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Negationism and Freedom of Speech

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On November 27, 2007 Spain's Constitutional Court ruled, in reference to genocide, that to penalize negationist behavior "is an attack against the right to freedom of expression" (Panyella 32). The sentence modified an article of the penal code that made negationism punishable, and it came in the wake of a trial against well-known neonazi Pedro Varela. The High Court justified its decision arguing that it cannot be asserted that "the negation of behavior juridically considered crime of genocide aims at creating a climate of social hostility against people who belong to the same group that was victimized" (Panyella 32). The Spanish magistrates' ruling is laden with implications for jurisprudence as well as for the relation between law and history. It is worthy of attention for what it can tell us about the conditions for democracy, and indeed the very conception of democracy, in post-transition Spain.

The key question, in every legal settlement, is whom does the sentence favor? If the parties directly affected by the change in the penal code are deniers on the one hand and the victims of genocide on the other, then the question has an unequivocal answer: deniers win. And they win big for linking their cause to a democratic freedom, to freedom in short. Unquestionably, democracy protects negationists as much as anyone else, but one can reasonably ask if it must protect negationism as well. If democracy includes respect for the truth (that is, a certain adequation of legislation to a social consensus based on unimpeded and undistorted access to facts) and protection of minorities's physical and social wellbeing, then it is possible to ask whether the Spanish Constitutional Court's decision was not a setback to democracy under the pretext of a principled defense of the democratic right to freedom of expression. We shall come back to the nature of this freedom. For now, it should be stated that the sentence is offensive because negationism is in and of itself an aggravation of the original crime. Negation of crimes and thus of the truth flourishes where perpetrators enjoy social esteem or at the very least rely on passive indifference, and where the political and juridical arrangement is pervaded by consciousness of the

lingering effects of crimes that are negated. Negation, in other words, does not occur in abstract academic space but in social terrain where leniency furnishes a protective umbrella for crimes that often remain unstated. The move by Spain's Constitutional Court constitutes an event of great significance, in that it abrogates not just the consequences of historical judgement but the notion of historical truth as such. One clarification is in order. I do not suggest that a court of law has jusrisdiction on epistemological matters. In a post-Nuremberg environment, however, a court of law is bound by historical truth when the latter has become foundational for the juridical situation. Currently, legislation in democratic societies incorporates concepts such as "hate crime," "crime against humanity," "racist aggravation," or "racial discrimination" that only came into existence or were substantially reinforced after the Nuremberg trials. To excise the historical fact of genocide from the sphere of law deprives the law of an empirical basis for its definition and sanction of those crimes. Similarly, and this is what makes the Constitutional Court's decision ominous, post-1975 Spanish legislation cannot sap the social knowledge about Francoism without eroding its own democratic legitimacy. If Francoism was not, or was not what a majority of people in the 1970s knew it to be, then the constitution that was crafted to transcend the impasse between institutional power and popular truth is voided of historical meaning.

What was so eventful in the ruling to decriminalize negationism? First, its pioneering character, which made this decision precedent setting. Spain, the last country in Europe to give up fascist political traits became the first, among those that have domestic laws against negationism,[1] to depenalize attempts to erase social awareness of crimes against humanity, committing the fact of genocide to the freeplay of social discourses. Such move ran afoul of the European Court of Human Rights, which in a decision made in 2003, stated that:

> Disputing the existence of crimes against humanity was, therefore, one of the most severe forms of racial defamation and of incitement to hatred of Jews. The denial or rewriting of this type of historical fact undermined the values on which the fight against racism and anti-Semitism was based and constituted a serious threat to public order. It was incompatible with democracy and human rights and its proponents indisputably had designs that fell into the category of prohibited aims under Article 17 of the Convention. (European Court of Human Rights, "Inadmissability")

The ECHR concluded that in application of article 17 of its convention (which provides that no one may use the rights guaranteed therein to seek the abolition or limitation of those same rights), the plainttif cannot appeal to the protection of article 10 (the right to freedom of expression) insofar as he

wants to use it to dispute crimes against humanity. The following year the ECHR reiterated this exclusion for "the category clearly established historical facts—such as the Holocaust—whose negation or revision is removed from the protection of Article 10 by Article 17 of the Convention (European Court of Human Rights, "Chauvy and Others" 20). Freedom of expression was thus explicitly subordinated to historical truth and respect for the rights of others. This decision disturbs fundamentalists for whom freedom of speech is context-free and unlimitable. Even if it functions as a cover for assailing other fundamental rights, its abuse, so the argument goes, can always and everywhere be restrained by the free marketplace of ideas. Redolent of the laissez-faire argument about the ultimate fairness of the market, freedom of speech fundamentalism does not consider that this right emerged as a guarantee against government's irrepressible tendency to muffle opposition rather than as a sanctuary for symbolic aggression against defenseless individuals or minorities. Such untrammeled liberalism dispenses with the "harm principle" recognized by John Stuart Mill and invoked (although to deny its applicability) by the Spanish Constitutional Court. Much less does legal fundamentalism concede the claims of the "offence principle" introduced by Joel Feinberg in 1985, or sufficiently weigh the evidence that, in a context of latent or explicit aggression, "symbolic" easily slips into effective violence, as in child pornography, sexual exploitation of women, hate speech, and other forms of actual and not merely hypothetical degradation of people. If some countries have incorporated anti-defamation laws and racist aggravation of ordinary crimes into their legal systems, it is because their legislative bodies contextualise the limits to freedom of expression. Negationism cannot take cover behind freedom of expression, because it is not a matter of expression. Negationists do not opine about or interpret past experience; they erase it. In place of indubitable experience, experience that preceded not only its enunciation but even the possibility of enunciating, they introduce ideology that is rooted in the motives that led to the original crime. And yet this shrill ideology attempts to work by downplaying the importance of ideology: yes there were some casualties, perhaps even concentration camps, but there was never a master plan to exterminate a human group. If one can relativize something as horrific as the Holocaust, then every denial becomes possible, including acts of domestic persecution that are so much more easily hidden among the casualties of a Civil War. From the victims' point of view, though, the genocidal intent is never in doubt. They know that they were chosen on account not of their acts but of their identity. And since that identity has become inextricable from the experience of persecution, nothing jeopardizes it as much as denying its experience.

In robbing victims of their experience, negationism kills them all over again; it wants a world without witnesses, and thus it seeks to undo the legacy of victimhood. Negationism is fed by the same prejudices that were

lethal in the past; within its scope a historical hatred transmutes into hatred of history. Negationists act as if they could dull the self-hatred arising from identification with the perpetrators. Nothing is more puerile than the belief that, if the crime could only be thought out of existence, then the denier's pathos would become less criminal. Negationists continue to hate and to justify the hatred, but their shoddy reasons show them wearing their hearts on their sleeves. If they deny genocide in the past, it is in order to perpetuate its pathos into the future. In their perverse logic, acknowledged genocide is an obstacle to unfettered racism. This is why its negation amounts to ongoing aggression. Negating the substance of the crime, namely the targeting of the victims for who they are, downgrades victimhood to victimism, lifting the protection afforded by society's bad conscience. Were there not other inmates in the camps? Gypsies, Slavs, Frenchmen, other Germans? Then, by what right do the Jews claim centrality in the course of a world war? Targeting the Jews out of anti-Semitism is far more dramatic than attributing their murder to accidentalism and, above all, is the only reason that squares with the facts of their systematic rounding up, careful separation from other populations, dehumanization and ultimate transformation into *Lebensunwertes Leben* (life unworthy of life).

The paradox of negationism is that it relies on the memory of persecution. Deniers are not in the grip of skepticism but of the desire to enhance the offence through fear and intimidation. They operate on a split front: the crime must and must not have taken place. It must remain an inarticulate memory, a traumatic specter casting a pall of fear over the targeted category of people without crystalizing into an image of horror, because horror that is revealed places the victim off limits.

The Spanish Constitutional Court's decision to decriminalize negationism is ominous in that it presents as an act of justice the freedom to annihilate public consensus about experience that can never be righted by an act of jurisprudence. Such a decision constitutes, in effect, a prolegomenon to renewed violence. The Court's justification of its ruling through recourse to freedom of expression clashes with the narrow limits of this very freedom when it bears on the symbols of the State. Swift and harsh application of laws against whatever may be construed as apology of terrorism, the severity with which offenses against the monarchy or disrespect toward the flag are penalized, speedy translation of an insufficiently meek response to a judge or a police officer into punishable defiance of authority, pre-electoral banning of political parties, closing of newspapers and shutting down television broadcasting stations, these actions do not bespeak ingrained reverence for freedom of speech. If freedom of speech is not the cornerstone of Spanish democracy, why does its formal validity trump the positive damage done by negationism?

Negationism shares with pornography addiction to the pleasure obtained in denigrating a subject that stands for an entire class of people. But while

pornography predicates its denigration of women on the graphic humiliation of an individual, negationism erases the representation of generic terror in order to humiliate individuals who are singled out because of their identity. Questioning pornography's protection by the First Amendment to the United States constitution, Catherine A. MacKinnon stresses the performative modality of discriminatory language, pointing out that social inequality is created and enforced largely through words and images. In respect to denigration, "saying it is doing it" (13). Her remarks apropos pornography ought to serve as a red flag for the Spanish Constitutional Court's treatment of negationism. What is particularly noxious about the court's ruling is that it anticipates the denier's obvious line of defense, namely that his words do not produce a social effect but merely lay out an "intellectual" position. When did aggression become a matter of opinion? Like pornography, what hatred does, "it does in the real world, not only in the mind" (15).

There is no greater hostility toward a victimized group than to deny its victimization. Doing so naturalizes the history of abuse and allows the denigration to go unchecked by moral sentiment or positive law. The surge of power experienced by the denier when he disarticulates knowledge that was painful to acquire is neither an opinion nor a subjective sentiment but the proceeds of social action. The point here is not that the Spanish judiciary is remarkably partial when it comes to protecting freedom of speech, but that it undoes the relation between history and justice, treating a sensitive ethical matter as if the issues at stake were an abstract problem of law. The fact that the Constitutional Court modified the Penal Code to exclude negationism from the list of punishable offences shows that the judges did not deliberate within the scope of interpretable law but assumed political agency in a step of incalculable moral consequence. What was hitherto codified as an injustice (and thus socially perceived as such) blurred into the grey area of indifferent acts. Furthermore, by keeping history in abeyance, the court assumed the garb of a historical subject. If negationism is a crime elsewhere in Western democratic States, it is because the relation between history and jurisprudence is understood, and the consequences of negationism are perceived to threaten not only the social stability but also the ethical foundations of the State. The question then arises, whether a non-representative, non-elected body at the service of the State may legitimately adopt the prerogatives of sovereignty and lift the legal sanction on attempting against the crucial link between ethical awareness of the past and the rule of law.

The Constitutional Court acted as if it operated in an abstract juridical sphere, where freedom of speech is merely a principle and negationism a concept. In doing so it harkened back to tradition. Until the middle of the twentieth century, law was considered ahistorical. This was especially the case where the doctrine of natural right (or divine right) prevailed, but also where right was held to be inseparable from positive acts of legislation.

Shoshana Felman argues that this state of affairs changed at the Nuremberg trials, when the court, by indicting the representatives of the Nazi regime, "for the first time called history itself into a court of justice" (11). Since then, "it has become part of the function of trials to repair judicially not only private but also collective historical injustices" (12). The Spanish Constitutional Court ruled as if the atrocities of the twentieth century had not intervened and jurisprudence enacted since Nuremberg, including the Universal Declaration of Human Rights, had no bearing on Spanish law. Its position raises important questions regarding the nature and scope of human rights, national sovereignty, and the limits to the autonomy of States.

The first of these questions bears on the distinction drawn by the court between genocide and its negation. Is it really true that denying the historical fact of genocide does not contribute to a climate of hostility against the group that was victimized in the past? Such questions cannot be answered philosophically. In order to answer this one meaningfully, it is crucial to scan the society for signs of hostility against the group. If they are present, then one must ask to what degree negationists participate in the hostility, and what the correlation between group-directed hostility and tolerance of negationism might be. This means that the Spanish court's decision would come under scrutiny as a possible symptom of deteriorating democracy. Furthermore, another such symptom would be its refusal to countenance collective rights, or what amounts to the same thing, its failure to look beyond the denier's individual right to freedom of expression to the collective stigmatizing of a whole group. There is no doubt that the court's decision to waive the denier's accountability had less to do with formal reconsideration of the legal process than with the objective defenselessness of groups that are hurt by denial.

This question also bears on the court's invocation of a human right (freedom of speech, recognized under Article 19 of the Universal Declaration of Human Rights) to suspend the application of another human right (the inherent dignity of all human beings) that is recognized in the preamble to the Declaration. Disregard for the dignity of the victims of genocide takes the form of suspending the right to know, thus lifting an important safeguard against recurrence. And with the legal guarantee of the truth also goes the right to freedom from fear. A step at a time, victims of genocide are divested of rights and dignity until the threshhold of physical violence is crossed again. Thus the first question leads to the second, namely about priorities among rights. While it is true that human rights are folded into the civil rights of liberal democracies, they are also recognized by some non-liberal States. Such States remain in good standing wihin the international community to the extent that they respect and are willing to enforce respect of human rights. Human rights are thus more basic and general, and therefore more universally binding, than civil rights. They are the litmus test for a State's progress toward full-fledged liberal democracy,

and when infringed upon they are the first sign that a State is regressing from liberalism's principles of division of powers and equality before the law. Hence it is contradictory to antepose a human right emanating from civil rights like freedom of speech to a more fundamental human right such as freedom from harm and the concomitant obligation to prevent genocide, which hinges on its detection, as the ECHR acknowledges when it warns signatory States against allowing freedom of expression to outdo the recognition of crimes against humanity.

John Rawls defines human rights as constitutive of a Law of Peoples, which "applies to how peoples treat each other as *peoples*" (83). This law differs from cosmopolitan liberal justice in that it concerns all societies, even hierarchical ones, that comply with his definition of a decent society, namely one that complies with the Law of Peoples. Because this law concerns the way *groups* treat each other, States that deny the existence of collective rights risk falling below the threshhold of decency. Furthermore, this law is not reducible to a set of regulatory principles with jurisdiction over a specific society only, as the Spanish constitutional law clearly is. On the contrary, according to Rawls, "How peoples treat each other and how they treat their own members are, it is important to recognize, two different things. A decent hierarchical society honors a reasonable and just Law of Peoples even though it does not treat its own members reasonably or justly as free and equal citizens, since it lacks the liberal idea of citizenship" (83).

No matter that Rawls confuses peoples with citizens and thus with States, the thrust of his argument is clear: a people organized as a State, to remain "decent" and thus a "*bona fide* member of a reasonable Society of Peoples" (Rawls 84), is not free to subject another people to demeaning conditions, regardless of whether the subjected people lives within the borders or enjoys citizenship in that State. Rogue States typically persecute internal peoples, euphemistically (and disparagingly) called minorities, and States that degrade or persecute their minorities risk becoming rogue States. Rawls' confusion between people and citizens stems from his belief in democracy as the free and public exercise of reason, a condition he extends to his transnational Society of Peoples, the central defining trait of which is to be reasonable. While democracy cannot be attributed to each and every member of this Society, Rawls replaces this unfeasible unifying feature with decency, the lowest common denominator of what he deems "reasonable." Because in the political realm States are the ultimate referent of "reasonableness," the bar is set rather low for States to accede to the Society of Peoples. Short of exterminating population deemed undesirable, fellow States in this Society do not as a rule object to domestic hierarchies or similar processes of differentiation, which in the absence of ethnic homogeneity often involve marginalization and/or assimilation of internal others.

Paradoxically, liberalism sometimes relies on a weak definition of human rights. For Michael Walzer, "majorities have no obligation to guarantee the survival of minority cultures" (74). In his own version of the decent society, minorities "have a claim, indeed, to physical but not to cultural security" (74). This is another version of the notion that individuals, not groups, are the bearers of rights, a position that brings Walzer into ethical proximity to the Spanish Constitutional Court, which ruled, in effect, that in the absence of a demonstrable link between negationism and a climate of hostility against the group that was victimized, the individual right of the denier to his opinion prevails over the minority's moral and cultural security. But is not this very opinion evidence of the existence of a climate of hostility against the victimized, who are first scapegoated and then deprived of the social recognition of their defining (and in some cases determining) experience?

With regard to culture, Walzerian liberalism is neocon. It does not actively promote the destruction of minority cultures, but by legitimizing indifference it signals that a passive climate attends on social decisions to rout out a minority culture. By denying the obligation to protect minority cultures, Walzer pulls the plug on them. At the limit, this way of thinking rejoins negationism. By reducing the understanding of genocide to the destruction of individual bodies, it passes over the reasons why precisely those bodies and not others were massacred. And viceversa, it is blind to genocidal actions so long as wholesale massacres are not in the perpetrators' agendas, just as some judges refuse to acknowledge torture when police employ methods that leave no traces on their victims' bodies. So long as corpses are not on the scene, liberalism remains unperturbed when States persecute minority cultures, or when the market finishes them off after they have been weakened by colonialism or dictatorship.

It will be objected that Walzer does not condone aggression against minority cultures, and the objection carries. Yet, exempting majorities from obligation toward these cultures fails to take into account the fact that the threat against them is constitutive of the social relation that establishes the minority as such. His argument for ethical indifference seems acceptable only in the case of accidental minorities, namely fractions of majority groups located outside the areas where they are hegemonic but still drawing support from those areas. Although numerically a minority in relation to its contingent majority, such a group is not a minority in an absolute sense. Absolute minorities lack hegemony in their own sphere and consequently cannot draw it from anywhere else. Absolute minorities are usually locked in States with potentially unfriendly majorities; lacking a diplomatic corps to protect them and sovereign institutions to grant them their specific rights, they are the historical targets of genocide.

Relations between majorities and minorities are often the outcome of long-term patterns of domination, sometimes including genocidal episodes.

It is difficult to settle these relations "reasonably" through "arrangements that satisfy the members (not the militants) of this or that minority" (Walzer 75). Part of the difficulty is in the language (and hence the concepts) deployed by liberalism. The distinction between member and militant is untenable, unless membership is defined to exclude militance; but then the definition would beg the question of what settlement could satisfy a minority that represses its most conscious and vocal members? A minority purged of militants, even when satisfied by a particular arrangement with the majority, would reconstruct the unhappy minority en abîme. In other words, it would always recreate militance.

Walzer's distinction is based on the liberal prejudice that political problems are always susceptible to rational solutions, but when this prejudice comes up against an intractable clash of wills, it concludes, quite illogically, that militance is opposed to rationality. According to this prejudice, membership and militance converge only outside the sphere of reason. Or to put it differently, inside a minority one can be either democratic or liberal, but not both. Liberalism would insist on the minority's attainment of the full universality of rights (which the majority denies it) thus leaning toward militance, while democracy would settle for the path favored by the greatest number (the members). We end up with the paradox of a self-cancelling liberalism; or, what amounts to the same thing, with an overlap between liberalism and militance, or yet again, a liberalism outside the sphere of "reasonableness." One need only turn Walzer's distinction inside out to see that it endows the majority with rationality, that the majority becomes in fact the standard of rationality and the litmus test for what counts as membership in the minority and what is excluded from it.

Walzer's position suffers from confusion between morality and politics, a confusion exposed by Chantal Mouffe in *The Democratic Paradox*. The Aristotelian identification between the good and the rational, espoused by liberals, fatally neglects the role of the affects in securing allegiance to a polity. Politics is, as Mouffe insists, intrinsically agonistic, and the violence inherent in power relations cannot be extracted from political transactions, not even those that allegedly satisfy the members of a minority, where "satisfy" has undertones of resignation. The full meaning of consensus is undermined not by circumstantial but by intrinsic authority, which no amount of participation will dispel. This is so because the subject of consensus is not this or that individual as such but an always already political subject.

To put it differently, the "I" that speaks politically (and this might be the primordial "I") is, like the enunciatory "I" described by Émile Benveniste, not a referent outside of speech but the elocutory possibility of enunciation, of language realizing itself. As such, however, it is a pronoun devoid of experience, and paradoxically that lack is what prevents it from "saying" anything. The "I" that comes into being in political discourse participates in

consensus formation from a systemic position codified as dominant or subaltern. Either it inflicts its will or obeys an alien will; either way it renews the fundational violence of politics. Consensus is a face-saving piety, a syllogism codifying the relative strengths in the majority/minority binary. More to the point, the "I" representing the reasonable member of a minority (unlike the militant who is a militant *because* excluded from consensus formation) has given up reference to experience outside the political frame that authorizes him or her to speak for the minority.

With this we come to the political meaning of the Spanish Constitutional Court's decision to strike down negationism from the roster of punishable crimes. This decision redrew the boundaries between minority and majority, admitting previously excluded discourse into the language of consensus formation. As a consequence, it narrowed the circle of "just members" of the minority and widened the experience that is excluded from any arrangement that could satisfy that minority. By allowing negation into the mainstream of political discourse, the Court put pressure on the experience of the victims, changing it from indubitable to debatable. Given the relatively small size and inconspicuousness of the Jewish community in Spain, the Court's decision resonated with political meaning beyond the scope of the Holocaust, just as neonazism in Spain adopts anti-Semitism as a code for hatred against other minorities. At a time when debate about the historical memory had transcended the academic compound and spilled over into the public arena, a verdict protecting negationism had unmistakable political implications.

There is nothing intrinsically democratic in a High Court's decision, but if the Court responds to growing public indifference to the experiential shape of the past, then its decision would have to be regarded as democratic. It would be extending the right to be free from the consequences of action undertaken in the past, and even from knowledge of that past, to a community of equals whose equality materializes before the law. Mnemonic equality among the members of a group is not only the basis of national identity but also the condition making legislation passed in the name of the group democratic. This is so whether the group retains what Dan Diner calls a mnemonic canon—the requirement for the emergence of a "community of solidarity," an *ethnos*—or throws it away in order to practice only the kind of memory that produces "ad hoc cohesion" (184). Far from paradoxical, the desire to break with the mnemonic canon is powerful in democracies, which favor ad hoc cohesion over intergenerational transmission of foundational memories.

Democracy, says Mouffe developing an argument made by Carl Schmitt in *The Crisis of Parliamentary Democracy* (1926), can exist only for a people, a *demos*, and therefore the equality of rights it postulates at the political level requires other kinds of equality, requires, in short, the homogeneization of the citizens (40–41). It requires, that is, that majority

rule be guaranteed by the progressive elimination or assimilation of the minority. And this can be done most expeditiously by destroying the minority's mnemonic canon and luring it toward the kind of memory that produces ad hoc cohesion. Liberalism, on the other hand, has its reference not in a *demos*, a people, but in humanity, the subject of abstract universal rights. Liberal democracy confuses both, mistaking a particular national subject for the universal subject a nation, by definition, cannot be.

Human rights are the expression of a universalistic ethics. But like all rights, human rights need States to define and enforce them, and historical contingencies to emerge and to mature to the point where they are implemented. The Universal Declaration of Human Rights on December 10, 1948 was neither the result of philosophical refinement nor of divine revelation, nor yet of new insight into the nature of law. It was an ethical breakthrough caused by unprecedented human catastrophes. If rights are, in the words of Alan Dershowitz, "quintessentially undemocratic, since they constrain the State from enforcing certain majoritarian preferences" (16), universal human rights are the single most powerful constraint on States and their majorities, whose interests at certain times have proven genocidal. States often pay lipservice to such rights but tend to resist them, because a right is always a limit on sovereignty.

It may be asked whether rights should trump the will of the majority, and the answer to this question, when issued by a government, will give a reliable measure of the degree of liberty tolerated by a State. But the existence of universally embraced human rights binds every State and is therefore the single most powerful check on sovereignty. This means that sovereignty is no longer based, as Carl Schmidt thought before World War II, on the sovereign's power to decide over the life of subjects. World Courts, such as The Hague's International Criminal Court, now supplement, and in certain cases replace National Courts, in the trial of the worst violations of human rights. Universal human rights entail world jurisdiction and thus a Court that is aloof from the interests of any one State. World Courts are undemocratic in Dershowitz's sense. Being independent from any existing polity, they do not rely on a political majority for their legitimacy. And this raises the question of what kind of consensus they rely on. The answer is that they rely on widely accepted standards of decency. These standards are not inherent in any transcedent category of consciousness; they are shaped by world historical events, and are thus relatively shielded from political oscillations in any given State.

Human rights are not natural; otherwise they would have been discovered long before they were formulated. Even so, they are assumed to be part of human nature in the same performative act that established them. In the preamble of the Universal Declaration of Human Rights one can read: "Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind . . ." The

truth is that rights are recognized in the breach; they are the remedial response to severe moral outrage. They are not a positive finding but the idealized image of a world made whole again by human good will. Rights belong to the realm of the *should*, not of the *is*. These two realms can only be confused by fatalism, which moves within the sphere of tragedy. But tragedy, as Giorgio Agamben remarks, is precisely what genocide in general and the Holocaust in particular lifted from the historical scene. "After Auschwitz—he says—, it is not possible to use a tragic paradigm in ethics" (99). Tragedy relies on fate and the concommitant embodiment of heroism, which is the expression of unknowingly incurred guilt. However, if the tragic hero pays for excess *objectively* incurred, the essence of genocide is that the victims are innocent—nothing they have done individually can ever justify their collective murder. Rather, they are ontological prey, sacrificed not for what they do but for who they are. And yet that sacrifice is not inscribed in the laws of history. So undetermined is it that the final solution, any final solution, evokes incredulity. Negationism misues the spontaneous refusal to believe, the unprompted "it cannot be" by taking advantage of the victim's untragic essence. Nor is the perpetrator a tragic figure either. The adverb "unknowingly" does not qualify the guilt incurred by a society that nurtures genocide. Even when the camps are out of sight, the degrading of the victim started in the public realm and was always already murderous.

Genocide issues from resentment, and so does its denial. If this is accurate, how can we explain the paradox that the twentieth century witnessed several genocides, including the yardstick for them all, if it was not driven by resentment? Agamben argues that the ethics of the twentieth century began with Nietzsche's overcoming of resentment. Against the impotence of the desire to undo the past, Zarathustra teaches joy in the recurrence of everything that has once taken place, repeated down to the slightest detail. Superior love of life would reveal itself in the active affirmation of the inmutability of the past. Nietzsche's is an ethics diametrically opposed to denial, and yet equally unacceptable in that it involves subjective freedom (the courage to say yes to all of the past) in objective determination (the inevitability of recurrence of all causal sequences in eternity). This superior love of life is that of a subject who has made himself the sovereign of every event by assimilating chance into self-willed determination. If it is a heroic ethics, then it is voided by the enormity of the crimes it would joyfully countenance. This ethics certainly pervades the perpetrators' sense of their self-overcoming through contempt for every human consideration. In his 1943 Posen speech to high-ranking SS officers, Heinrich Himmler came as close as anyone ever did to heroicizing the extermination of Jews: "To have stuck this out, and—excepting cases of human weakness—to have kept our integrity, that is what has made us hard" (qtd. in LaCapra 28). Dominick LaCapra is undoubtedly right in arguing that Himmler "alludes to a kind of initiatory, radically transgressive limit-

experience for Nazi perpetrators—an unspeakable rite of passage involving quasi-sacrifice, victimization, and regeneration through violence" (28–29, n19). And I would argue that the rite of passage, imagined as a rite of elevation, is linked to the experience of the negative sublime invoked by LaCapra in relation to the spectacle of piled up corpses. The Nazi grows in self-perceived stature in proportion to the Jew's descent into subhumanness. Overcoming resentment, under the ethical circumstances inaugurated by the camps, is possible only through dehumanization of both the resented and the resenter. A god does not resent an insect.

But an anti-Nietzschean ethics that refuses to accept the amorality of the past need not be slated to the morality of resentment. There is no compelling reason to accept Nietzsche's characterization of morality as impotent revenge, as Agamben does in taking Jean Améry's self-ascription to the world of resentment at face value. Améry's refusal to let crime flaten to mere historical fact is not steeped in the impotence of unfeasible revenge. He explicitly foregoes all hope of redress as long as the crime comes into its truth and the criminal remains stuck to his fate along with the victim. "My resentments are there in order that the crime become a moral reality for the criminal, in order that he be swept into the truth of his atrocity" (qtd. in Agamben 100). In this resentment there is neither hope of human justice nor of divine punishment. This is not the resentment that Nietzsche detected at the root of Christianity. Justice in the wake of the Holocaust has become necessarily epistemological, a matter of consciousness squaring with the facts.

An affirmation of the past altogether different from Nietzsche's can be found in Walter Benjamin's *Theses on the Philosophy of History*, in the famous passage about a future historian who will fan a spark of hope in the past because he is convinced that not even the dead will be safe from the enemy if he wins (*Illuminations* 254). Here Nietzsche's desperate redemption of all suffering through the joy of superior vitalism is met by a historicism capable of gathering strength from the past for struggles in the present. Benjamin's historian in dark times turns to the past for a spark of hope and says "yes" *in extremis* to the suffering of the dead, thus redeeming it from the barbarism of a history that drains it of significance. For Benjamin, the Hegelian theory of history as rational teleology gave way, under the barrages of World War I and the Nazi conquest of power, to a broken chain of devastation—the ruins gazed upon by the angel of history as he regresses along an infinitely appalling trauma.

Inspired by Benjamin's view of history as trauma, Shoshana Felman turns her attention to the actual subjects of history, the traumatized, who are deprived of speech and thus rendered incapable of bearing witness to their victimization. The aporia in this theory of history is evident. History is a record of articulated experiences, a matter of speech. But if the relation between history and trauma is speechless (Felman 33), then testimony

dissolves into aphasia. With witnesses as the aphasiacs of history, to guarantee the negationist's freedom of speech is to abjure history twice, to remove its traumatic embodiment in favor of articulated language—which is the prerogative of the victors. The reverse of the Führer's "inspired" speeches is the inarticulateness of the Muselmann: a body surviving biologically after the spirit has fled. Underpinning the charisma of power is the aversion experienced even by fellow inmates vis-à-vis the Muselmann. Life so brutalized that it no longer reacted to stimuli, this life-beyond life was the nether point in the Nazi organization of history. Less than human, the Muselmann was the abject counterimage of the Führer's transcendence of humanity from above.

The Nazis' tragic concept of history is the opposite of Benjamin's idea of history as constituted by the silence of the victimized. In Felman's words: "History . . . is thus inhabited by a historical unconscious related to—and founded on—a double silence: the silence of 'the tradition of the oppressed,' who are by definition deprived of voice and whose story (or whose narrative perspective) is always systematically reduced to silence; and the silence of official history—the victor's history—with respect to the tradition of the oppressed" (34). Where can one turn to recognize and honor this tradition of the voiceless? What official history silences, trauma reveals in bodies that struggle to break the stranglehold of language on what aims to be said. If "history becomes equal to signification in human language" (Benjamin, "The Role of Language in *Trauerspiel* and Tragedy" 60), then witnessing trauma demands something that language cannot convey, the evidence of experience, and this can only be produced by the body in which experience is inscribed. Benjamin's idea of history's unconscious merges with Hans Ulrich Gumbrecht's observation that meaning cultures (as opposed to presence cultures) repress the spatial or material side of signification, giving rise to a metaphysics of meaning (Gumbrecht 81).

Gumbrecht's observation helps us to understand the Spanish Constitutional Court's decision to liberalize the area of meaning at the expense of traumatic history. To rule in favor of freedom of speech when speech is known to run counter to experience is to declare meaning insubstantial, free-floating, and spectral—a *flatus vocis*. Under those conditions, experience's inarticulateness succumbs to the noise of undecidable opinion. Presence, on the other hand, makes it immediately apparent that power—the power to lift the traumatic constraints on speech—relies on violence to organize relations among bodies. According to Gumbrecht, the more a culture imagines itself as a meaning culture, the more it will disguise violence in its power relations. This camouflage, he says, explains the confusion in recent decades between power relations and relations defined by the distribution of knowledge. "But the lines along which knowledge is distributed will only coincide with the lines of power relations as long as the stability of the lines of knowledge distribution is

ultimately covered, even in a meaning culture, by the potential and the threat of physical violence" (Gumbrecht 84). In the case of Spain such coverage is now guaranteed by the ostensible link between the negation of genocide, whose stakes are ultimately not the accumulation of epistemological capital but the raw assertion of power, and the redistribution of social certainties at the foundation of the present Spanish State. The chartering of negationism on the back of freedom of speech not only separates witnessing (an experience linked to presence) from speaking, body from meaning; it also secures the convergence of knowledge with power relations, paradoxically, by abstracting discourse from its effect on bodies and, whenever it is convenient, excepting it from the constraints of the law.

Notes

1. Some of these are the Belgian Holocaust denial law of 1995 or the 1990 French *Gayssot Act*, which prohibits any "racist, anti-Semitic or xenophobic" speech. Switzerland also outlawed the denial of the Holocaust (Article 261bis of the Penal Code), as did Germany (§ 130 (3) of the penal code), Austria (Article 3h Verbotsgesetz 1947), Romania, Slovakia, the Czech Republic, Lithuania, and Poland (Article 55 of the law creating the Institute of National Remembrance, 1998).

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