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OVERVIEW

The Journal of International Criminal Law (*JICL*) is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and publication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;



- historical accounts that address the international, regional, and national levels; and
- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about “ecocide” is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

Why Have Holocaust Denial Laws? A Logistic Regression Analysis

by William R. Pruitt*

ABSTRACT: When a nation passes Holocaust denial laws there are myriad reasons for doing so. One of the reasons often cited is to preserve the memory and honour of the victims. If this is true, then it would be likely that the number of Holocaust related deaths would affect the likelihood of a country having denial legislation. Those countries suffering more Holocaust related deaths would have a greater impetus to pass denial law in order to preserve the memory of the Holocaust and its victims. The logistic regression analysis shows support for the idea that the number of Holocaust related deaths are influential.

KEYWORDS: Holocaust; Denial; Logit; Laws; Warfare.

I. Introduction

Holocaust denial is not a new phenomenon. Denial was the reaction of many countries during World War II when word began to spread of mass killings.¹ From world leaders to journalists to the average citizen, the attempted extermination of an entire race was unbelievable.² Holocaust survivors testified to German troops taunting them saying that no one would believe their claims even before the end of the war.³ While Holocaust denial is not new, it takes on a different dimension in a time when survivors and eyewitnesses are becoming harder to find. Soon the memory of the Holocaust and its victims will be left to be told by history alone.

In these cases, denial serves to ignore or reject victim status. If the event never happened there can be no victims. To protect the memory of victims and survivors, a country may choose to take a stand against denial. One route to prevent the spread of Holocaust denial and protect victim memory is to criminalize the act of denying. In this way the actor bears the stigma of a criminal conviction and the associated penalties. This approach has been favoured by many countries in Europe. Of the twenty-one countries that criminalize denial, eighteen of them are located in Europe.⁴ One reason that European countries have criminalized Holocaust denial may be due to their

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¹ SAMANTHA POWER, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

² *Id.*

³ John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLORIDA ST. UNIV. L. REV. 41 (2008).

⁴ William R. Pruitt, *Understanding Genocide Denial Legislation: A Comparative Analysis*, 12 INTERNATIONAL JOURNAL OF CRIMINAL JUSTICE SCIENCES 270 (2017).

interpretation of free speech versus human dignity. European nations are more inclined to prohibit speech when it reaches the level of hate speech. By doing so these countries are protecting the rights of individuals and groups to human dignity.⁵ The right of free speech has never been seen as absolute.⁶ Even the United States with the most expansive free speech protection places certain limits on speech. Certain types of speech including obscenity, defamation, fighting words, incitement, and threats are not protected by the First Amendment under freedom of speech.⁷ Predating the U.S. First Amendment, Article IV of the 1789 Declaration of the Rights of Man and of the Citizen states that “liberty consists in the freedom to do everything which injures no one else”.⁸ France used this limitation as the basis for its Holocaust denial law.⁹ From the early recognition of individual rights, there have been limitations. In that way one’s rights only extend as far as the next person and cannot violate the next person’s rights.

Further even when Holocaust denial is not specifically proscribed by law, there is often laws on hate speech that protect group dignity. In Canada, section 319 of the criminal code forbids hate propaganda which has been used to punish Holocaust deniers. The Supreme Court of Canada found that this law was a permissible limitation on speech given the right of minority groups to protection against vilifying speech.¹⁰ The court found that outlawing promotion of hatred was a justifiable limit on free expression since hate speech serves to harm the dignity of others and society as a whole.¹¹

In addition to constitutional interpretation and beliefs about free expression, there are practical matters to legislation as well. The majority of countries with Holocaust denial laws represent nations that were involved in the Second World War and have a deep connection to the atrocities committed by the German regime.¹² This close connection may be one reason these countries have decided upon criminalizing denial of the Holocaust. A national memory scarred by the crimes of the German regime almost certainly prompts many countries to outlaw denial to avoid reoccurrence.

Preserving national memory based on factual information is the right of every nation. Choosing to preserve the truth may justify the limitation on speech in certain circumstances.¹³ When this memory is composed of genocide and atrocity crimes there is valid reason to see preservation as a means to address previous wrongs and move forward. In addition to addressing previous wrongs, protecting national memory also

⁵ Knechtle, *supra* note 3.

⁶ Dominic McGoldrick, Therese O’Donnell, *Hate Speech Laws: Consistency with National and International Human Rights Law*, 18 LEGAL STUDIES 453 (2006).

⁷ Knechtle, *supra* note 3.

⁸ Russell L. Weaver, Nicolas Delpierre, Laurence Boissier, *Holocaust Denial and Governmentally Declared “Truth”*: French and American Perspectives, 41 TEXAS TECH L. REV. 495 (2009) at 506.

⁹ *Id.*

¹⁰ Karen Etlis, *A Constitutional Right to Deny and Promote Genocide? Preempting the Usurpation of Human Rights Discourse towards Incitement from a Canadian Perspective*, 9 CARDOZO J. OF CONFLICT RESOLUTION 463 (2008).

¹¹ *Id.*

¹² Pruitt, *supra* note 4.

¹³ Linda O. Smiddy, *An Essay on Professor Fronza’s Paper: Should Holocaust Denial Be Criminalized?*, 30 VERMONT L. REV. 645 (2010).

protects the vulnerable who could be swayed by the lies of Holocaust deniers. The young, naïve, and misinformed are shielded when deniers are labelled as liars and criminals.¹⁴

The protection of institutional memory can be controversial though. Through Holocaust denial laws, when deniers are tried and punished for their lies the collective memory is reaffirmed.¹⁵ This intervention by the state can be perceived as being overbearing where the state is forcing people to remember in a certain way.¹⁶ However, every country at least acknowledges that the criminal law carries with it symbolic power to reinforce the nation's priorities and values. For those nations compelled to criminalize denial then, they must view the Holocaust and its related crimes to be worthy of collectively remembering.¹⁷ This decision is important to many nations in order to protect the dignity and memory of those lost.

Since the memory of those people lost probably plays a role in the decision to outlaw Holocaust denial, questions arise about how death tolls might influence policy decisions. Of the millions of deaths during the Second World War the nations of Europe suffered military losses, civilian losses, and losses related to the Holocaust. While tragic, military losses are an expected aspect of war. Therefore, it would seem unlikely that military deaths would influence a country to pass denial laws. Civilian losses not related to the Holocaust would not be predicted to influence passage of denial legislation since the law would not necessarily protect the memory of those victims. Logically it seems that the number of Holocaust deaths would influence the likelihood of passing denial laws to commemorate those victims and protect their memory from being erased.

Hypothesis 1: The number of military deaths experienced during the war will not increase the likelihood of a nation outlawing Holocaust denial.

Hypothesis 2: The number of civilian deaths experienced during the war will not increase the likelihood of a nation outlawing Holocaust denial.

Hypothesis 3: The number of Holocaust related deaths experienced during the war will increase the likelihood of a nation outlawing Holocaust denial.

II. Methodology

Nations either have legislation outlawing Holocaust denial or they don't. Since the outcome is a dichotomous variable the use of logistic regression seems most appropriate.¹⁸ A dichotomous dependent variable calls for logistic regression over linear regression.¹⁹

¹⁴ Pascale Bloch, *Response to Professor Franza's "The Punishment of Negationism"*, 30 VERMONT L. REV. 627 (2006).

¹⁵ Emanuela Fronza, *The Punishment of Negationism: The Difficult Dialogue between Law and Memory*, 30 VERMONT L. REV. 609 (2006).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ FRED C. PAMPEL, *LOGISTIC REGRESSION: A PRIMER* (2000).

¹⁹ DAVID W. HOSMER & STANLEY LEMESHOW, *APPLIED LOGISTIC REGRESSION* (1989).

Why Have Holocaust Denial Laws? A Logistic Regression Analysis

There is some disagreement over whether linear regression can be used with a dichotomous dependent variable because the probabilities are nearly identical.²⁰ But for the reasons outlined in Pampel, logit regression was used to better accommodate the dichotomous nature of the dependent variable.

The dependent variable is operationalized as a dummy variable with value of either 0 or 1.²¹ In this case, 0 is a country that does not have denial legislation and 1 represents a country with denial legislation. Using logistic regression we can speak of the probability of a country having denial legislation.

The probability of a nation having Holocaust denial legislation is predicted to increase based on the number of Holocaust-related deaths the country suffered. Interpreting the logistic coefficients using odds and odds ratio is considered the most useful.²² Odds are the “ratio of the probability that an event occurs to the probability that it does not occur”.²³ Odds ratio tells us the ratio of odds for one group compared to another group.²⁴ An odds ratio greater than 1 indicates an increased chance of an event occurring and an odds ratio less than 1 indicates a reduced chance of an event occurring.²⁵

Following the convention of multiple logistic regression,²⁶ the regression model equations will be:

$$1. g(x) = \beta_0 + \beta_1x_1$$

$$2. g(x) = \beta_0 + \beta_2x_2$$

$$3. g(x) = \beta_0 + \beta_3x_3$$

$G(x)$ represents the probability of a nation having Holocaust denial legislation. X_1 represents the number of military deaths; x_2 represents civilian deaths; x_3 represents Holocaust-related deaths.

Data on Holocaust denial legislation was collected from multiple sources. The main sources included Smith, Lechtholz-Zey, and Na’amat and Deutch.²⁷ When possible the law was crosschecked with the country’s local penal code to confirm

²⁰ Ottar Helevik, *Linear versus Logistic Regression when the Dependent Variable is a Dichotomy*, 43 QUALITY & QUANTITY 59 (2009); Jerome D. Thayer, *Using Multiple Regression with Dichotomous Dependent Variables*, Paper presented at the Annual Meeting of the American Educational Research Association (1986).

²¹ PAMPEL, *supra* note 18.

²² TIM F. LIAO, INTERPRETING PROBABILITY MODELS: LOGIT, PROBIT, AND OTHER GENERALIZED LINEAR MODELS, (1994).

²³ Dennis W. Roncek, Marc L. Swatt, *For those who like Odds: A Direct Interpretation of the Logit Coefficient for Continuous Variables*, 87 SOCIAL SCIENCE QUARTERLY 731 (2006) at 731.

²⁴ *Id.*

²⁵ LIAO, *supra* note 22.

²⁶ See HOSMER & LEMESHOW, *supra* note 19 at 25.

²⁷ Roger Smith, *Legislating against Genocide Denial: Criminalizing Denial or Preventing Free Speech?* 4 JOURNAL OF L.AND PUB. POL. 128 (2010); Jacqueline Lechtholz-Zey, *The Laws Banning Holocaust Denial*, 9 GENOCIDE PREVENTION NOW (2012); Tsvi Na’amat, Igor Deutch, *Legislating Against Antisemitism and Holocaust Denial*, Kantor Center for the study of contemporary European Jewry, at <http://www.kantorcenter.tau.ac.il/sites/default/files/Laws%20against%20Antisemitism%20and%20Holocaust%20Denial.pdf>.

scope and language. For comparison purposes, countries without a Holocaust denial law were limited to fellow European countries. See Table 1 for a list of European countries with Holocaust denial legislation and those countries without denial legislation.

Table 1. *Holocaust denial laws by country*

Countries with Holocaust denial legislation	Countries without Holocaust denial legislation
Austria Belgium Czech Republic France Germany Hungary Italy Latvia Luxembourg Malta Poland Romania Slovakia Slovenia Switzerland	Albania Bulgaria Denmark Estonia Finland Greece Lithuania Netherlands Norway

Data on death counts related to military deaths, civilian deaths, and Holocaust deaths was collected from multiple sources. The main sources included the World War II Museum in New Orleans, the Second World War History database, the Anne Frank Guide, the Jewish Virtual Library, and the United States Holocaust Memorial and Museum. Countries with no recorded deaths in one category were eliminated in the analysis. Those countries included Liechtenstein, Portugal, and Switzerland. Removing these countries avoided regression error. See Table 2 for death counts.

Table 2a. *Death counts per country*

Country (with denial legislation)	Military Deaths	Civilian Deaths	Holocaust Deaths
Austria	261,000	58,700	65,000
Belgium	12,100	49,613	24,387
Czech Republic	25,000	43,000	277,000
France	217,600	250,000	100,000
Germany	5,533,000	2,167,000	210,000

Why Have Holocaust Denial Laws? A Logistic Regression Analysis

Hungary	300,000	280,000	400,000
Italy	301,400	147,600	8,000
Latvia	100,000	234,000	66,000
Liechtenstein	NA	NA	NA
Luxembourg	4,000	5,000	1,000
Malta	7,500	1,581	NA
Poland	400,000	2,360,000	3,000,000
Portugal	NA	NA	NA
Romania	370,000	253,000	280,000
Slovakia	25,000	43,000	277,000
Slovenia	446,000	524,000	57,000

Table 2b. *Death counts by country*

Country (with no denial legislation)	Military Deaths	Civilian Deaths	Holocaust Deaths
Albania	NA	30,000	200
Bulgaria	22,000	3,000	NA
Denmark	2,100	1,100	NA
Estonia	30,000	50,000	1,500
Finland	95,000	2,000	15
Greece	27,500	4,625,000	60,000
Lithuania	25,000	218,000	135,000
Netherlands	17,000	178,000	106,000
Norway	3,000	6,500	NA

Using SPSS, three separate logistic regression analyses were run. A fourth final regression was run on the total death count but is excluded here due to the fact that the results did not contribute to the understanding of how a country's deathcount may have led to enacting Holocaust denial laws. By dividing the death counts into unique categories it becomes easier to analyze the effect that death count might have – are some deaths more likely to lead to enacting denial legislation? In this manner it is hypothesized that certain deaths carry more weight in the decision to enact Holocaust denial laws.

A. Results

After running logistic regression analysis, the following results were obtained. The b coefficient represents a unit of 10,000 deaths. A one unit increase or decrease would equal 10,000 deaths.

Table 3. *Logistic Regression Results*

Variable	Constant	B	S.E.	Sig.
Military deaths	-0.776	0.16	0.09	.096
Civilian deaths	0.107	0.02	0.02	.382
Holocaust deaths	-0.734	0.14	0.08	.093

Interpreting the coefficients of logit regression has been the subject of much discussion in social sciences. For this study, the use of odds and probabilities seemed most appropriate. In that way it can be determined what the odds of a country having Holocaust denial legislation are when they experienced the related deaths (military, civilian, and Holocaust).

1. Military Deaths

When a nation enters into war it is expected that military lives will be lost. “Warfare is undertaken as a form of sacrifice...whereby human beings give over their bodies and possessions to objects of worship with names like France, Germany, Japan, America, etc”.²⁸ For this reason it seemed unlikely that a country would pass legislation protecting remembrance of the Holocaust because of military deaths. However, the number of military deaths does seem to have an impact on the likelihood of Holocaust denial legislation.

Looking at the odds of a country with denial legislation based on military deaths reveals that there is a significant relationship.

$$\text{ODDS} = e^{a+bX}$$

$$\text{ODDS} (x = 0) = e^{-.766+(.16)(0)} = 0.4602$$

$$\text{ODDS} (x = 1) = e^{-.766+(.16)(1)} = 0.5401$$

$$\text{ODDS} (x = 10) = e^{-.766+(.16)(10)} = 2.2795$$

The odds of a country having denial legislation based on 10,000 military deaths is 0.5401. A country that experienced 10,000 military deaths is 0.5401 times as likely to have denial legislation than not. Many countries with denial legislation experienced much higher military death rates in the hundreds of thousands. The odds of a country with 100,000 military deaths having denial legislation is 2.2795. This means that a country with 100,000 military deaths is 2.2795 times as likely to have denial legislation as not.²⁹

The odds ratio allows for comparing countries with denial laws to those without

²⁸ RICHARD A. KOENIGSBERG, *NATIONS HAVE THE RIGHT TO KILL: HITLER, THE HOLOCAUST AND WAR*, XV (2009).

²⁹ Ilsa. L. Lottes, Marina A. Adler, Alfred De Maris, *Using and Interpreting Logistic Regression: A Guide for Teachers and Students*, 24 *TEACHING SOCIOLOGY* 284 (1996).

denial laws.

$$\text{ODDS RATIO} = \text{ODDS } (x = 1) / \text{ODDS } (x = 0)$$

$$\text{ODDS RATIO} = 0.5401/0.4602 = 1.1736$$

$$\text{ODDS RATIO} = \text{ODDS } (x = 10) / \text{ODDS } (x = 0)$$

$$\text{ODDS RATIO} = 2.2795/0.4602 = 4.953$$

An odds ratio greater than 1 signifies an increased likelihood of having denial legislation.³⁰ An odds ratio of less than 1 implies a decreased likelihood of having denial legislation.³¹ The odds ratio for a country with 10,000 military deaths is equal to 1.1736. This indicates an increased likelihood of this country having denial legislation. The odds ratio of a country with 100,000 deaths is equal to 4.0836. This indicates a substantially increased likelihood of a country having denial legislation.

Converting the odds to probabilities ($Y = \text{ODDS}/1+\text{ODDS}$) reveals that there is a probability of 0.3506 that a country with 10,000 military deaths has denial legislation.³² The model predicts that there is a 35% probability that a country with 10,000 military deaths will have denial legislation.³³ When looking at countries with a death rate of 100,000 the probability increases to 0.6951; there is a 69% probability that countries with military deaths of 100,000 have denial legislation. As Table 2b indicates no country without denial legislation had 100,000 military deaths compared to nine countries with denial legislation that suffered in excess of 100,000 military deaths.

Since the independent variable is continuous there is an additional interpretation that can predict the change in the odds with a one unit change in the independent variable.³⁴ “Multiplying the logit coefficient by 100 [...] allows describing the effect of an independent variable in terms of the percentage change in the odds given a unit change in a continuous independent variable”.³⁵ Taking the b coefficient of 0.16 and multiplying by 100 equals a 16% change in the odds per increase of 10,000 military deaths. Put another way, for every 10,000 military deaths the odds of a country having denial legislation increases by 16%.

Contrary to the hypothesis, the number of military deaths does have an effect on the likelihood of a nation having denial legislation. Once a nation reaches 100,000 military deaths the probability of having denial legislation is 69%. The loss of military lives during the Second World War appears to be acknowledged by these countries with Holocaust denial legislation even though military war deaths are an expected outcome.

2. Civilian Deaths

While the loss of civilian lives during war is ideally avoided, it must be anticipated

³⁰ *Id.*

³¹ *Id.*

³² Karl. L. Wuensch, *Binary Logistic Regression with SPSS*, at core.edu/psyc/wuensch/MV/Multreg/Logistic-SPSS.PDF (2014).

³³ *Id.*

³⁴ Roncek & Swatt, *supra* note 23.

³⁵ *Id.* at 731.

that non-combatants will suffer. However, the loss of civilian lives not related to the Holocaust would seem to be unrelated to a country passing denial legislation. It is unlikely that these lives would be commemorated by Holocaust denial legislation. Regression results support this hypothesis that civilian deaths are not related to the likelihood of having denial legislation. The logit model does not find a significant relationship between civilian deaths and denial laws.

$$\text{ODDS} = e^{a+bX}$$

$$\text{ODDS} (x = 0) = e^{-107+(0.02)(0)} = 1.1129$$

$$\text{ODDS} (x = 1) = e^{-107+(0.02)(1)} = 1.1354$$

$$\text{ODDS} (x = 10) = e^{-107+(0.02)(10)} = 1.3593$$

The odds of a nation with 10,000 civilian deaths having denial legislation is 1.1354. This indicates that a country with 10,000 civilian deaths is 1.1354 times as likely to have denial legislation than not. The odds do not change drastically when looking at countries with 100,000 deaths. An odds of 1.3593 exists if the country has experienced 100,000 civilian deaths.

When transforming these odds into probabilities it becomes clearer how little effect civilian deaths seem to have. The probability of a country with 10,000 deaths is 0.5317 (53% probability) and for a country with 100,000 deaths equals 0.5761 (56% probability). The likelihood of having denial legislation based on civilian death is only slightly greater than half. Civilian deaths, while tragic, do not relate specifically to the Holocaust which would reinforce the idea that Holocaust denial laws are really about protecting the memory of those lost to Holocaust-related violence.

4. Holocaust Deaths

As expected, the number of Holocaust related deaths did affect the likelihood of a country having denial legislation. However, the effect was quite similar to the effect of military deaths, which was unexpected. There seems a minimal difference between having denial laws based on military and Holocaust deaths. Possible explanations will be explored below.

Holocaust denial laws are designed to protect the memory of this world-changing event. Therefore, the greater number of lives lost to the Holocaust would seem to encourage a country to pass denial legislation. But the likelihood closely resembles that for military deaths.

$$\text{ODDS} = e^{a+bX}$$

$$\text{ODDS} (x = 0) = e^{-734+(0.14)(0)} = 0.4799$$

$$\text{ODDS} (x = 1) = e^{-734+(0.14)(1)} = 0.5521$$

$$\text{ODDS} (x = 10) = e^{-734+(0.14)(10)} = 1.9464$$

The odds of a country with 10,000 Holocaust deaths having denial legislation is 0.5521. A country who lost 10,000 lives to the Holocaust is 0.5521 times as likely to have denial laws than not. Only two countries with denial laws suffered less than

10,000 deaths. The majority of countries lost hundreds of thousands of people to the Holocaust. The odds of a country with 100,000 Holocaust deaths having denial legislation is 1.9464. That country is nearly two times as likely to have denial legislation than not.

$$\text{ODDS RATIO} = \text{ODDS} (x = 1) / \text{ODDS} (x = 0)$$

$$\text{ODDS RATIO} = 0.5521/0.4799 = 1.1509$$

$$\text{ODDS RATIO} = \text{ODDS} (x = 10) / \text{ODDS} (x = 0)$$

$$\text{ODDS RATIO} = 1.9464/0.4799 = 4.0558$$

The odds ratio of whether a country will have denial legislation shows an increased likelihood when a nation suffered 10,000 and a greater likelihood when a country suffered 100,000 deaths.

Multiplying the b coefficient by 100 equals a 14% change in the odds per increase of 10,000 Holocaust deaths. For each increase of 10,000 Holocaust deaths the odds of a country having denial legislation increases by 14%. This is close to the change in odds for military deaths which stands at 16%. Again both military and Holocaust deaths appear to have an impact on the likelihood of a nation having denial legislation.

When looking at the probabilities, a country with 10,000 deaths has a probability of 0.3557, a 35% probability of having denial laws. A country with 100,000 deaths has a probability of 0.6606, a 66% probability of having denial laws. Hungary suffered 400,000 Holocaust related deaths during the war. The probability that Hungary would have denial legislation is 0.99, a near certainty. However, Lithuania lost roughly 106,000 and would have a probability of 0.67 indicating high likelihood of having denial legislation. Lithuania though does not have denial laws. In this gap lies the other myriad reasons a nation might outlaw Holocaust denial.

III. Discussion

Overall the logit regression models confirmed two hypotheses and rejected one hypothesis, though only two of the death variables were significant (military and Holocaust). Contrary to the hypothesis, military deaths did in fact effect the likelihood of having denial legislation. While the hypothesis on civilian deaths was moderately supported the variable was not significant. As predicted, the number of Holocaust deaths did effect the probability of a country having denial laws. Though this effect was very similar to the effect of military deaths.

It is possible that there is some overlap that the military and Holocaust deaths is capturing. Many of the Holocaust denial laws go further than just prohibiting denying the Holocaust. Many also prohibit the denial of crimes against humanity or war crimes.³⁶ The victim of these war crimes and crimes against humanity may well be military members who were involved in fighting the war.

³⁶ Pruitt, *supra* note 4.

By protecting these events from denial, the state may be recognizing the sacrifices of its military service-members.

When denial laws cover multiple actions it is more difficult to parse out which deaths may be effecting the law. In fact the impact of military deaths may not be related to passing Holocaust denial laws but instead related to passing war crime denial laws. But most countries have combined Holocaust denial and war crime denial into one piece of legislation. Of the sixteen nations with Holocaust denial laws, seven of them also include war crimes in their coverage. Eleven of the sixteen include crimes against humanity too.

Another possible reason for the impact of military deaths is the death count for many European nations. Eliminating Liechtenstein and Portugal where accurate death counts could not be found, Luxembourg has the lowest number of military deaths at 4,000. Germany has the highest count at over five million. Nine of the fourteen countries recorded death counts over 100,000. The majority of countries with denial legislation suffered serious military losses. These numbers may impact the decision of a country to pass denial legislation thereby protecting the memory of its military members.

Countries like Luxembourg (4,000 deaths) and Malta (7,500 deaths) include war crimes and crimes against humanity in their denial laws. While the death total may be small compared to other countries, the death rate of such small nations may hit harder. Of countries experiencing in excess of 100,000 military deaths only two – Hungary and Romania – do not include war crimes or crimes against humanity in their laws. Therefore it may be possible that military deaths impact not Holocaust denial legislation, but the inclusion of war crimes and crimes against humanity in those laws.

However, this logic does not extend to civilian deaths. Civilians are also likely to be the victims of war crimes and crimes against humanity. But there does not appear to be a connection between the number of civilian deaths and a country's likelihood of having denial laws. If denial laws are about protecting memory then it would seem that prohibiting denial of war crimes and crimes against humanity would also preserve the memory of non-combatants. And while this may be so it does not seem to be the driving force behind the laws.

Legally speaking there is no weighing of human life; each life is worth the same in the eyes of the law. An infamous case from 1884 set the standard that no life can be valued greater than another. After a ship was caught in a bad storm Dudley, Stephens, and the cabin boy were set adrift in a small raft.³⁷ A lack of food and water led to deteriorating conditions. After several days, the cabin boy became quite sick and it was clear he would soon die.³⁸ When the limited resources ran out the remaining sailors debated killing the cabin boy and eating him for sustenance.

Ultimately, the cabin boy was killed and Dudley and Stephens were rescued a few days later. Upon returning to port, they were indicted for murder. Their defence was that they had acted out of necessity and that the cabin boy was likely to die anyway. The court rejected this theory on the basis that saving Dudley and Stephens was not

³⁷ High Court of Justice, *The Queen v. Dudley and Stephens*, 14 QBD 273, Queens Bench Division (Dec. 9, 1884).

³⁸ *Id.*

greater than losing the cabin boy.³⁹ The court was clear that the law saw no value difference between the sick cabin boy and the now healthy defendants. This has remained the legal standard ever since.

So theoretically civilian lives are worth no more or less than military deaths. Realistically though value does get placed on human life. In the 1970s the Ford Pinto was found to have a structural defect that led the car to explode in rear-end accidents. When Ford was deciding whether to fix the defect, they conducted a cost-benefit analysis. They estimated there would be 180 deaths, each death was valued at \$200,000.⁴⁰ This would cost the company \$36 million. Fixing the defect would cost \$11 per car on 12.5 million vehicles for a total of \$137.5 million.⁴¹ Ford decided that it would be cheaper to pay for the deaths rather than fix the defect. Human life had a clear value.

Similar to the Pinto debacle, the U.S. Environmental Protection Agency created its own value on human life with a senior discount. The agency valued one human life at \$3.7 million, unless the individual was over seventy, then their life was worth \$2.3 million.⁴² Not only does human life have a value but it is dependent on certain characteristics. So it is not surprising that military deaths may be valued greater because they place themselves in harm's way. They also die to preserve a nation's way of life and belief system, sacrificing themselves on the altar of nationalism.⁴³

Perhaps this is why military deaths had an impact on denial laws while civilian deaths did not. This is not to imply that civilian deaths are any less tragic. But when a nation is deciding on denial legislation military deaths may be more prominent in their thoughts. There also exist other means to commemorate civilian deaths including monuments and memorials. These may better preserve the memory of civilian deaths than denial legislation.

Holocaust monuments and memorials also exist to honour the victims but some nations have decided that that is not enough to protect the memory of the Holocaust. Those countries have decided that criminalizing the denial of the Holocaust is the way to ensure that event is not forgotten. Invoking the power of the criminal law shows how important these nations take this responsibility. If protecting the memory is this important it is likely because of the innocent victims who suffered and ideally to prevent reoccurrence. Prevention is another way to remember the victims by ensuring that no one else suffers a similar fate. As the regression shows, the number of Holocaust victims a country experienced is related to the probability of having denial legislation.

While the effect is not as significant as predicted –it closely mirrors the effect of military deaths– there is reason to believe that countries pass denial laws to commemorate those lost in the Holocaust. Excluding Liechtenstein, Malta, and Portugal where data on Holocaust victims is lacking, seven of the remaining thirteen countries with denial laws suffered in excess of 100,000 deaths. Of the countries with

³⁹ *Id.*

⁴⁰ MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (2009).

⁴¹ *Id.*

⁴² *Id.*

⁴³ KOENIGSBERG, *supra* note 28.

no denial laws, only two suffered in excess of 100,000 deaths but less than 140,000 deaths.

Another reason why Holocaust denial laws might be important is to honour those who survived. While this was not part of this analysis, it would be logical to assume that honouring survivors of the Holocaust by acknowledging what happened to them is part of the decision making process. Recognizing that there are other reasons for denial laws does not diminish the importance of the Holocaust deaths in this decision.

IV. Conclusion

When deciding to pass Holocaust denial legislation a country has much to consider. Some possible goals include honouring victims and survivors, protecting free speech, reconciliation, preserving historical memory and more.⁴⁴ These are all valid reasons for outlawing the denial of the Holocaust. Another reason might be to raise awareness of the Holocaust to combat ignorance.⁴⁵ As ignorance and denial grow this reason may become even more important. In addition, reducing the risk of recurrence would be a reason for a nation to preserve the memory from fading away. “Those who cannot remember the past are condemned to repeat it”.⁴⁶

The current analysis is designed to examine whether a country’s losses during the Second World War and the Holocaust specifically in any way contributed to the overall goal of denial legislation. If keeping or raising awareness of the Holocaust is a goal of denial laws then the number of Holocaust victims would seem to be a factor. By maintaining awareness of the event, we are also maintaining awareness of the victims. This rationale is also why the number of military deaths might be relevant to the inclusion of war crimes and crimes against humanity in many countries laws.

Protecting the memory of the Holocaust increases in importance each year as more survivors and first-hand witnesses pass away. Holocaust denial laws are but one way to protect what society considers worthy of collective protection.⁴⁷ And a country must weigh many considerations when deciding to pass denial laws including the right of free speech balanced with the right of minority groups. In many nations free speech will prevail but, in those countries, hardest hit by the horrors of the Holocaust, there appears to be strong reliance on the penalties of criminal law to reinforce the memory of the Holocaust. This reliance though is not arbitrary but based on the rigorous research on the Holocaust thereby honoring those lost and hopefully preventing reoccurrence.

No study could discover all of the reasons behind the decision to pass Holocaust denial laws. Raising awareness of the horrors, protecting the memory of the victims, and reducing the risk of reoccurrence are all probably involved. There may also be

⁴⁴ Smiddy, *supra* note 13.

⁴⁵ Anti-Defamation League, *The Holocaust—Global awareness and denial*, (2014), at http://global100.adl.org/info/holocaust_info.

⁴⁶ This saying is attributed to George Santayana a 20th century philosopher.

⁴⁷ See Fronza, *supra* note 15.

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many other reasons behind the decision. But the likelihood of having Holocaust denial legislation does increase based on military deaths and Holocaust deaths. Commemorating these lost lives is a noble reason and seems to be part of the influence on legislators when making this decision.