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Theorizing Law and Historical Memory: Denialism and the Pre-conditions of Human Rights*

Teorizzare diritto e memoria storica: il negazionismo e le precondizioni dei diritti umani

Derecho y memoria histórica: negacionismo y presupuestos de los derechos humanos

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Negazionismo Negacionismo Denial

Abstracts

There is a striking, and far from coincidental, resemblance between a state's attitude towards history and its attitudes towards human rights. Both postures, after all, centrally concern a state's statements or silences about important events, be they of a recent or a more remote past. Any state position towards its human rights past inherently entails a two-fold denial, both of views omitted by and of views contradicting its own. There are many senses in which allegations of human rights abuse can be denied, 'bad-faith denialism' by states being decisive for human rights. Bad-faith denialism is not a problem like torture or lack of food. It is a 'meta-problem' for human rights—the problem inherently attaching to all human rights problems. By the very nature of human rights, there is no way their implementation can even in principle be expected absent adequate expressive possibilities within society to challenge official records and histories. Free expression, then, while certainly no more important than other rights as a matter of sheer human existence—protections from torture or rights to food and water are arguably more important—must not be viewed as just another right on the human rights 'checklist'. As the only ultimate safeguard against bad-faith denialism by states, it sets a condition for the very possibility of any regime of human rights, and the only meaningful measure against which human rights 'universality' can be assessed.

C'è una somiglianza sorprendente, tutt'altro che casuale, tra l'atteggiamento di uno Stato nei confronti della storia e il suo atteggiamento nei confronti dei diritti umani. Entrambe le posizioni, dopo tutto, riguardano essenzialmente le dichiarazioni o i silenzi di uno Stato in relazione a eventi importanti, siano essi di un passato recente o più remoto. Qualsiasi posizione dello Stato nei confronti del suo passato in relazione ai diritti umani comporta intrinsecamente un doppio rifiuto, sia delle visioni omesse che dei punti di vista che contraddicono il suo. Ci sono molti modi in cui le accuse di abusi dei diritti umani possono essere negate, ma il "negazionismo in malafede" da parte degli Stati è decisivo per i diritti umani. Il negazionismo in malafede non è un problema come la tortura o la mancanza di cibo. È un "meta-problema" per i diritti umani - il problema inerente a tutti i problemi dei diritti umani. Per la stessa natura dei diritti umani, in nessun modo la loro attuazione può, in

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linea di principio, essere prevista in assenza di adeguate possibilità di espressione all'interno della società, che consentano di sfidare documenti e storie ufficiali. La libera espressione, quindi, sebbene non sia certamente più importante di altri diritti in termini di pura esistenza umana – le protezioni dalla tortura o i diritti al cibo e all'acqua sono probabilmente più importanti - non deve essere considerata solo un altro diritto sulla "checklist" dei diritti umani. Al contrario, essa è l'unica salvaguardia contro il negazionismo in malafede da parte degli Stati, la condizione per la possibilità stessa di qualsiasi regime dei diritti umani: è l'unica misura significativa su cui valutare la "universalità" dei diritti umani.

Existe un parecido sorprendente, y en absoluto casual, entre la actitud de un estado hacia la historia y hacia los derechos humanos. Al fin y al cabo, ambas posiciones concierten significativamente a las declaraciones o silencios del estado sobre sucesos importantes, de un pasado reciente o más remoto. Cualquier posición del estado sobre su pasado respecto a los derechos humanos implica una doble negación, la del punto de vista que se omite y la del que resulta contradictorio con la posición que se mantiene. Las denuncias de abusos relacionados con derechos humanos pueden rechazarse en muchos sentidos, "negacionismo de mala fe" por parte de estados que es decisivo para los derechos humanos. El negacionismo de mala fe no es un problema como la tortura o la falta de alimentos. Es un "metaproblema" para los derechos humanos —el problema inherente a todos los derechos humanos. Debido a la naturaleza misma de los derechos humanos, en principio no cabe esperar que su implementación se produzca sin las adecuadas posibilidades de expresión dentro de la sociedad para desafiar los registros e historias oficiales. Por lo tanto, aunque no sea más importante que otros derechos desde el punto de vista de la existencia humana —la protección frente a la tortura o los derechos a la comida y la bebida son sin duda más importantes —, la libertad de expresión no puede considerarse como un derecho más en la lista. En tanto que única salvaguarda final contra el negacionismo de mala fe procedente de los estados, es una condición para que pueda existir cualquier régimen de derechos humanos y la única medida significativa con la que se puede evaluar la "universalidad" de los derechos humanos.

Sommario

1. Introduction.

"There is no shameful incident in our past", tweeted the Turkish Foreign Minister Mevlüt Çavuşoğlu in 2016, with words as chilling as they were cryptic, "that would make us bow our heads".[1] That grumble came among a torrent hurled against the German Parliament after it passed a near-unanimous resolution designating as genocide the Ottoman mass killing of Armenians in 1915.[2]

No shameful incident? Twitter is admittedly the natural home of hyperbole. Still, we must wonder whether officials even from States with milder histories, such as Liechtenstein or Tuvalu, would deny that *anything* blameworthy had ever occurred in their national pasts. Çavuşoğlu's outburst does not count as "law" in any obvious sense, yet Turkey certainly has penalized individuals who challenged the Ottoman campaign in World War One or the modern Turkish State's accounts of it.[3]

A vast literature continues to emerge about how States use law to shape public understandings of the past. Studies on law and historical memory ordinarily focus upon selected times and places – that is, upon particular events within specific nations or regions. A more general theory of law and historical memory, however, must not be neglected. A 2017 anthology entitled *Law and Memory: Towards Legal Governance of History* includes chapters on Canada, the Czech Republic, Greece, Hungary, Israel/Palestine, Peru, Poland, Romania, Russia, Ukraine, and Spain.[4] Another, entitled *Injustice, Memory and Faith in Human Rights* includes chapters on Bangladesh, ISIS, Northern Ireland, Spain, New Zealand, and Australia.[5] Far from losing focus, those varied geographies highlight recurring patterns, which a general theory of law and historical memory has the task of identifying and explaining.

Two patterns emerge from those and similar studies. First, the case studies appearing in those collections directly or indirectly trace back to histories of systemic political violence or repression. Government interventions into historical memory are rarely undertaken frivolously, even when they take obtuse forms. Elsewhere I have argued that, for example, the deliberately humorous Frank Zappa monument erected in Vilnius in 1992 – seemingly deviating from the familiar species of solemn, even pompous public statuary – sheds light on the dynamics of law and historical memory.[6] In an effort to pursue that enquiry into a general theory of law and historical memory, this article will examine the relationship between historical denialism and human rights, broadly construing "denialism" as conduct by governments aimed at curtailing critical public awareness of salient histories. Denialism, as a failure of State cooperation, is not *just another* obstacle in the path of remedying historical abuses. Denialism undermines human rights in their distinctive capacity *as* rights. Second, the aforementioned anthologies encompass well-established democracies alongside weaker democracies and non-democracies. The latter have at times been associated with extensive manipulations of historical memory. A general theory must apply, however, across the board. States considered to be top human

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[1] Quoted in Smale e Eddy (2016).

[2] Resolution adopted 2 June 2016 from Antrag der Fraktionen CDU/CSU, SPD und Bündnis 90/Die Grünen: "Erinnerung und Gedenken an den Völkermord an den Armeniern und anderen christlichen Minderheiten in den Jahren 1915 und 1916", Deutscher Bundestag, 18 Wahlperiode, Drucksache 18/8613 (31 May 2016). The Resolution passed with one vote opposed and one abstention. Abdi-Herrle (2016). The resolution's aim was not solely to censure Turkey or its Ottoman predecessor, but to acknowledge also the "reprehensible roll" (*unrühmliche Rolle*) played by German authorities at the time for geo-strategic purposes.

[3] See, for example, *Agence France Presse*, "Anzeige wegen Beleidigung des 'Türkentums'", 9 June 2016; Heymann (2014).

[4] Belavusau e Gliszczyńska-Grabias (2017).

[5] Chainoglou et al. (2017). See review by Ioanna Tourkochoriti in the present journal.

[6] Heinze (2017), pp. 428-429.

rights performers[7] can offer models for best practice as to the ways in which governments ought to confront their nations' histories.

2. Law as Tool of "Expressive Authority".

A paradigm case for the use of law to influence public memory is the conventional "memory law" (*loi mémorielle*), such as a law penalizing Holocaust denial. There are various ways, sometimes less direct yet nevertheless potent, in which law exercises such influence. A law open-endedly penalizing "public order" offenses, although lacking any explicit reference to history, can be equally intrusive when used, for example, against a person who publicly disputes some official history – or even more intrusive, in the sense that the offense may be unforeseeable or the punishments harsher.[8] Similarly, officially mandated school curricula adopting State-approved histories in the classroom[9] could simply fall back upon ordinary disciplinary rules governing teaching staff, that is, rules bearing no resemblance to conventional "memory laws", and which might indifferently apply penalties to teachers for all and sundry offenses, such as missing work or smoking on school grounds. Similarly, laws may be adopted to authorize the building or the removal of public monuments, which do not involve penalties as such (except of course for customary rules against *any* defacement of property), yet which aim to shape public perceptions. Even systemic government inaction influences memory by preserving a *status quo*, as witnessed by states failing, for example, to re-name public places commemorating repressive officials.[10] As opposed to the more usual concept of "memory laws", a phrase such as "laws affecting historical memory" can better capture the variety of ways in which law is used to influence public understandings of the past.[11]

Laws affecting historical memory can dramatically change perceptions about the past. Governments can and do sponsor the introduction of evidentiary documentation into the public sphere, for example, through influential academic and research institutes or indeed through propaganda agencies. In so doing, however, they do not necessarily proceed in ways different from non-State actors intervening on historical topics or debates. What is distinctive about specifically *legal* means of promoting particular renderings of history is *not* the various ways in which they may introduce *substantive* evidence, but rather the *expressive* authority they envisage.

Imagine all governments on earth jointly resolving to insist that Louis XVI had never been guillotined. They might purge all historical evidence of the beheading, substituting fabricated evidence to the effect that he lived out his full reign. Such an effort would not render the revised history factually true.[12] Facts are embedded within narrative and interpretive contexts but do not wholly dissolve into them.[13] Any such systemic erasure of evidence about Louis's execution, although not rendering the denial true, would nevertheless impede citizens' abilities to confirm the event's occurrence. It would thereby render the new claim persuasive, particularly in a world, even within Europe, where many know little about the French Revolution. Such a campaign would augment the revisionist claim's expressive authority without augmenting its substantive truth.

Substantive and expressive authority need not always conflict. One can imagine the op-

[7] Criteria for such an assessment are by no means uncontroversial nor immune from questions about political or cultural bias, but see, for example, the criteria set forth in Economist Intelligence Unit, *Democracy Index 2015* (2016).
[8] Heinze (2017), pp. 416-418.
[9] "The Rewriting of History", *The Economist*, 8 November 2007.
[10] Aragoneses (2017), p. 177.
[11] Heinze (2017), p. 417.
[12] Unless of course we adopt a social constructionism so extreme as to amount to epistemic nihilism, an option sometimes tempting to adopt when we contemplate states, such as North Korea, maintaining quasi-total information control. See, for example, Amnesty International, *Amnesty International Report 2016-17* (2017), p. 222. Even if the near-totality of the North Korean population can be led to believe that, for example, the nation's founder Kim Il-Sung was born in a log cabin (cf. "God is dead. Long live Kim Il Sung", *The Independent*, 16 September 2004), that success certainly does not render the claim true on any seriously empirical notion of history. Some might indeed apply extreme constructionism to Western media as well, on the view that its supposed viewpoint-pluralism becomes a patina beneath which dominant class interests inevitably trump marginalized histories. Even that postulate of class-interested undercutting seemingly pluralist façades presupposes some ascertainable truth by which the distinction itself can reliably be drawn. A more credible social constructionism is not ordinarily of that extreme type. It serves more to critique the significance and limits of factual and evidentiary claims, and not to undermine the possibility of such claims.
[13] See, for example, Habermas (1988).

posite scenario, whereby the said governments join in affirming the execution of Louis XVI, conjoining their expressive authority to the documented record. For the study of law and historical memory, however, the central problems arise not through such *conjunctions* between, on the one hand, historical events and, on the other hand, governments' stances towards those events, but rather through actual or prospective *disjunctions* between those two factors. Even governments desiring in good faith to promote the most accurate possible histories may come in for scrutiny in view of conflicting views about controversial histories – that is, in view of possible disjunctions arising even when they strive to achieve conjunction between documented history and their official positions *about* those histories.[14] That problem of obstructions even to good-faith renderings of history commonly arises within spheres of open public discourse. It is implausible, after all, to attribute good faith to a government which systemically bars dissenting voices. (That is one reason why serious questions of legitimacy haunt bans on Holocaust denial within democracies as incompatible with their otherwise robust spheres of public discussion.[15]) The problem of denialism concerns above all disjunctions between expressive authority and substantive truth maintained through repression exerted upon open dissent within the public sphere.

This article enquires solely into the *normative* significance of denialism for a legal system purporting to incorporate human rights as higher-order norms. There will be no examination of historical denialism in the *sociological* terms richly explored by such writers as Hannah Arendt, who scrutinized social and political processes that normalize and "banalise" injustice[16]; or Stanley Cohen, who explored individual and collective tendencies to divert attention away from injustice.[17] Such approaches shed great light on the concrete human processes lurking behind formal normative systems, but the scope of the present analysis will remain on the latter.

3. Components of Denialism.

"Whoever publicly denies, crudely trivialises, or attempts to justify genocide or other crimes against humanity… shall be punished with imprisonment for up to two years." So runs the Liechtenstein Criminal Code (*Strafgesetzbuch*) §283(1)(5).[18] Many countries have similar provisions, and rarely is Liechtenstein chosen for purposes of examining them. We would normally turn to jurisdictions such as Germany and France, where such provisions have generated fierce public debate and high-profile prosecutions.[19] Liechtenstein has generated no case law and little if any public controversy – neither result surprising for a nation of 40,000 not famous for their rowdiness.

StGB §283(1)(5) is helpful, however, because of its black-letter formulation, which, being broader than similar statutes in other democracies, makes it a useful springboard for identifying conceptual components of denialism. Compare it, for example, to Article 1(1)(c) of the more prominent EU "Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law":[20]

> 1. Each Member State shall take the measures necessary to ensure that the following intentional conduct is punishable: […]
> (c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes

[14] See, for example, "Entscheidung zum Mahnmal im Bundestag", 1999.
[15] See, for example, Heinze (2016), pp. 131-133, pp. 163-164.
[16] Arendt (1963).
[17] Cohen (2000).
[18] „Mit Freiheitsstrafe bis zu zwei Jahren ist zu bestrafen, wer… (5) öffentlich durch Wort, Schrift, Bild, über elektronische Medien übermittelte Zeichen, Gebärden, Tätlichkeiten oder in anderer Weise Völkermord oder andere Verbrechen gegen die Menschlichkeit leugnet, gröblich verharmlost oder zu rechtfertigen versucht." *Strafgesetzbuch* (StGB), 24 June 1987, LGBl. 1988, no. 37, as amended in LGBl. 2000, no. 37. StGB § 283(1)(5) foresees various forms of expression. If the message is expressed by physical violence (*Tätlichkeit*), then it overlaps with standard crimes of battery or assault, raising only questions as to whether a hateful motive can, through an anti-denialist or similar hate crime provision, become a distinct offense, akin to an aggravating circumstance. By contrast, forms that are "oral, written, pictorial, electronic [or] gestural" raise balder questions about free expression, i.e., about whether such purely expressive acts ought to be prohibited at all. See, for example, Heinze (2016), p. 19.
[19] See generally, Josende (2010); Leggewie e Meier (2002); Nieuwenhuis (2011); Pech (2003); Robitaille-Froidure (2011); Rohrssen (2009); Thiel (2003).
[20] EU Council Framework Decision 2008/913/JHA (28 November 2008).

> against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group […].

Although rather broadly worded, Article 1(1)(c) limits the scope of any prospective crimes to definitions set forth in the Statute of the International Criminal Court, not unlike the types of limits found in the national laws of various European Union member States. Liechtenstein's provision contains no such restraint. A small jurisdiction anticipating few breaches can more easily accommodate case-by-case adjudication. I shall therefore propose the following definition, to be refined with the assistance of §283(1)(5) as the analysis progresses. At the most basic level, we can say that *human rights denialism consists of acts or omissions aimed at promoting doubt that a human rights violation has occurred.* The term "acts" denotes affirmative steps, such as a State prosecuting a dissenter. By contrast, the term "omission" would include, for example, a refusal to reveal evidence about a violation.

Anyone can undertake such acts or omissions. The definition can therefore be refined to distinguish among different types of actors. Accordingly, *human rights denialism consists of acts or omissions, by States or State agents, or by non-State actors, aimed at promoting doubt that a human rights violation has occurred.* Those various types of actors are all amenable to both formal and more informal, pragmatic criteria. Formally non-State actors, for example, may turn out to be front organisations under state control or influence.[21] Such acts or omissions can, moreover, be undertaken in good faith even where allegations of a violation are ill-founded. This essay's focus, however, will be on *bad-faith denialism*, in the sense of undertaking a systemic, concerted disjunction between expressive authority and substantive evidence.

Unlike similar laws of other States, the scope of StGB §283(1)(5) is not limited to explicitly named atrocities. It envisages a more general concept of denialism. Its literal wording leaves open the possibility of an unlimited number of events – either those which might already have occurred in the past or those which might still occur in the future.[22] Whether taking the form of an express statement or undertaking ("act") or of calculated neglect ("omission"), denial could in principle be undertaken with respect to any *prima facie* human rights violation. To be sure, §283(1)(5), just as analogues in other legal systems,[23] remains confined to mass atrocities. As a strictly conceptual matter, however, even an everyday denial, as when an ordinary police agent mendaciously denies having roughed up a detainee where there was no evident necessity to do so, fully counts as human rights denialism.

The analysis herein applies irrespective of longstanding debates about which interests fall, or ought to fall, within the scope of human rights protections. Drawing for now on conventionally recognized norms, denialism does not pose a *discrete* human rights problem as does an invasion of privacy or an unfair trial. Denialism makes sense only as a derivative of a distinct human rights problem. There must first be some suggestion that a violation has occurred before the prospect of its denial can meaningfully arise. Nor, however, is denialism merely a subsequent problem resulting from a prior one, in the way unjust imprisonment might follow from an unfair trial or malnourishment from obstruction of food supplies. Denialism is a "meta"-problem, a problem about some other problem, namely, about some substantive abuse. It is the problem of whether or how some substantive human rights problem is acknowledged or conceived; about whether and how a problem comes to be discussed at all.

Several components of denialism are crucial for the purposes of developing a general theory. These are: *the principle of facticity, the principle of universal agency, the principle of non-incrementalism, the principle of effectivity,* and *the principle of normativity.* Not only through what it contains, but also through what it lacks, StGB §283(1)(5) sheds light on each of those principles.

[21] For example, the London-based Islamic Human Rights Commission (IHRC), although formally purporting to observe general human rights precepts, has widely been viewed as following Iranian government policy, see Murray (2015). Cf. Islamic Human Rights Commission, describing itself as "independent", "About IHRC", *Islamic Human Rights Commission*, here; Cf. also Heinze (2008a), pp. 22-36.

[22] One apparent limitation can be discerned, for §283 carries the heading "racial discrimination" (*Rassendiskriminierung*). See, for a review of the case law precedents under §283, ECRI (European Commission against Racism and Intolerance), *ECRI-Bericht über Liechtenstein* (2013), p. 17. Cf. Marxer (2014). See also ECRI, pp. 9, 10, 17 (recommending that the scope of culpable actions be extended in law to include grounds of nationality and language).

[23] See Imbleau (2003).

Principle of facticity. Like other such bans, StGB §283(1)(5) assumes the reality, which we can call the "facticity", of certain past events, such as genocides and crimes against humanity. Denialism by definition assumes some set of fact-claims open to evidence-based affirmation or denial. A law such as StGB §283(1)(5) assumes that, once some evidential threshold has been crossed, a given event's facticity becomes presumptive. Laws, for example, that penalize Holocaust denial, leaving aside questions about their democratic legitimacy or practical effectiveness, assume that evidence for the Holocaust – that is, for its facticity – has been satisfactorily adduced.

Principle of universal agency. One may deny acts or omissions either (a) for which one bears liability, or (b) for which others bear liability. Everyday examples of element (a) arise among criminal defendants. As to States and their agents, the Nuremberg trials confirmed the principle that liability for atrocities can accrue not only to immediately engaged henchmen, but also to high, mid-level, or low-level officials or facilitators.[24] Familiar examples of element (b) arise around present-day Holocaust denial, where most denialism today is carried on by persons other than those who originally perpetrated it,[25] the latter having generally died out. A concept of denialism must therefore entail a *principle of universal agency*. Substantive offenses can be committed only by particular parties, but any individual, any State, or any organization can in principle commit some form of denialism, because denialism can extend not only to one's own conduct but also to the conduct of others.

Principle of non-incrementalism. StGB §283(1)(5) limits its scope to heinous abuses; few legal systems could in practice or would wish in principle to criminalize all denials of all possible human rights violations. After all, even denial of the most egregious violations raises questions about free speech. Outside situations of potential perjury or defamation, it would certainly be rare for a fully-fledged democracy to penalize a citizen for openly denying, even in bad faith, that a police constable had unnecessarily roughed up a non-violent criminal suspect. Anti-denialist laws take what we can call an *incrementalist* view of human rights. Any right certainly can be violated in greater or lesser degrees, through the volume and intensity of violations. A more general concept of human rights denialism, by contrast, need not be limited to extreme abuses. An isolated instance of police brutality does not equate in gravity with a genocide, but does not thereby become trivial nor lose its status either as an object of legal regulation or as an object of possible denial. Although government anti-denialist policies take that incrementalist view in practice, the concept of denialism as such must assume *non-incrementalism*: *any* violation, whether great or small, whether committed *en masse* or randomly, *can* be denied, irrespective of any legal penalties that may attach to some types of denial.

Principle of effectivity. Express denial can emerge through a direct speech act, such as "We did not do *x*" or "*x* never occurred". But indirect denial often supplies the better strategy. For example, the political United Nations organs and specialized agencies concerned with human rights such as the General Assembly, ECOSOC, UNESCO, and the Human Rights Council, show how block voting, as well as political factors extraneous to the human rights at issue, is routinely used by States to avoid scrutiny of their own human rights records. Throughout much of the Human Rights Council activities, States such as China, Iran, or Saudi Arabia have scarcely needed to worry about matters ever progressing to the stage of having to undertake formal denial in any high-profile way, as they have frequently wielded enough influence to keep their records off the primary agendas in the first instance.[26]

State officials may from time to time issue this or that denial of some violation, but a greater power rests with their control over school curricula or State media,[27] entailing choices about matters exposed to or withheld from entire populations. One contributing factor to early twenty-first century antisemitism in Central and Eastern Europe, for example, despite the miniscule numbers of Jews, was the omission of Holocaust education in schools or the mass media during the period of Soviet domination, in view of continuing anti-Jewish persecution after World War II.[28] Such calculated silencing can be understood as tacit, "pre-emptive" denialism – as "engineered silence".

That concept of informal denial is not without problems. On countless human rights

[24] Cf., e.g., Arendt (1963).
[25] See Benz (2005); Imbleau (2003); Taguieff (2002); Taguieff (2004); Tiedemann (1996).
[26] See generally Freedman (2013).
[27] See 'The rewriting of history', 2007.
[28] See Salomoni (2008).

fronts, activists feel that their particular issues receive inadequate attention. Whenever greater attention seems possible (which is effectively always: activists rarely feel their causes receive too much attention), inattention may seem deliberate or negligent, and may be viewed as informal denialism. The nagging problem of "whataboutery", whereby States seek to deflect criticisms by emphasizing allegations against other States,[29] raises the paradox that any attention to some given violation means that attention is drawn away from others. The concept of "informal denialism" does not, however, broaden beyond all utility. "Whataboutery", contrary to widespread condemnations of it, is legitimate and indeed ethically compelled to the extent, though *only* to the extent, that it vindicates a sheer rule-of-law principle demanding generally similar treatment of similarly situated actors, hence scrutiny in reasonable proportion to a given State's overall levels of violation.[30] What remains crucial to bad-faith denialism is, then, not only expressly declared but also tacitly engineered denial.

Principle of normativity. A general concept of human rights denialism must encompass all human rights. The greater the number of such norms, however, the weaker the consensus around them. The consensus around condemning genocide or crimes against humanity, acts widely treated as the core of gross and systemic abuse, remains strong.[31] As we move away from that core, rights become more disputed as to their content or scope, such as claims governing abortion or equal rights of sexual minorities.[32] In many States, assuming they had such a law formulated like StGB §283(1)(5), it remains doubtful that someone would be prosecuted for denying even systemic oppression of sexual minorities.[33] That uncertainty does not bar us, as independent observers or advocates for human rights, from *assuming* the normativity of equality for sexual minorities.

Even the most settled norm is not immune from controversy. Readily falling under StGB §283(1)(5) would be an extremist who publicly claims either that no Nazi plan of mass extermination of Jews ever existed (literal "denial" or *Holocaustleugnung*) or that victims were few (effective denial through 'trivialization' or *Holocaustverharmlosung*).[34] Both positions constitute *factual* denialism. But some other denier, instead of resorting to those tactics, might just as easily proclaim: "Now we ought to finish the job!" That position represents not factual but rather *normative* denialism. The speaker does not deny but rather celebrates the recognized facts, and in that sense, under a provision like StGB §283(1)(5), "attempts to justify" them. The speaker denies not the facts of the Holocaust, but rather the *norm* that it ought to have been deemed illegal or even immoral. Extremists, rarely perturbed by logical contradictions, may well make both types of statements: both the factual denialism that the Holocaust did not happen *and* the normative denialism whereby it is good that it happened.[35]

Normative denialism may take the form of a straightforward utterance, but may be subtler. The element of "trivialization" (*Verharmlosung*), for example, may flow from an attempt to diminish the factual record. For example: "It wasn't millions, but at most a few thousand, which was to be expected in wartime and not as bad as much of what the allies did". But trivialization can also flow from attempts to ridicule the norm itself. Leaving aside questions as to the propriety or efficacy of anti-denialist bans, courts may find that a defendant undertakes normative denialism not by minimizing facts about the Holocaust, but by lampooning the norm, at least with respect to the victim group (for example: "The Jews must have deserved it"), a tactic deployed by the French antisemitic performer Dieudonné M'Bala M'Bala.[36] By extension, the "Nuremberg defence" that legal obedience required orders to be followed, claimed as valid within the bounds of the law in force at the time the acts were committed, becomes a particularly ambiguous normative denialism.[37] Questions as to whether it amounts to falsification or implies bad faith remain disputed.

[29] See Cohen (2011).
[30] See Heinze (2008a).
[31] See Vienna Declaration and Programme of Action (VDPA), para. 28, adopted by the World Conference on Human Rights in Vienna, 25 June 1993.
[32] See Heinze (2001), pp. 283-309.
[33] See, e.g., Buchanan (2015); Saner (2013).
[34] See Tiedemann (1996).
[35] See Benz (2005); Tiedemann (1996).
[36] See "Dieudonné condamné pour provocation à la haine raciale", *Le Monde*, 24 March 2015, here.
[37] See Lacey (2007), pp. 1203-1224.

4. Categories of Denialism.

Factual and normative denialism are related yet distinct occurrences. We can therefore further refine the earlier definition. *Denialism consists of acts or omissions, by States or State agents, or by non-State actors, aimed at promoting doubt about the facticity or normativity of a human rights violation.* But that definition remains formal. We can apply it only to the extent that we agree on the facticity and normativity applicable to any given claim or case. There has to be such agreement in at least some cases in order for there to be a human rights system at all.

The reader versed in post-positivist social science might question the distinction between factual and normative levels proposed thus far. Facts, particularly within social and political contexts, are perceived and assessed within cultural, normatively-laden contexts. The present analysis is, again, not undertaken in furtherance of prior sociological studies of denialism. It assumes only the conventional distinction between posited norms and their application to designated fact patterns, without which the possibility of a regime of law or rights becomes impossible. As related but distinct elements factual and normative denialism combine to establish four general senses of denialism, summarized below in Figure 1.

First, the most obvious type of denialism arises through acts or omissions aimed at promoting doubt about both (a) the *strong* facticity and (b) the *strong* normativity of a human rights violation – that is, about (a') plausibly established violations of (b') largely uncontroversial norms. To be sure, plausibility cannot always or easily be deemed an objective matter. It remains anchored within discursive contexts and epistemic communities. Human rights can make no sense at all, however, without background assumptions of both factual and normative plausibility. From that standpoint, an overlap of strong normativity with strong facticity represents *paradigmatic denialism* (see Figure 1, quadrant 1), as represented, for example, by the "genocide or other crimes against humanity" clause of StGB §283(1)(5).

Second, denialism can arise around actions governed by strong facticity but weak human rights normativity. That scenario can be called *controversial denialism* (see Figure 1, quadrant 2). Many States, for example, by no means deny the factually unequal treatment of some or all sexual minorities. Some take pride in it, as a principally moral or even divinely commanded stance. What they therefore deny is the *norm* of equal treatment for such individuals, hence an assumption of weak normativity.[38] No State would readily deny norms against ethnic genocide, an allegation they would instead deny, if at all, on factual grounds ("we have not committed actions tantamount to genocide"). Equality for sexual minorities being less accepted, the denial of abuses on normative grounds becomes more likely ("they get what they deserve for their immoral and unlawful conduct"). Such a position can avoid factual denial, which might appear to confirm the underlying norm, opting instead to deny any norm that would constitute abuses of sexual minorities *as* human rights violations.

Third, denialism can arise around actions governed by strong normativity but weak facticity. That situation would include cases of legitimate factual denial, flowing from *presumptive innocence* (see Figure 1, quadrant 3), in response to accusations of human rights violations. For example, if the rights of law-abiding citizen Jones have been vilated by police officer Smith, with no knowledge on the part of police officer Owen, then Owen's denial may plausibly fall within quadrant 3, whereas Smith's falls within quadrant 1.

Fourth, one may deny the occurrence of actions governed by weak normativity and weak facticity. Many engaging arguments have emerged, for example, in favor of general legalization for the production, distribution, and possession of cannabis. In Western democracies, those arguments are commonly formulated as trade-offs between individual liberty and social policy. Rarely are arguments for legalization presented as human rights claims (except perhaps for a limited subset of medicinal users, or on an exceedingly libertarian construction of human rights). If a State punishes those actions in a non-excessive way, in overall proportion to the gravity of the harm caused (which in many cases might mean only petty fines), then it can legitimately deny both the normativity and the facticity of any claim that such penalties could in any way violate a *human right* (even if it does violate what may be the better social policy). That case presents, then, the *presumptive absence* (see Figure 1, quadrant 4) of any human rights violation.

[38] See, e.g., Buchanan (2015).

Four Basic Categories of Human Rights Denialism

	Strong Normativity	Weak Normativity
Strong Facticity	[1] *Paradigmatic denialism* as to actual human rights violation	[2] *Controversial denialism* as to actual human rights violation
Weak Facticity	[3] *Presumptive innocence* as to actual human rights violation	[4] *Presumptive absence* of any human rights violation

Figure 1

5. Bad-Faith Denialism.

Following Figure 1, we can pinpoint the type of denialism that raises a particular concern for present purposes, namely bad-faith denialism. An act or omission aimed at promoting doubt about the facticity or normativity of a human rights violation may be undertaken in good faith, as no human rights violation occurred (Figure 1, quadrant 4), or when a violation did occur, but one reasonably denies one's own liability in law (Figure 1, quadrant 3). Bad-faith denial, by contrast, arises where the violation has indeed taken place (eliminating quadrant 4) and proceeds beyond attempts to exculpate a presumably innocent party (eliminating quadrant 3).

Therefore, to continue refining our definition, *bad-faith denialism consists of acts or omissions, by States or State agents, or by non-State actors, aimed at promoting doubt about the otherwise presumptive facticity or normativity of a human rights violation.* Normativity becomes presumptive either uncontroversially, hence paradigmatically (quadrant 1) or controversially (quadrant 2). In other words, for quadrant 2, normativity becomes presumptive only to the extent that some sufficient agreement on the norm can be garnered, rendering both elements uncontroversial only to that same extent. Beyond that point, the presumption fails. Accordingly, *if* both facticity and normativity are sufficiently established (and become in that sense "presumptive"), such that certain conduct *x* does indeed constitute a human rights violation, *then* bad-faith denialism consists by definition of acts or omissions designed to promote doubt either about that violation's facticity, or about its normativity, or about both.

There is another way of phrasing that same definition. To say that doubt is being promoted about the *otherwise presumptive* facticity or normativity of a human rights violation equates with saying that the promotion of such doubt is *unjustified.* Accordingly, *bad-faith denialism consists of acts or omissions, by States or State agents, or by non-State actors, aimed at promoting unjustifiable doubt about the facticity or normativity of a human rights violation.* Accordingly, *if* both facticity and normativity are sufficiently established, such that certain conduct *x* does

indeed constitute a human rights violation, *then* bad-faith denialism consists by definition of acts or omissions designed to promote unjustifiable doubt either about that violation's facticity, or about its normativity, or about both. Doubt counts as *unequivocally unjustifiable* insofar as both facticity and normativity are sufficiently strong (quadrant 1), but as *controversially unjustifiable* insofar as the facticity is strong but the normativity is insufficiently strong, and in that sense, "weak" (quadrant 2). That distinction, and decisions about which category applies, will of course depend on our prior assumptions as to the sufficient strength or weakness of the relevant facticity and normativity in any given situation of denial, as illustrated by the controversies over abortion rights or gay equality.

Bad-faith denial emanates from both State and non-State actors (see Figure 2 below). Familiar bans on Holocaust denial, for example, assume non-State actors' bad-faith denialism through such speech acts as outright denial or trivialization. Categorical denial of the Nazi Holocaust is not currently adopted as official policy by any State,[39] yet remains ubiquitous among non-State actors, indeed often with greater or lesser levels of State support, as in various far-right and Islamist circles.[40] Insofar as it is States who remain the crucial focus of human rights systems, for the remainder of the analysis we shall pursue a framework for denialism by States. Bad-faith denial by States consists of acts and omissions. The paradigm case of an act of denial is a formal, official statement. A paradigm case of informal denial is manipulation of media or institutions to prevent the relevant topics from being raised.

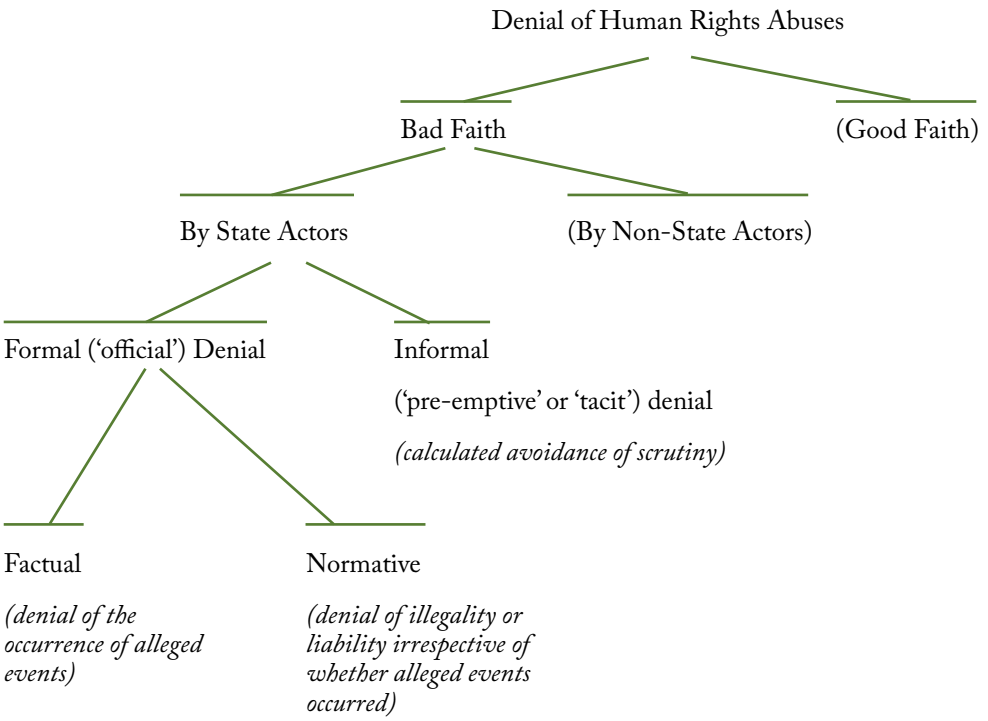

Figure 2

6. Avowal and Acquiescence.

Acts or omissions constituting bad-faith denialism become, by definition, worthy of condemnation. But condemnation in the name of what? What kind of background norm does bad-faith denial *itself* breach, as distinct from the substantive norm at issue in a particular instance? In a full-blown and credible judicial proceeding, it breaches a prohibition of perjury, but such proceedings are guaranteed only in a minority of States. Rather, which broader social

[39] The Iranian government has staged officially sponsored events promoting Holocaust denial. See R. Tait, 12 December 2006. "Holocaust deniers gather in Iran for 'scientific' conference", *The Guardian*, 1 May 2016, here) and trivialisation. See Schiavenza (2015).
[40] See Benz (2005); Taguieff (2002); Taguieff (2004).

and political circumstances can best prevent or diminish denialism? On that question, too, we can identify various possibilities (see below Figure 3). We must first distinguish between "government avowal" and "government acquiescence". A government undertakes avowal when it openly confesses and condemns violations it has committed. It undertakes acquiescence when, even if withholding any such overt declaration, it nevertheless willingly allows independent processes to investigate actual or possible violations.

Avowal is familiar from histories of radical political change associated with a momentous constitutional shift. American, French, or Russian revolutionaries, for example, published laundry lists of monarchical abuses. A more recent model emerges with post-war Germany's peremptory and ongoing avowals of Nazi crimes.[41] Those examples cannot, however, be called avowals in the most relevant sense. Human rights law is certainly concerned with the retrospective problem of historical abuses committed by predecessor regimes. Its primary focus rests, however, upon the practices of extant regimes. Human rights law requires above all avowals by governments with respect to their current State institutions and agents, and not merely with respect to earlier, overthrown regimes.

Avowal by governments of violations by their own existing institutions remain rare, usually for mundane political or even partisan reasons. States may decline any factual avowal citing security rationales, the necessity or scope of which is often opaque.[42] In other cases, factual avowal is forthcoming, but defended, persuasively or unpersuasively, on the normative grounds that the impugned conduct was undertaken in conformity with prevailing law.[43] Within democracies, a party in power only reluctantly opts for open or exhaustive proclamations of its own trespasses. Even avowal by a present government of violations attributable to an earlier but recent government from within the same constitutional order (that is, not overthrown), usually of some rival political party or coalition, can lead it into perilous political waters. The current government may not have wholly broken with the violations, or may be involved in related conduct of its own, hence a desire to avoid publicity or interrogation.[44] Nor are incentives for avowal any greater within non-democracies, which, to maintain a veneer of legitimacy both at home and abroad, strenuously avoid critical scrutiny.[45]

The other remedy for denial, *acquiescence*, occurs to the extent that a government allows scrutiny by some independent agent. One type would be *formal acquiescence*, whereby the government willingly submits to a supervisory process, such as domestic judicial review, a parliamentary enquiry, an administrative, ombudsman-type procedure, or an intergovernmental, i.e., an international or regional procedure or investigation.

Human rights become *effective* – that is, more than purely formal, "on paper" norms –only to the extent of effective channels for complaint and redress. For example, Article 2(3) of the International Covenant on Civil and Political Rights provides that States parties shall "ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy […] determined by competent judicial, administrative or legislative authorities, or by any other competent authority …".[46] That Article's location in the "preliminary" Part II rather than the "substantive" Part III plausibly confirms such as institutionally and indeed conceptually prior to the possibility of any system of substantive human rights.

Who determines a remedy's effectiveness? The "competent" authority. How is the competence of that authority determined? Presumably through adequate political process. How is "adequacy" determined? Here we come to the decisive step. There is no avoiding citizens' prerogatives of expression within public discourse as the only ultimate control, not merely based on experience but as purely conceptual, *a priori* matter. The term "citizen prerogative" as opposed to a "right" or "freedom" of expression underscores that the possibility of scrutiny must be in place as a condition for the very possibility for any system of higher-order ("hu-

[41] Those acknowledgments take place in no single moment, but rather unfold gradually through a series of steps, indeed at times criticized as inadequate. For an early specimen, see Adenauer (1998), pp. 1-9.
[42] See M. Landler and P. Baker reporting United States security concerns voiced by opponents of published report on extraordinary renditions involving torture. Landler e Baker (2014).
[43] See, e.g., "Remarks Upon Her Departure for Europe: Secretary Condoleezza Rice", *US Department of State Archive: 2001-2009*, 5 December 2005, here.
[44] See L. Jacobson criticizing continuing extraordinary renditions despite President Obama's pledges to "eliminate" the practice. Jacobson (2012).
[45] See generally Reporters without Borders, "2016 World Press Freedom Index", *Reporters without Borders*, 2016, here.
[46] General Assembly Resolution 2200A (XXI), 16 December 1966; entry into force 23 March 1976.

man") rights or freedoms to exist.[47] That prerogative becomes not merely an empirically necessary convenience, but rather a conceptually necessary condition for human goods to become objects of human rights.

Within international or regional institutions, formal acquiescence assumes the integrity of such bodies, notoriously doubtful in the case of such politicized agencies as the United Nations Human Rights Council. In addition, the international or regional option assumes thoroughgoing State cooperation. Some of the worst abusers remain peremptory deniers. Of course, they may decline to become parties to human rights treaties at all. More commonly, they do become parties *pro forma,* but fail to submit to some or all of the treaty supervisory procedures; or they submit only to the least effectual procedures, for example, abstaining from individual complaints procedures while offering no effective remedies under national law.[48] The only remaining type of acquiescence, then, is *informal*, which is nothing other than the citizen prerogative of expression within public discourse, including its various manifestations such as civil society organizations as well as mass and social media. Indeed, even (or rather especially) contemporary democracies with the best human rights records most thoroughly ensure against institutional failures by protecting that citizen prerogative. That prerogative ensures the possibility not only to declare and to pursue accusations of violations,[49] but also to scrutinize all institutional means of redress, within public discourse.

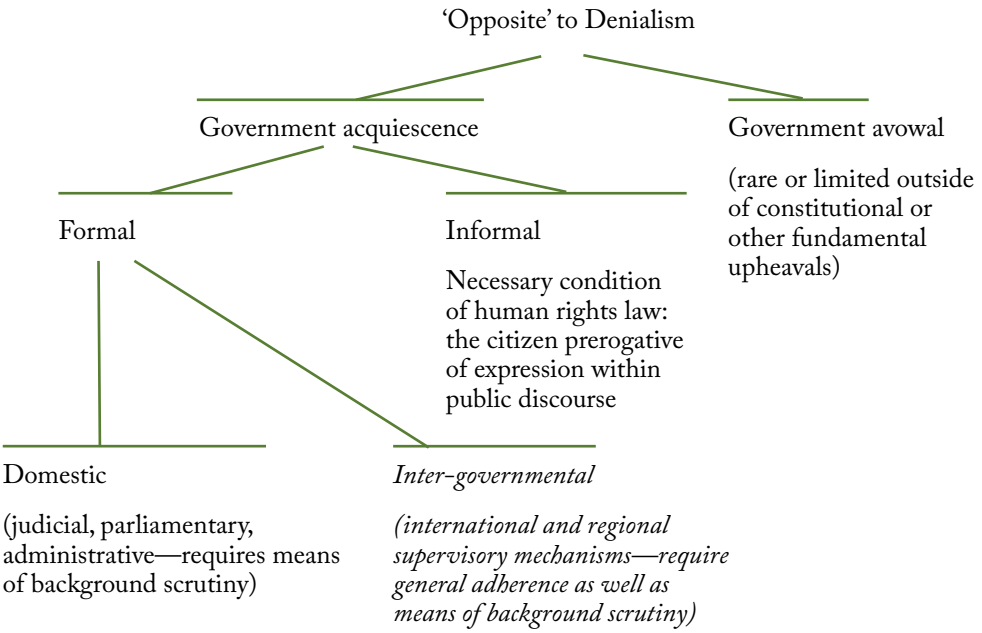

Figure 3

As a practical matter, the central role of informal acquiescence leaves no panacea in sight. By definition, the more abusive the State, the more likely it is to curtail free expression, often by actively persecuting dissidents or competent journalists. Even as to States with effective domestic procedures, however, informal acquiescence assumes not just a correlative or co-equal but a primordial role. Only accountability through the possibility of scrutiny within public discourse can ensure that those procedures' integrity remains intact. Among top human rights performers, basic civil rights and liberties do always enforce each other. Fair trials, for example, are certainly protected, but also actively protect free expression. Yet it is not simply the outcomes of trials which free speech may scrutinize, but the notion of fair trial and continuing possibilities for revision of that notion. In that sense, the citizen's prerogative of expression within public discourse stands not merely as a right co-equal with other rights on a "human rights checklist". Rather, it creates the possibility for a system of human goods to become and

[47] Heinze (2008a), pp. 5, 9, 14, 18, 22, 45-51, 70, 72, 77-78, 81-119.
[48] See, e.g., Heinze (2008b), p. 125.
[49] Cf. Heinze (2008a), pp. 30-32, 157.

to be maintained as a system of human rights.[50]

It might be objected that the citizen's prerogative promotes law generally, and therefore fails to supply any distinct condition for transforming goods into rights. After all, even ordinary rights in contract or tort (or indeed legal interests within regimes lacking any clear concept of "right") arguably become more reliable through public discourse amenable to scrutinizing the fairness and efficiency of their implementation. However, the status of those rights as ordinary, and not higher-order, means by definition that they are nothing more nor less that what any given legal system, as an ensemble of norms, institutions and practices, creates them as or allows them to be. There is no sense in which they must presuppose as conceptually prior the citizen prerogative of expression within public discourse; otherwise there could be no law anywhere at all except in democracies, which would entail an anthropological and historical absurdity. The citizen prerogative is not necessary for a regime simply to *be* a legal system, in the way it is necessary for goods to become human rights. The absence of citizen prerogative is not necessarily, in Lon Fuller's sense, a way of "making law fail".[51] But it certainly is, in an *a priori* sense, a way of making human rights fail.

It might also be objected that such an approach places too much emphasis on a State-centred model of human rights. However, the discursive condition applies straightforwardly to non-State political entities. Within inter-governmental organizations, for example, a commitment to human rights more than gestural or strategic can altogether be measured against the overall commitment to an open public sphere among its respective member States.

7. Conclusion.

We have jumped through several hoops only to end up with an apparent commonplace: States become more accountable in an environment of free expression.[52] Not all democracies have outstanding human rights records[53], yet States with outstanding human rights records are all fully-fledged democracies, including expansive spheres of public discourse.[54] To make the same point using the terms developed in the foregoing pages: the only ultimate remedy against State denialism is informal acquiescence to scrutiny, ensured through a citizen prerogative of expression within public discourse.

The conclusion seems familiar, yet I have challenged the prevailing notion that free expression merely counts as one right alongside many upon the standard checklists of human rights. The problem of denialism confirms a necessary citizen prerogative of expression within public discourse as a – not temporally, but conceptually – prior condition for the possibility of a human rights regime. That conclusion raises as many questions as it answers: public discourse may well be important for human rights, but more so than food, water, privacy, or fair trials? Even necessities like food and water are certainly vital human *goods*. However, they in no way become straightforward objects of human *rights*, except insofar as they are formulated in language. Human rights retain an inherently discursive element, and the analysis has suggested that it is only in public discourse that human rights become scrutinised and vindicated.

As to immediate prospects for State conduct, the news remains lukewarm. The electronic revolution has certainly facilitated modes of public discourse and scrutiny unfeasible in the past. However, crackdowns on free speech and avoidance of self-scrutiny among leading human rights abusers leave only limited room for optimism about foreseeable improvements in human rights. Bad-faith denialism, as we have seen, is not a discrete human rights problem, but a meta-problem for every human rights problem. It is the essential problem attaching to *any* substantive problem as a problem of *human rights*. Free expression and free media serve no purpose more important than that of informal government acquiescence in scrutiny of States'

[50] Cf. Heinze (2008a), pp. 88-94.
[51] Fuller (1969), pp. 49-51.
[52] See generally, Reporters without Borders, note 47 above. See also Duxbury (2011), pp. 300-301; see J. O. McGinnis and I. Somin, examinig the extent and limits of political accountability: McGinnis e Somin (2009), pp. 1741-1742, 1753-1755, 1796.
[53] See, e.g., Economist Intelligence Unit, *Democracy Index 2016* (2016), pp. 4-5.
[54] See Conrad, claiming that "[s]cholarly research on government repression consistently finds that democracies violate the human rights of their citizens less frequently and less violently than non-democracies": Conrad (2014); Davenport, proposing the notion of "the domestic democratic peace": Davenport (2010); Donnelly, noting successes among Northern European social democracies: Donnelly (1999), pp. 611-12. Cf., e.g., McGinnis e Somin (2009), p. 1744, 1767.

human rights performances. More than any substantively discrete human rights problem, the meta-problem of denialism shows how it is of the essence of free expression – not merely as one among a checklist of rights, but as the possibility of legitimate government (as opposed to rule by sheer force) – that no scrutiny of government performance be barred. Substantial fulfilment of that condition does not merely become a "plus" on the human rights balance sheet. It becomes a necessary condition for the very possibility of human rights.

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