Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*

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I. TWO DIFFERENT WAYS OF DEALING WITH HATE SPEECH

The way legal systems should deal with hate speech has been the subject of much debate, but this should come as no surprise. Liberal states generally value the protection of speech in the abstract, but in practice it is usually only offensive or repulsive speech that is in need of that protection. Hate speech is one such form of repugnant speech. The view that offensive speech merits protection is illustrated in the works of Voltaire, a prominent representative of the French Enlightenment, whose philosophy was, "I disapprove of what you say, but I will defend to the death your right to say it."[1] The opposite view is that the content of hate

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* This Article is a compilation of speeches presented at the law schools of Brooklyn University, Georgetown University, Golden Gate University, University of San Francisco, Vanderbilt University, and Yeshiva University during the Fall Semester 2001. The written version retains the informal style of the speeches.

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1. SIMON LEE, THE COST OF FREE SPEECH 3 (1990). Lee points out that this is not, as is often assumed, a direct quote from Voltaire, but a line invented later to summarize Voltaire's philosophy. See also the British philosopher Bertrand Russell, who said, "It is an essential part of democracy that substantial groups, even majorities, should extend toleration to dissentient groups, however small and however much their sentiments may be outraged. In a democracy it is

speech eliminates, or at least minimizes, its communicative character, and uttering racist messages is therefore rightly viewed more as conduct than speech, and so no, or only weak, constitutional free speech arguments apply.[2]

On the whole, neither modern constitutional law nor international law consistently permits or consistently prohibits hate speech. In the world community, such speech is sometimes protected, and sometimes not. However, hate speech is protected in the United States far more frequently than in Germany, Europe, Canada, or the majority of other countries with modern constitutions. Under dominant American jurisprudence, free speech, including the right to utter hate messages, is a preferred right that usually outweighs countervailing interests in dignity, honor, civility, and equality. In America, hate speech is fully viewed as a form of speech, not of conduct, despite the fact that such speech may be truly painful to others.[3] International law and most non-American modern legal systems assign greater protection to the dignity, honor, and equality interests of the targets of hate speech.

Before progressing any further, we should pause to define the term. According to most definitions, hate speech refers to utterances which tend to insult, intimidate, or harass persons on account of their race, color, ethnicity, nationality, gender, or religion, or which are capable of instigating violence, hatred, or discrimination against such persons.[4] My

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necessary that people should learn to endure to have their sentiments outraged." *Quoted in* THE BERTRAND RUSSELL CASE 183 (John Dewey & Horace M. Kallen eds., 1941), cited after HARRY M. BRACKEN, FREEDOM OF SPEECH. WORDS ARE NOT DEEDS 32 (1994).

2. Hate speech would then fall under the protection accorded by the general liberty right in the Constitution, which is usually weaker than protection under the free speech clause.

3. Therefore, while being dominant in the United States, this approach is often labeled as "unusual" or "out of step" with the rest of the legally enlightened world. *See* Credence Fogo-Schensul, *More Than a River: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 GONZ. L. REV. 241, 247, 276 (1997-98); SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 159 (1994); Kathleen Sullivan, *Freedom of Expression in the United States*, *in* THE BOUNDARIES OF FREEDOM OF EXPRESSION AND ORDER IN AMERICAN DEMOCRACY 1, 9 (Thomas R. Hensley ed., 2001); THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS 153 (1998).

4. *See* ANJA ZIMMER, HATE SPEECH IM VÖLKERRECHT. DAS VÖLKERRECHTLICHE VERBOT RASSENDISKRIMINIERENDER ÄUßERUNGEN IM SPANNUNGSFELD ZWISCHEN DEM VERBOT DER RASSENDISKRIMINIERUNG UND DEM SCHUTZ DER MEINUNGSFREIHEIT 17 (2001); *infra* notes 12 ff. on section 130 German Criminal Code; the International Covenant on the Elimination of All Forms of Racial Discrimination, enacted on January 4, 1969, 5 I.L.M. 352 (1966). Article 1, 1 reads:

> In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

remarks will concentrate mostly on German law, which is, on the whole, in step with the European and world approach, but I will draw some comparisons with American constitutional law.[5]

In order to dramatize the differences between the American and German approaches to hate speech, I will illustrate this with a hypothetical situation. Let us imagine that we are spending a nice afternoon on the steps of the Capitol in Washington, D.C.; suddenly the quiet is interrupted by a person waving a placard. She shouts,

> Wake up, you tired masses, I have four messages that you better listen to, understand, and share! First, our President is a pig! I have painted two pictures to demonstrate my point. Here is one showing our clearly recognizable President as a pig engaged in sexual conduct with another pig in a judge's robe, and here is another, showing our President having a sexual encounter with his mother in an outhouse. Second, all our soldiers are murderers. Third, the Holocaust never happened. Fourth, African Americans use the slavery lie to extort money from the American government in the same way Jews use the Holocaust lie to extort money from Germany. Something should be done about this!

After having regained our composure after such an intrusion into our peaceful afternoon, we might wonder if the claims just made qualify as protected speech. Spoken on the steps of the U.S. Capitol, all four of these allegations would be protected under the First Amendment.[6] However, spoken on the steps of the German *Reichstag*, all four of these messages would lead to criminal prosecution. In Germany, as well as in most other countries, the basic collective instinct reflected in the law is

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Article 2 contains a comprehensive duty of all member states to outlaw racial discrimination. Article 4 clarifies that hate speech is also covered by mentioning condemnation of all propaganda that "[promotes] racial hatred and discrimination in any form."

5. It is evident that I have been forced to omit many fine points of law, but my hope is that the clarification of the deep differences between the German and the American approaches and references to some of the reasons for this divergence can enlighten the reader on the options available to deal with hate speech. This topic clearly demonstrates that history and culture count, and some would argue that these considerations count much more than words found in legal texts. For more detailed comparative studies on hate speech, see *supra* notes 3-4 and *infra* notes 11, 13, 44, and, e.g., David E. Weiss, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 869 (1994); Charles Lewis Nier, *Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany*, 13 DICK. J. INT'L L. 241 (1995); Bradley A. Appleman, *Hate Speech: A Comparison of the Approaches Taken by the United States and Germany*, 14 WIS. INT'L L.J. 422 (1996); STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NONDISCRIMINATION (Sandra Coliver ed., 1992); UNDER THE SHADOW OF WEIMAR. DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES (Louis Greenspan & Cyril Levitt eds., 1993); FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY (David Kretzmer & Francine Kershman Hazan eds., 2000).

6. As to the third statement in the scenario, see *infra* note 39.

that hate speech is dangerous and should be effectively eliminated. How can there be so many different views on the same speech? I will first sketch the applicable laws and then elaborate on the different issues raised by the four statements.

II. THE APPLICABLE LAWS

The German Constitution has a free speech clause, as do all other modern constitutions. Article 5 of the German Constitution, referred to as the Basic Law (hereinafter BL), states the following: "Every person shall have the right freely to express and disseminate his opinions."[7] For the purposes of this provision, opinion is understood to include all kinds of judgments, whether they be "well-founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmless . . . An expression of opinion does not lose this protection by being sharply or hurtfully worded."[8] Thus, as in America, words that wound due to their hateful content are protected in Germany by a free speech clause.[9] Such words are not considered unprotected conduct, as some progressive American scholars insist.[10]

However, while this constitutional protection of hate speech is essentially the end of the story in America, it is only the beginning in Germany. The strong, libertarian words used by the German Federal Constitutional Court in carving out an expansive definition of

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7. The full text of Article 5 BL reads:

> (1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights find their limits in the provisions of the general laws, in provisions for the protection of young persons, and in the right to personal honor. (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

This English translation is taken from Basic Law for the Federal Republic of Germany, published by the Press and Information Office of the Federal Government, 53105 Bonn.

8. 90 BVerfGE 241, 247 (1994) (Official Reports of the Federal Constitutional Court) = Decisions of the Bundesverfassungsgericht—Federal Constitutional Court—Federal Republic of Germany, vol. 2—Freedom of Speech, 1998 (henceforth: Decisions), 620, at 625.

9. Depending on the facts of the case, they could also fall under the freedom of the arts (Article 5 (3) BL), the freedom to form religious groups and to express religious or non-religious beliefs (Article 4 BL), the freedom to associate (Article 8 BL), the freedom of assembly (Article 9 BL), or the freedom to form political parties (Article 21 BL). While these provisions are technically treated differently due to their different definitional coverages and their divergent limitation clauses, the results under these provisions would not be substantially different in a hate speech case due to the constitutional considerations addressed in the main text.

10. *See* MARI MATSUDA ET AL., WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (1994).

constitutionally protected opinion can be misleading, as these words do not yet address the fundamental issue of balancing competing constitutional interests in hate speech cases. The effect of this balancing is profound, as the German Constitutional Court has never struck down any of the many criminal, administrative, and civil prohibitions of "constitutionally protected" hate speech in Germany.[11]

For reasons of brevity, I will concentrate on two provisions in the German Federal Criminal Code which, although similar in content, have somewhat different goals. Sections 185 and following of the Federal Criminal Code prohibit insults. Insult is generally understood to be an illegal attack on the honor of another person by intentionally showing lack of respect or expressing disrespect. Section 185 states the following: "Insult will be punished by imprisonment not exceeding one year or by a fine." Hate speech directed against either individuals or groups can qualify as insult, as will be explained later in the discussion of statements made by the protester in our hypothetical scenario.

In addition to the section on insults, the German Federal Criminal Code also includes provisions for the preservation of public peace. One of these provisions, section 130, is of special importance to the limitation of hate speech in Germany. Section 130(1) states the following:

> Whosoever, in a manner liable to disturb public peace, (1) incites hatred against parts of the population or invites violence or arbitrary acts against them, or (2) attacks the human dignity of others by insulting, maliciously degrading or defaming parts of the population shall be punished with imprisonment of no less than three months and not exceeding five years.

The second paragraph of the provision contains a similar prohibition on publications and explicitly defines hate speech by mentioning incitement to hatred against "groups determined by nationality, race, religion, or ethnic origin."[12] Paragraph three of the section, added in 1994, effectively

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11. For surveys of such regulations and prohibitions, see Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law*, *in* EIBE RIEDEL (ed.), STOCKTAKING IN GERMAN PUBLIC LAW: GERMAN REPORTS ON PUBLIC LAW, Presented to the XVI International Congress on Comparative Law, Brisbane, 14 to 20 July 2002, section IV.2; Appleman, *supra* note 5, at 431 ff.; Juliane Wetzel, *The Judicial Treatment of Incitement Against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany*, *in* UNDER THE SHADOW OF WEIMAR. DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 86 ff. (Louis Greenspan & Cyril Levitt eds., 1993); Manfred Zuleeg, *Group Defamation in West Germany*, 13 CLEV.-MARSHALL L. REV. 52, 54 ff. (1964); James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1292 ff. (2000); Klaus Günther, *The Denial of the Holocaust: Employing Criminal Law to Combat Anti-Semitism in Germany*, 15 TEL AVIV U. STUD. L. 51, 52 ff. (2000).

12. *See supra* note 4. While there is agreement on the core criteria which, with verbal attacks, qualify as hate speech, different authors include or exclude such criteria as religion,

punishes all kinds of Holocaust denials, lies, and approvals. Section 130(3) states the following:

> Imprisonment, not exceeding five years, or a fine, will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes an act described in § 220a(1) [i.e., genocide] committed under National Socialism, in a manner which is liable to disturb the public peace.

The reason for the amendment was that not all Holocaust cases could be effectively addressed under the aforementioned criminal prohibitions of insult.[13]

III. BALANCING RULES OF THE FEDERAL CONSTITUTIONAL COURT

These prohibitions of hate speech in the Federal Criminal Code, as well as many others in other areas of the law, have been accepted by the German Constitutional Court as legitimate infringements on free speech. The acceptance of these limitations is supported on two levels: one abstract, the other case-specific.

On the abstract level, the Federal Constitutional Court views these prohibitions of hate speech as being justified by the clauses in the Basic Law that serve to explicitly limit communicative rights. These specific limitation clauses will be described in a moment.

Regarding the case-specific reasoning, the Court has developed balancing rules which state the following:

> Freedom of opinion by no means always takes precedence over protection of personality. . . . Rather, where an expression of opinion must be viewed as a formal criminal insult or vilification, protection of personality routinely comes before freedom of expression. . . . Where expressions of opinions are linked to factual assertions, the protection merited can depend on the truth of the underlying factual assumption. If these assumptions have proven untrue, freedom of expression will routinely yield to personality protection. . . . Otherwise, the issue is which legal interest deserves protection in that specific case. Even then, it must be

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gender, and sexual orientation. Expansive readings of "suspicious" criteria for verbal attacks would include all factors that form the core of one's identity, that other groups assign to the group attacked, or that the individual cannot change. Thus, sexual orientation would qualify, and does qualify, in the United States, with regard to hate crimes (not hate speech). *See* JAMES B. JACOBS & KIMBERLEY POTTER, HATE CRIMES. CRIMINAL LAW AND IDENTITY POLITICS ch. 3 (1998) (summarizing U.S. hate crime laws).

13. For an analysis of the state of the law before 1994, see Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies,"* 85 MICH. L. REV. 277 (1986); Wetzel, *supra* note 11, at 86 ff.

> recalled that a presumption in favour of free speech applies concerning issues of essential importance to the public.[14]

These rulings by the Federal Constitutional Court together illustrate that the German Court does not view free speech as a preferred right that in most cases trumps competing constitutional rights and interests. This is strikingly different from the practice of the American courts, which provides free speech with almost absolute protection. One reason for the differences is attributable to textual differences found in the Constitutions of the two nations: In the United States, freedom of speech is the first right named in the Bill of Rights,[15] whereas it does not appear until Article 5 of the German Constitution; furthermore, there are explicit limitations to the German free speech clause, but no specific limitations to the First Amendment in the U.S. Constitution. In addition, the German Constitution contains an entire cluster of rights that seems to presuppose limits to absolute freedom of expression. These counter-vailing interests include the right to personal honor in Article 5(2), the right to personality in Article 2(1), and the required respect for dignity in Article 1(1) BL.[16] These textual arguments are not the only ones affecting the resolution of hate speech cases. Additional arguments will be mentioned later, but at least the text of the German Constitution provides dignity, personality, and honor with more leverage against hate speech than the American Constitution, which remains silent on all of these interests.

Even though free speech is not a generally preferred right in Germany, it does have the status of a right with special importance due to the functions it serves. The German Court cited well-known American rationales for the importance of speech; it also seems to apply a two-tiered approach. The German Court recognizes the special importance of free speech in the formation of opinions that, in turn, are vital to the autonomy of the speaker, irrespective of any consequences. The German Court further recognizes the importance of the free exchange of information and ideas in support of finding the truth, of legitimizing democracy, of helping to make decisions in personal and public matters,

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14. 90 BVerfGE 241, 248 ff. (1994) = Decisions 620, at 626. For another formulation, see 93 BVerfGE 266, 294 (1995) = Decisions 659, at 680 ff.

15. The German "Bill of Rights" consists of the first part of the Basic Law.

16. Article 2(1) BL reads: "Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." Article 1(1) BL reads: "Human dignity shall be inviolable. To respect it and to protect it shall be the duty of all state authority." For the text of article 5 BL, see *supra* note 7.

and of eliminating the need for recourse to physical violence. A representative formulation of the Court reads as follows:

> The fundamental right to free expression of opinion is, as the most direct expression of human personality in society, one of the foremost human rights of all. . . . For a free democratic State system, it is nothing other than constitutive, for it is only through it that the constant intellectual debate, the clash of opinions, that is its vital element is made possible. . . . It is in a certain sense the basis of every freedom whatsoever, 'the matrix, the indispensable condition of nearly every other form of freedom' (Cardozo).[17]

The German Constitutional Court transformed these functional analyses into two doctrinal precepts to be followed in all free speech cases. First, in applying the principle of proportionality, laws promoting ordinary public interests may not justify interference with free speech—rather, such interference must be justified by a pressing public interest that no less intrusive means can achieve, and this is particularly true when the prohibition is viewpoint-based.[18] Second, when considering whether the content of a message justifies its limitation, the courts may not choose the punishable interpretation of a message if a reasonable alternative interpretation exists. Therefore, determining the legal meaning of a statement requires an examination of the linguistic and social context in which the statement was made. If a court "choose[s] the one [interpretation of the statement] that leads to an adverse judgement, without excluding the other on the basis of explicit and convincing grounds,"[19] then a violation of free speech has occurred.

IV. ANALYSIS AND EVALUATION OF DIFFICULT CASES

Having completed this brief sketch of the German free speech doctrine, I will now return to the four statements made by our hypothetical protester.

A. Insult of Individuals

Hate speech is commonly directed at groups of individuals. However, such speech can also be directed against a single person and still be punishable under criminal law if the verbal attack meets the definition of insult in section 185 of the Criminal Code. Insult, or

17. 7 BVerfGE 198, 208 (1958) = Decisions 1, at 6; *see also* 69 BVerfGE 315, 347 (1985) = Decisions 284, at 295.

18. *See* 7 BVerfGE 198, 209 ff. (1958) = Decisions 1, at 7 ff.; 82 BVerfGE 272, 280 (1990) = Decisions 463, at 469.

19. 82 BVerfGE 272, 280 ff. (1990) = Decisions 463, at 470.

defamation,[20] is understood to be an illegal attack on the honor of another person by intentionally showing lack of respect. In Germany, the notion of honor is divided into three levels, all of which fall under sections 185 and following of the Criminal Code.

(1) In its most basic sense, honor describes the status of a person who enjoys equal rights and who is entitled to respect as a member of the human community irrespective of individual accomplishments (*menschlicher Achtungsanspruch*). Thus, even lazy or dumb persons and criminals deserve this level of respect. The constitutional point of reference for this level of honor is the protection of the dignity of all human beings found in Art. 1(1) BL. Honor in this sense is violated, and an insult occurs, when, for example, a human being is called subhuman or worthless, when a verbal attack is based on an assertion of racial inferiority,[21] or when being equated with an animal amounts to the denial of his or her humanity.

(2) The second level of honor is concerned with the preservation of minimum standards of mutual respect or civility in public—an outward show of respect for people irrespective of one's feelings about them (*sozialer Respekt* or *Achtungsanspruch*). This level of honor is rooted in the constitutional protection of the personality as provided by Art. 2(1) BL. Instances of disrespect and insult that violate the law include accusing another person of possessing severe moral or social character faults or having intellectual shortcomings—for instance, by calling someone a "jerk" or by making obscene gestures, such as "giving a person the finger."[22]

(3) The third level of honor covers defamation in the American sense. These are assertions of fact that tend to harm the reputation of another person, affecting his or her standing in the community or

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20. *Insult* and *defamation* are used here in a wider sense (covering all criminal offences against honor, sections 185 ff.) and in a narrower sense. In the latter, narrower, sense, *insult* refers to section 185 of the Criminal Code only, whereas section 186 covers calumny, and section 187 addresses defamation in the narrower sense. As to the restrictive American understanding of defamation, see *infra* note 22. The United States has no "law of insult" to protect honor, as does Germany. *See* Whitman, *supra* note 11, at 1282, 1288 ff., 1293.

21. In the United States, such assertions would be protected under the First Amendment. *See* the Skokie controversy, summarized in GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1071 ff. (4th ed. 2001); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

22. For many examples, see Whitman, *supra* note 11, at 1292 ff. On insult as an outward display of disrespect, *see id.* at 1288 ff., 1290, 1292 ff., 1382, 1337. Whitman observes that in the United States, this second level is not protected by law; instead, this is the area of mere rudeness that one has to endure. The law does not interfere, but social norms may punish incivility or—at level one—racial statements. American defamation law mostly covers the third level discussed above, but in fact it is reputation, and not honor, with which American defamation law concerns itself.

deterring third parties from associating or dealing with him or her. Most of these violations of honor would fall under §§ 186 (Calumny) and 187 (Defamation) of the German Criminal Code. Constitutionally, these honor interests are based on the right to the free development of the personality in Art. 2(1) and the term "honor" in Art. 5(2) BL.

This leads us to the first statement made by the protester in the hypothetical. You will remember that she called the President a pig and held up two pictures: one showing the clearly recognizable President as a pig engaged in sexual conduct with another pig in a judge's robe (hinting at some manipulation of the judiciary by the President) and one showing the President engaged in incestuous activities in an outhouse (hinting at profound moral flaws). The message of the first picture is clearly political. Political criticism, according to the German Constitutional Court, should be allowed to be open, robust, and even excessive. Nevertheless, in the Strauss Caricature Case,[23] which serves as the model for this incident, the Constitutional Court affirmed a criminal court verdict of insult against the creators of the parody.

The Court reasoned that legitimate political criticism does not of itself include formal vilification or contemptuous criticism marked by strictly derogatory statements either unrelated or entirely marginal to any political message. In the actual case, the drawing of the state prime minister of Bavaria as a copulating pig was considered to be a violation of his human dignity in the sense of the first level of honor. As stated by the Court in that case:

> [What] was plainly intended was an attack on the personal dignity of the person caricatured. It is not his human features, his personal peculiarities, that are brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked "bestial" characteristics and behaves accordingly. Particularly the portrayal of sexual conduct, which in man still today forms part of the core of intimate life deserving of protection, is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being . . . a legal system that takes the dignity of man as the highest value must disapprove of [such a portrayal.][24]

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23. 75 BVerfGE 369 (1987) = Decisions 420.

24. *Id.* at 380 = Decisions at 425; *see also* 82 BVerfGE 272 (1990) = Decisions 463 ff. There, Bavarian State Prime Minister Strauss was characterized in a publication as a coerced democrat who did not genuinely believe in democracy. The Federal Constitutional Court acknowledged in principle that, taken as a personal attack, such a characterization would be a "belittlement," and that Strauss' portrayal as a sympathizer of Nazism would go beyond the legitimate scope of political criticism, given the material on which the publication was based. But

If we follow this German line of reasoning, the second picture in the hypothetical scenario (of the incest committed in the outhouse) would clearly be punishable as insult. But in the American case *Hustler Magazine v. Falwell*,[25] which is the model for this incident, the U.S. Supreme Court reversed a lower court's award of $200,000 for "intentional infliction of emotional distress," a cause of action that does not require that a false statement of fact be made. The Court held that freedom of speech outweighed the pain and outrage of public figures such as plaintiff.

As the two examples demonstrate, the treatment of speech in Germany and America differs when dealing with extremely derogatory opinions that are not based on assertions of fact, or when any underlying facts are clearly overshadowed by the harshness of the criticism. Unlike in America, Germany's Constitution does not assign to the right of free speech higher status than the rights to dignity, personality, and honor, in view of the fact that Germany's recent past has made the country particularly sensitive to threats against human dignity and equality. Furthermore, Germany, unlike the United States, has a long tradition of state-sponsored civil discourse and requires citizens to respect and observe a minimal level of civility and politeness. Indeed, Germany discourages and even punishes severe forms of rudeness, and thereby "levels up" societal discourse at the potential expense of certain opinions, while the United States allows all forms of rudeness, thereby "leveling down" societal discourse with the benefit of ensuring that few opinions are suppressed in the marketplace of ideas.[26]

B. Collective Insult and Hate Speech

I will now turn to hate speech in the form of group defamation. Group defamation, or collective insult, as it is called in Germany, can be punished under section 185 of the German Penal Code, and incitement to hatred is prohibited under section 130. I will first address the section criminalizing insult.

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the lower courts had not made it clear enough that this interpretation was necessary and appropriate; thus, the case was remanded.

25. *See* 485 U.S. 46 (1988). For a detailed comparison of these two cases, see Georg Nolte, *Falwell v. Strauss: Die rechtlichen Grenzen politischer Satire in den USA und der Bundesrepublik*, 15 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 253 (1988).

26. As to the terminology of "leveling up and down," see Whitman, *supra* note 11, at 1285, 1384 ff.

For group defamation to be punishable under sections 185 and following of the Criminal Code, four requirements must be met:[27] (1) There must be a small, rather than a large, group that is attacked; (2) the group's characteristics must differ from those of the general public; (3) the defamatory statement must assault all members of the group rather than single or typical members; and (4) the derogatory criticism must be based on unalterable criteria or on criteria that are attributed to the group by the larger society around them instead of by the group itself, especially ethnic, racial, physical, or mental characteristics.

This leads to the second statement made by our hypothetical protester. You will remember that our protester shouted: "All our soldiers are murderers." Would such a statement count as group defamation in Germany? The hypothetical facts are similar, but not identical, to those of a hotly disputed German case, the Soldiers-are-Murderers Case.[28] In the actual case, the statement was "soldiers are murderers," while in the hypothetical case the statement is "all our soldiers are murderers." Does that make a difference regarding group defamation? In all probability, yes, as can be gleaned from the reasoning of the Federal Constitutional Court in the real case. In that case, posters and leaflets accusing soldiers of being murderers were distributed to the public. After active members of the German armed forces complained to the police, the people who had distributed these materials were arrested, tried, and sentenced for collective insult under section 185 of the Criminal Code. The criminal courts ruled that every active member of the German armed forces had been publicly accused of being the worst of criminals and that the affected group could be sufficiently identified. The convictions, though, were set aside by the Federal Constitutional Court, and the case was remanded to the lower courts. The Federal Constitutional Court held that the accusations did not constitute an attack on human dignity, nor did they formally assail the soldiers; rather, they represented a severe and harsh form of criticism regarding a matter of public interest, i.e., the role played by soldiers and the German armed forces. Although the honor of soldiers had admittedly been severely attacked, the Constitutional Court observed that it was not entirely clear whether every German soldier, only certain German soldiers, or every soldier in the world was the target of the attack.

This would obviously be different in the hypothetical scenario. Once one specifies "*all our* soldiers," the group targeted by the insult is

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27. *See* 93 BVerfGE 266, 300 ff. (1995) = Decisions 659, at 685 ff.; THOMAS WANDRES, DIE STRAFBARKEIT DES AUSCHWITZ-LEUGNENS 201 ff. (2000).

28. See the decision cited in the preceding footnote.

readily identifiable, and this condemnation, in all probability, could be prosecuted in Germany as group defamation in accordance with the second notion of honor mentioned earlier.[29]

In addition to section 185 of the Criminal Code, section 130[30] punishes also cases of collective defamation if the facts suggest hateful attacks on "sections of the population," especially if these "groups [are] determined by nationality, race, religion, or ethnic origin," but the protected legal interest is different.[31] This provision aims to preempt the climate conducive to hate crimes that can be created by collective defamation. In American parlance, it can be termed a breach-of-the-peace provision. It is important to note that incitement of others to hatred and violence against minority groups becomes punishable well before the conduct would be considered concrete incitement to a specific criminal act; such instigation is punishable under different provisions of the Criminal Code.[32] Section 130 of the Criminal Code expresses the determination by the legislature that incitement to hatred and violence need not result in present endangerment (i.e., a provable increase of danger to minorities) in order to be punishable. Instead, incitement to racial hatred is viewed by the legislature as heightening the general danger of disruption of the public peace, including violations of the dignity and honor of minority groups and the occurrence of hate crimes.[33] This provision is directed against the "danger of a danger."[34]

This provision constitutes a far-reaching limitation on public speech that would be considered overly broad by American jurisprudence. It represents the kind of breach-of-the-peace statute that the Supreme Court had to analyze in *Beauharnais v. Illinois* in 1952. There, a statute declared it unlawful for any person to distribute any publication that portrayed depravity, criminality, lewdness, or lack of virtue of a class of

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29. *See id.* at 302 = Decisions at 686. If it had been evident that all and only German soldiers were meant, then

> the criminal courts [would not have been] constitutionally prevented from seeing the (active) soldiers of the Bundeswehr as an adequately graspable group, so that a statement referring to them may also insult every member of the Bundeswehr, if it is associated with a feature that manifestly or at least typically applies to all members of the collective.

30. For the text, see *supra* notes 12 ff.

31. *See* WANDRES, *supra* note 27, at 210 ff.

32. *See* §§ 26, 30, 111 of the German Criminal Code (Instigation, Attempted Instigation, and Public Encouragement to Commit Criminal Acts) and WANDRES, *supra* note 27, at 210 ff.

33. The technical legal term is *abstraktes Gefährdungsdelikt*—criminal law provisions prohibiting acts that in general heighten the danger that some person will commit a crime within a specified category. *See* WANDRES, *supra* note 27, at 224 ff.

34. WANDRES, *supra* note 27, at 221 ff., uses this telling characterization.

citizens of any race, color, creed, or religion or that subjected them to contempt, derision, or abusive language or which could potentially lead to a disturbance of the peace or riots. Speaking for the majority, Justice Frankfurter said,

> No one will [dispute] that it is libelous to falsely accuse another with being a rapist, robber, carrier of knives and guns, and user of marijuana . . . . [This being so,] if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State [the right] to punish the same utterance directed at a defined group, unless we can say that this is a willful and purposeless restriction unrelated to the peace and well-being of the State.[35]

Beauharnais has never been formally overruled, but its reach has been substantially narrowed and restricted to the *Brandenburg* test, which states that the government must not proscribe advocacy of the use of force or violation of the law unless such advocacy is directed at inciting or producing imminent lawless action and is likely to incite or produce such action.[36]

So, section 130 of the German Criminal Code would pass American constitutional muster under the 1952 *Beauharnais* standard, incitement to hatred, but not under the modern *Brandenburg* test, which insists on an imminent danger of an illegal act before speech can be curtailed. What accounts for these substantial differences between the United States and Germany in granting or denying hate speech preferred status?[37] First, in the American tradition, there is more trust that when good opinions compete with bad ones, the good ones will prevail. Second, offensive speech, or hate speech in America has occasionally had liberating consequences, for example during the era of the civil rights struggle and the Vietnam War protests, but Germany and Europe see hate speech exclusively or primarily as a tool of suppression and annihilation. Third, unlike Germans, Americans do not trust government to select "good" over "bad" opinions—a consequence of this attitude is that viewpoint discrimination by representatives of the government, even if directed at "evil speech," is viewed with suspicion and may even be characterized as "cardinal sin." Fourth, out of deference to free speech, American courts strive to look beyond the "hate" element in suspect speech in order to find some component related to public concern, even if this

35. Beauharnais v. Illinois, 343 U.S. 250, 257 (1952).

36. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969).

37. The following points summarize arguments from discussions in American constitutional law.

interpretation is somewhat strained; there is no such broad tendency in Germany.

C. Simple and Qualified Holocaust Lies

The German rules concerning collective insult and incitement to hatred assume special importance in Holocaust cases. For this reason, I will discuss these cases separately. First, one should distinguish the "simple" Holocaust lie from the "qualified" Holocaust lie.[38]

Advocates of the "simple" Holocaust lie (or denial) insist that no genocide took place during the years of the Third Reich or that, if Jews were killed, this did not happen in the magnitude reported or by means of a massive gassing campaign. Proponents of this view might say, "The Holocaust never happened," or "Reports about the Holocaust are greatly exaggerated." The third statement made by our hypothetical protester is such an assertion.

A simple denial of the Holocaust becomes "qualified" when it is accompanied by additional normative conclusions or calls to action. The fourth statement made in the hypothetical is such an assertion. To better suit an American backdrop, I have embellished the statement by letting the protester allege, "African Americans use the slavery lie to extort money from the American government in same way Jews use the Holocaust lie to extort money from Germany. Something should be done about this!"

Nothing in this statement would cause the speaker to be criminally prosecuted in the United States. General calls to action are protected under the First Amendment as long as there is no concrete and imminent danger of an illegal act. The same is true of unflattering assertions about people's motives as long as these opinions do not amount to defamation, which, in the United States, usually requires assertions of facts that harm the reputation of the attacked individuals. Making obviously untrue statements, such as denying the Holocaust, is not punishable in the United States, and it is improbable that Congress or a state legislature would try to criminalize the simple Holocaust denial. One could, though, reflect on the potential constitutional admissibility of a prohibition of Holocaust denial in America. After all, in *Gertz v. Robert Welch*, the Supreme Court explicitly said that "there is no Constitutional value in false statements of fact."[39] But regardless of any possibility of future

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38. For an excellent analysis of the relevant cases and the distinction drawn above, see WANDRES, *supra* note 27.

39. 418 U.S. 323, 340 (1974). If that statement is taken seriously and applied in a context different from private libel suits of officials as in *New York Times v. Sullivan*, 376 U.S. 254

limitation in the United States, both variations of the Holocaust lie are currently punishable in Germany under sections 130 and 185 of the Criminal Code. The Federal Constitutional Court deems these provisions to be justified limitations to the freedom of opinion.

It is doubtful that the German criminalization of the simple Holocaust lie actually serves the goals underlying the protection of free speech. After all, why should truth not be promoted if such lies are propagated? Denials of the Holocaust would certainly meet with loud rejection in Germany,[40] and the ensuing discussion might reach the hearts and minds of the ignorant, or even some neo-Nazis; it undoubtedly would guarantee that the terrible events of the Second World War will never be forgotten. Thus, the consequentialist arguments are not clear: If such speech were permitted, more good than bad may come from it in the long run.

One must also consider the autonomy interests of the speaker. Barring clear evidence to the contrary, and using traditional free speech doctrine, one would have to assume that anyone who denies the Holocaust is speaking his mind, and being able to freely speak one's mind irrespective of any consequences is an important rationale for the freedom of expression. It seems that in terms of the standard free speech doctrine and the aforementioned rationale, simple Holocaust denial should be viewed as protected free speech.

However, that still leaves the question of whether prohibitive laws are justified by countervailing constitutional values that are observed by limiting free speech. Which constitutionally protected rights are impaired by the simple denial of the Holocaust? It cannot be the truth about historical events, because a lie does not eliminate facts and neither will it obliterate any proof of what happened. Moreover, it would be difficult to comprehend why criminal law ought to protect "historical truths" with sanctions, other than to enforce the specific duties of witnesses to tell the truth about facts relevant to judicial procedures.

(1964), then government could regulate or prohibit such statements as non-speech in the constitutional sense; the interference would have only to meet the rational basis test. The regulation would then have to further a legitimate state goal. Would "preservation of historical truth" or "protection of the sensitivity of the Jews living in the United States" suffice? Perhaps under the rational basis test, but certainly not under the strict scrutiny test that would result if the Supreme Court characterized the Holocaust denial as "speech" and "opinion."

40. The most recent illustration is the public display in summer 2001 of a large poster on a wall in Berlin which, in huge letters, referred to the "Holocaust lie." The small print made clear that this was an intentional provocation by a group of people who urged Berliners to donate money for the future Holocaust memorial. There was severe criticism and condemnation by many citizens and organizations even against this well-intentioned use of the "Holocaust denial."

The real reason for the German criminalization of even simple Holocaust denial is that nearly every politician in Germany and all courts up to the Federal Constitutional Court assume that such denial constitutes group defamation and incitement to hatred. The seminal formulation for this viewpoint was introduced by the High Federal Court and affirmed by the Federal Constitutional Court:

> The historical fact alone that human beings were singled out according to the criteria of the "Nuremberg Acts" and robbed of their individuality with the goal of exterminating them puts the Jews who live in the Federal Republic of Germany into a special personal relationship *vis-à-vis* their fellow citizens; the past is still present in this relationship today. It is part of their personal self-perception and their dignity that they are comprehended as belonging to a group of people who stand out by virtue of their fate, and in relation to whom all others have a special moral responsibility. Indeed, respect for this self-perception is for each of them one of the guarantees against a repetition of such discrimination, and it forms a basic condition for their life in the Federal Republic. Whoever seeks to deny these events denies to each one of them the personal worth to which they are entitled. For the person affected this means the continuation of the discrimination against the group to which he belongs as well as against himself. . . . [Nor is anything changed] when one considers that Germany's attitude to its Nazi past and the political consequences thereof. . .is a question of essential concern to the public. It is true that in that case a presumption exists in favour of free speech. But this presumption does not apply if the utterance constitutes a formal criminal insult or vilification, or if the offensive utterance is based on factual assertions that have been proven untrue.[41]

However, one can question what exactly constitutes incitement to hatred or assault on the dignity of every single Jewish person currently living in Germany.[42] The Federal Constitutional Court stretches the interpretation of the Holocaust denial in several ways. First, the Court turns a moral duty into a legal duty, and when the criminal law is used as *ultima ratio* to acknowledge a terrible historical event, additional arguments as to the necessity of the means and the interests protected should be brought forward. Second, although the argument of Jewish collective dignity makes some sense given the collective terror inflicted by the Nazi regime, such a claim of group uniformity can be

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41. 90 BVerfGE 241, 251 ff., 254 (1994) = Decisions 620, at 628 ff.

42. *See* WANDRES, *supra* note 27, at 186 ff., 239 ff., citing the few critics of this ruling. For instance, one critic stated: "The ruling satisfies us from a human, political and historical point of view. However, from a legal point of view it raises more questions than it answers." *Id.* at 193 n.158.

counterproductive if dignity is seen as protecting mainly the individuality, and not the collectivity, of Jews living in Germany. Third, in its argument, the Court equates past experience and present life, and, fourth, the Court construes Holocaust denial as "attack" on life, dignity, and equality. The problem with these interpretations is not that they could not be viewed as tenable or plausible by many listeners or readers, but that the Federal Constitutional Court excludes other, non-punishable interpretations based, for example, on ignorance, and without examining other less restrictive means for preserving the memory of the Holocaust and securing peace and security for Jews in Germany. Instead, the Court chooses the punishable variant of the statement and does so quite elaborately, while the free speech arguments on the speaker's side are hardly developed. This imbalance and divergence from the Court's own free speech doctrines becomes especially striking when one compares the treatment of the Holocaust Denial Case, where the Court took great pains to interpret a historical claim as punishable speech, with the Soldiers-are-Murderers Case, where the Court worked hard to find a speech-friendly interpretation. No matter how the latter message is interpreted, it certainly is more clearly an "attack" on honor than "The Holocaust did not happen", and the addressees are easier to identify as well.

All of this leads to the conclusion that the criminalization of the simple denial of the Holocaust cannot be justified along the lines of traditionally accepted free speech doctrine. It can be justified only against the background of the singular significance of the Holocaust to the self-image of all Germans.[43] Millions of Jews and other minorities were killed during the Nazi era; as to German identity, this is still a traumatic event that is best expressed in the famous words "Never Again!"[44] Based on this promise, encroachment on the freedom of opinions on the Holocaust by criminal laws is considered justified even if the usual principles regarding the freedom of opinion are substantially curtailed.

Any constitutional qualms about the criminalization of Holocaust lies are diminished or vanish in cases of qualified Holocaust lies, such as the ones implied by the aforementioned hypothetical scenario. When calls for action based on theories of racial superiority and inferiority are

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43. On this thesis, see WANDRES, *supra* note 27, at 35 ff., 240.

44. *See* Natasha Minsker, *I Have a Dream—Never Forget: When Rhetoric Becomes Law. A Comparison of the Jurisprudence of Race in Germany and the United States*, 14 HARV. BLACKLETTER L.J. 113 (1998), especially at 157 with note 297. The main thesis of this article is that the United States should learn from Germany to "look back" and accept its responsibility for slavery; Germany, on the other hand, should learn from the United States to "look forward" and adopt better antidiscrimination laws.

voiced, hate speech approaches hate crime, consequentialist arguments point to harmful results, and the autonomy argument is not ultimately convincing because it can favor both the speaker and the addressee.[45] Punishment of such incitements under sections 130 and 185 and following of the Criminal Code are justified. Offenders are viewed as having violated the human dignity and honor of the group under attack and as having threatened its members' rights to security and physical integrity, even though the offender's conduct might fall well short of criminal instigation and there is no clear and present danger to public peace. Of course, interpretive problems remain here as well—for instance, with regard to when exactly an utterance violates the dignity of a person or group and how "abstractly dangerous" a call to action may still qualify as a crime under this category.

Another group of cases concerns normative assessments and conclusions made in conjunction with denying or minimizing the Holocaust. How should the government respond when a citizen states, "Special interest groups and Jews use the Holocaust lie to extort money from Germany"? Such statements constitute crimes in Germany, but the threat to life, liberty, and security of the verbally attacked minority is not as clear as in the call-for-action cases, and as long as no reference to theories of racial superiority is made, the insult to dignity or honor is less evident.

Considering the admonishment of the Federal Constitutional Court to give opinions a free-speech-friendly interpretation rather than focus immediately on the punishable meaning, these cases are not easily resolved.

In general, and abstracting from the Holocaust cases, interest groups and politicians often use moral failures and political mistakes of other players for their own benefit, and this may be justified or not in terms of moral and political values. It may lead, for example, to reparations and apologies—as seen most recently at the anti-racism conference in Durban, South Africa, regarding apologies for former slavery. But open and robust discussion should prevail when consequences of political mistakes or harmful actions in the past or in the present are considered. Why then punish allegations about the way the Holocaust has been treated? Maybe because in these cases, heavily disliked extremists make ideological use of historical events and falsify them? This might well be the case, but is there really a relevant

45. Article 1(1) BL supports this argument because government is required to respect the human dignity (of the speaker) as well as protect human dignity (of the addressee).

difference between their interpretation of history and other instances of one-sided and self-serving construction of historical events by mainstream politicians or not so despicable extremists? I think not, because distinctions between different kinds of extremism often reflect more of *Zeitgeist* or political correctness than principled differentiation, and simple assumption that all right-wingers are also die-hard neo-Nazis unable to change their world-view would amount to constitutionally suspect stereotyping.

In addition, it is usually as difficult to disprove, as it is to prove, accusations of historical falsification or the ideological use of statistics and events, while the assumption that only neo-Nazis make ideological use of historical events in qualified Holocaust lies, whereas other groups or politicians do not, is highly improbable.

Finally, the presumption that all criticisms directed against "Jews" or "the Jews" refer to each and every individual Jew may not be accurate, since such general assertions are commonly directed at "many," "typical," or "too many" of the group, from the speaker's point of view, instead of "all." Such a more selective insult would not meet the usual requirement that collective insults be directed against every member of the group. The presumption that the insult in such cases is directed at all Jews is valid only when these assertions are viewed not as empirical, but rather as stereotypical, attributions of negative characteristics against which individuals cannot defend themselves in the absence of either a proof or counterproof.[46] German jurisprudence, which criminalizes such speech as a category of Holocaust lie, may be justified under this rationale.[47]

V. CONCLUSION

I have tried to sketch how the world outside the United States deals with hate speech, and the differences are striking. I have used the German system to illustrate the approach followed by most modern constitutional systems and international law. Although I have been critical of the German approach, my criticism is not based on the fact that German law and jurisprudence deviate from the American approach. Instead, I have tried to show that the expansive perception of "honor" in German law leads to rather far-reaching limitations on speech, based on

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46. *See* WANDRES, *supra* note 27, at 206 (referencing Nazi literature characterizing all Jews as liars and parasites).

47. Questions remain. Doesn't the command to liberally construe potentially prohibited statements require choosing the alternative reading that avoids illegality? In this case this would be the empirical construction of the statement.

competing claims to basic equality and civility; it also leads to the inclusion of group defamation claims. In addition, intellectual honesty requires one to point out that in Holocaust cases, the German Constitutional Court departs from its usual doctrines concerning freedom of speech. The Court and German jurisprudence tend not to see or discuss this divergence in terms of what exactly the difference is, to what extent a divergence from the usual doctrines is appropriate, and how long one should accept such a divergence. The best explanation and, possibly, justification for the special treatment of the Holocaust cases is the singularity of the Holocaust in German and global history; from this singularity result comprehensive prohibitory statutes and expansive interpretations leading to prohibitions in the Holocaust lie cases. The moral, political, and legal singularity of the Holocaust certainly stands out in recent history, and the memory of the Holocaust has served as a catalyst for the global concern for human rights. Yet, as terrible as the Holocaust was, it should not distract from the necessity to allow open and unfettered discussion in all matters of public interest, especially when our resolve is tested by messengers or messages we dislike—or hate.

The American legal system prohibits hate speech as late as possible—only when an imminent danger of illegal acts exist. German jurisprudence cracks down on hate speech as early as possible. Both approaches have their advantages and disadvantages, and this is clearly understood in the United States where a persistent minority advocates a system more in keeping with the rest of the world.[48] However, there is hardly any discussion in Germany about the costs of its expansive hate speech prohibition to free speech. This is certainly not a satisfactory state of public discourse regarding German constitutional law. Whatever the "right" balancing in hate speech cases may be, it will not be found without an open and unfettered discussion that is mindful of the special purpose of the free speech clause to protect offensive speech.

48. *See, e.g.*, *supra* notes 3, 10, 44.