
REGULATING HATE SPEECH—DAMNED IF YOU DO AND DAMNED IF YOU DON'T: LESSONS LEARNED FROM COMPARING THE GERMAN AND U.S. APPROACHES

Claudia E. Haupt*

I. THE ISSUE	300
A. <i>The Comparative Perspective on Hate Speech – Quo Vadis?</i>	300
B. <i>Comparative Analysis</i>	301
C. <i>The Argument</i>	303
II. THE PROBLEM OF HATE SPEECH – IF THERE IS ONE	303
A. <i>The Subject of Inquiry</i>	304
B. <i>United States</i>	304
1. The Case for Regulation	306
2. The Traditionalists' Reply	310
C. <i>Germany</i>	312
III. THE VALUE OF SPEECH: PHILOSOPHICAL AND HISTORICAL ROOTS	313
IV. FREE SPEECH DOCTRINE	316
A. <i>United States</i>	317
B. <i>Germany</i>	321
1. Constitutional Protection	321
2. Statutory Restrictions	322
3. Balancing Rules	323
a. <i>Lüth</i>	323
b. <i>Schmidt-Spiegel</i>	324
c. <i>Mephisto</i>	325
d. <i>The Strauß Cases</i>	326
e. <i>Hate Speech: Auschwitzlüge & "Soldaten sind Mörder"</i>	328
V. THE LESSONS PROVIDED BY THE GERMAN APPROACH	333

* Law Clerk, Cologne, Germany. Erstes Juristisches Staatsexamen (E.J.S) (J.D. equivalent), University of Cologne, Germany; M.A., State University of New York at Albany. The author thanks Professor Thomas Church for his helpful advice, Professor Joan Schaffner for her support and numerous invaluable suggestions, and Professor Winfried Brugger for her much appreciated feedback.

“It is all well and good to remark that foreigners regulate hate speech. Before we cite foreign statutes in any discussion of American law, though, we really need to know more.”¹

I. THE ISSUE

Although the choice of free speech issues—campus speech codes, pornography, Holocaust revisionism, and the honor of German soldiers—seem unrelated at first sight, a comparable ongoing controversy is taking place in Germany and the United States in the area of free speech. The underlying question is whether free speech should be limited when the target of offensive speech is a group that has historically been discriminated against. In Germany, Holocaust revisionism, especially in the form of the so-called “*Auschwitzlüge*,” has been at the center of attention. In the United States, on the other hand, the debate revolves around the issues of race and gender discrimination.

A. *The Comparative Perspective on Hate Speech – Quo Vadis?*

Comparing the U.S. approach with the approaches taken in Germany and various other European countries is a popular academic exercise² in

¹ James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L.J. 1279, 1281 (2000).

² See e.g., 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); Winfried Brugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1 (2002) [hereinafter Brugger, *Ban or Protection*]; Winfried Brugger, *Verbot oder Schutz von Hassrede? Ein Streit zwischen Deutschland und Amerika*, 27 DAJV-NL 33 (2003) [hereinafter Brugger, *Verbot oder Schutz von Hassrede?*]; Winfried Brugger, *Schutz oder Verbot aggressiver Rede? Argumente aus liberaler und kommunitaristischer Sicht*, 42 DER STAAT 77 (2003); Winfried Brugger, *Verbot oder Schutz von Hassrede? Rechtsvergleichende Beobachtungen zum deutschen und amerikanischen Recht*, 128 ARCHIV DES ÖFFENTLICHEN RECHTS 372 (2003); Thomas W. Church and Milton Heuman, *Punishing the Words that Wound: Thoughts on Hate Speech Regulation in Western Democracies*, Annual Meeting of the Committee on Comparative Judicial Studies, International Political Science Association, Jerusalem, July 1-4, 1996 [hereinafter Church & Heuman]; Roland Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004); Friedrich Kübler, *How much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335 (1998). [hereinafter *Racist Speech*]; Friedrich Kübler, *Rassenhetze und Meinungsfreiheit*, 125 ARCHIV DES ÖFFENTLICHEN RECHTS 125 (2000); Natasha L. 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). Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523 (2003); Lars Weihe, *Freedom of Speech: Gleichheit ohne Grenzen. Eine*

which German hate speech regulation is often cited favorably, even admiringly.³ The comparative approach sometimes taken, though, has not escaped criticism.⁴ Professor James Whitman, in fact, alleges that some studies are conducted “in a naïve way,” in which foreign laws are merely summarized, without much of an explanation of the application of the respective laws.⁵ While such comparative studies are without a doubt very useful to promote scholarly exchange of ideas and achieve the higher level of information that allows educated choices, the question of their ultimate purpose arises.

This analysis, therefore, goes a step further than merely pointing to the European or German example. The fundamental question of this paper could simply be “quo vadis?” Where does the comparative approach lead? The implicit or explicit invocation of the German system when discussing hate speech in the United States, a common theme, must have a rationale behind it. The often-voiced approval at least implicitly suggests that the German approach might eventually translate into a blueprint for improving less desirable systems. The inevitable question then becomes whether it would be a good idea to implement the German approach, or a similar one, or elements thereof?

B. Comparative Analysis

There are several reasons why the debates in the two countries lend themselves to a comparative analysis. Germany has been described as a “cultural near-neighbor” of the United States because of similarities in their social and political systems.⁶ Both countries have a written constitution⁷ with a bill of rights that contains provisions protecting the freedom of speech.⁸

rechtsvergleichende Untersuchung zur Meinungsfreiheit in den USA und Deutschland, 24 DEUTSCH-AMERIKANISCHE JURISTEN-VEREINIGUNG NEWSLETTER 46 (1990); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (drawing attention to the United Kingdom and Canada); Richard Delgado & David H. Yun, “*The Speech We Hate*”: *First Amendment Totalitarianism, The ACLU, And the Principle of Dialogic Politics*, 27 ARIZ. ST. L.J. 1281 (1995) (discussing on Sweden, Italy, the United Kingdom, and Canada).

³ Whitman, *supra* note 1, at 1282.

⁴ *Id.* at 1281 (“Within our swelling civility literature there has not been much in the way of careful comparative law. To be sure, a kind of pop comparativism has been a minor motif in the literature. In particular, writers concerned with the problems of hate-speech regulation like to mention that other countries find it easier than ours does to regulate ‘uncivil’ hate speech, and they have produced a variety of lists of the countries that do so.”).

⁵ *Id.* (pointing out that no effort is made in explaining the reasons why civility is the subject of regulation in some societies and not in others).

⁶ *Id.* at 1282.

⁷ U.S. CONST. & GRUNDGESETZ [GG].

⁸ U.S. CONST. amend. I. & GRUNDGESETZ [GG] art. V.

Specific groups in each country have been the target of discrimination, and, therefore, both Germany and the United States entertain some dialogue about treating these groups differently. Against the backdrop of the Holocaust, it is not surprising that a heightened sensitivity would prevail in Germany when it comes to speech that has the potential to harm Jews as a group. In the United States, slavery and segregation led to racial tensions that may leave the non-white population in need of heightened protection against harmful speech.

German scholars, especially German historians, are deeply divided on the issue of comparing the Holocaust with any other historical event.⁹ Some argue that the Holocaust is such a singular occurrence that it cannot possibly be the subject of a comparative analysis.¹⁰ Despite this debate, this paper will compare American and German legal standards. Holocaust denial is one of the central aspects of the hate speech debate, and the very singularity of the Holocaust may justify a hesitancy to make it a subject of comparative analysis. Holocaust denial therefore may turn out to be unlike any other form of hate speech. Moreover, the comparative approach in general demands some caution. In the context of comparing hate speech regulation, for example, it has been pointed out that a careful student of the field should not automatically assume that labeling one system “different” is simply a polite way of labeling it “wrong.”¹¹

The United States has traditionally had a more removed position toward seeking guidance from abroad on social and political issues, presumably the result of a firm belief in the “superiority and uniqueness of [its] political institutions.”¹² The trend has begun to change recently, yet there is a particular reluctance to open up to foreign influences when it comes to legal issues in general, and civil rights in particular.¹³ Some Americans believe that the experiences of other polities that share the devotion to the rule of law, to freedom of expression, and to due process as well as racial, ethnic, and religious equality can inform the hate speech discussion in the United States.¹⁴ Equally, these other polities can benefit from a closer look at the state of deliberations in the United States.

⁹ This specifically refers to the “*Historikerstreit*” of the 1980s; for a collection of writings of the main contenders in the debate, See RUDOLF AUGSTEIN ET AL., *HISTORIKERSTREIT: DIE DOKUMENTATION DER KONTROVERSE UM DIE EINZIGARTIGKEIT DER NATIONALSOZIALISTISCHEN JUDENVERNICHTUNG* (R. Piper 1987) (collection of writings of the main contenders in the “Historikerstreit” debate of the 1980s).

¹⁰ See e.g., DIETMAR SCHIRMER, *IDENTITY AND INTOLERANCE: NATIONALISM, RACISM AND XENOPHOBIA IN GERMANY AND THE UNITED STATES*, xiv. (Norbert Finzsch and Dietmar Schirmer, eds., 1998), who left out the Holocaust as a separate event in a study of nationalism, racism and xenophobia.

¹¹ Krotoszynski, *supra* note 2, at 1554-55.

¹² Church & Hueman, *supra* note 2, at 2.

¹³ *Id.*

¹⁴ *Id.* at 4.

C. *The Argument*

A number of lessons can be learned from comparing the two approaches that this paper addresses. First, despite the cultural similarities between Germany and the United States, the legal underpinnings regarding the value of free speech are quite distinct due to philosophical and historical circumstances. Second, both systems are imperfect in their attempts to regulate hate speech. Third, in the United States, much has been written about possible improvements of hate speech regulation but most suggestions ignore the constraints of First Amendment jurisprudence. Fourth, in Germany, a policy choice has been made in favor of protecting the Jewish population, although the Constitutional Court jurisprudence is inconsistent regarding other groups in German society. This article argues that this inconsistency can be solved by the Court acknowledging this fact while upholding its current jurisprudence, or through the equal application of its principles to all other groups. Finally, given the fundamental differences between the two approaches to free speech and consequently to hate speech regulation, the result of comparing the U.S. approach with the German one should not be to call for the implementation of the German system or its elements in the United States.

Germany is often cited as a typical example of the European approach, an approach some proponents believe can help regulate hate speech in the United States. The core argument of this article, however, is that the reference to the German example should be made carefully. Specifically, it should be made with the understanding that not only would the German approach be unconstitutional under current First Amendment jurisprudence but also that, in itself, it has a number of problems that are often overlooked in comparative analyses.

This paper begins its analysis in Part II with a summary of the discussion in the United States regarding hate speech and the proposed regulation thereof. This discussion is not waged as passionately in Germany, where hate speech regulation poses just another constitutionally provided constraint on free speech.¹⁵

Part III addresses the value of speech in each country and illustrates how the historical and philosophical developments gave rise to divergent values.

Finally, Part IV illustrates that the doctrinal bases do in fact differ despite their seemingly numerous common features, and that these differences lead to a fundamental incompatibility of the German approach with U.S First Amendment doctrine.

II. THE PROBLEM OF HATE SPEECH – IF THERE IS ONE

After an initial definition of “hate speech,” the obvious first question that has to be raised in connection with the phenomenon of hate speech is

¹⁵ See e.g., Brugger, *Ban or Protection*, *supra* note 2, at 21; see also *infra* Part V.

whether it constitutes a problem that should be addressed by public policy. The initial step, therefore, is a policy analysis that examines the effects hate speech on a society or on certain groups within it. This step would then be followed by choosing a policy instrument to address this problem, the most likely of which would be a law regulating hate speech.

A. *The Subject of Inquiry*

The definition of hate speech fluctuates over time. Walker provides a short overview of the changing definition of the term "hate speech":

Traditionally it included any form of expression deemed offensive to any racial, religious, ethnic, or national group. In the 1980s some campus speech codes broadened it to include gender, age, sexual preference, marital status, physical capacity, and other categories. Human Rights Watch defines hate speech as 'any form of expression regarded as offensive to racial, ethnic and religious groups and other discrete minorities, and to women.' Rodney Smolla defines it as a 'generic term that has come to embrace the use of speech attacks based on race, ethnicity, religion and sexual orientation or preference.' Historically, hate speech has been referred to by several terms. In the late 1920s and early 1930s it was known as 'race hate.' Beginning in the 1940s it was generally called 'group libel,' reflecting the specific legal question whether the law of libel should be expanded to cover groups as well as individuals. In the 1980s 'hate speech' and 'racist speech' became the most common terms.¹⁶

The treatment of hate speech also varies. There is no uniform treatment of hate speech in contemporary constitutional law or international law; it is neither consistently permitted nor prohibited. In the United States, however, it is much more likely to be protected than in Germany or other countries.¹⁷ European democracies committed to free speech except hate speech from free speech protection; in these democracies, "it is possible to think that racial and ethnic hate speech is really *sui generis*, and that it is properly treated differently."¹⁸ As the following section will illustrate, there is a considerable debate in the United States over whether hate speech constitutes a problem at all; in Germany, on the other hand, such a debate is almost nonexistent.

B. *United States*

In the United States, scholars on hate speech have addressed two main areas of speech: the campus speech codes resulting from racial incidents

¹⁶ SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 8 (University of Nebraska Press 1994).

¹⁷ Brugger, *Ban or Protection*, *supra* note 2, at 2.

¹⁸ CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH*, 186 (The Free Press 1995).

and efforts to regulate pornography.¹⁹ Both forms of regulation deal with hate speech targeted at groups that have historically been the victims of discrimination. The Critical Race and Feminist Theory schools of thought and their most prominent representatives, Professors Catharine MacKinnon, Charles Lawrence, Mari Matsuda and Richard Delgado, call for restrictions on hate speech.²⁰ The central argument of the proponents of speech codes and the opponents of pornography is that the behavior they seek to restrict causes real harm to certain identifiable classes of victims.²¹ The opponents of pornography, for example, argue that pornography harms not only the individuals depicted in the material, but all women as well.²² The opponents of speech codes and the ban on pornography, in turn, are concerned that the supposed beneficiaries of such legislation would, in fact, be deprived of their own right to free speech.²³

¹⁹ See *infra* Part II.B.1. Pornography, as a form of expression offensive to women, is argued to fall within the category of hate speech as defined above. See e.g., Catherine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 703 (1991).

²⁰ See Matsuda, *supra* note 2, at 232 (outlining the approach of what she calls ‘outsider jurisprudence’: “First is a methodology grounded in the particulars of their social reality and experience. This method is consciously both historical and revisionist, attempting to know history from the bottom. . . . This methodology, which rejects presentist, androcentric, Eurocentric, and false-universalist descriptions of social phenomena, offers a unique description of law. The description is realist, but not necessarily nihilist. It accepts the standard teaching of street wisdom: law is essentially political. It accepts as well the pragmatic use of law as a tool of social change, and the aspirational core of law as the human dream of peaceable existence. If these views seem contradictory, that is consistent with another component of the jurisprudence of color: it is jurisprudence recognizing, struggling within, and utilizing contradiction, dualism, and ambiguity.”). See also Mari J. Matsuda et al, WORDS THAT WOUND. CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 19 (Westview Press 1993).

²¹ MILTON HEUMAN & THOMAS W. CHURCH, HATE SPEECH ON CAMPUS 6-7 (Northeastern University Press 1997). See also SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU at x (2d ed. Southern Illinois University Press 1999) further explaining that those in favor of regulation argue that the special circumstances of groups which have been historically the victims of discrimination have to be taken into account, and the present application of First Amendment principles fails to do so. Hence, racist or sexist speech, causing “real harm” should not be protected by the First Amendment at all. Racial epithets, thus, would be regarded as a common assault. Likewise, MacKinnon argues that “depictions of sexual violence are essentially forms of assault against women.”

²² *Id.*

²³ *Id.*

1. The Case for Regulation

Catharine MacKinnon is a primary contender for regulating “pornography”²⁴ as a form of hate speech. She presents the case against what she classifies as a form of hate speech against women, stating that pornography is propaganda, an expression of male ideology, a hate literature, and an argument for sexual fascism.²⁵ An Indianapolis ordinance, based on MacKinnon and Dworkin’s model legislation, provided that pornography “is to be redressed through the administrative and judicial methods used for other discrimination.”²⁶ It has been pointed out that MacKinnon’s “ordinances against pornography,” despite suggestions to the contrary, do not involve censorship but rather a civil damage action.²⁷

MacKinnon’s assessment of a woman’s role in contemporary society is remarkably bleak. She contends that the status and treatment of women has certain regularities across time and space, making gender a group experience of inequality on the basis of sex. Traditionally, women have been disenfranchised, excluded from public life and denied an effective voice in public rules, denied even the use of their own names. Women are still commonly relegated to the least compensated and most degraded occupations. Their forced dependency is exploited and venerated as woman’s role; their work is devalued because they are doing it, as women they are devalued through devaluating the work they do. Women remain reportedly colonized, subjected to systematic physical and sexual insecurity and violation, and blamed for it. Women are commonly raped, battered, sexually harassed, sexually abused as children, forced into motherhood and prostitution, depersonalized, denigrated and objectified – and told this is just and equal by the left, and inevitable and natural by

²⁴ The Model Ordinance drafted by MacKinnon and Andrea Dworkin defines pornography as:

the graphic sexually explicit subordination of women through pictures and/or words that also includes one or more of the following: a. women are presented dehumanized as sexual objects, things or commodities; or b. women are presented as sexual objects who enjoy humiliation or pain; or c. women are presented as sexual objects experiencing sexual pleasure in rape, incest, or other sexual assault; or d. women are presented as sexual objects tied up or cut up or mutilated or bruised or physically hurt; or e. women are presented in postures or positions of sexual submission, servility, or display; or f. women’s body parts—including but not limited to vaginas, breasts, or buttocks—are exhibited such that women are reduced to those parts; or g. women are presented being penetrated by objects or animals; or h. women are presented in scenarios of degradation, humiliation, injury, torture, shown as filthy or inferior, bleeding, bruised or hurt in a context that makes these conditions sexual.

See MacKinnon, *supra* note 24, at 796 n.19.

²⁵ *Id.* at 807.

²⁶ American Booksellers Association, Inc. v. Hudnut, 771 F.2d 323, 324 (1985).

²⁷ Martha C. Nussbaum, *The Professor of Parody*, THE NEW REPUBLIC, February 22, 1999, at 44 (discussing Judith Butler’s misinterpretation of MacKinnon’s standpoint).

the right. Women's abilities and contributions continue to be suppressed, their achievements denied and marginalized and, when valued, appropriated, and their children stolen. Women are used, abused, bought, sold, and silenced. Little of this has changed to the present; some of it has gotten better, and some of it has gotten worse. The level of victimization of women varies within and across cultures; in the contemporary United States, for example, women of color are hardest hit. But no woman is exempt from this condition from the moment of her birth to the moment of her death, in the eyes of the law, or in the memory of her children.²⁸

MacKinnon asserts that this condition is forcefully imposed on women and ignored by law and politics; in fact, she says that "nothing is done about any of it, by anyone, anywhere."²⁹ She further characterizes pornography as a "civil rights violation" that makes women second class citizens.³⁰ Pornography "has a central role in actualizing this system of subordination in the contemporary West."³¹

A key aspect in MacKinnon's assessment is the way that consumers are affected by pornography. The consumption of pornographic material leads to increased sexual aggression and especially "makes men hostile and aggressive toward women, and it makes women silent."³² Pornography, as MacKinnon sees it, is "at once a concrete practice and an ideological statement. The concrete practices are discriminatory; the ideological statements are defamatory."³³ According to MacKinnon, through the consumption of pornography the subhuman, victimized, second class status of women is further institutionalized.³⁴ Her central arguments in the context of pornography are echoed in the discussion surrounding campus speech codes; in fact, MacKinnon's First Amendment interpretation is explicitly referenced.³⁵

The discussion of hate speech based on racial discrimination has largely concentrated on the debate of campus speech codes.³⁶ These speech codes have been so widely used that there has been an "explosion of speech codes at colleges and universities throughout the United States."³⁷ According to one estimate, about 70% of colleges and universities have

²⁸ MacKinnon, *supra* note 24, at 795-96; *see also* CATHARINE A. MACKINNON, ONLY WORDS (Harvard University Press 1993).

²⁹ MacKinnon, *supra* note 24, at 796.

³⁰ *Id.* at 802.

³¹ *Id.* at 796.

³² *Id.* at 800-801.

³³ *Id.* at 802.

³⁴ *Id.* at 802.

³⁵ Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus* 1990 DUKE L.J. 431, 427 (1990). *See infra* note 43.

³⁶ Church & Heuman, *supra* note 21, at 3; Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 488-89 (1990); Lawrence, *supra* note 35.

³⁷ Church & Heuman, *supra* note 23, at 3.

some type of restriction in place that limits offensive speech.³⁸ While it is important to note that the campus environment is different from “the rest of the world,”³⁹ the arguments brought forth in the debate are similar to those made by the proponents of banning pornography. For example, Charles Lawrence argues in favor of hate speech regulation on campus⁴⁰ and cites MacKinnon’s argument in the pornography debate on the shortcomings of First Amendment absolutism.⁴¹ Reflecting MacKinnon’s classification of pornography as both concrete discriminatory practices and ideological statements,⁴² Lawrence states that racism is both speech and conduct.⁴³ He notes that the message of white supremacy is central to all racist acts; through racist speech, the liberty of nonwhites is constrained.⁴⁴ Thus, the social reality that constrains is constructed through racist speech.⁴⁵ “By limiting the life opportunities of others, this act of constructing meaning also makes racist speech into conduct.”⁴⁶ Lawrence’s analysis of *Brown v. Board of Education*, for example, suggests that in some cases the U.S. Constitution requires the content regulation of racist speech.⁴⁷

As a representative of Critical Race Theory, Lawrence also alleges that those who oppose the regulation of racist speech based on their interpretation of the First Amendment have not adequately considered the experiences of those who actually suffered injury from racist speech. He believes that “civil libertarians fail to comprehend both the nature and extent of the injury inflicted by racist speech.”⁴⁸ Further, addressing the concept of the “marketplace of ideas,” Lawrence points out that racially motivated speech, in this context, might be called a market failure.⁴⁹ The problem he identifies is that the operation of the market is disabled by the idea of racial inferiority.⁵⁰ The unconscious aspect of racism leads to a belief in the inferiority of nonwhites which, in turn, “trumps good ideas that contend with it in the market.”⁵¹ Additionally, notwithstanding their

³⁸ *Id.*

³⁹ See e.g., Strossen, *supra* note 38, at 488-90.

⁴⁰ Lawrence, *supra* note 35.

⁴¹ *Id.* at 472 (“Again, MacKinnon’s analysis of how First Amendment law misconstrues pornography is instructive. She notes that in concerning themselves only with government censorship, First Amendment absolutists fail to recognize that whole segments of the population are systematically silenced by powerful private actors”).

⁴² See *supra* note 35.

⁴³ Lawrence, *supra* note 37, at 444.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 449.

⁴⁸ *Id.* at 457.

⁴⁹ *Id.* at 468.

⁵⁰ *Id.*

⁵¹ *Id.*

value, positive ideas about nonwhites are simply not marketable in such a corrupted marketplace.⁵²

Likewise, Mari Matsuda speaks of the cumulative effect of physical and verbal violence or what she calls “the violence of the word.” According to Matsuda:

Racist hate messages, threats, slurs, epithets, and disparagement all hit the gut of those in the target group. The spoken message of hatred and inferiority is conveyed on the street, in schoolyards, in popular culture and in the propaganda of hate widely distributed in this country. Our college campuses have seen an epidemic of racist incidents in the 1980s. The hate speech flaring up in our midst includes insulting nouns for racial groups, degrading caricatures, threats of violence, and literature portraying Jews and people of color as animal-like and requiring extermination.⁵³

Matsuda suggests a three-tier test that defines hate speech as (1) a message of racial inferiority; (2) a message directed against a historically oppressed group; and (3) a message that is persecutory, hateful, and degrading.⁵⁴

In summarizing the arguments in favor of regulating racist speech, Friedrich Kübler emphasizes the conflict between equal protection and liberty.⁵⁵ While racist speech advocates discrimination, the act of making choices based on personal bias is a part of self-determination; so too, is the contribution to the “social definition of others.”⁵⁶ Hate speech, however, has the potential to inflict emotional pain and distress, intimidation, and fear. These resulting feelings may be dismissed as simply part of free expression and open discourse, but Kübler suggests that there are, in fact, good reasons to approach the issue in a more subtle and discerning way.⁵⁷ The painful and intimidating effect of racial insults is likely to increase with repetition and is particularly strong for those who have previously been the victims of racially motivated persecution or violence.⁵⁸ The effects of silencing the minority, thereby excluding it from public discourse, and the link to physical violence both underscore the necessity of imposing limits on racist speech in order to curb the articulation of racial hatred.⁵⁹ There are, in sum, a number of good reasons to be concerned about the effects of hate speech, and a defensible argument for some kind of regulation in the area of hate speech emerges from the opinions voiced on this side of the debate.

⁵² *Id.*

⁵³ Matsuda, *supra* note 2, at 2332-33; Matsuda et al., *supra* note 20, at 23.

⁵⁴ Matsuda, *supra* note 2, at 2357; Matsuda et al., *supra* note 20, at 36.

⁵⁵ Kübler, *Racist Speech*, *supra* note 2, at 366.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 366-68.

2. The Traditionalists' Reply

The gist of the traditionalists' argument is that there is, in fact, no problem with leaving hate speech unregulated. Rather, they contend that a serious problem would arise if such regulation should occur. Again, this argument can be traced in both the gender and the race debates with minor variations of these themes.

The libertarian arguments protective of the First Amendment parallel those made by traditionalists in the campus speech code debate and will be illustrated in that context. Nadine Strossen, for examples, argues against free speech restrictions based on her interpretation of First Amendment doctrine. She confronts MacKinnon in the context of feminist discourse.⁶⁰ Strossen argues that numerous works of special value to feminists would inevitably be subject to the kind of regulatory scheme advocated by MacKinnon. Moreover, some scholars have pointed out that the very groups that were intended to be the beneficiaries of the protective measures – especially feminists and lesbians – would be the ones hardest hit.⁶¹ Thus, censorship would promote a multitude of reactions counterproductive to the cause.⁶² It would perpetuate demeaning stereotypes, including that sex is bad for women, and the disempowering notion that women are victims. Strossen also suggests that the proposed legislation would distract people from working towards eliminating gender-based discrimination and violence through more constructive approaches.⁶³

⁶⁰ Nadine Strossen, *A Feminist Critique of the 'The' Feminist Critique of Pornography*, 70 VA. L. REV. 1099 (1993) [hereinafter Strossen, *Feminist Critique*]. See NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (New York University Press 1995) [hereinafter Strossen, *Defending Pornography*] for her in-depth analysis. See also Nadine Strossen, *Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?*, 46 CASE W. RES. L. REV. 449 (1996); Strossen finds herself allied on the issue with a number of feminist scholars who oppose equating the feminist position with the MacKinnon anti-pornography position; see e.g., WOMEN AGAINST CENSORSHIP (Varda Burstyn, ed., Douglas & McIntyre 1985) and LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE* (Routledge 1995).

⁶¹ Henry Louis Gates, Jr., *Critical Race Theory and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 43 (New York University Press 1994). Gates elaborates, "What you don't hear from the hate speech theorists is that the first casualty of the MacKinnonite anti-obscenity ruling was a gay and lesbian bookshop in Toronto, which was raided because of a lesbian magazine it carried." *C.f.* Rosenfeld, *supra* note 2, at 1525 (stating "[I]t is ironic that the first person convicted under the United Kingdom's Race Relations Law criminalizing hate speech was a black man who uttered a racial epithet against a white policeman.").

⁶² Strossen, *Defending Pornography*, *supra* note 60, at 261.

⁶³ *Id.*

Turning to the individual, Strossen contends that women who voluntarily work in the sex industry would be harmed⁶⁴ and the efforts of women to develop their own sexuality would be thwarted. On a political level, she states that MacKinnon's proposed legislation would lead to an increased power of the religious right and its patriarchal agenda that would curtail women's rights while depriving feminists of a powerful tool in their struggle to advance women's equality.⁶⁵

Similarly, an argument can be made that that laws such as those suggested by MacKinnon, which lead to an increase in the state's regulation of sexual images, would present many dangers to women "because they seek to embody in law an analysis of the role of sexuality and sexual images in the oppression of women with which even all feminists do not agree." Under this view, an analysis of sexuality as "a realm of unremitting, unequaled victimization for women" is what MacKinnon seeks to impose with the power of the state.⁶⁶

In *American Booksellers Association, Inc. v. Hudnut*,⁶⁷ the Federal Court of Appeals for the Seventh Circuit had to decide on the MacKinnon-inspired legislation that was intended to regulate pornography in the City of Indianapolis.⁶⁸ The Supreme Court summarily affirmed the judgment.⁶⁹ Indianapolis enacted an ordinance that defined "pornography" as a practice that discriminates against women and that is to be redressed through the administrative and judicial methods also used for other discrimination.⁷⁰ While the Supreme Court has held that "obscenity" is not protected by the First Amendment, the ordinance's definition of "pornography" is considerably different.⁷¹ The ordinance, the court of appeals explains, discriminates on the grounds of the content of the speech.⁷² The state may not ordain preferred viewpoints in this way.⁷³ The First Amendment demands that government leave the evaluation of ideas to

⁶⁴ *Id.* at 179-98.

⁶⁵ Strossen, *Feminist Critique*, *supra* note 60, at 1111-12.

⁶⁶ Lisa Duggan, Nan Hunter, and Carole Vance, *False Promises: Feminist Antipornography Legislation*, in DUGGAN & HUNTER, *supra* note 60, at 63.

⁶⁷ 771 F.2d 323 (1985).

⁶⁸ *Id.* at 324. Under the ordinance, "pornography" is defined as in the model ordinance, *supra* note 26, (with the exception of a. and f. which are not part of the Indianapolis ordinance). See *Hudnut*, 771 F.2d at 324 for the Indianapolis ordinance definition of pornography.

⁶⁹ 475 U.S. 1001 (1986). Conversely, in *Butler v. Her Majesty The Queen*, 1 S.C.R. 452 (1992) (Can.), the Canadian Supreme Court upheld a similar law. For a comparative analysis from historical perspective; see Kevin W. Saunders, *The United States and Canadian Responses to the Feminist Attack on Pornography: A Perspective from the History of Obscenity*, 9 IND. INT'L & COMP. L. REV. 1 (1998).

⁷⁰ *Am. Booksellers Ass'n*, 771 F.2d at 324.

⁷¹ *Id.*

⁷² *Id.* at 325.

⁷³ *Id.* at 325.

the people; an idea is as powerful as the audience allows it to be, so even pernicious ideas may prevail. The difference, however, is that in U.S. society there is an “absolute right to propagandize opinions that the government finds wrong or even hateful.”⁷⁴ The definition of “pornography,” the court finds, is unconstitutional.⁷⁵

According to the traditionalists, those who advocate hate speech restrictions should be the ones most concerned with avoiding restrictions on the First Amendment rights. Free speech has proven to be an indispensable tool for civil libertarians in promoting other rights and freedoms, such as racial equality. Regulating expression in the form of campus speech codes, for example, would in turn undermine both equality and free speech. Rather than being antagonistic goals, however, the fight against racial discrimination and the protection of free speech should be mutually reinforcing.⁷⁶

Racist speech on campus, further, has to be placed in the context of earlier censorship efforts on other forms of hate speech, such as sexist and anti-Semitic speech, in order to illustrate the need for applying consistent principles to different forms of hate speech. Each person is tested in their dedication to free speech values by different messages. While racist speech would be the most offensive to some, others would identify anti-choice speech, anti-Semitic speech, sexist speech, or flag desecration. The indivisibility of free speech, thus, prohibits content based speech regulation.⁷⁷ Similarly, Henry Gates in points out that the second element of the Matsuda test is obviously problematic because it is either in danger of being too narrow, limited to only blacks for example, or too broad, to include, as Gates says, “just about everybody.”⁷⁸

C. *Germany*

In the case of Germany, such a fundamental debate regarding the problematic nature of hate speech and its proscribability does not arise. Such speech is a problem that is being addressed in different areas of the law. Various provisions addressing restrictions on freedom of speech exist in the area of administrative law⁷⁹ as well as in the Civil Code (*Bürgerliches Gesetzbuch, BGB*). Most notably, civil liability can be established under § 823(2) BGB if criminal law provisions against insult and defamation apply and civil liability can also arise under § 823 (1) BGB, which

⁷⁴ *Id.* at 327-28.

⁷⁵ *Id.* at 332.

⁷⁶ Strossen, *supra* note 36, at 489.

⁷⁷ *Id.* at 533-534.

⁷⁸ Gates, *supra* note 61, at 33.

⁷⁹ Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law* (pts. 1 & 2), 3 GERMAN L.J. No. 12 (Dec. 2002) at 17, available at <http://www.germanlawjournal.com/article.php?id=225>; Brisbane, 14 TO 20 JULY 2002 117-51 (Eibe Riedel ed., Nomos 2002).

protects “other rights” such as the right to one’s personality (*allgemeines Persönlichkeitsrecht*). Remedies for tort liability include compensation for material damages, retraction of false assertions, and compensation for pain and suffering.⁸⁰ There are also several other less common applicable provisions,⁸¹ the discussion of which would exceed the scope of this article. Therefore the question of civil liability will be confined to these brief remarks.⁸² More importantly for the purpose of this discussion, public policy has identified hate speech as a problem against which the most powerful tool available, criminal law, is employed.⁸³

III. THE VALUE OF SPEECH: PHILOSOPHICAL AND HISTORICAL ROOTS

The United States and Germany both have written constitutions that contain provisions protecting the freedom of speech.⁸⁴ Nevertheless, the value assigned to speech in each constitutional framework is quite distinct. The underlying argument is that not only were the two societies founded on different philosophical premises; they also offer different interpretations of historical events that led to diverging responses in the legal framework concerning the value of free speech.⁸⁵

In the Bill of Rights to the United States Constitution, freedom of speech takes a prominent position whereas Article 1 of the German Basic Law articulates the protection of human dignity.⁸⁶ In the United States, individualistic values underlying the freedom of expression generally trump the “societal interest in protecting ‘the whole national collectivity,’ unless some clear individual – rather than social – harm can be demonstrated.”⁸⁷ At the core of this understanding of free speech is the Lockean principle of individualism. Fundamental rights are regarded as inalienable and as preceding and transcending civil society.⁸⁸ The United States Constitution thus provides a set of negative liberties in a catalogue of enu-

⁸⁰ *Id.* at 18.

⁸¹ *See id.* at 18-19 for an in-depth discussion.

⁸² *See id.* For a complementary discussion of U.S. jurisprudence, *see e.g.*, Joan E. Schaffner, Note, *Protection of Reputation versus Freedom of Expression: Striking a Manageable Compromise in the Tort of Defamation*, 63 S. CAL. L. REV. 435 (1990).

⁸³ *See infra* Part IV.B.2.

⁸⁴ U.S. CONST., *supra* notes 7 & 8.

⁸⁵ *See also* WALKER, *supra* note 16, at 2; Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 801 (1997).

⁸⁶ *See* Krotoszynski, *supra* note 2, at 1579, elaborating: “When one then turns to Article 1, one finds that the very first right the Basic Law articulates is the protection of human dignity. By way of contrast, the Bill of Rights makes the freedom of speech, press, and assembly (along with the religion clauses) its first concern. The structural contrast could not be more striking. Article 79(3) further confirms this textual primacy by rendering Article 1 unamendable; it is a permanent and fixed part of the German constitutional order.”

⁸⁷ Church & Hueman, *supra* note 2, at 11.

⁸⁸ Rosenfeld, *supra* note 2, at 1549.

merated rights that are not to be infringed upon by the government. The Constitution does not, however, contain comparable duties that citizens must assume, or values that the government must realize.⁸⁹

John Stuart Mill's *On Liberty*, first published in London in 1859, provides the classic defense of free speech:

First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

Secondly, though the silenced opinion may be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost or enfeebled, and deprived of its vital effect on the character and conduct: the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground and preventing the growth of any real and heartfelt conviction from reason or personal experience.⁹⁰

In the context of the German Constitution, all rights must be weighed against human dignity, which takes precedence over all other values.⁹¹ The German approach, that of most other western democracies, and that of international law⁹² can be easily identified as decidedly Kantian; the major traditions incorporated are classical liberalism, democratic socialism, and Christian-natural legal thought.⁹³ The German constitutional system is immersed in a normative framework and therefore requires a balancing of rights and duties on the side of the state as well as the citizenry.⁹⁴ A Kantian interpretation of the human dignity concept is a central theme in postwar German constitutional law.⁹⁵

The Nazi experience prompted Germany to adopt the status of a "militant democracy" ("*wehrhafte Demokratie*"), which means that anti-

⁸⁹ Eberle, *supra* note 85.

⁹⁰ Reprinted in HEUMAN & CHURCH, *supra* note 21, at 261.

⁹¹ See e.g., Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] February 24, 1971, 30 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 173, 193 (F.R.G.) (infra part IV.B.3.c). See also: Krotoszynski, *supra* note 2, at 1579.

⁹² For a discussion of hate speech regulation in international law see Kübler, *Racist Speech*, *supra* note 2, at 355-61.

⁹³ Eberle, *supra* note 85, at 800-01.

⁹⁴ Rosenfeld, *supra* note 2, at 1549; Eberle, *supra* note 66, at 801.

⁹⁵ Whitman, *supra* note 1, at 1333.

democratic forces working against the order are not protected by it, and specifically that freedom of speech does not extend to advocating the abolition of the existing constitutional order.⁹⁶ Walker cites Karl Lowenstein as saying “[D]emocracy and democratic tolerance have been used for their own destruction.”⁹⁷ The use of antidemocratic measures in order to preserve democracy was justified since established democracies could tolerate this compromise of principle: “Where fundamental rights are institutionalized, their temporary suspension is justified.”⁹⁸ The underlying sentiment in Germany, as Brugger points out, is expressed in the rallying cries “*Nie wieder!*” (“Never again!”) and “*Wehret den Anfängen!*” (“Nip it in the bud.”).⁹⁹

Whitman’s prewar explanation is an intriguing one that does not entirely abandon the Kantian approach, but at its core offers a somewhat different and older reason. He specifically identifies “honor” that prompted “civil behavior” as a characteristically aristocratic value.¹⁰⁰ Civil behavior today, then, is an adoption of formerly aristocratic patterns of behavior. This explanation, in his view, reaches deeper than the explanation through Kantianism and Christianity, which have mainly exercised an influence in postwar Europe.¹⁰¹ Further, Whitman identifies a social phenomenon that he describes as “leveling up” and “leveling down”:

To echo a famous claim of Louis Hartz, the United States is a place where, in contrast to Continental Europe, the “feudal ethos” has not exercised a formative influence, and that has made a profound difference. This difference is one that I try to capture in a large sociological generalization: France and Germany, I argue, have witnessed, each in its own way, leveling up. In both societies, the cultural memory of an age of social hierarchy is strong, and the commitment to modern egalitarianism has been a commitment to the proposition that all persons should stand on the highest rung of the social hierarchy. Egalitarianism in France and Germany is an egalitarianism that proclaims we are all aristocrats now; and in practice this has been an egalitarianism of widely generalized norms of civil respect. American egalitarianism, by contrast, is, I suggest, an egalitarianism of leveling down, which proclaims, in effect, that there are no more aristocrats – that we all stand together on the lowest rung of the social ladder.

⁹⁶ Krotoszynski, *supra* note 2, at 1583; Eberle, *supra* note 85, at 825; WALKER, *supra* note 16, at 45-48; see generally MARKUS THIEL, ED., WEHRHAFTE DEMOKRATIE: BEITRÄGE ÜBER DIE REGELUNGEN ZUM SCHUTZE DER FREIHEITLICHEN DEMOKRATISCHEN GRUNDORDNUNG (Mohr Siebeck 2003) (explaining the concept of “militant democracy”).

⁹⁷ WALKER, *supra* note 16, at 46.

⁹⁸ *Id.* at 48.

⁹⁹ Brugger, *supra* note 79, at 40.

¹⁰⁰ Whitman, *supra* note 1, at 1284.

¹⁰¹ *Id.*

One consequence is that this egalitarianism of the lowest rung has often proven to be an egalitarianism of lack of respect.¹⁰²

In sum, for these historical and philosophical reasons, free speech in the United States has a supreme value unlike free speech in the law of Germany, and for that matter, of Continental Europe.¹⁰³

These differences lead to some important consequences. Generally, the American tradition places a much greater trust in the strength of good opinions that compete with bad ones; it is more commonly assumed that the good ideas will prevail.¹⁰⁴ Moreover, while offensive speech can have a beneficial effect, for example in the civil rights struggle in the United States, its detrimental effect is the focus in Germany and Europe, where it is primarily seen as a tool of oppression.¹⁰⁵ Because distrust of government prevails in the United States, a mindset not commonly encountered in Germany, there is a strong reluctance to let the government select good opinions over bad ones.¹⁰⁶ Finally, American courts tend to look for an issue of public concern that may be found beyond the element of hate, a tendency not present in German jurisprudence.¹⁰⁷

IV. FREE SPEECH DOCTRINE

American policy responses to racial and ethnic agitation and hate speech are quite different from those of other western democracies. While there is no shortage of calls to address these social pathologies, government action in the United States is "severely circumscribed by the courts."¹⁰⁸ Because of different historical and philosophical paths in the United States and Germany,¹⁰⁹ the development of free speech doctrine has diverged. Dominant opinions in the two countries are arguably polar opposites on the hate speech issue. These doctrinal differences, as will be shown, would make it extremely difficult to introduce elements of the German approach in a manner consistent with current U.S. First Amendment jurisprudence. In addition, the German approach in itself may suffer from inconsistencies that are overlooked all too easily when citing it as a favorable solution.

¹⁰² *Id.* at 1285.

¹⁰³ *Id.* at 1379-80.

¹⁰⁴ Brugger, *Ban or Protection*, *supra* note 2, at 14.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 14-15; Brugger, *Verbot oder Schutz von Haßrede?*, *supra* note 2, at 37.

¹⁰⁸ Church & Huelman, *supra* note 2, at 2.

¹⁰⁹ *See supra* part III.

A. *United States*

“Congress shall make no law (. . .) abridging the freedom of speech.”¹¹⁰ These seemingly unambiguous ten words that make up the relevant portion of the First Amendment are the subject of the following discussion. Heuman and Church summarize that in U.S. jurisprudence there is a broad general rule specifying the overall scope of the freedom of speech protected by the First and the Fourteenth Amendments, together with a series of exceptions to the rule. The broad rule is a presumption against the validity of governmental attempts to prohibit, punish, or (to a lesser degree) regulate expression – particularly expression relating to questions of relevance to government and public policy. This rule is based on ‘a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’¹¹¹

The development of the general presumption in favor of free speech can be traced through cases such as Justice Brandeis’ forceful dissent in *Whitney v. California*,¹¹² outlining the contours of a strong free speech sentiment;¹¹³ *Tinker v. Des Moines*;¹¹⁴ and most recently *Texas v. Johnson*.¹¹⁵ Despite this general presumption in favor of free speech, First Amendment protection is not absolute and certain categories of expression may be regulated consistent with the First Amendment.¹¹⁶

In the case of group libel, it made only a brief appearance in Supreme Court free speech jurisprudence. It was placed on the map, so to speak, in *Beauharnais v. Illinois*,¹¹⁷ a decision that most scholars thought, after *New York Times v. Sullivan*,¹¹⁸ was no longer good law.¹¹⁹ *Brandenburg v. Ohio*¹²⁰ articulates the modern incitement test. Replacing the “clear and present danger” test, the new standard requires the elements of provoking imminent lawless action under circumstances that it is likely to occur, as the *Brandenburg* Court states:

¹¹⁰ U.S. CONST., *supra* note 8.

¹¹¹ Church & Hueman, *supra* note 21, at 20.

¹¹² 274 U.S. 357, 372-79 (1927).

¹¹³ *Id.* at 375-78.

¹¹⁴ 393 U.S. 503 (1969).

¹¹⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable We have not recognized an exception to this principle even where our flag has been involved.”).

¹¹⁶ *Virginia v. Black*, 538 U.S. 343, 358 (2003); *see e.g.*, Church & Hueman, *supra* note 21, at 21.

¹¹⁷ *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

¹¹⁸ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹¹⁹ Sunstein, *supra* note 18, at 185.

¹²⁰ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.¹²¹

Thus, falling short of incitement, hate speech is generally not subject to the *Brandenburg* standard.

The most likely exception to First Amendment protection which might include hate speech,¹²² is that of “fighting words” as established by the Court in *Chaplinsky v. New Hampshire*.¹²³ The court describes well-defined and narrowly limited classes of speech whose prevention has never been thought to raise any Constitutional problem.¹²⁴ “These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words, which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.”¹²⁵ The question whether hate speech falls within the scope of one of the exceptions from First Amendment protection was addressed in the three hate speech cases below. The first case, *Collin v. Smith*,¹²⁶ involves the Nazi march at Skokie, decided by the Federal Court of Appeals for the Seventh Circuit. On appeal, the Supreme Court denied certiorari¹²⁷ with Justices Blackmun and White dissenting.¹²⁸ The second case, *R.A.V. v. St. Paul*,¹²⁹ is a cross burning case in which the Court struck down a St. Paul ordinance banning cross burning. The most recent, *Virginia v. Black*,¹³⁰ is another cross-burning case in which a Virginia law was invalidated. These cases, delineating the Court’s view of First Amendment protection for “hateful messages,” must be kept in mind whenever the question of hate speech regulation arises.

In *Collin v. Smith*,¹³¹ the Seventh Circuit found that under First Amendment standards there is no reason to prevent a Nazi march in the village of Skokie, Illinois. The ordinance¹³² invoked by the town to pro-

¹²¹ *Id.* at 447.

¹²² Racist speech, for example, has been called a “functional equivalent of fighting words.” Lawrence, *supra* note 35, at 449.

¹²³ 315 U.S. 568 (1942).

¹²⁴ *Id.* at 571-72.

¹²⁵ *Id.*

¹²⁶ *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ 505 U.S. 377 (1992).

¹³⁰ *Black*, 538 U.S. at 358.

¹³¹ *Smith*, 578 F.2d at 1197.

¹³² Village Ordinance No. 77-5-N-994 is a comprehensive permit system for all parades or public assemblies of more than 50 persons. It requires permit applicants to obtain \$300,000 in public liability insurance and \$50,000 in property damage

hibit the march was invalidated because of its over-breadth. While content legislation is not per se invalid, the court stated, there are only a limited number of established exceptions in which it is permissible: obscenity, fighting words, and, under *Brandenburg*, the imminent danger of a grave substantive evil.¹³³ The court then examined whether any of these established exceptions were present in this case and found none applied. The village did not expect any physical violence if the march were held, which eliminated the *Brandenburg* exception.¹³⁴ The fighting words exception only applies “to words with a direct tendency to cause violence by the persons to whom, individually, the words were addressed.”¹³⁵ Further, the asserted falseness of Nazi dogma does not justify its suppression.¹³⁶ Turning to *Beauharnais*, the court said first that its rationale would not apply, and, second, that it agreed with the doubt expressed on whether *Beauharnais* remains good law.¹³⁷ Addressing the alleged “infliction of psychic trauma on resident holocaust survivors and other Jewish residents,” the court agreed that “the demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village’s residents.”¹³⁸ The court nevertheless found it “perfectly clear that a state may not make criminal the peaceful expression of unpopular views . . . [and] mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms.”¹³⁹

The Court in *R.A.V.* had to examine the constitutionality of a St. Paul ordinance that banned cross burning. Justice Scalia, writing for the majority, explained that generally speaking, the government is prevented from proscribing speech based on its content. There are, however, limited areas in which such restrictions are permissible, areas that are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”¹⁴⁰ These limited areas in which it is permissible to regulate speech content include obscenity or defamation, and can be regulated consistently with the First Amendment given their proscribable content. They are not, however, “categories of speech entirely invisible to the Constitution, so that they may be made the vehicles for content discrimination unrelated

insurance. One of the prerequisites for a permit is a finding by the appropriate (officials) that the assembly will not portray criminality, depravity or lack of virtue in, or incite violence, hatred, abuse or hostility toward a person or group of persons by reason of reference to religious, racial, ethnic, national or regional affiliation. *Id.* at 1199.

¹³³ *Id.* at 1202.

¹³⁴ *Id.* at 1203.

¹³⁵ *Id.* at 1203.

¹³⁶ *Id.* at 1203.

¹³⁷ *Id.* at 1204-05.

¹³⁸ *Id.* at 1205.

¹³⁹ *Id.* at 1205 (internal citation omitted).

¹⁴⁰ 505 U.S. at 382-83.

to their distinctively proscribable content.”¹⁴¹ Fighting words may therefore not be regulated based on the message they convey because “the government may not regulate [their] use based on hostility – or favoritism – towards the underlying message [they] expressed.”¹⁴² Regulation based on the message expressed, however, was the problem with the St. Paul ordinance. Expressions of hostility and the use of “fighting words” was permissible if directed at various categories such as “political affiliation, union membership, or homosexuality,” but not the “specified disfavored topics.”¹⁴³ The Court, however, found that the “First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”¹⁴⁴

In 2003, *Virginia v. Black*¹⁴⁵ brought the question of cross burning back to the Court. Contrary to the prima facie provision in the Virginia law, the Court found that burning a cross is not always intended to intimidate.¹⁴⁶ It therefore held the law unconstitutional. Justice O’Connor, writing for the plurality, pointed out, however, that a State can in fact regulate activities such as cross burning in a manner consistent with the First Amendment even after the *R.A.V.* decision.¹⁴⁷

After reiterating that the First Amendment protection to speech is not absolute,¹⁴⁸ and that certain categories of expression can, in fact, be regulated in accordance with the First Amendment,¹⁴⁹ O’Connor states that this is the case when “the speaker means to communicate a serious expression of an intent to commit and act of unlawful violence to a particular individual or group of individuals.”¹⁵⁰ It is not necessary that the threatened act is actually carried out.¹⁵¹ Thus, Virginia can outlaw cross burnings done with the intent to intimidate without running afoul of the First Amendment or the *R.A.V.* decision.¹⁵² The Court in *R.A.V.*, according to O’Connor, stated that a particular type of content discrimination does not violate the First Amendment when the basis for it consists entirely of the very reason its entire class of speech is proscribable.¹⁵³ Unlike the statute in *R.A.V.*, the Virginia statute does not specify a disfavored topic: “It does not matter whether an individual burns a cross with the intent to intimidate because of the victim’s race, gender, or religion,

¹⁴¹ *Id.* at 383-84.

¹⁴² *Id.* at 386.

¹⁴³ *Id.* at 391.

¹⁴⁴ *Id.*

¹⁴⁵ 538 U.S. at 343.

¹⁴⁶ *Id.* at 345.

¹⁴⁷ *Id.* at 363.

¹⁴⁸ *Id.* at 358.

¹⁴⁹ *Id.* at 358-60.

¹⁵⁰ *Id.* at 359.

¹⁵¹ *Id.* at 359-60.

¹⁵² *Id.* at 362.

¹⁵³ *Id.* at 361-62.

or because of the victim's political affiliation, union membership, or homosexuality."¹⁵⁴ Thus, burning a cross with the intent to intimidate is proscribable under the First Amendment.¹⁵⁵

B. Germany

The free speech provision in the German constitution is somewhat wordier than the ten words that make up the relevant portion of the First Amendment, but not necessarily less ambiguous, as demonstrated by the landmark cases, which establish the balancing rules for determining the constitutionality of laws limiting free speech.

1. Constitutional Protection

Article 5 GG is the central freedom of speech provision for Germany. It reads:

(1) Every person shall have the right to freely 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 shall find their limits in the provisions of 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.¹⁵⁶

A potential violation of a constitutional right is subject to a multilevel analysis with three basic stages of inquiry. First, whether the matter is subject to the definitional coverage of the right (*Schutzbereich*); second, whether there is a possible limit posed by a regulation or prohibition (*Schranken*); and third, whether the limitation is proportional (*Verhältnismäßigkeit*).¹⁵⁷ The definitional coverage of the right is determined by the activity or sphere of life that it addresses. In the case of hate speech, for example, the question posed in this initial stage would be whether hate speech is addressed as "speech," "assembly," "association," or "artistic" or "scholarly" expression.¹⁵⁸ If this definitional coverage in fact extends to the activity in question, the activity is in principle protected; it may, however, be subject to regulation. This regulation must be an encroachment on the right which is allowed under an explicit or implicit limitation

¹⁵⁴ *Id.* at 362 (internal citation omitted).

¹⁵⁵ *Id.* at 363.

¹⁵⁶ Brugger, *supra* note 79, at 3-4.

¹⁵⁷ *Id.* at 9-10.

¹⁵⁸ *Id.* at 9.

clause to the right.¹⁵⁹ If, then, the state action is covered by such a limitation clause, the limitation to the right has to be found proportional. This proportionality test is comprised of three elements: the suitability of the means used to further a legitimate end (*Geeignetheit*), the absence of an equally effective yet less restrictive action (*Notwendigkeit*), and finally, the presence of an appropriate relationship between the goal to be achieved and the extent of the intrusion upon the protected right (*Verhältnismäßigkeit im engeren Sinne*).¹⁶⁰

2. Statutory Restrictions

The rights enshrined in Article 5 GG find their legitimate limitations in various provisions of the criminal code, administrative law, and the civil code.¹⁶¹ From an American perspective, the most striking aspect is the placement of these limits on the right to free speech (*Gesetzesvorbehalt*).¹⁶² The remainder of this article will largely concentrate on the provisions of the criminal code – the most likely to be applied in the case of hate speech – but the article will also refer to other limits in the course of analyzing the balancing efforts of the Constitutional Court.

Sections 185 to 200 of Part 14 of the Federal Penal Code (*Strafgesetzbuch, StGB*) contain provisions punishing individual and collective defamation or insult. The StGB's section on "Threats to the Democratic Constitutional State" (Sections 84 to 91 StGB) contains provisions forbidding the dissemination and use of propaganda by unconstitutional and National Socialist organizations (Sections 86 and 86a StGB). In addition, the section on "Crimes against the Public Peace" (Section 130 StGB) proclaims incitement to hatred and violence against minority groups to be a punishable offence.¹⁶³ Section 130(1) StGB reads:

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

¹⁵⁹ *Id.* at 9-10.

¹⁶⁰ *Id.* at 10.

¹⁶¹ *Cf. id.* at 14.

¹⁶² *Gesetzesvorbehalt* describes the situation in which the constitutional right in question, in its definitional coverage, allows for the imposition of limits upon itself. In the case of Art. 5 GG, the imposition of limits through provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor are mentioned. *See e.g.*, HANS D. JARASS, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND KOMMENTAR, VOF Art. 1, 40 (Hans D. Jarass and Bodo Pieroth, 2002).

¹⁶³ Brugger, *supra* note 79, at 16.

shall be punished with imprisonment of no less than three months and not exceeding five years.¹⁶⁴

The second paragraph explicitly defines hate speech by mentioning incitement to hatred against “groups determined by nationality, race, religion, or ethnic origin,” while the third paragraph states:

Imprisonment, not exceeding five years, or a fine will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes and act described in 220a(1) [i.e., genocide] committed under National Socialism, in a manner which is liable to disturb the peace.¹⁶⁵

3. Balancing Rules

Thus far, none of the statutory limits on initially protected hate speech, whether criminal, administrative, or civil in nature, have been struck down by the German Constitutional Court, displaying the significant consequences of the balancing system that was developed in a series of cases.¹⁶⁶ While initially there seemed to be a strong commitment to free speech by the German Constitutional Court in the balancing with other interests – most notably personal dignity – the commitment faded only to be rediscovered, perhaps even more pronounced, at a later stage.¹⁶⁷ The shifting tides will briefly be traced in the following cases. These cases are presented to demonstrate that while the balancing is profound, the Court has failed to establish a universally applicable standard in its balancing efforts that could be applied to the hate speech cases which will be part of this analysis.¹⁶⁸

a. *Lüth*

First in the series of landmark free speech cases is the 1958 *Lüth* case,¹⁶⁹ the earliest major case involving Article 5 communicative freedoms. The question was whether Erich Lüth could publicly call for a boycott of the movie *Unsterbliche Geliebte* (“Immortal Beloved”) directed by Veit Harlan, a notorious anti-Semite and former Nazi propagandist.¹⁷⁰

¹⁶⁴ Translated in Brugger, *Ban or Protection*, *supra* note 2, at 5-6; Brugger, *supra* note 79, at 16-17. For a comparison of the old and new section 130 StGB, see Kübler, *Racist Speech*, *supra* note 2, at 343-45.

¹⁶⁵ Brugger, *Ban or Protection*, *supra* note 2 at 5-6.

¹⁶⁶ Brugger, *Ban or Protection*, *supra* note 2, at 5.

¹⁶⁷ See Eberle, *supra* note 85, for a more detailed analysis of the shifts in the Court’s balancing efforts.

¹⁶⁸ See *infra* Part IV.B.3.e.

¹⁶⁹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Jan. 15, 1958, 1 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 198 (F.R.G).

¹⁷⁰ See Eberle, *supra* note 85, at 808-27, for an in-depth discussion of the case. See also Krotoszynski, *supra* note 2, at 1585-90; David Weiss, *Striking a Difficult Balance*:

The *Lüth* Court held that the right to free speech is absolutely fundamental:

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).¹⁷¹

The *Lüth* case has rightly been called “the foundational case for interpretation of freedoms of opinion.”¹⁷² It touches on several basic elements of German constitutional doctrine in general, and free speech doctrine in particular. It establishes the notion that the Constitution demands an objective ordering of values that influences the social structure. The constitutional rights, in turn, are an integral part of this order and consequently affect private law, something that the ordinary courts have to be conscious of in their decision-making process. In presumptively protecting communication that adds to the formation of public opinion, the decision further established the individual and social spheres of communication as well as the basic structure of public discourse. The balancing favored the protection of communication according to the significance of the public issues addressed. The decision set out the essential framework that has been adhered to ever since.¹⁷³

b. Schmidt-Spiegel

*Schmid-Spiegel*¹⁷⁴ was the result of a libel case in which a high ranking state judge, Schmid, compared the political reporting of the news magazine “Der Spiegel” to pornography after the magazine had accused Judge Schmid of communist sympathies in his judgments. The news magazine secured a libel judgment, but the Constitutional Court overruled the lower court decision by holding that private law norms are influenced by constitutional rights just as constitutional rights may be influenced by the “general laws” (this being a result of the theory of reciprocal effect,

Combatting the Threat of Neo-Nazism in Germany while Preserving Individual Liberties, 27 VAND. J. TRANSNAT'L L. 899 (1994).

¹⁷¹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] January 15, 1958, 7 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 198, 208 (F.R.G); translation quoted from Brugger, *supra* note 79, at 14; *see also* Eberle, *supra* note 85, at 817.

¹⁷² Eberle, *supra* note 85, at 827.

¹⁷³ *Id.*

¹⁷⁴ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] January 25, 1961, 12 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 113 (F.R.G).

or *Wechselwirkungstheorie*).¹⁷⁵ The *Schmid-Spiegel* court, in line with the Lüth paradigm,¹⁷⁶ further held that given the value of communication, the related freedoms are to be treated with heightened protection:

Only a free public discussion over all matters of general significance guarantees the free building of public opinion that is necessary to a free democratic state. This dialogue necessarily occurs pluralistically involving contrasting views arising from contrasting motives, freely disseminated. Above all, it consists of speech versus counterspeech. Every citizen is guaranteed the right through Article 5 to take part in this public discussion.¹⁷⁷

The great achievement of this case was the addition of the concept of counterattack in public discourse: harsh public criticism justifies a harsh reply.¹⁷⁸ Additionally, the case initiated the doctrine that false statements of fact, as opposed to value judgments, are “a verifiable limit on public discourse.”¹⁷⁹

c. *Mephisto*

The *Mephisto* case¹⁸⁰ marked somewhat of a shift in free speech jurisprudence. In this 1971 case, the heir of a deceased German actor sought to prevent the publication of a novel allegedly based on the actor’s life, which accused the actor of collaborating with the Nazi regime and thereby betraying his own political convictions to further his career.¹⁸¹ The *Mephisto* Court found that despite the wording of Article 5 (3), the

¹⁷⁵ Eberle, *supra* note 85, at 827-28.

¹⁷⁶ *Id.* at 827.

¹⁷⁷ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] January 25, 1961, 12 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 113, 125 (F.R.G); translated in Eberle, *supra* note 85, at 828.

¹⁷⁸ Eberle, *supra* note 85, at 828.

¹⁷⁹ *Id.* at 828-29. The author puts the case in a comparative perspective:

To an American observer, the Constitutional Court’s structuring of public discourse as an open, robust, even caustic dialogue is reminiscent of American doctrine. In both the American “marketplace of ideas” and German “battle of opinions” (*Meinungskampf*), the remedy for sharp or harsh speech is not suppression but more speech. Both countries seem committed to entrusting the nature of this aspect of public discourse to the people. In this way, *Schmid-Spiegel* mirrors certain of the great Supreme Court cases, decisions like *Whitney v. California* or *Cohen v. California*.

Id. at 829.

¹⁸⁰ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Feb. 24, 1971, 9 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 173 (F.R.G).

¹⁸¹ See Eberle, *supra* note 85, at 831-41, for an in-depth discussion. See also Weiss, *supra* note 170, at 922.

Article 5 rights are not without limits¹⁸² and under certain circumstances can be limited by such interests as protection of personality and human dignity (in this case, the post mortem protection of dignity).¹⁸³ Article 5 claims are subordinate to claims arising under the dignity clause in Article 1; free speech and other communication freedoms thus must yield to the superior value of human dignity.¹⁸⁴ “Human dignity is the supreme value that dominates the whole value system of the fundamental rights.”¹⁸⁵

The *Mephisto* case marked a departure from the *Lüth* decision by recognizing that communication no longer possessed a preferred status.¹⁸⁶ *Mephisto* was the low water mark as far as communication freedoms were concerned. Until the 1990s, the Court tried to recapture the value of free speech, constantly trying to reconcile personality rights and communication rights. It was not until the *Strauß* cases, decided in 1987 and 1990, and two 1990 cases involving the national flag¹⁸⁷ and the national anthem,¹⁸⁸ that the Court ultimately preferred communication rights over personality rights.¹⁸⁹

d. *The Strauß Cases*

The *Strauß* cases¹⁹⁰ in particular have been said to “mark a noticeable heightening of the scrutiny applied by the Constitutional Court.”¹⁹¹ The

¹⁸² Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] February 24, 1971, 30 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 173, 193 (F.R.G).

¹⁸³ Eberle, *supra* note 85, at 836-37.

¹⁸⁴ Krotoszynski, *supra* note 2, at 1567; Eberle, *supra* note 85, at 837.

¹⁸⁵ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] February 24, 1971, 30 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 173, 193 (F.R.G); translation quoted from Krotoszynski, *supra* note 2, at 1567.

¹⁸⁶ Eberle, *supra* note 85, at 840.

¹⁸⁷ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Mar. 7, 1990, 81 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 278 (F.R.G).

¹⁸⁸ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Mar. 7, 1990, 81 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 298 (F.R.G).

¹⁸⁹ Eberle, *supra* note 85, at 841-53.

¹⁹⁰ See *e.g.*, Eberle, *supra* note 85, at 853-63.

¹⁹¹ *Id.* at 862; As could be expected, following this return to the preferred protection of communicative rights in the early 1990s, there were repeated calls for a stricter application of the principles of protection of personal honor that were felt by some to have been given up by the court. See, for example, Peter J. Tettinger, *Das Recht der persönlichen Ehre in der Wertordnung des Grundgesetzes*, 37 JURISTISCHE SCHULUNG 769 (1997), calling for a better protection of personal honor and sharply criticizing Constitutional Court Justice Grimm; Martin Kriele, *Ehrenschutz und Meinungsfreiheit*, 45 NEUE JURISTISCHE WOCHENSCHRIFT 1897 (1994), arguing that the Constitutional Court is coercing the lower courts to follow in a doctrinal error to let go of the protection of honor in favor of freedom of speech and press; Manfred

late former prime minister of the state of Bavaria, Franz Josef Strauß, was repeatedly the subject of rather intense controversies that often ended in legal battles, some of which then made their way to the Constitutional Court. The caricature case¹⁹² of 1987 involved the publication of cartoons that depicted Strauß as a rutting pig. The Court found that the caricatures met the requirements for constitutional protection under Article 5.¹⁹³ Yet, although satire and parody enjoy protection under Articles 5(1) and 5(3), this protection must give way to the paramount importance of personal dignity. In this case, what was plainly intended was an attack on the personal dignity of the person caricatured.¹⁹⁴

Another Strauß case, the 1990 *Zwangsdemokrat*,¹⁹⁵ dealt with an issue of the newsmagazine “Stern” marking the death of former Nazi leader Rudolf Hess. In an interview published in that issue, a prominent writer made the point that not all German politicians are committed to democracy – to illustrate this point, he suggested Strauß was coerced into adopting democratic values out of political necessity.¹⁹⁶ By being labeled an “opportunistic democrat” (*Zwangsdemokrat*), Strauß argued that he had been libeled, an argument accepted by the lower courts.¹⁹⁷ Upon review, the Constitutional Court returned to its original view first expressed in *Lüth* in reassigning a special status to communication rights. According to the reciprocal effect theory, the general law – although posing a limit to free speech rights – is subject to the fundamental constitutional values.¹⁹⁸

Kiesel, *Die Liquidierung des Ehrenschatzes durch das BVerfG*, 43 NEUE JURISTISCHE WOCHENSCHRIFT 1129 (1992).

¹⁹² Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 3, 1987, 75 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 369 (F.R.G.). See also: Krotoszynski, *supra* note 2, at 1575-77; *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (decided around the same time); for a detailed comparison, see e.g., Georg Nolte, *Falwell v. Strauß: Die rechtlichen Grenzen politischer Satire in the USA und der Bundesrepublik*, 15 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 253 (1988).

¹⁹³ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 3, 1987, 75 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 369, 379 (F.R.G.); Krotoszynski, *supra* note 2, at 1575; Eberle, *supra* note 85, at 862.

¹⁹⁴ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 3, 1987, 75 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 369, 379 (F.R.G.); Krotoszynski, *supra* note 2, at 1575-76; Eberle, *supra* note 85, at 862. See also Brugger, *Ban or Protection*, *supra* note 2, at 10 (picking up Whitman’s terminology of ‘leveling up’ and ‘leveling down’ societal discourse in this context).

¹⁹⁵ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] June 26, 1990, 82 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 272 (F.R.G.).

¹⁹⁶ *Id.* at 273.

¹⁹⁷ Strauß died during the appeal, and his heirs continued the case, cf. *Id.* at 275.

¹⁹⁸ Eberle, *supra* note 85, at 854.

e. *Hate Speech: Auschwitzlüge & “Soldaten sind Mörder”*

The balancing struggles of the Court translate to the most prominent and recent hate speech cases. At the center of the German discussion of hate speech are instances in which the Holocaust is denied. The *Holocaust Denial* case (*Auschwitzlüge*) that came before the Constitutional Court in 1994¹⁹⁹ dealt with a demonstration held by the National Democratic Party²⁰⁰ (Nationaldemokratische Partei Deutschlands, NPD) at which David Irving, a known Holocaust revisionist, was to be the featured speaker.²⁰¹ Local authorities in Munich demanded that appropriate measures be taken to ensure that the Holocaust not be denied, and threatened the NPD with criminal charges if they failed to comply. The lower administrative courts and the Federal Administrative Court upheld the restrictions, and the NPD appealed these decisions to the Constitutional Court.²⁰²

A distinction is made between the “simple” Holocaust lie, which insists that no genocide took place or that the magnitude of the genocide is grossly exaggerated, and a “qualified” Holocaust lie. A simple denial becomes a “qualified” Holocaust lie if it is accompanied by supplementary normative conclusions or calls for action based on this lie, such as in the statement “Something ought to be done about the use of extortion as a political tool against Germany by Jews spreading lies about

¹⁹⁹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Apr. 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241 (F.R.G). For an in-depth analysis of the case, see THOMAS WANDRES, DIE STRAFBARKEIT DES AUSCHWITZ-LEUGNENS (Duncker & Humblot 2000); Stefan Huster, *Das Verbot der “Auschwitzlüge”, die Meinungsfreiheit und das Bundesverfassungsgericht*, 46 NEUE JURISTISCHE WOCHENSCHRIFT 487 (1996); Daniel Beisel, *Die Strafbarkeit der Auschwitzlüge*, 45 NEUE JURISTISCHE WOCHENSCHRIFT 997 (1995); see also Eric Stein, *History against Free Speech: The New German Law Against the ‘Auschwitz’ – and other – , ‘lies’*, 85 MICH. L. REV. 277 (1987); Eberle, *supra* note 85, at 892-94; Krotoszynski, *supra* note 2, at 1593-95.

²⁰⁰ The NPD is the most notorious neo-Nazi party active in Germany today. The legal proceedings initiated by the German government asking the Constitutional Court to ban the NPD as a political party pursuant to Article 21 (2) failed in 2003, *cf.* Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] March 18, 2003, 107 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 339 (F.R.G). Most recently, the NPD was involved in a scandal involving their representatives in the state parliament of Saxony who refused to participate in a minute of silence to honor the 60th anniversary of the liberation of Auschwitz, which has reinvigorated calls for its ban. See *e.g.*, FRANKFURTER ALLGEMEINE ZEITUNG, Jan. 25, 2005, at 1-2; ; Reiner Burger, *Brüllende Parlamentsfeinde*, *id.* at 3.

²⁰¹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] April 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241(F.R.G).

²⁰² *Id.* at 241-45.

Auschwitz.”²⁰³ Both versions of the Holocaust lie are punishable under criminal law.²⁰⁴ The Court held that Article 5 was not violated in the contested decisions.²⁰⁵ Opinions are characterized by a subjective element while facts feature an objective element which allows for their verification or denial. Factual assertions are not protected under Article 5 insofar as they cannot contribute anything to the formation of opinion; incorrect information therefore does not receive protection.²⁰⁶

It is a demonstrably false fact that the Holocaust never occurred; the accounts of eyewitnesses, the research of historians, and the findings of judicial proceedings dismiss any doubt that the Holocaust occurred and that Germany was responsible.²⁰⁷ Thus, the *Holocaust Denial* case and the *Responsibility Denial* case²⁰⁸ can be distinguished; while the question of whether Germany was responsible for the outbreak of World War II requires a complex analysis of historical events that cannot be reduced to a factual assertion, the denial of a single event does usually have the character of a factual assertion.²⁰⁹

The criminal laws, namely Sections 130 and 185 StGB²¹⁰ that were cited by the city and lower courts as the basis for the Munich authorities’ demand to ensure the Holocaust not be denied, are constitutional and as such can function as legitimate limits according to Article 5 (2).²¹¹ In applying these criminal laws, there can be no doubt that the reputation and dignity of Jews is harmed significantly in denying the Holocaust, since the Holocaust for Jewish people is an inextricable part of their identity and personal dignity.²¹²

²⁰³ Brugger, *supra* note 79, at 32-33; Brugger, *Ban or Protection*, *supra* note 2, at 15. *See also*, Kübler, *Racist Speech*, *supra* note 2, at 346; Beisel, *supra* note 199.

²⁰⁴ *See supra* Part IV.B.2.

²⁰⁵ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] April 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241, 246 (F.R.G.).

²⁰⁶ *Id.* at 247; *see also*: Krotoszynski, *supra* note 2, at 1593-94; Eberle, *supra* note 85, at 892.

²⁰⁷ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] April 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241, 249 (F.R.G.); *see also* Eberle, *supra* note 85, at 892.

²⁰⁸ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Jan. 11, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 1 (F.R.G.).

²⁰⁹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] April 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241, 249-50 (F.R.G.); *see also* Eberle, *supra* note 85, at 892.

²¹⁰ *Supra* part IV.B.2

²¹¹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] April 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241, 251 (F.R.G.); *see also* Eberle, *supra* note 85, at 893; Krotoszynski, *supra* note 2, at 1594.

²¹² Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] April 13, 1994, 90 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 241, 250-54 (F.R.G.); *see also*: Krotoszynski, *supra* note 2, at 1594; Eberle, *supra* note 85, at 893.

The Court has been criticized for stretching the interpretation of Holocaust denial too far. In making observations based on German and American Law, Brugger, for example, identifies four areas in which such an overextension occurred.²¹³ First, he points out, “the Court turns a moral duty into a legal duty.”²¹⁴ The magnitude of the reaction by the state, namely the employment of the criminal law “as ultima ratio to acknowledge a terrible historical event,” requires further arguments regarding “the necessity of the means and the interests protected” than those developed by the Court.²¹⁵ A further overextension involves the claim of group uniformity: while the Court’s argument stressing Jewish collective dignity “makes some sense given the collective terror inflicted by the Nazi regime,” such a claim can, in fact, “be counterproductive if dignity is seen as protecting mainly the individuality, and not the collectivity, of Jews living in Germany.”²¹⁶ Third, the Court equates past experience and present life; and finally, Holocaust denials are construed as attacks on life, dignity, and equality.²¹⁷ These interpretations, Brugger concedes, are without a doubt fully defensible and reasonable; however, the Court in its examination does not credit other non-punishable interpretations and does not address other less restrictive means to achieve the goal of adequately honoring the memory of a past tragedy while at the same time securing a peaceful future.²¹⁸ Thus, the Court chose the punishable interpretation at the expense of the free speech arguments on behalf of the speaker.²¹⁹

An argument less critical of the Court states that the Constitutional Court is simply enforcing limits that are established by the text of the German Constitution itself.²²⁰ Under this view, the reason for the different results in the *Lüth* decision and the *Holocaust Denial* case, however, is that the “German government supported the views and attitudes espoused by Lüth and detests and opposes the views expressed by Mr. Irving and the NPD. It is a simple case of state-enforced viewpoint discrimination.”²²¹ The Court in the *Holocaust Denial* case notably parts with its own free speech doctrine; this divergence is also seen in the other prominent modern case cited in connection with hate speech, the *Soldiers are Murderers* decision.²²² The *Soldiers are Murderers* case, ultimately

²¹³ Brugger, *Ban or Protection*, *supra* note 2, at 17.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at 17-18.

²¹⁷ *Id.* at 18.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ Krotoszynski, *supra* note 2, at 1594-95.

²²¹ *Id.* at 1594.

²²² Brugger, *Ban or Protection*, *supra* note 2, at 17-18.

decided by the entire First Senate of the Constitutional Court in 1995,²²³ was the result of several appeals consolidated into one decision. All of the original cases²²⁴ dealt, in some form, with the statements “soldiers are murderers” or “soldiers are potential murderers,”²²⁵ the former of which was a Kurt Tucholsky quotation.

The first case²²⁶ was decided by a panel consisting of three Justices (*Kammerentscheidung*),²²⁷ since it was not expected to involve an issue of great importance or doctrinal difficulties.²²⁸ The case involved the statement being displayed on a bumper sticker at the time of the 1991 Gulf War. While the lower courts ruled that the message was insulting and hate-inciting, the Constitutional Court interpreted the statement as a general protest of war rather than being directed at the German army.²²⁹ The case turned out to be much more controversial than anticipated,²³⁰ and the issue was revisited in the 1995 consolidated appeal.²³¹ The Court stated that in the case of defamation, as far as personal dignity in Article 1 is concerned, freedom of expression must yield.²³² Defamation, however, is to be narrowly defined,²³³ and the presumption of protected

²²³ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] Oct. 10, 1995, 93 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 266 (F.R.G.) ; see also Ute Mager, *Meinungsfreiheit und Ehrenschtz von Soldaten*, 18 JURA 405 (1996); Georgis Gounalakis, *Soldaten sind Mörder*, 47 NEUE JURISTISCHE WOCHENSCHRIFT 481 (1996); Eberle, *supra* note 85, at 878-89, for in-depth analyses.

²²⁴ 1 BvR 1476/91, 1 BvR 1980/91, 1 BvR 102/92, and 1 BvR 221/92.

²²⁵ See Eberle, *supra* note 85, at 882.

²²⁶ BVerfG 45 Neue Juristische Wochenschrift 2943 (1994).

²²⁷ Sections 93b-93d Bundesverfassungsgerichtsgesetz (BVerfGG).

²²⁸ Eberle, *supra* note 85, at 878-79.

²²⁹ *Id.* at 879.

²³⁰ See *id.* at 878-80.

²³¹ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] October 10, 1995, 93 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 266, 268 (F.R.G.).

²³² *Id.* at 290.

²³³ *Id.* at 293-94. See Eberle, *supra* note 85, at 887-88, for further comparison of the different approaches taken by the Constitutional Court and the Supreme Court:

This definition is construed very narrowly out of concern that loose interpretation will detrimentally chill the exercise of expression rights. The Constitutional Court chose to do this by tightening the application of the definition. By contrast, the Supreme Court has accomplished the same end by narrowing the definition of defamation itself and then scrutinizing its application. Despite the differing methodologies, the end result is the same: protecting expressing through limiting its restriction to specifically enumerated, narrowly defined, categories.

Id.

speech works in favor of questions deemed decisive for public discourse.²³⁴

It is critical to interpret precisely what was said, focusing on the meaning with the specific context in mind,²³⁵ and to take into consideration alternative meanings – which would not be punishable under criminal law or would carry a lesser penalty – when establishing the meaning of what was actually said.²³⁶ The lower courts failed to take into consideration that the references were made to soldiers in general, as opposed to an individual person or a specific group.²³⁷ The context suggested the expression of disapproval of war; the word “murderer” was not used as a technical term, but rather illustrated the act of killing in wartime as an act committed by people rather than in some impersonal way.²³⁸ The Court, thus, engaged in a broader interpretation of the phrase that was more permissive of free speech, or, vice versa, a narrower definition of defamation. The narrow definition of defamation requires that the sole intent of the communication be the infliction of personal harm while any substantive content is secondary.²³⁹ In the case of “soldiers are (potential) murderers,” however, the primary intent was to address the question of whether war and military service and the killing of people that may result are morally justifiable or not.²⁴⁰ The struggle between “defense readiness” and pacifism is a question that significantly concerns public discourse; a presumption thus applies in favor of free speech.²⁴¹

Regarding the punishment of group defamation pursuant to Section 185 StGB, the Constitutional Court restated that the requirements are that, first, the attack has to be targeted at a small group; second, the characteristics of this targeted group have to differ from those of the general public; further, all members of the group rather than individual ones must be assaulted; and finally, immutable characteristics such as ethnic, racial, physical or characteristics attributed by society must be the subject of the derogatory remarks.²⁴²

²³⁴ Bundesverfassungsgericht [BVerfGE] [Federal Constitutional Court] October 10, 1995, 93 Entscheidungen des Bundesverfassungsgericht [BVerfGE] 266, 294-95 (F.R.G).

²³⁵ *Id.* at 295.

²³⁶ *Id.* at 297.

²³⁷ *Id.* at 297-98.

²³⁸ *Id.* at 298.

²³⁹ *Id.* at 303.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 303-04.

²⁴² *Id.* at 299-302; Brugger, *Ban or Protection*, *supra* note 2, at 12; Eberle, *supra* note 85, at 888-89.

V. THE LESSONS PROVIDED BY THE GERMAN APPROACH

The central lesson that the comparison of United States and German hate speech regulation yields is that the German approach is far from providing a clear answer to the problem. The German Court is caught in an intricate balancing act for which it has not found a universally applicable solution that can be applied to solve the hate speech dilemma. The analysis of the two central hate speech cases in modern German constitutional jurisprudence, the *Holocaust Denial* and the *Soldiers are Murderers* cases, highlight this struggle.

Soldiers are Murderers, on the one hand, confirms the trend of modern German law as one very much following the pattern of the more absolutist American law.²⁴³ On the other hand, this more permissive approach is clearly at odds with the *Holocaust Denial* case. It has, therefore, been observed that the Court has protected dignity at the expense of free speech in near absolute terms in the case of anti-Semitic speech.²⁴⁴ This, however, immediately draws the criticism of viewpoint-based regulation.²⁴⁵ Speech hostile to Nazis, Communists, or anti-Semites, the criticism goes, would not only be protected speech, but there would be no countervailing dignity interests on the part of those groups. More bluntly, “the Federal Constitutional Court appears to be generally more protective of speech that advances the favored government position on these issues than it is of other kinds of speech.”²⁴⁶

As far as other potential targets of hate speech are concerned, it could be argued that the application of the legal proscriptions is not universal and the vigilance is reduced in the case of other groups, such as Turks.²⁴⁷ As the *Holocaust Denial* case shows, the “German commitment to protecting Jewish sensibilities is in this regard remarkably far-reaching.”²⁴⁸ Where other groups are concerned, however, the question centers on the individual, not the group, and asks not “whether the larger climate of equal dignity has been endangered.”²⁴⁹ The law, rather, provides a safeguard against individual attacks. In fact, in German doctrinal treatment, if there is an attack on a group, it is an attack on each individual member of the group based on their group membership, not an attack on the group as such.²⁵⁰ Furthermore, Whitman addresses the misconception that German law, in fact, does what some want it to do:

German collective insult law thus does not do what some American advocates of hate-speech law would like to see done: It does not

²⁴³ Eberle, *supra* note 85, at 881-82.

²⁴⁴ Krotoszynski, *supra* note 2, at 1581.

²⁴⁵ *Id.* at 1584.

²⁴⁶ *Id.*

²⁴⁷ *Id.* Whitman, *supra* note 1, at 1310 cites the Turkish example as well.

²⁴⁸ Whitman, *supra* note 1, at 1310.

²⁴⁹ *Id.* at 1311.

²⁵⁰ *Id.*

establish structural ground rules for respectful interracial relations that will operate regardless of the (ever-elusive) subjective intent of the persons involved. It does not aim to guarantee an atmosphere of dignity.²⁵¹

Regarding the treatment of groups, the discussion shows that the anti-racist legal doctrine in Germany specifically targets Nazi speech.²⁵² The comparison with the treatment of other groups, such as Turks, shows that there is a quite clear distinction between German-Jews and “foreigners” or “immigrants”.²⁵³ The emphasis on the “unique fate” of German Jews leads to the implicit exclusion of all other racial and religious minorities from access to the claim of rights and reciprocal responsibilities on the part of the majority of Germans.²⁵⁴

The most striking aspect of the treatment of hate speech in German jurisprudence is the reluctance toward a discussion of its shortcomings. This is not to say that, as alluded to above, it is a wrong policy choice to deem hate speech a problem of such societal magnitude as to employ the criminal law against it. It is, however, somewhat remarkable to see that infringements on free speech are based on what has been criticized as an overextension of otherwise highly permissible free speech doctrine. Brugger, in pointing out the lack of scholarly discussion, identifies three specific areas which are only rarely addressed: the exact nature of the different treatment of speech, the extent to which a divergence from the usual doctrine is appropriate, and the time frame during which such a divergence should be acceptable.²⁵⁵

As stated at the beginning,²⁵⁶ the singularity of the Holocaust may be the only justification for its treatment in German hate speech law. It 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.”²⁵⁷ Certainly, this singularity has to be kept in mind when looking at the German approach to the *Holocaust Denial* case. At the same time, open discourse

²⁵¹ *Id.* at 1312. Further, Whitman asserts: “Indeed, the German law of insult will greatly be fraught with mystery for the American reader. This is a body of law that shows, in many of its doctrines, a numbness to free-speech concerns that will startle any American. Its law of sexual insult is rooted in what will strike many Americans as comically antiquated notions of sexual honor and desirability. . . . All of this will inevitably lead Americans to wonder whether such a body of law can survive in a modern democratic society. Nevertheless, it survives.”

²⁵² Minsker, *supra* note 2, at 154; *see also* Whitman, *supra* note 1, at 1310: “As for its law of collective insult, in its emphasis on Jews it has an ad hoc quality – though, to be sure, one that is understandable in historical perspective.”

²⁵³ Minsker, *supra* note 2 at 154.

²⁵⁴ *Id.*

²⁵⁵ Brugger, *Ban or Protection*, *supra* note 2, at 21.

²⁵⁶ *Supra*, part II.B

²⁵⁷ Brugger, *Ban or Protection*, *supra* note 2, at 21.

regarding the treatment of hate speech is necessary.²⁵⁸ Public discourse in Germany should “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.”²⁵⁹ Yet, there is very little discussion in Germany about the downside of the German approach to hate speech.²⁶⁰ In fact, even the state of academic discourse on this matter in German constitutional law has been characterized as unsatisfactory.²⁶¹ The key to finding the right balance between freedom of speech and protection from offensive speech, however, lies in openly addressing the problems of the current status.²⁶²

It has been said that hate speech poses “the hardest free speech question of all.”²⁶³ It should come as no surprise, then, that a simple answer cannot be provided. This article demonstrates that turning to the German approach in search of an answer will not yield the desired result – to provide a simple, workable, and in fact already tested solution. The comparative analyses involving Germany have shown that whatever the solution to the problem may be, a look abroad may raise awareness, but will not provide a blueprint for legislation regulating hate speech in the United States. Above all, the lesson should be to examine the German approach carefully and not to overlook its inherent difficulties.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Walker, *supra* note 16, at 3 (citing RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 151 (Alfred A. Knopf 1992)).

