LAW AND MEMORY
Towards Legal Governance of History

Edited by
ULADZISLAU BELAVUSAU
T.M.C. Asser Institute – University of Amsterdam
ALEKSANDRA GLISZCZYŃSKA-GRABIAS
Polish Academy of Sciences
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Germany is the last country that ought to be voting about a so-called genocide.¹

Memory should never be watered-down or forgotten. Memory is the source of peace and the future.²

1 Introduction

Law constantly moulds collective understandings of the past, in ways falling along a spectrum from the benign to the brutal. At the mild end, we find a 1992 Vilnius town ordinance authorising a public monument to honour rock legend Frank Zappa. 'We were desperate', quips a Lithuanian civil servant who had favoured the move, 'to find a symbol that would mark the end of communism'.³ That symbol had to remind people that history 'wasn't always doom and gloom'.⁴ At the opposite end we find systemic executions and labour-camp imprisonment of whole families for a North

Some material in this chapter is adapted from E. Heinze, 'Law can enshrine a country's history, but it is a citizen's right to question it'. Retrieved 1 July 2017, from The Conversation: available at: https://theconversation.com/law-can-enshrine-a-countrys-history-but-it-is-a-citizens-right-to-question-it-59561 (19 May 2016). I would like to thank Uładzislaw Belausau, Aleksandra Gliszczynska-Grabias, and Antoon De Baets for their comments, as well as Matthïjs Lok for acting as respondent. Ideas in this essay were also presented at the conference 'Denialism and Human Rights', Faculty of Law, Maastricht University, 22–3 January 2015.

¹ Turkish President Recep Tayyip Erdoğan cited in Mordaufrufe gegen Bundestagsabgeordnete, Retrieved 1 July 2017, from Die Zeit, available at: www.zeit.de/politik/ausland/2016-06/tuerkei-recep-tayyip-erdogan-armenien-resolution-morddrohungen (6 June 2016).
⁴ Ibid.
Korean who challenges official history. Between those two poles, states devise countless ways to inscribe their preferred versions of history into law. Can approaches diverging throughout a vast range of nations and historical settings share any meaningful characteristics? Can we write a general theory of law as a tool for ordering public knowledge of the past?

Most professional historians find it laborious enough, after all, to write about love in ancient Phoenicia, or markets in seventeenth-century China, or navigation in medieval Scandinavia, without also having to answer the ultimate question, ‘What is history?’ Some would insist that history is nothing but a plethora of histories, concealing no transcendent essence such as ‘History is the progressive achievement of democracy’ or ‘of reason’ or ‘of proletarian revolution’ beneath its variegated surface. Any universalist claim seems either ideologically laden or plausible only as to obvious and trivial elements (‘History concerns past events’). Laws affecting historical memory, too, remain deeply embedded within cultural contexts. Age-old debates still rage about whether law itself – irrespective of any given system’s distinct norms, institutions, and practices – ‘is’ the same type of thing from one culture to the next. Can it be meaningful to ask about law’s effect on historical memory in general terms?

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Law's distinct feature as a vehicle of memory, I shall argue, is its aim or effect of increasing the expressive weight of some version of history, irrespective of that version's substantive weight. In order to proceed towards that observation, I begin in Section 2 by examining the notion of a memory law. It is a new phrase, but derives from something as old as law itself. The phrase admittedly helps us to understand certain debates within law emerging from a post-World War II and post-colonial world, but accounts for only certain types of specially consecrated norms. I shall propose that we instead adopt a phrase like law affecting historical memory (or some cognate) if we wish to grasp the broader processes through which law guides the public's understanding of the past.

In Section 3, I examine public discourse as the matrix within which facts and norms relevant to the past are expressed. Claims about the past gain substantive weight through factual and normative claims as perceived within respective epistemic communities. We must distinguish substantive weight, however, from a claim's expressive weight, the claim's opportunity to be heard and discussed. In Section 4, I argue that law serves to add expressive weight to some preferred version of history and to subtract expressive weight from rival versions, irrespective of those respective versions' substantive merits. I draw a further distinction in Section 5 between legal-formalist and legal-realist approaches in order to propose, in conclusion, a general description of law as a vehicle for shaping public understandings of the past.

2 From 'Memory Laws' to Laws Affecting Memory

For as long as human society has existed, law has shaped historical memory. I make that claim not with any privileged insight into all societies, but because law can scarcely do otherwise. 'The life of the law has not been logic', in Oliver Wendell Holmes's time-honoured words, 'it has been experience . . . The law embodies the story of a nation's development through many centuries.'\(^{10}\) Well before establishing their democracy, the ancient Athenians had 'committed the whole constitution (πολιτείαν) into the 'hands' of the statesman Solon.'\(^{11}\) Solon's steps towards citizen enfranchisement followed from more than moral abstractions. '[T]he hardest and bitterest part' of their earlier constitution, Aristotle would later write, had been

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'their state of servitude (δουλεύειν).\textsuperscript{12} Among the democratising features of Solon’s new regime were: prohibitions on loans secured by ‘the debtor’s person; the right of each citizen ‘to claim redress on behalf of any one to whom wrong was being done’; and the ‘institution of the appeal of the jury-courts.’\textsuperscript{13} Those are no humdrum, blackletter norms. They are the codified memories of an overthrown past.

Modern constitutions stand largely as responses to the arrival or overthrow of some monarchical, dictatorial, oligarchic, colonial, or imperial power. The preamble to the 1996 South African Constitution, for example, enshrines core legal principles through the recollection of a chilling history:

\begin{quote}
We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land . . . We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to – Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.\textsuperscript{14}
\end{quote}

We need not, moreover, assume the concept of a legal system to overlap entirely with that of a national legal system. Law at supra-state, sub-state, and indeed non-state levels is equally framed in response to dramatic histories. The 1948 Universal Declaration of Human Rights (UDHR) cloaks its otherwise conventionally humanist goals as the remembrance of a grievous past:

\begin{quote}
Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . .,

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law . . . \textsuperscript{15}
\end{quote}

Curiously, however, the phrase ‘memory laws’ is remarkably new, sometimes mentioned as a legal aberration. But we can easily close the gap between law’s age-old incorporation of memory and the recent emergence


\textsuperscript{15} G.A. res. 217A (III), U.N. Doc A/810 at 71, art. 19 (1948), preamble par. 1–2. The European Convention on Human Rights, albeit not expressly reciting that history, remains unmistakably embedded in it. Its drafting followed closely in the footsteps of the UDHR. On relevant comments of the UN Human Rights Committee, see chapter by Antoon De Baets in the present volume.
of a specialist discourse. We can distinguish between, on the one hand, a narrow category of specifically dedicated memory laws and, on the other hand, the inherent and far broader phenomenon of laws affecting public memory. As a recent term of art, memory laws translates, not altogether accurately, the phrase lois mémorielles, which emerged in post-World War II French political discourse. It designates actual and proposed laws formulated to proclaim authoritative versions of some invariably sensitive history. Such laws might well ‘prove repressive by penalising alternative opinions.’ But they can also be purely ‘declaratory’, adopted solely to confer solemnity upon a brutal past without penalising the expression of contrary views.

That distinction between declaratory and punitive norms does not, however, wholly capture even this recent and narrower concept of ‘memory laws’. Some laws are non-punitive yet more than just declaratory. They authorise specific government action, albeit without imposing penalties for breach. These include laws designating a commemorative garden, a souvenir postage stamp, or a national holiday. The Vilnius ordinance may seem harmless enough, yet those more-than-just-declaratory and yet non-punitive norms often spark as much controversy as punitive norms. The 2014 Hungarian law purporting to create a World War II memorial was widely condemned as a ploy to whitewash the Horthy regime’s complicity in Nazi atrocities. Even something as seemingly benign as the Hyde Park Diana Princess of Wales Memorial Fountain ends up scorned as royalist propaganda.


18 Ibid. For a critical assessment of declaratory norms, see, e.g., chapter by Miklós Könczöl in the present volume.


As illustrated in Figure 1, we can distinguish between, on the one hand, declaratory, hence *non-regulatory* measures, and, on the other hand, measures that are *regulatory* in the sense of authorising action in ways that may be either punitive, entailing limits on freedom, or non-punitive yet entailing some state action. A strictly declaratory norm is not only non-punitive, but more generally non-regulatory.

Antoon De Baets, for example, defines a memory law as serving to ‘prescribe or proscribe certain views of historical figures, dates, symbols or events’. The word ‘proscribe’, on his view, entails punitive norms, whereas ‘prescribe’ includes both non-punitive and declaratory norms. The distinction between regulatory and non-regulatory norms arises largely at the level of prospective, legislative norm creation. Yet it echoes a parallel distinction at the level of retrospective dispute settlement. We find, on the one hand, traditionally judicial procedures of full-fledged prosecutions containing a punitive element, as with war crimes tribunals. On the other hand, we find conciliatory ‘truth commissions’ or ‘bridging’ approaches of a non-judicial or only quasi-judicial type, aiming more to establish a declaratory record than to punish.

As suggested in this chapter’s epigraph, it is not only regulatory laws that spark controversy. The German Parliament’s 2016 resolution recognising

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21 See chapter by Antoon De Baets in the present volume.

22 For critical analyses see, e.g., chapters by Jeremie Bracka and Salvador Herencia Carrassco in the present volume. The distinction between non-regulatory and regulatory approaches cannot, however, be pushed too far. For a state even to ‘declare’ some activity to be criminal, for example, can in some instances constitute an affirmative step towards subsequent coercive or punitive measures. In the case of genocide, for example, declaratory recognition may subsequently be invoked to justify use of force to prevent further killing or criminal procedures to punish it.
the mass Ottoman killings of Armenians as genocide sparked a hefty Turkish backlash. Many have argued that even a good-faith declaratory law, e.g., acknowledging complicity in the Holocaust or the trans-Atlantic slave trade, wrongly distorts historical enquiry by throwing too much weight behind governments entering an arena where they command insufficient scholarly competence. States or supra-national bodies such as the United Nations or Council of Europe, on that view, cannot match the political authority they wield to any correlative epistemic authority. The temptation, moreover, for non-democratic or only quasi-democratic regimes to declare their own readings of history only further frustrates serious historical enquiry and education.

Within the contexts of strong democracies, however, I have elsewhere supported declaratory (and indeed other non-punitive) laws. I do so by challenging any background assumption that the state can retreat to neutrality on controversial ethical disputes, including those involving historical interpretation. States perforce take positions on history, and can scarcely do otherwise. Every authorised grade-school history curriculum stamps an official imprimatur upon particular readings of history. Few modern democracies are prepared to abandon historical education on the grounds that it cannot be done with perfect ethical or political neutrality.

More importantly, that particular and recent concept of memory law, in both its regulatory and non-regulatory forms, only partly accounts for the broader and older panoplies of ways in which law directs public memory. Even in today’s France or Germany, where such laws have attracted attention, they become dwarfed by the far broader means through which law shapes popular understandings of history in schools or through the media. Particularly in contemporary democracies, law’s power simply to promote certain views of history and to sideline other views far exceeds its power to ‘prescribe’ and to ‘proscribe’ this or that particular view through formal sanctions.

The Vilnius ordinance promotes a particular understanding of history. Through its conspicuously idiosyncratic irony and nuance, however, it neither ‘prescribes’ any officially endorsed history nor ‘proscribes’ any

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24 E. Heinze, Hate Speech and Democratic Citizenship, 6, 22, 186, 111-16, 211.
The Zappa monument lampoons the whole notion of states prescribing or proscribing particular accounts of history. There is no obvious way to ‘violate’ the Vilnius ordinance. (One might well incur penalties for defacing such a structure, but that prospect holds under laws protecting public property generally. It is not unique to memory laws as such, although some laws might impose penalties disproportionate to those authorised for defiling other public property.) The Zappa bust satirises the po-faced, taboo-laden colossuses of state-approved heroes imposed throughout the Soviet imperial space, which could once be ridiculed only through precarious whispers. It is anti-iconographic iconography.

To be sure, that monument is highly idiosyncratic. I invoke it not as typical, but as a test case to ensure that general principles can apply even to an unusual specimen. More typical forms of non-punitive commemoration, like postage stamps or the Princess Diana fountain, serve more to promote than to prescribe a particular view of persons or events from the past. Law, after all, always acts beyond sheer prescription and proscription. We would err if, failing to see prescription and proscription, we saw no law at all. Not to legislate is also to legislate. Legal power acts through law’s proceedings but also through law’s abstentions. Alfons Aragoneses reminds us, for example, that by remaining ostensibly neutral, ostensibly silent about its fascist past, Spanish law ends up pervasively and systematically bolstering a politically expedient, albeit ethically questionable status quo of unreflective forgetfulness. The power of law in a Spain which withholds even a declaratory legislative resolution on Francoist crimes is a power indeed. It is a power for schools and public institutions to avoid taking an essential ethical stance. It is a power to sideline public instruction and debate.

We must forever anew shake off the popular view of law as operating on the criminal paradigm, namely, that law consists essentially of ‘orders

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25 This is not to say that all Lithuanian law and practice are equally liberal. See, e.g., Prosecution and persecution, 2008 (noting prosecutions brought against elderly Holocaust survivors on dubious charges of collaboration).


backed by threats\textsuperscript{28} which 'get you into trouble' when you break them. When Germany adopts a law punishing Holocaust denial, it admittedly creates a rule in the recent sense of a \textit{loi mémorietelle}. By contrast, Britain's omission to punish Holocaust denial does not rob it of relevant law, indeed of \textit{equal force}. For Germany, such a law powerfully restricts individual freedom. For Britain, law serves just as powerfully to protect individual speakers as to the utterances in question. Britain does not lack relevant law and retains no sphere of 'no law' on Holocaust denial. For many a German mindful of the past, it is the power of the British law that is the more ominous, the more dangerous for preserving historical memory (however passionately we free speech advocates may disagree).\textsuperscript{29} In both states, irrespective of having or not having some memory law, there is plenary law affecting historical memory. The \textit{memory law} is but a recent subset of the far broader, age-old category of \textit{law affecting historical memory}. Our question, then, is not \textit{whether} law shapes memory, as if it could do anything else, but rather \textit{how} it performs that task.

3 Discursive Contexts: Substantive versus Expressive Weight

Any claim about history, certainly within a contemporary state, is arguably relevant to memory laws, insofar as it seeks to influence someone's understanding of the past. Some such views end up reflected within law and policy. Historical memory arises largely through public discourse. Public discourse does not necessarily entail candid public conversation, even if the greatest possible overlap between the two remains central to democracy.\textsuperscript{30} In repressive states, public discourse often amounts to little more than endless reiteration of state-approved messages.

Consider the following Context $C_1$. A township committee plans to facilitate a public discussion about some controversial history. The organisers expect in advance that not all views will carry equal substantive weight as to their intellectual or moral content. Some views, they predict, will entail glaring factual inaccuracies or repugnant normative assumptions. The organisers decide that each view must nonetheless be accorded

\textsuperscript{28} Hart (1994, 7).


the same expressive weight through an equal opportunity for all views to be recited and discussed.

That difference between substantive and expressive weight is crucial.\(^{31}\) A history of the Holocaust may carry overwhelming substantive weight through voluminous and intricate factual evidence about its organisation and execution, and may carry expressive weight within a small, specialist community. For the broad public, however, it may carry expressive weight only once it translates into accessible terms. Run-of-the-mill populists, by contrast, may carry strong expressive weight through sheer charisma. But they often bear little substantive weight in view of their implausible factual or normative assumptions. The founder of the French Front National Jean-Marie Le Pen entertained Holocaust denial of both the factual type, casting doubt on the existence or extent of Nazi gas chambers, and of a normative type, sidestepping such factual questions on the view that any Jewish genocide under the Nazis amounted, in any event, to little more than a ‘detail’ of history.\(^ {32}\)

Sheer repetition or amplification of an idea cannot increase its substantive weight – its materially factual record or its presupposed ethical principles – but does aim to enhance its expressive weight. From the late 1930s through to 1945, Germans under Nazi rule became exposed to incessant messages in school and the media about Jews as dangerous and perfidious vermin (Die Juden sind unser Unglück) to the exclusion of any counter-narrative. That communicative monopoly lent to antisemitism colossal expressive weight, persuading much of the population of its factual accuracy and ethical force. It in no way, however, endowed

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\(^{31}\) Cf. E. Heinze, *Hate Speech and Democratic Citizenship*, 104 (distinguishing between epistemic equality and democratic equality).

antisemitism with greater substantive weight through a materially superior factual record or rigour of ethical reason (except perhaps under an extreme social constructionist view, which would collapse substantive weight altogether into expressive weight). The Nuremberg rally will forever stand as the epitome of crushing expressive weight coupled with substantive vacuity. Conversely, no addition of substantive weight through factual clarification or ethical reason inherently increases an idea’s expressive weight. To the contrary, the more fastidious and comprehensive a history of the Holocaust, the fewer its readers.

The organisers in Context C1 strive for an ‘ideal speech situation’. They aim to avoid, as far as possible, unfair weighting of the discussion in favour of any one reading of the historical event in question, even if they recognise that such a situation can never be perfectly achieved. As has been noted by critics of classical liberalism, power dynamics long embedded within culture impair equal opportunities for all views to receive the fair and equal hearing that the liberal paradigm purports to vindicate. Exponents of a mainstream opinion enter the conversation with attitudes already strongly weighted in their favour; with, so to speak, countless hours ‘awarded’ to their opinion even before this particular event begins. No discussion about something as value-laden as a controversial historical event can start with a clean slate.

Nor could adjustments in the conversation’s rules ever erase those predispositions. A gap separates, on the one hand, the conversation as a particular event in space and time (‘next Thursday evening at the Town Hall’) from, on the other hand, its inscription within a matrix of opinion.

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33 Modern controversies surrounding the ethical implications of social constructionism echo an inveterate concern about the discrepancy between the substantive and the purely expressive force of arguments. That anxiety became, in Athens, pivotal for assessing political legitimacy. For Plato, the disjunction between substantive essence and rhetorical appearance engenders endless injustice. See, e.g., Gorgias, in Plato, Plato: Complete Works, J.M. Cooper (ed.) (Indianapolis, IN: Hackett 1997 [fourth-century BCE]), 791–869; Rhetoric, in Aristotle [fourth-century BCE], 1984:2, 2152–269.

34 See, e.g., Habermas, 1983, 53–125. Unlike the English translation, which creates ambiguity between the two nouns ‘speech’ and ‘situation’, the adjective ‘ideal’ in the original ideale Sprechsituation unambiguously modifies ‘situation’ and not ‘speech’. We might instead translate the phase as ‘ideal speaking situation’ to emphasise not the product but rather the process of expression, even if we admittedly refine the process in the hope of refining the product.

weighted in favour of the *status quo*. The organisers might, for example, adopt a rule granting additional time to representatives claiming to present historically repressed minority perspectives. For some participants, however, that attempt to redress an historical imbalance risks inserting an opposite yet equally unsatisfactory imbalance into the conversation scheduled for that particular date and place. Many blacks within a white majority situation might well shun a rule of ‘Twenty minutes more for black people’, which would seem merely to patronise them. They might well prefer to rely on their arguments’ inherent substantive weight even despite an expressive weight historically skewed against them. There is no infallible remedy to that dilemma of democratic public discourse. We would immobilise ourselves, however, if we were to swing from one naive extreme, assuming perfect expressive fairness, to the opposite yet equally untenable extreme of assuming the impossibility of expressive weight for historically marginalised viewpoints.

Figure 2 proposes various correlations between substantive and expressive weight, representing four basic contexts within which public discourse about history can proceed. As an ideal we might hope that the views carrying strong substantive weight, through strong factual and normative bases, will emerge through strong expressive weight (quadrant 1), in effect
marrying ‘essence’ and ‘appearance’. The best arguments in substance –
proclaiming the injustices of genocides, of the transatlantic slave trade, of
women’s subordination – would then acquire expressive weight through
their substantive weight. That ideal speech situation would conversely
entail weak expressive weight for views carrying weak substantive weight
(quadrant 4). Ideally, in that situation, attempts at factual and ethical
denial or trivialisation of genocides, slavery, or patriarchy would, precisely
through their substantive weakness, progressively dissipate, enjoying only
weak expressive force.

Together, then, quadrants 1 and 4 present an aspirational context for
historical debate. Quadrants 2 and 3, by contrast, counter that ideal with
the flaws of everyday, fallible discursive reality. One such realistic, hence
commonly defective type of discourse would be a position enjoying strong
substantive weight through rigorous factual and normative bases, yet dis-
sipated through weak expressive weight (quadrant 3), as we witness among
dissidents within highly oppressive regimes, or with the aforementioned
example of a Holocaust history too meticulous to be widely accessible. The
final situation, conversely, involves strong expressive weight enjoyed by
a view carrying only weak substantive weight (quadrant 2), as with Jean-
Marie Le Pen’s type of populism.

Those four categories are admittedly limited. For any discussion about
a controversial history, substantive and expressive strength will always be
context- and viewpoint-dependent, often subject to the assessments of
epistemic communities themselves either defective in their own factual
or ethical foundations, or simply lacking consensus. (While the concept
of ‘epistemic community’ often refers to expert groups, I construe it here
more broadly to mean any locus of identifiable shared understandings,
not limited to scholars or professionals.) For simplicity’s sake, moreover,
I have merged factual and normative elements, as they do not readily dis-
aggregate. A dispute, for example, as to whether it was justified for allied
forces to bomb Dresden in 1945 deeply embeds factual claims within ethi-
cal assumptions, yet those same ethical assumptions within further factual
claims (A was ethically legitimate if B was factually the case, but B was fac-
tually the case only if ethically necessitated by C, and so forth).36 Even if we
assume agreement on a set of factual claims, divergent normative positions

36 See, e.g., D. Selwood, Dresden was a civilian town with no military significance. Why did
.co.uk/history/world-war-two/11410633/Dresden-was-a-civilian-town-with-no-military-
will accord different importance to some facts over others. A speaker may take a substantively compelling normative position but may lack depth of factual support, or may, conversely, turn factually sound evidence towards an ethically questionable aim. The seductive way to perpetrate Holocaust denial is not by reciting wholly false facts, but by blending the false with the true.\(^{37}\)

The axis of real-world, hence often or even inherently defective discourse running between quadrants 2 and 3 raises a problem central to law's role in shaping memory. Situations represented by quadrant 3, where expressive weakness inhibits substantive strength, might seem to suggest that state interventions become most likely through measures aimed at adding expressive strength. In repressive states, we would expect any use of law to maintain that dynamic. North Korea embodies an arch-typical 'Quadrant 3 regime', relentlessly directed towards suppressing substantive evidence of both past and current affairs through a state monopoly on expressive strength for its viewpoint. In stable and prosperous democracies, by contrast, we witness many debates about (a) whether the state ought to add expressive weight to histories threatened by neglect or counter-narratives; and, if so, (b) whether that should be done in punitive ways, as with punitive anti-negationist laws, or only in non-punitive or declaratory ways. That prospect raises concerns for those who distrust government as a protagonist within historical discourse. The question, again, is not whether law enters historical discourse, but how it enters. Quadrant 3 by no means compels, say, a ban on Holocaust denial. It might well, however, be cited to demand more effective primary education, better coverage within state-operated media, or more effective state commemorative and cultural events.

The concept of substantive weight presupposes no telos, no inevitable end-point, no final or objectively verifiable completion of historical knowledge. History remains a hermeneutic enterprise, rarely enjoying any Archimedean point hovering above sensitive and complex histories. Ioanna Tourkokoriti rightly invokes Durkheim, Castoriades, Foucault, and Ricoeur to recall the impossibility of fixed or canonical histories.\(^{38}\)


\(^{38}\) See chapter by Ioanna Tourkokoriti in the present volume. See also chapter by Cosmin Sebastian Cercel (developing an anti-essentialist approach), and the notion of 'ontological security' developed in the chapter by Maria Määksoo.
Greater and lesser substantive weight will always depend upon the epistemic communities within which claims are adduced.\textsuperscript{39} We may aim to avoid the relativism that would equate, for example, affirmation and denial of the Holocaust as positions of equal validity; yet those writers, along with such historians as Maurice Halbwachs and François Hartog, remind us of history’s polysemic character. The distinction between substantive and expressive weight does not correspond to any distinction between, respectively, objectivist and subjectivist assumptions about history. To the contrary, the distinction emerges from post-Wittgensteinian and post-Heideggerian understandings, particularly prominent in the work of Habermas, that substantive knowledge and debate about history cannot proceed independently of the socio-linguistically expressive contexts within which they find their articulation and thereby, for present purposes, their expressive weight.

4 State Intervention as ‘Expressive Weighting’

Now consider Context $C_2$, in which the committee members further adopt a portentous exception to their seeming quest for expressive parity among speakers and viewpoints. They agree to exclude speakers whose statements ‘undermine or insult any of our deceased Heads of State.’\textsuperscript{40} That restriction aims to subtract expressive weight from views critical of, and to add expressive weight either to overt praise for, or to the silence which sidelines scrutiny of, those former Heads of State. Law, from that perspective, affects historical memory through the aim or effect of adding expressive weight within public discourse to some preferred version of a given history, commensurately subtracting from the expressive weight of rival versions. That ‘subtraction’ clause may seem tautological or redundant, but emphasises a salient factor. Expression within public discourse may be open-ended in principle, since there is no limit \textit{a priori} to how many or how much people might speak; but its effectiveness is zero-sum in practice, since none of us can absorb all views without end. In practice, greater

\textsuperscript{39} Whether a claim within natural science envisages truth irrespective of any epistemic community, indeed in a way fundamentally distinct from truth claims within social science, remains an ongoing dispute central to the philosophy of science. The notion of absolute objectivism as necessarily presupposed by natural science still presupposes epistemic communities setting criteria of experimental and pragmatic veracity.

\textsuperscript{40} Cf., e.g., Turkish Criminal Code, Law no. 5273 of 26 September 2004 (Official Gazette No. 25611 of 12 December 2004), sec. 13, arts. 297–9.
exposure, hence greater expressive weight for one view does indeed subtract to some extent, even if only minimally, from competing views.

North Korea again dramatises such a point at the extreme end. Upon the death of Kim Jong-il in 2011, state media carried the claim that magpies had mourned the leader’s death.\(^{41}\) Within the modernist, scientific context to which that state strenuously proclaims its adherence,\(^ {42}\) and yet which yields no empirical evidence that birds emote over conventionally political events, such claims enjoy scant substantive weight yet overwhelming expressive weight through public discourse barring dissent. (What distinguishes our extreme poles running from Zappa to magpies is not humour versus seriousness, but rather deliberate versus unintended humour.) Yet even the mild state action of a Vilnius ordinance deliberately satirical of official statuary nevertheless enhances the expressive weight of a twentieth-century Americanist myth of individual freedom. The sculpture thereby subtracts, albeit to an equally mild degree, from rival views about individualism. Persons viewing even an intentionally funny monument may still be impacted so as more strongly to favour its message over rival views. After all, if public art lacked all impact, nations would scarcely bother with it.

The emphasis on ‘aim’ as well as effect in that provisional account is crucial, as actual effects are unpredictable. In some contexts, a law could boomerang, provoking a backlash which would undermine the additional expressive weight envisaged for the official version.\(^ {43}\) A categorical statement can be made, then, only about the expected effects of laws influencing historical memory, and not about their actual effects. All such laws aim to enhance the expressive weight of the state’s view\(^ {44}\) vis-à-vis rival views,


\(^{42}\) See, e.g., Foundation of Socialism. Retrieved 1 July 2017, from Official webpage of the DPR of Korea, available at: www.korea-dpr.com/foundation_socialism.html (2011). That qualification is crucial, particularly in the repressive context within which the North Korean state operates. I by no means deny the ascription of symbolically rich animal interaction with humans recognised within cultures throughout history, as reported, for example, by Herodotus.

\(^{43}\) See, e.g., E. Heinze, Hate Speech and Democratic Citizenship, 145–53 (arguing that bans within full-fledged democracies on Holocaust denial or other forms of provocative speech, while aiming to promote a preferred reading of history, may serve more to strengthen than to dissipate those provocative readings).

be it dramatically through Draconian laws or minimally through mild ones. For Draconian regimes, such readjustments are made through harsh penalties. For the mild ones, the readjustments can be deemed de minimis both in expressive weight and in legal enforcement.

When law is used to add expressive weight to views already carrying strong substantive weight (Figure 2, quadrant 1), it is with an anxiety about the better view languishing. We witness that aspiration through laws prohibiting Holocaust denial,\(^45\) even if it can be challenged through rival aspirations, such as free speech principles.\(^46\) Commensurately weaker expressive weight is then accorded to substantively weaker rival views (quadrant 4), such as Holocaust denial, with the aspiration of dissipating them. Strong expressive weight added to views carrying only weak substantive weight (quadrant 2), by contrast, typifies a bad-faith, propagandising effort. An unsatisfactory stance is offered a better opportunity to prevail through a discursive process commensurately subtracting expressive weight from alternative views which carry a stronger substantive weight. Commensurately weaker expressive weight is then accorded to stronger substantive views with the aim of diluting them (quadrant 3), which is the classic predicament of dissidents within dictatorial or censorious regimes.

Through the Zappa monument's self-parody, a Lithuanian public authority adds only a de minimis expressive weight to the view that the entertainer once represented a freedom of anti-establishment expression denied under Soviet rule. The almost imperceptibly slight expressive weighting of the public conversation through that intervention emerges through Lithuanians' freedom to detest Zappa, or anything he represents, as loudly as they wish. The Vilnius ordinance certainly exemplifies a local government intervening to tilt public discourse in favour of a certain reading of history, but does so with an adjustment of expressive weight no


\(^{46}\) See, e.g., E. Heinze, *Hate Speech and Democratic Citizenship*, 22, 23, 102, 103, 113, 144, 150, 151, 154, 155. De Baets recommends that we 'distinguish three possible effects of laws: their symbolic effects (emphasizing social values), their repressive effects (punishing offenders) and their pragmatic effects (steering conduct in a certain direction). Genocide denial laws can have powerful symbolic effects, but usually have poor repressive and pragmatic effects. The same goes for hate speech laws' (personal communication of 22 June 2016, on file with author).
heavier than that of a feather. The North Korean state, in polar opposition, crushes with the weight of an avalanche even featherweight departures from its approved history. There is no obvious way to violate the Vilnius ordinance, and no obvious way, beyond ritual obedience, not to violate any North Korean law affecting historical memory.

Re-adjustment of expressive weight need not proceed wholly against popular will. On a socially divisive historical event, a memory law will often add expressive weight to the view of one constitutive social group, subtracting it from the view of another. Many members of ethnic minorities, for example, decry a media which they claim to be dominated by, thereby according unfairly strong expressive weight to, the views of an ethnic elite. Many conservatives condemn mainstream media for being rigged by, hence according undue expressive weight to, a leftist elite. Many progressives reject the media for being controlled by, according undue expressive weight to, a corporate elite. The readjustment may, moreover, entail both local and global levels of influence. Russian or Chinese nationalists warn of media manipulated by, according undue expressive weight to, a Washington-based elite. The far-right and far-left blast the media worldwide as puppeted by, according undue expressive weight to, a Jewish elite; and so forth.

5 Formalist versus Realist Aspects

Memory laws must be viewed from both legal-formalist and legal-realist perspectives. As a matter of sheer formalism, a state may, for example, keep a law on the books that penalises speakers who ‘undermine or insult the nation’s President’, but which has long ceased to be enforced, falling into desuetude. From a legal-realist perspective, that law’s expressive weight within general historical discussion may turn out to be null. To be sure, as long as the law remains on the books, it might suddenly be invoked at any time, which is why people sometimes agitate for repeal even of neglected laws. People may also push for the law’s removal on the symbolic grounds that its ongoing enshrinement lends it an inadmissible legitimacy.47

Conversely, from a legal-realist perspective, a state may clandestinely engage thugs or hitmen to attack individuals, groups, or organisations dissenting from a state-approved history, even if no formal, blackletter law

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47 For De Baets, ‘a comparable (partly overlapping, partly more important) case is the case of survivals: flawed laws promulgated under dictatorship, or their remnants, sometimes survive in democracies’ (personal communication of 22 June 2016, on file with author).
forbids the airing of such opinions – indeed even if officials laud their nation as a paradise of free speech. In 2016, the Russian Prime Minister Dmitry Medvedev maintained that ‘no one bans’ access by the political opposition to Russia’s central mass media. ‘It is absolutely impossible to impose any restrictions on the freedom of speech in the era of Internet.’ Legal-realist theory emphasises that state power may operate through material albeit formally unacknowledged effects. That point expands the aforementioned observation that law never retreats from its role of shaping memory, even, or especially, when it appears silent.

Refining the prior account, then, it can be said that law affects historical knowledge through formal norms as well as informal, institutionally supported practices, with the primary aim or effect of adding expressive weight within public discourse to some preferred version of a given history, thereby commensurately subtracting from the expressive weight of rival versions. That description aims to avoid a scope so broad as to attribute commemorative aims to virtually any law, but also to avoid a scope so narrow as to include only ‘memory laws’, _lois mémorielles_, tailored expressly for a commemorative purpose.

The German Justice Minister announced in 2016 proposed legislation to compensate individuals who had been convicted under the now-repealed § 175 of the Criminal Code (Strafgesetzbuch), which had penalised homosexual acts between consulting adults. Ordinarily legal systems recognise no presumption of compensation to persons previously disadvantaged under later-repealed laws. For example, a 95 per cent marginal tax rate for highest earners may be repealed in favour of a 50 per cent rate without any assumption of repayment to those who had once paid the higher rate. The German proposal recognises not merely that the earlier law is no longer necessary as a practical matter. Rather it stakes out an ethical position on German history, namely, that the conception or implementation

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of § 175 StGB had visited a fundamentally unjust form of persecution upon those convicted. As the law’s overtly stated purpose is to compensate former convicts, it does not impose penalties to enforce its view of the past in any prescriptive or proscriptive way. It might admittedly be identified under Figure 1 as regulatory but non-punitive; yet it cannot altogether, or at least not primarily, be recognised as a loi mémorielle, as it is not obviously adopted for a specifically commemorative purpose. We can recognise memory laws as only sample, particularly obvious manifestations of the broader phenomenon of laws affecting historical memory, by also acknowledging such borderline cases in which a norm’s or practice’s specifically commemorative purpose may not be wholly clear.

More generally, a law may delegate decisions about primary educational curricula, including the teaching of history, to expert educational bodies or to school oversight committees. Insofar as primary education is compulsory, such a law adds formal state power to the choices made by such bodies even if the law itself makes no such choices. The phrase ‘institutionally supported’ in that definition again reminds us, moreover, that the concept of a ‘legal system’ is not fully coextensive with the concept of a national system. Within national legal systems, ‘institutionally supported’ will indeed largely mean ‘state-supported’, but law at supra-state, sub-state, and indeed non-state levels is equally framed within historical contexts and in response to decisive histories.

Lines between punitive and non-punitive laws can blur once we take the synthesis of formalist and realist elements into account. A law may, for example, mandate a schoolroom curriculum, which includes state-approved instruction of important past events. On its face, the blackletter text prescribing that educational programme, albeit regulatory, need not set forth penalties for particular departures from it. State measures could nevertheless be taken against teachers who express contrary views, or who allow open student discussion of such views, perhaps under a different law, such as one setting forth general conditions governing professional insubordination. In such a case, the law may indeed be non-punitive in its literal formulation, yet becomes de facto punitive in its application.

The distinction between punitive and non-punitive laws should not be confused with the distinction between mild and harsh laws. Here too we must consider both formalist and realist elements. A law imposing only negligible penalties, such as token fines that even the poor can easily pay, may fall on the milder end of the spectrum, and may even be deemed to be effectively non-punitive as a practical matter, but is still punitive in its
literal formulation. Or a law may formally provide for harsh penalties, but if only small penalties are in fact applied, then it too remains punitive in form but mild in practice. Conversely, as already mentioned, a law may formally include no penalty at all, but prompt either mild or harsh punishments in practice. De Baets observes, 'the mere fact of a conviction is punitive, the mere fact of an acquittal is reparatory. Therefore international human rights courts, when ruling that states have committed human rights violations, often stress the reparatory nature of their judgments for the victims of these violations.'

Law affecting memory commonly arises in contexts of dramatic histories, such as genocides, brutal dictatorships, or other incidents of gross and systemic human rights violations, well within the context of 'history' as conventionally understood. In view of the foregoing definition, however, any norm, policy or practice can count as a state intervention into public memory as long as it is imposed through some constitutional power, with the primary aim or effect of adding expressive weight within public discourse to some preferred version of a given history. 'Memory laws', *lois mémorielles*, in the current and familiar sense have certainly focussed recent scholarly and media attention on the ways in which states act to influence public understandings of history. Those seemingly recent developments must not, however, divert our attention from something far older and far deeper within law. We must examine all the more closely the links between law and historical memory. For as long as human societies have existed, law inherently reflects official positions taken on past events.

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51 Personal communication of 22 June 2016 (on file with author).
52 Cf. Heinze, 2017 (identifying both minor, isolated abuses and mass atrocities as equally vulnerable to suspect state denials).