimate when the speech in question incites to "imminent lawless action"[44]—something most speech acts targeted by memory laws manifestly do not do (at least once one removes the possibility that some Holocaust denial is coded anti-Semitism). Furthermore, punitive memory laws close off opinion, do not lead to the truth, raise questions of a slippery slope and cannot be justified as necessary to ensure democratic legitimacy.[45] Thus, there are powerful doctrinal arguments, at least from a United States perspective, for objecting to memory laws on free speech grounds.

There are two added advantages to the free speech objection. The first concerns tone. To the extent one takes a consistent civil libertarian position, one can simultaneously oppose memory laws and the speech acts such laws would punish, a practice well established in the United States ever since the 1978 decision protecting the right of neo-Nazis to march through a community of Holocaust survivors in Skokie, Illinois.[46]

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41. *See* Ellen Barry & Martin Selsoe Sorensen, *In Denmark, Harsh New Las for Imigrant 'Ghettos*,' N.Y. TIMES (July 1, 2018), https://www.nytimes.com/2018/07/01/world/europe/denmark-immigrant-ghettos.html.

42. *See* 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, 690 (2014) (describing Rose and Rushdie's view of the human subject as "a storytelling animal").

43. 395 U.S. 444 (1969).

44. *Id*. At 449.

45. *Supra* note 23, at 67–70.

46. *See*, Robert A. Kahn, *The Danish Cartoon Controversy and the Rhetoric of Libertarian Regret*, 16 U. OF MIAMI INT'L AND COMP. L. REV. 151, 161 (2009) (describing language of liberal regret by the court in Collin v. Smith, 578 F.2d 1197, 1201 (7th Cir. 1978)).

Second, speech-based objections to memory laws lead to the evaluation of memory laws on largely technical grounds: How much speech do they restrict? What defenses are available to those accused of violating them? How severe are the punishments? In effect, the free speech objection becomes a measuring stick—the more speech a given memory ban covers, the worse it is.[47] This technical quality may make the objections to memory laws less threatening in a society deeply committed to the norms memory laws protect.[48]

That said, free speech objection has problems. For one thing, speech-based arguments against memory laws risk proving too much. Many of the countries enacting memory bans also have hate speech laws, which also close off opinion, undermine the search for truth, and (depending on one's perspective) lack democratic legitimacy.[49] For instance, Eric Heinze opposes hate speech bans as democratically illegitimate in longstanding, stable prosperous democracies.[50] Worse still, to the extent the loudest voices against European memory laws come from the other side of the Atlantic, we are faced with another example of gun-toting, climate pact destroying, Trump-electing all-American cowboys telling long suffering Europeans what to do.[51] To be sure, some Europeans oppose memory laws and hate speech bans, at least in some situations.[52] But there is a real risk that the specific speech harms posed by memory laws will be lost in the Euro-American tussle over the legitimacy of hate speech restrictions in general.

The free speech objection has two other difficulties. First, from a speech perspective all memory laws are in theory equally bad, regardless of what they cover. A ban on Holocaust denial, on this view, is the same as a ban denying the World War II exploits of the Soviet Army. Likewise, bans on denial of the Armenian genocide are a little different from Article 301 of the Turkish Penal Code which punishes insults to "Turkishness" and has been used to punish those who assert that the Armenian genocide occurred.[53] Simply put, the free speech argument is too blunt an

47. *See* Robert Kahn, *Rethinking Blasphemy and anti-Blasphemy Laws*, *in* BLASPHEMY AND FREEDOM OF EXPRESSION AFTER THE CHARLIE HEBDO MASSACRE 179–85 (Jeroen Temperman & Andras Koltay eds., 2017) (calling for evaluating blasphemy bans based on their severity).

48. This was my sense after following the global campaign against Pakistan's blasphemy laws. *Id*. at 191 (describing the enduring support for blasphemy bans in Pakistan).

49. *See* ERIC HEINZE, HATE SPEECH AND DEMOCRATIC CITIZENSHIP 68–78 (2016).

50. *See* Eric Heinze, *Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech*, *in* EXTREME SPEECH AND DEMOCRACY 182, 185–87 (Ivan Hare & James Weinstein eds., 2009).

51. Id.

52. *See* Heinze, *supra* note 50; TIMOTHY GARTON ASH, FREE SPEECH: TEN PRINCIPLES FOR A CONNECTED WORLD (Yale 2016). To be sure, neither Heinze nor Ash are free speech absolutists.

53. *See* Janisha Tate, Note, *Turkey's Article 301: A Legitimate Tool for Maintaining Order or a Threat to Freedom of Expression?,* 37 GA. J. INT'L & COMP. L. 182 (2008).

instrument to make nuanced political distinctions among various memory laws.

Second, not all memory laws are punitive. For instance, there are debates in the United States over the erection and removal of statues of Confederate military leaders[54] as well as Poland's recent campaign to cleanse street names of anyone who may have had a left-wing connection.[55] Here, one reaches a crossroads. One can either, like Koposov, focus primarily on punitive memory bans[56] (and, given the great harms punitive sanctions can generate, there are good reasons for this), or one needs a broader theory that can evaluate non-punitive memory laws as good or bad. Opponents of memory laws need a vocabulary for critiquing narrow, slanted, but non-punitive memory laws; a focus on free speech, while important in several respects, will not provide this.[57]

B. *Objections Based on Official History*

Unlike the free speech objection, which in theory could cover hate speech bans (and other speech restrictions), the official history objection is narrowly focused on memory laws. Moreover, the academic freedom concerns raised by the Heinz Richter and Jan Gross cases are real;[58] and undoubtedly, the French historians of *Liberté pour l'Histoire* have played

54. *See* Rob Kahn, "Charlottesville, Ferguson and 'Laws Affecting Memory' in the United States," Workshop on "Legal Governance of Historical Memory in Comparative Perspective," University of California Berkeley, Apr. 2018, https://www.researchgate.net/publication/324759975_Charlottesville_Ferguson_and_Laws_Affecting_Memory_in_the_United_States.

55. *See* Belavusau & Wójcik, *supra* note 38. The policy would impact at least 1,000 street names. Among those purged are streets honoring people who, while victims of Stalin, had a left-wing connection of some sort.

56. KOPOSOV, *supra* note 1, at 6.

57. Nor do free speech objections necessarily reach the problem of "informal" censorship—i.e., those situations in which a newspaper, school district, library or other actor decides to impose a singular view of history. Informal censorship can limit a speaker's ability to find an audience while shaping how society views the historical event in question. *See also*, Robert A. Kahn, *Informal Censorship of Holocaust Revisionism in the United States and Germany*, 9 GEO. MASON U. CIV. RTS. L.J. 125 (1998). To the extent free speech arguments focus narrowly on criminal sanctions, they will not address these types of situations.

58. German historian Heinz Richter was prosecuted for denying crimes against humanity in 2008 on account of his book, *The Battle of Crete*, which challenged notions of heroism central to Greek national identity. *See* Ioanna Tourkochoriti, *Memory Politics and Academic Freedom: Some Recent Controversies in Greece*, VERFASSUNGSBLOG (Jan. 14, 2018), https://verfassungsblog.de/memory-politics-and-academic-freedom-some-recent-controversies-in-greece/. United States historian Jan Gross aroused controversy—including a law (later invalidated on technical grounds) targeting him—after the appearance of his book, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland* (2002). *See* Uladzislau Belavusau & Anna Wójcik, *Polish Memory Law: When history becomes a source of mistrust*, NEW EASTERN EUROPE, Feb. 19, 2018, http://neweasterneurope.eu/in-the-magazine/.

a role in curbing the growth of memory laws in France, and elsewhere, even if they somewhat exaggerate this role.[59] The "official history" argument also has a political resonance; as early as 1990, French conservatives asked why, as the Berlin Wall was collapsing in the East, a Stalinist style official history was being imposed in the West.[60] In addition, the official history argument reflects a broader concern about judges and history. Simply put, it violates separation of powers for a judge, empowered to resolve disputes in a final way, to pronounce on history, which is always open for reevaluation.[61]

At the same time, the official history argument has problems. First, while "official history" objection seeks to protect historians; are most genocide deniers "historians"? Defending Jan Gross or Heinz Richter's academic freedom is easy; doing the same for Robert Faurisson, who does have a doctorate in literature, is a harder sell. Consider next the late Bernard Lewis, sued in France in the 1990s for denying the Armenian genocide.[62] He was not sued for his 1961 book *The Emergence of Modern Turkey*; he was sued for an off the cuff remark made during a January 1994 *Le Monde* interview.[63] Does everything a historian says become an issue of academic freedom? What the Faurisson and Lewis examples suggest is that as viewpoints become more extreme, and language more

59. This often takes the form of humble bragging. After noting that *Liberté* is not "much of an organization," Oliver Salvatori, the group's secretary, tells Josie Appleton how: "Our ideas have won the battle of public opinion." *See* Josie Appleton, *Freedom for history? The case against memory laws*, THE FREE SPEECH DEBATE, (Apr. 3, 2013), http://freespeechdebate.com/discuss/freedom-for-history-the-case-against-memory-laws/. Given the explosion of punitive memory bans in Eastern Europe over the past decade, Salvatori's victory celebration may be a bit premature.

60. See KAHN, *supra* note 25, at 105. Conservative back benchers hurled insults including "Goulag," "Katyn" and "Bucharest."

61. Bernard Edelman, Paris law clerk, made this argument about the 1980s prosecution of Faurisson for falsifying history. Ironically, Judge Hugh Locke, the first judge in the Ernst Zundel trial, flipped the lawversus history distinction on its head. Refusing to take judicial notice of the Holocaust at Zundel's trial for spreading false news, Locke refused to reach a final issue on innocence or guilt—something that should be left for the jury to decide. *See* KAHN, *supra* note 25, at 35–36, 40–41.

62. *See* YVES TERNON, REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 244 (Richard G. Hovannisian ed., 1998).

63. Asked why the Turks refused to admit the Armenian genocide, Lewis replied "You mean the Armenian version of this history." *Id*. at 243. While Lewis subsequently expanded on his position in a January 1994 op-ed article in *Le Monde*, which Ternon claims led to the French Armenian groups suing him. *Id*. at 244. He was not reporting academic research or making a claim; he was giving his opinion. While this ought to be respected as freedom of speech, the claim of academic freedom is weaker here than in the Richter and Gross cases.

causal, the "official history" objection becomes less and less about protecting academic research.[64]

Second, a certain elitism creeps into some versions of the "official history" objection. It is one thing to say the state should not set up an official history, or even that the state should not threaten historians; it is quite another, however, to treat history as the sovereign province of professional historians, as some *Liberté pour l'Histoire* pronouncements seem to do. For example, in a 2013 interview with Josie Appleton about memory laws, Nora condemned the victim-centered "moralization" of history and rejected the argument that the slave trade was a crime against humanity as a "judicial absurdity."[65] As I have pointed out elsewhere, this not an effective way to encourage members of victim groups to join the campaign against memory laws.[66] Moreover, historians are just as capable as courts of offering narrow-minded history; while historians likely will inevitably play a role in the creation of history, I am not sure they are the guardians of it (or even the sole producers of it).

In this regard, compare the tone of Nora's remarks with Diane Ravitch, a specialist in education policy. Describing the impact of censorship on high-school history textbooks in the United States, Ravitch explained, "To produce history textbooks, teams of writers and editors have mastered the art of compression, reducing complex controversies to a few lines or a page, smoothing out the rough edges of reality, eliminating the confusion and rancor that invariably accompanied major crises."[67] Ravitch calls for complex, rough-edged history; she, unlike Nora, does not dictate *what* that history should say. The official history objection against memory laws will flourish precisely to the extent that it encompasses a broad, popular conception of history, one based on the understanding that history comes in many shapes and sizes. Taking an open-ended approach increases the chances of winning over memory law supporters.[68]

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64. This concern reaches its apex in the case of Holocaust denial used as coded hate speech. Is someone who says: "Go to Israel, you Holocaust hoaxing Jew!" engaging in history in a meaningful sense?

65. Appleton, *supra* note 58. For more examples, see Kahn, *supra* note 23, at 82–89 (noting how *Liberté* supporters oppose multiculturalism as the history of victims and give historians a leading role in guarding the national past).

66. Kahn, *supra* note 23, at 92.

67. DIANE RAVITCH, THE LANGUAGE POLICE: HOW PRESSURE GROUPS RESTRICT WHAT STUDENTS LEARN 134–35 (2003).

68. Legal historian Reuel Schiller made a similar point at April 2018 Memory Law Panel at Berkeley, California. Faced with memory entrepreneurs, some of whom are also deniers, societies should strive to create an educated populace able to understand the nuance of history. In the United States, such a public would more concerned about the moral ambiguity of slave-owner United States President Thomas Jefferson than worrying about those who seek to "rehabilitate" Robert E. Lee or Stonewall Jackson.

Meanwhile, the anti-Stalinist "official history" argument raised by the French deputies who voted against the Gayssot law is similar to the conservative argument in the United States about "political correctness"—and suffers from the same problems. In the United States, lampooning political correctness appeals to those skeptical of changing norms, and the resultant speech restrictions, around issues of race, gender, sexual preference and sexual identity. The attack on political correctness, however, is less effective, however, in changing the minds of the "social justice warriors" who support the norms and speech restrictions.[69] The same limited persuasiveness is likely true of arguments that France's recognition of the Holocaust, the Atlantic Slave trade, or any other human rights tragedy, will recreate the Stalinist police state in the heart of Paris.

Finally, the official history objection shares some weaknesses with the free speech objection. While the official history argument may reach some non-punitive memory laws (since street naming, statue removal and similar activities could serve an official history) treating a change of a street name as an assault on academic freedom risks minimizing the very real harms to academic freedom memory laws can pose. Meanwhile, the concern about official history, without a probing about what "official" means,[70] cannot speak to the politics of specific memory laws. After all, every imposition of official history should, in theory, be equally bad.

In the end, the official history objection has a role to play in campaigns against memory laws, but it should be used with care. The less elitist it is, the more effective it will be.

C. *Objecting to Memory Laws as "Bad" Politics*

The final category of memory law objections is political. Some objections apply to punitive memory laws in general—although one can also raise these arguments as free speech objections. For example, the concern that memory laws will make a state more authoritarian[71] has both a political and a legal component. But the strongest political arguments apply to a certain category of memory laws, those Koposov refers to as narrow, particularistic laws, ones in which the state (or other relevant entity) seeks to punish discordant views of history it finds threatening to the national image.[72] Many of the recent memory laws enacted in Russia and Eastern Europe fit this category. A primary

69. For more about the limits of political correctness arguments, see Rob Kahn, *The Anti-Coddling Narrative and Campus Speech*, 15 U. ST. THOMAS L.J. 1 (2018).

70. Clearly all societies have some history that they deem official. Is this problematic when enforced in a non-speech punitive way? It may well be, but to reach this point, one needs a political critique that does more than trace a given statue, commemoration, high school syllabus, or other memory policy to the state.

71. *See* Fronza, *supra* note 12, at 622.

72. *See* KOPOSOV, *supra* note 1, at 9–10.

characteristic these laws is that they punish those who deny harms inflicted on the state. (This stands in contrast to universal memory laws, in which the state bans denial of its own crimes, or denial of crimes against groups with no direct connection to the state).[73]

The argument against particularistic memory bans is simple. Memory laws are "bad" to the extent they foster narrow, exclusionary politics. This is particularly a concern where, as in Eastern Europe during World War II, neighboring groups, such as Poles and Ukrainians, committed atrocities against each other.[74] These laws reinforce nationalism. They also raise international tensions as Country A reacts to Country B's narrow memory law by enacting a law of its own, triggering a mnemonic arms race in which each country seeks to police the truth, as it sees it, within and outside of its borders. One finds echoes here of Kenneth Waltz's security dilemma:[75] Just as each additional arms purchase, by fostering a response, makes the initial purchaser less secure, so the enacting of narrow memory bans with extra-territorial bite, by encouraging neighbors to do the same, ultimately harms the countries enacting them.[76]

Let me give an example. In 2014 Russia enacted a memory law about the Red Army—most likely not for "security purposes" but for aggrandizement. In response, Ukraine enacted a series of decommunization laws that, in addition to responding to the Russian "threat," also rehabilitated Ukraine's World War II era guerillas and punished those who "disrespected" them.[77] Because some of those guerillas committed atrocities against Poles,[78] Poland saw the new law as

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73. *Id*.

74. *See generally* Alina Cherviatsova, *Gravity of the Past: Polish-Ukrainian Memory War and Freedom of Speech*, EJIL: TALK!, Feb. 22, 2018, https://www.ejiltalk.org/gravity-of-the-past-polish-ukrainian-memory-war-and-freedom-of-speech/ (giving a brief overview of the relevant history).

75. For more, with an emphasis on the Ukrainian case, see Maria Mälksoo, *Decommunization in Times of War: Ukraine's Militant Democracy Problem*," VERFASSUNGSBLOG, Jan. 9, 2018, https://verfassungsblog.de/decommunization-in-times-of-war-ukraines-militant-democracy-problem/.

76. *See* Robert Jervis, "*Cooperation under the Security Dilemma*," *in* 30 WORLD POLITICS 169–70 (1978) (describing security dilemma in a state of anarchy). *See also* Maria Mälksoo, Kononov v. Latvia *as an Ontological Security Struggle over Remembering the Second World War*, *in* LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 91–92 (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2017) (describing concerns of ontological security).

77. *See* Cherviatsova, *supra* note 73; Lina Klymenko, *Cutting the Umbilical Cord: The Narrative of the National Past and Future in Ukrainian De-communization Policy*, *in* LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY 310–28 (Uladzislau Belavusau & Aleksandra Gliszczynska-Grabias eds., 2017).

78. In response, Poles engaged in a campaign of anti-Ukrainian ethnic cleansing from 1944 to 1947. *See* Cherviatsova *supra* note 73.

a threat. This was one of the many reasons for enactment of Poland's 2018 law, since revised,[79] that punished those who used the phrase "Polish concentration camps" to suggest that Poland was responsible for the Nazi death camps; it also punished those who suggested that the Polish state or nation were complicit in Nazi crimes.[80] This led Israel to consider enacting a bill accusing Poland of Holocaust denial.[81] Although it is a bit exaggerated, this example shows how a mnemonic arms race can spread across a region.

Second, the political objection lets us focus on specific memory laws while also reaching non-punitive memory laws. One can now, for example, distinguish calls in the Southern United States to remove Confederate statues in the name of recognizing the harms of slavery and segregation from Poland's changes of place names to exclude anyone with a left-wing past.[82] There will, of course, be judgment calls, and scholars will disagree about which memory laws are universal and which are particularistic; there is a perverse incentive for memory law proponents to present their laws as universal—and, therefore, as "good."[83] That said, the universal versus particularistic framework is a helpful way to evaluate specific memory laws, including non-punitive ones, which is something the other objections struggle with.

At the same time, the political objection has its own challenges. First, the literature on ethnicity and nationalism has struggled with the question of "good" nationalism;[84] can there be a "good" memory law? Perhaps memory laws (at least punitive ones) are not always bad—some are just worse than others. Alternatively, is it fair to label nationalism or memory laws as "bad" if Fredrik Barth is correct that maintaining boundaries, i.e. creating an "Other," is a fundamental part of human life?[85] Either position seems to undercut efforts to separate nationalisms (and memory laws) into "good" and "bad" categories. Even if one could do this, what about

79. Christian Davies, *Poland makes partial U-turn on Holocaust law after Israeli row*, THE GUARDIAN, June 27, 2018, https://www.theguardian.com/world/2018/jun/27/poland-partial-u-turn-controversial-holocaust-law. The proposed revision will remove the criminal penalties. *Id*.

80. *Id*.

81. Lahav Harkov, *Majority of Knesset backs bill accusing Poland of Holocaust denial,* THE JERUSALEM POST, Jan. 31, 2018, https://www.jpost.com/Israel-News/Majority-of-Knesset-backs-bill-accusing-Poland-of-Holocaust-denial-540311.

82. *See* Belavusau & Wójcik, *supra* note 38.

83. For an example, see Kahn, *supra* note 53, at 11–16 (describing efforts of Polish Prime Minister Mateusz Morawiecki to defend the Poland's law against accusations of anti-Semitism by highlighting the revival of Jewish culture in Poland).

84. The doubts about the existence of a good nationalism have a historical basis. In the words of Peter Alter: "Between 1918 and 1945, nationalism became synonymous with intolerance, inhumanity and violence." *See* Peter Alter, *Nationalism: An Overview*, *in* NATIONALISM AND ETHNIC CONFLICT at 19 (1994).

85. Fredrik Barth, *Ethnic Groups and Boundaries*, *in* ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURAL DIFFERENCE at 37 (1969).

the possibility of Orientalizing?[86] Is the project of distinguishing the Gayssot Law from Ukraine's decommunization laws simply one more way of privileging an advanced West over a primitive East?

One silver lining of our times is that—in the age of Wilders, Le Pen, and Trump—one can no longer cabin "bad" nationalism to the "East." Xenophobic populism is alive and well in the United States, the Netherlands, Denmark, Poland, and Hungary.[87] Indeed, one of the most longstanding nationalisms of the last two centuries—the Lost Cause tradition of the Confederacy—flourished in the heart of the West.[88] The particularistic versus universal distinction—while presented in East versus West terms, and subject to manipulation—at bottom rests on a clear distinction; is the community punishing the denial of its own past suffering, or of its own crimes against another group? This distinction, in turn, tells us whether the state, nation, or society in question takes a closed or open posture towards its past.[89]

Assuming one can distinguish memory laws based on their politics, a second concern emerges. A memory law's politics can be good or bad in two different ways. On the one hand, one can focus on the international situation and the scope of the law and ask, comparatively speaking, whether the memory law is justifiable. On the other hand, one can look at who or what the memory law rehabilitates. Sometimes the answers to these questions point in the same direction: Article 301 of the Turkish Penal Code, used to prop up an authoritarian state, punishes those who speak the truth about the Armenian genocide. Both the international politics and the subject matter of the law are problematic. On the other side of the spectrum, the Gayssot law, while still sharing the speech and academic freedom concerns that attach to all punitive memory laws, recognizes a harm suffered by a minority group. Here, both the politics and subject matter of the memory law are "good"—or at least as good one can expect of a memory law.

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86. For instance, Maria Mälksoo argues that some critics of Ukraine's decommunization laws have engaged in a rhetoric of an "implicitly…Orientalizing and infantilizing kind" by downplaying the security dilemma Ukraine faced in enacting its law. *See* Mälksoo, *Decommunization in Times of War*, *supra* note 74.

87. To put it another way, both Denmark and Hungary have harsh anti-immigrant policies. One might distinguish Denmark's law as "civic" in nature, and the Hungarian law as "ethnic" since the Danish law seeks to "assimilate" immigrant children, while Hungary seeks to keep out immigrants entirely. At the end of the day, however, the harshness of both laws may matter more than the nature of their operating principles.

88. For more, see Kahn, *supra* note 53.

89. In a similar way, the dichotomy between ethnic and civic nationalism has an East versus West valence but, in the end, turns on a real difference: Can people become part of the nation by adopting its civic norms?

For a harder case, consider Ukraine's decommunization laws.[90] The international context, while not ideal, seems better than many other Eastern European memory laws. Ukraine passed the laws in response to Russian memory laws and actual Russian territorial aggression; if mnemonic security could ever justify a memory law, this would seem to be the place.[91] Moreover, the scope of the law was narrower than those enacted in neighboring states. At the same time, however, the Ukrainian law rehabilitated the Organization of Ukrainian Nationalists (OUN), which was responsible for the Volhynian massacres against the Poles in 1943 and 1944. Indeed, the law made it illegal "to publicly display a disrespectful attitude" toward OUN members.[92] Not only does Ukraine's law, therefore, make it illegal to minimize crimes against Ukrainians; it punishes those who question the state's effort to rehabilitate those Ukrainians who committed crimes against others.

This leads to a quandary. Should the Ukrainian law be defended—at least as compared to other laws in the region—for its legal moderation and the provocation from Russia?[93] Or should the rehabilitation of OUN members make it an especially bad memory law?[94] There is not an easy answer here. Less speech restrictive memory laws should be preferred over those that punish more speech; and the package of Ukrainian decommunization laws, of which the rehabilitation of the OUN members was just a part, may well have some justification. But it is hard to get excited about a memory law that rehabilitates people who committed crimes against humanity. Perhaps the way forward here is to oppose, in a blanket fashion, any law whose goal is to whitewash the past. One could take this position, even while accepting that Ukraine had cause, given the threat from Russia, for taking some action to secure its past.

On another level, the Ukrainian case highlights the importance for countering the politics of the past with a future-oriented politics. Ideally, the response to a threatening memory should be something other than a call for more security. There are several ways of envisioning this politics. One could, for example, follow Hedley Bull and seek to temper the

90. *See* Cherviatsova, *supra* note 73.

91. *See* Uladzislau Belavusau, *Final Thoughts on Mnemonic Constitutionalism*, VERFASSUNGSBLOG, Jan 15, 2018, https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/; *see also* Mälksoo, *supra* note 74.

92. *See* Cherviatsova, *supra* note 73.

93. *See* Belavusau, *supra* note 90 (taking this position).

94. For example, one commentator expressed his displeasure about the "relatively muted" international response to the Ukrainian decommunization laws, which he attributed to a sympathetic attitude toward Ukraine given the challenges it was facing in the West. *See* Samuel Sokol, *Is Poland's Holocaust law changing US attitudes towards Ukraine's memory laws?*" OPEN DEMOCRACY, Apr. 26, 2018, https://www.opendemocracy.net/od-russia/samuel-sokol/is-us-acceptance-of-poland-and-ukraine-s-memory-laws-beginning-to-change.

turbulence of the anarchical society of memory laws[95] by banning the use of memory laws as means of interstate aggression as an international norm, much as a little less than a hundred years ago states rejected the use of poison gas as a means of war.[96] Alternatively, activists could seek to build a cosmopolitan memory, one that based on the free flow of ideas and the multiple identities present in nations, states, cities and individuals.[97] Such an identity would undermine the need to promote narrow, nationalistic identities. More pessimistically, memory law opponents could focus on free speech argument that, for all its analytical limitations, offers a way for memory law opponents to make their case without being seen as attacking the nation.

In the end, the political objection to memory laws has great promise but some peril. The promise comes from the ability to target why a given memory law—punitive or not—is objectionable. At the same time, dividing memory laws into particularistic and universal categories—the former of which is marked "bad"—will likely persuade those already opposed to self-oriented, defensive nationalism. When it comes to convincing the nationalists themselves, the political arguments may prove less helpful than a combination of more traditional free speech approaches combined with efforts to create a new universalism that nevertheless has a radical, countercultural appeal.[98]

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95. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF WORLD ORDER (1977).

96. There is a debate over why chemical weapons have largely not been used since World War I. *See* Richard Price, *A Genealogy of the Chemical Weapons Taboo*, 49 INTERNATIONAL ORGANIZATION 1, 73–103 (Winter 1995). Some observers, such as Price, argue that a moral stigma against such weapons plays a role—even if combined with other factors. On the other hand, military historian Mark Perry, writing in *Politico*, makes the argument that chemical weapons ceased to be used because they are relatively ineffective as weapons of war. *See* Mark Perry, *Why the world banned chemical weapons*, POLITICO, Apr. 16, 2017, https://www.politico.eu/article/why-the-world-banned-chemical-weapons/. This suggests that memory law opponents should rely both on a moral stigma argument (memory laws are a form of intellectual arson, etc.) as well as an argument that, as a tool of national policy, punitive memory laws are less effective in securing the state than the appear to be—which might be one way of describing Poland's 2018 experience with its memory law.

97. In this regard, one might ask if the "left-wing" activists whose names are being taken off Polish streets might, ironically, be the people who a country like Poland should be celebrating, to the extent they bridge the gap between the many different pasts Poland encompasses. For instance, Bronisław Taraskiewicz, one of the street naming the Polish authorities changed, was a Belarusian linguist is persecuted in both Poland and the Soviet Union, a quality that might make him an ideal symbol for a genuinely cosmopolitan Poland. *See* Belavusau & Wójcik, *supra* note 38.

98. *See, e.g.*, ASAD HAIDER, MISTAKEN IDENTITY: RACE AND CLASS IN THE AGE OF TRUMP (Verso 2018). Haider, a Muslim American born in Pennsylvania, views the move to identity politics as a retreat from the radicalism of the Black Power movement, a radicalism he hopes to restore in the name of an "insurgent universality." *Id*. at 114.

III. MEMORY LAWS AND NATIONAL IDENTITY

The path to finding this new, radical universalism will be easier if the study of memory laws is seen as part of nationalism and identity studies. The narrow, particularistic type of memory law that fosters exclusionary politics is part of a larger category of laws that foster a sense of belonging by (to return to Fronza) fostering "a *single* interpretation" of identity. Another example of this broader category are immigration restrictions, which ensure that the nation, whose past memory laws supposedly preserve, remains the same. Interestingly, some of the countries that enact the harshest memory laws are also reluctant to admit new immigrants.

Here we might add to Koposov's categories of universal and particular, a third category of *exclusionary* memory laws. A memory law may be *particularistic*, but be open to those willing to accept the memory as their own. Let me give some examples. During the 19th century Hungarian identity was—at least theoretically—open to anyone willing to learn the Magyar language.[99] By contrast, *exclusionary* memory laws seek to protect the national past by excluding those who might potentially have a different view of history. The state excludes people before they have a chance to accept or reject the norms the memory laws enforce.

This is one way to understand the Hungarian STOP Soros law and the Danish welfare immigration law. In stopping what it sees as a threat to Hungarian national identity posed by immigrants (and émigré George Soros), the Orban government is attempting to fossilize Hungarian identity (and history) by making sure that the nation state remains ethnically Hungarian.[100] While not a memory law *per se*, the STOP Soros law promotes, by force of law, a vision of Hungarian identity, one based on a myth of common descent. In addition, the STOP Soros law, like many memory laws, punishes speech—by making it illegal to advise "illegal" immigrants about potential asylum claims.[101]

The Danish welfare law is an even closer fit with punitive memory bans. The law defines immigrant Danes living in certain specified low-income neighborhoods as "ghetto" immigrants.[102] By separating "ghetto" children from their "ghetto" parents for 25 hours each week, during which the children are inculcated with Danish values, and forbidding trips to the

99. Granted, there were specific reasons for this, including the fact that native Magyar speakers were a minority in the Hungarian half of the Austro-Hungarian Empire.

100. One sees this with the government's fixation with George Soros as well as with its statement about the then proposed legislation, which described how "millions are about to move to Europe from Africa and the Middle East." Government of Hungary, *Organization of illegal migration should be made a punishable offense*, June 6, 2018, http://www.kormany.hu/en/ministry-of-interior/news/organisation-of-illegal-migration-should-be-made-a-punishable-offence.

101. *See* Szigeti, *supra* note 40.

102. *See* Barry & Selsoe Sorensen, *supra* note 41.

old country, the Danish government is shaping the present by creating citizens who will not be receptive to threatening memories about the past. In other words, instead of going after the supply of threatening speech, as most memory laws do, Denmark has taken a demand side approach. By isolating a group of citizens who might be attracted to threatening thoughts or values, Denmark hopes to render certain ideas harmless. As in the Hungarian example, the exclusion takes place; but instead of excluding people, the Danish law excludes thought.

More generally, viewing memory laws through the lens of national identity highlights the connections between the particularism of recent memory laws and the anti-immigrant politics sweeping across North America and Europe.[103] While there are differences between the two phenomena—memory laws have a symbolic impact, whereas immigration restrictions have practical effects, both types of restrictions originate from the same style of politics, one that, as Koposov puts it, has turned away from the future and is firmly focused on the past.[104] Efforts to create a future-oriented politics that will unsettle the current xenophobic mood would benefit from studying the origins, mechanisms and contradictions of nationalism.

CONCLUSION: THE IMPORTANCE OF OBJECTING TO MEMORY LAWS ON MULTIPLE GROUNDS

As Eric Heinze has pointed out, memory laws—punitive or not—are not new; indeed, they have been present for thousands of years.[105] The Gayssot law and its progeny, however, are new; and the recent, particularistic memory laws of Russia and Eastern Europe are newer still. This novelty complicates the task of opposing memory laws. Free speech objections to memory laws are relatively politically easy to make, since freedom of speech retains some universal appeal. Yet the free speech argument, while perhaps necessary when dealing with punitive memory laws, cannot say why a specific memory law is objectionable and may, in fact, apply to other speech restrictions (such as hate speech bans) some see as legitimate.

The official history objection is initially more promising given that it targets memory laws directly. However, it creates the impression that *all* targets of such laws are, in fact, historians, and some proponents seem to

103. Such a move will also unlock a treasure trove of literature on ethnicity and nationalism that might be helpful to the study of memory laws. *See, e.g.*, SMITH, *supra* note 3; BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM (1991); ERNEST GELLNER, NATIONS AND NATIONALISM (1983); JOHN BREIULLY, NATIONALISM AND THE STATE (1993).

104. KOPOSOV, *supra* note 1, at 53–55 (placing the move toward memory in the context of a neo-liberal moment in which the future appears unappealing).

105. Heinze, *supra* note 35, at 415.

want to become "guardians of history" themselves, while demonizing memory law advocates for their faulty victim-based history. On the other hand, a more neutral approach, one that genuinely views history as something anyone can do, may be more successful at defending protecting academic freedom.[106]

Lastly, one can object to memory laws on political grounds. The political approach lets one distinguish between good (or tolerable) universal memory laws (in which the state punishes the denial of its own crimes) from "bad" particularistic memory laws (in which the state punishes those who minimize the harms against the national community). The political approach also highlights the harm memory laws pose for international relations. At the same time, however, attempts to distinguish "good" from "bad" memory laws run into questions of Orientalism as well as how to evaluate otherwise good laws that rehabilitate bad people. Finally, will political objections matter where they are most important—within the country enacting the "bad" memory laws? In this regard, the other two objections (free speech and official history) may be more politically persuasive even as they are less analytically precise.

In another sense, the politics behind memory laws is indispensable. The explosion of memory laws owes much to a global surge in nativism, one expressed not only in memory laws but also in laws intended to preserve national identity in the present. Often these laws govern some aspect of immigration. To understand these laws, and the surrounding political climate that creates them, we should expand our discipline to incorporate the literature of ethnicity and national identity, with an emphasis on how nations use law to regulate national identity. Doing so will increase the chances of replacing the current turn toward the past with an "insurgent" (or resurgent) universalism capable of pushing back against the age of Trump and Putin.

106. Here I have in mind both Ravitch's open mindedness as to what history is, see RAVITCH, *supra* note 66, as well as Reuel Schiller's focus on educating the potential consumers of history. These approaches seem more likely to win converts than the historians of *Liberté pour l'Histoire*.