

# HOW MUCH FREEDOM FOR RACIST SPEECH?: TRANSNATIONAL ASPECTS OF A CONFLICT OF HUMAN RIGHTS

*Friedrich Kübler\**

## CONTENTS

I. RACIST SPEECH AS AN ISSUE OF CONSTITUTIONAL LAW .....	336
A. <i>The Emergence of Hate Speech Regulation</i> .....	336
B. <i>Constitutional Review of Speech Regulation</i> .....	337
C. <i>The Example of Defamation</i> .....	338
II. LEGISLATION AND JUDICIAL REVIEW: THE DIVERGING WAYS OF THE UNITED STATES AND OF GERMANY .....	340
A. <i>The Expanding Statutory Framework in Germany</i> .....	340
B. <i>The Narrowing Impact of Constitutional         Adjudication in the United States</i> .....	347
III. RACIST HATE SPEECH AS AN ISSUE OF INTERNATIONAL LAW .....	355
A. <i>Explaining the Divergence?</i> .....	355
B. <i>International Agreements</i> .....	356

---

\* Professor of Law, University of Pennsylvania and Johann Wolfgang Goethe-Universität Frankfurt am Main. This Article is based on a paper prepared for the international conference on "Racist Speech and Freedom of Expression: Legal and Philosophical Issues," organized by the Hungarian Institute in Paris with the cooperation of the Paris Goethe Institute and The Soros Foundation May 9 and 10, 1997, and on a presentation before a faculty workshop at the University of Pennsylvania Law School. I benefited from the discussions in Paris as well as in Philadelphia. In particular, I received helpful advice and comments from Matt Adler, Ed Baker, Colin Diver, Mike Fitts, Robert Gorman, Pamela Harris, Klaus Günther, Seth Kreimer, Helmut Kohl, Stephen Morse, Gery Neumann, and Kim Scheppele. Research assistance by Maryellen Feehery, Rudolf Lemke, Klaus Roller, and Maria Smolka-Day is gratefully acknowledged, but all opinions and errors remain the responsibility of the Author. The *Hofstra Law Review* has relied on the Author for citation style and substance for many of the foreign sources used in this Article. Citations to German sources mirror the German citation style as closely as possible.

C.	<i>The Reasons Behind the International Agreements</i> .....	358
IV.	LOOKING FOR A COMMON GROUND.....	362
A.	<i>Free Speech Concerns</i> .....	362
B.	<i>Consistency Problems of Speech Regulation</i> .....	363
C.	<i>Reasons to Regulate Hate Speech</i> .....	366
D.	<i>Different Speakers</i> .....	368
V.	THE "COMMON GROUND" BETWEEN "SLIPPERY SLOPES" AND "MARGINS OF APPRECIATION" .....	370
A.	<i>The "Slippery Slope" Argument</i> .....	370
B.	<i>The Emergence of a "Common Ground" in Constitutional Adjudication</i> .....	371
C.	<i>The "Common Ground" Between "Margins of Appreciation"</i> .....	375

#### I. RACIST SPEECH AS AN ISSUE OF CONSTITUTIONAL LAW

Racism is certainly not a new phenomenon, but it is a comparatively new issue of constitutional law. This is particularly true in one respect: rules against hate speech emerged about as recently as the judicial review of speech regulation.

##### A. *The Emergence of Hate Speech Regulation*

Specific laws against racist hate speech are largely a product of the second half of the twentieth century.<sup>1</sup> In part, their origins are shaped by the specific national experience. This is particularly obvious in Germany, where its approach is primarily dictated by the trauma of the Holocaust.<sup>2</sup> The emergence of new statutes and their repeated amendments<sup>3</sup> can be understood as a complex response to the darkest chapter in German history—admitting collectively that it happened, trying to establish safeguards against any possible recurrence, and protecting the emotions of the new Jewish communities within the country. At the

---

1. For a comprehensive examination, see the national reports in *STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION 75-295* (Sandra Coliver ed., 1992) [hereinafter *STRIKING A BALANCE*].

2. See generally Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—and Other—"Lies,"* 85 MICH. L. REV. 277 (1986) (discussing the history of German hate speech legislation).

3. See *infra* Part II.A.

same time, the German example has inspired legislation in other countries. The Canadian rules, for example, have been based on the careful studies of the Cohen Committee.<sup>4</sup> One of the Committee's arguments, advocating penal sanctions for hate speech, was based on the premise that the "successes of modern advertising, the triumph of impudent propaganda such as Hitler's, have qualified sharply our belief in the rationality of man."<sup>5</sup>

There are other roots to the emergence of anti-hate statutes, including the more recent acts of racist violence in Europe, which can be attributed to social change, generated by increasing mobility.<sup>6</sup> The addition of ethnic, cultural, and religious diversity to the formerly more homogeneous European societies has generated hatred toward such targets (apart from asylum-seekers) as Turks and Vietnamese in Germany; North Africans in France and Italy; Asians and Africans in the United Kingdom; and gypsies in Spain, Romania, and the former Czechoslovakia. Older conflicts proliferate beyond their traditional boundaries. Violence between Turks and Kurds, and between Serbs, Croates, and Bosnian Muslims mushroom throughout the continent. Thus, legislation against hate speech is equally a response to violent conflicts nurtured by increasing social diversity.

### B. Constitutional Review of Speech Regulation

New laws are, however, merely one side of the new legal issue. The other novelty is that the statutes, ordinances, and regulations banning racist hate speech are often in conflict with constitutional protections of free speech and are, therefore, threatened with invalidation by judicial review. With the exception of the United States, the endowment of judges with the power to enforce civil rights against acts of parliamentary legislation is a recent addition to constitutional law. The German Federal Constitutional Court, established by the post war constitution, the "Basic Law" since 1949, follows the American example and

---

4. The Cohen Committee was established by the Minister of Justice and headed by Dean Maxwell Cohen of McGill University School of Law. See Thomas David Jones, *Human Rights: Freedom of Expression and Group Defamation Under British, Canadian, Indian, Nigerian and United States Law—A Comparative Analysis*, 18 SUFFOLK TRANSNAT'L L. REV. 427, 455 (1995).

5. MAXWELL COHEN, REPORT TO THE MINISTER OF JUSTICE OF THE SPECIAL COMMITTEE ON HATE PROPAGANDA 8 (1966) [hereinafter SPECIAL COMMITTEE].

6. See Paul Gordon, *Racist Violence: The Expression of Hate in Europe*, in STRIKING A BALANCE, *supra* note 1, at 9, 9-17. For an analysis of the increase of hate speech in the United States, see Frederick Schauer, *The Sociology of the Hate Speech Debate*, 37 VILL. L. REV. 805, 808-12 (1992).

has served as a model for the new democracies in Eastern Europe. In addition, the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") has set up its own system of judicial review which, by now, applies throughout the continent.

In addition to this institutional change, the emergence of constitutional courts has been accompanied by a still more pervasive change of legal substance. This change has been particularly obvious in the United States. In spite of the fact that the Supreme Court has the power to enforce the Bill of Rights against legislative restrictions, it was generally understood and accepted that free speech was limited by both traditional and new rules protecting reputation, morals, public peace, and other goods or interests. For nearly two centuries, there could be no doubt that only socially acceptable speech was entitled to constitutional protection. The most obvious example is provided by defamation. It was not until the 1960s that the Supreme Court, in the landmark decision *New York Times Co. v. Sullivan*,<sup>7</sup> began to rewrite the law of slander and libel along lines derived from a new interpretation of the First Amendment. This case had been preceded by a comparable decision of the German Federal Constitutional Court, the *Lüth* opinion,<sup>8</sup> redefining traditional private law restrictions of free speech under the impact of the constitutional guarantee of free expression in Article 5 of the Basic Law. The German Court cited the United States Supreme Court, defining freedom of expression as "the matrix, the indispensable condition, of nearly every other form of freedom."<sup>9</sup> The European Court of Human Rights followed suit a few years later, rejecting the traditional application of Austrian defamation law as a violation of the free speech guarantee provided by Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>10</sup>

### C. *The Example of Defamation*

These judicial developments have set the stage for the debate on the compatibility of racist speech bans with constitutional guarantees of

---

7. 376 U.S. 254 (1964).

8. 7 BVerfGE 198 (1958). For a comprehensive discussion of this opinion, see DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 184-89 (1994); Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 808-27 (1997); Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 252-90 (1989).

9. 7 BVerfGE at 208 (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937)).

10. See *Lingens v. Austria*, 103 Eur. Ct. H.R. (ser. A) (1986), available at <<http://www.dhcour.coe.fr/hudoc1docthejud\sift\108.txt>>.

free speech. In order to illustrate the specific problem to be discussed in this Article, it seems useful to return for a moment to the defamation cases previously mentioned.<sup>11</sup> Although the decisions differ in many respects, they show striking similarities, particularly in their concern with racial issues. In *New York Times*, the Supreme Court reversed the Alabama Supreme Court's ruling which suppressed a newspaper article offering public support for the civil rights movement in the South.<sup>12</sup> In *Lüth*, the German court annulled a decision from below enjoining the appeal to boycott a film director who, under the Nazi regime, had produced an anti-Semitic propaganda movie.<sup>13</sup> In *Lingens*, the European Court of Human Rights invalidated the verdict directed against an Austrian journalist for criticizing Austrian Federal Chancellor Bruno Kreisky, a Jew, for minimizing and defending the Nazi past of one of his cabinet ministers.<sup>14</sup> And it is no less remarkable that all three courts operated very much along the same lines. In each case, the decision of the lower courts had been based on traditional rules of speech regulation. Through the exercise of constitutional law review, the reach of these speech-restricting rules was considerably limited, but the torts of libel or boycott were by no means abolished.<sup>15</sup> There appears to exist a common understanding by all three courts, providing for a "common ground" of reasoning and thus for a common approach to the issue. Public figures can no longer use criminal or tort law in order to deter others from criticizing their ideas, manifestations, performance, or other behavior. However, even the most prominent and the most powerful are not obliged to tolerate malicious falsities and distortions. There persists a core element of protection for an individual's reputational interests, which proves to be resistant even against the demands of public discourse. This harmony has considerable merits (which may be more obvious in other countries than the United States). The "common ground" makes the judicial intervention still more persuasive and thus strengthens the position of the courts.

This common approach appears even more remarkable when reactions to racist hate speech are considered. Part II describes the widely

---

11. See *supra* notes 7-10 and accompanying text.

12. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 (1964).

13. See *Entscheidungen des Bundesverfassungsgerichts (BVerfGE)* at 198, 199.

14. See *Lingens v. Austria*, 103 Eur. Ct. H.R. at ¶ 11-15.

15. For a careful comparative discussion, see GEORG NOLTE, *BELEIDIGUNGSSCHUTZ IN DER FREIHEITLICHEN DEMOKRATIE* (1992) (describing how the impact of freedom of speech by constitutional adjudication has changed the traditional patterns of defamation law); Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995) (analyzing differences in the American and German approaches).

contrasting positions adopted by American and German law. This divergence is even more significant in light of international law asking for state action against extreme forms of racist hate speech; this is explained in Part III. Part IV maps out a conceptual framework which might be useful for the elaboration of a more harmonious understanding. Part V shows how some courts have engaged in the task of providing for a more differentiated approach. This approach may serve as a model, not for solutions, but for a convergence of basic attitudes, without restraining the discretion of paying respect to differing national traditions and needs.

## II. LEGISLATION AND JUDICIAL REVIEW: THE DIVERGING WAYS OF THE UNITED STATES AND OF GERMANY

### A. *The Expanding Statutory Framework in Germany*

How has the German legal system reacted to racist speech? I propose to distinguish four starting points in the development of pertinent rules.

The first approach has been based on the general provisions of criminal and civil law protecting individual integrity against insult, defamation, and similar forms of verbal aggression.<sup>16</sup> This segment of German law is based on a rigorous distinction between statements of fact and expressions of opinion. Criminal sanctions are imprisonment and fines; the civil sanctions include damages, injunctions not to repeat an illegal attack, and the imposition of the duty to retract or correct an untrue statement of fact. There are many cases where these rules operate in a satisfactory manner, particularly where the courts have to deal with the exchange of insulting or fighting words between individuals or small groups facing each other in a local conflict. But there have been and still exist serious difficulties in coping with public statements of a general nature attacking and degrading anonymous collectives like "the Jews" or "the Turks." In many cases, the courts have had to struggle with "the Auschwitz lie"—the denial of the fact that the Holocaust occurred.<sup>17</sup>

---

16. See §§ 185, 186, 189 StGB (F.R.G.) (Penal Code) (prohibiting insults to a person's honor; damage to reputation consisting of factual statements insulting a third person; and disparaging the memory of the dead, respectively); §§ 823, 824, 826 BGB (F.R.G.) (Civil Code) (prohibiting intentional or negligent infringement on the life, body, health, freedom, property, or other rights of another person; endangerment of a third person's credit; and willfully causing damage to another in a manner contrary to public policy, respectively).

17. I owe information and understanding to the excellent discussion by Klaus Günther,

This fact situation raises several issues.

First, civil litigation requires an action brought by a plaintiff. In addition, German criminal law links the prosecution of insulting or defamatory statements to an application or petition made by the injured person. In most of the cases dealing with denials of the Holocaust, there was neither an action nor an application by any of the individuals or organizations which could be viewed as injured or at least as concerned. For this reason, the Penal Code was amended in 1985.<sup>18</sup> The new rule allows the public prosecution of an insulting or defamatory public statement whenever the injured person belongs to a group which had been a victim of the Nazi or of another totalitarian or lawless regime. At the same time, this group has to be part of the German population, and the insult or defamation has to be related to the prosecution by the regime.<sup>19</sup> In addition, the Penal Code now allows the application to be made by relatives or descendants of the victims; even in such a case, prosecution can be initiated *ex officio*.<sup>20</sup>

Another problem has been determining under which circumstances the integrity of an individual is affected by disparaging expressions directed only against her group as a whole. Where anti-Semitic propaganda was under review, the German courts refused to punish insulting or defamatory expressions addressed to "the Jews" or other groups in general.<sup>21</sup> It was only after the defeat of the Nazi regime that these precedents were overruled.<sup>22</sup> The reasons for this modification of a well-established principle have been carefully explained by the highest private law court (Bundesgerichtshof in Zivilsachen). It is the fact of the common destiny, the experience of the persecution by the Nazi regime, which has generated a new identity not only of those who have survived, but also of their descendants living within Germany including

---

Criminal Law Against Anti-Semitism: The Denial of the Holocaust (1996) (unpublished manuscript, on file with the Author).

18. See Stein, *supra* note 2, at 305-14 (detailing the legislative process involved in the 1985 amendment to the Penal Code).

19. See StGB art. 194(1)(2) (F.R.G.) (Penal Code). This rule requires, in addition, that the statement has been distributed in writing or print or by broadcast or that it has been made in an assembly. See *id.*

20. See StGB art. 194(2).

21. See Rechtsprechung des Reichsgerichts (RG Repr.) 3, 606; Reichsgericht in Goldtdammer's Archiv für Strafrecht (RG GA) 75, 295, 298.

22. See Bundesgerichtshof in Strafsachen (BGHSt) 11, 207 (holding that the 30,000 Jews presently living in Germany and formerly persecuted by the Nazis formed a sufficiently defined group for the purposes of Article 185); Bundesgerichtshof in Zivilsachen (BGHZ) 75, 160 (recognizing Jews as a legally articulable group and "Jewishness" as a legally defensible identity).

those born after 1945.<sup>23</sup> These decisions reflect a more general change in the attitude of German courts. Today, they are much more ready to grant protection against attacks on reputation and similar interests addressed exclusively against groups or organizations. The most recent controversy has been triggered by car stickers claiming that “soldiers are murderers.” Germany continues to struggle with the question of whether this can be punished as a defamation of all soldiers serving in the German army.<sup>24</sup>

A final problem has been explaining why a pure and simple denial of the fact of the Holocaust should constitute an insult or defamation of Jews living in Germany. Again, the most elaborate answer has been given by the Bundesgerichtshof in Zivilsachen.<sup>25</sup> A defendant had publicly denounced the Holocaust as a “Zionist lie.” The Federal Court confirmed an injunction issued by a lower court ordering defendant not to repeat this statement. The main issue was why the plaintiff, the grandson of a Jew killed in Auschwitz, should have standing to ask for such an injunction. The court reasoned that the Nazi prosecution provided the Jewish community in Germany with a new and specific identity which determines the relationship between individual German Jews and individual other Germans. For this reason, denying the Holocaust amounts to a refusal to respect the suffering of the victims and their relatives and to pay the esteem owed to the German Jews as a distinguishable group. For the Jewish part of the German population, this respect and esteem is an indispensable condition for living in Germany and a guarantee that anti-Semitic discrimination and prosecution will not happen again.<sup>26</sup>

The difficulties of applying the general rules protecting individual integrity and reputation to the “Auschwitz lie” have been a major reason to look for more specific remedies against racist hate speech. As a result, section 130 of the Penal Code (“StGB”) was amended—in fact completely rewritten—in 1960. The original version of the rule had been introduced in the late nineteenth century in order to protect public peace against “incitement to class struggle.”<sup>27</sup> The new section 130 now reads:

---

23. See BGHZ 75, 160; MARKUS WEHINGER, KOLLEKTIVBELEIDIGUNG—VOLKSVERHETZUNG 38 (1994).

24. See GEORG NOLTE, “SOLDATEN SIND MÖRDER”—EUROPÄISCH BETRACHTET 313 (Archiv für Presserecht, 1996).

25. See BGHZ 75, 160.

26. See BGHZ 75, 160 (161-63).

27. Günther, *supra* note 17, at 11; see also FRANZ STRENG, DAS UNRECHT DER VOLKSVERHETZUNG 501 (Festschrift für Lackner 1987).



“Whosoever attacks the human dignity of others in a manner liable to disturb the public peace by:

1. inciting hatred against a certain part of the population,
  2. inciting to violent or arbitrary acts against such part of the population, or
  3. insulting, maliciously ridiculing or defaming such part,
- shall be punished by a term of imprisonment of not less than three months and not exceeding five years.”<sup>28</sup>

Under this rule, speech could be punished only if the following three conditions were met:

(1) There had to be an act of hateful or degrading speech directed against “part of the population,” that is, a group within Germany.

(2) The act was an attack against the human dignity of others. It is generally—and correctly—assumed that a violation of human dignity requires more than mere criticism of behavior (in a broad sense). Human dignity is affected when and where the identity as a human being, the basic right to be part of the human community, is denied to persons.<sup>29</sup> A typical example is provided by the European Court of Human Rights in *Jersild v. Denmark*,<sup>30</sup> where ethnic minorities were compared to animals, with the implication that they should be eliminated from the community.

(3) Finally, the message had to involve a threat to the preservation of public peace. This element recalls that the original purpose of the rule had been the protection not of individual rights, but of a public good. The 1960 amendment introduced a certain ambiguity, as threats to public peace could only be punished if they involved an attack against human dignity. The combination of the two elements certainly narrowed the field of application of the new rule.

The court decisions rendered on this version of section 130 again show a clear emphasis on anti-Semitic propaganda. Traditional hate acts did not present serious problems for the courts. Pamphlets charging “the Jews” collectively with all sorts of conspiracies and crimes<sup>31</sup> as well as

28. Rainer Hofmann, *Incitement to National and Racial Hatred: The Legal Situation in Germany*, in *STRIKING A BALANCE*, *supra* note 1, at 159, 163 n.16.

29. This distinction is explained by the *Titanic* decision of the Federal Constitutional Court. See 86 BVerfGE 1 (1992). In a satirical article, a disabled young man who had insisted on performing military service had been called a “cripple” as well as a (potential) “murderer.” The latter term he had to tolerate as it referred to his behavior; the former interfered with his human dignity as it degraded him by reason of his physical condition.

30. 298 Eur. Ct. H.R. (ser. A) at ¶ 11 (1994), available at <<http://www.dhcour.coe.fr/hudoc/ViewHtml.a...e=0&Noticemode=&RelatedMode=0&X=116194655>>; see *infra* Part V.B.

31. See BGHSI 16, 49 (holding that an anti-Semitic tract about a banker’s conspiracy in the

putting a sticker saying nothing but “Jew” on the election posters of a candidate running for political office could be equally punished.<sup>32</sup> Again, it was the “revisionist” agitation, the denial of the Holocaust, which proved to be a troubling problem. The highest criminal court (Bundesgerichtshof in Strafsachen) introduced the distinction between the “simple Auschwitz lie” and the “qualified Auschwitz lie.”<sup>33</sup> The simple lie is the mere denial of the Holocaust, which is deemed an insult to the Jews living in Germany but not an attack on their human dignity. The simple lie cannot, therefore, be punished under section 130. The language used by the court is certainly not very appealing. But the basic idea that the mere denial of a historical event, even if made maliciously, does not by itself amount to a violation of human dignity has some merit. In fact, the distinction between the “simple” and the “qualified” lie was used until 1994. At that time, the court decided the *Deckert* case.<sup>34</sup> Deckert, the local chairman of an extremist right wing party, had invited American Fred Leuchter to speak as an “expert” on concentration camps and gas chambers. Deckert translated and commented on the presentation by Leuchter and, for this reason, he was convicted by a panel of the local court under section 130. On appeal, the Federal Court reversed the lower judge’s holding that it was not sufficiently established that Deckert had expressed a “qualified Auschwitz lie”; the case was remanded to another panel of the same local court. This panel affirmed the conviction under section 130, but in sentencing, it demonstrated an embarrassing and even shocking amount of sympathy with Deckert and his motives, granting him release on probation. On appeal by the public prosecutor, the sentence was corrected by the Federal Court.<sup>35</sup> But this was not enough to dampen the shock and the outrage about the incident. As a result of this controversy, section 130 was included in a pending criminal law reform bill and thus amended again in the same year.

The new version of section 130 is more complicated. Its relevant parts read:

- (1) Whosoever, in a manner liable to disturb the public peace,
- (a) incites hatred against parts of the population or invites violence or

---

United States was hostile to the Constitution and inspired hatred).

32. See BGHSt 21, 371. But even these cases show that the courts tend to give a broad reading to the notion of “public peace.”

33. See BGHSt 31, 226; BGH Neue Zeitschrift für Strafrecht (NStZ) 1994, 140.

34. See BGHSt 40, 97 = Neue Juristische Wochenschrift (NJW) 1994, 1421 = NStZ 1994, 390 (annotated by Jürgen Baumann) = Strafverteidiger (StV) 1994, 538 (annotated by Günther Jacobs), abstract available at <<http://www.jura.uni-sb.de/Entscheidungen/abstracts/deckert.html>>.

35. See BGH NJW 1995, 340.

arbitrary acts against them, or

(b) attacks the human dignity of others by insulting, maliciously degrading or defaming parts of the population shall be punished by imprisonment of no less than three months and not exceeding five years.

(2) Imprisonment, not exceeding five years, or fine will be the punishment for whoever

(a) distributes,

(b) makes available to the public,

(c) makes available to persons of less than 18 years, or

(d) produces, stores or offers for use as mentioned in letters (a) to (c) documents inciting hatred against part of the population or against groups determined by nationality, race, religion, or ethnic origin, or inviting to violent or arbitrary acts against these parts or groups, or attacking the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population or such a group, or

(e) distributes a message of the kind described in (1) by broadcast.

(3) Imprisonment, not exceeding five years or fine, will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes an act described in section 220a paragraph 1 committed under the regime of National-socialism, in a manner which is liable to disturb the public peace.<sup>36</sup>

This amendment has considerably enlarged the field of application of section 130 and thus intensified the conflict with the constitutional guarantee for freedom of expression. The basic rule of paragraph (1) provides for the punishment of racial speech without additionally requiring an attack on human dignity, but it retains the requirement of a threat to public peace. Paragraph (2) prohibits the production and distribution of racist materials by print or by the electronic media. It refers neither to human dignity, nor to public peace. Paragraph (3) is obviously designed to cover the "simple" Holocaust lie. A threat to the public peace is still

---

36. StGB art. 130 (F.R.G.) (Penal Code) (translation by Author). StGB art. 220a(1) (F.R.G.) (Penal Code) states:

"Whoever, with the intention of wholly or partially destroying a national, racial, religious or ethnically distinct group as such,

1. kills a member of a group;

2. inflicts serious physical or mental injury . . . on members of a group;

3. subjects the group to living conditions likely to cause death to all or some of the members;

4. imposes measures designed to prevent births within the group;

5. forcibly transfers children from one group to another,

shall be punished by imprisonment for life."

David E. Weiss, Note, *Striking a Difficult Balance: Combatting the Threat of Neo-Nazism in Germany While Preserving Individual Liberties*, 27 VAND. J. TRANSNAT'L L. 899, 927 n.206 (1994) (alteration in original).

required, but not an attack on human dignity. It is not only the denial, but also the approval and the minimization, of the Holocaust which is threatened with criminal sanctions. "Approval" and "minimization" do not constitute (untrue) statements of fact, but rather expressions of an opinion. These notions thus are confronted with additional questions as to their compatibility with the constitutional free speech guarantee.<sup>37</sup>

Restrictions on racist speech are not limited to criminal and civil law; the government can be allowed to intervene by using its administrative law instruments. There is one case which is important primarily due to the fact that the final decision was made by the Federal Constitutional Court.<sup>38</sup> A right wing party had been preparing a public conference with David Irving, an Englishman engaged in pseudo-scientific agitation against the fact of the Holocaust. The Munich city government allowed the conference but, by a specific administrative order, burdened the organizer with the duty of preventing any violation of section 130. The order was affirmed by the local and regional administrative courts. A constitutional complaint brought by the organizer was rejected as unfounded by the Federal Constitutional Court. The opinion states, without engaging in a more profound discussion, that denying the Holocaust is an untrue statement of fact, and that untrue statements of fact do not enjoy the protection of article 5, the free speech guarantee of the German constitution, if the falsity is known to the speaker or if it has been established by proof.<sup>39</sup> The court did not discuss if speech rights of the organizer are affected when he is charged with the responsibility for everything that is said during a conference. But, in any case, the decision affirmed that the constitutionality of section 130, in its old version, was not doubted.

A final consideration—normally not discussed in this context—is broadcasting regulation. This field of law is exclusively reserved to legislation by the states (Bundeslaender). They enact the rules regulating public as well as private broadcasting either by statute or by interstate agreement having the rank of statute. The basic principles are now established in a "Broadcasting Interstate Agreement" formed in 1991 and amended in 1996 by accord of all the states.<sup>40</sup> Article 3, paragraph 1,

---

37. This is discussed by Daniel Beisel, *Die Strafbarkeit der Ausschwitzlüge*, NJW 1995, 997 ff.; Stefan Huster, *Das Verbot der "Auschwitzlüge," die Meinungsfreiheit und das Bundesverfassungsgericht*, NJW 1996, 487 ff. The narrower issue of artistic expression of racist ideas is examined by DANIEL BEISEL, *DIE KUNSTFREIHEITSGARANTIE DES GRUNDGESETZES UND IHRE STRAFRECHTLICHEN GRENZEN* 335-45 (1997).

38. See 90 BVerfGE 241 (1994).

39. See *id.* at 248-49.

40. See *Dritter Staatsvertrag zur Änderung rundfunkrechtlicher Staatsverträge vom*

number 1 of this agreement prohibits programs

which incite hatred against parts of the population or against a group which is determined by nationality, race, religion, or ethnic origin, or which propagate violence and discrimination against such parts or groups, or which attack the human dignity of others by insulting, maliciously ridiculing or defaming parts of the population.<sup>41</sup>

Some of the local statutes refer to this provision, while others have retained their own language. Quite often, these statutes stipulate that programs inciting race hatred or glorifying violence against others are intolerable.<sup>42</sup> The aspects that these rules have in common is that they have never been contested before a court or another forum, and that they are strictly obeyed. The public broadcasting system has completely abstained from any reprehensible broadcasting, and, to date, there do not seem to have been any serious problems with commercial broadcasters either.

### B. *The Narrowing Impact of Constitutional Adjudication in the United States*

As compared with Germany, the American response to hate speech presents a dramatically different scenario. In the United States, the issues of law and policy generated by the phenomenon of racist hate speech have inspired abounding academic literature. Its volume may well, and its intensity and depth certainly do, exceed what has been written in all other countries combined.<sup>43</sup> However, there is no federal or

---

26.8/11.9.1996 (Dritter Rundfunkänderungsstaatsvertrag), reprinted in MEDIA PERSPEKTIVEN DOKUMENTATION (1996).

41. This translation was provided by the Author based upon a document in his possession.

42. See, e.g., Sec. 8 Par. 1 no. 1 Staatsvertrag für das Zweite Deutsche Fernsehen (ZDF-StV).

43. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986); KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* (1995); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992); Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207 (1993); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95; Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, in *SPEAKING OF RACE, SPEAKING OF SEX: HATE SPEECH, CIVIL RIGHTS, AND CIVIL LIBERTIES* 115 (Henry Louis Gates, Jr. et al. eds., 1994); John A. Powell, *Worlds Apart: Reconciling Freedom of Speech and Equality*, 85 KY. L.J. 9

uniform legislation addressing racist hate speech. The occasional and differing regulations enacted by states and by local communities have repeatedly come under judicial review. The emphasis has been, therefore, much less focused on rulemaking than on corrective adjudication. The attitude of the courts, in particular the Supreme Court, has changed over time. There are several steps to be distinguished.

Significant constitutional adjudication based on the Free Speech Clause of the First Amendment began with World War I. The activities of pacifists and other opponents to the military involvement of the United States were viewed as violations of the Espionage Act. The Supreme Court regularly affirmed the verdicts rendered by the lower courts,<sup>44</sup> applying a standard that was explained, with particular clarity, by Justice Holmes in *Schenck v. United States*.<sup>45</sup> The defendant there had been involved in the distribution of leaflets advocating opposition and resistance to the draft. He challenged his punishment as violative of the First Amendment: "It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . ."<sup>46</sup> However, under the circumstances of war, the verdict was upheld, as "the words used" were "of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>47</sup> Later decisions indicate that war was not the only circumstance justifying penal sanctions against extremist political speech; Communist propaganda calling for the violent overthrow of the existing government was found to be equally compatible with the standard of clear and present danger.<sup>48</sup> At this stage, statutes and other

---

(1996).

44. See *Abrams v. United States*, 250 U.S. 616 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Schenck v. United States*, 249 U.S. 47 (1919). For earlier developments in First Amendment adjudication, see David M. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514 (1981). The extent to which the First Amendment was understood as a ban only on prior restraints is shown by Justice Holmes' opinion in *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

45. 249 U.S. 47 (1919).

46. *Id.* at 51-52.

47. *Id.* at 52.

48. See *Dennis v. United States*, 341 U.S. 494 (1951); *Whitney v. California*, 274 U.S. 357 (1927), *overruled in part by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Gitlow v. New York*, 268 U.S. 652 (1925); see also OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 115 (1996) ("[T]he Supreme Court has been measured in its protection of subversive advocacy. Communists were allowed to engage in the general advocacy of revolution, but the Court drew the line when advocacy turned into incitement."). For a particularly critical comment, see Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner's and Rorty's Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 145

regulations were allowed to proscribe the expression of ideas whenever the language used presented such a “clear and present” threat to the good the legislature wanted to protect.

However, a next step, probably encouraged by the famous dissenting and concurring opinions of Justices Holmes and Brandeis,<sup>49</sup> led to much more restrictive standards derived from the First Amendment. In *Cantwell v. Connecticut*,<sup>50</sup> the defendant, a Jehovah’s Witness, was convicted under a state statute which, inter alia, protected the public peace, for aggressively propagating his religion in a Roman Catholic neighborhood.<sup>51</sup> In reversing the verdict, the Supreme Court reasoned that the state was allowed to prohibit “words likely to produce violence in others,” but that defendant’s conduct, “did not amount to a breach of the peace.”<sup>52</sup> At the end of the opinion, the Court addressed the phenomenon of racist speech. Although the importance of free speech rights was emphasized, the Court concluded:

There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits [what] the States appropriately may punish.<sup>53</sup>

The new approach became more obvious in *Chaplinsky v. New Hampshire*.<sup>54</sup> The defendant, again a Jehovah’s Witness proselytizing on a public street, called the city marshal “a God damned racketeer” and a “damned Fascist” during a dispute with the police.<sup>55</sup> His conviction under a state statute protecting public peace was affirmed, but the state’s powers to regulate speech were now described by the Court in a narrower way:

[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and

---

(1996) (“[W]hile arguably consistent on a doctrinal level, American First Amendment jurisprudence has fairly consistently resulted in suppression of extremist speech coming from the left and in toleration of hate propaganda perpetrated by the extreme right.”).

49. See *Whitney*, 274 U.S. at 372 (Holmes & Brandeis, J.J., concurring); *Gitlow*, 268 U.S. at 672 (Holmes & Brandeis, J.J., dissenting); *Abrams*, 250 U.S. at 624, 631 (Holmes, J., dissenting).

50. 310 U.S. 296 (1940).

51. See *id.* at 301-02.

52. *Id.* at 308-09.

53. *Id.* at 310 (referring to the events in Nazi Germany).

54. 315 U.S. 568 (1942).

55. *Id.* at 569.

narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and 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. "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."<sup>56</sup>

The New Hampshire statute met this test, as it did no more than prohibit

"face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitutes a breach of the peace by the speaker—including 'classical fighting words,' words in current use less 'classical' but equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."<sup>57</sup>

*Chaplinsky* remains the authority permitting the regulation of "fighting words."

The *Chaplinsky* approach was affirmed by *Beauharnais v. Illinois*.<sup>58</sup> Defendant, president of the "White Circle League," a racist organization, had warned against "'the white race . . . becoming mongrelized by the negro.'"<sup>59</sup> He was fined \$200 under a state statute outlawing publications or exhibitions portraying "'depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication . . . exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots.'"<sup>60</sup> The defendant challenged the statute as violating his liberty of speech, a defense that was rejected in an opinion delivered by Justice Frankfurter. Justice Frankfurter repeated the formula used in *Chaplinsky*, stating that there are "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitu-

---

56. *Id.* at 571-72 (quoting *Cantwell*, 310 U.S. at 309-10) (footnotes omitted).

57. *Id.* at 573 (quoting *State v. Brown*, 38 A. 731 (N.H. 1895), and *State v. McConnell*, 47 A. 267 (N.H. 1900)).

58. 343 U.S. 250 (1952).

59. *Id.* at 252 (quoting the organization's leaflet).

60. *Id.* at 251 (quoting the statute).



tional problem.”<sup>61</sup> Libel constitutes one of these categories; thus the question presented was whether the Constitution allows a state to punish defamatory utterances directed not merely at an individual but “at a defined group.”<sup>62</sup> The Court decided to grant the state such power. The opinion recounts many incidents of racial conflict: “From the murder of the abolitionist Lovejoy in 1837 to the Cicero riots of 1951, Illinois has been the scene of exacerbated tension between races, often flaring into violence and destruction.”<sup>63</sup> With regard to this history, the Court “would deny experience to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups.”<sup>64</sup> Justices Black, Reed, Douglas, and Jackson dissented, but Justice Douglas drew a fine line:

Hitler and his Nazis showed how evil a conspiracy could be which was aimed at destroying a race by exposing it to contempt, derision, and obloquy. I would be willing to concede that such conduct directed at a race or group in this country could be made an indictable offense.<sup>65</sup>

How do these decisions differ from those of the earlier period? The government is no longer allowed to limit freedom of expression for the protection of any interest directly threatened by speech. However, certain categories of speech remain outside the constitutional guarantee, including obscenity, fighting words, and libel.<sup>66</sup> At the same time, the issue of racist speech is addressed by the Court when it takes into account not only the German, but also the quite different American experience. The conclusion is that racist speech can be outlawed as fighting words and as group libel.

In the mid 1960s, the landmark opinion of Justice Brennan in *New York Times Co. v. Sullivan*<sup>67</sup> led to a further change. Until this opinion, the free speech guarantee of the First Amendment had found its limits in the traditional rules of the law of defamation. After it, “the principle that debate on public issues should be uninhibited, robust, and wide-open,”<sup>68</sup> reversed the analysis for determining the power to regulate speech. The

---

61. *Id.* at 255-56 (quoting *Cantwell*, 310 U.S. at 309-10).

62. *Id.* at 258.

63. *Id.* at 259.

64. *Id.* at 261; see also *id.* at 261 n.16 (citing the classic article by David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942)).

65. *Id.* at 284 (Douglas, J. dissenting).

66. This list is not intended to be exclusive.

67. 376 U.S. 254 (1964).

68. *Id.* at 270.

essence of the tort of libel, as indicated previously,<sup>69</sup> has certainly survived, but its application is now limited by the constitutional guarantee of free expression.

Does this interfere with the group libel approach in *Beauharnais*?<sup>70</sup> *Brandenburg v. Ohio*<sup>71</sup> confronted the Court with a similar fact situation. Defendant organized a Ku Klux Klan meeting and planned to have it filmed and broadcast. During the filmed meeting, ““revengeance”” was threatened and, in a second film depicting the meeting, defendant added that ““the nigger should be returned to Africa, the Jew returned to Israel.””<sup>72</sup> He was convicted under the Ohio Criminal Syndicalism Statute, enacted in 1919, for ““advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform.””<sup>73</sup> In a comparatively short per curiam opinion, this statute was declared unconstitutional as it abridged

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.<sup>74</sup>

The distinction of “mere advocacy” from “incitement to imminent lawless action”<sup>75</sup> shows a similarity with the language in *Chaplinsky*<sup>76</sup> indicating that the public peace can be protected only against speech which is likely to produce immediate violence.

In 1977, the American Nazi Party planned a public march through the village of Skokie, Illinois, a northern suburb of Chicago with a predominantly Jewish population, including several thousand survivors of the Holocaust.<sup>77</sup> Skokie responded by enacting three ordinances prohibiting demonstrations that would incite violence, hatred, abuse, or hostility towards persons or groups by reference to race, nationality, or

69. See discussion *supra* Part I.B.

70. See *supra* notes 58-66 and accompanying text.

71. 395 U.S. 444 (1969).

72. *Id.* at 447.

73. *Id.* at 444; see also OHIO REV. CODE ANN. § 2917.01 (Anderson 1996) (replacing Ohio Criminal Syndicalism Statute section 2923.13 cited in *Brandenburg* and omitting the quoted language).

74. *Brandenburg*, 395 U.S. at 447 (footnote omitted).

75. *Id.* at 449.

76. See *supra* notes 54-57 and accompanying text. *Chaplinsky* is not mentioned in *Brandenburg*, but the Court explicitly overruled *Whitney v. California*. See *Brandenburg*, 395 U.S. at 449.

77. See *Collin v. Smith*, 578 F.2d 1197, 1199 (7th Cir. 1978).

religion.<sup>78</sup> These ordinances were invalidated by the Seventh Circuit.<sup>79</sup> The court distinguished *Brandenburg* and *Chaplinsky* and concluded that Skokie did not justify the ordinances with “a fear of responsive violence” or other threat to public peace.<sup>80</sup> *Beauharnais* could not support the ordinances for the same reason.<sup>81</sup> In addition, the Court found that decisions like *New York Times v. Sullivan* “have abrogated the *Chaplinsky* dictum, made one of the premises in *Beauharnais*, that the punishment of libel ‘has never been thought to raise any Constitutional problem.’”<sup>82</sup> For this reason, the court shares the doubt “that *Beauharnais* remains good law at all after the constitutional libel cases.”<sup>83</sup> The result is supported by the observation that “[l]egislating against the content of First Amendment activity, however, launches the government on a slippery and precarious path.”<sup>84</sup> In any case, it was and is no longer certain that hate speech can be outlawed as group libel.

The final step in the American response to hate speech was achieved by *R.A.V. v. City of St. Paul*.<sup>85</sup> A group of white teenagers burned a cross within the fenced yard of a black family.<sup>86</sup> They were charged under the St. Paul Bias-Motivated Crime Ordinance, making it a misdemeanor to place “on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>87</sup> The Minnesota Supreme Court construed and upheld the ordinance as banning only “fighting words” within the meaning of *Chaplinsky*.<sup>88</sup> This holding was accepted as binding by the United States Supreme Court, with Justice Scalia writing the opinion for a narrow majority.<sup>89</sup> He stated that *Chaplinsky* had to be corrected since obscenity, defamation, and fighting words could no longer be viewed as “categories of speech entirely

78. *See id.* at 1199-200.

79. *See id.* at 1210.

80. *Id.* at 1203.

81. *See id.* at 1204-05.

82. *Id.* at 1205 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942)).

83. *Id.*

84. *Id.* at 1202.

85. 505 U.S. 377 (1992).

86. *See id.* at 379.

87. *Id.* at 380.

88. *See In re Welfare of R.A.V.*, 464 N.W.2d 507, 510 (Minn. 1991).

89. The majority included Chief Justice Rehnquist and Justices Kennedy, Souter, and Thomas. *See R.A.V.*, 505 U.S. at 378-79.

invisible to the Constitution.”<sup>90</sup> Rather, he concluded, they mark areas of speech which can be regulated, but the government is not allowed to impose additional content discrimination.<sup>91</sup> The Court emphasized that this appeared to be particularly true for fighting words, observing that their unprotected features are “essentially a ‘non-speech’ element of communication. Fighting words are thus analogous to a noisy sound truck . . . .”<sup>92</sup> The Court resolved that the St. Paul ordinance was “facially unconstitutional” as it applied only to fighting words that insult, or provoke violence, ““on the basis of race, color, creed, religion or gender.””<sup>93</sup> The Court clarified that the ordinance was not “mere content regulation,” but, in addition, “view-point discrimination.”<sup>94</sup> In carrying this idea further, the Court noted that “a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.”<sup>95</sup> Finally, the Court concluded that the ordinance was unconstitutional, and could not be justified by the intent to protect a group that historically had been the victim of discrimination.<sup>96</sup> The concurring opinion by Justice White views the ordinance as “fatally overbroad because it crimi-

90. *Id.* at 383.

91. *See id.* at 384 (“[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.”).

92. *Id.* at 386.

93. *Id.* at 391.

94. *Id.*

95. *Id.* at 389.

96. *See id.* at 394. This appears to be the only reference to the historical and social context of cross-burning. As to this aspect, Judith Butler comments:

That the cross burns and thus constitutes an incendiary destruction is not considered as a sign of the intention to reproduce that incendiary destruction at the site of the house or the family; the historical correlation between cross-burning and marking a community, a family, or an individual for further violence is also ignored. How much of that burning is translatable into a declarative or constative proposition? And how would one know exactly what constative claim is being made by the burning cross? If the cross is the expression of a viewpoint, is it a declaration as in, “I am of the opinion that black people ought not to live in this neighborhood” or even, “I am of the opinion that violence ought to be perpetrated against black people,” or is it a perlocutionary performative, as in imperatives and commands which take the form of “Burn!” or “Die!”? Is it an injunction that works its power metonymically not only in the sense that the fire recalls prior burnings which have served to mark black people as targets for violence, but also in the sense that the fire is understood to be transferable from the cross to the target that is marked by the cross? The relation between cross-burning and torchings of both persons and properties is historically established. Hence, from this perspective, the burning cross assumes the status of a direct address and a *threat* and, as such, is construed either as the incipient moment of injurious action *or* as the statement of an intention to injure.

JUDITH BUTLER, *EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE* 57 (1997). For similar observations, see Mari J. Matsuda & Charles R. Lawrence III., *Epilogue: Burning Crosses and the R.A.V. Case*, in *WORDS THAT WOUND*, *supra* note 43, at 133, 133-36.

nalizes not only unprotected expression but expression protected by the First Amendment."<sup>97</sup> White sharply criticizes the majority opinion for being inconsistent with precedent.<sup>98</sup> This will not be discussed in the context of this Article, as it is sufficient to state that as a result of the majority opinion, the "fighting word" category for not protected or less-protected speech appears to be no longer available as a justification for any ban imposed on any form of racist hate speech. The views of the majority and the concurring opinion taken together provide little guidance for potential legislatures or regulators, ensuring that any ordinance will probably be either too narrow or too broad or both at the same time.

### III. RACIST HATE SPEECH AS AN ISSUE OF INTERNATIONAL LAW

#### A. *Explaining the Divergence?*

The comparison of the American and the German reaction to hate speech shows widely diverging perceptions and attitudes. The German lawmakers are inspired by a continuing, if not increasing, concern as to how the new or renewed use of language attacking, degrading, and dehumanizing stereotyped or artificially constructed groups may harm not only the victims, but equally the social and cultural web of a civilized community. This concern is so dominant that it has not allowed for a more than very superficial examination as to if and to what extent the expanding rules are compatible with freedom of speech. In the United States, on the other hand, the legislative powers to contain racist speech have been gradually narrowed down by the Supreme Court, and it may well be that none of these powers have survived after *R.A.V. v. St. Paul*.<sup>99</sup> At the same time, the Court's perspective and rhetoric follow a comparable closing trend. In *Beauharnais*, the Justices, speaking for the majority as well as for the dissent, did not leave any doubt that they were fully aware of the atrocities of the Holocaust, as well as of the manifestations of racial violence in their own country. In *R.A.V.*, the Court found that "burning a cross in someone's front yard is reprehensible,"<sup>100</sup> but the victims could be protected by the prohibition of arson and criminal damage to property.<sup>101</sup> Explaining the contrast between the two systems by referring to history looks easy, but it does not appear

---

97. *R.A.V.*, 505 U.S. at 397.

98. *See id.* at 399-407.

99. *See supra* notes 85-98 and accompanying text.

100. *R.A.V.*, 505 U.S. at 396.

101. *See id.* at 380 n.1.

very satisfactory. The German experience mandates comprehensive rules against government interference with free speech rights and the Federal Constitutional Court in general tends to pay full tribute to this need.<sup>102</sup> At the same time, there can be doubts that the American experience would allow one to deny the existence of any factual connections between racist hate speech and acts of brutal violence and enduring suppression.

### B. *International Agreements*

The divergence of the American and the German reactions to hate speech is still more remarkable for a normative reason. There is a broad international consensus that freedom of expression is a fundamental human right which has to be defended against the suppression by governments. This is reflected in, among others, Article 19 of the Universal Declaration of Human Rights;<sup>103</sup> Article 19 of the International Covenant on Civil and Political Rights ("CCPR");<sup>104</sup> the American Convention on Human Rights;<sup>105</sup> Article 10 of the ECHR;<sup>106</sup> and the Conference on Security and Cooperation in Europe.<sup>107</sup> But these guarantees are not thought to be absolute; they are limited by an equally broad international consensus that they do not include the most degrading and threatening forms of racist speech. This is documented by Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination ("CERD").<sup>108</sup> Article 4 says:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of

---

102. See CURRIE, *supra* note 8, at 174-81; Eberle, *supra* note 8, at 800-04.

103. Adopted and proclaimed by the General Assembly Resolution 217A(III) of Dec. 10, 1948. For the text, see STRIKING A BALANCE, *supra* note 1, at 378.

104. Adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A(XXI) of Dec. 16, 1966; entered into force March 23, 1976. For the text, see STRIKING A BALANCE, *supra* note 1, at 381.

105. Adopted by the Organization of American States on Nov. 22, 1969; entered into force on July 18, 1978. For the text, see STRIKING A BALANCE, *supra* note 1, at 382-83.

106. Signed by the Contracting States of the Council of Europe on Nov. 4, 1950; entered into force on Sept. 3, 1953. For the text, see STRIKING A BALANCE, *supra* note 1, at 384.

107. Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 5-29, 1990. For the text, see STRIKING A BALANCE, *supra* note 1, at 388-90.

108. Adopted and opened for signature, ratification, and accession by General Assembly resolution 2106A(XX) of Dec. 21, 1965; entered into force on Jan. 4, 1969. For the text, see STRIKING A BALANCE, *supra* note 1, at 379-80. The history and the problems of interpretation of Article 4 are explained by Karl Josef Partsch, *Racial Speech and Human Rights: Article 4 of the Convention on the Elimination of all Forms of Racial Discrimination*, in STRIKING A BALANCE, *supra* note 1, at 21, 21-28.

persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitements to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of such persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination."<sup>109</sup>

This principle is confirmed by Article 20, paragraph 2 CCPR: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."<sup>110</sup>

It is obvious that Article 4 CERD as well as Article 20 paragraph 2 CCPR conflict with free speech guarantees in international conventions and national constitutions.<sup>111</sup> It is not surprising that the United States, upon ratification of the CERD and of the CCPR, has attached reservations to both of them. Neither Article 4 CERD nor Article 20 paragraph 2 CCPR could "authorize or require legislation . . . by the United States that would restrict the right of free speech . . . protected by the Constitution and the laws of the United States."<sup>112</sup> It has been doubted that these reservations are indispensable.<sup>113</sup> This is not to be discussed here; for the following proposals, it is assumed that, at the very least, *R.A.V. v. City of St. Paul* prevents the United States government from an unre-

109. STRIKING A BALANCE, *supra* note 1, at 379-80.

110. *Id.* at 381. For the history of Article 20, paragraph 2 CCPR and its relationship to Article 4 CERD, see MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 365-69 (1993).

111. This had been intensively discussed in the drafting process. See NOWAK, *supra* note 110, at 367-68; Partsch, *supra* note 108, at 26-27.

112. NOWAK, *supra* note 110, at 770.

113. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 343 (1995); Gerald L. Neuman, *The Global Dimension of RFRA*, 14 CONST. COMMENTARY 33, 42 n.54, 42-43 (1997).

stricted ratification of Article 4 CERD and Article 20 paragraph 2 CCPR. We are then faced with the question of if and to what extent the interpretation given to national constitutions by national adjudication could and should be inspired and guided by the evolving principles of international law, in particular by the normative patterns of agreements providing for the protection of human rights.<sup>114</sup>

### C. *The Reasons Behind the International Agreements*

The increasingly complex relationship between constitutional adjudication and international law cannot be generally discussed within the narrow scope of this Article. The investigation here has to be limited to the much closer question of whether the purpose behind the international rules protecting free speech *and* requiring prohibitions of expressions of racist hatred might advocate a more harmonious approach to resolving such a conflict. Such an approach we have seen in the landmark decisions reshaping, but not eliminating, the tort and criminal law rules against defamation by reconciling them with the requirements imposed by free speech guarantees.<sup>115</sup> Therefore, it has to be asked: What are the purposes served by provisions like Article 4 CERD and Article 20 paragraph 2 CCPR, which advocate a common commitment of all civilized nations to join efforts in order to contain the most threatening and reprehensible manifestations of racial hatred? Several such reasons can be identified.

First, court decisions like *R.A.V. v. City of St. Paul* give the impression of racist hate speech as the spontaneous and emotional behavior of people who are socially marginalized by their lack of education, employment, income, status, and recognition. This observation is likely to obscure another important aspect. The bias and the prejudices triggering specific incidents are mostly generated by organized propaganda and/or by commercially produced and distributed materials. For a rather long time, the business of printing and disseminating anti-Semitic and similarly repulsive publications has been international. In 1965, the Canadian Cohen Committee based its recommendation to introduce legislation against racist speech on the "recent upsurge in hate propaganda" and concluded: "Most worrisome of all is that in recent years Canada has become a major source of supply of hate propaganda that finds its

---

114. For another example of such a confrontation of national traditions with evolving supra-national principles, see J.H.H. Weiler, *Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision*, 1 EUR. L.J. 219 (1995).

115. See *supra* Part I.C.



way to Europe and specially to West Germany.”<sup>116</sup>

Twenty years later, Professor Eric Stein reviewed the then available sources addressing the proliferation of anti-Semitic material and found they suggested that “the center for the collection and distribution of all this literature is located in California.”<sup>117</sup> As it has become obviously impossible to stop the inflow of highly threatening and therefore illegal material through inspections and checks performed by customs services or similar authorities, any defensive measure taken by the receiving country would need the cooperation of the country where the material is produced and shipped.<sup>118</sup> This cooperation can be effectively ensured only by the mechanism of mutual assistance in criminal proceedings. However, the agreements providing for mutual assistance generally require that the acts under investigation can be criminally punished under both legal systems.<sup>119</sup> Thus, a country which views itself as socially peaceful and politically stable and therefore abstains from prohibiting any form of hate speech, can still contribute to the incitement of racial violence in a more exposed country by allowing the production and exportation of racist materials.<sup>120</sup> International conventions requiring sovereign states to outlaw hate speech serve the purpose of eliminating such a threat. Mutual assistance might be particularly needed for the fight against the least justifiable form of racist hate speech—the carefully planned exploitation of racial bias and prejudice in order to maximize profits or power.

A second reason justifying a common commitment to the prohibition of hate speech is that the consequences of racial obsessions and ethnic conflicts will rarely be confined to the territory of one country. The Holocaust was certainly planned and initiated by Nazi Germany,

116. See SPECIAL COMMITTEE, *supra* note 5, at 69.

117. Stein, *supra* note 2, at 280.

118. In a comparable manner, the fight against the abuse of drugs in the countries of consumption depends on the cooperation by the countries where the drugs originate.

119. This is illustrated by the case of Otto Ernst Remer. As an officer in the German army, he had been instrumental in helping Hitler retain control of Germany after the failed assassination attempt in July 1944. After promotion, he had become responsible for Hitler’s personal security. In the 1950’s he began to engage in neo-Nazi activities. In 1994, he fled to Spain in order to escape a 22-month jail term in Germany for publicly denouncing the Holocaust as a deliberate lie. He could not be extradited by Spain, as hate speech there was not penalized until a law prohibiting it was enacted in 1995. See *Otto Remer, 84, Nazi Officer; Helped Foil Anti-Hitler Plot*, N.Y. TIMES, Oct. 9, 1997, at D22.

120. This observation contradicts the popular assumption that legislation should respond exclusively to the local situation. See, e.g., BOLLINGER, *supra* note 43, at 199 (positing that anti-Semitism is not enough of a problem in the United States to require an explicit congressional ban on Nazi speech).

but it evolved into an operation involving victims and cooperators from many other countries. The fight between Turks and Kurds generates violent crimes throughout Europe, and the atrocities committed in the provinces of the former Yugoslavia, particularly in Bosnia, affect many of the neighboring countries. These countries have to host refugees, they are called upon to contribute to peace keeping measures, and they may be exposed to economic externalities by losing markets and other opportunities. The international approach reflects the experience that the consequences of racially motivated violence can rarely be confined to national borderlines.

The case of Bosnia is significant for still another reason. It is often assumed that the events of the 1990s—killings, torture, rape, concentration camps, “ethnic cleansing”<sup>121</sup>—have to be understood as the mere continuation of old ethnic strife which had been merely interrupted and temporarily suppressed by the Communist regime. This view is not confirmed by the reported evidence. Slobodan Milosevic intentionally used Serbian nationalism as an instrument to stabilize and expand his power. He made use of mass media, in particular television, to incite Serbian resentments against Croates and Muslims.<sup>122</sup> The hatred motivating the atrocities has been the result of propagandistic engineering.<sup>123</sup> Warren Zimmermann, the then American ambassador to Bosnia, recalls that the “virus of television spread ethnic hatred like an epidemic.”<sup>124</sup> This observation raises important questions for the Yugoslavia War Crimes Tribunal. Should the prosecution be limited to those in immediate command and to their eager executioners, to the Karadzic, Mladic, and Tadic<sup>125</sup> as well as to the Himmler or Eichmann, or should a figure like Joseph Goebbels, who organized and directed the anti-Semitic propaganda machinery of the Nazi regime, not be equally held responsible for the consequences of his activity? This aspect again recommends a broad international understanding that a limited area of “hard core” racist propaganda cannot be justified as the exercise of free speech rights and, therefore, should not be automatically excluded from

---

121. See MICHAEL P. SCHARF, *BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG* 29-30 (1997).

122. See *id.* at 25.

123. See Anthony Lewis, *War Crimes*, in *THE BLACK BOOK OF BOSNIA* 58 (Nader Mousavizadeh ed., 1996).

124. WARREN ZIMMERMAN, *ORIGINS OF A CATASTROPHE: YUGOSLAVIA AND ITS DESTROYERS—AMERICA’S LAST AMBASSADOR TELLS WHAT HAPPENED AND WHY* 121 (1996).

125. See SCHARF, *supra* note 121, at 93-96. Tadic reportedly singled out the intellectuals, leaders, and other prominent Muslims for immediate execution in the town of Kozarac. See *id.* at 95.

the proceedings of war crime tribunals, be it in Nuremberg or in The Hague.

The European experience suggests a final observation. In *R.A.V. v. City of St. Paul*, the majority opinion framed the issue as one of protecting minorities “who express views on disfavored subjects” against the majority’s “special hostility towards the particular biases thus singled out.”<sup>126</sup> Even if this reflects an accurate understanding of the issue within the sophisticated web of the political process in a country like the United States, it is much less than an adequate description of what has happened and happens in other places. The construction of racial differences between people, and the propagandistic degradation and dehumanization of groups thus singled out and separated, is used as an efficient instrument to maximize power. In this game, the limits between “private” and “state” action become blurred and the rivaling factions grasp and usurp functions of government in order to enhance and stabilize their influence.<sup>127</sup> The closer they get to public office, the more they become interested in gaining and retaining a certain amount of respectability in order to gain the support they need domestically and from abroad.<sup>128</sup> Rules outlawing the language which denies individuals and groups the dignity of human beings can help to interfere with such a strategy; respectability will less easily be reconciled with permanent illegal action.<sup>129</sup> Therefore, laws against racist speech can have symbolic

---

126. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391, 396 (1992).

127. This has been earlier observed for the Nazi regime, but it appears equally, if not even more true, for the feuds between war lords in regions like Bosnia or Central Africa. See generally ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941) (explaining how Hitler and the Nazi Party gained power for themselves by usurping the functions of government).

128. See Fox & Nolte, *supra* note 15, at 10-13. This can be illustrated by the German situation in the early 1930s. The SA continued to shout their racist slurs in the streets; at the same time Hitler and Göring were assuring the German conservatives that this was merely to be taken as the awkward expression of dissatisfaction with the political status quo.

129. There is a proposition that the anti-hate laws of pre-Hitler Germany were generally ineffective. See, e.g., A. ALAN BOROVY, *WHEN FREEDOMS COLLIDE: THE CASE FOR OUR CIVIL LIBERTIES* 50 (1988). This proposition is unfounded—the Weimar Republic had no such laws. For the consequences of this gap, see Ambrose Doskow & Sidney B. Jacoby, *Anti-Semitism and the Law in Pre-Nazi Germany*, *CONTEMPORARY JEWISH RECORD* 498-509 (1940) (detailing that court enforcement of existing rules was ineffective, but “[u]ndoubtedly, the statutes could have been greatly strengthened”); Donald L. Niewyk, *Jews and the Courts in Weimar Germany*, 37 *JEWISH SOC. STUD.* 99 (1975); David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 *COLUM. L. REV.* 727 (1942) (showing how the lack of group libel protection was successfully used by the Nazis and other extreme right wing groups to undermine the democratic government by the systematic distribution of lies). Niewyk’s carefully researched and well documented article concludes: “[Those] matters other than judicial bias were the major obstacles to justice in cases touching upon the legal defense of Jews.” Niewyk, *supra*, at 112. In addition, the prosecution of

importance; they show effects even before or without being enforced by courts. This impact will be strengthened if the law is supported by international agreements mandating such rules.

#### IV. LOOKING FOR A COMMON GROUND

As there appears to exist a need for, or at least a strong interest in, a more harmonized approach to racist speech, it would be useful to examine a few topics in order to map out a conceptual framework and to identify what could be the starting point for a basic agreement. For this reason, the following observations should not be read as the doctrinal analysis of any specific legal system; they are intended to suggest a blueprint of reference for a discussion that might contribute to the approximation of widely differing perspectives.

##### A. *Free Speech Concerns*

The investigation has to start by emphasizing freedom of expression. International conventions and national constitutions protect individual liberty. Their “key ethical postulate is that respect for individual integrity and autonomy requires the recognition that a person has the right to use speech to develop herself or to influence or interact with others in a manner that corresponds to her values.”<sup>130</sup> This freedom, at the same time, is an indispensable element of democracy. It safeguards the “structure of public discourse, so that our democracy will be able to serve the end of collective self-determination.”<sup>131</sup> The “free speech principle requires us to begin with a strong presumption in favor of toleration.”<sup>132</sup> This includes the toleration of unpopular and even distasteful beliefs as well as of the use of repulsive and shocking language. Some more specific aspects have to be mentioned at least briefly.

Public discourse is often the most effective and, in any case, the most desirable method to deal with racist bias and prejudice. Therefore, contributions to this discourse have to be kept free from sanctions. It has been doubted that drawing such a line will be possible: the adoption of censorship would also silence “the subversive, activist use of hate speech.”<sup>133</sup> But the courts, at least those reviewing the constitutionality

---

Judeophobes was impeded by a lack of laws prohibiting defamation on racial grounds and allowing class actions. *See id.*

130. C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 59 (1989).

131. Post, *supra* note 43, at 126.

132. BOLLINGER, *supra* note 43, at 197.

133. Amy Adler, *What's Left?: Hate Speech, Pornography, and the Problem for Artistic Ex-*

of sanctions, have generally been able to distinguish the merely aggressive and inciting from the argumentative use. Thus parody, caricature, and satire remain free even if these products are liable to shock, disgust, and hurt.<sup>134</sup> The same has proven true for news reporting. As long as the media does not adopt and endorse the message advocating racist violence, they retain full discretion as to the manner of presenting the evidence of racist prejudice and hate-inspired activities to their audiences.<sup>135</sup>

At the same time, it has to be remembered that, in a democratic system, free speech is primarily a right protecting minorities against suppression of their views and their communicative desires by the majority. The exercise of unabridged free speech rights can be an effective defense against discrimination and degradation. There will always be the risk that laws punishing hate speech are applied against members of minority groups.<sup>136</sup> However, as modern societies become more diversified, majorities tend to be replaced by an increasing number of minorities. The mere fact that the British legislation against hate speech has led to the conviction of black spokesmen<sup>137</sup> does not support the conclusion that such laws are generally counterproductive. The protection of suppressed minorities is certainly a concern which can and in many cases should encourage statutory bans on racist speech; but such prohibitions should not and cannot be imposed exclusively upon those who speak for a majority.

### B. Consistency Problems of Speech Regulation

The crucial importance of free speech rights for any open and democratic society is indisputable, but why should the freedom to communicate be fully incompatible with any regulation outlawing any form of racial hate speech? The majority opinion in *R.A.V. v. City of St. Paul* appears to come close to such an absolute position.<sup>138</sup> If each ban on racial hate speech is content regulation or even viewpoint discrimi-

---

pression, 84 CAL. L. REV. 1499, 1572 (1996).

134. See 82 BVerfGE 1 (5) ("Hitler-T-Shirt"); see also *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (adjudicating a libel case involving emotional harm).

135. This has been most clearly expressed by the EHRC in the *Jersild* case. 298 Eur. Ct. H.R. (ser. A) at 32-35 (1994), available at <<http://www.dhcour.coe.fr/hudoc/ViewHtml.a...=0&Noticemode=&RelatedMode=0&X=116194655>>.

136. See Nadine Strossen, *Balancing the Rights to Freedom of Expression and Equality: A Civil Liberties Approach to Hate Speech on Campus*, in STRIKING A BALANCE, *supra* note 1, at 295, 307-09 (arguing that the banning of racist speech could aggravate racism).

137. See ERIC BARENDT, FREEDOM OF SPEECH 163 (1985).

138. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-96 (1992).

nation, there remains hardly any room for legislative action. Such a far-reaching doctrine raises serious issues of consistency in the underlying policies.<sup>139</sup>

There is no legal system which does not provide for some regulation of communicative content. At least some forms of obscenity are generally thought to be expression of very little or of no value and therefore outside the constitutional protection of free speech.<sup>140</sup> The reasons for this exclusion are not always well explained,<sup>141</sup> and they have changed over time. Two arguments have emerged as more persuasive than the traditional reference to morals. One is the fear that the distribution and use of pornographic material is related to violence and crime.<sup>142</sup> The other is that obscenity systematically degrades human beings, depicting them as mere objects.<sup>143</sup> Both arguments are directly applicable to racist speech.<sup>144</sup> The basic purpose of racist speech is to degrade others, to deny them their identity as human beings, to exclude them from the entitlements of the basic social and constitutional covenant, and to expose them to violence, "ethnic cleansing," and extermination. At least in its crudest forms, racist hate speech has a normative meaning which transcends the expression of a mere "viewpoint." By denying human dignity to some people, it attacks the very basis of a democratic system.

Similar problems arise with regard to defamation. For good rea-

139. It is not the purpose of this Article to examine the consistency of the majority opinion in *R.A.V.* with precedent. Compare *Watts v. U.S.*, 394 U.S. 705, 708 (1969) (finding that petitioner's threats against the President, although violative of a specific statute, were only "a very crude, offensive method of stating a political opposition to the President"), with *Wisconsin v. Mitchell*, 508 U.S. 476, 487-90 (1993) (validating the application of a statute enhancing punishment for racial animus despite petitioner's First Amendment argument); see also CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 194-95 (1993) (highlighting the Supreme Court's failure to adequately explain the inconsistencies between its decisions in *R.A.V.* and *Mitchell*).

140. See, e.g., *New York v. Ferber*, 458 U.S. 747, 761 (1982) (refusing to confer First Amendment protections on child pornography); *Miller v. California*, 413 U.S. 15, 26 (1973) (stating that "prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection").

141. See GREENAWALT, *supra* note 43, at 103 (stating that "the Supreme Court has never explained fully why obscenity falls completely outside of First Amendment protection").

142. See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986) (explaining that the zoning ordinance applicable to adult theaters was designed to prevent crime); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 n.34 (1976) (explaining that the focus of a zoning ordinance was the correlation between "adult" movie theaters and crime); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973) (citing a report correlating obscene material and crime).

143. This aspect is more obvious in the Canadian adjudication. See *Regina v. Butler* [1992] 89 D.L.R. 449, 489-90 (upholding a criminal obscenity law as a justified limitation on the guarantee of freedom of expression to prevent degrading or dehumanizing women).

144. See Cohen, *supra* note 43, at 258-60.

sons, constitutional adjudication has considerably cut back the traditional rules protecting individual reputation in order to allow uninhibited and robust debate on all matters of legitimate public interest.<sup>145</sup> However, no public official or public figure, as important as she may be, has to tolerate a defamatory falsehood, if she can prove that the statement was made with actual malice, “that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”<sup>146</sup> It is hard to see a First Amendment argument which could compel us to categorically deny groups of persons at least some of the protection reserved for public officials and public figures. If it is true that “there is no constitutional value in false statements of fact,”<sup>147</sup> rules protecting minorities against the dissemination of deliberate falsehoods cannot be judged to be unconstitutional.

Again following venerable legal traditions, it is generally accepted that speech can be regulated in order to preserve “public peace.” This has been the starting point for specific rules against racist hate speech in Germany.<sup>148</sup> In the United States, the common law wrong of “sedition” has survived as a First Amendment exception for “the insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”<sup>149</sup> The borderlines of this exception again raise questions. It is the spontaneous speech, very often the emotional reaction to a conflict situation, which is deprived of protection; thus the well planned and organized infliction of emotional distress or similar harm is privileged. This can hardly be justified by the assumption that the direct attack does not allow a response whereas calculated propaganda can be countered by speech. It has been correctly observed that particularly appalling forms of degrading racial insults will silence their targets.<sup>150</sup> In addition, the fighting words doctrine applies to events where the verbal provocation will be answered by physical force. This approach is “deeply troubling,” the same language might “be punishable if directed at the one person able to physically retaliate and be constitutionally protected if directed at people not able to match the speaker physically.”<sup>151</sup>

---

145. See *supra* Part I.C.

146. *New York Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964).

147. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

148. See *supra* Part II.A.

149. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (citing ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 149 (1941)).

150. See FISS, *supra* note 48, at 119; SUNSTEIN, *supra* note 139, at 186.

151. GREENAWALT, *supra* note 43, at 52.

### C. *Reasons to Regulate Hate Speech*

A more consistent approach will require the more precise identification of the potential and real harms inflicted by racist speech. This issue has been carefully examined before;<sup>152</sup> thus, a short summary should suffice.

First, racist speech advocates discrimination, and it denies the right to equal protection and treatment, which itself is constitutionally ensured by bills of rights, constitutional amendments, and international conventions.<sup>153</sup> But here, the conflict with liberty is most obvious; self-determination includes the right to make choices and to base them on individual predilections. Freedom of expression comprises the freedom to contribute to the social definition of others,<sup>154</sup> yet this freedom may find its legitimate limits where people (e. g., by equating them with animals like rats or with vermin)<sup>155</sup> are denied the dignity which is the basis of all human rights and to which all human beings are equally entitled.

A second result of hate speech is the emotional pain and distress, the intimidation and fear, which racist speech is able to inflict upon members of the targeted group. These harms include "feelings of humiliation, isolation, and self-hatred."<sup>156</sup> It could be argued that suffering these effects is part of the price to be paid by everybody for the huge advantages provided by a system which is based on the principles of free individual expression and open discourse of public affairs. But there are good reasons for a more subtle and differentiating approach. The painful and intimidating effect of racial insults tends to increase with repetition, and it often will be particularly strong for those who have previously been the victims of racially motivated persecution and violence. Under the specific circumstances of Germany, the regard for the survivors of the Holocaust should be sufficient reason to allow the prohibition of maliciously denying the Holocaust. Such a justification carries more weight than the argument generally used by the German

152. See MATSUDA ET AL., *supra* note 43, at 2326-31; Lawrence, *supra* note 43, at 458-66; Post, *supra* note 43, at 118-22 (addressing the harms of racist speech, but not mentioning violence).

153. For a discussion of the impact of the Thirteenth and Fourteenth Amendments on the regulation of racist speech, see Amar, *supra* note 43, at 153-60.

154. See Karst, *supra* note 43, at 95.

155. These had been the facts in a case adjudicated by the European Court of Human Rights. See Jersild, 298 Eur. Ct. H.R. (ser. A) at 11 (1994), available at <<http://www.dhcour.coe.fr/hudoc/ViewHtml.a...e=0&Noticemode=&RelatedMode=0&X=116194655>>.

156. Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 137 (1982).



courts, that untrue statements of fact are barred from free speech protection if the falsity is either known to the speaker or has been established by proof.<sup>157</sup>

A third reason for the imposition of limits upon racist speech is that this form of public stigmatization may silence a minority and exclude its members individually as well as a group from communicative interaction and from integration into the fabric of a civilized society. This “silencing effect” has met with the most academic literary attention.<sup>158</sup> It is obviously difficult to answer racial insults with civilized speech, as they function as a “preemptive strike.”<sup>159</sup> Intimidation may amount to coercion and thus result in much more than discrimination. We are confronted “not simply with a conflict between liberty and equality, but also with a conflict within liberty.”<sup>160</sup> And the injury is not limited to individuals who no longer dare to speak out; it also affects the public good of the marketplace of ideas. The exclusion of potential speakers undermines the utility and the legitimacy of public discourse as a key element of democratic systems.<sup>161</sup> The importance of this aspect is reflected in existing case law. For the United States, it has been persuasively observed that *Brown v. Board of Education*<sup>162</sup> is a case dealing with racist speech.<sup>163</sup> The German Federal Constitutional Court has barred a television network from showing at prime time a docudrama identifying by likeness and name a convicted criminal shortly before release on probation. Having served his term, he was entitled to a fair chance of rehabilitation and the opportunity to become a respected member of his local community.<sup>164</sup> The Court provided protection

157. See 90 BVerfGE 241 (247-48) (“Auschwitz Lie”). In reality, the German constitutional court is not strictly applying such a doctrine. Denying the facts which emphasize German responsibility for the Second World War has been held to be constitutionally protected speech. See 90 BVerfGE 1 (13-14, 20-22) (“Jugendgefährdende Schriften”).

158. See FISS, *supra* note 48, at 116 (arguing that certain speech activities—for example cross-burning—“have to be curbed in order to protect the expressive activities of blacks in the community”); SUNSTEIN, *supra* note 139, at 186; Adler, *supra* note 133, at 1505; Karst, *supra* note 43, at 109-16; Lawrence, *supra* note 43, at 466-72; Frank Michelman, *Universities, Racist Speech and Democracy in America: An Essay for the ACLU*, 27 HARV. C.R.-C.L. L. REV. 339, 351-52 (1992); Post, *supra* note 43, at 120.

159. See Lawrence, *supra* note 43, at 452.

160. FISS, *supra* note 48, at 120.

161. See Lawrence, *supra* note 43, at 468-72; Post, *supra* note 43, at 120.

162. 347 U.S. 483 (1954).

163. See Lawrence, *supra* note 43, at 463 (“*Brown* is a case about group defamation. The message of segregation was stigmatizing to black children. To be labeled unfit to attend school with white children injured the reputation of black children, thereby foreclosing employment opportunities and the right to be regarded as respected members of the body politic.”).

164. 35 BVerfGE 202 (“*Lebach*”), available at <<http://www.uni-wuerzburg.de/glaw/>>

against highly organized and influential media speech in order to safeguard individual chances for communicative participation.

The most pressing need to curb expressions of racial hatred arises from their link to physical violence. It is generally agreed that a narrow set of expressions is exempt from free speech protection: inciting another person to commit a specific crime can be punished as abetting and instigating, and insults provoking immediate violent reactions can be outlawed under the fighting words doctrine.<sup>165</sup> These cases have in common a direct and unambiguous causal connection between a specific expression and a specific violent act. The events involving larger groups, however, are different: the Holocaust, or the killings and mutilations inflicted by lynch mobs,<sup>166</sup> or the use of torture in South Africa,<sup>167</sup> or "ethnic cleansing" in Bosnia cannot be traced to one particular public statement, but this cannot mean that they are unrelated to speech. In each of these examples, as different as they are, we find the *condicio sine qua non* of a "culture" or "climate"<sup>168</sup>—a specific pattern of popular assumptions and beliefs stigmatizing specific groups as inferior and harmful. Such a culture cannot emerge and expand without communication, and it is, to a considerable extent, the product of organized propaganda.<sup>169</sup> Its impact again appears to be complex; only a few may be encouraged to torture and to kill, but many others will become inclined to tolerate what should be unacceptable. Legal rules outlawing extreme forms of racist speech will not suffice to eliminate such a "climate," but they can help to contain it by destroying its legitimacy and by depriving its proponents of their respectability.

#### D. Different Speakers

The elaboration of a "common ground" may finally be advanced by the observation of how the regulation of racist speech can be differentiated as to speakers. Free speech doctrine increasingly distinguishes two justifications for constitutional protection. As a human right, free expression is an indispensable element of individual liberty. Each limi-

---

bv035202.html>. The court explicitly stated that this restriction applied only to a major public service television channel and certainly not to any form of a more private communication.

165. See *supra* Part II.B.

166. See Karst, *supra* note 43, at 112.

167. See Suzanne Daley, *Apartheid Torturer Testifies, As Evil Shows Its Banal Face*, N.Y. TIMES, Nov. 9, 1997, at A1 (describing the practices inspired by the ideology of apartheid, which are now revealed by South Africa's Truth and Reconciliation Commission).

168. See Gordon, *supra* note 6, at 15-16.

169. See *supra* Part III. C.

tation conflicts with the speaker's fundamental right to expressive self-determination and self-realization,<sup>170</sup> and can therefore be justified only for reasons carrying as much weight as the basic human right. At the same time, speech is protected for functional reasons: "A system of free expression . . . has value because it enables the public . . . to arrive at truth and make wise decisions, especially about matters of public import."<sup>171</sup> This distinction explains why we tend to give some protection to forms of expression—like corporate or commercial speech—that cannot be viewed as serving the primary purpose of human self-expression.<sup>172</sup> Their protection is justified and required by the social purpose they serve; therefore regulation enhancing this purpose has to be allowed.

This distinction is reflected in the ways hate speech is regulated. There appears to exist a broad consensus that conversations of a purely private nature—within the family or a small group of friends—should be kept free from any sanctions.<sup>173</sup> This exclusion respects a core area of individual liberty. The exchange of views with those who are next to the speaker should be kept free from legal intervention, regardless of how offensive and harmful these views may appear to others. At the same time, German law has subjected broadcasting to much stricter rules than any other form of communication.<sup>174</sup> Such a distinction is not unknown to American law. As "the broadcast media have established a uniquely pervasive presence in the lives of all Americans"<sup>175</sup> and as "broadcasting

170. See BAKER, *supra* note 130, at 47-69; Friedrich Kübler, *Massenkommunikation und Medienverfassung*, in Festschrift für LERCHE 649 (1993). Elena Kagan views this as a "speaker-based" model of First Amendment doctrine. See Kagan, *supra* note 43, at 424.

171. Kagan, *supra* note 43, at 424 (calling this second approach the "audience-based" model); see also SUNSTEIN, *supra* note 139, at 53-77 (explaining that one of the most important issues in contemporary democracies is the regulation of broadcasting); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 787-94 (1987) (outlining how the market constrains the presentation of matters of public interest and importance).

172. See C. Edwin Baker, *Turner Broadcasting: Content-Based Regulation of Persons and Presses*, 2 SUP. CT. REV. 57, 62-80 (1994).

173. The new version of Article 130 of the German Penal Code sanctions speech "liable to disturb the public peace" or distribution by mass media or statements made "in public or in an assembly." See *supra* notes 27-39 and accompanying text. In a very similar way, section 18, paragraph 2 of the British Public Order Act 1986 explicitly provides "that no offence is committed where the words or behavior are used, or the written material is displayed, by a person inside a dwelling, and are not heard or seen except by the persons in that or another dwelling." For this legislation, see Public Order Act 1936 § 18, para. 2; BARENDT, *supra* note 137, at 163-64. In very much the same way, French law only sanctions messages made to the public. See GUIDE DES LOIS ANTIRACISTES 8-9 (Ministère de la Justice, 1994) (text on file with Author).

174. See *supra* Part II.A.

175. Federal Communication Comm'n v. Pacifica Found., 438 U.S. 726, 748 (1978).

is uniquely accessible to children,"<sup>176</sup> indecent speech, which would be protected for all other speakers, can be banned from the programs of radio and television. Constitutional protection could, therefore, be reduced for the exclusively commercial production and distribution of hate speech material.

## V. THE "COMMON GROUND" BETWEEN "SLIPPERY SLOPES" AND "MARGINS OF APPRECIATION"

### A. The "Slippery Slope" Argument

The rough sketch of the framework conditions suggests that there are many starting points for the elaboration of a "common ground." The respect for the fundamental needs addressed by international agreements<sup>177</sup> can be reconciled in many ways with the normative propositions of constitutional systems emphasizing the importance of collective self-determination by public discourse. But there remains another argument opposing a more balanced approach to racist hate speech—"simply the inability to draw any line that would effectively exclude this kind of speech while not intruding on speech that everyone believed valuable and worthy of protection."<sup>178</sup> It appears that racist speech lends itself more than other issues to this reasoning:

The *Skokie* controversy provides one of the most notorious modern examples of this type of argument in freedom of speech debates. The argument there was not that freedom of speech in theory *ought* to protect the Nazis, but rather that denying free speech protection to Nazis was likely to start us down a slippery slope, at the bottom of which would be the denial of protection even to those who should, in theory, be protected.<sup>179</sup>

Why is this concern not shared by other legal systems? Is it the sheer size of the United States, its internal diversity, and, in addition, its tradition to adjudicate by jury, which requires that the lines be drawn by a very broad brush? Other systems face similar difficulties; this is most obvious in examining the judicial enforcement of the European Human

---

176. *Id.* at 749.

177. *See supra* Part III.B.

178. BOLLINGER, *supra* note 43, at 34.

179. Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 363 (1985) (footnotes omitted) (referring to *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978)); *see supra* notes 77-84 and accompanying text.

Rights Convention.<sup>180</sup> Even in the United States, the rhetoric of the “slippery slope” (or the “foot in the door” or “camel’s nose in the tent”)<sup>181</sup> appears to be losing its magic: “[T]he line-drawing claim is one of the most beguiling methods of obfuscation and diversion in legal argumentation,”<sup>182</sup> “totalizing” is an extreme form of—mostly disguised—privileging;<sup>183</sup> slippery slope arguments represent “an exaggerated form of distrust”<sup>184</sup> and could “in virtually every case” be equally made for the opposite proposition.<sup>185</sup> This rejection of the slippery slope argument is particularly persuasive where we are faced with conflicts of human rights. In these cases, the task of constitutional adjudication should be to draw the finer lines which will take into account the legitimate concerns of both sides.

### B. *The Emergence of a “Common Ground” in Constitutional Adjudication*

It may be useful to recall very briefly that there are constitutional courts that have engaged in the task of reconciling freedom of expression with internationally mandated restrictions for racist hate speech.

Article 269 of the Hungarian Penal Code punishes not only the incitement of hatred against nations, people, creed, or race in paragraph 1, but, in paragraph 2, the use of offensive or denigrating expressions against these groups.<sup>186</sup> In a case where the publisher of an extremist right wing newspaper had engaged in anti-Semitic propaganda and therefore been accused under Article 269,<sup>187</sup> the Hungarian Constitutional Court annulled paragraph 2 but upheld paragraph 1 of this provision.<sup>188</sup> The decision explains that freedom of expression protects every idea, “irrespective of the value or veracity of its content”; every individual opinion, “good or bad, pleasant or offensive,” has a place in the social process of communication. But the state may resort to restriction,

180. See *infra* Part V.B.

181. Schauer, *supra* note 179, at 361.

182. BOLLINGER, *supra* note 43, at 37.

183. See Powell, *supra* note 43, at 23.

184. Cohen, *supra* note 143, at 257.

185. See Schauer, *supra* note 179, at 381.

186. See Büntető Törvénykönyv art. 269 (Penal Code).

187. See GABOR HALMAI, DIE MEINUNGSFREIHEIT IN DER RECHTSPRECHUNG DES UNGARISCHEN VERFASSUNGSGERICHTS, in FESTSCHRIFT FÜR STERN 953, 957 (1997) (relating the facts of the case); Gabor Halmái, *Criminal Law as Means Against Racist Speech? The Hungarian Legal Approach*, 4 J. CONST. L. E. & CENT. EUR. 41, 45-46 (1997) (providing a critical comment on the case).

188. See Decision (V.26.) AB from Dec. 30, 1992 (English translation on file with Author).

where this is indispensable for the protection of another fundamental right, in particular for the protection of human dignity which is "everyone's birthright."<sup>189</sup> Therefore, the incitement of hatred against groups defined in racial, ethnic, national, or religious terms can be outlawed: "The tragic historical experiences of our country prove that views preaching racial, ethnic, national or religious inferiority or superiority, the dissemination of ideas of hatred, contempt and exclusion endanger the values of human civilization."<sup>190</sup>

In two opinions, both enormously well researched and carefully argued, and both accompanied by an equally impressive dissent, the Canadian Supreme Court engaged in the drawing of similar lines.<sup>191</sup> Section 319(2) of the Canadian Criminal Code outlaws the communication of statements, other than in private conversation, that willfully promote hatred against any identifiable group.<sup>192</sup> Keegstra, the defendant high school teacher, was convicted for describing Jews to his pupils as "treacherous," "sadistic," "money-loving," "child-killers."<sup>193</sup> His conviction was affirmed. The Canadian Charter of Rights and Freedoms protects freedom of expression (section 2(b)), as well as equality (section 15(1)) and "the preservation and enhancement of the multicultural heritage of Canadians" (section 27). The Court referred to all of these provisions as well as to Article 4 CERD and Article 20 paragraph 2 CCPR,<sup>194</sup> and found that the ban on hate speech satisfies a pressing and substantial concern in a free and democratic society.<sup>195</sup> In the end, the Court saw a conflict between speech rights and concluded "that it is through rejecting hate propaganda that the state can best encourage the protection of values central to freedom of expression."<sup>196</sup> But only two years later, the limits imposed upon the regulation of racist speech under section 2(b) of the charter became obvious in another criminal case appealed to the Supreme Court.<sup>197</sup> Defendant Zundel had published a booklet, which had previously been printed and distributed in the United States, describing the Holocaust as a myth perpetrated by a worldwide Jewish conspiracy.<sup>198</sup> The conviction was based on section 181 of the

---

189. *Id.* at 5.

190. *Id.* at 4.

191. For an excellent summary of these cases, see GREENAWALT, *supra* note 43, at 64-70.

192. See Canadian Criminal Code § 319(2).

193. See *Regina v. Keegstra* [1990] 3 S.C.R. 697, 713-14.

194. See *supra* Part III.

195. See *Keegstra*, 3 S.C.R. at 745-49.

196. *Id.* at 764.

197. See *Regina v. Zundel*, [1992] 2 S.C.R. 731.

198. See *id.* at 779-80.

criminal code, which prohibited the willful publication of false statements likely to cause injury to a public interest.<sup>199</sup> This time, the court reversed for section 181's "fatal flaw—its overbreath."<sup>200</sup> The Court held that

Section 181 can be used to inhibit statements which society considers should be inhibited, like those which denigrate vulnerable groups. Its danger, however, lies in the fact that, by its broad reach, it criminalizes a vast penumbra of other statements merely because they might be thought to constitute a mischief to some public interest . . . .<sup>201</sup>

The *Faurisson* case,<sup>202</sup> decided by the Human Rights Committee enforcing the CCPR,<sup>203</sup> shows how the international legal community reacts to the denial of the Holocaust. Robert Faurisson, a historian of French and British nationality, in a press interview called the gas chambers in the Nazi concentration camps a myth and dishonest fabrication ("c'est une gredinerie"). Associations of French resistance fighters and of deportees to German concentration camps filed a private criminal action against Faurisson under the "Loi Grayssot," which makes it an offense to contest the existence of crimes against humanity which had been established by the International Military Tribunal at Nuremberg in 1945 and 1946. Faurisson was sentenced by French courts to pay a fine and punitive damages. His appeal to the Human Rights Committee was rejected. The Committee did not exclude the possibility that the application of the Loi Gayssot could interfere with the free speech guarantee of article 19 CCPR. But in the case of Faurisson, the Committee saw no reason to reverse the decisions of the French courts. Denying that the Holocaust took place can be punished as a defamation; the government is entitled to take action against this "principal vehicle for anti-semitism."<sup>204</sup>

A final example is provided by the review system established for the enforcement of the European Human Rights Convention. The Commission of Human Rights ("Commission")<sup>205</sup> has rejected two

199. See Criminal Code, R.S.C. ch.1, § 181 (1985) (Can.).

200. *Zundel*, 2 S.C.R. at 772.

201. *Id.* at 771-72.

202. (Commun. No. 550/1993) (16 Dec. 1996) (58th Session), UN H.R. Comm., Doc. No. CCPR/C/58/D/550/1993 (on file with Author).

203. See *supra* note 104.

204. (Commun. No. 550/1993) (16 Dec. 1996) (58th Session), UN H.R. Comm., Doc. No. CCPR/C/58/D/550/1993 at ¶ 9.7.

205. The Commission on Human Rights, an abolished judicial body, had the task to protect the Human Rights Court from an overload of complaints. If a complaint was rejected by the Commission, there was no appeal. Where the Commission found a violation by a Contracting

complaints against national courts. Glimmerven was sentenced to a two-week prison term by Dutch courts for the distribution of leaflets advocating the expulsion of all Surinamers, most of them Dutch nationals, from the Netherlands.<sup>206</sup> His conviction was not found to be a violation of Article 10, the free speech guarantee of the Convention. As Article 17 states: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."<sup>207</sup> The Commission held that Article 17 allows the prohibition of speech which advocates depriving others of their human rights.<sup>208</sup> In a German case, the defendant had displayed pamphlets on a notice board fixed to his garden fence describing the Holocaust as an unacceptable lie and a Zionist swindle.<sup>209</sup> His neighbor, a Jew whose grandfather had been murdered in Auschwitz, brought a private action for defamation; the German Federal Court enjoined the defendant from repeating these statements.<sup>210</sup> The Commission affirmed, stating that the untrue statement of fact defamed the plaintiff, as protection "may be especially indicated vis-à-vis groups which have historically suffered from discrimination."<sup>211</sup>

The most important case went through the Commission to the Human Rights Court. Jersild, a Danish broadcasting journalist, invited three members of the "Greenjackets," a skinhead gang, to present their views on a television program discussing racism. During the interview, they compared Turks and other foreigners with rats and called for their expulsion and extermination.<sup>212</sup> The Danish courts punished not only the speakers, but also Jersild for providing them with the forum of the electronic media. The Human Rights Court reversed his conviction finding that reporting racist views of others without endorsing them is speech

---

state, this state could appeal the case to the Court. See Andrew Drzemczewski, *The European Rights Convention: A New Court of Human Rights in Strasbourg as of November 1, 1998*, 55 WASH. & LEE L. REV. 697, 697 (1998).

206. See *Glimmerveen v. Netherlands* 8348/78 D. & R. 187 (dec. Oct. 11, 1979).

207. Convention for the Protection of Human Rights & Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 211 (entered into force Sept. 3, 1953).

208. See *Glimmerveen*, 8348/78 D. & R. at 195.

209. BGHZ 75, 160; see *supra* notes 22-23 and accompanying text.

210. See *id.*

211. See *X v. Federal Republic of Germany*, App. No. 9235/81, 29 Eur. Comm'n H.R., D. & R. 194, 198 (1982).

212. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. (ser. A) at ¶ 11 (1994), available at <<http://www.dhcour.coe.fr/hudoc/ViewHtml.a...e=0&Noticemode=&RelatedMode=0&X=116194655>>; *supra* note 30 and accompanying text.



protected by Article 10 of the Convention.<sup>213</sup>

### C. The “Common Ground” Between “Margins of Appreciation”

The decisions in the prior section have been mentioned exclusively for the purpose of showing how constitutional adjudication is able to resolve conflicts between free speech rights and rules protecting human dignity. The widely differing solutions found in each of these opinions are not intended to serve as models or examples to be strictly followed by courts in other countries. It is not the intention of this Article to advocate for or recommend identical rules and results for all legal systems. Even within Europe, this would not work. In applying Article 10 of the Convention, the European Human Rights Court grants the courts of the states who signed and ratified the Convention a “margin of appreciation” in order to allow them to take into account different cultural, political, religious, and legal traditions.<sup>214</sup> Such a margin is allowed, for example, with regard to the impact of “morals” in obscenity cases<sup>215</sup> or of national security in cases involving the publication of classified government information.<sup>216</sup> The “common ground” suggested in this article should have a still more modest scope. International conventions like Article 4 CERD<sup>217</sup> and Article 20 paragraph 2 CCPR<sup>218</sup> indicate the need to achieve, across borderlines and across oceans, a shared understanding that a reasonable interpretation of free speech guarantees will allow the prohibition of the most threatening emanations of racial hatred and dehumanizing propaganda. Such a common understanding would still allow each legal system to retain, in almost every respect, a very wide margin of discretion. This would include the drafting of relevant statutes, the interpretation of reprehensible speech, the selection of cases to be prosecuted, and—most importantly—the reading and the application of the constitutional rules. But the “common ground” could help to fight cross-border propaganda of racist violence. This would demonstrate that

---

213. *Id.* at ¶ 32.

214. See Dirk Voorhoof, *The Media in a Democratic Society: Art. 10 of the European Convention on Human Rights*, in LEGAL PROBLEMS OF THE FUNCTIONING OF THE MEDIA IN A DEMOCRATIC SOCIETY 39, 62-66 (Council of Europe/University of Ljubljana Faculty of Law eds., 1995).

215. See *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) (1976); *Case of Müller and Others*, 133 Eur. Ct. H.R. (ser. A) (1988).

216. See *Times Newspapers & Andrew Neil v. United Kingdom*, App. No. 14644/89 (Report of the Commission, October 8, 1991); *Chorherr v. Austria*, 266 Eur. Ct. H.R. (ser. A) (1993).

217. See *supra* notes 108-10 and accompanying text.

218. See *supra* note 110 and accompanying text.

the law is able to endorse highly abstract principles without forgetting the victims.