ARE HOLOCAUST DENIAL LAWS AND CRITICAL RACE THEORY BANS THE SAME?

Rob Kahn[*]

ABSTRACT

Florida's education rules list Holocaust denial and critical race theory ("CRT") as "theories that distort the past." This is not a fair comparison. Holocaust denial laws and CRT bans are analytically distinguishable. Holocaust denial laws were originally intended to fight hate, and this is the only reason they might be legitimate today. By contrast, CRT bans, for all their well-meaning language about protecting children from race-based accusations of guilt, intend to silence the past. Indeed, the CRT bans are uncannily similar to the laws used in Turkey to ban discussion of the Armenian Genocide in schools. While one might reject both sets of bans on free speech grounds, when the focus shifts from criminal law to educational policy there is world of difference between countering hate speech by restricting Holocaust denial in the classroom and the silencing of history by CRT bans.

[*] University of St. Thomas, B.A. Columbia College, Columbia University; J.D. New York University; PhD Johns Hopkins University (Political Science); Professor of Law, St. Thomas University, Minneapolis, Minnesota. A version of this paper was presented at the Second Annual Conference on Law and Antisemitism in Portland Oregon, in March 2023. I would like to thank Grazyna Baranowska, Anna Pingen, Lili Levin, Joel Nichols, David Grenardo, Mariana Hernandez Crespo Gonstead, and Jacqueline Baronian for listening to me discuss these issues and providing helpful comments.

I. INTRODUCTION

Florida Administrative Code states, "Examples of theories that distort historical events and are inconsistent with State Board approved standards include the denial or minimization of the Holocaust, and the teaching of Critical Race Theory."[1] The juxtaposition of Holocaust denial and "Critical Race Theory" begs the question: Do these concepts belong together? Are critical race theory bans and Holocaust denial bans the same?[2] Can one oppose CRT bans and not oppose Holocaust denial laws?

I conclude that Holocaust denial laws and CRT bans are different. Holocaust denial was historically, and often still is, a form of hate speech.[3] Countries might debate whether it is legitimate (or wise) to punish expressions of Holocaust denial with criminal sanctions,[4] to oppose it as a form of hate speech, or counter it through education and

1 Danielle Lucksted, *Memory Laws, Mnemonic Weapons: The Diffusion of a Norm Across Europe and Beyond*, 15 MEMORY STUD. 1449, 1459 (2021).

2 Critical Race Theory is a diverse set of ideas, not always targeted or even defined by critical race theory bans. To highlight this difference, the article uses "Critical Race Theory" to refer to the set of ideas and "CRT bans" to refer to the bans that target critical race theory.

3 *See* Rob Kahn, *Free Speech, Official History, and Nationalist Politics: Toward a Typology of Objections to Memory Laws*, 31 FLA. J. INT'L L. 33, 35-88 (2019) (explaining why Holocaust denial is usually hate speech); *see also* Eran Fish, *Memory Laws as a Misuse of Legislation*, 54 ISR. L. REV. 324, 326 (2021) (describing Holocaust denial as coded hate speech).

4 *See, e.g.*, Emanuela Fronza, *Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609, 611, 621-22 (2006) (opposing sanctions on Holocaust denial).

regulatory mandates in school lesson plans,[5] but, generally speaking, Holocaust denial spreads hate in spite of those efforts.[6]

CRT bans are different. Critical race theory, which began in the 1990s, asserts that the United States was and still is systemically racist,[7] and that the white majority only yields rights to people of color when it benefits them to do so.[8] In the name of banning critical race theory, opponents take two main approaches. Some CRT bans list a set of "divisive concepts" that school teachers and administrators are forbidden to use.[9] For example, the 2022 Virginia Executive Order banning "divisive concepts" includes expressions of the idea that the United States is "endemically," "fundamentally," or "inherently" racist.[10] The laws also, whether or not they rely on a list of banned concepts, target speech that blames members of a specific racial, ethnic, religious, or other group for past crimes committed by members of that group.[11]

Although some CRT bans also contain provisions punishing assertions that a given race, ethnicity, sex, or gender is inherently

5 *See infra* Part II.

6 Deborah Lipstadt said this in 1993; thirty years later, she is still right. *See* DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 32 (1993).

7 Nicholas Daniel Hartlep, Critical Race Theory: An Examination of Its Past, Present, and Future Implications 6 (Oct. 11, 2009) (Master's Thesis, University of Wisconsin at Milwaukee) (describing the five major tenets of critical race theory).

8 *Id.* at 7-8 (describing the idea of interest convergence); *see also* Lori Latrice Martin, *Black Out: Backlash and Betrayal in the Academy and Beyond*, 13 J. ACAD. FREEDOM 1, 5 ("Critical race theory . . . was used as a catchall term to describe anything related to understanding the causes and consequences of a racialized system in America that reaps benefits for white people while placing Black and other nonwhite people in a feedback loop of violence, disadvantage and despair.").

9 It is not the intention of this paper to categorize all laws passed under the banner of CRT bans. To the extent a given CRT ban does not have the features listed below, it might raise different questions.

10 *See, e.g.*, Commonwealth of Virgina Office of the Governor, Ending the Use of Inherently Divisive Concepts, Including Critical Race Theory, and Restoring Excellence in K-12 Public Education in the Commonwealth, Executive Order No. 1 (Jan. 15, 2022), https://www.governor.virginia.gov/media/governorvirginiagov/governor-of-virginia/pdf/eo/EO-1-Ending-the-Use-of-Inherently-Divisive-Concepts.pdf [perma.cc/JQ2W-KU9Y] [hereinafter Virginia Executive Order].

11 *Id.* Some CRT bans go further and also punish speech that might cause a student emotional discomfort. *See* JAMES COPLAND, MANHATTAN INST., HOW TO REGULATE CRITICAL RACE THEORY IN SCHOOLS: A PRIMER AND MODEL LEGISLATION 8-9 (2021), https://manhattan.institute/article/how-to-regulate-critical-race-theory-in-schools-a-primer-and-model-legislation [https://perma.cc/7LRZ-LGQ4] (describing Tennessee's CRT ban).

superior or inferior,[12] the purpose of CRT bans is not to counter racism or to fight hate. Rather, the bans assume a link between the past and present and silence discussions *about the racist nature of* the past to tamp down on present conversations about race. The italicized words are crucial; CRT ban supporters vigorously insist that they do not forestall conversations about slavery or segregation.[13] Rather, CRT ban proponents seek to prevent students from drawing "revolutionary conclusions" from this history.[14]

Critical race theory bans, in other words, seek to silence the past in order to preserve the present status quo, which parallels Turkey's implementation of laws and educational policies that seek to silence discussion of the Armenian Genocide.[15] In both instances, the function of these policies is to minimize discussion about ethical and moral responsibly for past wrongdoing,[16] often at great cost to members of the group whose past trauma is being denied.[17] This silencing quality distinguishes CRT bans from Holocaust denial laws.

The rest of this Article develops these points. The argument unfolds as follows. Part II discusses the history and rationale of Holocaust denial laws. As a historical matter, Holocaust denial prosecutions and the blanket bans on Holocaust denial that followed were aimed at countering hate speech. As a doctrinal matter, countering hate speech is the best rationale for justifying these laws (assuming they are justifiable at all).[18] Part III discusses CRT bans. While CRT bans present themselves as protecting children from unfair assertions of guilt, and similar harms, the laws in fact serve to comfort the majority culture by silencing an unpleasant past. CRT bans' methods are similar to Turkey's silencing of the Armenian Genocide to make ethnic

12 *See, e.g.*, Virginia Executive Order, *supra* note 10, at 4 (describing claims of "inherent superiority" based on "race, skin color, ethnicity, sex, or faith" as an "inherently divisive" concept).

13 *Id.*; *see also* Christopher F. Rufo, *Critical Race Theory: What It Is and How to Fight It*, 50 IMPRIMIS 1, 4 (Mar. 2021) (accepting slavery and segregation as historical facts).

14 Rufo, *supra* note 13, at 3.

15 *See* Rudi Sayat Pulatyan, Which Armenianness? The Armenian Youth of Turkey and Their Sense of Identity and Belonging (July 7, 2021) (Master's thesis, Sabanci University), https://research.sabanciuniv.edu/id/eprint/42427/ [https://perma.cc/3AN4-DEQV].

16 Rufo, *supra* note 13; Pulatyan, *supra* note 15, at 78-79 (describing ethical duties).

17 Pulatyan, *supra* note 15, at 77 (describing impact on student faced with genocide denial material in school textbook).

18 *See infra* Part II.

Turks feel comfortable.[19] The Conclusion briefly addresses freedom of speech. Under robust free speech jurisprudence in the United States, Holocaust denial bans *and* CRT bans are likely unconstitutional.[20] However, this should not obscure key differences between Holocaust denial and the speech targeted by CRT bans. We may tolerate speech we hate, but this does not mean all speech we tolerate is the same.[21]

II. HOLOCAUST DENIAL BANS EXIST TO FIGHT HATE

As a historical matter, the initial impetus for Holocaust denial laws stemmed from a felt need to counter the hate spread by Holocaust denial.[22] Moreover, the most convincing defense of Holocaust denial bans rests on the idea that denial, when worth punishing, is a form of hate speech.[23] This distinguishes Holocaust denial laws from CRT bans.

A. Hate Speech and the Historical Basis of Holocaust Denial Laws

The early prosecutions of Holocaust denial and civil lawsuits brought by survivors against Holocaust deniers were motivated either by direct experience with hate speech or by its impact on the dignity of Holocaust survivors.[24] With the possible exception of Germany, which will be discussed later,[25] Holocaust denial laws did not seek "mnemonic security," the idea that the state seeks to enhance its well-being by controlling the past.[26] Instead, the laws emphasized the harm that Holocaust denial posed to survivors and others.[27]

Early cases bear this out. In Germany, cases were brought under Section 130 of the Penal Code, which punishes hate speech,[28] and Section 185, which punishes insulting speech.[29] In 1979, the Federal

19 *See infra* Part III.

20 *See infra* Conclusion.

21 *See infra* Conclusion.

22 *See infra* Part II(A).

23 *See infra* Part II(B).

24 ROBERT A. KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY 2-4 (2004).

25 *See infra* notes 45-62 and accompanying text.

26 Uladzislau Belavusau, *Final Thoughts on Mnemonic Constitutionalism*, VERFASSUNGSBLOG (Jan. 15, 2018), https://verfassungsblog.de/final-thoughts-on-mnemonic-constitutionalism/ [https://perma.cc/2RSL-PR6N].

27 KAHN, *supra* note 24, at 3-6.

28 *Id.* at 21.

29 *Id.* at 15-19.

Supreme Court, interpreting Section 185, described Holocaust denial as a "direct attack" on the "self-conception" of those singled out as Jews during the Holocaust,[30] a formulation that further reinforced the connection between Holocaust denial, the dignity of survivors, and the fight against antisemitism. In 1983, Canadian Holocaust survivors sued Toronto-based Holocaust denier Ernst Zundel under the Canadian False News Law for knowingly disseminating false news in a pamphlet titled *Did Six Million Really Die?*[31] In France, Holocaust survivor groups used Section 1382 of the Civil Code, a general tort provision that holds professionals responsible for failing to act according to established norms, to successfully claim that French Holocaust denier Robert Faurisson failed in his duty as a historian by falsifying history.[32] Finally, in Los Angeles, Mel Mermelstein, a survivor of Auschwitz, took up a $50,000 offer from the Institute for Historical Review ("IHR"), a Holocaust denial group based in California, for evidence that Jews were gassed at Auschwitz.[33] Mermelstein provided the required evidence and sued the IHR for breach of contract after it failed to give him $50,000.[34] While the case settled out of court, Mermelstein won a motion in which the court took judicial notice of the Holocaust.[35]

One might object that the False News Law, the falsifying history charges, and the judicial notice motion in Mel Mermelstein's case hinged on the factual truth of the Holocaust. If so, perhaps the cases were about "mnemonic security" after all. At the same time, however, the early cases often hinged on the racist and antisemitic content of Holocaust denial. For example, the Zundel trials focused on a book titled *The Hitler We Loved and Why*, which Zundel wrote under a pseudonym.[36] As the title shows, early Holocaust denial was interwoven with antisemitism. And while some deniers merely minimized the

30 *Id.* at 18, 160-61.

31 *Id.* at 36. The False News Law was later held unconstitutional. *Id.* at 95.

32 *Id.* at 33-37 (describing falsifying history civil litigation).

33 KAHN, *supra* note 24, at 22-31.

34 *Id.* at 23.

35 *Id.* at 28.

36 The book was used for cross examination purposes when Zundel took the stand in his own defense. *Id.* at 86. It formed the centerpiece of the prosecution's strategy at his second trial. *Id.*

number of victims who died in the Holocaust,[37] others described the Holocaust as a "hoax," and placed the blame on Jews or Zionists.[38]

The passage of Holocaust denial bans in France and Germany highlights the concern with fighting racism and antisemitism. Generally speaking, the countries' denial bans grew out of prosecutions that faltered in one way or another. The historical argument is strongest in the case of France, where the trial and appellate courts had difficulties with the civil tort claim brought against Robert Faurisson, a French academic and prominent Holocaust denier.[39] While Faurisson was found liable, the trial court struggled to conclude that he had falsified history—as opposed to failing in his obligations as a historian[40]—and the appeals Court rejected accusations that Faurisson's "work" was "frivolous," preferring to focus on the inappropriate way he reduced his research to "political slogans."[41]

This trial led to enactment of the 1990 French Gayssot Law, which prohibited questioning the Holocaust.[42] The law helped civil rights groups and survivor associations sue deniers, but it also reflected a larger concern with the growing power of Jean Marie Le Pen and his far-right National Front party.[43] For Socialist Justice Minister Pierre Arpaillange, Holocaust denial had a "racist resonance," adding that racism was not an "opinion" but "aggression."[44] Meanwhile, the United Nations Human Rights Committee, rejecting Faurisson's free speech claim, described Faurisson's "statements" denying the Holocaust when "read in their full context" as being "of a nature as to raise or strengthen anti-Semitic feelings."[45]

The origins of Germany's 1994 Holocaust denial ban were different. German courts never had a problem with taking judicial notice of the Holocaust.[46] The question that German courts struggled with was *who* denial harmed, especially under its insult laws. Who had standing to be insulted by Holocaust denial? Holocaust survivors?

37 *Id*. at 114 (describing a case where a defendant was charged under the French Holocaust denial law for a poster stating "Auschwitz, 125,000 deaths").

38 *Id.* at 17-19 (describing the "Zionist Swindle Case").

39 KAHN, *supra* note 24, at 34-37.

40 *Id.* at 34-35.

41 *Id.* at 37.

42 *Id.* at 105-08. The law was named after Jean-Claude Gayssot, a Communist parliament member who proposed the law. *Id*. at 105.

43 *Id.* at 102-04.

44 *Id*. at 106.

45 Human Rights Committee, Views on Commc'n No. 550/1993, U.N. Doc. CCPR/C/58/D/550/1993, at 9.6 (Nov. 8, 1996).

46 *See* KAHN, *supra* note 24, at 21-22.

Jews? What if a person was part-Jewish? German courts reached different conclusions, with one court relying on the Nazi Nuremburg Laws to determine who had standing.[47] This decision led to discomfort for many and in 1985, Germany enacted a law giving the public prosecutor standing in cases involving National Socialist crimes (as well as Soviet crimes in Germany and Eastern Europe).[48]

In June 1994, when a wave of right-wing extremism fanned lingering suspicions about the democratic bona fides of a reunited Germany, the Federal Supreme Court began to answer those questions.[49] The Federal Supreme Court held that bare Holocaust denial (e.g., denial unsupported by other evidence of antisemitism) was not hate speech under Section 130.[50] The case involved Günter Deckert, head of the far-right National Democratic Party. Deckert translated a speech of Massachusetts Holocaust denier Fred Leuchter in a closed-door meeting in Baden-Wurttemberg, which was recorded by a journalist.[51] The Federal Supreme Court remanded the case to the Mannheim District Court to assess whether the speech, or Deckert's translation of it, constituted hate speech.[52]

In response to this decision, the conservative ruling coalition proposed a law punishing denial or trivialization of the Holocaust with jail time.[53] In September 1994, the Mannheim District Court, in an opinion by Judge Rainer Orlet, found Deckert guilty but suspended his sentence. Deckert, according to the judge, could have accomplished his aim—"to ward off 'the claims still raised against Germany a half-century after the Holocaust'"—by highlighting "the long time since the period of the National Socialist persecution of the Jews, the extent of the German acts of reconciliation already brought forth and the unatoned and unregretted mass crimes of other peoples."[54] Judge Orlet also noted how Germany was "fifty years after the war's end . . . set upon by a wide-reaching claims of a political, moral, and financial

47 *Id.* at 17-18.

48 Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 188 (2006) (describing circumstances of the passage of the 1985 law); *see generally* Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz" – and Other – "Lies"*, 85 MICH. L. REV. 277 (1986).

49 KAHN, *supra* note 24, at 70-71 (describing concerns about right-wing and anti-foreigner violence in the early 1990s).

50 *Id.* at 71.

51 *Id.* at 70.

52 *Id.*

53 *Id.* at 71-72.

54 *Id.* at 72.

type arising out of the persecution of Jews."[55] The resulting scandal, which saw the judge accused of creating an "instruction manual" for the far right,[56] all but assured the passage of the law.

On one level, the German Holocaust denial law is even more clearly linked to hate speech than the French Gayssot Law. The 1994 Federal Supreme Court ruling suggested that bare Holocaust denial was not hate speech; the 1994 law reassured the world that it was. The 1994 law, in this regard, was similar to the position taken by Justice Clarence Thomas in *Virginia v. Black*,[57] who argued that all cross-burning is done with an intent to intimidate and, as such, can be criminalized without violating the First Amendment.[58] This reflects the idea, well stated by Judith Butler, that an expression—be it a burning cross or Holocaust denial—can take on a symbolic meaning of its own.[59] In this way, Holocaust denial became a symbol of hate, just like cross burning in the United States.[60] One can disagree over whether a liberal society should ban such speech, but at least the state's motive was clear.

Yet this is not the entire story. During the Deckert scandal, as civil jurors refused to sit with "Nazi judges" and Judge Orlet was placed on sick leave and then forced into retirement,[61] an opinion piece ran in the *Frankfurter Allgemeine Zeitung*. It argued that if Deckert and the Holocaust deniers were right, "the Federal Republic was founded on a lie," a lie that encompassed "every Presidential talk, every minute of silence and every history book."[62] Thus, the motivation behind forcing Judge Orlet into retirement was not only to fight hate, but also to preserve the good name of the Federal Republic.

As we shall see, some scholars view the German Holocaust denial law as a classic example of a state-inculpatory memory law, a situation

55 KAHN, *supra* note 24, at 72.

56 *Id.*

57 Virginia v. Black, 538 U.S. 343, 388-400 (2003) (Thomas, J., dissenting).

58 For an overview of this argument, 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*, 35 STUD. L., POL. & SOC'Y 75 (2006).

59 *See* JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE, 43-70 (1997) (describing the meaning of the burning cross in the context of *R.A.V. v. St. Paul*, 505 U.S. 377 (1992)).

60 *See* Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, *supra* note 48, at 194.

61 KAHN, HOLOCAUST DENIAL AND THE LAW, *supra* note 24, at 73-77.

62 *Id.* at 73 (citing Patrick Bahners, *Objektive Selbstzerstörung*, FRANKFURTER ALLGEMEINE ZEITUNG, Aug. 15, 1994).

in which the state punishes denial of its own human rights abuses.[63] What was just described in the previous paragraph, however, is somewhat different. Certainly, Germany aimed to admit its past crimes. But it sought to show the world that it had moved beyond the National Socialist past. To that extent, Germany's 1994 Holocaust denial law was at least partially self-exculpatory; it attempted to repair the damage to Germany's international reputation from the Deckert affair by showing that Germany cared about the Holocaust.

By and large, however, France and Germany's Holocaust denial laws were aimed at hate speech. The French law responded to the rise of Jean Marie Le Pen and the difficulty of prosecuting Robert Faurisson without allowing him to put the Holocaust on trial. The German law sought to clarify that, even in reunified Germany, Holocaust denial was a form of hate speech, even when unaccompanied by words like "hoax" or "lie." The early Holocaust denial prosecutions and laws fought hate. For a CRT ban to be comparable to a ban on Holocaust denial, it ought to counter hate as well.

B. Hate Speech and the Doctrinal Legitimacy of Holocaust Denial Laws

During the late 2010s, Humanities in the European Research Area ("HERA") granted a group of scholars €1.2 million to study memory laws.[64] The grant, titled Memory Laws in Comparative and European Context ("MELA"), led to a series of scholarly conferences. At a 2019 meeting in Brussels, MELA issued its Model Declaration on Law and Historical Memory, with an accompanying set of Explanatory Comments.[65] These documents sought to describe when memory laws are appropriate.[66] MELA generally views memory laws negatively

63 Eric Heinze, *Should Governments Butt Out of History?*, FREE SPEECH DEBATE (Mar. 12, 2019), https://freespeechdebate.com/discuss/should-governments-butt-out-of-history/ [perma.cc/L5JH-BZML].

64 The main scholars behind the grant were Eric Heinze, Uladzislau Belavusau, Aleksandra Gliszczyńska-Grabias, Emanuela Fronza, Nanor Kebranian, Grazyna Baranowska, Leon Castellanos-Jankiewicz, Paolo Caroli, Marina Bán, Anna Wójcik, and Cris van Eijk. *See Team Members*, MELA, https://melaproject.org/team/ [perma.cc/48BR-TJHD] (last visited Sept. 15, 2023).

65 *Model Declaration on Law and Historical Memory*, MELA (Feb. 7, 2019), https://drive.google.com/file/d/1cxrVoAE4FW3mj4Sn8XinbelAbhIaBI6C/.

66 *Explanatory Comments to the Model Declaration on Law and Historical Memory*, MELA, [hereinafter *Explanatory Comments*] https://drive.google.com/file/d/1qAtoTVczB18latL5NfuoaMZ9vMJL899D/view [https://perma.cc/VX5F-H4H5] (last visited Sept. 22, 2023). I attended several

because they restrict freedom of speech, hamper academic research, and establish an official history that ordinary citizens cannot challenge.[67] But when it comes to Holocaust denial bans, the group takes a more neutral stance.[68] The connection between Holocaust denial and hate speech best explains this.

To show that the unique connection between Holocaust denial and hate speech requires a different perspective, I first present a brief overview of memory law scholarship, focusing on the work produced by MELA.[69] I then reject two unconvincing explanations for why some MELA scholars have a soft spot for Holocaust denial laws, which are (1) that Holocaust denial bans uniquely target false facts, and (2) that Holocaust denial bans are state-inculpatory.[70] I argue that the best explanation for MELA's decision not to condemn Holocaust denial laws comes from an underlying sense that—at least in some instances—Holocaust denial constitutes hate speech or spreads hate speech.[71]

1. Types of Memory Laws

While some scholars use the phrase "memory law" to refer to laws that impose criminal penalties for statements about the past, it is useful to divide memory laws into three categories: punitive, regulatory, and commemorative.[72] As we shall see, most CRT bans are

MELA meetings as an affiliated scholar, including the Brussels 2019 meeting during which the Model Declaration and Explanatory Comments were unveiled.

67 Kahn, *supra* note 3, at 34 (noting that critics allege that memory laws "violate freedom of speech," "create an official history," and sometimes "foster a narrow, particularistic politics"); Heinze, *supra* note 63 (opposing state-exculpatory memory laws on similar grounds).

68 *Team Members*, *supra* note 64.

69 *See infra* Part II(B)(1). The scholarship on memory laws is voluminous. *See, e.g.*, NIKOLAY KOPOSOV, MEMORY LAWS, MEMORY WARS: THE POLITICS OF THE PAST IN EUROPE AND RUSSIA (2017); LAW AND MEMORY: TOWARDS LEGAL GOVERNANCE OF HISTORY (Uladzislau Belavusau & Aleksandra Gliszczyńska-Grabias eds., 2017); Uladzislau Belavusau, *Law and the Politics of Memory*, *in* HANDBOOK ON THE POLITICS OF MEMORY 65 (2023); George Soroka & Félix Krawatzek, *When the Past Is Not Another Country: The Battlefields of History in Russia*, 68 PROBS. POST-COMMUNISM 353 (2021). Let me add that not all scholars writing on memory laws are affiliated with MELA or necessarily share the values of the Model Declaration and Explanatory Notes. That said, MELA-affiliated scholars play a prominent role in the field.

70 *See infra* Part II(B)(2).

71 *See infra* Part II(B)(3).

72 *See* Heinze, *supra* note 63 (addressing the power of regulatory memory laws to cause harm).

regulatory—they do not impose prison time,[73] but they do more than merely commemorate. Instead, CRT bans impose administrative penalties on teachers and school districts that refuse to abide by the ban.[74] Regarding Holocaust denial, however, the debate concerns punitive memory laws (i.e., the laws with criminal penalties).

Memory laws also differ based on content. Nikolay Koposov, in his influential book, *Memory Laws, Memory Wars: The Politics of the Past in Europe and Russia*, distinguishes between *universal* and *particularistic* memory laws.[75] In the name of advancing human rights, a universal memory law seeks to ban the denial of previously committed crimes.[76] A universal memory law could ban a crime for which the state is directly responsible (such as Holocaust denial bans implemented by the perpetrator and collaborator states), but it could also consist of a general ban on denial of genocide or crimes against humanity. For example, Germany now bans denial of all genocides.[77] This is not because of a specific past but because of a general commitment to protecting international human rights.[78] By contrast,

73 There have been some close calls. For example, Kentucky legislators modified a proposed bill that would have exposed classroom teachers to five-year prison sentences for violating the proposed CRT ban. Jess Clark, *Ky. Lawmakers Say They've Fixed a Bill that Could Have Sent Teachers to Jail for Classroom Speech*, LOUISVILLE PUBLIC MEDIA (Apr. 14, 2022, 11:22 PM), https://www.lpm.org/news/2022-04-14/ky-lawmakers-say-theyve-fixed-a-bill-that-could-have-sent-teachers-to-jail-for-classroom-speech [https://perma.cc/V5GM-3EFX].

74 For example, Texas House Bill 1607, which would ban the teaching of CRT in state colleges and universities, would make an institution that violates the rules ineligible to receive state funds. *See* H.B. 1607, 2023 Leg., 88th Sess. (Tex. 2023); *see also* Sarah Berger, *Proposed Bill Could Ban Critical Race Theory from Texas Universities*, THE DAILY TEXAN (Feb. 13, 2023), https://thedailytexan.com/2023/02/13/proposed-bill-could-ban-critical-race-theory-from-texas-universities/ [perma.cc/Q43K-BC38] (noting that 23% of the University of Texas budget comes from state sources). Likewise, Florida teachers who run afoul of Florida's new Stop W.O.K.E. Act face job termination and school districts risk losing performance-based state funding. *See* John R. Vile, *Stop W.O.K.E. Act (Florida) (2022)*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/2167/stop-w-o-k-e-act [perma.cc/3FQM-X537] (Aug. 10, 2023). The punishments show that CRT bans are more than simple commemorative acts, even if the penalties fall short of criminal punishment.

75 KOPOSOV, *supra* note 69, at 6-9.

76 *Id*.

77 Strafgesetzbuch [StGB] [Penal Code], § 130(2)(5), https://www.gesetze-im-internet.de/stgb/__130.html [https://perma.cc/T45B-Y97X] (Ger.).

78 Indeed, Germany acted under a 2008 European policy to fight racism by enacting laws on genocide denial. *See* Lisa Hänel, *Germany Criminalizes Denying War Crimes, Genocide*, DW, (Nov. 25, 2022) https://www.dw.com/en/germany-criminalizes-denying-war-crimes-genocide/a-63834791 [https://perma.cc/7Q3H-K9XQ].

particularistic memory laws focus on the state's own history and enshrine moments of special importance.[79] For example, an Eastern European state like Poland might punish denial of past Soviet crimes committed against it.[80] A state enacting a particularistic memory law is not promoting its commitment to a universal regime of human rights; instead, it is protecting the story of its victimhood.[81]

The universal vs. particularistic paradigm has limits. Consider Russia's 2014 law punishing those who claim the Red Army made mistakes during World War II.[82] Because the Red Army was Soviet, not Russian, George Saroka and Félix Krawatzek argue that the law was less a particularistic, defensive, Russian history than an assertion of an imperial, neo-Soviet identity.[83] In addition, Koposov's scheme does not entirely distinguish between state-inculpatory and state-exculpatory memory laws. Some particularistic memory laws are state-exculpatory, like Ukraine's law banning criticism of Ukrainian partisans who fought in World War II[84] or Turkey's state-mandated denial of the Armenian Genocide.[85] But other particularistic memory laws are neutral when it comes to the enacting state's responsibility—for example, Germany's inclusion of Soviet crimes in its 1985 Holocaust denial law falls into this category.[86]

79 KOPOSOV, *supra* note 69, at 10.

80 *Id*. at 160-76 (describing passage of laws in Eastern Europe criminalizing the communist past).

81 *See* Belavusau, *Law and the Politics of Memory*, *supra* note 69, at 10 (describing how "recent memory politics in Europe and elsewhere have been largely driven by dystopian visions of a dark past populated with unimpeachable heroes fighting for independence and victims of atrocities perpetuated by cruel regimes imposed by foreign oppressors").

82 The law, known as the Yarovaya Act, punishes the "dissemination of knowingly false information on the activities of the USSR during World War II." KOPOSOV, *supra* note 69, at 10 (quoting the Act); *see also id*. at 247-99 (describing the cult of World War II and the passage of the Yarovaya Act).

83 Soroka & Krawatzek, *supra* note 69, at 359-60 (tracing the memory law to the construction of a larger Russian civilizational/Soviet identity based on empire, rather than the nation-state).

84 KOPOSOV, *supra* note 69, at 177-206 (describing Ukrainian memory laws).

85 *Id.* at 309 (noting similarities between Russia's memory laws and article 301 of the Turkish penal code).

86 *See* Kahn, *supra* note 48. In this regard, the three-tiered division proposed by Eva-Clarita Pettai is helpful. She divides memory laws into three categories: (1) laws that target hate speech, (2) post-communist memory laws, and (3) anti-liberal memory laws. *See* Eva-Clarita Pettai, *Protecting Memory or Criminalizing Dissent: Memory Laws in Lithuania and Latvia*, *in* MEMORY LAWS AND HISTORICAL JUSTICE: THE POLITICS OF CRIMINALIZING THE PAST 167 (Elazar Barkan & Ariella Lang eds., 2022).

Memory laws can also—as noted—be characterized as either state-inculpatory or state-exculpatory memory laws.[87] A state-inculpatory memory law punishes the denial of the enacting state's own crimes—in theory, this would include Germany's Holocaust denial laws.[88] A state-exculpatory memory law, by contrast, hides or silences discussion of the crimes the state has committed.[89] While many state-exculpatory memory laws—like Russia, Poland, and Ukraine's—are recent,[90] Turkey's longstanding state-mandated denial of the Armenian Genocide fits into the state-exculpatory category as well.[91] The inculpatory vs. exculpatory distinction features prominently in MELA's 2019 Model Declaration and the arguments of MELA scholars.[92] MELA scholars agree that state-exculpatory bans are far more threatening to free expression than state-inculpatory bans.[93]

Meanwhile, the memory law community struggles to vigorously oppose France and Germany's Holocaust denial laws. For example, in 2010, French historian Pierre Nora expressed hesitation about repealing the Gayssot Law while addressing a conference arranged by *Liberté pour l'Histoire*, an organization that is generally opposed to memory laws.[94] Likewise, Holocaust denial expert Deborah Lipstadt, while extolling the values of free speech in general, expressed her understanding of France, Germany, and Austria's Holocaust denial bans, which she compared to Southern U.S. states banning Ku Klux Klan

87 *See* Heinze, *supra* note 63.

88 *Id.*

89 *Id.*

90 While neither Heinze nor the MELA Explanatory Comments single out Russia, Poland, or Ukraine directly, many MELA-affiliated memory law scholars take a critical view of these states' laws. *See, e.g.*, Uladzislau Belavusau, Aleksandra Gliszczyńska-Grabias & Maria Mälksoo, *Memory Laws and Memory Wars in Poland, Russia and Ukraine*, 69 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 95 (pre-publication English language manuscript available at https://kar.kent.ac.uk/88586/ [https://perma.cc/VE2H-4J7D]) (noting the potential of these laws "in deepening conflicts, historical feuds, and ethnic and national tensions").

91 *See* Heinze, *supra* note 63 (describing Turkey's memory laws as state-exculpatory).

92 *Model Declaration on Law and Historical Memory*, *supra* note 65.

93 *Explanatory Comments*, *supra* note 66, ¶ 9; Heinze, *supra* note 63.

94 *See* Robert A. Kahn, *Does It Matter* How *One Opposes Memory Bans? A Commentary on Liberte Pour L'Histoire*, 15 WASH. U. GLOB. STUD. L. REV. 55, 76 (noting that opposing the Gayssot law might "authoriz[e]" or "encourage[e]" Holocaust denial).

symbols.[95] What accounts for this reluctance to repeal Holocaust denial laws?

2. Arguments from Truth and the State-Inculpatory Bonus

One explanation for the reluctance to repeal Holocaust denial laws is raised by Eran Fish, who argues, as a threshold matter, that democratic states should not enact memory laws because democratic legislatures should not "influence . . . how the past is remembered."[96] Fish exempts the Holocaust denial bans from this limitation, however, because—as described by the European Court of Human Rights in *Garaudy v. France*—the events of the Holocaust are "clearly established facts."[97] Therefore, laws like the French Gayssot Law are more acceptable because they "are not assumed to be an attempt to settle a serious controversy, or to suppress some bona fide challenge to the accepted version of history."[98]

In making this argument, Fish relies on a narrow conception of truth, and what constitutes a "bona fide challenge to the accepted version of history."[99] Consider that Deborah Lipstadt, in the subtitle to her 1993 book, refers to Holocaust denial's "growing assault on truth and memory."[100] What makes this "assault" not "bona fide?" Alternatively, consider the Turkish denial of the Armenian Genocide. Reputable historians from around the world accept the Armenian Genocide as a historical fact, as do many scholars in Turkey.[101] Despite near universal recognition, the Turkish government has instituted a wide-ranging set of rules that deny and silence the mass murder of

95 Robert A. Kahn, *Holocaust Denial and Hate Speech*, *in* GENOCIDE DENIALS AND THE LAW 77, 93-94 (Ludovic Hennebel & Thomas Hochmann eds., 2011).

96 Fish, *supra* note 3, at 326.

97 *Id*. at 326-27.

98 *Id*. at 326.

99 *Id.*

100 LIPSTADT, *supra* note 6. It is noteworthy that the book focuses on the racist and antisemitic quality of Holocaust denial.

101 Roger W. Smith, Eric Markusen & Robert J. Lifton, *Professional Ethics and the Denial of the Armenian Genocide*, *in* REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE 271, 272 (Richard Hovannisian ed., 1998) (giving an overview of the Armenian Genocide); *see also* Vahakn Dadrian, *The Armenian Genocide: Review of Its Historical, Political, and Legal Aspects*, 5 U. ST. THOMAS J. L. & PUB. POL'Y 135 (2011).

Armenians in Turkey.[102] In *Perinçek v. Switzerland*,[103] the European Court of Human Rights held that Switzerland's genocide denial law, as applied to Armenian Genocide denial, violated freedom of speech, which is protected by Article 10 of the European Charter of Human Rights.[104]

Does this mean that the non-occurrence of the Armenian Genocide is not "clearly established" or that Turkish genocide denial is not intended to suppress a "serious" and/or "bona fide" challenge to received history?[105] If one accepts that the Armenian Genocide *is* a "clearly established fact," the analysis progresses to historical facts that—seriously or not—some contest.[106] More generally, should our opinion about laws punishing those who claim the Soviet Army made mistakes during World War II or that Poles bear complicity for the Holocaust turn on whether, to use Eran Fish's words, these subjects involve a "bona fide challenge to the accepted version of history?"[107]

In the end, the acceptability of memory laws should not center on truth. Distinguishing good from bad punitive memory laws based on truth fails for the same reasons Fish rejects memory laws more generally—legislatures are best at resolving "coordination problems" that require balancing competing interests.[108] Applied to Holocaust denial, Fish's truth-centered argument runs the risk that a society may view the Holocaust as untrue, much as the Holocaust denial litigation of the 1970s and 1980s created the risk that legal proceedings would raise

102 Grażyna Baranowska, *Penalizing Statements About the Past in Turkey*, *in* RESPONSIBILITY FOR NEGATION OF INTERNATIONAL CRIMES 249 (Patrycja Grzebyk ed., 2020).

103 Perinçek v. Switzerland, App. No. 27510/08, (Oct. 15, 2015), https://hudoc.echr.coe.int/eng#{%22ecli%22:[%22ECLI:CE:ECHR:2013:1217JUD002751008%22],%22itemid%22:[%22001-139724%22]} [https://perma.cc/W6H4-HP8W].

104 The court focused on a lack of nexus between the Armenian Genocide and Europe, something that—in the Court's opinion—distinguished it from Holocaust denial. *Id*. at ¶ 117. For a critique of the ruling, see Robert A. Kahn, *Banning Genocide Denial – Should Geography Matter?*, *in* LAW AND MEMORY 329, *supra* note 69.

105 Fish, *supra* note 3, at 326-27.

106 *Id.*

107 *Id.* at 326.

108 *Id.* at 337.

doubts about the Holocaust.[109] There are better ways to distinguish Holocaust denial bans from memory laws.[110]

A second argument regarding the reluctance to challenge Holocaust denial laws asserts that Holocaust denial bans are more justifiable because they are state-inculpatory memory laws. The MELA Explanatory Comments make a point of highlighting the continuing disputes among scholars and jurists about whether a state should be allowed to punish those who seek "to deny, to defend, to excuse, or to glorify" past atrocities, including "bans on Holocaust denial."[111] On this question, MELA "strongly supports continued dialogue" over the "democratic legitimacy and practical utility of such laws," which "pose only a secondary threat to free expression and political participation."[112] Accordingly, MELA seeks "to remain neutral" about such laws.[113]

By contrast, state-exculpatory memory laws pose "far more urgent threats to free expression and political participation" which is why, in MELA's view, "debates about fundamentally state-inculpatory bans, although important, must not furnish pretexts to avoid examination of what are far more dangerous state-exculpatory bans."[114] Thus the Model Declaration forbids governing entities from punishing an "individual or organization" for "accusing any past or present governing entity of having committed acts in violation of international human rights law"[115] or introducing "laws or policies" that "penalise acts of defamation . . . against the nation or national population," and especially those alleging state human rights violations by act or omission.[116] These concerns about state-exculpatory law remain "even if doubts exist as to whether such acts or policies" actually "constituted violations under international law at the time they were committed."[117]

At first glance, this is an ideal way to distinguish Holocaust denial laws from CRT bans. MELA is neutral regarding the legitimacy and

109 *See* KAHN, *supra* note 24, at 89-92 (describing the media coverage of Zundel's first trial and criticisms of it as suggesting denial was plausible).

110 In the interest of fairness, let me add that Fish makes other more persuasive arguments that fit better in the rubric of Holocaust denial as hate speech. *See* Fish, *supra* note 3, at 326-27.

111 *Explanatory Comments*, *supra* note 66, ¶ 9.

112 *Id.*

113 *Id.*

114 *Id.*

110 *Model Declaration on Law and Historical Memory*, *supra* note 65, art. 4.

111 *Id.* art. 4(b).

117 *Id.* art. 4.

wisdom of Holocaust denial bans.[118] At the same time, MELA's Model Declaration forbids punishment for statements that a "past . . . governing entity," "nation" or "national population" committed or failed to prevent human rights abuses, even if such accusations are, in fact, wrong.[119] So even if Florida or Virginia are correct that the United States is not systemically and endemically racist, the laws violate the Model Declaration because the prohibition on state-exculpatory punishments protects mistaken views about the past.[120]

Yet the inculpatory-exculpatory framework has weaknesses. For one thing, while the state-inculpatory bonus is more amenable to regulation, it does not resolve the issue. Indeed, MELA did not come out in support of Holocaust denial laws;[121] rather, it chose neutrality, echoing Pierre Nora's hesitation to condemn the Gayssot Law.[122] Moreover, some leading memory law scholars, such as Uladzislau Belavusau (one of the MELA grant recipients), are critical of Holocaust denial bans.[123] Given scholars' widespread reluctance about approving Holocaust denial laws, one can doubt whether the state-inculpatory concept is sufficient to legitimize Holocaust denial laws.

Assuming the inculpatory-exculpatory framework withstands scrutiny, it faces an empirical difficulty. While a ban might seem state-inculpatory on paper, the state's motives might actually be state-exculpatory.[124] Consider the laws passed by Southern states in the 1940s and 1950s outlawing Ku Klux Klan masks.[125] On one level, these laws

118 Explanatory Comments, *supra* note 66, ¶ 9.

119 *Model Declaration on Law and Historical Memory*, *supra* note 65, art. 4.

120 The same result follows from Eric Heinze's separate commentary supporting the Model Declaration claims: "Even the most zealous free speech advocate must confess that punishing the denials of atrocities that states did commit, if a sin, is a minor one; punishing accusations of atrocities which states insist they didn't commit is altogether more sinister." Heinze, *supra* note 63.

116 Instead, MELA notes the current "disagreements . . . within and among Western democracies" over Holocaust denial laws and calls for "continued dialogue" on the subject. *Explanatory Comments*, *supra* note 66, ¶ 9.

122 Kahn, *supra* note 94, at 92.

123 *See* Uladzislau Belavusau, *Memory Laws and Freedom of Speech: Governance of History in European Law*, *in* COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION 535 (Andràs Koltay ed., 2015) (distinguishing Holocaust denial bans from hate speech laws); Fronza, *supra* note 4, at 623 (opposing punitive sanctions for Holocaust denial).

124 This involves castigating an internal other. *See* Robert Kahn, *Mask Bans as Expressions of Memory Politics in the United States*, (May 8, 2019) at 29, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3434689 [https://perma.cc/QR49-EEPX].

125 *Id.* at 18-22 (describing postwar wave of mask bans).

confronted the Klan's presence by depriving them of their masks, while also taking symbolic notice of the Klan's role in perpetuating racist violence.[126] At the same time, the anti-mask laws sent the message, at a time when southern states were still segregated but facing pressure to change, that the South was modern and civilized.[127] This message was at least partly state-exculpatory: "We reject the Klan, so leave us alone."[128]

Germany's 1994 Holocaust denial ban has a similarly quasi-exculpatory quality. After the *Deckert* case, Germany reassured the world of its stance against Holocaust denial and antisemitism, increasing comfort for Holocaust survivors and Holocaust denial experts like Deborah Lipstadt. Comfort, in turn, is a resource the state can exploit to achieve mnemonic security.[129] It might benefit scholarship to turn focus to *why* Holocaust denial causes discomfort, and *why*, despite it all, we might find it comforting that Germany banned Holocaust denial.

3. Holocaust Denial and Hate Speech

Better than positioning Holocaust denial laws in frameworks centered on the inculpatory-exculpatory divide, the degree of truth, or the scope of the law, I posit that a free society can punish Holocaust denial only to the extent it is hate speech. I have repeated versions of this position for nearly a decade. In 2011, I wrote: "By denying past acts of hatred and violence targeting the victim group, the denier opens the door to future attacks and isolates the victim from the rest of humanity."[130] Three years later, I argued that Holocaust denial was banned because it symbolizes human destructiveness, much like burning crosses and swastikas, whose repeal risked encouraging

126 Indeed, there were rare instances even in the postwar South where mask bans were enacted as a direct counter to Klan violence. *Id.* at 22 (describing the passage of Alabama's mask ban in the aftermath of a Klan attack on an integrated Girl Scout meeting).

127 *Id.* at 18-19.

128 The politics behind the passage of postwar mask bans in the United States supports this. With the exception of Alabama, where there was a grassroots campaign to ban Klan masks, the laws were promoted by Democratic state governors, often on party-line votes for arguably symbolic purposes. *Id.* at 20-21 (describing the politics of mask bans in Georgia where, after years of legislative deadlock, Governor Herman Talmadge enacted a mask ban with a single dissenting vote).

129 *See* Belavusau, *supra* note 26.

130 Kahn, *supra* note 94, at 94.

antisemitism.[131] In 2015, speaking of genocide denial more broadly, I concluded: "[W]hile not every statement of genocide denial is hateful, there is something about the denial of acts of mass murder based on race, religion and ethnicity that distinguishes genocide denial from other types of historical revisionism."[132] Finally, in 2019, I argued that one could counter strong pro-memory law arguments by classifying laws that punished Holocaust denial as "hate speech in disguise," thereby removing them from the scope of memory laws.[133]

The debate between Justices Sandra Day O'Connor and Clarence Thomas in *Virginia v. Black* over whether cross burning is inherently intimidatory may be instructive.[134] At times I want to agree with Justice Thomas that cross burning is one of those communicative acts that acquires a cultural meaning "beyond what outsiders can comprehend."[135] Other times, I am drawn to Justice O'Connor's efforts to characterize individual acts of cross burning as communicative in context. For example, the cross burned at the private wedding of a Klansman and a Nazi party member, however gross, was not necessarily meant to intimidate others.[136] Ultimately, however, I am less interested in the debate than in the underlying consensus—cross burning is punishable only when it intimidates.[137]

My argument is similar to the *Virginia v. Black* consensus. One can ask whether a specific instance of Holocaust denial promotes antisemitism or other forms of hate. This is an empirical question.[138] As in *Virginia v. Black*, the legitimacy of the underlying test ultimately matters most. In *Virginia v. Black*, Justices O'Connor and Thomas agreed that cross burning is punishable (if at all) under the true threats

131 Robert Kahn, *Offensive Symbols and Hate Speech Law, Where to Draw the Line? An American Perspective*, *in* MEDIA FREEDOM AND REGULATION IN THE NEW MEDIA WORLD 441, 456-57 (Andràs Koltay ed., 2014).

132 Robert Kahn, *Can Law Understand the Harm of Genocide Denial?*, *in* DENIALISM AND HUMAN RIGHTS 215, 234 (Roland Moerland, Hans Nelen & Jan C.M. Willems eds., 2016).

133 Kahn, *supra* note 3, at 38.

134 *See* Kahn, *supra* note 58.

135 Virginia v. Black, 538 U.S. 343, 388 (Thomas, J., dissenting).

136 *Id.* at 356-57.

137 *Compare id.* at 359-60 (stating that intimidatory cross burning can be punished under the true threats doctrine), *with id.* at 388 (Thomas, J., dissenting) (agreeing with the majority that the state can ban intimidatory acts without violating the First Amendment).

138 Kahn, *supra* note 131, at 448 (noting the difficulty in determining when a symbol is used in a hateful way).

doctrine,[139] which allows regulation of "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[140]

Viewing Holocaust denial laws through this perspective has four advantages. First, it best reflects MELA-affiliated memory law scholars' sympathies toward Holocaust denial laws. Consider Aleksandra Gliszczyńska-Grabias, one of the scholars funded by the MELA grant.[141] She is a fierce critic of memory laws, especially in Poland, her home country.[142] At the same time, she has consistently supported Holocaust denial laws because of their potential to stir up hate, especially when the victim groups are categorized as "liars."[143] Similarly, Loyola University Chicago School of Law Professor Alexander Tsesis argues that "[t]he denial of the Holocaust fosters antisemitism: Holocaust denial infects public discourse through misinformation with lies that threaten collective memory and glorify racialist murders."[144]

Consider the contrast between Gliszczyńska-Grabias and Tsesis on one hand—who both focus on the harm and misinformation spread by labeling minority groups as "liars"—and Fish, who rests his argument on the basis that the Holocaust is a "clearly established" fact.[145] Tsesis uses very similar language to Fish, describing how, in *Witzsch v. Germany*, the European Court of Human Rights described the Holocaust as "clearly established historical fact."[146] For Tsesis, however, the "clearly established" nature of the Holocaust is not the reason why a state may ban Holocaust denial. Instead, the state may ban such laws because, unlike the Polish memory laws that seek to censor the past,

139 *Black*, 538 U.S. at 359-60; *id.* at 388 (Thomas, J., dissenting).

140 *Id.* at 359.

141 For a list of MELA main scholars, see *Team Members*, *supra* note 64.

142 *See, e.g.*, Aleksandra Gliszczyńska & Michał Jabłoński, *Is One Offended Pole Enough to Take Critics of Official Narratives to Court?*, VERFASSUNGSBLOG (Oct. 12, 2019), https://verfassungsblog.de/is-one-offended-pole-enough-to-take-critics-of-official-historical-narratives-to-court/ [https://perma.cc/9MG4-ALA7] (opposing group libel based memory laws in Poland).

143 Kahn, *supra* note 3, at 37 (quoting Aleksandra Glisczyńska-Grabias, *Law and Memory*, MEMORY L. IN EUR. & COMPAR. PERSP., http://melaproject.org/blog/249 [https://perma.cc/CZR5-QNBX] (last visited Oct. 12, 2023)).

144 Alexander Tsesis, *Genocide Censorship and Genocide Denial*, *in* RESPONSIBILITY FOR NEGATION OF INTERNATIONAL CRIMES 107, *supra* note 102, at 107, 110.

145 Fish, *supra* note 3, at 326.

146 Tsesis, *supra* note 144, at 109.

"genocide denial laws are meant to preserve and accurately portray histories of international mass murders."[147]

Second, the countering hate speech justification best explains Pierre Nora and the MELA scholars' hesitation toward encouraging France, Germany, and Austria to repeal their memory laws.[148] As a logical matter, why did Nora hesitate? Was it because the Holocaust was a clearly established fact needing protection? Or that the Gayssot Law (or the German 1994 Holocaust denial law) was state-inculpatory? Possibly. But is it not more likely that Nora and others feared that repealing France or Germany's Holocaust denial bans would lead to an explosion of hate speech by antisemites, racists, and xenophobes who used Holocaust denial to spread hatred?

Third, the countering hate speech justification undercuts the claim that Holocaust denial laws are a type of secular blasphemy law (a point argued in the 1990s by Eric Delcroix, Faurisson's lawyer),[149] and that Holocaust denial laws create a double standard between the Holocaust and other genocides[150] or between Jews and other groups subject to discrimination.[151] Belavusau makes a similar point when he argues that Holocaust denial laws cannot be justified as symbolic acts of atonement for Jewish suffering.[152] The best counter to these arguments is to limit punishment or regulation of Holocaust denial to situations where it, in fact, operates as hate speech.

Finally, the countering hate speech perspective is especially useful in regulatory settings such as schools, where the question is not jail time but curriculum setting. MELA documents do not address curricula. The Model Declaration protects the right to research but does not mention teaching.[153] The Explanatory Comments likewise concede that memory laws (of a regulatory or commemorative type) can play a role in public education.[154] Indeed, they concede that "primary and secondary educational establishments require generally structured

147 *Id*.

148 *See* Kahn, *supra* note 94.

149 KAHN, *supra* note 24, at 114 (noting Delcroix's description of belief in the Holocaust as "religious" rather than "scientific").

150 *See, e.g.*, Belavusau, *supra* note 123, at 540-41 (describing genocide denial laws as a symbolic acknowledgement of suffering).

151 Thomas M. Keck, *Hate Speech and Double Standards*, 1 CONST. STUD. 95, 101 (2016).

152 Belavusau, *supra* note 123, at 540-41.

153 *Model Declaration on Law and Historical Memory*, *supra* note 65, at ¶ 6.

154 *Explanatory Comments*, *supra* note 66, at ¶ 2(ii).

environments," which means that the "[c]urricular choices for historical education" might "at times not satisfy all parents or citizens."[155]

On one level, the MELA documents state a truth about public education—schools must decide what to teach, and every curricular move leaves someone out. On the other hand, the state-exculpatory prohibition stops at the classroom door. The MELA rules prohibit a state from enacting a self-serving, exculpatory criminal law, such as Turkey's use of laws punishing insults against the Turkish nation to ban assertions that the Armenian Genocide took place.[156] But Turkey could, nevertheless, impose a curriculum that sanitized, denied, or entirely ignored the Armenian Genocide (as indeed it has) without violating MELA's principles.[157] Likewise, in Virginia, Florida, or Texas, MELA rules appear to permit critical race theory bans as a curricular matter.

Yet curricular policies can be enforced with regulatory provisions with quasi-punitive components. As we have seen, Florida's Stop W.O.K.E. Act exposes teachers to firing and exposes school districts to performance-based funding cuts.[158] This type of quasi-punitive regulation falls outside the scope of the MELA documents. By contrast, a countering hate speech approach operates in regulatory settings. Even if schools (and parents) must make curricular choices, Holocaust denial promotes hate and, therefore, can be excluded from the public schools.

Adopting the countering hate speech approach to Holocaust denial does not complete the argument. It is still necessary to argue that CRT bans do not counter hate themselves.[159] But at least comparisons of Holocaust denial laws and CRT bans will not be sidetracked by arguments that Holocaust denial bans establish an official truth or are imperfectly state-inculpatory. The argument is much simpler. Hate has no place in public schools. Holocaust denial policies respond to this principle by targeting hate (even if they do so imperfectly). Can the same be said about CRT bans?

155 *Id*. at ¶ 15.

156 *See* Grażyna Baranowska, *Penalizing Statements About the Past in Turkey*, *in* RESPONSIBILITY FOR NEGATION OF INTERNATIONAL CRIMES 249, *supra* note 144, at 251 (describing the use of Article 301 of the Turkish Penal Code to punish assertions that the Armenian Genocide took place).

157 *See* Pulatyan, *supra* note 15, at 60-62 (describing genocide denialism in Turkish schools).

158 *See* Vile, *supra* note 74.

159 *See infra* Part III.

III. CRT BANS SILENCE THE PAST

A thoughtful supporter of CRT bans might agree with much of Part II, especially the conclusion that hate has no place in public schools. Indeed, they might go further and argue that they, too, are engaged in removing hate by countering the pernicious influence of critical race theory. Do CRT ban supporters have a point? Are CRT bans, like Holocaust denial laws and educational policies, narrowly focused on countering hate speech?

Part III(A) examines the origins of CRT bans and the type of speech they target. While CRT bans often exclude hate speech, it is not their main purpose. Rather, the bans shut down classroom discussions about the role played by race and racism in the United States.[160]

To show the harm this causes, Part III(B) discusses the use of educational policy in Turkey to perpetuate denial of the Armenian Genocide and its impact on Armenian school children in Turkey. Similar to Turkey's educational policy, CRT bans seek to omit particular components of history from curricula, much to the detriment of those whose past is denied.[161]

A. Protecting Sensibilities is not Countering Hate Speech

Do CRT bans counter hate? At least, they seem to counter inadequate teaching. In August 2021, the Manhattan Institute proposed a model CRT ban, which opens with a list of classroom activities that the author finds troubling.[162] For example, third-grade students in Cupertino, California were directed "to 'deconstruct' their racial identities and rank themselves according to their 'power and privilege.'"[163] One might reasonably ask, as a parent, why "deconstruct[ing] racial identities" should be part of a math class. Or, to take a step further, one might posit that ranking students by "power and privilege" promotes hate in the same way that Holocaust denial does. Or, for example, one might say that Virginia's Executive Order targets "divisive concepts," or speech that promotes the idea that one race (or other protected group) is superior to another.[164]

Indeed, critical race theory might lead to memory law enactment. For example, Uladzislau Belavusau argues that critical race theory,

160 *See infra* Part III(A).
161 *See infra* Part III(B).
162 COPLAND, *supra* note 11, at 1-2.
163 *Id.* at 1.
164 Virginia Executive Order, *supra* note 10.

like Germany with the Holocaust, and the nations of central and eastern Europe with Communism, defines racism as a dystopian past against which the nation struggles.[165] Turning efforts to remove Confederate statues, Belavusau decries "a spirit of censorship" that inspired broadcasters to remove "Gone with the Wind."[166] In objecting to this trend, he notes that the Roman Colosseum exploited gladiators and, while "deplorable," "most of the history of our civilization has been marked by crimes against humanity, judged by contemporary standards of Western humanism, liberal democracies, and international law."[167]

So perhaps there is a connection between CRT and Holocaust denial bans. Virginia Governor Youngkin opened the preamble to his Executive Order banning "divisive concepts," by stating: "We must equip our teachers to teach our students the entirety of our history—both good and bad."[168] MELA scholars would agree with this statement. Indeed, Rich Lowry in his tussle with Timothy Snyder over whether CRT bans were "memory laws,"[169] and Florida Governor Ron DeSantis in his fight with an MSNBC reporter,[170] insisted the bans do not prevent describing slavery, segregation, or other less appetizing parts of the national past.[171]

165 Uladzislau Belavusau, *On Ephemeral Memory Politics, Conservationist International Law and (In-)alienable Value of Art in Lucas Lixinski's Legalized Identities: Cultural Heritage Law and the Shaping of Transitional Justice*, 25 JERUSALEM R. LEGAL STUD. 200, 206 (2022).

166 *Id.* at 210.

167 *Id.* Belavusau also makes an aesthetic argument about the difference between "perfectly executed neo-classical monuments," such as the monument in Belgium commemorating King Leopold II, to "the monstrous, and identically reproduced-on an industrial scale, monuments to Lenin and Dzerzhinsky" found in Eastern Europe. *Id.* at 208.

168 Virginia Executive Order, *supra* note 10.

169 Timothy Snyder, *The War on History Is a War on Democracy*, N.Y. TIMES (June 29, 2021), https://www.nytimes.com/2021/06/29/magazine/memory-laws.html [https://perma.cc/6BHD-DZVQ]; Rich Lowry, *The Absurdly Misleading Attacks on Anti-CRT Rules*, NAT'L REV. (July 1, 2021), https://www.nationalreview.com/2021/07/the-absurdly-misleading-attacks-on-anti-crt-rules/ [https://perma.cc/B3YG-NCQS].

170 *See* Sara Boboltz, *Gov. Ron DeSantis Picks a Fight with NBC, MSNBC over Black History Lessons in Florida*, HUFFINGTON POST (Feb. 23, 2023), https://www.huffpost.com/entry/desantis-nbc-msnbc-black-history-florida_n_63f8cf66e4b0735bf877591a [https://perma.cc/63M9-8X5K] (describing how Gov. DeSantis rebutted assertion that his educational policies forbid discussion of slavery).

171 The willingness of CRT foes to accept the facts of slavery and segregation may be weakening. *See* Sarah Mervosh, *Florida Scoured Math Textbooks for "Prohibited Topics." Next Up: Social Studies*, N.Y. TIMES (Mar. 17, 2023),

The preamble of the Virginia Executive Order is especially detailed in its admission of the nation's historical foibles:

> From the horrors of American slavery and segregation, and our country's treatment of Native Americans, to the triumph of America's Greatest Generation against the Nazi Empire, the heroic efforts of Americans in the Civil Rights Movement, and our country's defeat of the Soviet Union and the ills of Communism, we must provide our children with the facts and context necessary to understand these important events.[172]

The language is striking. Likewise, James Copland, the author of the 2021 Manhattan Institute report, warns that "legislation should not encourage schools to 'whitewash' history by failing to teach adequately [the] historical atrocities committed in the name of race."[173] One might be forgiven for wondering if Youngkin and Copland were actually proponents of critical race theory.

This internal dissonance raises two questions. First, if supporters of CRT bans are okay with accepting slavery, segregation, and presumably other instances of the United States' racist history, why are those supporters suddenly rushing to ban critical race theory? Second, what speech acts do the CRT bans cover? If a teacher can say "slavery happened," or "segregation happened," what are they barred from saying? As established in Part II, one argument justifying Holocaust denial bans rests on the idea that Holocaust denial is coded hate speech.[174] What in the universe of critical race theory plays a similar role?

To explore these questions, let us look at some of the other CRT teaching methods that James Copland finds so troubling.[175] After his description of third graders ranking themselves according to race, Copland describes how, in Philadelphia, fifth graders were "ordered" to "march across an auditorium stage bearing signs that read 'Jail Trump' and 'Black Power Matters' at a rally celebrating 'black communism.'"[176] Immediately after that, he recounts how, in Buffalo,

https://www.nytimes.com/2023/03/16/us/florida-textbooks-african-american-history.html [https://perma.cc/2M2P-FBPP] (describing how Florida textbook publisher removed reference to skin color in passage describing the story of how Rosa Parks refused to sit at the back of the bus).

172 Virginia Executive Order, *supra* note 10.

173 COPLAND, *supra* note 11, at 6.

174 *See* Fish, *supra* note 3, at 326.

175 COPLAND, *supra* note 11, at 1.

176 *Id.* at 2.

New York, the "school district adopted an 'emancipatory curriculum'" adding that "its 'pedagogy of liberation' instructed students that 'all white people play a part in perpetuating systemic racism.'"[177]

While the "black communism" anecdote might be discounted,[178] the Buffalo, New York snippet cuts to the heart of the matter. Proponents of CRT bans fear that students are being told that White people are responsible for "systemic" racism.[179] As a result, CRT bans focus on attributions of blame and responsibility.[180] Copland's model statute, for example, which seeks to "conform to [anti-CRT] principles and pass constitutional muster," decries the idea that individuals "should be blamed for actions committed in the past" by members of the "same sex, race, ethnicity, religion, color, national origin."[181] Likewise, the Virginia Executive Order excludes from curricula as an "inherently divisive concept" the idea that "an individual by virtue of his or her race . . . bears responsibility for actions committed in the past by other members of the same race."[182]

This concept of blame is slippery. Copland recognizes that most schoolteachers do not point a finger at a child and say: "You are responsible for racism." In discussing Tennessee's CRT ban, which contains a clause about students feeling "discomfort, guilt, anguish or another form of psychological distress solely because of the individual's race or sex,"[183] Copland distinguishes lesson plans that cause discomfort as a factual matter (legal in Tennessee, according to Copland), from lesson plans that suggest that a student *should* experience feelings discomfort, guilt, or anguish.[184] On one level, this is reassuring; a nervous teacher hoping to teach CRT might evade liability by including language that the *aim* of the lesson plan is not to make anyone feel bad.

Yet the battle against CRT begs the question: Why are some conservatives suddenly so invested in the well-being of students? A few years ago, conservatives were ardent supporters of free speech for college students, resisting the coddling of the American mind allegedly

177 *Id.*
178 *Id.* at 11.
179 *Id.*
180 *Id.*
181 COPLAND, *supra* note 11, at 12.
182 Virginia Executive Order, *supra* note 10.
183 COPLAND, *supra* note 11, at 8.
184 *Id*. at 9.

taking place in colleges around the country.[185] Conservatives largely opposed safe spaces and trigger warnings.[186] Today, conservatives flying the anti-CRT banner are banning lesson plans premised on the belief that students should experience discomfort and hurt feelings. Why such a vast change in so few years?

Copland offers a hint. After reassuring his readers that "it would be the rare secondary school . . . that would assign to its students the writings of Critical Race Theory scholars such as Derrick Bell, Richard Delgado, Charles Lawrence, Kimberlé Crenshaw, or Mari Matsuda,"[187] he warns that their scholarship nevertheless "inform[s] modern educational pedagogy."[188] He adds that the National Education Association, a labor union consisting of teachers and support staff, endorsed a "curriculum . . . informed by academic frameworks for understanding and interpreting the impact of the past on current society, including critical race theory"[189] and was allocating new resources to a study that critiques, among other things, "empire, white supremacy, anti-Blackness, anti-Indigeneity, racism, patriarchy, cisheteropatriarchy, capitalism, ableism, [and] anthropocentrism."[190]

The problem is ideological. Support for CRT bans is about more than feelings of guilt and lesson plans that intentionally or unintentionally cause student discomfort. As Christopher Rufo, one of the leading intellectuals behind the recent wave of CRT bans,[191] stated in

185 *See generally* GREG LUKIANOFF & JONATHAN HAIDT, THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE (2018). For a critique on the proposition that college students are being coddled, see Rob Kahn, *The Anti-Coddling Narrative and Campus Speech*, 15 U. ST. THOMAS L. J. 1 (2018).

186 *See* Charles Lipson, *The Death of Campus Free Speech—and How to Revive It*, REAL CLEAR POLITICS (June 28, 2016), https://www.nas.org/blogs/article/the_death_of_campus_free_speech_and_how_to_revive_it [https://perma.cc/J845-H88L] (bemoaning safe spaces and trigger warnings as the work product of snowflake administrators).

187 COPLAND, *supra* note 11, at 4.

188 *Id.*

189 *Id.* (quoting *New Business Item 39: Adopted as Modified*, NAT'L EDUC. ASS'N (June 30, 2021), https://www.catholicleague.org/wp-content/uploads/2021/07/web.archive.org-New-Business-Item-39-ActionAdopted-as-Modified.pdf [https://perma.cc/KS32-634S].

190 *Id.* (quoting *New Business Item 39: Adopted as Modified*, *supra* note 190).

191 For background on Christopher Rufo and his role in the campaign against critical race theory, see Sarah Jones, *How to Manufacture a Moral Panic: Christopher Rufo Helped Incite an Uproar over Racism Education with Dramatic, Dodgy Reporting*, N.Y. MAGAZINE (July 11, 2021), https://nymag.com/intelligencer/2021/07/christopher-rufo-and-the-critical-race-theory-moral-panic.html [https://perma.cc/4N7V-MCSR].

a March 2021 speech at Hillsdale College: "Americans across the political spectrum have failed to separate the premise of critical race theory from its conclusion."[192] The premise, according to Rufo, is undeniable: "American history includes slavery and other injustices" which we should learn from.[193] The "revolutionary conclusion" is what Rufo rejects: "[T]hat America was founded on and defined by racism and that our founding principles, our Constitution and our way of life should be overthrown."[194]

This brings us to our second question: When social studies teachers are confronted by laws banning lesson plans that cause guilt or discomfort, how should the teachers interpret them? The Rufo passage goes to the heart of the issue. Issues of academic freedom aside, a social studies teacher can understand and follow a prohibition on teaching materials that call for overthrowing "our founding principles, our Constitution and our way of life."[195] These questions have been at the heart of our seditious libel case law for over a century.[196] Moreover, from a memory law perspective, this part of Rufo's formulation is uncontroversial. Nothing in the MELA Model Declaration or Explanatory Comments requires a state to tolerate speech that seeks its demise.[197]

The interpretive difficulty for the hypothetical social studies teacher arises from the first part of the "revolutionary conclusion" passage. Is the statement "America was founded on and defined by racism" really a "revolutionary conclusion" about history?[198] Is it even a conclusion at all—as opposed to a characterization of fact? Similarly, could our hypothetical social studies teacher say that, at the time the Constitution was drafted, the United States was racist, given the ongoing presence of slavery and the lack of a vote for African Americans?

192 Rufo, *supra* note 13.

193 *Id.*

194 *Id.*

195 *Id.*

196 Both the incitement to imminent violence standard in *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969), and the true threats doctrine reasserted in *Virginia v. Black*, 538 U.S. 342, 359-60 (2003), give the state some tools in fighting attempts at its overthrow.

197 As its title indicates, the Model Declaration is limited to laws that relate to historical memory.

198 Rufo, *supra* note 13.

Could a teacher say that Jefferson owned over 600 slaves over the course of his lifetime?[199]

In advising the teacher, Rufo would likely rely on the first part of the passage in his Hillsdale College speech in which he accepts the historical "premises" of critical race theory.[200] This would likely insulate a factual statement about Jefferson's treatment of his slaves or the existence of the three-fifths clause.[201] The conclusion that the United States, perhaps because of these facts, was "racist" poses a more difficult question for the teacher. Is saying that the United States was racist at a given point in time or that a specific institution was racist the same thing as saying that the United States, the antebellum South, or the Jim Crow era was "defined by racism?" The uncertainty of Rufo's formulation will chill speech. Consider Rufo's "revolutionary conclusion" language. How is a teacher supposed to know which statements about the past infer a "revolutionary conclusion"? The teacher, should they want to keep their job, will likely conclude that "less is more" and avoid making any controversial statements about past racism, at least in a state with an actively enforced CRT ban.

The dilemma posed by Rufo's premise vs. conclusion divide is familiar. Consider Poland, for example, which in 2018 criminalized attempts to attribute guilt to the Polish nation for complicity in the Holocaust.[202] The ostensible target of the legislation was the phrase "Polish Concentration Camps," which conflated the location of the camps with their operator.[203] From an outside perspective, the free speech threat was mitigated when the criminal penalties were revoked,[204] but Poland still considered statements defaming the Polish

199 *See* Henry Wiencek, *The Dark Side of Thomas Jefferson*, SMITHSONIAN MAGAZINE (Oct. 2012), https://www.smithsonianmag.com/history/the-dark-side-of-thomas-jefferson-35976004/ [https://perma.cc/UK7U-ZGV3].

200 Rufo, *supra* note 13.

201 The three-fifths clause allowed states to count enslaved people toward congressional representation which gave slaveholding Southern states more representation in Congress. For more, see *5 Issues at the Constitutional Convention*, MOUNT VERNON CTR., https://www.mountvernon.org/george-washington/constitutional-convention/issues-of-the-constitutional-convention/ [https://perma.cc/V5E4-J5M9] (last visited Sept. 1, 2023).

202 Kahn, *supra* note 3, at 46-47; *see also* Uladzislau Belavusau, Polish Memory Laws and Historical Identity in Europe: Analysing the Defence of 'Disinformation' 12-17 (Nov. 19, 2019) (Research Paper No. 20-01, University of Milano-Bicocca School of Law).

203 Kahn, *supra* note 3, at 47 (noting the conflation between the location of the concentration camps and responsibility for their operation).

204 Belavusau, *supra* note 202, at 16 (noting the change of the law).

nation libelous.[205] In 2017, the Polish version of *Newsweek* ran an article stating that, after 1945, Poland opened a branch of the Auschwitz-Birkenau camp.[206] Maciej Świrski, head of the Polish League against Defamation, sued under Polish libel laws.[207] The case was most noteworthy for its open-ended concept of standing, which allows "one offended Pole" to sustain charges, much like the Texas bounty provisions that allow parents to bring claims under its CRT bans.[208]

My interest, however, lies in the speech itself. Author Paulina Szewczyk, wrote an article in 2017 titled: "After the Liberation of Nazi Camps, Did the Poles Open Them Again? 'The Little Crime' by Marek Łuszcznya."[209] While the title ("The Little Crime") inferred guilt to Poland, the author did not argue that all Poles were responsible for the Holocaust and, indeed, the events in question took place after the Holocaust was over.[210] Moreover, under Rufo's formulation, there was no evidence that Szewczyk sought to "overthrow" anything. Rather, she (or the author of the book she was reviewing) drew a conclusion about the past—namely, that reopening Auschwitz after liberation was a crime, albeit a small one.[211] Like opponents of CRT, the Polish League Against Defamation targeted a statement about the past because of its present-day consequences.

If the comparison between U.S. anti-CRT efforts and Polish anti-Holocaust accountability efforts seems fanciful, consider Florida, where Governor DeSantis has sought to remove all traces of CRT from math books.[212] Yet what did Florida actually ban? Florida authorities flagged a high school statistics book for noting there were "too many" White police officers in the NYPD based on the population.[213] Likewise, a Mathematics for College Liberal Arts book was flagged for

205 Gliszczyńska & Jabłoński, *supra* note 142.

206 *Id.*

207 *Id.*

208 *Id.* There have been similar efforts by foes of critical race theory bans to mobilize parents to lodge complaints against books or note violations of CRT bans. *See, e.g.*, Paul Blest, *An Anti-CRT Group is Offering People $500 to Snitch on Teachers*, VICE (Nov. 15, 2021, 12:55 PM), https://www.vice.com/en/article/y3vga5/anti-crt-group-offering-teachers-money-new-hampshire [https://perma.cc/P6P9-NL5L].

209 Gliszczyńska & Jabłoński, *supra* note 142.

210 *Id.*

211 *Id.*

212 Andrew Atterbury, *Mystery Solved? Florida Reveals Why It Rejected Math Books over Critical Race Theory*, POLITICO (May 5, 2022, 6:28 PM), https://www.politico.com/news/2022/05/05/fldoe-releases-math-textbook-reviews-00030503 [https://perma.cc/WJ49-LC6W].

213 *Id.*

including a bar graph "measuring racial prejudice by age."[214] As we have seen, CRT foes accept that the United States' past included slavery, segregation, and Native American genocide, and they insist that these concepts can be discussed fully and fairly in schools. If so, how does a bar graph showing that young people are less racist constitute a "revolutionary" call to overthrow the existing order? Would our social studies teacher, if they were in a Floridian school, believe the assurances of CRT supporters when Florida views a bar graph as a step too far?

Finally, if CRT ban supporters were truly concerned about countering hate speech, they would address teaching that targets people of color and Jews. Sadly, these instances abound. In 2012, a teacher in Gwinnet County, Georgia, used language describing slavery and slave beatings to teach arithmetic.[215] The following year, a New York schoolteacher asked fourth graders to create questions by blending math and social studies. [216] A student created a question using slave whipping to teach multiplication, which the teacher then gave to the class.[217] A few years later, a schoolteacher in Los Angeles used the language of slavery to teach math to second graders, which led the journalist covering the story to ask: "What genius thought this was a good idea during Black History Month—or anytime?"[218]

These incidents are not limited to slavery, but extend to antisemitism. In 2014, a California school asked eighth-grade students to write about whether they thought the Holocaust happened.[219] The essay question stated that "some people claim that the Holocaust is not an actual historical event but a propaganda tool that was used for political

214 *Id.*

215 Michael W. Twitty, *The Slavery Math Question*, AFROCULINARIA (Jan. 10, 2012), https://afroculinaria.com/2012/01/10/the-slavery-math-question/ [https://perma.cc/GQB9-LNFF].

216 *Elementary School's Math Problems Citing Slavery Are Unacceptable: DOE*, NBC NEWS, https://www.nbcnewyork.com/news/local/slavery-math-problems-ps-59-teacher-students/1968564/ [https://perma.cc/U2T5-527Q] (Feb. 22, 2013, 8:12 PM).

217 *Id*.

218 *Parents Outraged over L.A. School's 2nd Grade Slavery Math Problem*, NEWSONE (Feb. 15, 2017), https://newsone.com/3668872/l-a-schools-2nd-grade-slavery-math-problem/ [https://perma.cc/UEN2-6TYK].

219 David Neiwert, *Holocaust Denial Exercise for Students in California High School Backfires*, S. POVERTY L. CTR. (May 6, 2014), https://www.splcenter.org/hatewatch/2014/05/06/holocaust-denial-exercise-students-california-high-school-backfires [https://perma.cc/9ZGM-S24F].

or monetary gain."[220] Students were asked to write an "argumentative essay" explaining whether they thought the Holocaust was "an actual event in history, or merely a political scheme motivated to influence opinion and gain."[221] Students were instructed to "address counter-claims (rebuttals) to [their] stated claim."[222]

Math questions using the language of slavery and Holocaust denial essay questions bring students face-to-face with hate. Words such as "slaves" and "whipping" are not only unnecessary to teach math, but they traumatize students. Similarly, while Jews and foes of Holocaust denial have argued about the wisdom of debating the factual claims of Holocaust deniers,[223] this question harms those Jewish students who do not voluntarily engage in this debate. While Florida Administrative Code Rule 6A-1.094124 bans Holocaust denial,[224] countering scholastic language concerning historical brutalization of slaves or questioning the existence of the Holocaust do not appear to be a priority for CRT ban supporters, in part because the speech in question poses no threat to "our founding principles, our Constitution and our way of life."[225]

Some examples illustrate the priorities that CRT selectively enshrines. Recently, a high school teacher in New York—where there is no state CRT ban—became a target of criticism by parents who were angry that the teacher included a newspaper article about "police

220 *Id.* This language parallels how Rainer Orlet justified the Günter Deckert verdict by highlighting financial and moral claims stemming from the Holocaust. *See supra* notes 54-55 and accompanying text (describing ruling).

221 Neiwert, *supra* note 219.

222 *Id.* Meanwhile, CRT bans themselves have the potential to chill the teaching of Holocaust and Jewish education. *See, e.g.*, Brian Lopez, *The Law that Prompted a School Administrator to Call for an "Opposing" Perspective on the Holocaust is Causing Confusion Across Texas*, TEXAS TRIBUNE (Oct. 15, 2021, 7:00 PM), https://www.texastribune.org/2021/10/15/Texas-critical-race-theory-law-confuses-educators/ [https://perma.cc/JY3L-XD5L] (describing brief attempt by Southlake, Texas educators to require the Holocaust to be balanced by other perspectives); Henry Abramson, *Banning Critical Race Theory Will Gut the Teaching of Jewish History*, JEWISH TELEGRAPHIC AGENCY (July 8, 2021, 4:47 PM), https://www.jta.org/2021/07/08/opinion/banning-critical-race-theory-will-gut-the-teaching-of-jewish-history [https://perma.cc/5YVW-U6SP] (arguing that the dictate in some CRT bans to avoid "difficult topics" will make the teaching of Jewish history challenging).

223 LIPSTADT, *supra* note 6, at 2 (stating her preference not to debate with Holocaust deniers).

224 FLA. AMIN. CODE ANN. R. 6A-1.094124 (2019) (amended 2023).

225 Rufo, *supra* note 13.

abuse" in a document package.[226] In response, the district superintendent reassured parents that "lessons and activities that create divisiveness or marginalize anyone have no place in our schools."[227]

But a newspaper paper article presenting facts about past police abuses is not hate speech against the police any more than a documentary on the Holocaust is a form of hate speech directed at Germans,[228] or a movie about African American civil rights protesters is hate speech directed at White people.[229] Targeting a teacher for assigning an article on police abuse further exposes the ambiguity of Christopher Rufo's call to arms against CRT. He opposes the "revolutionary conclusions" that critical race theory advocates draw, not the premise of past racism.[230] Rufo includes conclusions drawn about the past in his "revolutionary conclusions" category, however,[231] including the United States' founding and its more recent history of police abuses. Instead of educating school children on how to draw their own, hopefully non-revolutionary conclusions about the past, Rufo would ban a whole set of answers to historical questions lest they lead to discontent.

In summary, CRT bans were never intended to counter hate or eradicate vestiges of racism from the classroom. While accepting slavery and segregation as facts, supporters of CRT bans are threatened by conclusions—not just conclusions one draws *from* the past (i.e., we need to overthrow racism) but conclusions one draws *about* the past

226 Alan Singer, Chris Dier, Pablo Muriel, Adeola Tella-Williams & Cynthia Vitere, *Teaching About Contemporary Controversies in High Schools and in University Teacher Education Programs*, 13 J. ACAD. FREEDOM 1, 3 (2022). The nature of the document package is not stated in the article.

227 *Id.*

228 On the other hand, a documentary about Holocaust denial in Germany was a closer call. The 1993 documentary *Beruf Neonazi* [Profession Neo-Nazi], which followed the activities of Bela Ewald Althans as he took part in Holocaust denial activities in Germany and Poland, caused a stir. The documentary was controversial because the documentary, intending to show the seriousness of Holocaust denial and neo-Nazis, lacked commentary, which led to fears that viewers would seek to imitate Althans. *See* BERUF NEONAZI [PROFESSION NEO-NAZI] (Ost-Film Hoffman & Loeser Produktion 1993), *described in* KAHN, HOLOCAUST DENIAL AND THE LAW: A COMPARATIVE STUDY, *supra* note 24, at 147-52.

229 Consider, in this regard, the 2023 ESPN documentary highlighting the police shooting of African American civil rights protesters in Orangeburg, South Carolina in 1968. *ESPN Daily - The Orangeburg Massacre: A Forgotten Story of a Team and Tragedy*, ESPN (Feb. 24, 2023), https://www.espn.com/radio/play/_/id/35724877 [https://perma.cc/E27B-EBYC]. The film may have had a moral message, but it is hard to see it marginalizing anyone.

230 Rufo, *supra* note 13.

231 *Id*.

(i.e., the United States was racist at its founding). This move distinguishes CRT bans from Holocaust denial laws and places them squarely in the category of state-exculpatory memory laws.

B. The Uncanny Resemblance to Turkey's Genocide Denial Campaign

Indeed, CRT seeks a silencing that is not novel. For several decades, Turkey has denied the mass murder of between 600,000 and two million Armenians from 1915-1923.[232] The Genocide left an Armenian population of roughly 50,000 in Turkey, mostly concentrated around Istanbul.[233] While most of Turkey's effort at genocide denial has been outward facing, intending to convince the global community and ward off Armenian claims for reparations,[234] the inward-facing side of the Turkish denial campaign is instructive for understanding the motives and operation of CRT bans in the United States.

To explore this idea, Section III-B describes the Armenian Genocide and Turkification campaign that followed it.[235] Turning to educational policy, the article then examines the harms the Turkish regime of genocide denial imposes on young Armenians in Turkey, and draws comparisons to CRT bans. [236] To presage a conclusion, the genocide denial campaign in Turkey and the new CRT bans contain clear parallels in how the silencing they enact allows for evasion of responsibilities that come with "knowing"[237] and how the forced invisibility they impose affects their targets.

---

232 Richard G. Hovannisian, *Introduction: The Armenian Genocide: Remembrance and Denial*, *in* REMEMBRANCE AND DENIAL: THE CASE OF THE ARMENIAN GENOCIDE, *supra* note 101, at 15; *see also* VAHAKN N. DADRIAN, THE HISTORY OF THE ARMENIAN GENOCIDE: ETHNIC CONFLICT FROM THE BALKANS TO ANATOLIA TO THE CAUCASUS xviii (2003) (concluding that "over one million Armenians were put to death during World War I"). Fatma Müge Göçek places the number of dead between 800,000 and 1.5 million. *See* FATMA MÜGE GÖÇEK, DENIAL OF VIOLENCE: OTTOMAN PAST, TURKISH PRESENT, AND COLLECTIVE VIOLENCE AGAINST THE ARMENIANS 1789-2009 1 (2015).

233 Pulatyan, *supra* note 15, at 24, 28.

234 *See* GÖÇEK, *supra* note 232, at 2-3 (describing Turkish genocide denial campaign and Armenian campaign to promote the Genocide); Smith et al., *supra* note 101 (describing Turkish genocide denial campaign in the United States).

235 *See infra* Part III(B)(1).

236 *See infra* Part III(B)(2).

237 Pulatyan, *supra* note 15, at 79.

1. Toward Invisibility: The Post-Genocide Turkification Campaign

Even after the Armenian Genocide and the population transfers between Greece and Turkey at the end of the Turkish War for Independence,[238] there were doubts as to whether Turkey was a "homogeneous" nation.[239] As the 1935 census revealed, Turkey still contained Jewish, Greek, and Armenian minorities, albeit small ones.[240] In addition, there were doubts about whether Turks would fill the commercial and professional roles formerly occupied by Greeks and Armenians.[241] This was especially true of Istanbul where, according to the 1927 census, 28% of the population were not native Turkish speakers.[242] What followed was a campaign of Turkification, a series of measures that, according to Rudi Pulatyan sought "to erase or suppress" minority "physical and socio-cultural presence from collective memory and public spaces."[243]

In the "Citizen Speak Turkish" campaign in the late 1920s, the government cracked down on the use of non-Turkish languages in public settings.[244] Those who used other languages faced "a significant risk of verbal and physical attack."[245] A few years later, the Turkish Parliament enacted the Surnames Legislation which outlawed the Armenian ("*ian*") and Greek ("*pulos*") surname endings.[246] Meanwhile, the state "supported and encouraged scholars to 'prove' the omnipotence of the Turkish nation in various academic fields,"[247] while laws passed in 1926 and 1932 restricted certain vocations to Turks.[248] Finally, the 1942 Capital Tax, theoretically a facially neutral attempt to respond to inflation caused by World War II, in practice targeted non-Muslim minorities who were often forced to sell their properties.[249]

As a result of the Genocide and the Turkification campaign, Turkey's population was around 97% Muslim in the late 1920s.[250] In the years that followed, these policies intensified, especially after the

238 *Id.* at 28.
239 *Id.* at 24 (describing 1935 census).
240 *Id.*
241 *Id.* at 30.
242 *Id.* at 29 (census).
243 Pulatyan, *supra* note 15, at 24.
244 *Id.* at 29.
245 *Id.*
246 *Id.* at 29-30.
247 *Id.* at 30.
248 *Id.*
249 Pulatyan, *supra* note 15, at 31.
250 *Id.* at 32.

1970s, when the Armenian Genocide gained international prominence.[251] This surge of international awareness led to existential fears about "the 'indivisibility and integrity' of Turkish national sovereignty," which manifested in a campaign to convince the international community that the Armenian Genocide did not happen.[252]

2. Genocide Denial, Turkish Schools, and CRT

The genocide denial campaign also impacted Turkey internally, where the law has been used since the founding of the Republic to silence discordant statements about the past.[253] Section 301 of the Penal Code, enacted in 2005 and prohibiting criticism of the Turkish state, was used to punish Turkish novelist and Nobel Prize winner Orhan Pamuk and Turkish-Armenian journalist Hrant Dink, who was later assassinated by a Turkish nationalist.[254] These laws have been targeted by the international human rights community and have been the focus of repeated European Court of Human Rights decisions.[255]

I do not suggest that CRT bans, as they currently stand, are the equivalent of Turkey's legal regime punishing Genocide denial. Rather, I make two narrower points. First, the Turkish experiences help us understand the *function* of CRT bans. As noted in Part II(A), Christopher Rufo argues that CRT's "revolutionary conclusions" about present-day American society are inseparable from critical race theory scholars' assessments of the past. The same dynamic is present in Turkey, where the act of questioning the past is viewed as undermining current Turkish homogeneity.

Second, the Turkish example shows the harm that history-regulating laws, such as CRT bans, can impose on victims and their survivors, especially school-aged children. Silencing past crimes is not simply about encouraging homogeneity or forestalling "revolutionary

251 Tunc Aybak, *Geopolitics of Denial: The Turkish State's 'Armenian Problem*', 18 J. BALKAN & NEAR E. STUD. 125, 125-27 (2016). In the early 1980s, Aybek taught in the International Relations Department, which trained Turkish diplomats. *Id.*

252 *Id.*

253 Turkey punished defaming the nation in 1926, and defaming Mustafa Kemal Atatürk in 1951. *See* Baranowska, *supra* note 156, at 251; Grażyna Baranowska, *Memory Laws in Turkey: Protecting the Memory of Mustafa Kemal Atatürk*, *in* CRIMINALIZING HISTORY: LEGAL RESTRICTIONS ON STATEMENTS AND INTERPRETATIONS OF THE PAST IN GERMANY, POLAND, RWANDA, TURKEY AND UKRAINE 107, 107-08 (Klaus Bachmann & Christian Garuka eds., 2020).

254 Baranowska, *supra* note 156, at 253. The assassination of Dink had a major impact on the Turkish Armenian community. Pulatyan, *supra* note 15, at 87.

255 Baranowska, *supra* note 156, at 254.

conclusions." It also imposes a true, tangible harm in the daily lives of those whose history is silenced. This is true for young Armenians in Turkey. It is also true of the experience of African Americans and others whose history is erased by CRT bans.

To compare the effect of CRT bans with the effect of the Turkish Genocide silencing, this Article relies heavily on a Master's Thesis by Rudi Sayat Pulatyan, who explores the identity and belonging of Armenian youth in Turkey today.[256] Pulatyan uses oral history methodology to track the experiences of twelve Turkish Armenians (aged 21-35 years old at the time of the study).[257] Pulatyan notes that in 1965 there were 9,200 students in Armenian educational institutions in Turkey; by 2017, the number had fallen to 3,000, which he attributes in part to the failure of the Turkish state to "confront the atrocities it either planned or failed to prevent."[258]

While Pulatyan's study highlights how his subjects face silencing of the Genocide (and their identities) in their daily lives,[259] to highlight the similarities with CRT bans, the discussion that follows focuses on the parts of his study that address the silencing that takes place in the classroom. As we shall see, there are some parallels with CRT that should trouble supporters of CRT bans.

Prior to the 1924 Unification of Education Act, the schools were run by the Armenian Patriarchate.[260] The Act placed the schools under the National Ministry of Education's jurisdiction.[261] The National Ministry implemented a "hidden curriculum" in the schools—i.e., the ideological values inculcated by schools throughout a student's educational experience.[262] For example, Armenian school children must recite the national pledge of allegiance every day, which begins with "I am a Turk" and ends with "I commit my being to the existence of Turks," as well as the national anthem, which highlights Turkish exploits from the War of Independence.[263] The schools (including Armenian ones) celebrate Turkish national holidays, such as the Commemoration of Atatürk.[264] The Turkish government also maintains

256 Pulatyan, *supra* note 15.

257 *Id.* at 11-12, 129.

258 *Id.* at 32-33.

259 For example, Pulatyan opens his study by describing his parents' reluctance to allow him to play soccer with his ethnic Turkish neighbors. *Id.* at 1.

260 *Id.* at 58.

261 *Id.*

262 Pulatyan, *supra* note 15, at 59.

263 *Id.* at 60.

264 *Id.* at 61.

control over Armenian schools by requiring that the vice-principal of an Armenian school should be an ethnic Turk, as should teachers of Turkish literature, geography, and history.[265] The history books either ignore Armenians and Greeks or portray them as traitors of the nation who were "tricked by foreign powers and stab the Turks from behind."[266]

Turkish teachers' manuals "whitewash" the Armenian Genocide in the same way Copland worries overzealous anti-CRT legislators might.[267] For example, Pulatyan quotes the following excerpt from a seventh-grade teaching manual:

State to your students that the Russians also made some Armenians revolt on this front and murder many of our civilian citizens. Explain that the Ottoman State took certain measures following these developments, and in May 1915 implemented the 'Tehcir Kanunu [Displacement Law] regarding the migration and settlement of Armenians in the battleground. Explain that care was taken to ensure that the land in which the Armenians who had to migrate were to settle was fertile, that police stations were established for their security, and that measures were taken to ensure that they could practice their previous jobs and professions.[268]

The language of genocide denial in the above passage is striking. It is hard to imagine a German or French teaching manual describing the Holocaust in similar language. Of course, Holocaust denial is a marginalized viewpoint in France and Germany; the same is not true of Turkey, where genocide denial is state policy.

Let us consider a potential objection to this argument. The seventh-grade teaching manual denies the history of the Genocide.[269] In the U.S. context, this would be the equivalent of erasing slavery and segregation from the history books. I am not suggesting an equivalence. As Christopher Rufo, James Copland, and Governor Glenn Youngkin all emphasize, CRT bans do not touch the facts of American history, only the conclusions one draws from them that the United States is "fundamentally racist"[270] or "was founded on and defined by

265 *Id.* at 61-62.

266 *Id.* at 62. This is consistent with Nazan Maksudyan's study of translation of foreign language history texts into Turkish. *See generally* Nazan Maksudyan, *Walls of Silence: Translating the Armenian Genocide into Turkish and Self-Censorship*, 37 CRITIQUE: J. SOCIALIST THEORY 635 (2009).

267 COPLAND, *supra* note 11, at 6.

268 Pulatyan, *supra* note 15, at 77 (quoting Aybak, *supra* note 251, at 138).

269 *See id.*

270 COPLAND, *supra* note 11, at 8.

racism."[271] The equivalent in U.S. history terms might be a justification of slavery or segregation—something that CRT bans do not explicitly do.

The similarity between the Turkish genocide denial policies and the CRT bans comes not from the extent of the denial in play, or in the severity of the laws (the Turkish laws, which impose criminal penalties, are more severe than CRT bans). Rather, the similarity comes from the *function* Turkish genocide denial regime (and CRT bans) serve. Denial of the Armenian Genocide marginalizes Armenians and creates a certain type of Turkish privilege.[272]

We begin with marginalization. Because of the Turkish denial laws and educational policies, young Armenians face a divide between what they are taught about the Armenian Genocide in school and what they learn through their families. Sometimes this occurs directly. Sometimes, however, Turkification occurs indirectly when overly cautious parents, while not discussing the Genocide, teach their children to refrain from speaking Armenian in public,[273] to use a Turkish fake name when with non-Armenians,[274] and to avoid wearing a visible cross.[275]

The tension between learned truths arising from lived experience and the official regime of denial is illustrated by Anoush, one of Pulatyan's Armenian interviewees. Anoush described how she "scribbled and tore the pages about the Armenian Genocide" from the textbook "in front of the teacher" and insisted to the teacher: "I won't read these pages. I won't learn from these pages."[276] She explained: "You learn not only from the lessons the school gives us, but also from the history lessons" learned from other places.[277]

At the same time, the young Armenians interviewed by Pulatyan struggled in conversations with Turkish acquaintances. A Turkish acquaintance might ask whether the young Armenian believes the

271 Rufo, *supra* note 13.

272 In this regard, the Turkish genocide denial campaign is quite similar to the way the white hierarchy seeks to repress critical race theory. *See* Danielle M. Conway, *The Assault on Critical Race Theory as Pretext for Populist Backlash on Higher Education*, 66 ST. LOUIS U. L.J. 707 (2022). It is for this reason that Conway views CRT bans as state-exculpatory memory laws. *Id.* at 716.

273 Pulatyan, *supra* note 15, at 41-43.

274 *Id.* at 45.

275 *Id.* at 48.

276 *Id.* at 77.

277 *Id.*

Genocide actually happened,[278] or whether they have considered converting to Islam.[279] A Turkish cab driver or storekeeper might express surprise upon learning that an Armenian is from, or had family from, eastern Turkey—even though this was common before the Genocide.[280] As Anoush noted, when an Armenian is asked their identity and replies that they are Armenian, their Turkish interlocutor will often reassure them that this is "no problem"[281]—as if it is the Armenian, and not the Turk, who should be apologizing for the Genocide.

Pulatyan notes the pressure denialism places on young Armenians: "[T]he obligation expected from young Armenians to know and discuss the Genocide, in a careful way, whenever it is requested . . . and not refrain from participating in a discussion are among the performances that are expected from Armenians in Turkey to fulfill." [282] These policies and cultural dynamics illustrate more than Armenian marginalization, but also Turkish privilege.

To develop this point, Pulatyan relies on Bariş Ünlü, who describes how Turks live "in a state of impenetrable ignorance in relation to the non-Turkish population of Turkey."[283] This ignorance is a privilege, one conferring "the power not to know, not to see, and not to hear."[284] Ünlü refers to this as the "Turkishness Contract" in which non-Turkish minorities are tolerated in return for allowing ethnic Turks to avoid their responsibilities for the past.[285]

The Turkishness Contract was inspired by Whiteness Studies, an area of study that emerged in the 1980s that postulates that racism shapes the lives of Whites in addition to the lives of oppressed communities.[286] In particular, Ünlü relies on the epistemology of ignorance employed by White people, which he defines as "an actively pursued ignorance for purposes of maintaining the comfort of

278 *Id.* at 78.

279 Pulatyan, *supra* note 15, at 69.

280 *Id.* at 46.

281 *Id.* at 47.

282 *Id.* at 79.

283 Bariş Ünlü, *The Kurdish Struggle and the Crisis of the Turkishness Contract*, 42 PHIL. & SOC. CRITICISM 397, 400 (2016).

284 *Id.* at 400-01.

285 *Id.* at 400.

286 Ünlü traces the rise of whiteness concerns to the rise of "the Black Power movement in the USA and the Black Consciousness Movement in South Africa." *Id.* at 401. The increasing visibility of "oppressed groups" led to an identity crisis among the "dominant group," leading Ünlü to suggest that "one can even trace the roots of Whiteness Studies to the crisis of whiteness in the USA during the 1960s and 1970s." *Id.*

whiteness, because the knowledge of the historical and social truth might produce moral sentiments such as shame and guilt which in turn might upset one's moral certainty and material comfort."[287]

The connection between the Turkish regime of Armenian genocide denial and Whiteness Studies merits comment. Pulatyan's reliance on Ünlü's Turkishness Contract,[288] and Ünlü's ultimate reliance on Whiteness Studies, a U.S.-based theory,[289] might lead one to ask what the Turkish comparison adds to the conversation. After all, Christopher Rufo's position on CRT bans is fairly consistent with epistemological ignorance.[290] Rufo, Copland, and Governor Youngkin do not deny the historical significance of slavery and segregation; they deny the moral significance of these events.[291] Or, as Rufo puts it, they deny the "revolutionary conclusion[s]" "that America was founded on and defined by racism."[292]

The Turkish example is worth exploring for three reasons. First, the CRT bans are relatively new. The Turkish example, where restrictions on the Armenian genocide have lasted for decades, helps show the long-term potential of CRT bans. Anoush, Pulatyan's interviewee, faced with the divide between her lived experiences and genocide denial in school, announced to her teacher that she would take the side of genocide denial.[293] Now consider proposed Senate Bill 3 in Texas, which forbids teachers from deferring to any one perspective when teaching controversial issues.[294] According to Tabatha S. M. Morton, a political science professor at Prairie View A & M University, a historically Black university, Senate Bill 3 endangers the university's B-GLOBAL global competency program because it does not fit with conservatives' "version of history" and "shows the United States in a negative light." [295] By undermining the B-GLOBAL program, CRT proponents will hinder the "building of global

287 *Id.* at 398.

288 Pulatyan, *supra* note 15, at 79.

289 Ünlü, *supra* note 283, at 398.

290 *Id.*

291 *See* Virginia Executive Order, *supra* note 10; Rufo, *supra* note 13; COPLAND, *supra* note 11.

292 Rufo, *supra* note 13.

293 Pulatyan, *supra* note 15, at 77-78.

294 Tabatha S.M. Morton, *Separate and Unequal Again: The Disparate Impact Texas Gag Orders May Have on Texas's Second-Oldest Institution of Higher Learning*, 13 AAUP J. ACAD. FREEDOM 1, 3-4 (2022).

295 *Id.* at 7.

competencies and future and career options for students of color."[296] Anoush's experience shows the consequences of this.

Second, both Ünlü and Pulatyan turned to a U.S.-based theory, Whiteness Studies, to describe the crushing burden imposed by decades of Turkish denialism on Armenians and other minority groups in Turkey. They turned to a theory developed in a country, where, because of centuries of slavery and segregation, the political theory of race, racism, and white privilege is well developed.[297] That a U.S. theory fits so well with the realities of a society engaged in decades of denialism raises questions. What are the commonalities between Turkishness and Whiteness that made "epistemological ignorance" such an appealing framework in both contexts?

Moreover, the Turkish example can deepen our understanding of silencing. Sociologist Fatma Müge Göçek, in her landmark study on anti-Armenian violence in Turkey from Ottoman times to the present,[298] defines silencing as "the absence of portions of information regarding past and present events" and views silencing as "the most significant characteristic of denial."[299] Göçek relates how silencing has an affective component, one that reaches the perpetrator as well as the victim, in which the perpetrator discards information that is not comforting.[300] This not only makes silencing "challenging to study denial methodologically,"[301] it helps explain how silencing helps perpetrators normalize authoritarian acts.[302] All of this suggests that CRT bans would not be harmless even if they were—as Rich Lowry and Governor DeSantis claim[303]—to focus solely on questions of moral attribution.[304]

296 *Id.* at 11.

297 This is why Ünlü is able to trace the rise of Whiteness Studies to conditions in the United States (and South Africa). *See* Ünlü, *supra* note 283, at 398.

298 *See* GÖÇEK, *supra* note 232.

299 *Id.* at 11.

300 *Id.* at 12.

301 *Id.*

302 *Id.* at 11.

303 *See* Boboltz, *supra* note 170; Lowry, *supra* note 169.

304 The work of Fatma Müge Göçek is noteworthy in another way: in the Preface to her book, Göçek relates how she viewed the world growing up in Istanbul alongside Jews, Turks, and Armenians. She then relates how she later, as an ethnic Turk, slowly came to terms with the Armenian Genocide as a historical event. GÖÇEK, *supra* note 232, at vii-xviii. As such, her story resonates with the experiences of many white Americans, me included, who are coming to terms with the full history of racism and Native American genocide in the United States. Göçek, in other words, provides not only an example to follow, but a model to emulate.

Third, the Turkish laws and policies banning recognition of the Armenian Genocide are widely recognized as memory laws of the worst type.[305] The laws governing what Armenian students in Turkish schools can learn about their own past reflect a narrow, particularistic notion of national identity on the part of the Turkish authorities.[306] The laws themselves are, to paraphrase Eric Heinze, state-exculpatory—they seek to cover up the crimes of the Ottoman predecessor of present-day Turkey.[307] The overlap between Turkey's genocide denial rules and the current spate of CRT bans is concerning. If Turkey's bans are "memory laws," so too are the CRT bans.[308] Both instances privilege a state of ignorance where students from the dominant majority are given "the power not to see, not to hear and not to know" to avoid individual assignments of guilt, or emotional discomfort.[309] In contrast, other students, whose history is silenced, are driven to tear pages from history textbooks.[310]

Finally, both the Turkish genocide denial laws and the CRT bans differ from Holocaust denial prosecutions and the laws that followed from them. Holocaust denial laws are not efforts to silence the past; they are attempts to counter racist and antisemitic acts of hate.[311] They are, to return to Eric Heinze, state-inculpatory.[312] The authors of the MELA Explanatory Comments are unsure about how to handle

305 For Eric Heinze, the Turkish laws are state-exculpatory. *See* Heinze, *supra* note 63.

306 *See* KOPOSOV, *supra* note 69, at 309 (noting the parallels between Turkish Penal Code Article 301 and Russian memory laws, both of which are extreme cases of the Eastern European model of legislating on issues of the past).

307 Heinze, *supra* note 63.

308 As noted above, some CRT ban supporters, like Rich Lowry, reject this characterization because, they argue, the bans do not restrict factual information about the past. *See* Lowry, *supra* note 169. As we have seen, the key question involves characterizations about the past—"the United States was racist at its founding." *See* Wiencek, *supra* note 199; *see also 5 Issues at the Constitutional Convention*, *supra* note 201. Is this a statement of moral attribution that might (possibly) fall outside the memory law category? Or is it the kind of generalization that is the bread and butter of making historical judgments?

309 Pulatyan, *supra* note 15, at 79.

310 *Id.*

311 *See supra* Part II. For a discussion of the connections between racism and antisemitism, see Lipstadt, *supra* note 6; Eric K. Ward, *Skin in the Game, How Antisemitism Animates White Nationalism*, POL. RSCH. ASSOC. (June 29, 2017), https://politicalresearch.org/2017/06/29/skin-in-the-game-how-antisemitism-animates-white-nationalism [https://perma.cc/3TGW-QKGW].

312 Heinze, *supra* note 63.

Holocaust denial bans.[313] This is not the case with the Turkish genocide denial regime,[314] and should not be the case with CRT bans.

IV. CONCLUSION: SPEECH SHOULD BE FREE BUT CATEGORIES MATTER

Voltaire supposedly said freedom of speech extends to speech we hate.[315] So did Justice Alito in *Matal v. Tam*,[316] citing back to Justice Holmes's dissent in *United States v. Schwimmer*, who called protecting speech we hate "our proudest boast."[317] When in the words of *New York Times* columnist Michelle Goldberg, "we're facing down a wave of censorship inspired by religious fervor,"[318] has the time come to order a general retreat behind the First Amendment? Were this to happen, it would not matter how similar or different Holocaust denial laws and CRT bans were from each other. The only sure defense of speech would be to defend all of it.

Let me make two observations. First, there is very little chance that a Holocaust denial ban would survive First Amendment review;[319] hopefully, the same is true of CRT bans.[320] Second, however, not all speech acts—even tolerated ones—are created equal. Some speech acts, such as Holocaust denial, are hateful. Other speech acts, while subject to disagreement, still reflect worthy ideals, even misguided ones. It is worth reflecting on *United States v. Schwimmer*, in which a

313 *See Explanatory Comments*, *supra* note 66, ¶ 9 (noting lack of consensus).

314 Heinze, *supra* note 63.

315 According to Justice Breyer, the quote comes from Evelyn Beatrice Hall, an English writer. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

316 Matal v. Tam, 582 U.S. 218, 246 (2017).

317 United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting); *see also* Wyatt Kozinski, *Our Proudest Boast*, 53 TULSA L. REV. 523, 523 (2018) (describing *United States v. Schwimmer* and its place in Holmes's thought).

318 Michelle Goldberg, *A Left-Leaning College Didn't Want to Offend, So It Closed Down Her Art Show*, N.Y. TIMES, (Feb. 13, 2013) https://www.nytimes.com/2023/02/13/opinion/censorship-iranian-artist-macalester.html [https://perma.cc/2KG4-GM8V].

319 *See* Tsesis, *supra* note 144, at 114.

320 For example, a federal district judge in Tallahassee struck down the Stop W.O.K.E. Act, now relabeled as the "Individual Freedom Act," on First Amendment grounds. Pernell v. Fla. Bd. of Governors State Univ. Sys., No. 4:22cv324-MW/MAF, 2022 WL 16985720, at *50 (N.D. Fla. Nov. 17, 2022).

fifty-year-old pacifist refused to bear arms when there was no conscription and was denied her citizenship.[321]

In an eloquent dissent that would have allowed Ms. Schwimmer to become a citizen, Justice Holmes disagreed that the world would soon learn that war was "absurd,"[322] but he did not find her views hateful. Instead, he noted that noted that Quakers "had done their share to make the country what it is" and doubted that anyone regretted "our inability to expel them because they believed more than some of us do in the teaching of the Sermon on the Mount."[323] In other words, while there are some speech acts, like Holocaust denial, which a liberal society should find hateful,[324] there should be other speech acts, such as a statement that the United States was racist from its founding, which deserve a certain level of respect. Chris Rufo might find this type of speech threatening to the established order,[325] but it is not hateful.

The Turkish example provides an added warning. Silencing the past creates a world where the majority has the power of "epistemological ignorance"—of "not knowing" about past injustices.[326] This power enables Turkish schoolchildren to ask their Armenian classmates, "Do you believe it happened?" It allows them to comment nonchalantly, "I didn't know there were Armenians in Sivas [a Turkish city]." The hidden subtext is: "Weren't they all killed?" It allows Turkish students to respond, "No problem," when their Armenian acquaintances reveal their identity.[327]

The spread of CRT bans has not reached Turkish proportions. Turkey had decades to perfect its regime of epistemological ignorance. The United States is at the dawn of CRT bans. Regardless of whether one believes they are memory laws,[328] CRT bans are harmful to those whose history is denied and to the country at large. Informed by Turkey's concerning relationship with an oppressive history it seeks to hide, we still have time to nip them in the bud.

321 *Schwimmer*, 279 U.S. at 644.

322 *Id.* at 654 (Holmes, J., dissenting).

323 *Id.* at 655 (Holmes, J., dissenting).

324 Nadine Strossen has repeatedly emphasized the way protecting free speech can go hand in hand with condemning hate speech. *See Interview with Nadine Strossen*, *in* THE CONTENT AND CONTEXT OF HATE SPEECH: RETHINKING REGULATION AND RESPONSES 378, 380 (Michael Herz & Peter Molnar eds., 2012).

325 *See* Rufo, *supra* note 13.

326 Ünlü, *supra* note 283, at 398.

327 *See* Pulatyan, *supra* note 15, at 47.

328 *See* Snyder, *supra* note 169; Lowry, *supra* note 169. I plan to take up the semiotic stakes of CRT bans in forthcoming work.