Lanzerath v. Germany: The Use of Censorship to Combat Holocaust Denial and Holocaust Severe Trivialization

I. OVERVIEW

After a German citizen was criminally convicted by a German court for comparing the treatment of his political party to the persecution of Jews in Nazi Germany, the European Court of Human Rights (ECHR) was forced to assess whether the interference with the right to freedom of expression was justified.[1] In June 2018, Rainer Lanzerath participated in a demonstration during an *Alternative für Deutschland* (AfD) party conference in Augsburg, Germany.[2] Lanzerath participated by holding up a banner with the title "Hate campaigns in Germany."[3] The left side of the banner depicted a *Judenstern*, the yellow star of David with the inscription "Jew" used in Nazi Germany to identify Jews and help facilitate their deportation, with the caption "1933 to 1945."[4] The right side of the banner depicted the AfD party logo with the caption "2013 to ?".[5] In addition to participating in the demonstration, Lanzerath also took to Twitter sometime before the party's conference to disseminate an image identical to the banner he held at the demonstration.[6]

In August 2019, the Augsburg district court sentenced Lanzerath to a fine for incitement to hatred (*Volksverhetzung*), in violation of Section

1. Lanzerath v. Germany, App. No. 1854/22, ¶¶ 1, 8 (July 28, 2022), https://hudoc.echr.coe.int/eng?i=001-218850.
2. *Id.* ¶ 2.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*

130, paragraph 3 of the German Criminal Code.[7] That particular provision criminalizes publicly approving of, denying, or downplaying genocidal acts, committed under the rule of National Socialism, which are capable of disturbing the public peace.[8] After his conviction in the district court, Lanzerath looked to the appeals process for reversal.[9] However, to Lanzerath's dismay, his appeals were declined, including his constitutional complaint to the Federal Constitutional Court.[10]

After exhausting the avenues for reversal in domestic courts, Lanzerath looked to the ECHR as his last effort to resist what he believed was a wrongful conviction and a suppression of his rights.[11] In his application to the ECHR, Lanzerath submitted that his behavior did not constitute a crime under Section 130, paragraph 3 of the German Criminal Code.[12] Rather, he merely participated in the "political battle of opinion" and intended to illuminate the "political and social marginali[z]ation of the AfD and its members."[13] Lanzerath maintained that he had neither downplayed nor approved of the Holocaust by use of the *Judenstern*, but intended to use it as a symbol of Germany's "willingness to violate a human being's dignity and human rights."[14] Lanzerath petitioned that his conviction was a violation of the Convention for Human Rights, notably Article 10's guarantee to the right to freedom of expression.[15] Without legitimate aims, which Lanzerath alleged was evidenced in the disproportionate effect on him as a private individual compared to the effect on Jews living in Germany, Lanzerath's conviction, he argued, could not stand.[16]

The European Court of Human Rights ultimately *held* that there was no violation of Article 10 of the Convention for Human Rights since the criminal sanction imposed on Lanzerath was a proportionate means to protect the reputation of Holocaust victims, their families and Jews living in Germany today. *Lanzerath v. Germany*, App. No. 1854/22, ¶ 1 (July 28, 2022), https://hudoc.echr.coe.int/eng?i=001-218850.

7. *Id.* ¶ 3.
8. *Id.*
9. *Id.* ¶ 4.
10. *Id.* ¶¶ 4-5.
11. *Id.* ¶ 6.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* ¶ 7.
16. *Id.*

II. BACKGROUND

A. Statutory Law

The aftermath of the horrors of World War II encouraged many countries to adopt legislation punishing the denial or severe trivialization of crimes against humanity or genocide.[17]

The Federal Republic of Germany, however, in abhorrence of the Holocaust and Nazism, took legislative reform further and adopted a wholly new constitutional framework.[18] In an effort to categorically reject National Socialism and the Nazi ideology, Germany introduced a transformed constitution in 1949 called the Basic Law, or, in German, *Grundgesetz*.[19] Pursuant to Germany's self-assigned moral responsibility to protect vulnerable individuals and prevent mass atrocities like the Holocaust from reoccurring, Germany grounded its Basic Law in human dignity.[20] One of the freedoms within the German Basic Law is the right to freedom of speech, a freedom believed by many to be fundamental to societal progress.[21] However, like other democracies around the world

17. *See* Perinçek v. Switzerland, App. No. 27510/08, ¶ 91 (Oct. 15, 2015), https://hudoc.echr.coe.int/eng?i=001-158235. In *Perinçek* the court refers to a comparative law study analyzing different legislation regarding denial of crimes against humanity. The court first considers Spanish legislation criminalizing the denial of acts with the proven purpose of fully or partially eliminating an ethnic, racial, or religious group. Austria criminalizes denying or severely trivializing genocide or other crimes against humanity committed by the National Socialist regime. Belgian law criminalizes denying or grossly trivializing genocide committed by the German National Socialist regime. More broadly, Norwegian law punishes anyone who makes an official statement that is discriminatory or hateful.

18. *Id.* ¶ 242 (noting that the failures of the Weimar Republic and the bitter period that followed the collapse of that regime led to the adoption of the Basic Law in 1949).

19. Grundgesetz [GG] [Basic Law], translation at https://www.gesetze-im internet.de/englisch_gg/englisch_gg.html. *See also* Robert Poll, *The Weimar Constitution: Germany's First Democratic Constitution, its Collapse, and the Lessons for Today*, *in* RULE OF L. PROGRAMME MIDDLE E./N. AFR., KONRAD ADENAUER STIFTUNG 1, 9 (2020), https://www.kas.de/documents/265308/265357/The+Weimar+Constitution.pdf/a6021d8d-82d2-47cf-7e37-0a314be02d9e?version=1.1&t=1590565540705 ("The constitutional design of post-World War II Germany . . . is built on the reflection of both the Weimar Republic's collapse as well as the horrors of Nazi Germany and its perversion of the law.").

20. Grundgesetz [GG] [Basic Law], Art. 1, § 1 translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. *See* PETA Deutschland v. Germany, App. No. 43481/09, ¶ 11 (Mar. 18, 2013), https://hudoc.echr.coe.int/fre?i=001-114273 (noting that the Basic Law put human dignity at its center). *See also* Perinçek, App. No. 27510/08, ¶ 243 ("[S]tates which have experienced the Nazi horrors . . . may be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they have perpetrated or abetted.").

21. Grundgesetz [GG] [Basic Law], Art. 5, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html. *See also* Perinçek App. No. 27510/08, ¶ 196 ("Freedom of expression is one of the essential foundations of a democratic society and one of the basic conditions for its progress.").

that protect the right to freedom of expression, Germany is forced to strike a balance between free speech and other values in the Basic Law, most notably human dignity and personal honor.[22] While legislative reform was occurring on the domestic level, there were developments at the international level as well.[23] In 1953, the Council of Europe, united in its decision to make rights considered in the United Nations' Universal Declaration of Human Rights binding, ratified the European Convention for Human Rights (the Convention), which not only holds member states of the Council of Europe responsible for securing human rights guarantees, but also subjects them to review by a supervisory jurisdiction, the ECHR.[24]

Although the right to freedom of expression is routinely secured in state constitutions, as evidenced in the previously mentioned German Basic Law, the right is also guaranteed in the Convention. [25] Under Article 10, everyone has the right to "receive and impart information and ideas without interference by public authority and regardless of frontiers."[26] The ECHR emphasizes the importance applying protection not only to information and ideas that are "favorably received," but also to those that "offend, shock, or disturb."[27] Although the ECHR interprets the right to freedom of expression as "one of the essential foundations of a democratic society," this particular freedom is subject to exceptions that are to be construed *strictly* and established *convincingly*.[28]

As set forth in Article 10 § 2, to justify an interference with freedom of expression the interference must have been prescribed by law, intended for one or more legitimate aims, and necessary in a democratic society.[29] This three-pronged test has been expanded upon in settled ECHR case

22. Guide on Article 10 of the European Convention on Human Rights – Freedom of Expression ¶ 108, Eur. Ct. H.R. (2022); Grundgesetz [GG] [Basic Law], Art. 5, § 2, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

23. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR] ("The Convention for the Protection of Human Rights and Fundamental Freedoms, better known as the European Convention on Human Rights, was opened for signature in Rome on 4 November 1950 and came into force on 3 September 1953.").

24. *Id*.

25. *Id*. at art. 10.

26. *Id*. at art. 10, § 1.

27. PETA Deutschland v. Germany, App. No. 43481/09, ¶¶ 46-47 (Mar. 18, 2013), https://hudoc.echr.coe.int/fre?i=001-114273 ("this right [protects] expressions even if they [are] formulated in a polemic or offensive way"). *See also* Perinçek v. Switzerland, App. No. 27510/08, ¶ 196 (Oct. 15, 2015), https://hudoc.echr.coe.int/eng?i=001-158235.

28. Perinçek, App. No. 27510/08, ¶ 196 (emphasis added).

29. ECHR, *supra* note 23, at art. 10, § 2; Perinçek, App. No. 27510/08, ¶ 125.

law.[30] In interpreting the first prong—whether the interference was prescribed by law—the ECHR notes that domestic courts are best suited to apply and interpret domestic law.[31]

However, in cases where the domestic court's interpretation is "arbitrary" or "manifestly unreasonable," the ECHR is entitled to dismiss domestic courts' judgments for lack of "foreseeability."[32] In other words, domestic law will not be regarded as law unless it is sufficient to enable a person to foresee the consequences of their actions.[33]

The second prong—whether the interference was in pursuit of legitimate aims—is the prong most clearly defined in the text of the Convention.[34] Section 2 of Article 10 provides a list of legitimate aims, including: interests of national security, territorial integrity, or public safety, the prevention of disorder or crime, and the protection of the reputation or rights of others.[35] Thus, once a party puts forth which aims the interference acted in furtherance of, the ECHR's role is to analyze whether the interference effectively served those aims.[36]

The third and last prong asks whether the interference is necessary in a democratic society, looking particularly for the existence of a "pressing social need."[37] The ECHR has advanced the notion that a pressing social need is not to be examined with the rigidity that comes with being "indispensable," but it also should not be considered with the flexibility that comes with being "useful" or "reasonable."[38] Although the ECHR notes that contracting states have a "margin of appreciation" in assessing whether such a need exists, the ECHR is empowered with ultimate supervisory review.[39]

30. Guide on Article 10, *supra* note 22, ¶ 61.

31. *Id.* ¶ 62. *See also* PETA Deutschland App. No. 43481/09, ¶ 43 ("[T]he application and the interpretation of the domestic law primarily fall within the competency of the domestic authorities which are . . . particularly well placed to settle the issues arising in this connection.").

32. Guide on Article 10, *supra* note 22, ¶¶ 62-63.

33. *Id.* ¶ 63. *See also* Perinçek App. No. 27510/08, ¶ 131.

34. Guide on Article 10, *supra* note 22, ¶ 85..

35. ECHR, *supra* note 23, at art. 10, § 2.

36. Guide on Article 10, *supra* note 22, ¶ 85.

37. PETA Deutschland v. Germany, App. No. 43481/09, ¶ 68 (Mar. 18, 2013), https://hudoc.echr.coe.int/fre?i=001-114273.

38. Guide on Article 10, *supra* note 22, ¶ 90.

39. *Id.* ¶ 91. *See also* PETA Deutschland, App. No. 43481/09, ¶ 68.

B. Application of the Three-Pronged Test

In *Hoffer and Annen v. Germany*, the ECHR was faced with an alleged Article 10 violation brought by anti-abortion activists.[40] The group was criminally convicted for including the statement "Then Holocaust / today: Babycaust" and for describing the doctor performing the abortions as a "killing specialist" in pamphlets for distribution at a Nuremberg medical center.[41] German courts found a violation of Section 185 of the German Criminal Code, Germany's defamation provision, ruling that by "comparing the performance of abortions to the mass-homicide committed during the Holocaust," the anti-abortion activists violated the doctor's personality rights.[42] In its application of the first prong, the ECHR looked to the law the applicants violated, ultimately holding that "on the ordinary meaning of the word "defamation," the applicants were able to foresee the risk of criminal consequences.[43]

After ruling that the interference satisfied the first prong, the ECHR next looked to the second prong, finding that the applicants' convictions were pursuant to protecting the reputation or rights of others, "namely [the doctor's] reputation and personality rights."[44] The ECHR further noted that the impact an expression has on another's personality rights cannot be detached from the historical context in which the expression was made.[45] The ECHR last looked to whether the conviction of the anti-abortion applicants was necessary in a democratic society, again emphasizing the importance of seeing the anti-abortion activists' behavior in the "specific context of the German past."[46] The court agreed with the domestic court's finding it necessary to uphold the obligation to desist from putting abortions on the same level as the Holocaust in order to defend democracy.[47] After finding that the conviction satisfied all three prongs of Article 10 § 2, the ECHR ruled against finding the government in violation of Article 10 of the Convention.[48]

In a similar case handed down a few years after the *Hoffer and Annen* decision, the ECHR was again faced with striking a balance between

40. Hoffer and Annen v. Germany, App. Nos. 397/07 & 2322/07, ¶ 29 (June 20, 2013), https://hudoc.echr.coe.int/eng?i=001-102804.
41. *Id.* ¶¶ 7-8.
42. *Id.* ¶¶ 41, 46.
43. *Id.* ¶ 41.
44. *Id.* ¶ 42.
45. *Id.* ¶ 48.
46. *Id.*
47. *Id.* ¶¶ 39, 48.
48. *Id.* ¶¶ 49-50.

freedom of expression and the obligation to protect the reputation and rights of others, this time Holocaust victims and survivors.[49] In *PETA Deutschland v. Germany*, the ECHR ruled that Germany did not violate Article 10 of the Convention when it prevented the publication of comparative images between caged animals and those of prisoners in concentration camps.[50] Although the applicants were faced with a civil injunction rather than a criminal conviction, the ECHR still analyzed the interference through the three-pronged test, looking first to whether the interference was prescribed by law.[51] Domestic courts forced PETA Deutschland to desist from publishing the posters pursuant to section 823 paragraphs 1 and 2 of the German Civil Code, which grants any person whose personality rights are at risk of being violated with the ability to compel that person to refrain from the impugned action.[52] Although PETA Deutschland emphasized the fact that a civil injunction against identical posters in Austria was denied in the Supreme Court of Austria, the ECHR determined that the injunction complained of was, in fact, prescribed by law.[53] The court reiterated the fact that interpretation and application of domestic law falls within the competency of domestic courts.[54]

Next, the ECHR considered whether the interference pursued a legitimate aim, finding that the civil injunction pursued the legitimate aim of protecting the reputation and rights of Jewish survivors of the Holocaust.[55] Consistent with its previous ruling in the case of *Hoffer and Annen*, the ECHR reiterated the importance of analyzing Germany's social needs in the context of their historical background.[56] Pursuant to Germany's special obligation towards Jews living in Germany, the court felt it necessary to enable every Jewish person to take steps against anti-Semitic discrimination, thereby upholding the injunction forbidding the publication of posters comparing caged animals with those of

49. PETA Deutschland v. Germany, App. No. 43481/09, ¶¶ 8, 32 (Mar. 18, 2013), https://hudoc.echr.coe.int/fre?i=001-114273.

50. *Id.* ¶ 51.

51. *Id.* ¶¶ 42, 50.

52. *Id.* ¶ 43.

53. *Id.* ¶¶ 22, 23, 35, 36, 43. The German government submitted that given Germany's history, "it was hardly conceivable that a German court would reach a similar conclusion as the Austrian Supreme Court." It further noted that, "Given its historical responsibility, it was Germany's duty to ensure that violations of personality rights could be claimed in connection with the Holocaust."

54. *Id.* ¶ 43.

55. *Id.* ¶¶ 44, 48

56. *Id.* ¶ 49.

concentration camp prisoners.[57] Although PETA Deutschland asserts that this approach is too broad–that is, permitting every depiction of a Jewish person to be considered a collective insult–the court reiterated the standard that an interference with one's freedom of expression must be "construed strictly" and "established convincingly."[58]

Three years after *PETA Deutschcland*, the ECHR hammered the final nail in the coffin of Holocaust trivialization in *Perinçek v. Switzerland*.[59] *Perinçek*, in contrast to the aforementioned cases, involved Doğu Perinçek's criminal conviction under Swiss law for denying the Armenian Genocide.[60] In assessing whether the Article 10 interference was justified, the ECHR walked through the same test it adopted in the cases of Holocaust denial and severe trivialization, first finding that the conviction was prescribed by law.[61] Looking next to the legitimacy of the interference, the court looked at the two alleged aims: prevention of disorder and the protection of the rights of others.[62] Although the court rejected the first aim, finding no evidence that Perinçek's statements were capable of leading to public disturbances, the Court accepted the latter aim.[63] Ruling consistently with *PETA Deutschland*, the court found that the interference with Perinçek's freedom of expression was intended to protect the dignity of Armenians who have suffered genocide as well as present-day Armenians.[64]

It was not until the third prong that the ECHR decided that the interference was not justified.[65] In rejecting the criminal conviction's necessity in a democracy, the ECHR compared the case at hand to a case of Holocaust denial, stating: Holocaust denial is particularly problematic in "[s]tates which have experienced the Nazi horrors, and which may be regarded as having a special moral responsibility to distance themselves from the mass atrocities that they have perpetrated or abetted . . ."[66] The ECHR in *Perinçek* found there was no pressing social need without a "direct link between Switzerland and the events that took place in the

57. *Id.* ¶ 30.
58. *Id.* ¶¶ 30, 46.
59. Perinçek v. Switzerland, App. No. 27510/08, ¶¶ 209-212 (Oct. 15, 2015), https://hudoc.echr.coe.int/eng?i=001-158235.
60. *Id.* ¶ 64.
61. *Id.* ¶ 138.
62. *Id.* ¶ 145.
63. *Id.* ¶¶ 152, 154.
64. *Id.* ¶¶ 155, 156.
65. *Id.* ¶ 262.
66. *Id.* ¶ 243.

Ottoman Empire in 1915 and the following years."[67] Thus, the ECHR again emphasizes the importance in justifying speech interferences against Holocaust denial and trivialization in those countries that have witnessed Nazi horrors in their not-so-distant pasts.[68]

III. COURT'S DECISION

In the noted case, the European Court of Human Rights looked to the Article 10 § 2 three-pronged analysis in order to determine whether the Article 10 interference was compatible with the Convention.[69] The ECHR first considered the lawfulness of the criminal conviction, plainly ruling that the interference was prescribed by law.[70] The court next looked to the legitimacy of the interference, finding that Lanzerath's conviction pursued legitimate aims as listed under Article 10 § 2 of the Convention, notably "the prevention of crime" and the "protection of the reputation and rights of others."[71] The court last analyzed whether the interference was necessary in a democratic society by asking whether Lanzerath's behavior, as seen in the immediate context and wider historical context, could be seen as a justification of intolerance.[72] Answering in the affirmative, the court reasoned that Lanzerath's behavior trivialized the systematic persecution and extermination of Jews in Nazi Germany, and the widespread impact of his statements were capable of disturbing public peace.[73]

In analyzing whether Lanzerath's conviction was prescribed by law, the ECHR, consistent with previous case law, reiterated the deference that is awarded to national courts and their interpretation and application of their laws.[74] The court noted that without finding national authorities' interpretation "arbitrary or manifestly unreasonable," the court is confined to assessing whether the effects of that interpretation are compatible with the Convention.[75] By indication of finding no pitfalls

67. *Id.* ¶ 244.
68. *Id.* ¶ 234.
69. Lanzerath v. Germany, App. No. 1854/22, ¶ 8 (July 28, 2022), https://hudoc.echr.coe.int/eng?i=001-218850.
70. *Id.* ¶¶ 8, 9
71. *Id.* ¶ 10.
72. *Id.* ¶ 11.
73. *Id.* ¶¶ 12, 13.
74. *Id.* ¶ 9.
75. *Id.*

within Germany's interpretation of Section 130, paragraph 3, the ECHR held that Lanzerath's conviction was effectively prescribed by law.[76]

After the brief analysis that is prong one of Article 10 § 2, the ECHR next touched upon which aims the interference serves to advance.[77] The court considered the conviction pursuant to two legitimate aims, "prevention of crime" and the "protection of the reputation or rights of others," namely Holocaust victims and survivors, their families, and Jews currently living in Germany.[78] The court found it important to reiterate that the impact of one's behavior or statements cannot be isolated from the historical and social context in which the expression was made.[79] More explicitly, a reference to the Holocaust in Germany must also be seen in the specific context of German history.[80]

With one last prong to satisfy, the ECHR dedicated the remainder of the opinion to answer whether the intervention was necessary in a democratic society.[81] The court, consistent with the German domestic court's decision, found that by comparing the mass extermination of Jews under the rule of Nazi Germany to the "alleged stigmatization" of members of a political party in current Germany, Lanzerath relativized and trivialized the Holocaust, the precise behavior Germany's legislators intended to be punished by law.[82] The ECHR stressed that statements like Lanzerath's impinged the dignity and reputation of Holocaust victims, survivors, and their families in a way that is "intolerable for society."[83] In addition to blatantly downplaying the Holocaust and his unbearable disregard for Holocaust victims, Lanzerath's behavior was inherently capable of poisoning the political climate and disturbing public peace.[84] Lanzerath, as evidenced by his holding up of a poster at the AfD party conference and by his posting on Twitter, aimed for a widespread impact of his statements.[85] To protect and preserve the reputation of Holocaust victims, survivors, their families, and Jews living in Germany today and to punish hate speech capable of disturbing the public peace, the ECHR found the satisfaction of the third and final prong of the Article 10 § 2

76. *Id.*
77. *Id.* ¶ 10.
78. *Id.*
79. *Id.* ¶ 11.
80. *Id.*
81. *Id.*
82. *Id.* ¶ 12.
83. *Id.* ¶ 13.
84. *Id.*
85. *Id.*

test.[86] With all three prongs satisfied, the ECHR accepted Lanzerath's criminal conviction and found no violation of Article 10.[87]

IV. ANALYSIS

In response to the abhorrent Nazi crimes that plagued the world and particularly Europe, many European countries enacted legislation punishing, if not criminalizing, Holocaust denial and severe trivialization.[88] Although many European countries adopted laws rejecting Nazism and Nazi crimes, Germany is the one country that prosecutes statements referencing the Holocaust rather vehemently.[89] In an effort to reject their Nazi past and hinder Nazi reemergence, Germany has adopted criminal provisions like Section 130, which prohibits incitement to hatred and Section 185, which prohibits defamation or insult to one's personal honor, both of which is at issue in *Lanzerath* and *Hoffer and Annen*, respectively.[90] Although the legislation addressing Holocaust denial and trivialization indisputably infringes upon free speech guarantees, the ECHR has consistently excluded Holocaust denial and trivialization from the protection of Article 10 of the Convention, and the *Lanzerath* decision proved no different.[91]

As evidenced in *Lanzerath*, *PETA Deutschland*, and *Hoffer and Annen*, the ECHR views the censorship of Holocaust denial and trivialization as justified interferences with free speech.[92] In both *Lanzerath* and *PETA Deutschland*, the ECHR noted that it is an appropriate means to interfere with one's freedom of expression in order to protect the reputation of Holocaust victims and survivors, their families, and Jews living in Germany today.[93] In other words, protecting Holocaust survivors and Jews living in Germany is a legitimate aim that

86. *Id.* ¶ 14.

87. *Id.*

88. Michael J. Bazyler, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, YAD VASHEM (2022), https://www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html.

89. *Id.*

90. Winfried Brugger, *Ban on or Protection of Hate Speech—Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 5-6 (2002); Lanzerath v. Germany, App. No. 1854/22, ¶ 6 (July 28, 2022), https://hudoc.echr.coe.int/eng?i=001-218850; Hoffer and Annen v. Germany, App. Nos. 397/07 & 2322/07, ¶ 25 (June 20, 2013), https://hudoc.echr.coe.int/eng?i=001-102804.

91. Lanzerath, App. No. 1854/22, ¶ 14; Hoffer and Annen, App. Nos. 397/07 & 2322/07, ¶ 50; PETA Deutschland, App. No. 43481/09, ¶ 51.

92. *Id.*

93. Lanzerath, App. No. 1854/22, ¶ 14; PETA Deutschland v. Germany, App. No. 43481/09, ¶ 48 (Mar. 18, 2013), https://hudoc.echr.coe.int/fre?i=001-114273.

satisfies one of the three prongs used to justify interference with one's freedom of speech.[94] Although the conviction at issue in *Hoffer and Annen* pursued the protection of a doctor's reputation, the context of the Holocaust was not absent in the ECHR judgment.[95]

In assessing the third prong, necessity in a democratic society, the ECHR in *Lanzerath*, *PETA Deutschland*, *Hoffer and Annen*, and *Perinçek* emphasized the importance of considering the context in which the statements occurred.[96] Thus, statements in Germany, the very soil that experienced Nazism and its horrors, cannot be detached from Germany's Nazi past.[97] The ECHR noted that Holocaust trivialization and relativization, like the behavior in *Lanzerath*, *PETA Deutschland*, and *Hoffer and Annen*, is inherently capable of poisoning the political climate, as is corroborated by a quick reference to Germany's historic past.[98] Most interestingly, however, the ECHR perpetuates the idea that Germany has a "special obligation towards Jews living in Germany" and a moral responsibility to overcome their Nazi past.[99]

Although the ECHR's decisions to uphold the censorship of Holocaust denial and trivialization in Germany are not bereft of reasoning, it still begs the question: why are things so different in the United States?[100] The ECHR in each aforementioned case emphasizes the importance in considering the context in which the statements are made.[101] Thus, it is important to recognize that statements made in Germany about the Holocaust are made within a different historical context than statements made in the United States. Nevertheless, the difference in treatment of hate speech also stems from the stark differences between international law and American law.[102]

International law, particularly German law, assigns great weight to the protection of personal honor and dignity, a concept mentioned during

94. Lanzerath, App. No. 1854/22, ¶¶ 10-11; PETA Deutschland, App. No. 43481/09, ¶ 44.

95. Hoffer and Annen, App. Nos. 397/07 & 2322/07, ¶ 42.

96. Lanzerath, App. No. 1854/22, ¶ 11; PETA Deutschland, App. No. 43481/09, ¶ 49; Hoffer and Annen, App. Nos. 397/07 & 2322/07, ¶ 48; Perinçek v. Switzerland, App. No. 27510/08, ¶ 243 (Oct. 15, 2015), https://hudoc.echr.coe.int/eng?i=001-158235.

97. *Id*.

98. Lanzerath, App. No. 1854/22, ¶¶ 2, 11; PETA Deutschland, App. No. 43481/09, ¶ 7; Hoffer and Annen, App. Nos. 397/07 & 2322/07, ¶¶ 7-8.

99. *See* PETA Deutschland, App. No. 43481/09, ¶ 36.

100. Lanzerath, App. No. 1854/22, ¶ 14; PETA Deutschland, App. No. 43481/09, ¶ 51; Hoffer and Annen, App. Nos. 397/07 & 2322/07, ¶ 50.

101. Lanzerath, App. No. 1854/22, ¶ 11; PETA Deutschland, App. No. 43481/09, ¶ 49; Hoffer and Annen, App. Nos. 397/07 & 2322/07, ¶ 48; Perinçek, App. No. 27510/08, ¶ 243.

102. Brugger, *supra* note 90, at 2.

this note's introduction to Germany's Basic Law, which allows and encourages legislation to target the fueling or early stages of hate.[103] American jurisprudence, however, upholds a more absolutist interpretation of free speech, which produces reluctance to restrict speech whether it be a form of hate speech or not.[104] For example, free speech absolutism allowed for the "Unite the Right" rally in Charlottesville, Virginia, until the violence overshadowed the speech.[105] This conventional American hesitancy to interfere with one's speech has produced a standard of restricting speech as late as possible, or only in the face of imminent or immediate danger, a very different approach as compared to the German system of early detection and prevention.[106] These conflicting interpretations indisputably illuminate why the United States is bereft of laws censoring Holocaust denial and trivialization, aside from the fact that it has a different past than Germany.[107]

Although Germany and the United States have different histories and different perspectives on free speech, Germany nevertheless provides what many refer to as an "exemplar of responsible public memory."[108] Author Jennifer Neal illuminated the fact that Germany proves that "when you honor the victims instead of the perpetrators, you're still remembering history."[109] For instance, Germany is not only stripped of all Nazi statutes and imagery, but they also constructed many memorials and museums, some with full financial support by the German government.[110] On the grounds of the former headquarters of the Gestapo, the oppressive secret police under Nazi rule, stands the Topography of Terror museum which is dedicated to telling the story and horrors of the Nazi regime.[111]

103. *Id*.

104. *Id*. at 7. It is important to note that the absolute protection provided to free speech may stem from the textual differences between the American Constitution and the German Constitution. For instance, freedom of speech is a right named in the Bill of Rights, whereas it is not mentioned until Article 5 in the German Constitution.

105. Dara Lind, *Unite the Right, the Violent White Supremacist Rally in Charlottesville, Explained*, VOX (Aug. 14, 2017), https://www.vox.com/2017/8/12/16138246/charlottesville-nazi-rally-right-uva.

106. Brugger, *supra* note 90, at 21; Wibke Timmermann, *Counteracting Hate Speech as a Way of Preventing Genocidal Violence*, 3 GENOCIDE STUD. & PREVENTION: AN INT'L J. 353, 353 (2008).

107. Bazyler, *supra* note 88 ("Broad interpretation by the U.S. Supreme Court of the First Amendment guarantees . . . has made denial of the Holocaust, promotion of Nazi ideology and dissemination of racist and anti-Semitic speech . . . legal under American law.").

108. Clint Smith, *Monuments to the Unthinkable*, ATLANTIC (Nov. 14, 2022), https://www.theatlantic.com/magazine/archive/2022/12/holocaust-remembrance-lessons-america/671893/.

109. *Id*.

110. *Id*.

111. *Id*.

Furthermore, many streets across Germany contain small brass cobblestones, which hold names and other biographical details of each man, woman, or child who was deported from that spot or that house.[112] While Germany is taking significant strides towards memorializing a sin of its history by honoring the victims, many question why the United States cannot similarly account for a sin of its past: slavery.[113] While there has been a notable shift in our country's understanding of the legacy of slavery, evidenced by the removal of Confederate leaders' monuments and the renaming of streets once named after slaveholders, the United States is still dealing with how to memorialize a dark period of its history even though the Civil War ended over 150 years ago.[114]

V. CONCLUSION

Although German efforts to combat anti-Semitism and hinder the possible reemergence of Nazism inevitably collide with free speech guarantees, the ECHR has ultimately ruled that such interferences are justified.[115] Hate speech and hateful behavior play an integral role in priming groups and societies at large, to commit horrible crimes against others.[116] The exacerbation of anti-Semitic, xenophobic, and racist tendencies psychologically prepares the state and dehumanizes intended victims, and without such extensive hate propaganda, mass atrocities or genocides would not be met with the widespread support they need.[117] By criminalizing Holocaust denial and severe trivialization, countries like Germany are impeding the grassroots movements that might lead to the widescale renaissance of neo-Nazism and other hate-driven regimes, and

112. *Id.*

113. *Id.*

114. *Id.*

115. Lanzerath v. Germany, App. No. 1854/22, ¶ 14 (July 28, 2022), https://hudoc.echr.coe.int/eng?i=001-218850; Hoffer and Annen v. Germany, App. Nos. 397/07 & 2322/07, ¶ 50 (June 20, 2013), https://hudoc.echr.coe.int/eng?i=001-102804; PETA Deutschland v. Germany, App. No. 43481/09, ¶ 51 (Mar. 18, 2013), https://hudoc.echr.coe.int/fre?i=001-114273.

116. Timmerman, *supra* note 106, at 353-54 ("It is well documented that major genocides of the twentieth century, such as the Holocaust and the Rwandan Genocide of 1994, were preceded and prepared by extensive hate propaganda.").

117. *Id.*

the ECHR, in decisions like *Lanzerath*, approves of doing so.[118] Although techniques like early detection and prevention of hate speech seem critical, it is a largely European method, which begs the question: will it be too late in countries that do not adopt such mechanisms?[119]

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118. Lanzerath, App. No. 1854/22, ¶¶ 14-15.

119. Brugger, *supra* note 90, at 21.

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