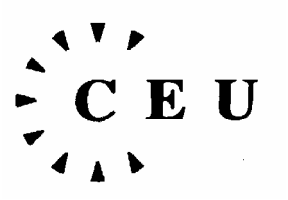

Law against Negation:
Anti-Holocaust Denial Legislation in Europe

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ABSTRACT

This study deals with anti-Holocaust denial legislation in the European context. By looking at a number of different legal systems and the manner in which each has chosen to regulate denial, the present analysis aims at furthering the reader's understanding of why such laws are adopted and how they function in practice.

The study proceeds, in Chapter One, by analyzing the theoretical justifications underlying the regulation of harmful speech. It thus details the normative considerations based on freedom of speech, equality, human dignity, and democracy. It also takes into account the international aspect, accounting for what is increasingly called an international standard of banning hate speech. Furthermore, the study proposes to look at the particular message carried by anti-Holocaust denial laws. Only in so doing, the argument goes, can we fully understand the choice in adopting these laws, explain their record of implementation, and weigh their ultimate societal impact.

The analysis then moves, in Chapter Two, to a detailed cross-national comparison of the texts of anti-denial legislation. Chapter Three discusses emerging jurisprudence surrounding Holocaust denial and its criminalization. The cases covered are varied, and are divided by region (Western Europe—Germany, Austria, France, Belgium; Eastern Europe—Romania and Hungary), but also according to specifics of the legal texts (which explains the grouping together of Spain and Switzerland). The reader will ultimately be able to identify common trends across these cases and even mutual reinforcement between different judicial bodies.

Based on all the reviewed evidence, this examination concludes that the impetus behind anti-Holocaust denial laws is multi-fold. It is both a reaction to internal factors, signaling a certain official stance toward the victims of hate speech and society at large, and to external factors, such as international reputation and membership conditionality.

INTRODUCTION

In January 2007, the United Nations General Assembly adopted Resolution GA/10569 condemning Holocaust denial,[1] while outgoing Secretary General Kofi Annan spoke against Holocaust deniers calling them "bigots."[2] Around the same time, a heated debate was raging on in Europe concerning the German proposal to have a common legal standard against Holocaust denial in the European Union (EU).[3] Present in everyone's minds were Iranian President Mahmoud Ahmadinejad's frequent verbal aggressions against Israel and statements questioning the Holocaust. After all, it was as recently as 2005 that he boldly declared: "they [in the West] have invented a myth that Jews were massacred and place this above God, religions and the prophets."[4] A year later he would also organize the so-called "International Conference to Review the Global Vision of the Holocaust," [5] where known Holocaust deniers were treated as eminent scholars.

The phenomenon of Holocaust denial has retained its prominence in media, academic, and popular debates. The spectrum of opinions as to how to best deal with denial is starkly divided, with those favoring robust speech protection rejecting any attempts at taking denial any more seriously than the utterances of politically peripheral elements. Those in favor of

[1] Quoted in "UN Assembly condemns Holocaust denial by consensus; Iran disassociates itself," *UN News Centre*, January 26, 2007, available at http://www.un.org/apps/news/story.asp?NewsID=21355&Cr=holocaust&Cr1 (last accessed March 31, 2008).
[2] Kofi Annan, quoted in "Annan condemns Holocaust denial," *BBC News*, January 27, 2007, available at http://news.bbc.co.uk/1/hi/world/europe/4653666.stm (last accessed March 31, 2008).
[3] "Berlin seeks to bar Holocaust denial in EU," *International Herald Tribune*, January 12, 2007, available at http://www.iht.com/articles/2007/01/12/news/germany.php (last accessed March 31, 2008). The legislation proposed to harmonize the European juridical responses to denial. The outcome reached later the same year (allowing national legislation to take precedence) represented what many saw as a watered down compromise. "EU adopts measure outlawing Holocust denial," *International Herald Tribune*, April 19, 2007, available at http://iht.com/articles/2007/04/19/news/eu.php (last accessed March 31, 2008).
[4] Quoted in "Iranian leader: Holocaust a 'myth'," *CNN*, December, 14, 2005, available at http://www.cnn.com/2005/WORLD/meast/12/14/iran.israel/ (last accessed March 31, 2008).
[5] The Conference, in the words of Iranian Prime-Minister Manouchehr Mottaki during opening remarks, sought "neither to prove nor to disprove the Holocaust." The speech can be accessed here: http://www.ipis.ir/English/meetings_roundtables_conferences.htm (last accessed March 16, 2007).

regulation have not failed to propose a wide array of legal options to remove Holocaust denial from public discourse. Furthermore, the debate has expanded to include concerns over the negation of other genocides. More and more countries, for example, are expressing concern over the Turkish government's continuous denial of the Armenian genocide. As in the case of Holocaust denial, France has even proposed to address this via criminal law and impose penalties and jail time for the offense of denying the Armenian massacre.[6]

Holocaust denial,[7] besides flaring the imagination of the public, academics, and policy-makers, also presents crucial constitutional difficulties. Its regulation operates at the nexus between competing constitutional commitments: to free speech on the one hand, and to equality, dignity, and democracy on the other. In attempts to balance these competing rights, which ones should be given precedence and on what grounds should others be set aside? While making this choice, whose interests are being protected and whose are being curtailed? Moreover, the type of regulation potentially used against Holocaust denial is also of importance: should the harsh hand of criminal law be allowed to reach "revisionism," or should a civil law solution be found instead? What are the legal, policy, and societal implications of both? Finally, all these considerations are surely grounded in specific historical and doctrinal settings. How do these influence the choice a society faces when examining its response to Holocaust denial? These are the questions the present study addresses.

Yet a most important question regarding Holocaust denial legislation is quite often omitted: Why do some countries choose to regulate Holocaust denial at all? What are the factors that trigger the singling out, criminalizing, and consequent chastising of what some

[6] The full text of the bill is available at: http://www.assemblee-nationale.fr/12/dossiers/reconnaissance_genocide_armenien_1915_loi_2001.asp (last accessed March 31, 2008).

[7] "Holocaust denial" is used interchangeably with the French-inspired term "negationism," as well as with "revisionism" (used in inverted commas to denote Holocaust deniers' hijacking of an otherwise legitimate mode of historical inquiry).

argue is consequentially innocent expression? Equally critically, why do other countries, some very similarly situated as the former, choose *not* to regulate denial? In presenting this regulatory choice puzzle, my intention is to go beyond a largely linear, descriptive (as opposed to explanatory) tradition of studies of Holocaust denial. Framing the research question as one of regulatory choice, and only subsequently analyzing the legal arguments and informative jurisprudence, I believe will prove more revealing in an attempt to understand the interaction of Holocaust denial and the law.

I begin this endeavor by evaluating the arguments for regulation and weighing them against their criticisms. In doing so, I pursue two main goals. My primary goal is to invite the reader to reflect on the multiple constitutional values involved in this debate and on the appropriateness of such regulation in specific contexts. Only by accounting for each country's historical self-understanding, prioritization of competing rights, commitment to democratic values, and engagement with emergent international understandings of the hate speech conundrum can we accurately grasp why, in the end, some countries have anti-denial laws while others reject them. My approach therefore draws substantially on socio-legal understandings of the role of law, of its impact on society, and its symbolic (as opposed to instrumental) role. My ultimate claim is that anti-negationist laws serve a dual signaling role. On the one hand, internally, they signal to the minority (in this case, Jewish) community that the attack presented by Holocaust denial is rejected by the government and by society. Still on the internal front, these laws may also be seen to signal to the majority itself that the values of inclusiveness and respect for the minority impose a clear rebuff of Holocaust denial. On the other hand, externally, anti-negationist laws send a message that "revisionism" is rejected in that specific country. This indicates to the international community a commitment to the protection of the interests of the Jewish population, as well as to values of

strong democracy and equal dignity for all. To a greater or lesser extent, it may also point to the recognition of guilt for the historical persecution of this same minority.

My secondary goal in this study is to extricate the discussion from a course dominated by free speech absolutism, heavily influenced by the American perspective. This latter goal will be less overt, since my thesis primarily deals with European legislation and case law. Nonetheless, the literature in the field is skewed to include substantial, and often lauding, accounts of the American position. My aim, therefore, is also to encourage a second look at the legal fight against Holocaust denial, as evidenced by particular countries in Europe. I hope to shed more light on the cultural and normative specificities of each system's approach, but also, through my comparative undertaking, to illuminate similarities across these approaches. Before engaging in the substantive jurisprudential analysis, however, I proceed with defining the key terms in this debate, an overview of relevant scholarly literature in the field, and a sketch of my methodological concerns in designing the present study.

1. DEFINITIONS

The importance of the definitional step in such an analysis cannot be overstated. What the following definitional preliminaries will reveal is the difficulty of tackling Holocaust "revisionism" from a basic, conceptual perspective. Only by first outlining the contours of the object of the study will it be able to avoid the lack of clarity regarding Holocaust denial legislation, as well as circumvent an omnipresent confusion surrounding the negationist phenomenon more broadly. We need to ask: What do we mean by hate speech? What differentiates it from other types of potentially unpleasant speech and, particularly relevant to our discussion, what is its relationship to Holocaust denial?

Holocaust denial refers to outright refutation, minimization, or trivialization of aspects of the Holocaust, commonly motivated by anti-Semitic ideology. Whether written or spoken,

enunciated by neo-Nazis or pseudo-academics, Holocaust denial implies deceit, manipulation of facts, and anti-Semitism. American historian Deborah Lipstadt explains it in these terms:

> The attempt to deny the Holocaust enlists a basic strategy of distortion. Truth is mixed with absolute lies, confusing readers who are unfamiliar with the tactics of the deniers. Half-truths and story segments, which conveniently avoid critical information, leave the listener with a distorted impression of what really happened. The abundance of documents and testimonies that confirm the Holocaust are dismissed as contrived, coerced, or forgeries and falsehoods.[8]

In the words of another observer, "[i]t is part hatred, part conspiracy theory and, to be generous, perhaps part misinformation."[9]

Of further assistance is the concise semantic analysis offered by writer Andrew Mathis.[10] He identifies three typologies of Holocaust revisionist claims. The first is the so-called "over- and under- defining" of the Holocaust, which abuses the ignorance of the broad public with regard to details of the event (such as how the six million Jews died or the myth of Nazi-made soap out of human body fat).[11] The second is the so-called "exten[sion of] the definition over time," whereby deniers claim that the "final solution" was never meant to include killings, but instead relocation.[12] Finally, Mathis's third typology is that of the so-called "two-valued orientation," which refers to a black-or-white view of the world that revisionists use to disparage normative historiography. They thus assert that, if there is no conclusive evidence of one event (such as the finding of the induction ports for Zyklon-B in the ruins of concentration camps), the entire edifice of Holocaust history is demolished.[13]

Political theorist Bhikhu Parekh helps guide our disentanglement of these difficult categories further. He defines hate speech as that which "expresses, advocates, encourages, promotes or incites hatred of a group of individuals distinguished by a particular feature or

[8] Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory* (Plume, 1993), p. 2.
[9] Credence Fogo-Schensul, "More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms," *Gonzaga Law Review*, Vol. 33, No. 1 (1997), pp. 242.
[10] Andrew E. Mathis, "General Semantics and Holocaust Denial," *ETC* (Jan., 2006), pp. 50-59.
[11] *Ibid.*, pp. 51-53.
[12] *Ibid.*, pp. 53-57.
[13] *Ibid.*, pp. 57-59.

set of features," while differentiating it from "disrespect, dislike, disapproval, or a demeaning view of others."[14] He extricates three distinctive features of hate speech, namely that it singles out an individual or group based on certain features; it stigmatizes said targets by ascribing them qualities "widely viewed as highly undesirable;" and it places them outside "the pale of normal social relationships."[15] While Parekh's definition might seem over-inclusive, I believe it subsumes the wide array of expressions commonly referred to as hate speech. Accepting this definition, however, does not automatically mean that all these sub-types of hate speech are equally open to regulation.[16]

Philosophy scholars such as Susan Brison define hate speech analogously, underlining its discriminatory nature, but also point to its negative consequences. She characterizes hate speech as "[s]peech that vilifies individuals or groups on the basis of such characteristics as race, sex, ethnicity, religion, and sexual orientation, which (1) constitutes face-to-face vilification, (2) creates a hostile or intimidating environment, or (3) is a kind of group libel."[17] Though such definitions of hate speech are not uncontested,[18] they nonetheless accentuate the main characteristics of hate expression: discriminatory remarks made against an individual or group which antagonize and silence the targeted audience.

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[14] Bhikhu Parekh, "Hate Speech: Is there a case for banning?" *Public Policy Research* (Dec. 2005-Feb. 2006), p. 214. Legal scholar Charles Lawrence also draws a distinction between offensive speech and hate speech. He writes that "[t]he word offensive is used as if we were speaking of a difference in taste," when, in fact,

> [t]here is a great difference between the offensiveness of words that you would rather not hear…and the *injury* inflicted by words that remind the world that you are fair game for physical attack, evoke in you all the millions of cultural lessons regarding your inferiority that you have so painstakingly repressed, and imprint upon you a badge of servitude and subservience for all the world to see.

Charles R. Lawrence, III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus," *Duke Law Journal*, Vol. 1990, No. 3 (Jun., 1990), p. 461 (emphasis in the original).

[15] Parekh (2006), p. 214.

[16] For a similar stance on the multitude of forms hate speech may take, see, *inter alia*, Richard Delgado, "Toward a Legal Realist View of the First Amendment," *Harvard Law Review*, Vol. 113, No. 3 (Jan., 2000), pp. 778-802. Delgado accurately points out that "[h]ate speech…comes in many guises, each implicating a unique mix of free-speech values, on the one hand, and dignity/personal-security concerns on the other." *Ibid.*, p. 786.

[17] Susan J. Brison, "The Autonomy Defense of Free Speech," *Ethics*, Vol. 108, No. 2 (January, 1998), p. 313.

[18] See, for example, the discussion in J. Angelo Corlett and Robert Francescotti, "Foundations of a Theory of Hate Speech," *Wayne Law Review*, Vol. 48 (Fall 2002), pp. 1080-1088, arguing that a pro-regulation element should not be assumed in the very definition of hate speech (such as Brison's insistence on the intimidating social environment created).

Other writers on the topic however, put forth definitions of hate speech that are either ambiguous or somewhat misguided. Lawyer Alexander Tsesis defines hate speech as "antisocial oratory that is intended to incite persecution against people because of their race, color, religion, ethnic group, or nationality, and has a substantial likelihood of causing such harm."[19] Tsesis also excludes from his definition "verbal attacks against individuals who incidentally happen to be members of an outgroup."[20] In other words, he excludes much of what numerous scholars primarily mean when discussing hate expression. As it has been argued,[21] such definitions (particularly when used in a legal sense, as Tsesis seems to do) risk being overbroad and seem more aimed at the suppression of racist ideologies rather than of direct verbal attacks and epithets.

To go back to Parekh, he interestingly emphasizes that it is the very content of hate speech that makes it dangerous, and not necessarily its potential result in harmful action.[22] He writes: "[i]t is a mistake…to define hate speech as one likely to lead to public disorder, and to proscribe it because or only when it is likely to do so. What matters is *its content*, what it says about an individual or a group, not its likely immediate consequences, and our reasons for

[19] Alexander Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (2002), p. 211. For an earlier version of the author's arguments, see Alexander Tsesis, "The empirical shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech," *Santa Clara Law Review*, Vol. 40 (2000), pp. 729-786. Tsesis's main claim is that because of their direct causal link to historical events such as the Holocaust, slavery and the expulsion of Native Americans from their lands, expressions of hate should be banned. In his book, he puts forth a model criminal statute to achieve this.

[20] Tsesis (2002), p. 211.

[21] Anuj C. Desai, "Attacking *Brandenburg* with History: Does the Long-Term Harm of Biased Speech Justify a Criminal Statute Suppressing It?," *Federal Communications Law Journal*, Vol. 55, No. 2 (2003), pp. 353-394.

[22] A strong emphasis on precisely the negative consequences on a dramatic scale of unregulated hate speech comes from international human rights tribunal jurisprudence. See the International Criminal Tribunal for Rwanda's decision in *Prosecutor v. Jean-Bosco Barayagwiza, Hassan Ngeze and Ferdinand Nahimana*, Case no ICTR-99-52-T (also dubbed "The Media Trial"), available through www.ictr.org (last accessed March 31, 2008). The Court in *Nahimana* defined hate speech thus:

> Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of persons on the basis of their ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.

Hence, while informed by the experience of the Rwandan genocide, this understanding of hate speech emphasizes its impact upon the dignity of the individual and of the group. See further discussion in Chapter 2.

banning it need not be tied to the latter."[23] While I agree with Parekh on this point, I believe the potential danger in hate speech goes further still, and incorporates its silencing and exclusionary effects on the target audience, as well as a divisive impact on the wider community. This point is further elaborated upon in my discussion in Chapter One.

Operating based on this definition, Parekh looks at Holocaust denial as not automatically a form of hate speech. He writes: "[a]lthough untrue, it is an opinion like any other, and should be tolerated in a free society in the same way that we put up with believers in witchcraft and a flat earth."[24] As will be detailed below, this understanding of Holocaust revisionism as harmless and merely misguided is hotly contested. Parekh himself admits that denial might be a veiled attack on minorities and writes: "it could also be a coded way of saying that the Jews cannot be trusted, will resort to any means to get their way, represent a hostile presence, that no shared life is possible with them, and so on. It then has all the three features of hate speech."[25] Scholars such as historian Deborah Lipstadt have taken a more aggressive stance and have, from the beginning, indicated the clear unison between Holocaust revisionists and anti-Semitism.[26] Throughout my thesis, I too will operate on the assumption of some form of anti-Semitism implicit in attempts at denying the Holocaust. While it is certainly true that ignorance can be at the root of Holocaust revisionism, the type of negationist claims that are covered by the law are hardly the innocent products of misinformation.

One final remark on the importance of language for the purposes of this thesis: Much has been written on the topic of language, truth, and the law.[27] In the case of Holocaust denial, the veracity of the statements of the accused and the underlying liability for such

[23] *Ibid.* (emphasis added).
[24] Parekh (2006), p. 215.
[25] *Ibid.*
[26] Lipstadt (1993). Lipstadt is, however, against the regulation by law of Holocaust denial.
[27] See, for instance Glanville L. Williams, "Language and the Law," *Law Quarterly Review*, Vol. 61 (1945), p. 71, p. 179, p. 293, and p. 384 and Brian Brix, *Law, Language, and Legal Determinacy* (Oxford University Press, 1995).

statements are of utmost importance. In the words of legal scholar Frederick Schauer, "[c]ourts of necessity must determine the factual truth of statements when dealing with areas in which the factual falsity of written or spoken words gives rise to substantive liability."[28] Moreover, the very nature of the Holocaust and a sort of inherent inability of its being appropriately captured by legal proceedings and their technical language make the interaction between law and this gruesome event in human history exceedingly complex.[29] Whether the courts can and should play the role of arbiters of the truth in the case of Holocaust "revisionism" is no longer as straightforward. That, among others, constitutes an underlying query of the present thesis.

2. LITERATURE REVIEW

The literature on hate speech (and Holocaust denial as one of its instantiations), the appropriate philosophical and practical means of addressing it, and the role played by the law in its regulation is abundant. In what follows, I sketch the main lines of scholarly interaction with denial and hate speech. I do so in order to familiarize the reader with the gamut of Holocaust denial literature, while indicating its relative scarcity. The comparative richness of works on hate speech will become even more evident in the theoretical discussion in the next chapter. Nevertheless, the reader should not perceive these two strands of literature as divorced from one another. Rather, they interact and build off of one another and are to be read as complementary.

Holocaust denial legislation is part of a broader category of laws used to regulate hate speech. Examining denial laws in a vacuum would therefore be limiting and unrealistic, given

[28] He continues: "Fraud, deceit, misrepresentation, and obtaining money by false pretenses are obvious examples." Frederick F. Schauer, "Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter," *Virginia Law Review*, Vol. 64, No. 2 (Mar., 1978), p. 276.

[29] See discussion in Lawrence Douglas, *The Memory of Judgment: Making Law and History in the Trials of the Holocaust* (Yale University Press, 2001). For a shorter account by the same author, see Douglas, "Language, Judgment and the Holocaust," *Law and History Review*, Vol. 19, No. 1 (Spring, 2001), pp. 177-182.

that in practice they interact and build off of various other types of legislation. They also vary tremendously in formulation and record of implementation: "What are generically referred to as "Holocaust denial" laws in fact sometimes range more widely than the Holocaust events per se and so the precise terms of the rather complex laws are important."[30] Anti-discrimination, hate speech, and defamation laws can and have all been employed in the fight against Holocaust denial. Scholars have not failed to note this. Writing on freedom of expression more generally, philosophy professor Andrew Altman describes the level of complexity that free speech norms have in a liberal society. Thus, he writes, the free speech framework does not merely include the law of libel, pornography, the law concerning racist or anti-Semitic speech and abstract doctrinal speech of government-imposed limits on speech. The framework, he argues, extends to encompass the nature of the political party and electoral systems, the power of the courts, rules regarding private property, and mass media.[31] This reminder of the complexity of speech regulation and its interaction with a much broader socio-political and legal context is important. The processes at work in the countries in this study unavoidably involve "striking a balance"[32] amidst competing values, different types of legislation, and political processes and societal pressures.

The question arises as to why hate speech is to be regulated to begin with. It is generally agreed that the quest should be for a fine balance between competing values, or, as legal scholar Owen Fiss writes, that regulation of hate speech "forces the legal system to choose between transcendent commitments—liberty and equality."[33] Various authors in both the American and European traditions have written on the desirability of regulation of speech

[30] Dominic McGoldrick and Therese O'Donnell, "Hate speech laws: consistency with national and international human rights law," *Legal Studies*, Vol. 18 (1998), p. 457.
[31] Andrew Altman, "Equality and Expression: The Radical Paradox," in *Freedom of Speech*, ed. Ellen Frankel Paul *et al.* (Cambridge University Press, 2004), pp. 3-4.
[32] The phrase is taken from one of the most useful comparative works on cross-country hate speech regulation, Sandra Coliver ed., *Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination* (Article 19, 1992).
[33] Owen M. Fiss, *The Irony of Free Speech* (Harvard University Press, 1998), p. 13. Elsewhere, Fiss writes also of "a conflict *within* liberty." Owen M. Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Westview Press, 1996), p. 120 (emphasis added).

when it incites to ethnic or racial hatred.[34] I outline the main exponents of this string of literature in what follows, while reminding the reader that Chapter One below deals in greater detail with the implications for the present study of these competing constitutional considerations.

Different strands of literature bring forth arguments rooted in equality when advocating for the regulation of hate speech. Notably, critical race theorists such as Mari J. Matsuda and Richard Delgado[35] and feminist legal scholars such as Catharine MacKinnon[36] have insisted on the need to shift our interpretive lens. Instead of focusing solely on the value of free speech in society, they assert, we should weigh this norm against considerations of equality and equal dignity, particularly in order to protect the least advantaged groups in society. In MacKinnon's words, "[w]herever equality is mandated, racial and sexual epithets, vilification and abuse should be able to be prohibited."[37] This focus on the victim of hateful speech is crucial, for, as Matsuda argues, "[t]olerance of hate speech is not borne by the community at large. Rather it is a psychic tax imposed on those least able to afford it."[38] In the case of Holocaust denial, this translates into concern for the well-being and conditions for equal integration and sense of security for the Jewish community under attach by negationist claims. The approach is not without its critics, as Chapter One especially will make quite

[34] For a compilation, see Coliver (1992).
[35] Mari J. Matsuda *et al.*, *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, 1993). See also Richard Delgado and Jean Stefanic, *Critical Race Theory: An Introduction* (New York University Press, 2001).
[36] Catharine A. MacKinnon, *Only Words* (Harvard University Press, 1993). Though writing primarily on pornography, MacKinnon also discusses the American freedom of speech doctrine more generally. She observes the absence of sufficient considerations of equality and says "the First Amendment has grown as if a commitment to speech were no part of a commitment to equality and as if a commitment to equality had no implications for the law of speech." *Ibid.*, p. 71.
[37] *Ibid*., p. 108.
[38] Matsuda *et al.* (1993), p. 18.

clear. Commenters have expressed fear that laws against hate will bring censorship, the muzzling of the very voices they seek to protect, and dispute their empirical success.[39]

Social science studies have also discussed hate speech and Holocaust denial in the context of the surge in xenophobic activity in recent years, particularly in Europe.[40] The links between neo-Nazism and political extremism have not gone unnoticed, with multiple observers expressing concern over the rise of a new form of anti-Semitism and its ramifications into the political sphere.[41] In this context, then, Holocaust denial is seen as an affront to democracy, challenging the values of tolerance and non-discrimination. It is also perceived as chauvinistic expression, often the translation of an "anti-Semitism without Jews"[42] into political gain.

To go back to the more normative literature, a focus on the actual harm produced by different types of hate speech seems omnipresent.[43] Whichever constitutional norm is given precedence, be it equality, dignity, democracy or otherwise, the policy outcome will depend, in the words of legal scholar Michel Rosenfeld, "on the values sought to be promoted, on the perceived harms involved, and on the importance attributed to these harms."[44] Naturally, each

[39] See, *inter alia*, Nadine Strossen, "Hate Speech and Pornography: Do We Have to Choose Between Freedom of Speech and Equality?," *Case Western Reserve Law Review*, Vol. 46 (1996), pp. 449-478 and discussion in Chapter 1.2. below.

[40] For general works, see, *inter alia*, Michael Minkenberg, *Die neue radikale Rechte im Vergleich: USA, Frankreich, Deutschland* (Westdeutscher Verlag, 1998) and Bert Klandermans and Nonna Mayer, *Extreme Right Activists in Europe: Through the Magnifying Glass* (Routledge, 2006). For an analysis focusing on Central and Eastern Europe, see Sabrina P. Ramet, *The Radical Right in Central and Eastern Europe since 1989* (Pennsylvania State University Press, 1999).

[41] See, *inter alia*, Manfred Gerstenfeld, *Europe's Crumbling Myths: The Post-Holocaust Origins of Today's Anti-Semitism* (Jerusalem Center for Public Affairs, 2003) and Wolfgang Benz, "Anti-Semitism Today," in Martin L. Davies and Claus-Christian W. Szejnmann eds., *How the Holocaust Looks Now: International Perspectives* (Palgrave Macmillan, 2007), pp. 261-271. Again, for perspectives on Eastern Europe, see Randolph L. Braham ed., *Anti-Semitism and the Treatment of the Holocaust in Postcommunist Eastern Europe*, (Columbia University Press, 1994).

[42] I borrow this term from Paul Lendvai, *Anti-Semitism without Jews: Communist Eastern Europe* (Doubleday, 1971).

[43] For a philosophical analysis of the nature of harm that may result from hate speech, see Frederick Schauer, "The Phenomenology of Speech and Harm," *Ethics*, Vol. 103, No. 4 (Jul., 1993), pp. 635-653. See also Schauer, "Speech, Behaviour and the Interdependence of Fact and Value," in eds. David Kretzmer and Francine Kershman Hazan, *Freedom of Speech and Incitement Against Democracy* (Kluwer Law International, 2000), pp. 43-61.

[44] Michel Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis," *Cardozo Law Review*, Vol. 24, No. 4 (2003), p. 1528.

nation's choice in this respect is individual. Yet what is certain is that, as law professor Kathleen Mahoney asserted, "[c]onstitutionally speaking, when these forms of "speech" strike at the heart of other values deeply cherished in a free and democratic society—particularly, the right of equality—doctrinal space for regulation opens up." How several indicative societies have chosen to fill that space is ultimately the object of this study.

In contrast to the broader hate speech literature, much of the writing on Holocaust denial itself tends to be descriptive. It often focuses on describing the origins and history of the negationist phenomenon,[45] on the personalities and personal histories of the deniers,[46] or on providing point-by-point refutations of deniers' claims.[47] Indeed, the author who "put Holocaust denial on the map" as a topic of academic inquiry, historian Deborah Lipstadt, has proceeded in her analysis to a large extent in line with this sequence of steps.[48] These early attempts at tackling Holocaust denial proceed in what I would term a linear manner. Thus, they first identify the deniers, assess their influence, and, when not outright dismissing them as fringe voices, conclude by giving the reader a watertight range of arguments to dismiss them. A more recent resurgence in interest in the matter occurred after the Irving trial in the United Kingdom. These works, often produced by the very parties involved, generally focused around the trial itself, the tactics of David Irving, and the difficult evidentiary task of

[45] Gill Seidel, *The Holocaust Denial: Antisemitism, Racism, and the New Right* (Beyond the Pale Collective, 1986); Pierre Vidal-Naquet, *Assassins of Memory, Essays on the Denial of the Holocaust* (Columbia University Press, 1992); Kenneth S. Stern, *Holocaust Denial* (American Jewish Committee, 1993); Kenneth Lasson, "Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society," *George Mason Law Review*, Vol. 6, No. 1 (1997), pp. 35-86; Michael Shafir, "*Ex Occidente Obscuritas*: The Diffusion of Holocaust Denial from West to East," *Studia Hebraica*, Vol. 3 (2003), pp. 23-82.

[46] Michael Shermer and Alex Grobman. Denying History: Who Says the Holocaust Never Happened and Why Do They Say It? (University of California Press, 2000) and Henri Deleersnijder, *Les prédateurs de la mémoire: la Shoah au péril des négationnistes* (Editions Labor: Editions Espace de Libertés, 2001).

[47] Shelly Shapiro ed., *Truth Prevails: Demolishing Holocaust Denial: The End of the Leuchter Report* (Beate Klarsfeld Foundation, 1990); John C. Zimmerman, *Holocaust Denial: Demographics, Testimonies and Ideologies* (University Press of America, 2000). See also the documentary-style film, presenting a pedagogical approach to combating Holocaust denial arguments, *Autopsie d'un mensonge* (Lili Productions, 2000).

[48] Lipstadt (1993). Lipstadt, however, strongly opposes debating with the deniers, arguing that it only works in their favor by providing them with publicity and the semblance of legitimacy.

proving the Holocaust in the courtroom setting. [49] Valuable as these works are, they do little to expand our knowledge of the more subtle operation of Holocaust denial and, most crucially here, of the legal means of thwarting its occurrence. For that reason, they will inform my analysis to only a limited extent.

More useful are relatively recent attempts at comparatively assessing the use of legislation in the fight against Holocaust denial.[50] Legal scholar Robert Kahn[51] on Western Europe and political scientist Michael Shafir[52] on Central and Eastern Europe are both worthy examples of academic analyses of the text, application, and impact of specific legislation. Their parallel commitments to studying both the legal bases and the enforcement of anti-negationist regulation are praiseworthy. Nevertheless, they fail to address some of the key concerns outlined in the introductory remarks above. First of all, their approach is not grounded on a clear delimitation of the constitutional values implicated. Instead, they are more concerned with the criminal law discussion (Kahn) and the political actors and their motivations (Shafir). To the extent that they do address concerns of speech versus equality and dignity, for instance, they do so in analyzing emergent jurisprudence and not in the

[49] Deborah Lipstadt, *History on Trial: My Day in Court with David Irving* (Harper Collins, 2005). See also the account from the defense's leading expert witness, Richard J. Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial* (Basic Books, 2002) and that of Robert Jan van Pelt, author of an expert report on Auschwitz during the trial, in Robert Jan van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial* (Indiana University Press, 2002).

[50] For mostly descriptive listings of legislation and some jurisprudence on Holocaust denial, see Stephen J. Roth, "The Legal Fight Against Anti-Semitism: Survey of Developments in 1993," *Supplement to Israel Yearbook on Human Rights*, Vol. 25 (1995); Institute for Jewish Policy Research, "Combating Holocaust Denial Through Law in the United Kingdom," JPR Report No. 3 (2000), available at http://www.jpr.co.uk/Reports/CS_Reports/no_3_2000/index.htm (last accessed March 31, 2008); and Michael J. Bazyler, "Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism," Yad Vashem International Institute for Holocaust Studies (2006).

[51] Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study* (Palgrave-Macmillan, 2004), discussing the German, Canadian and French approaches. For an earlier version of his arguments, see Kahn, "Informal Censorship of Holocaust Revisionism in the United States and Germany," *George Mason University Civil Rights Law Journal*, Vol. 9, No. 1 (1998), pp. 125-149. For an updated version, see Kahn, "Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany," *University of Detroit Mercy Law Review*, Vol. 83 (Spring, 2006), pp. 163-194.

[52] Michael Shafir, *Între negare si trivializare prin comparaţie. Negarea Holocaustului în ţările postcomuniste din Europa Centrala şi de Est* (*Between Denial and 'Comparative Trivialization:' Holocaust Negationism in Post-Communist East Central Europe*) (Polirom, 2002), discussing Romania, Slovakia, and Hungary. A work on a similar topic but drawing substantially on Shafir is Florin Lobonţ, "Antisemitism and Holocaust Denial in Post-Communist Eastern Europe," in ed. Dan Stone, *Historiography of the Holocaust* (Palgrave Macmillan, 2006), pp. 440-468.

context of an explicatory theoretical discussion. Furthermore, their studies are inherently limited due to the restricted choice of case studies. While instructive in and of themselves, analyses that only focus on some countries of Eastern or Western Europe, while addressing only limitedly, if at all, other experiences with Holocaust denial legislation are bound to constrain the degree to which their conclusions may be generalized. Not least, these works offer little in the sense of an informed explanation as to why some countries have chosen to embark on the regulatory route while others have not.

Some legal scholarship dealing with Holocaust denial, particularly when addressing the topic from an obviously American-inspired perspective, seems to miss many of the nuances involved. Some observers have thus limited themselves to brand anti-negationist laws as a "radical step of state censorship through imposition of criminal sanctions,"[53] without even attempting to look into the more subtle doctrinal justifications for such laws. Others have pointed to the same laws as an attempt at creating forced acceptance for official history,[54] while failing to take into account the full kaleidoscope of roles that the law, especially sensitive law on controversial issues, plays in society.[55]

Having briefly illustrated some of the common themes and approaches in the main works on Holocaust denial, a note of caution is in order. It regards the literature, also dealing with Holocaust denial, which will not constitute my main focus in the present thesis. As mentioned above, the topic itself is multi-faceted and challenging enough to have spurred interest from a myriad of disciplines. Of these, such subjects as memory politics, postmodernism, and psychology are too far removed from the object of the present study to be covered in much detail. At the same time, strands of legal scholarship (such as Internet

[53] Peter R. Teachout, "Making "Holocaust Denial" a Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience," *Vermont Law Review*, Vol. 30 (Spring, 2006), pp. 655-692.
[54] Emanuela Fronza, "The Punishment of Negationism: The Difficult Dialogue Between Law and Memory," *Vermont Law Review*, Vol. 30 (Spring, 2006), pp. 609-626.
[55] I address precisely this issue in Chapter 1.6. below.

hate speech regulation or academic freedom) will likewise not be delved into in great minutiae, both for lack of adequate space and due to the need for a narrower focus of analysis. I point to some of the main works in these fields here and will only refer back to them where relevant.

Studies in how societies form collective remembrance are intrinsically tied to the question of Holocaust denial. Viewed from this angle, anti-denial legislation may appear as one in a number of steps taken by a community recovering from atrocity to come to terms with its past. Works such as those of legal scholars' Mark Osiel[56] and Brian Havel[57] help us understand Holocaust denial at the intersection of "public memory," the law, and "remembrance of administrative massacre." In the words of another writer, trials of Holocaust deniers are more "about the reflection of the Holocaust, rather than the Holocaust" itself and the defendants are seen as "abusers of memory."[58] Postmodernist theory has also been used in debunking past myths concerning our engagement with the Holocaust. It has often served to point out the bias of our historical projections, as well as the essentializing nature of legal discourse.[59] Some authors writing in the postmodernist tradition have also argued against understanding this strand of scholarship, with its emphasis on deconstruction and a call for the subjective reading of history, as intrinsically legitimizing Holocaust

[56] Mark J. Osiel, *Mass Atrocity, Collective Memory, and the Law* (Transaction Publishers, 1997). For an earlier version, see Osiel, "Ever Again: Legal Remembrance of Administrative Massacre," *University of Pennsylvania Law Review*, Vol. 144 (1996), pp. 463-707 (criticizing the use of criminal prosecutions in an effort to influence a nation's collective memory of state-sponsored atrocities).
[57] Brian F. Havel, "In Search of a Theory of Public Memory: The State, The Individual, and Marcel Proust," *Indiana Law Journal*, Vol. 80 (2005), pp. 605-726 (with an interesting discussion of Austria's complicated relationship with official memory of Nazi aggression).
[58] Vera Ranki, "Holocaust History and The Law: Recent Trials Emerging Theories," *Cardozo Studies in Law and Literature*, Vol. 9 (1997), pp. 26-27.
[59] See, *inter alia*, Lawrence McNamara, "History, Memory, and Judgment: Holocaust Denial, The History Wars, and Law's Problems with the Past," *Sydney Law Review*, Vol. 26 (2004), pp. 353-394.

denial.[60] Psychology, too, has been used in the study of the negationist phenomenon, whether to reveal the motivations of deniers[61] or the responses in their targets.[62]

The literature on Holocaust denial and the Internet has been incredibly prolific in recent years.[63] It generally emphasizes the difficult challenges faced by the law in attempting to regulate a medium as unpredictable and elusive as the virtual world, while acknowledging the lack of consensus on an international anti-hate speech standard between countries. Similarly growing has been the field of studies of Holocaust "revisionism" and the academia.[64] This mirrors and intersects with the rich literature interested in hate speech regulation in universities more generally.[65] These and other works serve to illustrate the wealth of interest in and arguments surrounding the controversial choice of regulating Holocaust denial.

[60] Robert Eaglestone, *Postmodernism and Holocaust denial* (Totem Books, 2001).
[61] See, for instance, Israel W. Charny, "The Psychological Satisfaction of Denials of the Holocaust or Other Genocides by Non-Extremists or Bigots, and Even by Known Scholars," *IDEA*, Vol. 6, No. 1 (Jul., 2001).
[62] See, for example, Evelyn Kallen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation," *Windsor Yearbook of Access to Justice*, Vol. 11 (1991), pp. 46-73.
[63] Fogo-Schensul (1997); Chris Gosnell, "Hate Speech on the Internet: A Question of Context," *Queen's Law Journal*, Vol. 23 (1998), pp. 371-438; Peter J. Breckheimer II, "A Haven for Hate: The Foreign and Domestic Implications of Protecting Internet Hate Speech under the First Amendment," *Southern California Law Review*, Vol. 75 (2002), pp. 1493-1528; Matthew Fagin, "Regulating Speech Across Borders: Technology vs. Values," *Michigan Telecommunications and Technology Law Review*, Vol. 9 (2003), pp. 395-455; Yulia A. Timofeeva, "Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany," *Journal of Transnational Law and Policy*, Vol. 12, No. 2 (Spring, 2003), pp. 253-285; Lyombe Eko, "New Medium, Old Free Speech Regimes: The Historical and Ideological Foundations of French & American Regulation of Bias-Motivated Speech and Symbolic Expression on the Internet," *Loyola of Los Angeles International and Comparative Law Review*, Vol. 28 (Winter, 2006), pp. 69-127.
[64] Geri J. Yonover, "Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy," *Dickinson Law Review*, Vol. 101, No. 1 (1996), pp. 71-94 and Stanley Fish, "Holocaust Denial and Academic Freedom," Seegers Lecture, *Valparaiso University Law Review*, Vol. 35 (2001), pp. 499-524. For a critical reading of Fish's arguments, see Richard H. Weisberg, "Fish Takes the Bait: Holocaust Denial and Post-Modernist Theory," *Law and Literature*, Vol. 14, No. 1 (Spring, 2002), pp. 131-141.
[65] Rodney A. Smolla, "Academic Freedom, Hate Speech, and the Idea of a University," *Law and Contemporary Problems*, Vol. 53, No. 3 (Summer, 1990), pp. 195-225 and Fletcher N. Baldwin, Jr., "The Academies, "Hate Speech" and the Concept of Academic Intellectual Freedom," *University of Florida Journal of Law and Public Policy*, Vol. 7 (1995), pp. 41-93.

3. METHODOLOGY

After setting the scholarly scenery and before embarking on the actual analysis of Holocaust denial legislation, a methodological note is in order. Clarification of my research approach and a brief explanation for the choice of case studies and their expected relevance will help guide the reader.

Too often when speaking of Holocaust denial regulation, Germany is assumed to be the "prototypical" case study.[66] The ensuing logic holds that Germany features "as many key characteristics as possible that are akin to those found in as many cases as possible,"[67] making generalizations seem not only feasible, but reliable. It is a false assumption. As will be seen, Germany's experience with this type of legislation combines unique elements of national history and endogenous legal doctrine that set it apart from other countries. That should have us question our reliance on the German model toward understanding negationist regulation more broadly.

My analysis ambitions to extend beyond inferences based on a restricted number of cases. In this endeavor, I rely on observations from countries ranging from France, Belgium, Spain, and Luxembourg, to Germany, Austria, and Switzerland, to Romania, Slovakia, and Hungary. The countries have not been chosen randomly. They exhibit characteristics making them relevant to a cross-continental, cross-cultural study. The first unifying element is their European identity, with all enjoying membership in the Council of Europe and all except one (Switzerland) being part of the European Union (EU). This will become relevant in understanding how certain doctrinal aspects which may have been problematic in other

[66] For a more detailed discussion of using the "prototypical case study" principle in comparative constitutional law, see Ran Hirschl, "On the blurred methodological matrix of constitutional law," in Sujit Choudry ed., *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), pp. 53-55. For the use of this method in social science more generally, see Stephen Van Evera, *Guide to Methods for Students of Political Science* (Cornell University Press, 1997), p. 84 and, generally on the use of case studies in social science research design, Chapter 2, pp. 49-88.
[67] Hirschl (2006), p. 53.

contexts do not pose significantly dividing threats here.[68] A second, more crucial, reason for choosing these countries is their legal engagement with the type of legislation under examination. As will be discussed, they have all heatedly debated whether to legislate on Holocaust denial and how to do so. All these countries except for Hungary have laws which either explicitly address denial or which have been, in practice, used to tackle manifestations of this phenomenon. A third element of influence in the selection criteria is the nature of these countries' self-understanding with respect to the Holocaust, their Jewish minorities, and collective guilt. The very fact that all of them were involved in one way or another in the war, and that most (arguably, all) share some form of guilt for actions during it gives this cross-country analysis a distinctive tone.[69]

It is not just similarity that justifies the selection of the above-mentioned case studies. Difference between these countries also justifies my choice. The case of Hungary, with its repeated rejection of an anti-negationist law, will be informative in a distinct sense. At the same time as it is important to understand why countries choose to legislate, it is equally and sometimes more important "to take into account events that did *not* occur and the motivation of political power-holders for not behaving in certain ways."[70] The case of Spain, too, presents an interesting shift: the Constitutional Court recently indicated its disapproval for legal measures against denial.[71] This "step back" on a law previously enforced against negationism shows the complexity and, indeed, fluidity of legal engagement with Holocaust denial.

[68] I have in mind here the very approach to speech limitations, which are allowed and generally included in the constitutional texts themselves, including under article 10(2) of the European Convention for Human Rights (ECHR), whereas they pose a distinct set of problems in the absolutist American context, for example.
[69] One could argue that, following this logic, the Canadian experience with Holocaust denial is of an inherently different nature. As will be seen, however, I do make use of Canadian jurisprudence in this thesis, primarily in light of its solid argumentative value.
[70] Hirschl (2006), pp. 62-63 (emphasis in the original).
[71] For a brief report, see "El Constitucional mantiene la pena por justificar el genocidio," *El País*, November 9, 2007, available at http://www.elpais.com/articulo/espana/Constitucional/mantiene/pena/justificar/genocidio/elpepuesp/20071109elpepinac_12/Tes (last accessed March 31, 2008).

Finally, I should note that the study is bound to be unbalanced. While the textual analysis will cover all of the mentioned countries, for reasons of availability and relevance, the jurisprudential analysis will be more restricted. An effort is nonetheless made to bring in material from all these contexts. Last but not least, an argument can be made that the richness of the legal debate in Germany and France contrasted with the relative scarcity of similar engagement in Slovakia or Romania is itself telling.

I have thus far illuminated some of the key definitional elements, sketched, in broad strokes, the relevant scholarly literature, and indicated the methodological considerations at play in this study. The following discussion is divided in three main parts. Chapter One details the main theoretical considerations in this analysis. It describes the constitutional arguments in the hate speech debate, namely the arguments for a robust protection of speech, as well as arguments for equality, democracy, and dignity as acceptable restrictions on speech. Chapter One further considers the "globalization" of the hate speech discussion and asks whether there is an international standard emerging. The first chapter ends with an examination of the different functions law may serve in society and argues that a complex understanding of this issue is the only way toward appreciating the true role of Holocaust denial legislation. Chapter Two is a comparative analysis of the texts of anti-negationist laws, with reference to their place in the broader speech-regulatory framework of each country. Chapter Three takes the comparative analysis further and considers the most pertinent jurisprudence on the issue of Holocaust denial emerging from this set of countries. While some of the texts analyzed in Chapter Two have not, as of yet, enjoyed significant juridical enforcement, the discussion is nevertheless informative regarding the manner in which anti-denial laws work in a court of law. I conclude my study with a summary of observations and a reinforcement of my core argument: that anti-Holocaust denial legislation, while drawing

on a different cocktail of constitutional rights, serves a primarily symbolic function in specific cultural contexts where this symbolism is likely to matter.

CHAPTER I

This chapter outlines the main constitutional considerations and theoretical arguments brought forth in debates over regulation of hate speech. It discusses balancing freedom of speech against competing constitutional concerns and describes the intersection between national, regional, and international standards. My division is not intended to negate the obvious interdependence of these categories. Indeed, the reader will notice a continuing dialogue between scholars and their arguments, as well as the inevitable reliance on parallel concepts. I believe that only through such a holistic view of the rights and justifications involved can the contentiousness of negationism regulation be grasped fully.

The following sub-sections proceed by, first, outlining the main justification for a robust protection of speech. Second comes a discussion of the main constitutional concerns on the basis of which regulation is suggested, including equality, dignity, and democracy. Third, a brief look at the international arena is presented, delineating the emergence of international human rights standards, as well as the unified approach of the European Court of Human Rights (ECtHR). Finally, I offer a discussion of the manifold purposes law, and criminal law in particular, may serve. This is meant to set the stage for an evaluation of how, by embracing certain constitutional values and rejecting others, different countries choose different types of law to embody said values. In other words, the function which Holocaust denial laws are seen to perform in society, whether instrumental or symbolic, matters in the process of their adoption.

1. NORMATIVE JUSTIFICATIONS

1.1 Freedom of Speech

The literature on the freedom of speech and the philosophical arguments brought in favor of its protection is vast.[72] The main justifications will be discussed here, with an overview of pro-regulation arguments to follow in ensuing sub-sections of this chapter.

One of the most oft-used arguments in favor of a robust protection of speech relies on its primordial role in our quest for truth. Its origins stem from John Stuart Mill's *On Liberty*, where he upholds the role of free speech in our search for truth. In Mill's terms, then, only unrestricted speech will help eradicate falsity and eventually enable us to reach the right conclusion. How Mill would respond to the problem of hate speech, however, is less clear. As some have argued,[73] his rejection of censorship is to be read in conjunction with an emphasis on safeguarding the very deliberative values which hate speech endangers.

Drawing on Millian principles, Justice Oliver W. Holmes elaborated his famous theory of the "marketplace of ideas" to enhance protection of speech. As he wrote in his dissenting opinion in *Abrams v. United States*,

> When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.[74]

Holmes's reliance on Mill, however, should be viewed critically. While both theories rely on truth as the basis for speech protection, Holmes offers a more pessimistic view of the chances

[72] For a critical overview, see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982) or Kent Greenawalt, "Free Speech Justifications," *Columbia Law Review*, Vol. 80 (1989), pp. 119-155.
[73] David O. Brink, "Millian Principles, Freedom of Expression, and Hate Speech," *Legal Theory*, Vol. 7 (2001), pp. 119-157.
[74] *Abrams v. United States*, 250 U.S. 616 (1919) (J. Holmes, dissenting), para. 630.

of truth to eventually emerge victorious in the marketplace.[75] The connection between Holmes's marketplace metaphor and Mill's theory of speech has been exposed as partial. Philosophy scholar Alan Haworth, for instance, points out that the marketplace of ideas model is misleading, for Mill envisioned something more akin to "the 'seminar group' model of thought and discussion,"[76] rather than seeing truth as "the outcome of negotiation."[77] Applying the truth-based justifications for the protection of speech to Holocaust denial, one finds it difficult to see the value it adds to any search for truth. Particularly in the context of producing harm to a group of listeners and the accepted falsity of their conclusions, negationist ideas cannot be protected solely relying on the truth-seeking marketplace model.[78]

A further defense of free speech comes from arguments rooted in its role for democracy. Justice Louis D. Brandeis's concurrence in the case of *Whitney v. California* is oft-cited as arguing the case for free speech as a foundational value of the democratic order, one whose restriction should only be allowed, therefore, in exceptional cases. He writes:

> To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.[79]

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[75] He writes:

> We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Ibid.

[76] Alan Haworth, *Free Speech* (Routledge, 1998), p. 69.

[77] *Ibid.*, p. 68.

[78] In this vein, Kathleen Mahoney writes:

> The proposition that it could be true that the Holocaust is a hoax is hardly a principled basis upon which to defend such speech. When speakers deliberately misrepresent the work of historians, misquote witnesses, fabricate evidence, and cite nonexistent authorities, as Holocaust deniers do, their speech is the antithesis of seeking truth through the free exchange of ideas.

Kathleen E. Mahoney, "Hate Speech: Affirmation or Contradiction of Freedom of Expression," *University of Illinois Law Review*, Vol. 1996, No. 3 (1996), p. 798.

[79] *Whitney v. California*, 274 U.S. 357 (1927) (J. Brandeis, concurring), para. 377. This constitutes the basis of the famous "clear and present danger test" in American free speech doctrine.

This is the source of the popular alternative to regulation of hate speech, namely to combat bad speech with "more speech." Brandeis additionally explains that only serious threats from speech are to be tackled with repression, for the latter would otherwise be "inappropriate as the means for averting a relatively trivial harm to society."[80] Following this line of reasoning, then, extremist speech represents a murky category. Depending on how one assesses the threat it poses and its likely harm, it will be protected or not. The discussion in the section on democracy in this chapter will elaborate on this point.

Connected with theories based on certain understandings of democracy are arguments favoring particular conceptions of the individual, within the democratic order, and the function of speech in his development. As early as 1948, philosopher Alexander Meiklejohn argued for a conception of the freedom of speech "derived, not from some supposed "Natural Right," but from the necessities of self-government by universal suffrage."[81] Meiklejohn based his interpretation on a "town hall" paradigm for democracy, one in which citizens are to be full, equal participants. Speech, therefore, would need to be uninhibited so as to lead to informed consensus. This conception clearly favors political speech, or, put differently, speech that bears a connection with this deliberative political process. In this paradigm, therefore, extremist speech would be protected when it could be proven to have an impact on the formation of political opinions. That is hardly ever difficult to do.

More recent reassessments of the democratic rationales for speech, such as that presented by legal scholar Cass Sunstein, take a Madisonian view of democracy and argue in favor of returning to the principle of "government by discussion."[82] In applying this theory, Sunstein concludes that "[i]t is not paternalistic, or an illegitimate interference with competing conceptions of the good, for a democracy to promote scrutiny and testing of

[80] *Ibid.*
[81] Alexander Meiklejohn, *Free Speech And Its Relation to Self-Government* (Harper & Brothers Publishers, 1948), pp. 93-94.
[82] Cass Sunstein, *Democracy and the Problem of Free Speech* (The Free Press, 1993), p. 19.

preferences and beliefs through deliberative processes."[83] While embracing deliberation, however, we should be aware of the dangers of some groups being excluded from this process (silenced) by other's speech. This point is also made by Owen Fiss when arguing that measures which enhance participation of such otherwise excluded groups help improve deliberative democracy, not undermine it.[84] Not to take into account hate speech's threatening nature, some have stated, "conceals the social functions of speech, minimizes the harms and abuses hate speech causes, and ignores the responsibility of government to maintain a civilized society."[85]

The inadequacy of these arguments, particularly when applied to the category of extremist speech has been repeatedly pointed out.[86] Legal scholars Frederick Schauer and Lee Bollinger have both emphasized the inability of the previous models to account for protection of a type of speech that carries little if any value and which is likely to cause harm: "a good part of the speech behavior we are talking about [extremist speech] is often unworthy of protection in itself and might very well be legally prohibited for entirely proper reasons."[87] In this vein, Bollinger has proposed to recalibrate the justification of free speech, mainly with a view to American society. He argues in favor of tolerance as a value which, by fostering self-restraint,[88] is the best means to fight intolerance (particularly political intolerance of the powerful) and also safeguard less powerful groups (from potentially becoming, themselves, future victims of intolerance). He writes that it is

> a matter of self-protective political strategy, response to a perceived reality of ever-threatening intolerance and prejudice by the politically powerful against the politically weak. To such groups, which possess only a fraction of the

[83] *Ibid.*, p. 20.
[84] Fiss (1996).
[85] Mahoney (1996), p. 796.
[86] Schauer (1982), Lee C. Bollinger, *The Tolerant Society* (Oxford University Press, 1986).
[87] Bollinger (1986), p. 9.
[88] Bollinger writes:

> At this stage in our social history, then, free speech involves a special act of carving out one area of social interaction for extraordinary self-restraint, the purpose of which is to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters.

Ibid., p. 10.

> power needed to secure their social position, [tolerance] becomes, therefore, a refuge, but one oddly secured by admitting into it the archenemy. As such, the act of tolerance becomes at once an ambiguous symbol of safety and vulnerability.[89]

Bollinger's view has been rightly criticized for failing to explain why tolerance, of all possible values, should sit at the core of free speech protection.[90] Furthermore, it has been pointed out that his proposed cultivation of self-restraint might lead to passive toleration[91] and conformity[92] and that it fails to account for an inherently unequal society.[93]

To his credit, though, Bollinger does not shy away from exposing the complexity and contestability of the issues he tackles. Moreover, with respect to anti-Semitic speech, he insists on tolerance as a culturally-conditioned response and acknowledges the different positions American and German societies find themselves in.[94] It is noteworthy, therefore, that, implicit in the concept of tolerance he proposes, Bollinger sees an important societal message.[95] The difficulty of disentangling official tolerance of racist speech from at least some form of acceptance has not escaped other observers either. Philosopher Thomas Scanlon writes:

> Victims of racist or anti-Semitic attacks cannot be expected to regard these as expressing "just another point of view" that deserves to be considered in the court of public opinion. Even in more trivial cases, in which one is in no way threatened, one often fails…to distinguish between opposition to a message and the belief that allowing it to be uttered is a form of partisanship on the part of the state. It is therefore natural for the victims of hate speech to take a willingness to ban such speech as a litmus test for the respect that they are due.[96]

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[89] *Ibid.*, p. 99.
[90] See Michel Rosenfeld, "Extremist Speech and the Paradox of Tolerance," *Harvard Law Review*, Vol. 100 (1987), pp. 1457-1481 and David A. J. Richards, "Toleration and Free Speech," *Philosophy and Public Affairs*, Vol. 17, No. 4 (Autumn, 1988), pp. 323-336.
[91] Rosenfeld (1987), p. 1474.
[92] *Ibid.*, p. 1478.
[93] *Ibid.*, p. 1477. Rosenfeld poignantly notes: "Indeed, self-restraint by the dominant seems to require much less of a sacrifice in personal autonomy than self-restraint by the relatively powerless."
[94] Bollinger (1986), p. 199. He writes: "While anti-Semitism is a problem in American society…it is not of such magnitude, or so pervasive, as to transform toleration into an act of implicit condonation.'
[95] Indeed, he emphasizes the symbolic and educational functions of promoting tolerance. *Ibid.*, p. 144.
[96] Thomas M. Scanlon, *The Difficulty of Tolerance: Essays in Political Philosophy* (Cambridge University Press, 2003), p. 199. Scanlon therefore believes that "challenging the accepted rules of tolerance is also an effective way of mobilizing support within the affected groups" and that the very proposals of anti-hate speech statutes works in favor of minorities by bringing their concerns to the fore and stimulating debate. *Ibid.*

The symbolism of legislation such as the one meant to combat Holocaust denial carries just such a message, as will be further elaborated upon in Section Three below.

Finally to be discussed here are arguments for the protection of speech which are rooted in the concept of individual autonomy. Exponents of this view include philosophers such as Thomas Scanlon and Ronald Dworkin.[97] To use Dworkin's classification, whereas the former justifications for the protection of speech were instrumental (viewing speech as a means toward achieving a particular good, i.e., truth, self-government, a functioning democracy), justification based on autonomy of the individual provide a "constitutive justification of free speech."[98] A clear, unitary definition of what is understood by autonomy here is unavailable; instead, different accounts operate with different meanings of the term, ranging from self-government (as a right or a value) to moral autonomy to autonomy as rational self-legislation.[99] Dworkin writes of a "right to moral independence"[100] which he then uses to justify the broad protection to be afforded speech. Thus, he argues that "[g]overnment insults its citizens, and denies their moral responsibility, when it decrees that they cannot be trusted to hear opinions that might persuade them to dangerous or offensive convictions" and the only way to retain individual dignity is by rejecting any form of government or majoritarian censorship.[101] Dworkin insists on a responsibility to form one's own opinions, but also "to express these to others, out of respect and concern to them, and out of a compelling desire that truth be known, justice served, and the good secured."[102] Susan Brison has adequately pointed out that, by only considering the harmful consequences of

[97] Scanlon (2003) and Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1986).
[98] Ronald Dworkin, "The Coming Battlers over Free Speech," *The New York Review of Books*, Vol. 39, No. 11, June 11, 1992.
[99] For a discussion, see Brison (1998), p. 323 and pp. 330-331.
[100] Dworkin (1986), p. 353. He writes:

> People have the right not to suffer disadvantage in the liberties permitted to them by the criminal law, just on the ground that their officials or fellow-citizens think that their opinions about the right way for them to lead their own lives are ignoble or wrong.

Ibid.
[101] Dworkin (1992).
[102] *Ibid.*

speech (and hate speech in particular) as a form of "moral harm" which we have no right to be protected against, Dworkin's account is limited. He does not consider that "other's rights, for example their rights to free speech or to equality of opportunity may be undermined by someone's engaging in hate speech."[103]

Scanlon, while also appealing to autonomy, departs from Dworkin in certain crucial points. Unlike Dworkin, Scanlon acknowledges the potential for serious harm to result from speech. Nevertheless, he argues, this does not lead to a justification for its restriction. He bases this on what he calls the "Millian principle:"

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[104]

Based on this principle, then, whether speech leads to false beliefs, or even to harmful acts, will not allow its restriction. As has rightly been pointed out, however, Scanlon does not account for the fact that his envisioned autonomous moral agent may be exposed to false or misleading information and does not process all speech rationally.[105] In the case of hate speech and Holocaust denial, this is of utmost importance. After all, racism often operates at the unconscious level. Holocaust denial, by its very nature, relies on deceit instead of accurate information. Furthermore, if the targets of hate speech are to be placed in what

[103] Brison (1998), p. 325. One should also note, in this context, Dworkin's opposition to the balancing of rights ("trumps") against policy considerations except for extreme situations. Dworkin, "Rights as Trumps," in ed. Jeremy Waldron, *Theories of Rights* (Oxford University Press, 1984).
[104] Thomas M. Scanlon, "A Theory of Freedom of Expression," *Philosophy and Public Affairs*, Vol. 1, No. 2 (Winter, 1972), p. 213.
[105] See Brison (1998), p. 328. Furthermore, Brison argues, in cases of face-to-face vilification or of a hostile environment, there is no intermediate agent as envisaged by Scanlon and the harm is a direct consequence of speech. *Ibid.*

Scanlon calls the category of bystanders,[106] then their own autonomy is severely impaired when faced with hate speech. They are neither willing listeners nor can escape the effects of hate speech on those who form a wiling audience and on themselves.[107]

After a careful examination of "the autonomy defense of free speech," Susan Brison concludes that there is no direct link between the assertion of individual autonomy and the outright rejection of government-imposed restrictions on speech.[108] Since, in her view, the marketplace model as well as the private sphere are not free of agency and thus already impose restrictions on speech,[109] it is not self-evident that allowing government intervention would leave us worse off. While Brison meticulously reaches her conclusion that if it is to be protected speech, hate speech cannot find its justification in autonomy, others writing from the perspective of autonomy propose the opposite view. Professor Catriona McKinnon, while seeing Holocaust denial as a form of offensive speech, still argues against its legal restriction by questioning its impact on the listener's "capacities to be self-directing."[110] To accept that negationism goes beyond this and becomes group defamation, in her opinion, "dissolves the distinction between [Holocaust denial] and anti-Semitism."[111] As I have argued in the Introduction, however, the link between denial and anti-Semitism is, if not universal, at least a strong assumption. While it is true that one may deny the Holocaust without being anti-Semitic, it is still unclear why the autonomy interests of the deniers and their willing audience are to outweigh those of the victims of this kind of hate speech. Such dismissals of the seriousness of the harm inflicted by hate speech are rejected by scholars advocating regulation. Their approach is discussed in what follows.

[106] Thomas M. Scanlon, "Freedom of Expression and Categories of Expression," *University of Pittsburg Law Review*, Vol. 40 (1979), p. 528. Scanlon distinguishes between three types of free speech interests: the speaker's, the audience's, and the bystander's (the latter being an interest in the effect on the audience, especially when leading to changes in behavior).
[107] See discussion in Brison (1998), p. 335.
[108] Brison (1998), p. 331, p. 338.
[109] *Ibid.*, p. 334.
[110] Catriona McKinnon, "Should We Tolerate Holocaust Denial?," *Res Publica*, Vol. 13 (2007), p. 18.
[111] *Ibid.*

1.2 Equality

Proponents of regulation on equality considerations have several points in common: they take the harm produced by hate speech seriously; they emphasize its crippling effects on the victims' ability to participate in public discussion; and they view anti-hate speech laws as a necessary compromise of free speech values.

Critical race theorists such as Mari Matsuda emphasize the need to "consider the victim's story"[112] when discussing regulation against hate speech. Writing about "the violence of the word,"[113] Matsuda unequivocally campaigns for a reshuffling of the value-order to place the actual harm suffered by victims at its center. She argues for the need to take legal action to protect victims from psychological harm, defamation, and silencing caused by the free expression of hate. Her emphasis on the harm speech may produce is present in other works, such as that of law professor Robert Post. He distinguishes between five different types of harm resultant from hate speech: an intrinsic harm, harm to identifiable groups, harm to individuals, harm to the marketplace of ideas, and harm to educational environment.[114] While the list is not exhaustive, all these (and more) types of harm are relevant to a discussion of the need for hate speech regulation. Their commonality resides in their identity-based discriminatory nature.

Matsuda writes from the perspective of balancing free speech against equality, holding that "reputational interests" must be accounted for and due weight attributed to those interests under attack by racist speech.[115] Her argument consists of several distinct claims.

[112] Mari J. Matsuda, "Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story," *Michigan Law Review*, Vol. 87 (Aug. 1989), pp. 2320-2381.
[113] *Ibid.*, p. 2332.
[114] Robert C. Post, "Free Speech and Religious, Racial, and Sexual Harassment: Racist Speech, Democracy, and the First Amendment," *William and Mary Law Review*, Vol. 32 (Winter, 1991), pp. 272-277. Also see Robert C. Post, *Constitutional Domains: Democracy, Community, Management* (Harvard University Press, 1995), p. 293.
[115] Matsuda *et al.* (1993), p. 47.

First, she points to other categories of speech that are prohibited, such as child pornography, defamation and certain privacy issues, as instances where speech is already curtailed. She also shows the undue burden which an absolutist defense of free speech places on previously discriminated against groups. Last but not least, she reveals what state inaction actually signifies to the victims of hate speech and to society itself. She claims it represents a form of legitimation for hate mongers ("[o]pen display conveys legitimacy"[116]) and helps boost their efficacy. She is undaunted when arguing for a legal response to hate speech, "not because it isn't really speech, not because it falls within a hoped-for neutral exception, but because it is wrong."[117]

Other scholars such as law professors Richard Delgado and Charles Lawrence also put forth arguments in favor of hate speech regulation. Lawrence, too, emphasizes the actual harm involved in this type of speech and advocates for a more honest balancing of the constitutional values involved. He points to concerns of "deep emotional scarring" and "reputational injury,"[118] stigmatization[119] and a denial of equal opportunity that arise from the unchecked existence of hate speech. He powerfully claims that because of the very real nature of the injury involved, "we [black people] see equality as a precondition for free speech."[120] He thus rejects the unequivocal protection of speech based on the marketplace of ideas metaphor as faulty due to the "flaw[ed], skew[ed], and disable[d]…operation of the market" caused by (often irrational) racism.[121] Thus, Lawrence reminds us to never forget that whenever we decline to ban hate speech for freedom of speech considerations,

> we ask blacks and other subordinated groups to bear a burden for the good of society—to pay the price for the societal benefit of creating more room for

[116] Matsuda (1989), p. 2378.
[117] *Ibid.*, p. 2380.
[118] Lawrence (1990), p. 462.
[119] *Ibid.*, p. 463.
[120] *Ibid.*, p. 467. His claim can be extended to include other historically discriminated against groups.
[121] *Ibid.*, pp. 467-468.

> speech. And we assign this burden to them without seeking their advice, or consent.[122]

Lawrence writes in the context of a heated debate over the regulation of expressions of hate on American campuses. Considering the propensity of Holocaust denial in the academic fora, his conclusion on the matter is relevant. He believes that "rules requiring civility and respect in academic discourse encourage rather than discourage the fullest exchange of ideas. Regulations that require civility of discourse in certain designated forums are not incursions on intellectual and political debate."[123] A carefully construed regulation will thus, in Lawrence's view, lead to more speech, rather than less.[124]

Delgado, too, is concerned with the harm inflicted by hate speech and advocates for the use of tort-like action (as in the case of defamation and the intentional infliction of emotional distress) to suppress it.[125] While also pointing out the competing constitutional values at play in the debate over hate speech regulation, Delgado, writing with Jean Stefanic, reveals a vital aspect of the role of the legal apparatus in this balancing act:

> Judges asked to strike a balance between free speech and minority protection are in effect deciding the contours of a new interpretive community. They must decide whose views count, whose speech is to be taken seriously, whose humanity afforded full respect.[126]

He is skeptical of the judge's ultimate objectivity in this endeavor and therefore advocates for a constitutional paradigm that more fairly takes into account the plight of its most vulnerable groups.

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[122] *Ibid.*, p. 472.
[123] *Ibid.*, p. 438.
[124] A similar view is discussed below, notably in the approach of Susanne Baer.
[125] Richard Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," *Harvard Civil Rights-Civil Liberties Law Review*, Vol. 17, No. 1 (Spring, 1982), pp. 133-181. For a direct criticism of Delgado's argument, see Marjorie Heins, "Banning Words: A Comment on "Words That Wound," *Harvard Civil-Rights-Civil Liberties Law Review*, Vol. 18, No. 2 (Summer, 1983), pp. 585-592.
[126] Richard Delgado and Jean Stefanic, "Hateful Speech, Loving Communities: Why Our Notion of "A Just Balance" Changes So Slowly," *California Law Review*, Vol. 82, No. 4 (Jul., 1994), p. 869. This view is mirrored in Kenneth Karst's account, who writes:

> When a subordinated group challenges a dominant community of meaning, those expressions are bound to arouse strong emotions, for they threaten the individual identities of the people who live inside the boundaries of the dominant culture.

Kenneth L. Karst, "Boundaries and Reasons: Freedom of Expression and the Subordination of Groups," *University of Illinois Law Review* (1990), p. 96.

The views of critical race theorists have hardly gone unchallenged. Former American Civil Liberties Union (ACLU) president Nadine Strossen, among numerous others, has been a staunch opponent of the idea of hate speech regulation. She argues that, because of the discretion in enforceability of hate speech statutes, there is "an inevitable danger of arbitrary or discriminatory enforcement,"[127] often resulting in the statutes being enforced precisely against members of minority groups.[128] Furthermore, she says, there will be a chilling effect beyond the initial scope of the statute,[129] while leaving open the possibility that, because narrowly drafted, it will not cover all forms of racist speech.[130] She also makes the argument that such attempts at banning them will more likely give racists more publicity;[131] they have not been proven effective in the fight against intolerance;[132] and only open debate and repudiation in the free marketplace of ideas is well-suited against hate. In response, Delgado among others has pointed to the underlying paternalism of arguments that claim to know better when minorities are protected and that insist "more speech" is always an available and appropriate response.[133]

Strossen's arguments echo throughout the works of other scholars writing on the juncture between free speech and equality. Law professor Kenneth Karst, for instance, aptly illustrates the complex relationship of minorities to freedom of expression, arguing that the latter

> is a mixed blessing for the members of a subordinated group. On the one hand, much of their subordination has been accomplished by the speech of others; any system of domination is carried on a stream of messages that both express a group's subordination and purport to justify it. On the other hand, precisely because an important part of a group's subordination consists in

[127] Nadine Strossen, "Regulating Hate Speech on Campus: A Modest Proposal?," *Duke Law Journal*, Vol. 1990, No. 3 (Jun., 1990), p.521.
[128] *Ibid.*, p. 556.
[129] *Ibid.*, p. 521.
[130] *Ibid.*, p. 560.
[131] *Ibid.*, p. 559.
[132] *Ibid.*, pp. 554-555. See also Strossen (1996), pp. 466-468 (giving examples of foreign jurisprudence to illustrate the misapplication of anti-hate speech codes).
[133] Richard Delgado, "Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation," *California Law Review*, Vol. 82, No. 4 (Jul., 1994), pp. 871-892.

> silencing, their emancipation requires a generously defined freedom of expression, a freedom that overflows the shallow capacity of the model of civic deliberation.[134]

Legal scholar Wojciech Sadurski has attacked what he terms the "silencing argument" in favor of prohibiting hate speech by pointing to the inadequacy of banning speech because of its efficacy.[135] Other attacks on calls for equality-based reassessments of free speech doctrine have been even sharper. Law professor Steven Gey, for instance, has severely criticized what he sees as nothing more than a postmodern theory of censorship, claiming that it "ultimately amounts to little more than an apologia for the free application of political power to squelch dissent."[136] Others have challenged the speech-harm correlation, arguing that instead of a direct link between the two, courts would conceptualize these harms as "cognitive responses to persuasion, not harm per se."[137]

For my purposes, it is interesting to note the near-total agreement between various scholarly voices on the fact that speech, indeed, can be harmful, and its victims should have means of recourse. The disagreements in the literature mirror a policy quandary and ask whether law is the appropriate tool to address this problem. Rejections of the view that equality considerations do not offer sufficient footing for regulation, however, will also have to account for other constitutional values invoked in favor of legislation. Two of these, dignity and democracy, are discussed in what follows.

[134] Karst (1990), p. 109.
[135] Wojciech Sadurski, "On 'Seeing Speech Through an Equality Lens': Critique of Egalitarian Arguments for Suppression of Hate Speech and Pornography," *Oxford Journal of Legal Studies*, Vol. 16, No. 4 (Winter 1996), pp. 713-723. At p. 723, Sadruski writes: "the fact that speech persuades the hearers to adopt wrongful attitudes toward other people in the community is not a good equality-based reason to prohibit the speech." One should note that Sadurski writes in direct response to Catharine A. MacKinnon's *Only Words* (1993).
[136] Steven G. Gey, "The Case against Postmodern Censorship Theory," *University of Pennsylvania Law Review*, Vol. 145, No. 2 (Dec., 1996), pp. 193-297. For a response to Gey, see Richard Delgado, "Are Hate-Speech Rules Constitutional Heresy? A Reply to Steven Gey," *University of Pennsylvania Law Review*, Vol. 146, No. 3 (Mar., 1998), pp. 865-879.
[137] W. Bradley Wendel, "The Banality of Evil and the First Amendment," *Michigan Law Review*, Vol. 102 (May 2004), p.1413, also citing Sunstein (1993), p. 191.

1.3 Dignity

Human dignity, unlike speech or equality, is a right that is both harder to define and the commitment to which is more difficult to evaluate. Fears of its diffused, open-ended character have scared away proponents of discretely enforceable, easily manageable enumerations of rights.[138] Though seen as a relatively recent legal instrument in the human rights discourse, and particularly as a reaction to National Socialism and World War II, the philosophical and religious roots of the concept of human dignity go farther back than that.[139] Moreover, there seems to be a widespread belief that Europeans take dignity, in the context of constitutional rights or values, more seriously than Americans. This is not entirely true. Dworkin's "moral reading of the American constitution" suggests dignity, alongside equality and liberty, as the pivotal lenses through which to understand the American constitutional project.[140] His view is not singular.[141] Nevertheless, it does appear to be the case that, "although the *term* 'human dignity' is used restrictively by both the US Supreme Court and the European Court of Human Rights, the *concept* of human dignity seems to play a significantly larger role in Europe."[142] Why this is so has been the object of further scholarship. Some have suggested that while, in Germany, the Kantian view of autonomy of the individual unfolded in line with a recognition of moral obligations, in the US autonomy

[138] Arthur Chaskalon, "Human Dignity as a Constitutional Value," in eds. David Kretzmer and Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* (Kluwer Law International, 2002), p. 135. Chaskalon aptly points out, however, that other vague, difficult to define rights such as the right to life do figure in constitutions and international human rights instruments.

[139] See, for instance, discussion in. Kretzmer and Klein eds. (2002) and Petra Bahr and Hans M. Heinig eds., *Menschenwürde in der säkularen Verfassungsordnung. Rechtswissenschaftliche und theologische Perspektiven* (Mohr Siebeck Verlag, 2006).

[140] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996).

[141] See Walter F. Murphy, "An Ordering of Constitutional Values," *Southern California Law Review*, Vol. 53 (1980), pp. 703-760. Murphy believes that "the fundamental value in the American polity has become the dignity of each human being. While judicial recognition of the primacy of this value can work no legal magic, it does mark a "fixed star" that judges may use in their navigation." *Ibid.*, p. 708.

[142] Georg Nolte, "European and US constitutionalism: comparing essential elements," in ed. Georg Nolte, *European and US Constitutionalism* (Cambridge University Press, 2005), p. 13 (emphasis in the original). See also discussion in John C. Knechtle, "When to Regulate Hate Speech," *Penn State Law Review*, Vol. 110 (Winter, 2006), pp. 559-569.

remained a value in itself.[143] Others have proposed to look at the history of the law protecting dignity to find its roots in the aristocratic tradition in Europe (comparatively absent in the US).[144] Others still reject the conflation of concerns over human dignity with laws of honor. Scholar Eyal Benevisti sees a marked difference between dignity and *human* dignity:

> These two terms carry remarkably different meaning. The concept of human dignity does not necessarily imply protection of reputation or honor, not even respect as such. It implies respect to each individual *qua* individual. Its message is universalistic, positing that each human being is subject to the same basic rights and freedoms regardless of race, gender, nationality, etc., but, not necessarily, and certainly not only, the right to protection of honor.[145]

In this sense, then, the concern with and constitutionalization of the right to human dignity in the aftermath of the Second World War seem novel. I am, however, more inclined to ascribe to the view which holds dignity to be "inherent in any legal order based on freedom and human rights."[146] In other words, whether we take a more universalistic view of dignity or, on the contrary, one that sees it as a legal concept with its own history of implementation and codification, the reality of its increasing prominence in contemporary constitutional discourse is undeniable. This view seems to resonate with what Professor Dieter Grimm sees in the German debate over whether to consider dignity a civil right or the objective basis of all other rights expressed in the Basic Law. He believes that, "when all the other civil rights are viewed as a concretization or expression of dignity, dignity consequently functions as a guiding principle for the interpretation of these other fundamental rights."[147] I therefore make use of the dignity argument in my explanation of how it interacts with other rights, such as

[143] Edward J. Eberle, "Public Discourse in Contemporary Germany," *Case Western Reserve*, Vol. 47 (Spring, 1997), p. 898. For a somewhat similar view, see W. Cole Durham, "Eine Grundsätzliche Bewertung Aus Amerikanischer Sicht," in eds. Paul Kirchhof and Donald P. Kommers, *Deutschland und sein Grundgesetz: Themen einer deutsch-amerikanischen Konferenz* (Nomos, 1992), p. 63.
[144] James Q. Whitman, "Enforcing Civility and Respect: Three Societies," *The Yale Law Journal*, Vol. 109, No. 6 (Apr., 2000), pp. 1279-1398; Whitman, "The Two Western Cultures of Privacy: Dignity versus Liberty," *The Yale Law Journal*, Vol. 113, No. 6 (Apr., 2004), pp. 1151-1221; see also, Whitman, "'Human Dignity' in Europe and the United States: The Social Foundation," in ed. Nolte (2005), pp. 108-124.
[145] Eyal Benevisti, "Comment," in ed. Nolte (2005), p. 126.
[146] Chaskalon (2002), p. 134.
[147] Remarks made by Dieter Grimm in "An Interview with Justice Frank Iacobucci and Professor Dieter Grimm," *Journal of Law & Equality*, Vol. 2, No. 2 (Fall, 2003), p. 199.

speech and equality. I do so despite the different approaches taken by different systems, and despite the fact that, while "implicit in the rights of personality," human dignity "is not entrenched as a discrete right in all human rights instruments."[148]

When we bring human dignity considerations into the speech context, their relevance is clear, yet their impact disputed. Some point to dignity as the foundation, rooted in individual autonomy, of according speech a broad protection. Dworkin's words speak to this approach: "we retain our dignity, as individuals, only by insisting that no one—no official and no majority—has the right to withhold an opinion from us on the ground that we are not fit to hear and consider it."[149] Yet one would be hard-pressed to ignore the potential for conflict between the constitutional values of speech and dignity. For just as speech may be a tool for affirmation of personal worth, so too, can speech be the vehicle for its attack. As Frederick Schauer argues, "the conflation of dignity and speech, as a general proposition, is mistaken, for although speaking is sometimes a manifestation of the dignity of the speaker, speech is also often the instrument through use of which the dignity of others is deprived."[150] In other words, because they reinforce as well as undermine each other, freedom of speech and dignity will often find each other in constitutional conflict and, unsurprisingly, one will inevitably be used to restrict the other.

Where that leaves us is in a situation where the hierarchization of constitutional norms is no longer avertable. As advocates emphasizing equality point out, it is not at all obvious that free speech should be given privileged constitutional status, relegating other rights and values to the background. But even assuming that dignity, as an instantiation of personal autonomy, is primarily looked at as a source of speech protection, the occasional need for ranking of the two values is inescapable. Thus, "resolving many hard issues by reference to

[148]Chaskalon (2002), p. 134.
[149] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977), p. 200.
[150] Frederick Schauer, "Speaking of Dignity," in eds. Michel J. Myer and William A. Parent, *The Constitution of Rights: Human Dignity and American Values* (Cornell University Press, 1992), p. 179.

dignity will be question-begging, and consequently it may be necessary at times to consider directly which of the values of free speech and dignity is more important."[151]

Often, human dignity arguments are used as a mantra, and the specific German approach to free speech versus dignity balancing is taken as a model for what could be achieved in other national contexts as well. Dignity's central role in the German constitutional system has been pointed to, with one observer writing: "Dignity is not merely a focus on individuality. As the central value of the constitution, dignity infuses throughout the whole constitutional order, obligating the state to protect and to realize it."[152] This seemingly far-reaching role which dignity is to play in German constitutionalism also carries dangers; as one early commentary on the German Basic Law put it, there is a risk of it becoming "*kleine Münze*"[153] (small change) if brought into trivial cases.[154] Nevertheless, caution is to be employed when referencing the German understanding of dignity as a constitutional value. Indeed, the same should be true when looking at any such value transnationally. As one former president of the German Federal Constitutional Court put it, "the historical developments, the cultural diversity, and the principal value conceptions of a society help to define the content and the borderlines of human dignity."[155] As will be further elaborated upon when dealing with German case law, moreover, the link between human dignity considerations and the distinctive German right to free development of personality is rather unique.

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[151] *Ibid.*
[152] Edward J. Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Praeger Publishers, 2002), pp. 41-42.
[153] Theodor Maunz and Günter Dürig *Grundgesetz Kommentar*, Band I, Art 1 Abs. 1 (C.H. Beck Verlag, 1959).
[154] For cases where this happened, see Ernst Benda, "The Protection of Human Dignity (Article 1 of the Basic Law)," *Southern Methodist University Law Review*, Vol. 53 (Spring, 2000), pp. 448. Benda also warns against this development, writing:

> The risk that the high principle of protecting human dignity deterioratesinto "small change," sometimes in a more or less ridiculous context, is greater than the danger that any serious violation of the principle passes undetected, or without sanction.

Ibid.
[155] *Ibid.*

In terms of a wider discussion evaluating dignity as a possible restriction on speech, then, the German model is highly informative, but not final. I mean simply that, while the system in place in the Federal Republic is instructive as to how dignity can be a legitimate restriction upon freedom of speech, it need not be the only mold. Though perhaps a more diffuse norm than concerns of equality, for instance, there is no reason to believe that, especially when a country's constitution makes provisions for it, dignity could not be treated as a full-standing right whose protection may involve restrictions on speech. In the case of Holocaust denial, this is strikingly likely. Given that negationism so often amounts to a harmful attack on the very self-identification of a distinctive sub-group within society, a strong dignity-based argument for its regulation can be and has been made.

1.4 Democracy

Having discussed arguments rooted in equality and attention to the individual harm caused by hate speech, it is similarly important to ask what price the broader community pays when allowing such speech. Even opponents of regulation, such as Professor Nicholas Wolfson, admit that hate speech is posited to "tear the weave of the community in which the speech is made, break down civil discourse, and incite weak-minded onlookers to similar thoughts and words."[156] Matsuda also argues that hate speech bans serve to protect society at large. We should, in her view, not disregard "[t]he effect on non-target-group members," which curtails associational and other liberty interests of the majority.[157] In correlation with the claim of its negative societal impact, authors like Wolfson argue that hate speech is a direct affront to democracy itself. Thus, he posits, it endangers democracy because of its

[156] Nicholas Wolfson, *Hate Speech, Sex Speech, Free Speech* (Praeger Publishers, 1997), p. 47.
[157] Matsuda (1989), p. 2338.

intrinsic lack of value ("the ideational content of the utterance is minimal")[158] and the social harm it produces. Alexander Tsesis, a strong proponent of regulation, writes that while hate propagandists make use of the democratic apparatus by defending their right to free expression, "they seek to suppress minority voices from influencing political and social thought, serving the cause of inequality."[159]

Two approaches to the interaction between hate speech and democracy will be presented here. One is based in the concept of "militant democracy" (*streitbare* or *wehrhafte Demokratie* in German), understood, broadly, as "the fight against radical movements, especially parties, and their activities."[160] As has been observed in the German context, there is a set of "twin goals" intertwined in the technical term of militant democracy, namely "protection and prevention."[161] This approach looks at hate speech as propaganda in the hands of agents of instability within the state that seek to destroy the democratic order. As such, their restriction and exclusion from public life is justified as an act toward defending democracy itself. The second approach incorporates considerations of equality and dignity into a rights-based response to the problem of hate speech confronting democracy. In other words, this latter approach asks: what kind of democratic setup do we envisage? What rights and obligations are envisioned for its citizens? How do they come under attack when hate speech goes unregulated and what should be done about it? This part of the discussion will therefore build off of the equality and dignity concerns illustrated above.

The dilemma faced by democracy over how to protect itself from foes when they attempt its destruction by undemocratic means is hardly a recent concern. As early as 1937, Karl Loewenstein pointed to the need for democracy to defend itself against those forces

[158] Wolfson (1997), p. 47.
[159] Tsesis (2002), p. 6.
[160] András Sajó ed., *Militant Democracy* (Eleven International Publishers, 2004), p. 210.
[161] Dieter Oberndörfer, "Germany's 'Militant Democracy': An Attempt to Fight Incitement Against Democracy and Freedom of Speech Through Constitutional Provisions: History and Overall Record," in eds. Kretzmer and Hazan (2000), pp. 236.

which "exploit the tolerant confidence of democratic ideology that in the long run truth is stronger than falsehood, that the spirit asserts itself against force."[162] In the context of the rise of fascism in the Third Reich and other European nations at the time, his call to "exclude from the game parties that deny the very existence of its rules"[163] was far-reaching indeed. With hindsight, it may well seem remarkably insightful. It is echoed in the practice of a number of European states, as well as in the ECHR's article 17.[164] The ECtHR's interpretation of article 17 makes it clear that, under the Convention, what is generally assumed under the guise of militant democracy is allowed:

> [A] political party whose leaders incite to violence or put forward a policy which fails to respect democracy pr which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognized in a democracy cannot lay claim to the Convention's protection against penalties imposed on those grounds.[165]

Militant democracy as the concept of fighting democracy's inner antagonists has been applied to contexts varying from the interwar period[166] to the early postwar bans on fascist parties[167] and the more recent rise in extreme-right movements in Europe and the United

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[162] Karl Loewenstein, "Militant Democracy and Fundamental Rights I," *The American Political Science Review*, Vol. 31, No. 3 (Jun., 1937), p. 424.

[163] *Ibid.*

[164] Article 17 of the ECHR reads:

> Nothing in this Convention my 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.

The relevance of article 17 and the interpretation given to it by the Court will be further discussed (with reference to cases involving Holocaust denial) in Chapter 3.

[165] *Refah Partisi (The Welfare Party) and Others v. Turkey*, Judgment of the Grand Chamber, 13 February 2003, para. 98. For an analysis of the view on militant democracy taken by the ECtHR in *Refah Partisi*, see Patrick Macklem, "Militant democracy, legal pluralism, and the paradox of self-determination," *International Journal of Constitutional Law*, Vol. 4, No. 3 (Jul., 2006), pp. 488-516.

[166] Giovanni Capoccia, *Defending Democracy: Reactions to Extremism in Interwar Europe* (Johns Hopkins University Press, 2005). For an earlier version, see Capoccia, "Defending democracy: reactions to political extremism in interwar Europe," *European Journal of Political Research*, Vol. 39, No. 4 (Jun., 2001), pp. 431-460.

[167] Such as the ban, in Germany, of the *Sozialistische Reichpartei* (SRP), 2 BVerfGE 1 (1952) and of the *Kommunistische Partei Deutschlands* (KPD), 5 BVerfGE 85 (1956). Similar cases existed in other contexts too, such as the attempted postwar ban on the Communist Party of Australia. See, *inter alia*, David Dyzenhaus, "Constituting the Enemy: A Response to Carl Schmitt," in ed. Sajó (2004), pp. 19-34.

States.[168] Opinions over the impact of anti-democratic means (such as party and association bans, restrictions of the right to assembly, speech, and opinion etc.) are divided. There are those who praise repressive legal methods as effective in reducing extremism, particularly with respect to Germany.[169] There are also those who, increasingly vociferously, criticize reliance on the tools of militant democracy due to their unproven effectiveness.[170] They argue that instead of debilitating extremist parties, associations, and movements, militant measures too often lead to their reorganization and sometimes radicalization and are thus "counter-productive."[171]

One of the criticisms levied against using militant democracy to counter extremism is similar to arguments against the regulation of hate speech and Holocaust deniers. Political scientist Michael Minkenberg points to the potential dangers of repression, saying it "can have the effect of stimulating in its victims a tendency towards ghetto-formation, which can lead to the creation of clandestine networks and the hardening of radical-right positions."[172] Instead of weakening extremists, then, repression may cause their emboldening, this argument goes. A similar fear, that Holocaust deniers would invariably be driven underground (and consequently become more difficult to monitor), has been expressed with

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[168] Jürgen Lameyer, *Streitbare Demokratie. Eine verfassungshermeneutische Untersuchung* (Duncker & Humbolt, 1978); Gregor P. Boventer, *Grenzen politischer Freiheit im demokratischen Staat. Das Konzept der streitbaren Demokratie in einem internationalen Vergleich* (Duncker & Humbolt, 1985); Isabelle Canu, *Der Schutz der Demokratie in Deutschland und Frankreich. Ein Vergleich des Umgangs mit politischem Extremismus vor dem Hintergrund der europäischen Integration* (Leske und Budrich, 1997); Meindert Fennema, "Legal repression of extreme right parties and racial discrimination," in eds. Ruud Koopmans and Paul Statham, *Challenging Immigration and Ethnic Relations Politics: Comparative European Perspectives* (Oxford University Press, 2000), pp. 119-144; Christopher Husbands, "Combating the extreme right with the instruments of the constitutional state: lessons from experiences in Western Europe," in *Journal für Konflikt- und Gewaltforschung*, Vol. 1 (2002), pp. 52-73.

[169] Eckhard Jesse, *Streitbare Demokratie, Theorie, Praxis und Herausforderungen in der Bundesrepublik Deutschland* (Colloquim Verlag, 1980) and Ruud Koopmans, "Repression and the public sphere: discursive opportunities for repression against the extreme right in Germany," in Christian Davenport *et al.*, *Repression and Mobilization* (University of Minnesota Press, 2005), pp. 159-188.

[170] Claus Leggewie and Horst Meier, *Republikschutz: Masstäbe für die Verteidigung der Demokratie* (Rowohlt Verlag, 1995) and Michael Minkenberg, "Repression and reaction: militant democracy and the radical right in Germany and France," *Patterns of Prejudice*, Vol. 40, No. 1 (2006), pp. 25-44.

[171] Minkenberg (2006).

[172] Minkenberg (2006), p. 43, also citing Tore Bjørgo, "Exit Neo-Nazism: Reducing Recruitment and Promoting Disengagement from Racist Groups," *NUPI* paper, no. 627 (Norwegian Institute of International Affairs, 2002).

respect to banning their activities. Yet advocates of regulation have retorted that this may not always be a bad thing. In the words of Bhikhu Parekh, "it denies them [extremists] the oxygen of publicity and aura of public respectability."[173] He also emphasizes that "such organizations need to build up networks, recruit people, distribute their literature, and so on" and hence, because never fully underground, they would also be incapable of escaping the reach of the law.[174] Put differently, it is not as straightforward that the potential negative consequences of a ban outweigh its gains.

A further disapproving view of militant democracy is of value in the present discussion. Because of its dubious effectiveness, scholars have advocated to replace recourse to militant democracy with "alternatives within civil society."[175] They point to the German experience when attempting to ban the radical-right party *Nationaldemokratische Partei Deutschlands* (NPD) as instructive. The attempt to outlaw the party in 2002 failed,[176] yet its defeat nonetheless came at the polls. Thus, writes political scientist Dieter Obendörfer, "[p]olitical extremism was contained not by militant democracy, but by the orderly political processes, an approach that avoids cloaking extremist political parties as 'martyrs of democracy.'"[177] An analogous argument is put forth in the fight against negationism: that instead of the harsh arm of the law, non-criminal alternatives, education especially, should be employed to stem such hate speech.[178] Yet it is equally true that, by renouncing the recourse to state action (via law), a danger of legitimation of the deniers remains. In this case, Mari Matsuda writes, state inaction *is* perceived as action: "State silence…is public action where

[173] Parekh (2006), p. 221.
[174] *Ibid.*
[175] Minkenberg (2006), p. 44.
[176] "German court rejects attempt to ban neo-Nazi party," *The Guardian*, March 19, 2003, available at http://www.quardian.co.uk/world/2003/mar/19/thefarright.germany (last accessed March 31, 2008).
[177] Obendörfer (2000), p. 240. See also Minkenberg (2006), p. 29.
[178] See, *inter alia*, Strossen (1996).

the strength of the new racist groups derives from their offering legitimation and justification for otherwise socially unacceptable emotions of hate, fear, and aggression."[179]

A different type of argument against militant democracy will form the basis of shifting the discussion toward the second democracy-based line of argumentation. Critics of the *Streitbaredemokratie* have pointed to the unacceptable lack of public discourse and consensus over the very fundamentals of democracy in societies where repression may be used against anti-democratic actors.[180] Emphasizing this concern over the nature of the democracy we are trying to protect, there is a distinct approach that we can take in looking at hate speech as a potential threat to the democratic order. Law professor Susanne Baer, for instance, advocates for an "equality approach to speech law," one which argues that "[t]he right to equality against hierarchy can be employed against violent speech as a right analogous to the right to free speech."[181] The law becomes a useful instrument in equalizing access to speech when it

> limits some speech by actively supporting other speech, in order to avoid violations of speech equality. In this case, the law focuses on equality of access to speech. It distributes the right to speak through fora, forms, and means of speech and thus actively intervenes in the discourse.[182]

This approach takes full account of the reality that some speech may indeed silence another (such as hate speech silencing its targets), thereby leading to inequality and exclusion.[183] Therefore, it can quite often be that, despite a *de jure* commitment to the "civic deliberation model," because of its emphasis on the speech of the culturally dominant, this approach may

[179] Matsuda (1989), p. 2378.
[180] Hans Gerd Jaschke, *Streitbare Demokratie und innere Sicherheit, Grundlagen, Praxis und Kritik* (Opladen, 1991).
[181] Susanne Baer, "Violence: Dilemmas of Democracy and Law," in eds. Kretzmer and Hazan (2000), p. 64. Her approach is influenced by that of Catharine MacKinnon, such as in *Towards a Feminist Theory of the State* (Harvard University Press, 1991) and draws heavily on German jurisprudence.
[182] Baer (2000), p. 77.
[183] The silencing effect of certain categories of speech has been often pointed out in the context of pornography. See Frank Michelman, "Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation," *Tennessee Law Review*, Vol. 56, No. 2 (1989), pp. 291-319 and MacKinnon (1993). For an analysis of MacKinnon on silencing, see Rae Langton, "Speech Acts and Unspeakable Acts," *Philosophy and Public Affairs*, Vol. 22 (1993), pp. 293-330. See also Brison (1998), pp. 335-336.

do "nothing to shield outsiders against de facto silencing."[184] Not to intervene under these circumstances, Baer believes, "would itself be a form of regulation: whoever speaks would have the right to do so, whatever the effect."[185]

Susanne Baer, as others before her,[186] asks that we no longer divorce the right to speech from that to equality but conceive of them jointly within a cohesive consideration of democracy. Her approach, rooted in an understanding of the harm produced by hate speech, reformulates the premises of the problem. We no longer have to conceive of it as a choice between one right (speech) and another (equality and equal dignity of all members of society). When viewed through the lens of a meaningful democratic order, which is equally devoted to each of these foundational rights, the perspective changes. In her words, "[a]ccording to the fundamentally democratic right of equality, speech law has to be extremely sensitive to the context of social inequality."[187] Within such a context, therefore, speech will be enhanced, not inhibited, and participation increased when the "will of those whose perspective is not heard in social conflict"[188] is driving the law.

Cass Sunstein reaches a similar conclusion coming from the perspective of the deliberative democracy. He explains that deliberative democracy is "premised on and even defined by reference to the commitment to political equality."[189] Thus, he contends, only by "institutionaliz[ing] the idea that the force of an argument is independent of the person who makes it"[190] can the constitutional commitment to equality be concretized. Yet emphasizing *political* (rather than a broader conception of) equality may lead to an argument barring regulation. If political equality is the type of equality we mean, one can end up arguing that

[184] Karst (1990), p. 114.
[185] Baer (2000), p. 91.
[186] See Fiss (1998), similarly arguing that expanding "the terms of public discussion" to include those who are otherwise silenced by hate speech and pornography will reinforce public debate and enhance freedom.
[187] Baer (2000), p. 93.
[188] *Ibid.*, p. 96.
[189] Sunstein (1993), p. 20.
[190] *Ibid.*

"equality demands that everyone, no matter how eccentric or despicable, have a chance to influence policies as well as elections."[191] Baer's view, however, speaks of a more meaningful understanding of equality. It refuses to rely on the concept of "equality of opportunity" (of access to the public arena) as fulfilling the commitment to equality. Instead, she advocates for an approach that acknowledges, instead of glossing over, the inherent inequality of access to that arena, and proposes concrete measures of equalizing it. Of course, this is possible in contexts where equality and speech are on comparable constitutional footing and where they can be balanced and assessed against each other in an effort to fulfill the constitutional commitment to both.

2. INTERNATIONAL STANDARDS

Having assessed the normative arguments for and against the regulation of hate speech, it would benefit our analysis to shift focus toward the international perspective. While many of the previously discussed accounts are heavily influenced by specific national experiences with hate speech laws, the international optic can offer a new lens for looking at hate speech and Holocaust denial legislation. In fact, a number of authors have already noted the growing favor anti-hate speech laws, including anti-Holocaust denial measures, have received throughout the world (with the notable exception of the United States).[192]

The emergence of a more or less unified system of international hate speech norms has not gone unnoticed. Law professor Friedrich Kübler has identified the growing interest in anti-racist speech laws worldwide. He justifies this trend by pointing to three characteristics of the hate speech phenomenon in recent years. One is its increasingly structured nature on a

[191] Ronald Dworkin, "Women and Pornography," *The New York Review of Books*, Vol. 40, No. 17, October 21, 1993.
[192] See, *inter alia*, Elizabeth F. Defeis, "Freedom of Speech and International Norms: A Response to Hate Speech," *Stanford Journal of International Law*, Vol. 29 (1992), pp. 57-130; McGoldrick and O'Donnell (1998); Knechtle (2006), pp. 539-542; and Rosenfeld (2003).

global scale, in other words, "the bias and prejudices triggering specific incidents are mostly generated by organized propaganda and/or by commercially produced and distributed materials."[193] The widespread availability of this type of material (especially since the advent of the Internet) coupled with the need for transnational cooperation in criminal prosecutions has thus lead to the emergence of necessary common standards. A second factor Kübler identifies "is that the consequences of racial obsessions and ethnic conflicts will rarely be confined to the territory of one country."[194] Kübler's third point has to do with the relationship between hate speech and the accumulation of power by hate groups and will be detailed in the ensuing discussion of the symbolic role of the law in fighting them.

Whether one agrees with the existence of a unified global body of norms surrounding hate speech or not, it is clear that expressions of hate constitute the focus of increased international attention. Jurist Stephanie Farrior links this new concern of international law with concerns of equality (echoing critical race theorists) and writes that "failure to restrict hate speech [constitutes] a failure to fulfill a state's obligation to give effect to the right to equality and non-discrimination."[195] She goes farther and asserts that there has emerged something akin to a positive right, what she terms "a right to be free from hateful speech, as well as a government obligation to protect against private actors."[196] Others have gone so far as to justify the need for wide-encompassing anti-hate speech norms by linking it to the

[193] Friedrich Kübler, "How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights," *Hofstra Law Review*, Vol. 27 (Winter 1998), p. 358.
[194] *Ibid.*, p. 359.
[195] Stephanie Farrior, "Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech," *Berkeley Journal of International Law*, Vol. 14, No. 1 (1996), p. 97. Farrior further links arguments from international law theory to those of critical race theorists by pointing to their joint emphasis on the targets of hate speech, on the seriousness of the injury caused by hate speech, on the latter's silencing effect, and on the need for highly contextual analyses of cases. *Ibid.*
[196] *Ibid.* Farrior's account is strongly premised on observations from European jurisprudence and will be further expanded upon in Chapter Three below.

occurrence of genocide.[197] There are even claims that hate speech regulation has all but reached the level of customary international law.[198]

While the latter claim may somewhat overstate the degree of international consensus, I do think it is correct to speak of an "emerging international standard outlawing hate speech."[199] One example of such international interpretation of free speech norms as they collide with hate speech is the UN Human Rights Council's decision in *Faurisson v. France*.[200] This and other decisions set the tone of what national interpretations of international legislative tools such as article 19 of the International Covenant on Civil and Political Rights (ICCPR) and article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) ought to take into account. The case will be discussed in detail when analyzing the French *loi Gayssot* in Chapter Three below. Another example of transnational recognition of anti-hate speech statutes can be found in the ECtHR's article 10 case law.[201] This, too, will be discussed in more detail in the third chapter, as a supplement to national analyses of Holocaust denial jurisprudence. For now, suffice it to say

[197] Beyond the frequent allusions to the role played by hate propaganda before the Holocaust, some have pointed out the function of hate speech in more recent genocidal campaigns as well. See, for instance, William A. Schabas, "Hate Speech in Rwanda: The Road to Genocide," *McGill Law Journal*, Vol. 46 (2000), pp. 141-171 and Wendel (2004). For the argument that denial is the final step in all occurrences of genocide (and the inevitable first step toward further atrocities), see Gregory H. Stanton, "Eight Stages of Genocide, Paper presented at the Yale University Center for International and Area Studies, 1998, available at http://www.genocidewatch.org/8stages.htm (last accessed March 31, 2008).

[198] Mariana Mello, "Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law," *Loyola of Los Angeles International and Comparative Law Review*, Vol. 28 (2006), pp. 365-378.

[199] Matsuda (1989), p. 2323. The U.S. remains outside this emergent international standard. For a view on American exceptionalism with regard to hate speech standards, see, *inter alia*, Kevin Boyle, "Hate Speech—The United States Versus the Rest of the World?," *Maine Law Review*, Vol. 53 (2001), pp. 487-502.

[200] For an analysis, see McGoldrick and O'Donnell (1998), pp. 469-484.

[201] For a schematic account, see *Ibid.*, pp. 464-469. Article 10 of the European Convention of Human Rights reads:

> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

that hate speech is open to proscription on the international level, within certain limits (dealing, primarily, with the protection of the rights of others, of public order, and of democracy itself). In other words, internationally, "the ideological imperative of freedom of expression is not allowed to ride roughshod over other human rights and laudable societal values."[202]

3. SYMBOLIC ROLE OF LAW

The emphasis on harm, whether to individuals, the community, or the very fabric of democracy, is not the only important aspect of an account of hate speech regulation. What values such regulation is meant to embody, and toward what purpose, play a crucial role in the adoption and functioning of such laws. Equally relevant is to trace the motivations behind the passing of anti-denial legislation inasmuch as they illuminate their expected function within the broader constitutional framework. How, then, the laws are reacted to within society is also telling. In other words, in the case of hate speech regulation broadly, and anti-negationism specifically, the intricacies of the law's inception, reception, and perception within various circles of power and of society are of utmost relevance. My analysis is intended to have the reader reflect on the complex, often mixed messages carried by anti-Holocaust denial laws, whether so intended or not, and on the impact this has on their effectiveness and social acceptance.

Early work on the social functioning of law identified two types of legislation: instrumental and symbolic.[203] Instrumental law, in this paradigm, pursues concrete goals, its effectiveness measured by its record of enforcement. Legislation could, on the other hand,

[202] Tarlach McGonagle, "Wrestling (Racial) Equality from Tolerance of Hate Speech," *Dublin University Law Review*, Vol. 23 (2001), p. 24.
[203] Joseph R. Gusfield, *Symbolic Crusade: Status Politics and the American Temperance Movement* (University of Illinois Press, 1976); Muray Edelman, *The Symbolic Uses of Politics* (1964); and Edelman, *Politics as Symbolic Action, Mass Arousal and Quiescence* (1971). For an even earlier work, see Thurman W. Arnold, *The Symbols of Government* (Yale University Press, 1938).

also be thought of as ceremonial or ritualistic state action[204] whose aim is to express and enforce social norms and ideals. One of the examples of such symbolic legislation is that of the Temperance Movement the United States. This, the argument goes, had as a goal the symbolic reaffirmation of the primacy of one societal subculture over others, rather than the eradication of drinking.[205] In other words, rather than an instrumental tool, it was the product of a battle over the character of the dominant culture and its values.

More recently, too, scholars have suggested analytical approaches to understanding the social effectiveness of legislation. One such method of relevance here is the so-called "communicative" approach.[206] It emphasizes how "the creation of statutes is an act which produces meaning,"[207] or a range of meanings. In this context, the difference between instrumental and symbolic laws "is that the audience of symbolic laws forms a community that incorporates a morality."[208] This community then views law as "expressive of shared norms."[209] The proponents of this approach understand law as embodying a set of aspirational norms which are communicated within a shared "communicative framework" between legislators and the "interpretive community."[210] The law, therefore, works, when the community has internalized the norms. By shedding light on the moment the law is conceived and promoted as a normative tool within specific societies, the communicative approach can

[204] Gusfield (1976).
[205] Namely, the older established Anglo-Saxon Protestants as opposed to newcomers such as the Irish or German at the end of the twentieth century/beginning of the nineteenth. *Ibid.* An interesting analogous examination, this time of Iceland's beer ban from 1915 until 1989, can be found in Helgi Gunnlaugsson and John F. Galliher, "Prohibition of Beer in Iceland: An International Test of Symbolic Politics," *Law & Society Review*, Vol. 20, No. 3 (1986), pp. 335-354.
[206] The main proponents of this approach are Willem J. Witteveen and Bart van Klink. See, *inter alia*, Witteven, "Significant, Symbolic and Symphonic Laws," in ed. Hanneke van Schooten, *Semiotics and Legislation: Jurisprudential, Institutional and Sociological Perspectives* (Deborah Charles Publications, 1999), pp. 27-70; Witteveen and van Klink, "Why Is Soft Law Really Law? A Communicative Approach to Legislation," *RegelMaat* (1999), pp. 126-140; and eds. Nicolle Zeegers *et al.*, *Social and Symbolic Effects of Legislation Under the Rule of Law* (The Edwin Mellen Press, 2005).
[207] Witteveen (1999), p. 27.
[208] *Ibid.*, p. 35.
[209] *Ibid.*, p. 36.
[210] They also emphasize the applicability of this approach to legislation on moral issues, which "can express who we are, what our identity is and which values we hold dear." See Wibren van der Burg, "The Expressive and Communicative Functions of Law, Especially with Regard to Moral Issues," *Law and Philosophy*, Vol. 20, No. 1 (Jan., 2001), p. 36.

inform the current study. It helps provide a more systematic understanding of how the competing values discussed in Section Two above actually translate into legislative outcome.

Throughout the current analysis, a simplified understanding of the term "symbolic legislation" will be employed. I will use it to denote legislation that is intended to incorporate certain values, notably constitutional values such as free speech, equality, dignity, and democracy (what some have called "expressive legislation"),[211] even when not armed with much implementation force. I should note that throughout this study I distance myself from the sometimes negative connotations attributed the label "symbolic law" (understood as law that is ineffectual and largely unimplemented). Instead, I will use it in its expressive sense, as law that carries meaning, that signifies a particular degree of commitment to key constitutional values, and, ultimately, as law that matters.

For my purposes, therefore, the differentiation between symbolic legislation in a negative sense—expressing certain values without being enforced—and symbolic in a positive sense—articulating communal values with an aim at discussion and interaction—is less relevant.[212] That is not to deny that this difference exists when it comes to anti-negationist legislation in the countries I cover. However, since the driving question behind my research is what triggers regulation to begin with, the legislative moment is more important. In this sense, then, I am taking an approach inspired by political science in its concern with the actors involved, their motivations, declared or not, and their inter-relationships. I accordingly scrutinize symbolic legislation such as anti-Holocaust denial legislation with skepticism. That is to say, the possibility will be assessed (especially when the law is worded in vague

[211] Van der Burg (2001), pp. 41-47. I also, therefore, discard the negative connotations that may accompany "symbolic legislation," particularly the view that when unenforced/unenforceable, it is meaningless.
[212] Bart van Klink, *De wet als symbol. Over wettelijke communicatie en de Wet gelijke behandeling van mannen en vrouwen bij de arbeid* (W.E.J. Tjeenk Willink, 1998). Van Klink calls the second of these types "communicative legislation."

language) that behind this type of legislation often lurk shrewd political goals, such as overcoming political crises, achieving compromise, and electoral success.[213]

What then, is the relevance of all this to a discussion of Holocaust denial laws? The symbolic role anti-negationist and anti-hate speech regulation might play has often been pointed to. Writing on speech codes on college campuses, Professor Jon Gould, for instance, argues that one reason they are implemented is to serve as symbolic responses to racial incidents on campus. Their purpose is "to assure campus constituencies that action had been taken against intolerance."[214] This suggests that the perceived need for action in cases of hate speech may lead to the belief that legislation, even with potentially weak hopes of enforcement, matters. It might be seen as a first step toward more incisive later measures or as a signaling action on the part of the state that it is not neutral in matters of intolerance.

Another view is that, even when not completely eradicating the climate of intolerance created by hate speech, laws against it might at least cause it a dent. How this can be achieved is interesting. One explanation points to the delegitimization that state involvement, on the side of abused minorities, has on their abusers. By attaching the stigma of illegality to them, this argument goes, their political legitimacy receives a serious blow and public acceptance will dwindle as a consequence. Friedrich Kübler is convinced of this when he writes about the very real dangers of hate speech in the hands of actors seeking political power, for

> 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. 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. 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. Therefore, laws against racist speech can have symbolic importance; they

[213] Harald Kindermann, "Symbolische Gesetzgebung," in eds. Dieter Grimm and Werner Maihofer, *Gesetzgebungstheorie und Rechtspolitik (Jahrbuch für Rechtsoziologie und Rechtstheorie XIII)* (Westdeutscher Verlag, 1988), pp. 222-245.
[214] Jon B. Gould, *Speak No Evil: The Triumph of Hate Speech Regulation* (University of Chicago Press, 2005), p. 5.

> 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.[215]

He thus observes that, while not completely eliminating the climate of intolerance, removing legitimacy by "depriving its proponents of their respectability" via law is a valuable tool toward that end. [216] He is not alone in pointing out that we should not discard the symbolic role that legislating at least "a small and more plausibly regulable subset of a much larger problem" may play.[217] Put differently, what these accounts suggest is that hate speech may be regarded as a tool in the hands of self-interested political actors with an extremist agenda. Viewed in this way, then, regulation no longer appears as the unfortunate inroad into individual liberty; instead, it becomes a necessary protective armor for minorities and society at large. The discussion centered on militant democracy above operated on similar grounds. Thus, regulation against hate speech becomes both a means of protecting the individually aggressed and the community at large.

If we accept that anti-negationist legislation carries symbolism, and that this symbolism matters in different contexts to different people, what, exactly, is its intended purpose? More explicitly, what might lie behind these laws at the moment of their creation? Which audience are they intended to speak to? Here I offer my dual explanation of a symbolism directed both internally and externally. As I have already clarified, the internal audience is constituted by the individual victim of hate speech, but also society in its entirety. The message they receive? That the national commitment to certain values (be they equality, dignity, democratic participation, or a combination of these) is still strong and will not tolerate expression of hate in the form of Holocaust denial. The external audience of these laws is made up of international bodies and the society of nations as a whole. The message

[215] Kübler (1998), pp. 361-362.
[216] Kübler (1998), p. 368.
[217] Frederick Schauer, "The Sociology of the Hate Speech Debate," *Villanova Law Review*, Vol. 37 (1992), p. 817.

sent is similar to the one expressed internally. The country's commitment to anti-discrimination and anti-hate speech international instruments only works to reinforce its claim that it is a respectable global player, ready to fulfill its obligations, and protect its citizens.

All this does not fully explain, however, the recourse to *criminal* law, as opposed to other types of legislation, in addressing Holocaust denial. If law itself can carry a message, how is the strength of that message affected by the choice of the arguably strongest legal instrument? Some oppose the use of the harsh medium of criminal law in regulating what they ultimately view as speech—unpleasant, offensive, potentially harmful—yet still to be allowed. They believe that "because the criminal law is primarily a concern of individuals, it is not well targeted to affect organic aspects of a community such as its value commitments."[218] If this were the case, anti-denial laws might even be counter-productive and misdirect attention from other means of fighting negationists (such as education in schools, awareness campaigns etc.) To be sure, this view is often proposed, with the complementary remark that victims should be made to understand that society's reluctance to regulate harmful speech is not the same as a *laissez-faire* card for deniers.[219] However carefully such proponents try to tread, it is inescapable that victims might, and often do, feel that no action is indeed action; that a state's silence speaks to its indifference for their plight. Consequently, I do not think that the availability of other means of fighting denial necessarily excludes the resort to law. The latter is a sole-standing path that may be pursued or not.

To go back to the question of why criminal law: it is not at all always the case that only criminal law "will do" to punish Holocaust denial. Alternative suggestions for both denial and hate speech generally have included civil remedies such as tort actions for

[218] Wendel (2004), pp. 1421-1422.
[219] Evan Simpson, "Responsibilities for Hateful Speech," *Legal Theory*, Vol. 12 (2006), p. 176.

defamation and intentional infliction of emotional distress[220] and non-punitive remedies.[221] Moreover, it is not clear whether laws *specifically* targeting negationism (whether criminal or otherwise) are always necessary or fortuitous in the fight against this phenomenon. In fact, as will be seen in the empirical discussion to follow, trials did take place before specific negationist laws were implemented in a number of countries, and not without success. The reader will therefore get a chance to explore more in depth the texts of these laws, with brief descriptions of their adoption process and broader constitutional framework in Chapter Two. The reader will then be able to "see the laws in action" by means of the jurisprudential analysis of leading cases offered in Chapter Three.

[220] Yonover (1996).
[221] Diana Tietjens Meyers, "Rights in Collision: A Non-Punitive, Compensatory Remedy for Abusive Speech," *Law and Philosophy*, Vol. 14, No. 2, Special Issue on Rights (May, 1995), pp. 203-243.

CHAPTER II

Legislation specifically targeting Holocaust denial can be found in several countries, including Austria, Belgium, the Czech Republic, France, Germany, Liechtenstein, Luxembourg, Romania, Slovakia, and Spain.[222] In this chapter, I intend to look at the texts of these laws and place them within a constitutional framework, as well as detail other (mostly criminal law) means of addressing related phenomena, such as incitement, group defamation, and discrimination. The emerging case law will be detailed in Chapter Three to follow.

One glance at the above list and one notices that most of these countries were engaged in one form or another during the Holocaust, be it that of perpetrator, collaborator or bystander. The adoption of anti-denial laws thus appears congruent with a larger debate in these societies, debates involving public memory of the Holocaust and recognition of guilt. In my analysis, I take this aspect into account. I mostly focus on case studies where the regulation of Holocaust denial by law is problematic not solely from a purely theoretical, constitutional point of view, but also from the viewpoint of an implicit acknowledgment of guilt and/or the destructive role of anti-Semitic speech in these societies.

One must not forget, however, that the regulation of Holocaust denial, much as it is influenced by national sensitivity to the Holocaust, is also a choice. Some of the most famous trials of Holocaust deniers took place in countries which lack specific anti-denial legislation. Other laws, particularly libel laws, were used to bring to trial notorious "revisionists" such as Ernst Zündel in Canada[223] or David Irving in the UK.[224] Unlike the countries with laws

[222] For further information and the text of specific articles banning Holocaust denial in these countries, see *Combating Hate Crimes in the OSCE Region: An Overview of Statistics, Legislation, and National Initiatives* (OSCE Office for Democratic Institutions and Human Rights, 2005).

[223] For more information on the Zündel case in Canada, see Kathleen Mahoney, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography," *Law and Contemporary Problems*, Vol. 55, No. 1 (Winter, 1992), pp. 77-105; Marouf A. Hasian Jr., "Canadian Civil Liberties, Holocaust Denial,

expressly addressing Holocaust historiography, these countries rely on individuals or associations employing other available legal tools to bring deniers to justice. Furthermore, prosecutions of deniers existed in some of the countries in this study (France, Germany) even before the specific provisions against negationism were passed. Though a cross-national analysis of the *entire* spectrum of means employed to regulate Holocaust denial is beyond the scope of my thesis, it is nonetheless useful to note that alternative paths have been taken.

For reasons of clarity and coherence, I will discuss the countries separately, but point to comparable features in other national contexts where relevant. As a general rule, I follow the pattern of first discussing the anti-denial law, followed by the constitutional provisions relating to speech, dignity, and equality, and also the penal provisions, if available, which complement the discussion of hate speech and Holocaust denial in particular.

1. ANTI-HOLOCAUST DENIAL LAWS IN WESTERN EUROPE

1.1 Germany

As already stated, the paradigmatic case for studying Holocaust denial legislation has been Germany. This has to do with the early engagement of the country with the phenomenon (negationism appeared immediately after the war and cases reached the courts from the 1970s onward)[225] as well as with its numerous and vocal exponents.[226] A major consideration has also been the understanding that in light of the German self-image as the perpetrator-country of the Holocaust, criminalization of denial serves a highly charged moral purpose. Often, the

and the Zündel Trials," *Communications and the Law*, Vol. 21 (Sept., 1999), pp. 43-56; and Kahn (2004), in particular pp.45-59 and 85-99.

[224] See ft. 49 above.

[225] For a review of the German courts' early attempts to tackle the negationist phenomenon, see Eric Stein, "History against Free Speech: The New German Law against the "Auschwitz" – and Other – "Lies,"" *Michigan Law Review*, Vol. 85, No. 2 (Nov., 1986), pp. 277-324.

[226] For an account of the major Holocaust deniers in Germany and their transnational influence, see Anthony Long, "Forgetting the Führer: the recent history of the Holocaust denial movement in Germany," *Australian Journal of Politics and History*, Vol. 48, No. 1 (2002), pp. 72-84.

literature emphasizes national history as the driving force behind the German anti-denial legal move, coupled with the fight against fringe extremism, and (unwarrantedly) assumes this causal explanation as valid in all contexts. Statements such as

> Germany's Nazi history earlier this century is, of course, the reason for the existence of such legislation, although the post cold-war resurgence of neo-Nazi activities has led to legislative reforms designed to strengthen these provisions still further[227]

are frequent in the literature. They do little, however, to engage with the broader social impact of the law, or to examine its actual effectiveness. The German case, moreover, has often been presented in comparisons with the US context, which, I believe, minimally illuminates the way Holocaust denial laws actually work.[228] That is the motivation behind the present multiple-nation analysis in a European *milieu*.

However, this view oversimplifies matters and cripples our understanding of anti-denial laws more broadly. I tend to agree with those who view the law, particularly law regulating contested moral issues, as a more complex tool which may be used to serve a multitude of purposes—some quantifiable, other not—simultaneously. Mark Osiel points to a very real possibility of using the law in the mnemonic process, saying that "collective memory can be socially constructed, with legal blueprint in hand."[229] This is just one of the considerations to be added to the simple "history + neo-Nazis = anti-denial law" equation presented above. Osiel also points to the danger of adopting legal solutions in sensitive

[227] Sionaidh Douglas-Scott, "The Hatefulness of Protected Speech: A Comparison of the American and European Approaches," *William & Mary Bill of Rights Journal*, Vol. 7 (Feb., 1999), p. 319.
[228] See, for example, Bradley A. Appleman, "Hate Speech: A Comparison of the Approaches Taken by the United States and Germany," *Wisconsin International Law Journal*, Vol. 14 (Spring, 1996), pp. 422-439; Natasha L. Minsker, ""I Have a Dream—Never Forget:" When Rhetoric Becoms Law, A Comparison of the Jurisprudence of Race in Germany and the United States," *Harvard BlackLetter Journal*, Vol. 14 (Spring, 1998), pp. 113-169; Douglas-Scott (1999); Thomas Lundmark, "Free Speech Meets Free Enterprise in the United States and Germany," *Indiana International and Comparative Law Review*, Vol. 11 (2001), pp. 289-317; Ronald J. Krotoszynski, Jr., "A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany," *Tulane Law Review*, Vol. 78, No. 5 (May, 2004), pp. 1549-1609; and Claudia E. Haupt, "Regulating Hate Speech – Damned If You Do and Damned If You Don't: Lessons Learned from Comparing the German and U.S. Approaches," *Boston University International Law Journal*, Vol. 23 (Fall, 2005), pp. 299-335.
[229] Osiel (1996), p. 661.

situations, for "[w]hen collective memory has already become comfortably entrenched, the law's efforts to excavate and scrutinize it are only likely to discredit the law and its professional spokesmen."[230] Given the high degree of contestation of Holocaust responsibility in many of the countries in this study, this remark is of utmost importance. Some authors also point to the more practical effects of laws aiming to limit hateful speech. They note that this type of legislation is often part of a broader attack on extremist movements and especially parties. Laws hence operate to regulate discourse in the political arena and to make sure that "undesirable," potentially threatening elements have little to no chance of gaining political capital. A study of five Western democracies that have all adopted hate speech laws found that

> [i]n all five countries [Germany, France, the Netherlands, Italy, and Belgium] the very presence of a legal framework that potentially could be used against RWE [right wing extremism] did put restrictions upon such parties and organizations and made them more careful in their public statements.[231]

Thus, it is not just the purposes of these laws that are multiple and complex, but also their intended audience.

To return to Germany, then, it will now seem clearer why I am reluctant to present it as the exemplary case of prohibiting negationism via law. Keeping in mind the multi-level interplay between legislative purpose, means, and target audience, the intricacy of the German anti-denial system of laws will become apparent.

There are several provisions in the German Penal Code (*Strafgesetzbuch* (StGB)) which together form the anti-denial legal apparatus. Section 130 StGB is the primary *locus* of anti-negationist measures, since it deals with "agitation of the people" (*Volksverhetzung*), emphasizing incitement to racial hatred and attacks on human dignity as means of disturbing

[230] *Ibid.*,p. 547.
[231] Klandermans and Mayer (2006), p. 32.

public peace.[232] Most importantly, section 130(3) StGB deals explicitly with denial of Nazi crimes:

> Whoever publicly or in a meeting approves of, denies or renders harmless an act committed under the rule of National Socialism of the type indicated in Section 220a subsection (1), in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.[233]

The same applies to writings and publications.[234] The core element of section 130 StGB therefore is that of human dignity (*Menschenwürde*) (see discussion below). Commentators have pointed out that it is not just actual breaches of peace that are pursued here; instead, this section also covers "attacks which might result in a sense of threat" among the target group, as well as those resulting "in an increase in an existing predisposition to commit such attach."[235]

This is not the entire spectrum of legal tools, however. Section 131 StGB should also be mentioned, as it regulates incitement to racial hatred, alongside the dissemination, display, and production of materials glorifying "violence against people in a cruel or otherwise

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[232] Section 130, subsections 1-2 read: (1) Whoever, in a manner that is capable of disturbing the public peace:
1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population, shall be punished with imprisonment from three months to five years.
(2) Whoever:
1. with respect to writings (Section 11 subsection (3)), which incite hatred against segments of the population or a national, racial or religious group, or one characterized by its folk customs, which call for violent or arbitrary measures against them, or which assault the human dignity of others by insulting, maliciously maligning or defaming segments of the population or a previously indicated group:
a) disseminates them;
b) publicly displays, posts, presents, or otherwise makes them accessible;
c) offers, gives or makes accessible to a person under eighteen years; or
(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of numbers a through c or facilitate such use by another; or
2. disseminates a presentation of the content indicated in number 1 by radio, shall be punished with imprisonment for not more than three years or a fine.

[233] This and ensuing translations are the author's and are based on the original German text available at http://bundesrecht.juris.de/stgb/index.html (last accesed March 31, 2008).

[234] Subsections 4-5 of section 130 read: (4) Subsection (2) shall also apply to writings (Section 11 subsection (3)) with content such as is indicated in subsection (3).
(5) In cases under subsection (2), also in conjunction with subsection (4), and in cases of subsection (3), Section 86 subsection (3), shall apply correspondingly.

[235] Rainer Hofmann, "Incitement to National and Racial Hatred: The Legal Situation in Germany," in ed. Coliver (1992), p. 164.

inhuman manner." Section 185 StGB, too, is relevant, since it prescribes a punishment of up to two years or a fine for insult (*Beleidigung*).[236] Moreover, section 189 StGB criminalizes the disparagement of the memory of the dead.[237] Last but not least, it is important to look at who and under what conditions may file a complaint following an incident of Holocaust denial. Section 194 StGB states that, as a general rule, insult is to be prosecuted upon individual complaint. However, in the case of public insult where "the aggrieved party was persecuted as a member of a group under the National Socialist or another rule by force and decree, this group is a part of the population and the insult is connected with this persecution," the complaint is no longer necessary (section 194(1) StGB). The same is true in cases of disparagement of the memory of the dead, though in both instances the victim may object to an *ex officio* prosecution.

To put these provisions into perspective and understand how they have been applied to the *Auschwitz-lüge*,[238] legal scholar Eric Stein's four-tiered categorization of relevant case law is useful. He classifies cases as follows: (1) attacks on human dignity (section 130), alone or in conjunction with incitement to racial hatred (section 131) or—if private petition is lodged—insult (section 185); (2) incitement to racial hatred (section 131), alone or in conjunction with sections 130 or 185; (3) insult (section 185), alone or in conjunction with section 189 or sections 130 or 131.[239] One should note that, while seemingly coherent, this system of laws has not always appeared as straightforward in German courts. For instance, how to deal with the Holocaust as historical phenomenon (namely, whether to treat it as established fact and take judicial notice of it or not—the German doctrine of *Offenkundigkeit*)

[236] Section 185, in its entirety, reads: "Insult shall be punished with imprisonment for not more than one year or a fine and, if the insult is committed by means of violence, with imprisonment for not more than two years or a fine.

[237] Section 189 reads: "Whoever disparages the memory of a deceased person shall be punished with imprisonment for not more than two years or a fine."

[238] This term, translatable as "Auschwitz lie," is used in Germany to denote the negationist phenomenon. It stems from the denial of the existence of gas chambers in Auschwitz.

[239] Stein (1986), p. 289.

was the source of much confusion in early litigation.[240] As will be seen in the jurisprudential discussion in Chapter Three, the current interpretation is that the Holocaust is "obvious (*offenkundig*) knowledge,"[241] but, on several occasions, courts wavered in their approach to this point. A similarly cumbersome aspect of the German fight against denial was constituted by the requirement, prior to the 1985 StGB reform, that prosecution be only possible based on individual complaints.

The jurisprudence of the Federal Constitutional Court (FCC) will make the operation of the law clearer. Yet before proceeding, it is important to understand the motivations behind passing this type of legislation, in the form in which it was passed. The 1985 reform debates offer some insight into legislative intent concerning *Auschwitz-lüge* prosecutions. The reform itself concerned a legislative bill that removed the previous requirement of a private petition and instead allowed for *ex officio* prosecutions. During the negotiations on the bill, many of the views still present in debates over anti-negationism laws today were expressed. Thus, there were those who wanted an extension to include denials of all genocides (the Socialists) and those who saw criminal law as an inadequate means to fight denial (the Greens); there were also those who appealed to the societal impact of Holocaust denial and saw it as a "whitewashing the National Socialist regime and thus an attack on public peace," which would impair the "basic consensus of our society."[242] This latter view is reminiscent of some scholarly opinions seeing denial as a "national embarrassment" for post-war Germany and as such in dire need of eradication from the public sphere.[243] Despite prosecutions being carried out based on sections 130, 131, and 185 StGB, it was not always the case that negationism

[240] See discussion in Kahn (2004), pp. 16-22. See also Stein (1986), pp. 290-291.
[241] *Neue Juristiche Wochenschrift* (1982), p. 1203, cited in Kahn (2004), p. 19. The case refers to a constitutional complaint by neo-Nazi leader Michael Kuhnen, dismissed by the Federal Constitutional Court.
[242] Social Democratic member of the Legal Committee, cited in Stein (1986), p. 309.
[243] See Kahn (2004), p. 15.

could be punished.[244] It was thus only after the 1994 reform of the German Penal Code that the *Auschwitz-lüge* provision was included as subsection 3 of section 130, finally translating courtroom reality into a firm legal provision.

Before engaging with anti-negationist laws in other countries, one should not forget that the *Auschwitz-lüge* law in Germany functions in a very carefully regulated constitutional system. Thus, with regard to speech, article 5of the Basic Law (*Grundgesetz* (GG))[245] initially makes broad protective provisions for speech, ensuring both a right to disseminate expression and a right to inform oneself and prohibits censorship. Subsection 2 of article 5 indicates the conditions for limitation of the freedom of expression as found "in the provisions of general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor," while subsection 3 declares the freedom to artistic and scientific expression.[246] Of note, too, are articles 1(1) GG and 2(1) GG, which both deal with dignity: the former declares it to be "inviolable," making its protection the (positive) duty of the state,[247] while the latter ensures "the right to the free development of personality."[248] Article 3(1) establishes equality before the law, while 3(3) lists the criteria according to which discrimination is prohibited. Last but not least, articles 9(2) on associations, 21(2) on political parties, and 18 on individuals serve the purposes of the *wehrhafte Demokratie* and are meant

[244] For early judgments of insult against Jews as a sufficiently defined group for the purposes of section 185, see cases of the Bundesgerichtshof: 11 BGHSt 207 (28 February 1958) and 16 BGHSt 49, 57 (21 April 1961). See also Stein (1986), ft. 90.

[245] The full text of article 5 reads: (1) Everyone shall have the right freely to express and disseminate his opinion by speech, writing, and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.
(2) These rights are limited by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor.
(3) Arts and science, research and teaching shall not absolve from loyalty to the Constitution.
This and subsequent English citations of the GG are taken from Donald P. Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 1997), 507-518.

[246] Though, from the text of the Basic Law, it would appear that artistic and scientific expression is not restricted, the *Bundesverfasungsgericht* has made it clear early on that this is not the case. *Mephisto*, 30 BVerfGE 173 (1971).

[247] In the words of one commentator, "[a]rticle 1(1) expressly imposes an affirmative obligation upon the state to protect human dignity, not merely to refrain from abusing it by its own actions." David P. Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, 1994), p. 194-195.

[248] For a discussion, see *Ibid.*, pp. 316-322.

to prevent activities which undermine the democratic order. Only by keeping in mind these considerations can we understand the subsequent emphasis on dignity, for instance, in German jurisprudence concerning denial, as well as the use of "personal honor" as the basis for limitation of negationist speech.

1.2 Austria

Keeping within the German-language context, the case of Austria is almost as often pointed to as one where the prosecution of deniers is ordinary. The recent case of the David Irving prosecution in 2006, resulting in a three year prison sentence, served to draw world attention, again, to the appropriateness of anti-denial laws in Europe.[249]

Section 3 of the Austrian Penal Code (*Verbotgesetz*)[250] deals with a wide range of activities related to the National Socialist regime, which thereby become prohibited. These include resurrecting NS associations or grounding similar ones (section 3(1)), becoming a member in such associations (section 3(b)), or other behavior furthering National Socialist ideology. Sections 3g and 3h are the most relevant to our discussion. 3g establishes a prison sentence of between one and ten years (up to twenty if particularly dangerous) for conduct *im nationalsozialistischen Sinn* (of a National Socialist nature) if not covered by other provisions. Subsequently, section 3h prescribes the same punishment for whoever, "in print, broadcast, or other media or by other public means," "denies, grossly minimizes, approves, or attempts to justify" ("*leugnet, gröblich verharmlost, gutheißt oder zu rechtfertigen sucht*") the Nazi genocide or other Nazi crimes.

The Austrian context is especially sensitive in two regards. On the one hand, the country is perceived as sharing in the guilt of Germany, seeing as though it was willingly

[249] "Holocaust denier Irving is jailed," *BBC News*, February 20, 2006, available at http://www.news.bbc.co.uk/2/hi/europe/4733820.stm (last accessed March 31, 2008).
[250] The following discussion and citations of the *Verbotgesetz* are the author's translation and are based on the text available at http://www.dagegenhalten.at/Verbotgesetz.pdf (last accessed March 31, 2008).

annexed to the Third Reich after the 1938 *Anschluss*. It would therefore follow that Austrians share, too, in the German guilt and sense of responsibility toward the Jewish population. However, their relationship to their partaking in the Second World War is more complicated than that. That the country sought to present itself (as well as understand its own role) as a victim in the aftermath of the war has been thoroughly documented.[251] In the words of one commentator, the combination of a narrative of victimhood and repeated denial of state responsibility define official remembrance of the Nazi era "even in the aftermath of other recent contestative events such as the controversial presidency of Kurt Waldheim and the political rise of the reactionary…Jörg Haider."[252]

On the other hand, the Austrian constitutional context, unlike the German one, does not establish an equally easily navigable system of rights. Thus, while article 7 established that "[a]ll federal nationals are equal before the law," there is no mirroring provision for human dignity.[253] Freedom of speech is regulated under article 6(1) of the State Treaty for the Re-establishment of an Independent and Democratic Austria.[254] Article 6(2) of the same document complements equality provisions by prohibiting discrimination on the basis of race, sex, language, or religion.

Given these mixed national feelings toward the WWII era, one would expect the anti-Holocaust denial Austrian law to come under severe attack. However, it would appear as

[251] See discussion in Havel (2005), pp. 620-630.
[252] *Ibid.*, p. 630. Havel is referring, first, to the president of Austria between 1986-1992, who had been disclosed as a former member of Nazi army units responsible for concentration camps deportations; secondly, the mention of Haider refers to this right-wing extremist politician entering the power coalition after the 1999 elections.
[253] The English version of the Austrian Constitution is to be found at http://servat.unibe.ch/icl/au00000_.html (last accessed March 31, 2008). Unless otherwise noted, the other English translations from constitutional texts also come from the International Constitutional Law Project website, available through http://www.servat.unibe.ch/law/icl/idenx.html (last accessed March 31, 2008).
[254] Article 6(2) reads:

> Austria shall take all measures necessary to secure to all persons under Austrian jurisdiction, without distinction as to race, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.

though, with a steady flow of cases being expediently resolved by lower courts, it has become accepted.

1.3 France

The reader has thus far been made familiar with two cases, Germany and Austria, in which the criminalization of Holocaust denial seems to present little societal opposition. Moreover, the laws themselves are part and parcel of elaborate penal provisions which juxtapose to protect individuals and groups from negationism. The French case, to be discussed below, is to some extent a departure from these initial considerations.

On July 13, 1990, the French Parliament passed the so-called *loi Gayssot* (named after the communist Member of Parliament who proposed the bill), which criminalized the contestation of National Socialist crimes, as established by the Nuremberg Tribunal. The text was included as article 24*bis* in the 1881 Freedom of the Press law. In its entirety, it reads:

> Shall be punished by the penalties stipulated in the sixteenth paragraph pf article 24, those who will have contested, in one of the means defined in article 23, the existence of one or more crimes against humanity as they are defined by article 6 of the statute of the international military tribunal annexed to the London accord of 8 August 1945 and that were committed either by the members of an organization declared criminal by applying article 9 of stated statute, or by a person recognized capable of such crimes by French or international jurisdiction.[255]

The very inclusion of a regulation prohibiting a certain type of speech into a law about the freedom of the printed word would appear paradoxical. The Chief of Section A4 (on the Press and Protection of Freedoms) of the *Parquet de Paris* noted that "[t]he legislator wanted to incriminate negationism but placed this incrimination at the heart of a repressive apparatus,

[255] This translation is the author's and is based on the original French version, available at http://legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=20080328 (last accessed March 31, 2008).

the law of the press, which is extremely favorable to freedom of expression."[256] Just one example of difficulties stemming from this choice is the three-month prescription period: after this time, prosecution can no longer be brought against the supposed denier. Some procedural difficulties are easily inferred, such as not being able to try a "revisionist" if his book/article was published more than three months in advance, even if he subsequently upheld his claims in public.[257] Given the French understanding of the role the State should play in controlling public discourse, however, this choice is not as unconventional.

The aim of giving the *loi Gayssot* this categorization was to make the offense of Holocaust denial more like an administrative matter, similar to prosecuting other kinds of undesirable discourse, such as libel and racist incitement. It incriminates negationism not so much as the expression of a lie, as a "lie which forms part of a campaign of anti-Semitic propaganda,"[258] or even an act of aggression the moment it is expressed.[259] In the French setting, this was not a completely unprecedented regulation. Criminal provisions against group libel and racial discrimination exist since July 1, 1972, when the *loi Pleven* was passed.[260] Interestingly, this law, as the *loi Gayssot* does as well, grants *locus standi* to any legally-established associations involved in the fight against discrimination. That is to say, they may become *parties civiles* in trials, a development of major importance. Professor Roger Errera, noting the major influence these associations have had in ensuing prosecutions, notes:

> The role of civil rights associations is a vital one: there are obvious limits to what individuals or target groups may or might be willing to do. The same can

[256] Fabienne Goget in *Rapport du colloque: La lutte contre le négationnisme: Bilan et perspectives de la loi du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe*, 5 July 2002, available at http://www.cncdh.fr/IMG/pdf/colloque_negationnisme.pdf (last accessed March 31, 2008) (hereinafter *Bilan de la loi Gayssot*), p. 61 (this and subsequent citations from this source are the author's translation).
[257] Matthieu Bourrette in *Ibid.*, p. 59.
[258] Michel Troper, "La loi Gayssot et la constitution," *Annales. Histoire, Sciences Sociales*, Vol. 54, No. 6 (1999), p. 1253 (author's translation).
[259] French Government justifications for the *loi Gayssot* in the National Assembly, cited in Norman Dorsen *et al.*, *Comparative Constitutionalism: Cases and Materials* (Thomson West, 2004), p. 919.
[260] The *loi Pleven* makes discrimination and incitement to discrimination on grounds of ethnicity, nationality, race, or religion an offense, whether committed against individuals, associations or companies.

> be said of public authorities when deciding whether to bring proceedings. Most of the case law…would simply not have existed if French law had not empowered certain associations to bring civil and criminal proceedings.[261]

As will be seen in other cases, notably Belgium and Spain, this is true of other contexts as well. One may speculate that the absence of such provisions, coupled with the penury of individual recourse to the courts, may lead to the almost total ineffectiveness of anti-denial laws (such as in the Romanian case).

Going back to the text of the *loi Gayssot*, of significance is the perception of the *Assemblée Nationale* that the *loi Pleven* did not go far enough, allowing some forms of hate speech, notably Holocaust denial, to go unpunished.[262] It is that much more interesting, then, that the word "Holocaust" does not explicitly appear in the text. Instead, the law refers to "crimes against humanity", a term taken from the mentioned proceedings of the Nuremberg tribunal. It has since been modified and enriched in the French understanding, extending its meaning and applicability. In 1985, the French Court of Criminal Appeals amended the definition of crimes against humanity to imply

> Inhumane acts and persecutions which, for the sake of a State practicing a policy of ideological hegemony, were committed systematically not only against individuals because they belonged to a racial or religious group, but also against adversaries of this policy, whatever may be the form of their opposition.[263]

The extended definition came at a time when France was struggling with the Vichy government's responsibility for wartime crimes. The language chosen thus left open the possibility of including national resistance heroes into the victim category.[264] Given this

[261] Roger Errera, "In Defense of Civility: Racial Incitement and Group Libel in French Law," in ed. Coliver (1992), p. 158.
[262] The Ministry of Justice declared to the National Assembly: "the authors of pseudo-historical writings have learned all subtleties of the law of the press and give their repulsive writings a racist resonance which despite everything eludes criminal law." Cited in Troper (1999), p. 1252.
[263] Cited in Donald Bloxham, "From Streicher to Sawoniuk: the Holocaust in the Courtroom," in ed. Stone (2006), p. 408.
[264] Interestingly, a parallel attempt at including "national heroes" within the protection of an anti-negationism law occurred during Romanian legislative proceedings. The proposal was not upheld, however.

understanding, the reference to crimes against humanity can be explained within the broader French effort of coming to terms with WWII guilt. Nevertheless, this constitutes the basis of much criticism of the *loi Gayssot* on account of its restrictiveness. Thus, there are those who see the inclusion of other genocides, or even other atrocities, as only fair and necessary if the French legislature is to remain consistent. There have even been legislative attempts toward this end,[265] but so far it cannot be said that the denial of the Armenian genocide (the most oft-invoked other genocide) finds itself on equal footing.[266]

Most significant, perhaps, is how the French text, in contrast to other laws, defines the actual crime at hand. The *loi Gayssot* uses the verb *contester* (to contest), and not without reason. As a member of the Minister of Justice noted, the law explicitly uses the term to avoid the more restrictive *nier* (to deny), but also to maintain the law applicable to more indirect negationism – *douter* (to doubt).[267] This extension in the language of the law allows for broader powers to the enforcing authorities, as it means that "all questioning of the existence of these crimes, even in a "disguised" or "dubitative" manner falls under the jurisdiction of the law."[268] Some have observed the relative ease with which French negationists managed to rely on "coded language" to avoid prosecution under the *loi Gayssot*.[269] It would appear, however, that legislators were well aware of this danger and tried to work against it from the inception of the law. How much they succeeded will be discussed in Chapter Three, under the relevant French jurisprudence.

The *loi Gayssot* is thus a somewhat "odd creature" when it comes to anti-denial legislation. It too, operates within a generally speech-protective constitution. The 1791 Declaration of Human and Civic Rights proclaimed the freedom of opinion (article 10) and of

[265] See ft. 6 above.
[266] Some commentators have noted that, while the French legislature might have an obligation to pursue coherence in this regard, this is only a moral, not a juridical, obligation. Troper (1999), p. 1255.
[267] Matthieu Bourrette in *Bilan de la loi Gayssot*, p. 58.
[268] *Ibid.*.
[269] Khan (2004), p. 101.

communication of ideas and opinions (article 11).[270] The equality of all citizens before the law is also amply provided for.[271] However, prior provisions existed that allowed for the prosecution of group libel and incitement, and not without success.[272] Under these conditions, therefore, some commentators see the *loi Gayssot* as "unnecessary and unwise."[273] Others explain the double impetus, political and judicial, behind the new law, which removed previous problems of proof when the prosecution depended on showing the anti-Semitic nature of the comments.[274] Still others see it as clearly needed in light of the perverse, eluding, and misleading nature of negationism.[275] If the initial purpose of this law, passed in the aftermath of some highly publicized incidents,[276] was to "permit[] the protection of public order, of the morals and rights of the individual, referring to the respect due to the past and the necessary preservation of social peace in the future,"[277] then its impact depends upon its societal effects and record of implementation. All these are detailed in the discussion in the subsequent chapter.

[270] The Declaration was incorporated into the current Constitution by way of the Preamble of the 1958 Constitution. The English texts of the 1791 Declaration as well as the 1958 Constitution are to be found at http://conseil-constitutionnel.fr/textes/constitu.htm (last accessed March 31, 2008).
[271] Under article 1 of the 1791 Declaration, in the Preamble to the 1946 Constitution, as well as under article 1, sentence 2 of the 1958 Constitution.
[272] For a review, see Errera (1992). See also Anne Cammilleri-Subrenat, "L'incitation à la haine et la Constitution," Paper presented at the XVIth Congress of the International Academy of Comparative Law, Brisbane, 14th-20th July, 2002, available at http://ddp.unipi.it/dipartimento/seminari/brisbane/Brisbane-Francia.pdf (last accessed March 31, 2008) and Régine Dhoquois, "Les thèses négationnistes et la liberté d'expresion en France," *Ethnologie française*, Vol. 37, No. 2 (2006), p. 27-33.
[273] Errera (1992), p. 155.
[274] Dhoquois (2006), p. 30.
[275] Gilles Karmasyn, "La Loi Gayssot et ses critiques de bonne foi: Ignorance de la nature du négationnisme," *PHDN (Pratique de l'histoire et dévoiements négationnistes)* (2002), available at http://www.phdn.org/negation/gayssot/critiques.html (last accessed March 31, 2008).
[276] Notably, the *loi Gayssot* followed some highly publicized cases of desecrations of Jewish cemeteries, as well as a statement made in September 1987 by extreme right wing politician Jean Marie Le Pen, calling the gas chambers a "detail of history:" "I don't say that the gas chambers did not exist. I wasn't able to see them myself. But I believe that it is a point of detail in the history of the Second World War." Quoted in Khan (2004), p. 102.
[277] Bourette in *Bilan de la loi Gayssot*, p. 53.

1.4 Belgium

The discussion so far has indicated the specificity of all three approaches covered, with neither serving as the oft-sought after "paradigmatic" case of an anti-negationism law. Belgium might fill this gap. The Belgian Act of 23 March 1995,[278] in many ways exhibits the core features of an anti-negationist law.[279] Under article 1, it identifies the crime as "den[ying], grossly minimize[ing],attempt[ing] to justify, or approv[ing] the genocide committed by the German National Socialist Regime during the Second World War" and prescribes a prison sentence of between eight days and one year and a fine. Additionally, suspension of civic rights is mandated in case of recidivism. The law also gives the possibility of the judgment being published in one or more newspapers and displayed, to the charge of the guilty party (article 2). Also of note is the possibility of associations with legal personality engaged in "defending moral interests and the honor of the resistance or the deported" (article 4) to act in legal disputes involving the Act. This inclusion of *parties civiles* in these types of trials is reminiscent of the French law, which similarly allows interested associations to take up the victim's plight.

In terms of the broader constitutional framework surrounding this law, the relative incoherence of the Belgian constitution has been pointed out.[280] Some observers have noted that due to the successive amendment of the text, it has lost some of its consistency

[278] The full name of the law is "Act of 23 March 1995 on punishing the denial, minimization, justification or approval of the genocide perpetrated by the German National Socialist Regime during the Second World War," available through http://diversiteit.be (last accessed October 13, 2007).

[279] Also perhaps closer to what denial of the Holocaust is generally referred to is the Luxembourg law. Under article 457(3), the Luxembourgian Penal Code states that it is forbidden to "contest, trivialize, justify or deny publicly the existence of one or more crimes against humanity or war crimes" as defined by article 6 of the 1945 London Treaty (language reminiscent of the French provision). Author's translation from the original French text, available at http://legilux.public.lu/leg/textescoordonnes/codes/index.html#code_penal (last accessed March 31, 2008). A mirror provision is included in article 283(5) of the Lichtenstein *Strafgesetbuch* (available at http://www.llv.li/stgb-01-01-08.doc-3.pdf (last accessed March 31, 2008)), with a difference in sentencing provisions (the latter provides for a prison sentence of up to two years or a fine). For reasons of space limitations and availability of material, I will not discuss the Luxembourg law in great detail, however.

[280] See Sébastien van Drooghenbroeck, "La Constitution de la Belgique et l'incitation à la haine," Paper presented at the XVIth Congress of the International Academy of Comparative Law, Brisbane, 14th-20th July, 2002, available at http://ddp.unipi.it/dipartimento/seminari/brisbane/Brisbane-Belgio.pdf (last accessed March 31, 2008). All citations from the French are the author's translation.

(including when it comes to the protection of fundamental rights). This is evident with respect to the protection of speech, which is subsumed in article 19 of the Constitution, guaranteeing the freedom of opinion, and article 25, referring to the freedom of the press. The former is unrestricted except when it leads to abuse of the freedom of expression. The latter is to be read in conjunction with article 150 of the Constitution, which prescribes the *délits de presse* and which makes special provisions for those instances where racism or xenophobia are involved.[281] Also of note is the provision on dignity made by the Belgian constitutional text under article 23. This provision establishes the right to "lead a life in conformity with human dignity," includes social and economic guarantees, together with "the right to enjoy cultural and social fulfillment" (article 23(5)). Article 10 also establishes equality before the law as a pillar of the Belgian constitutional system. Last but not least, with regard to the country's engagement with militant democracy, observers note that instead of adopting a system of *démocratie combative*, Belgium opted for an "open democracy," emphasizing liberty within responsibility.[282]

Outside of the constitutional framework, too, are provisions relevant to the fight against extremism and denial to be found. Of these, one should note the Act of 30 July 1981[283] which constitutes a far-reaching anti-discrimination instrument. It proscribes incitement to discrimination, hatred, or violence against a person or group, as well as workplace discrimination. Furthermore, non-penal legal provisions, such as limiting the use of public cultural infrastructure, excluding anti-democratic parties from TV access, and

[281] For a discussion of article 150, see *Ibid.*
[282] *Ibid.*, p. 8. Van Drooghenbroeck explains that this does not mean Belgium has not employed some of the tools of militant democracy, just that this has largely been done"outside of the Constitution and the constitutional debates." For a broader discussion, see A. Backs *et al.*, *Le noeud gordien des parties antidémocratiques. La loi, une épée à double trenchant?* (Mys & Breesch, 2001). For a discussion of the 2004 *Vlaams Blok* party ban, see Eva Brems, "Belgium: The Vlaams Blok political party convicted indirectly of racism," *International Journal of Constitutional Law*, Vol. 4, No. 4 (Oct., 2006), pp. 702-711.
[283] The full name of the law is "Act of 30 July 1981 on the punishment of certain acts motivated by racism or xenophobia," available through http://diversiteit.be (last accessed October 13, 2007).

restrictions on public financing[284] are also in place to prevent the encouragement of racist and Holocaust denial in public. Nevertheless, it is the March 23, 1995 Act that stirs the most contestation and is the primary tool against negationism, and its operation in practice will be discussed in Chapter Three below.

2. ANTI-HOLOCAUST DENIAL LAWS IN CENTRAL AND EASTERN EUROPE

The contexts so far covered are all Western European countries with a relatively long-standing democratic tradition. What, though, is the situation in the newer democracies of the East? How does their recent authoritarian past influence their engagement with and regulation of incidents of hate speech generally, and of Holocaust denial particularly?

One broad-encompassing initial remark is that they all have, to varying degrees, adopted laws restricting potentially dangerous speech. Thus, despite the desire, in the aftermath of the fall of communism, to embrace liberal values, of which freedom of speech especially, they did not do so unconditionally. One observer has thus noted that "C[entral] E[ast] E[European] countries are in line with the European tradition…of readiness to restrict speech in the interests of social peace, or the protection of the victims of racism."[285] In what follows, I will discuss certain exponents of the Central East European engagement with Holocaust denial, focusing on Romania as an example of regulation, and on Hungary as a context without such a law. Other countries in the region also have anti-denial laws, notably the Czech Republic[286] and Slovakia,[287] or anti-incitement laws that have been used to

[284] For a discussion, see van Drooghenbroeck (2002), pp. 15-18.
[285] Wojciech Sadurski, *Rights Before Courts: A Study of Constitutional Courts in Post-communist States of Central and Eastern Europe* (Springer, 2005), p. 160.
[286] Interestingly, the Czech provision (Section 261a of the Penal Code) punishes denial of Nazi *or communist* crimes. It reads: "The person who publicly denies, puts in doubt, approves or tries to justify [N]azi or communist genocide or other crimes of [N]azis or communists will be punished by prison of 6 months to 3

prosecute negationists (Lithuania and Poland).[288] For reasons of space and focus, however, the present study can only mention them.

It is also worthwhile to note the special, local character of hate speech in the region and subsequent levels of approval of hate speech within Central Eastern European countries. András Sajó distinguishes hate speech from extremist speech in the context of post-communist countries by looking at the level of socialization for each. Thus, he argues that racist speech is most often discussed at the level of constitutions, while "in many [post-communist] countries extremist speech, irrespective of the legal provisions, became socially normalized to an extent."[289] This process of social "normalization" is particularly relevant when looking at Holocaust denial in these countries, for it is often associated with politicians and groups that enjoy relative popularity and make their "revisionist" claims in conjunction with other types of extremist discourse. Here, more than in the other contexts in this study, therefore, the difference between the "law on the books" and the "law in practice" becomes starkly evident.

years." Cited in "Punishment for Holocaust Denial Incorporated in Czech Law," Permanent Representation of the Czech Republic to the European Union, available at http://mzv.cz/wwwo/default.asp?id=46561&ido=13925&idj=2&amb=3 (last accessed March 31, 2008).

[287] Section 261 of the Slovak Penal Code thus makes it a crime to publicly deny, doubt, accept or justify fascist crimes or other similar movements. The full text of the provision may be accessed (in Slovak) at http://justice.gov.sk/jaspi?? ? (last accessed March 31, 2008). This provision is very much contested, and its inclusion, in 2005, in the Penal Code was opposed by many high-ranking figures. See interview with former Slovak Justice Minister in "Lipšic defends free speech," *The Slovak Spectator*, March 7, 2005, available at http://www.spectator.sk/articles/view/19007// (last accessed March 31, 2008). Thanks are due to Peter Kocvar for providing these resources.

[288] Section 170 of the Lithuanian Criminal Code penalizes incitement to hatred, discrimination, or violence against groups, while article 256 of the Polish Criminal Code punishes the public propagation of fascist or totalitarian systems of state and article 257 criminalizes group insult. The English version of these laws can be accessed via Legislationonline, a project of the OSCE Office for Democratic Institutions and Human Rights, at http://www.legislationonline.org/?tid=218&jid=1&less=true (last accessed March 31, 2008).

[289] András Sajó, *Freedom of Expression* (Instytut Spraw Publicznych, 2004a), p. 128.

2.1 Romania

Before discussing the peculiarities of the Romania anti-negationism law,[290] it is worthwhile to look into the developments which led to its adoption. Given the main argument of this study, namely the signaling role of such laws, on both the internal and the external fronts, this will prove revealing. The public discourse surrounding criminalization of denial in Romania was strongly influenced by NATO and EU membership conditionality. Thus, an American representative to NATO was quoted at stating:

> The way in which they treat the Holocaust problem is the cornerstone for candidate countries in the values chapter. A correct confrontation with this past does not guarantee admission, but a country that clearly refuses this confrontation, stands no chance of admission.[291]

The Romanian Prime-Minister at the time reacted quickly, assuring the American ambassador that Romania got the message: "the Jewish concern is part of the preparation plan for Romania's candidacy to NATO, which is why it receives special attention."[292] With respect to the EU, while there are no common legal standards such as in the form of a Directive,[293] the German attempts to achieve one in 2007 were not without echo.[294] During the

[290] For an early evaluation of the law, written before the law finally passed Parliament in its current form, see Gabriel Andreescu, *Extremismul de dreapta în România* (*Right-wing extremism in Romania*) (Centrul de Resurse pentru Diversitate Etnoculturala, 2003), pp. 99-115.

[291] Quoted in ""Financial Times" – implicarea în Holocaust, criteriu de aderare la NATO" ("Financial Times" – Involvement in the Holocaust, NATO membership criterion," *Adevărul*, July 11, 2002, available at http://adevarul.ro/articole/financial-times-implicarea-in-holocaust-criteriu-de-aderare-la-nato/17695 (last accessed March 31, 2008) (author's translation).

[292] Adrian Năstase quoted in "Adrian Năstase îi răspunde ambasadorului Michael Guest" ("Adrian Năstase answers to Ambassador Michael Guest"), *Adevărul,* March 23, 2002, previously available through http://adevarul.ro (last accessed March 16, 2007) (author's translation). He did so, however, in typically evasive manner, for to the Romanian public, Năstase presented the issue as one imposed from outside: "Historical debates can continue but from the point of view of the Romanian government's interests, it is important to take measures along the line of decisions and values that are accepted everywhere in the world." *Ibid.*

[293] Notable here too is the European Union Framework Decision on Action to Combat Racism and Xenophobia (2007/2067) and the European Parliament Recommendation to the Council of 27 June 2007 Concerning the Progress of the Negotiations on the Framework decision on Action to Combat Racism and Xenophobia, available at http://europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0285+0+DOC+XML+V0//EN (last accessed March 31, 2008).

[294] Franco Frattini, the European Commissioner for Freedom, Security and Justice, was then quoted as stating:

> I want to restate the Commission's firm condemnation of any attempt to deny, trivialize or minimize the Shoah, war crimes and crimes against humanity. These views constitute an unacceptable affront not only to the victims of that tragedy and their descendants, but also to the whole democratic world.

Parliamentary debates, several members of the extremist party *Partidul România Mare*, but also of the governing Social Democratic Party clearly stated their disapproval. They perceived it as compromising national pride to abide by such international demands:

> Of course joining NATO is a good thing and of course none of us will retract any statements or commitment [to this end]. But, toward Romania's membership in NATO, it has become too much.[295]

The Romanian anti-denial law was passed in the form of an Emergency Government Ordinance[296] on March 13, 2002. Looking at the adopted text, we find that the heated debates preceding its passing more than substantially influenced its wording. The Romanian act explicitly invokes the Holocaust, defines it and includes some key characteristics, precisely to make the law's applicability harder to elude. The definition of Holocaust (article 2(d)) thus reads:

> The systematic, state-sponsored persecution and annihilation of European Jews by Nazi Germany, as well as its allies and collaborators in the period 1933-1945. During World War II, part of the Roma population was also subjected to deportation and annihilation.[297]

The reference to "allies and collaborators" was the most controversial, as it allowed for inclusion of Romanian authorities among perpetrators of genocidal acts—an unprecedented assumption of guilt in the country's postwar history. The law refers to "persons guilty of committing crimes against peace and humanity" in its article 1(c), invoking the authority of any "Romanian or foreign court" or of "an international criminal court for war crimes or

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Franco Frattini, quoted in Yossi Lempkowicz, "Frattini urges EU nations to adopt laws against Holocaust denial," *European Jewish Press*, January 27, 2007, available at http://www.ejpress.org/article/13405 (last accessed March 31, 2008)

[295] Corneliu Vadim-Tudor, Speech in the Senate plenum debates on 2 April 2002, available through http://cdep.ro/ (last accessed March 31, 2008).

[296] This type of Government regulation becomes law upon publication, remaining to be discussed and adopted in its final form in Parliament.

[297] This and all ensuing citations are the author's translation and are based on the original Romanian text, available at: http://cdep.ro/pls/legis/legis_pck.htp_act?ida=35293 (last accessed March 31, 2008). Interestingly, the second sentence of article 2(d) was only added in late 2005, after newly elected President Traian Băsescu refused to sign the act originally passed by Parliament because it did not make any reference to the annihilation of the Roma.

crimes against humanity" in prosecuting such persons. The reference to war criminals here is directly related to the cult of Marshal Antonescu, which saw a surge in the country after 1989. Most significant for the purposes of our discussion is the explicit reference to denial in the text, under article 6: "Public denial of the Holocaust or its effects constitutes a crime and is punishable with prison from six months to five years and removal of certain rights."

The Romanian law was specifically formulated as a broader measure, banning all "fascist, racist or xenophobic symbols" (Art. 1(b)), "establishing an organization with a fascist, racist or xenophobic organization" (Art. 3(1)), "producing, selling, distributing, as well as owning with the intention of distributing fascist, racist or xenophobic symbols" (Art. 4(1)), "promoting the personality cult" of war criminals and "promoting fascist, racist or xenophobic ideology through propaganda, by any means, in public" (Art. 5). Its broad scope reflects the perceived need of official control where it was previously missing: symbols in the public space, printed and visual media, public discourse, and, most importantly, organizations.

Anti-discrimination legislation is also present in the Penal Code, such as under article 247, which criminalizes "limitation, by a public employee, of the use or exertion of a right by a citizen, or putting the latter in a position of inferiority on grounds of nationality, race, sex or religion." Article 317 of the Penal Code is the main provision against propaganda, punishing "nationalist-chauvinistic propaganda, stirring the national or racial hatred" by six months to five years in jail. Article 166, too, proscribes "propaganda for establishing of a totalitarian state, performed through any means, in public" and prescribes the same punishment. While seemingly far reaching, these provisions paint a distorted picture of the anti-discrimination fight in Romania, at least prior to the adoption of Emergency Ordinance 31/2002. The

country has been criticized for its failure to implement anti-discrimination tools[298] and the number of relevant cases is minimal.[299]

With respect to speech, the Romanian Constitution provides for it via an extensive provision under article 30.[300] While prohibiting censorship, the text also lists extensive limitations, including the requirement that speech "not be prejudicial to the dignity, honor, privacy of person, and the right to one's own image" (article 30(6)). Furthermore, article 30(7) of the Constitution includes a mixed array of anti-speech provisions, including defamation, incitement, and obscenity. The inclusion of "defamation of the country and the nation," of "instigation to a war of aggression, to national, racial, class or religious hatred," of "incitement to discrimination, territorial separatism, or public violence," as well as of "obscene conduct contrary to morality" among the valid limitations on speech paints the picture of a new democracy which, while adhering to the principle of free expression, nevertheless is not ready to renounce certain anti-liberal impulses. This will also be discussed in the case of Hungary below.

The Romanian constitutional text also makes references to the freedom of opinion (article 29), to dignity (included as early as article 1(3), alongside the right to the free

[298] One example is that of the OSCE High Commissioner on National Minorities who, in June 1993, after a visit to Romania, "recommended that the Romanian government take action to combat expressions of ethnic hatred and to investigate and prosecute perpetrations of violent attacks on other groups." Quoted in Roth (1995), pp. 471-472.

[299] One of the rare cases that got to court was that of Oliviu Tocacili in 1993, who had sponsored the publishing of Hitler's *Mein Kampf*. The prosecuting authorities in Sibiu banned the sale of the book and confiscated the copies under Article 166 of the Penal Code. Mentioned in *Ibid.*, p. 415.

[300] Article 30, in its entirety, reads: (1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds or other means of communication in public are inviolable.
(2) Any censorship shall be prohibited.
(3) Freedom of the press also involves the free setting up of publications.
(4) No publication shall be suppressed.
(5) The law may impose an obligation for the media to make public their financing source.
(6) Freedom of expression shall not be prejudicial to the dignity, honor, privacy of person, and the right to one's own image.
(7) Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class or religious hatred, any incitement to discrimination, territorial separatism, or public violence, as well as any obscene conduct contrary to morality shall be prohibited by law.
(8) Civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offences of the press shall be established by law.

development of human personality, as well as among the limitations on speech, in article 30(6)), and to equality (article 16). The Constitution, under article 37(2), proscribes anti-democratic political parties, saying that when, "by their aims or activity, militate against political pluralism, the principles of a State governed by the rule of law, or against the sovereignty, integrity or independence of Romania," they shall be declared unconstitutional.

2.2 Hungary

As was seen above, the Romanian Constitution offers a broad assortment of speech-related norms, and its Penal Code is rich in provisions aimed at speech limitation. The same can be said, to a certain extent, of Hungary. The Hungarian Constitution's article 61 provides for the freedom to express opinions, as well as the right to access to information of public interest.[301] Furthermore, the Hungarian Constitution also provides for the protection of human dignity (article 54(1)) and equality (article 66).

Despite a mix of anti-discrimination laws, including articles 70A and 70B of the Constitution and section 269 of the Penal Code, Hungary does not at present have an anti-Holocaust denial law. Its inclusion in this study may therefore appear paradoxical, yet it is by no means arbitrary. If in the context of a post-communist country which is no stranger to xenophobic and racist speech,[302] the question of whether or not to criminalize negationism

[301] Article 61 reads: (1) In the Republic of Hungary everyone has the right to freely express his opinion, and furthermore to access and distribute information of public interest.
(2) The Republic of Hungary recognizes and respects the freedom of the press.
(3) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the public access to information of public interest and the law on the freedom of the press.
(4) A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the supervision of public radio, television and the public news agency, as well as the appointment of the directors thereof, on the licensing of commercial radio and television, and on the prevention of monopolies in the media sector.

[302] This was especially true in the years immediately following the fall of communism, as one observer noted: "Unlimited freedom of speech, the proliferation of poor quality publications (frequently by non-professional publishers) allowed for numerous openly anti-Semitic statements in the early 1990s." Attila Pók, "Why Was There No *Historikerstreit* in Hungary after 1989-1990?" in eds. Randolph L. Braham and Brewster S. Chamberlin. *The Holocaust in Hungary: Sixty Years Later* (Columbia University Press, 2006), p. 250.

was answered in the negative, why that was is important. It will help us understand that external conditionality, when faced with a distinct set of internal factors, does not automatically lead to new regulation. Furthermore, attempts to criminalize hate speech, as under article 269(1) and (2) of the Penal Code, will be discussed in the jurisprudential section in Chapter Three.

Hungary's role in the murder of European Jews during the Holocaust is no less highly charged than in the Romanian and other collaborator-countries. The 1994 public apology by then-Prime Minister Gyula Horn (saying: "Our historic burden is to apologize to the Jews for 600,000 exterminated and tens of thousands of deported Jewish compatriots.")[303] arose controversy and even led to a lawsuit against him.[304]

The absence of a Hungarian anti-denial law should not be seen as proof of the absence of Holocaust denial from the country. Quite to the contrary. Michael Shafir describes the Hungarian form of denial as deflective, implying the eschewing responsibility for past atrocities while not outright denying the occurrence of the historical event itself.[305] Evocative of this form of denial are comments made by the adviser to the Hungarian Prime Minister at the 2001 opening of the *Terrorhaza* (House of Terror) in Budapest,[306] who commented that the word "Holocaust" should be extended to the victims of the communist genocide as well, noting that "the Holocaust, the extermination or rescue of the Jews, represented but a secondary, marginal point of view [as it was not an objective] among the war aims of either belligerent."[307] Other observers, too, have noted the more subtle form of negationism present in Hungary, which makes it more dangerous.[308] Its threat should also be apprehended with a

[303] Quoted in "Jerusalem Letter/Viewpoints," No. 351, Jerusalem Center for Public Affairs, February 2, 1997.
[304] Right-wing extremist Áron Mónus sued Horn for personal injury on account of this apology. See Laszlo Karsai, "The Radical Right in Hungary," in ed. Ramet (1999), p. 139.
[305] Shafir (2002). This is true in other contexts as well, and in the Romanian one in particular.
[306] The House of Terror is a museum built during Viktor Orbán's premiership with the aim of commemorating victims of the fascist and communist regimes in Hungary.
[307] Mária Schmidt quoted in Shafir (2002), pp. 59-60.
[308] Random Braham writes:

view to the fragility of Hungary's newly established democratic system, which is subverted by the resort to negationism by oftentimes "respectable" public figures.[309]

It is within this context, thus, that the reader must read the great importance of the Hungarian Constitutional Court (HCC) 1992 decision with respect to incitement and group defamation (discussed in Chapter Three below). The emerging doctrine seems to point to a "privileged position amongst basic constitutional rights"[310] for freedom of speech. Furthermore, the inclusion within the Penal Code of article 269(B) outlawing the distribution and public display of both Nazi and communist symbols (including the red star) corresponds to the provisions against prohibited symbols in the Romanian law.[311] The extent of the Hungarian ban, however, suggests a sweeping renunciation of a painful aspect of the country's past. Historian Tony Judt saw in this a clear message: "Rather than evaluate the distinctions between the regimes represented by these symbols, Hungary…has simply "slammed the door on the sick twentieth century.""[312]

> While the number of xenophobic champions of anti-Semitism—like that of the Hungarian neo-Nazis actually denying the Holocaust—is relatively small, the camp of those distorting and denigrating the catastrophe of the Jews is fairly large and—judging by recent developments—growing.

Randolph L. Braham, "The Assault on Historical Memory: Hungarian Nationalists and the Holocaust," *East European Quarterly,* Vol. 33, No. 4 (1999), p. 198.

[309] *Ibid.*,

[310] Gábor Halmai, "Criticizing Public Officials in Hungary," in ed. Michael K. Addo, *Freedom of Expression and the Criticism of Judges: A comparative study of European legal standards* (Ashgate, 2000), p. 204.

[311] Article 269(B) reads:

(1) The person who
a) distributes;
b) uses before great publicity;
c) exhibits in public;
a swastika, the SS sign, an arrow-cross, sickle and hammer, a five-pointed red star or a symbol depicting the above—unless a graver crime is realized—commits a misdemeanor, and shall be punishable with fine.

(2) The person, who commits the act defined in subsection (1) for the purposes of the dissemination of knowledge, education, science, or art, or with the purpose of information about the events of history or the present time, shall not be punishable.

(3) The provisions of subsections (1) and (2) do not extend to the official symbols of states in force.

The English text of the Hungarian Criminal Code is available at http://www.legislationonline.org/upload/legislations/15/ef/84d98ff3242b74e606dcb1da83aa.pdf (last accessed March 31, 2008).

[312] Tony Judt, *Postwar: A History of Europe Since 1945* (Penguin Books, 2005), p. 828, citing Prime Minister Orbán at the opening of the *Terrorhaza* on February 24, 2002.

In recent years, Hungary has continued its search for the proper means of fighting extremist speech. While a law banning Holocaust denial is still not in place, there have been repeated attempts at instituting it. Hungarian Foreign Minister László Kovács, on a visit to the United States in 2002, pointed to a proposal to criminalize Holocaust denial and to amend the penal provisions against hate crimes and racially motivated crimes. "The objective of the modification is to close the legal loopholes used by those making anti-Semitic statements," he said.[313] Referencing German and Austrian anti-denial law, he described Hungary as being "in the range of countries where even today there is a need for [such a law]."[314] The Hungarian Constitutional Court, however, failed to see this necessity and returned the law to Parliament requesting further specifications. It is nonetheless true that Hungarian political discourse has been more apprehensive of the threat posed by anti-Semitism and Holocaust denial. The current Prime Minister, Ferenc Gyurcsány, distanced himself from the likes of (now opposition leader) Viktor Orbán, whom he accused of exploiting anti-Semitism for political gain. Gyurcsány has been quoted as saying "There is something horrible happening. There have never been so many anti-Semitic remarks as now."[315] Whether this signals a rise in the extremism of the country is unclear. It does, however, show increased awareness of the dangers of hate speech, even in a country that has, as a norm, more lax restrictions on freedom of expression.

3. ANTI-GENOCIDE DENIAL LAWS

All the countries discussed thus far have made the denial of the Holocaust—whether strictly defined within the confines of the legal text, or with reference to the Nuremberg

[313] Quoted in "Hungarian FM says gov't to make Holocaust denial a crime," *Associated Press*, September 16, 2002, previously available through http://haaretz.com (last accessed March 16, 2007).
[314] *Ibid.*
[315] Quoted in "Hungarian PM warns of escalating anti-Semitism in his country," *European Jewish Press*, March 3, 2007, available at http://www.ejpress.org/article/14710 (last accessed March 31, 2008).

trials—a crime. The countries to be discussed further, Spain and Switzerland, have extended the scope of their respective anti-negationist laws to include denials of all genocides. While suggestions to do the same in the previous countries constantly resurface,[316] it is interesting to note that only the ensuing two have actually done so. This, coupled with a different understanding of national involvement in the Holocaust, both in the Spanish and in the Swiss contexts,[317] justifies their inclusion in a separate category.

3.1 Spain

Spain is a constitutional monarchy with a constitution dating back to 1978. That document came into force after thirty-six years of dictatorship under General Francisco Franco. It should come as no surprise, then, that certain provisions in the text are a direct reaction to the country's difficult past as well as intended to prevent a similar slip into authoritarianism.

The Spanish anti-Holocaust denial provision is incorporated in article 607 of the *Código Penal*. The full article defines the crime of genocide and prescribes the specific prison sentences for the elements of the crime. Denial itself is described in article 607(2), which reads:

> The distribution by whatever means of ideas or doctrines denying or justifying the crimes codified in the prior section of this article, or attempt the rehabilitation of regimes or institutions which fostered practices generating the same [crimes] will be punished with the prison sentence of one to two years.[318]

[316] As discussed above, the problem was posed in, among others, the German and French contexts, as well as with respect to communist crimes in Central East European countries.
[317] This is not to deny, of course, their involvement in some aspects of the Holocaust. For example, Swiss banks notoriously helped Nazis put away gold and money from their Jewish victims. My point, however, refers to the national self-understanding in these two countries, which is nowhere near as negative as in the other contexts.
[318] This and ensuing translations from the Spanish Criminal Code are the author's. The full text of the Spanish *Código Penal* can be found at http://www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1995/25444 (last accessed March 31, 2008).

The reader should notice the interesting conjunction of what are, in essence, two distinct types of crimes: negation of genocidal crimes as opposed to their justification. There are clear distinctions between the two. On the one hand, the attitude of the supposed accused with regard to historical truth is dissimilar: one accepts it but excuses it while the other denies its very existence. When thinking of the intense debates over the nature of Holocaust denial laws as historical debates entering the unfit *locus* of the courtroom, one may have expected the Spanish legislators to divide the two more clearly for reasons of intelligibility. On the other hand, there is the question of intent. As noted previously, it may well be that a Holocaust denier is also an anti-Semite, a neo-Nazi, or both. At the same time, however, it may happen that the element of intent behind perpetrating the crime of denial is nowhere near obvious, or at least difficult to prove. What article 607(2) does, however, appears to be to evade the question of intent, making prosecution of negationism independent of the *mens rea* of the accused. As will be seen, the Spanish Constitutional Tribunal had much to say on this very issue. Last but not least, of note is the extension of the provision to all genocides, not just the Holocaust. This is a feature shared by the Swiss anti-denial provision as well.

One would only have a partial idea of the Spanish context when limiting the discussion to article 607, however. The broader constitutional framework is greatly relevant to this discussion. It should be noted that the Spanish Constitution makes forthright provisions for the protection of dignity (article 10)[319] and equality (article 14).[320] The mention, in the dignity clause, of "inviolable rights which are inherent," as well as "the free development of personality" and respect for others as "the *foundation* of political order and

[319] Article 10 reads: (1) The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace.
(2) The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements on those matters ratified by Spain.
[320] Article 14 reads: Spaniards are equal before the law, without any discrimination for reasons of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance.

social peace" (emphasis added) speak to its central importance within the constitutional structure. It should also be noted that the article links dignity not just to the individual, but also the entire political order and societal peace. Article 6 of the Constitution,[321] regulating political parties, is also relevant here. The requirement that the parties' "internal structure and operation" be democratic echoes the militant democracy discussion in Chapter One.[322]

Conversely, the Spanish constitutional provisions for the protection of speech are perhaps weaker than we have seen elsewhere.[323] Article 20 initially makes broad provisions for the freedom to "express and disseminate thoughts," for artistic and scientific creation, academic freedom, as well as freedom of communication. It includes the freedom of speech *stricto senso* and the right to freedom of information; according to the Spanish Constitutional Tribunal, "the first right allows individuals to express an opinion, a value-judgment, while the other protects the flow of factual information."[324] Nevertheless, article 20(4) extensively gives the conditions under which the freedom of expression may be restricted in view of the fundamental rights included in Title I of the Constitution, emphasizing that "the right to

[321] Article 6 reads: Political parties express democratic pluralism, assist in the formulation and manifestation of the popular will, and are a basic instrument for political participation. Their creation and the exercise of their activity are free within the observance of the Constitution and the laws. Their internal structure and operation must be democratic.

[322] For a discussion of the regulation of political parties in Spain with the outlawing of the *Batasuna* party as a case study, see Victor Ferreres Comella, "The New Regulation of Political Parties in Spain, and the Decision to Outlaw Batasuna," in ed. Sajó (2004), pp. 133-156; Leslie Turano, "Spain: Banning political parties as a response to Basque terrorism," *International Journal of Constitutional Law*, Vol. 1, No. 4 (Oct., 2003), pp. 730-740; and Ian Cram, "Constitutional responses to extremist political associations – *ETA*, *Batasuna* and democratic norms," *Legal Studies*, Vol. 28, No. 1 (March 2008), pp. 68-95.

[323] Article 20 reads: (1) The following rights are recognized and protected: a) To express and disseminate thoughts freely through words, writing, or any other means of reproduction. b) Literary, artistic, scientific, and technical production, and creation. c) Academic freedom. d) To communicate or receive freely truthful information through any means of dissemination. The law shall regulate the right to the protection of the clause on conscience and professional secrecy in the exercise of these freedoms.
(2) The exercise of these rights cannot be restricted through any type of prior censorship.
(3) The law shall regulate the organization and parliamentary control of the means of social communication owned by the State or any public entity and shall guarantee access to those means by significant social and political groups, respecting the pluralism of society and the various languages of Spain.
(4) These liberties find their limitation in the respect for the rights recognized in this Title, in the precepts of the laws which develop it and, especially, in the right to honor, privacy, personal identity, and protection of youth and childhood.
(5) The seizure of publications, recordings, or other means of information may only be determined by a judicial resolution.

[324] Victor Ferreres Comella, "The Regulation of Hate Speech in Spain," Paper presented at the XVIth Congress of the International Academy of Comparative Law, Brisbane, 14th-20th July, 2002, available at http://ddp.unipi.it/dipartimento/seminari/brisbane/Brisbane-Spagna.pdf (last accessed March 31, 2008).

honor, privacy, personal identity, and protection of youth and childhood" are especially weighed in this process. With such a strong limitation clause, small wonder that problematic speech such as Holocaust denial may, at least theoretically, be prohibited.[325] Thus, the constitutional text of Spain exhibits several key characteristics for our discussion of Holocaust denial regulation in this country: freedom of expression, but with important limitations; a strong emphasis on dignity as a human right and a precondition for social peace; equality; and militant democracy.

Beyond these constitutional provisions, one should also look again at the Criminal Code and note that it has further stipulations aimed at curbing potentially dangerous speech. Thus, article 510(1) provides for a prison sentence of between one and three years and a fine for

> incitement to discrimination, hatred or violence against groups or associations for racist, anti-Semitic or other reasons referring to the ideology, religion or beliefs, family situation, to the belonging of their members to an ethnicity or race, to their national origin, their sex, sexual orientation, ailment or disability.

Article 510(2) stipulates the same punishment for those who knowingly or with reckless disregard for the truth spread injurious information concerning the same types of groups or associations. In other words, the former deals with incitement (to discrimination, hatred, as well as violence), while the latter with a type of group defamation. An even further provision in the Criminal Code refers explicitly to the public derision (*escarnio*) of religious dogma, beliefs or ceremonies or the public abuse (*vejar*) of believers (and atheists) (article 525). This emphasis on religious sensitivities is explicable in light of Spain's struggle with accommodating its Catholic identity alongside religious pluralism.[326]

[325] Ferreres Comella remarks that "it is easier in Spain than in other countries to hola that hate speech is outside the boundaries of constitutionally protected speech." He also notes that insult is constitutionally excluded from protection. *Ibid.*

[326] See Augustín Motilla, "Religious Pluralims in Spain: Striking the Balance Between Religious Freedom and constitucional Rights," *Brigham Young University Law Review*, No. 2 (Summer, 2004), pp. 575-606.

3.2 Switzerland

Similar to the Spanish provision, the Swiss anti-denial law aims to prohibit the negation of a wider array of crimes, not just the Nazi Holocaust. Section 261*bis* of the *Schweizerisches Strafgesetzbuch*, after criminalizing the public incitement to racial hatred or discrimination and spreading of racist ideology and propaganda, under paragraph 4 reads:

> Whoever publicly by word of mouth, in writing, through image, gesture, acts or in any other way which affects human dignity belittles or discriminates (*herabsetzt oder diskriminiert*) against a person or a group of persons on the basis of their race, ethnicity, or religion, or on the basis of these reasons denies, grossly minimizes, or attempts to justify genocide or other crimes against humanity…will be punished with imprisonment of up to three years or a fine.[327]

It is yet again interesting to note the similarity in language across many of these laws, with the sequence of denial-minimization-justification apparent in most of them (the Swiss text, too, speaks of "*leugnen, gröblich verharmlosen oder zu rechtfertigen suchen*").

Of more significance here are two aspects of the Swiss law. One is the direct link between the denial of genocide and other crimes against humanity and racism. If the "Holocaust denial is anti-Semitism" contention of many observers is still contested, it is not so within the confines of the Swiss Penal Code. In fact, article 261*bis* in its entirety comes under the heading "*Rassendiskriminierung*" and, as noted above, includes a multitude of anti-racism measures. It would seem logical, therefore, to conclude that negationism, in the Swiss understanding, is a form of hate speech as deserving of punishment as other types of hate incitement. Moreover, the inclusion of all genocides and even further, crimes against humanity, certainly seems a marked departure from the other case studies in this analysis. This is, in some ways, the transference into law of the suggestions for extension made in

[327] Author's translation of the German original text, available at http://admin.ch/ch/d/sr/3/311.0.de.pdf (last accessed March 31, 2008).

other contexts (such as the German and French, discussed above), so its operation might shed some light into what happens when the law is made applicable to all analogous cases.

Prior to mentioning the controversies surrounding the Swiss law, as well as its application to denials of the Armenian genocide, it is, again, relevant to ask what is the broader constitutional context within which this law operates. Article 16 protects the freedom of opinion and information (the latter goes both ways—it provides a right to expression, as well as one to receive information freely).[328] Article 7 proclaims the need to respect and protect human dignity, seemingly pointing to a positive obligation of the State as in the German case. Article 8(1) provides equality before the law, whereas 8(2) ensures protection from discrimination. The limitation of these rights is to be found in the general limitation clause in article 36, which mentions as bases for restrictions "public interest" and "protection of fundamental rights of others." The Swiss anti-denial law carries one feature which makes it all but unique: its adoption followed a national referendum on September 24, 1994, wherein it received fifty-four point six percent of the votes.[329] This adds another dimension to all subsequent challenges of the law: it has, albeit by a small margin, enjoyed the directly expressed support of the Swiss population.

A debate over the reform of article 261*bis* has been ongoing in Switzerland. The Justice Minister Christoph Blocher, for one, has called on the repelling of the prohibition on genocide denial. He expressed his belief that the right to freedom of expression is more valuable than whether some minorities will be offended, and also voiced dissatisfaction with the toll on Switzerland's international relations with other states that this criminal provision had.[330] A party which in 1994 had approved of the new law, the Swiss People's Party (SVP),

[328] This and all subsequent references to the Swiss Constitution are based on the original German text, available at http://admin.ch/ch/d/sr/1/101.de.pdf (last accessed March 31, 2008) and are the translations of the author.
[329] "Die Rassismusstrafnorm in Wortlaut," *Neue Zürcher Zeitung*, October 6, 2006, available at http://www.nzz.ch/2006/10/05/il/newzzeswub03c-12_1.66029.html (last accessed March 31, 2008).
[330] "Blocher will Genozid-Leugnunglegalisieren," *Neue Zürcher Zeitung*, October 12, 2006, available at http://www.nzz.ch/2006/10/07/il/articleejqwt_1.66537.html (last accessed March 31, 2008).

is now at the forefront of the fight against the *Rassendiskirminierung* provision.[331] A commission was even set up to make suggestions on the reform of 261*bis*, which discussed the possibility of restricting its provisions to only a few, named genocides (notably the Holocaust and the Armenian genocide).[332] This renewed debate comes in conjunction with heated exchanges over whether the denial of the Armenian genocide is racist or not. As recently as March 2007, the Swiss politician Dogu Perincek, who had maintained that the Armenian genocide was an international lie, was sentenced to ninety days imprisonment and a fine for his remarks.[333]

This extended exposition of the main features of the texts of anti-Holocaust denial laws serves multiple purposes. Beyond just listing the laws themselves, the comparative outlook affords us an enriched view over the primary elements of these laws. For instance, the definitional component is of crucial importance. Whether defined in strict relationship to the Holocaust (Germany, Austria, Romania) or not, by reference to the Nuremberg Tribunal (France and Belgium), or in more general terms (Spain and Switzerland) indicates a certain country-specific understanding of the Holocaust as historical event. Moreover, whether the law only covers the Holocaust or extends to other genocides (Spain, Switzerland, but also the Czech Republic) is significant, clearly shaping the ensuing scope of application of the law. The inclusion of anti-negationism laws in distinct legal instruments is similarly relevant. As we have seen, their inclusion in the Law of the Press in France carried with it certain restrictions, just as their connection with insult and protection of the memory of the dead did in Germany, and as their framing within a broader anti-discrimination tool did in Switzerland.

[331] "SVP bläst zum Sturm gegen die Rassismus-Strafnorm," *Neue Zürcher Zeitung*, November 16, 2006, available at http://www.nzz.ch/2006/11/16/il/newzzeukw4h74-12_1.75908.html (last accessed March 31, 2008).
[332] "Vorschläge zur Revision des Rassismusgesetzes," *Neue Zürcher Zeitung*, May 24, 2007, available at http://www.nzz.ch/2007/05/24/il/articlef7i86_1.363527.html (last accessed March 31, 2008).
[333] "Genozid-Leugner Perincek verurteilt," *Neue Zürcher Zeitung*, March 12, 2007, available at http://nzz.ch/2007/03/12/il/articleezypn_1.125424.html (last accessed March 31, 2008). Of note is that the Swiss-Armenian Association was a private party to this trial.

Not to be forgotten, too, is the intentional element, which is more or less explicitly stated in the actual wording of the laws. All of these constitutive elements will become clearer in view of the following jurisprudential discussion, which illustrates their actual application and interpretation by pertinent authorities.

CHAPTER III

1. ANTI-HOLOCAUST DENIAL LEGISLATION ENFORCEMENT

In the previous chapters, I dealt with the philosophical justifications for the protection of speech and, conversely, the prohibition of hate speech, then proceeded to explore the influence of these justifications as they transpire from actual anti-Holocaust denial laws. The discussion in this chapter will move even further toward understanding the practical implications of anti-negationism and anti-hate speech doctrine. In what follows, I shall analyze five case studies—Germany, France, Belgium, Hungary, and Spain—in an effort to extricate the main doctrinal elements of the implementation of anti-denial laws in these countries. Before proceeding, however, a few preliminary words on procedural and enforcement matters are in order.

1.1 The Law and Standing

Wherever possible, the analysis will center on case law from the constitutional level. The countries in the study, however, have vastly different rules when it comes to judicial review and *locus standi*. In Germany, the FCC's competence to review legislation is described in article 93 GG and concerns the rights and duties of public organs as well as reviewing the compatibility of laws, as enforced, with the Basic Law. For the present purposes, the most relevant of its provisions refers to the capacity of individuals to bring complaints of unconstitutionality (*Verfassungsbeschwerde*). Article 93(4b) thus requires that the individual claim that his basic rights (or a set of other enumerated rights) have been violated by a public authority. A similar option of *actio popularis* may form the basis of constitutional review in Hungary (article 32A(3) of the Constitution). The Spanish

Constitutional Tribunal also has broad review powers, including the review of laws and the possibility to hear individual appeals for constitutional protection (*recursos de amparo*) from citizens claiming rights violations.[334] In France, however, the *Conseil Constitutionnel* has only abstract review powers; in other words, it may review legislation only before it actually goes into force. Under article 61 of the 1958 French Constitution, the *Conseil* has the power to review *lois organiques* and rules of procedure of Parliament automatically, whereas to review other *lois*, it requires a referral by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or sixty Members of Parliament. The Romanian Constitutional Court may review "exceptions of unconstitutionality" (article 146 of the Constitution), as raised by normal courts or the Ombudsman. The Swiss Constitution precludes the *Bundesgericht* from reviewing acts of Parliament or the Federal Council (article 189(4)), except if otherwise provided in the acts.

The schematic picture painted here illustrates how much procedural rules vary. It is therefore to be inferred that the ensuing number of cases at the constitutional or even the higher court levels will differ greatly from one country to the other. If the German citizen may contest the compatibility of the law applied by a public authority (such as the courts) with the provisions of the *Grundgesetz*, a similarly situated French citizen has no such recourse. Moreover, some of the above cases may be misleading. Whereas the Swiss Federal Court does not have power to review laws, the recourse to referendum may indicate an emphasis on direct democracy, as opposed to the (democratically deficient) judicial review by a higher court. In what follows, I survey some of the available data on a number of cases concerning anti-denial laws. The reader will, keeping in mind the procedural caveat above, be in a better position to grasp the source of the stark contrasts between countries. In the second

[334] Article 2(1) of the *Ley Orgánica del Tribunal Constitucional*, available at http://www.tribunalconstitucional.es/tribunal/leyesacuerdos/Texto%20consolidado%20nueva%20LOTC.pdf (last accessed March 31, 2008).

part of this chapter I proceed to discuss case law stemming from five of the countries with anti-negationism laws.

1.2 The Law in Numbers

How do we know whether a certain law "works"? What are the criteria for determining its success? Is success quantifiable? These questions have no straightforward answers, but that does not mean that an evaluation of the effectiveness of a given law is completely out of reach. With respect to anti-denial laws, one may look at the number of emerging cases,[335] their prominence, or, more generally, the amount of public debate spurred by this legislation. Some authors have chosen one or the other of these methods when discussing anti-negationism laws, and provide different answers. Thus, some works specifically focus on the cases which have produced the biggest "scandals" in their respective societies, constructing the legal analysis upon this background of public contestation.[336]

Other authors look at the number of emerging cases and draw their conclusions therein. The *loi Gayssot*, despite its broad language and fears that it would lead to an avalanche of prosecutions, resulted in a total of twenty nine cases that reached trial between 1992 and 2000.[337] An older study had found that, of thirty judgments concerning "revisionism," only nine had been rendered on the basis of article 24*bis*, the others invoking laws against defamation or incitement.[338] Conversely, a steady flow of cases is reported in the news in Germany and Austria, increasingly finding finality in the lower courts. In Switzerland, one report for the years 1999 and 2000 lists the number of cases involving

[335] There is no consistent, across the board data available on prosecution data with respect to all the anti-denial laws surveyed in this study. As a consequence, only partial data is discussed here, with a view to complement it with new statistics as it becomes available in the future.
[336] Kahn (2004), *passim.*
[337] *Bilan de la Loi Gayssot*, p. 57.
[338] Jeannin France, *Le révisionnisme. Contribution à l'étude de la liberté d'expression*, Thèse de droit, Université de Paris I (1995), cited in Dhoquois (2006), p. 30.

article 261*bis* in the fifties for each.[339] Other laws, particularly the more recently adopted ones in Central and Eastern Europe, have little case law to speak of. In Romania, for instance, the only reported case involving the Emergency Ordinance 31/2002 concerned one individual sympathizer of the interwar fascist Romanian movement *Mişcarea Legionară*.[340] The case reached the High Court of Cassation and Justice which, in 2006, reversed his condemnation and stated that the law in question unlawfully sets up a crime of opinion, contrary to the precepts of a free and democratic state.[341] Undoubtedly, this had to do with the manner in which the law was passed, and the argument against a severe restriction of individual rights being implemented via Government ordinance is a valid one. Lest we forget, some of the reactions in the Romanian Parliament had been very negative, with some already predicting poor *de facto* implementation.[342] The language of the High Court's reasoning seems to suggest an appreciation of the importance of the freedom of speech at odds with the main purpose of the law and as such leaves little hope of its future successful implementation.[343] The comparative scarcity of civil society organizations involved in anti-racism work in Central and Eastern Europe might also constitute a cause for the shortage of lawsuits (as opposed to the activity of such actors in Spain, Belgium, or France).

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[339] *Deuxième et troisième rapports périodiques présentées par la Suisse au Comité des Nations Unies pour l'Élimination de Toute forme de discrimination raciale* (2002), available at http://edi.admin.ch/shop/00077/index.html?lan=fr (last accessed March 31, 2008), p. 59.

[340] The main effect of the law was the removal of certain statues of Marshal Antonescu from public spaces and the renaming of streets bearing his name.

[341] "Justiția recunoaşte legalitatea Mişcării Legionare," ("The law recognizes the legality of *Mişcarea Legionară*") *Cotidianul*, June 2, 2006, available at http://cotidianul.ro/justitia_recunoaste_legalitatea_miscarii_legionare-11853.html (last accessed March 31, 2008).

[342] One Senator is quoted as stating:

> Despite my different opinion from that of the Prime Minister and the Government, I am ready –if this will serve the good situation of Romania, toward NATO accession –to now hold silent about my opinions. I repeat, this is for the general good, not for fear of jail time, which in too big a rush the Executive announces.

Adrian Păunescu, Speech in the Senate plenum debates on 25 March 2002, available through http://cdep.ro/ (last accessed March 31, 2008).

[343] Some authors also point out that, despite their use of obvious inciting and even "revisionist" language, prominent public figures in Romania have not been prosecuted. See Andreescu (2003).

When interpreting the significance of the number of trials, two attitudes emerge. One is more optimistic, such as that expressed by some French jurists, stating a strong belief that "[s]uch numbers, a priori relatively mediocre, can simply suggest that the negationist theses are luckily limited, and that the law has permitted an assumption of profound consciousness ["*une prise de conscience profonde*"], on the part of the majority of the population."[344] It is hard to assess whether the impact of "revisionism" in France decreased with the adoption of the *loi Gayssot*. It is not at all clear that a limited number of trials implies less negationist activity and fewer proponents of Holocaust denial. Indeed, one French attorney involved in anti-denial cases offered a more nuanced explanation. In his view, the number of trials did not skyrocket "not because there is a decrease of the detestable thought ["*pensée immonde*"], but because, with discernment, associations hold central to choose those [cases] that seem indisputable [in their usefulness] to public repression and pedagogy at the benefit of others."[345] The less optimistic explanation for prosecution figures goes back to a belief in the slippery nature of the law's language and subsequent scope. Given the danger in instituting a "state truth" and in prosecuting anything that casts doubt on the Holocaust, some scholars find the number of trials and the reasoning behind them a sign of defeat in themselves:

> With no one willing to contest the Holocaust, civil plaintiffs prosecuted the slightest hint of denial. This was a mixed blessing. In the short run, the court's expansive interpretation of the *loi Gayssot* helped France avoid scandal. In the long run, however, that same policy fed a growing impatience with the law.[346]

Ultimately, in what numbers are concerned, their assessment is a subjective matter: do we believe fifty cases per year(Switzerland), twenty nine in eight years (France), or one in six years (Romania) are "appropriate"? Or are such numbers mediocre and unsatisfying, proof of the self-defeating nature of these laws? A detailed, comparative evaluation of this data is not possible here. The numbers differ significantly, due to an array of factors, including

[344] Bourrette in *Bilan de la loi Gayssot*, p 57.
[345] Christian Charriere-Bournazel in *Bilan de la Loi Gayssot*, p. 64.
[346] Khan (2004), p. 115.

specificities of each judicial system and the prevalence of prosecutable negationists in a given country. Moreover, the available data itself should be minutely scrutinized, for differences in reporting of cases often vitiate the resulting statistics. In the end, my goal here was to give anecdotal information with regard to the laws' implementation. I believe this is, for the present study, sufficient to indicate the difficulties in comparing different laws in different countries, and signals to the reader the necessary precaution when considering the following jurisprudential remarks.

2. ANTI-HOLOCAUST DENIAL LEGISLATION CASE LAW

2.1 Germany

Of the numerous German decisions touching upon Holocaust denial, only the relevant constitutional-level ones will be discussed here, with an emphasis on the 1994 FCC decision on the *Auschwitz-lüge*.[347]

The facts of the case involve a meeting planned by one of the regional associations of the *Nazional Partei Deutschland* (NPD), at which to be discussed was "Germany's future in the shadow of political blackmail."[348] The Munich authorities, on the basis of the Public Assembly Act,[349] made it a pre-condition that there would not be negationist claims at the conference, with liability falling on the organizers. Sections 130 StGB (agitation of the people), 185 StGB (insult), and 189 StGB (denigrating the memory of the dead) were all seen as likely to be violated. The NPD filed a constitutional complaint arguing that this prior restraint constituted an unlawful infringement on its right to freedom of expression.

[347] 90 BVerfGE 241 (1994).
[348] Cited in Kommers (1997), p. 382. All English citations of the decision refer to the Kommers version, whereas the German language ones are taken from the original.
[349] The Act allows for prior restraint on associations where there is a likelihood of criminal acts being committed.

After explaining that the case did not involve the right of assembly, but that of freedom of expression (since it was the utterances of the complainant that were the grounds for restriction), the FCC went on to clarify its stance on opinions *versus* facts. Thus, the Court emphasized that opinions are subjective and to be protected under the Basic Law: "[they] enjoy the protection of basic rights regardless of whether they are well-founded or deemed emotional or rational, valuable or worthless, dangerous or harmless."[350] In other words, mere expressions of opinion, even when "sharply or hurtfully worded"[351] ("*scharf oder verletzend*"), do not lose their constitutional protection.

The Court did not stop here, however. It went on to analyze "representations of fact," which, in its view, are not expressions of opinion. Because in their case, "it is the objective relationship of the utterance to reality that comes to the fore"[352] ("*die objektive Beziehung zwischen der Äußerung und der Realität*"), they are to be subjected to a review of truthfulness. With regard to the relationship between opinion and fact (one clearly involved in the case of Holocaust denial), the Court emphasized that, to the extent that they form the foundation of an opinion, statements of fact also enjoy protection. It went on to state:

> Consequently, protection of a representation of fact stops only when [the so-called fact] contributes nothing to the constitutionally protected formation of opinion. From this point of view, incorrect information does not constitute an interest worthy of formation. Thus the [FCC] has consistently ruled that a deliberate, demonstrably untrue representation of fact is not protected by the guarantee of free expression [*die bewußt oder erwiesen unwahre Tatsachenbehauptung nich vom Schtuz der Meinungsfreiheit umfaßt wird*].[353]

The two, fact and opinion, should only be disentangled, the Court further held, when this is possible without "falsifying the meaning" of the utterance. Otherwise, the former is to be considered opinion.

[350] Cited in Kommers (1997), p. 383.
[351] *Ibid.*
[352] *Ibid.*
[353] *Ibid.*, p. 384.

In the present case, the Court said, the limits on the freedom of speech enunciated in article 5(2) GG (general laws and statutory provisions protecting the youth and personal honor) needed to be balanced against the legal interest served by the statute under review (in this case, the Public Assembly Act). In so doing, the FCC emphasized that speech does not always take precedence. In cases where it infringes on the right to the protection of personality via "formal insult or vilification"[354] ("*Formalbeleidigung oder Schmähung*"), speech normally yields. Furthermore, because the utterances discussed in the case (negationist claims) have been proven untrue "in the light of innumerable eyewitness accounts, documents, findings of courts in numerous criminal cases, and historical analysis,"[355] they are not deserving of protection.

It is interesting to see how the FCC reconciled Section 130 StGB with the GG. As a law against defamation protecting honor, the Court held Section 130 to be a justifiable limitation on freedom of speech. It is in line, it said, with the provisions of article 5(2) GG, which also mentions honor, as well as more generally with the provision of inviolability of human dignity as expressed in article 1(1) GG. What is specific to the case of Holocaust denial is how the Court chose to understand Section 130's application to the Jews. It first upheld their definition as a "group capable of being insulted" (*beleidigungsfähige Gruppe*). In so doing, the Court recalled a decision by the German Federal Court of Justice which based this interpretation on the particular history of the Jewish community in Germany:

> The historical fact itself, that human beings were singled out according to the criteria of the so-called "Nuremberg Laws" and robbed of their individuality for the purpose of extermination, puts Jews living in the Federal Republic in a special, personal relationship vis-à-vis their fellow citizens; what happened [then] is also present in this relationship today. It is part of their personal self-perception, to be understood as part of a group of people who stands out by virtue of their fate and in relation to whom there is a special moral responsibility on the part of all others, and that this is part of their dignity. Respect for this self-perception, for each individual, is one of the guarantees

[354] *Ibid.*
[355] *Ibid.*, p. 385.

> against repetition of this kind of discrimination and forms a basic condition of their lives in the Federal Republic. Whoever seeks to deny these events denies vis-à-vis each individual the personal worth of [Jewish persons]. For the person concerned, this is continuing discrimination against the group to which he belongs and, as part of the group, against him.[356]

The Court hence emphasized not only the high value of respecting the dignity of each individual German Jew and of their totality as a group, but it linked it with racial discrimination.[357] The great weight given to the moral responsibility of Germany toward the Jews, translating into their constitution as a *beleidigungsfähige Gruppe*, has not gone unchallenged. Some observers have noted the stark contrast between this attitude toward the Jewish population and the refusal to view discriminatory acts against the country's Turkish population as similar instances of group insult.[358]

It is also interesting to note one of the FCC's previous decisions, which dealt with the question of German guilt for the war.[359] There, the Court reasoned, the complexity of the historical event prevented a definitive answer and was thus best left to historians instead of judges. Unlike Holocaust denial, therefore, which was based on demonstrably untrue facts, "[u]tterances about guilt and responsibility for historical events are always complex evaluations not reducible to representations of fact."[360]

2.2 France

As has been noted, the *loi Gayssot* was not submitted to the review of the *Conseil Constitutionnel* prior to its ratification. Some speculate that the reasons behind this have to do

[356] BGHZ 160, 162 *et seq.*, cited in Kommers (1997), p. 386.
[357] The Court stated in this regard: "there is no flaw in the Federal Court of Justice's logical connection between the racially motivated extermination of Jews during the Third Reich and a [current-day] attack on the right to respet and human dignity of today's Jews." *Ibid.*
[358] Krotoszynski (2004), Whitman (2000).
[359] 90 BVerfGE 1 (1994). The case concerned a book entitled *Truth for Germany: The Question of Guilt for the Second World War* by Ernst Nolte.
[360] Cited in Kommers (1997), p. 385.

with the political risks that the minority in Parliament would have incurred had it chosen to do so.[361] Even so, the law certainly had and continues to have a fair share of critics, including prominent jurists[362] and historians.[363] Its conformity with the Constitution has also been amply studied,[364] and the restriction of racist speech generally, and negationism in particular, has been presumed to be "consistent with the republican understanding that individual liberty must be promoted and affirmed within a collective space, upon the basis of public authority."[365] The legitimacy of the *loi Gayssot* has also been discussed in light of the ECtHR case law surrounding restrictions on Holocaust denial. This will also be surveyed here, as it emerged from cases discussing the French—and other—laws in detail.

The ECtHR doctrine surrounding the ban of racist speech goes back a number of years. In rejecting an application of two members of a Dutch radical party,[366] the (then) European Commission of Human Rights evaluated the ban on inciting language in light of the restrictions allowed for by article 10(2) of the ECHR, as well as in light of article 17. It found that the two applicants

> are essentially seeking to use Article 10 to provide a basis under the Convention for a right to engage in these activities which are…contrary to the text and spirit of the Convention and which right, if granted, would contribute to the destruction of the rights and freedoms referred to above.

This stance was reiterated three years later when the Commission again rejected an application, this time from a German citizen, claiming that his right to the freedom of expression had been infringed upon when he was prosecuted for group libel (under the pre-

[361] Troper (1999), p. 1239.
[362] See the open letter signed by fifty-six jurists calling for the repeal of the "*lois mémorielles*," including the *loi Gayssot*, November 23, 2006, available at http://www.ldh-toulon.net/spip.php?article1683-gyssot_9913.html (last accessed March 31, 2008).
[363] See the open letter signed by a number of prominent French historians under the heading "Liberté pour l'histoire," cited in "Les historiens se rebiffent," *Observatoire du communautarisme*, December 13, 2005, available at http://communautarisme.net/Les-historiens-se-rebiffent_a654.html (last accessed March 31, 2008).
[364] Troper (1999).
[365] Karen L. Bird, "Racist Speech or Free Speech? A Comparison of the Law in France and the United States," *Comparative Politics*, Vol. 32, No. 4 (Jul., 2000), p. 406.
[366] *J. Glimmerveen and J. Hagenbeek* v. The Netherlands, Application no. 8348/78 and 8406/78, October 11, 1979 (rejected).

reform Section 185 StGB).[367] In finding the restriction "necessary within a free and democratic society," the Commission recalled that

> [s]uch a society rests on the principles of tolerance and broadmindedness which the pamphlets in question clearly failed to observe. The protection of these principles may be especially indicated vis-à-vis groups which have historically suffered from discrimination. The fact that collective protection against defamation is limited to certain specific groups including [J]ews does not involve any element of discrimination contrary to Article 14 of the Convention.

In more recent yeas, the ECtHR has also not found fault with the current state of the German anti-Holocaust denial provisions, as they are incorporated into Sections 130, 189, and 194 StGB.[368] One more decision of relevance involved a case, decided by the Grand Chamber, in which a Danish journalist was convicted for airing, without sufficient denunciation, a TV news reportage on a racist group.[369] Despite the injurious remarks by members of the group, the Court decided that the journalist had sufficiently distanced himself from the remarks and the context of the broadcast was such as not to imply the condonation of the racist statements. One of the dissenting opinions, however, noted that to allow the encouragement of racial hatred "is to display an optimism, which to say the least, is belied by experience."[370]

These prior rulings make the ECHR interpretation of the legitimacy of restricting hate speech clear. It emphasizes the specific nature of the democratic system, which is entitled to punish those abuses of rights which undermine its very existence (a stance embracing, at least in part, the idea of a militant democracy). Furthermore, the Court did not find problematic the singling out of one group, the Jewish community, and excluding others from the protection of anti-negationist laws. It reasoned that their special history explains this choice, thus echoing the German FCC decision on Holocaust denial. The Court also showed that it is not ready to

[367] *X. v. Federal Republic of Germany*, Application no. 9235/81, July16, 1982 (rejected).
[368] Two decisions of admissibility relating to the same applicant, Hans-Jürgen Witzsch, discuss these laws. See Application no. 41448/98, April 20, 1999 and Application no. 7485/03, December 13, 2005 (both rejected).
[369] *Jersild v. Denmark*, Application no. 15890/89, Decision of the Grand Chamber, September 23, 1994.
[370] Joint dissenting opinions of judges Gölcüklü, Russo and Valticos, in *Ibid.*

go too far into the direction of restriction of speech, particularly with regard to serious journalism, in an effort to maintain the role of the press in forming public opinion.

With respect to cases specifically brought against France, the Commission declared the *loi Gayssot* in line with the Convention as early as 1996.[371] The case concerned a French citizen who, based on the publication of a "revisionist" article contesting the deadliness of gas chambers at a specific concentration camp, was condemned and fined for negationism. Despite the careful phrasing of his article (but referring constantly to "the supposed gassings" ("*les prétendus gassages*") in concentration camps), the *Cour d'appel de Paris* found that he "left to be understood that he contested the reality of the extermination of the Jewish community by the Nazi regime and of the use to this end of the gas chambers." The European Commission agreed that, "under the cover of a technical demonstration," ("*sous couvert d'une démonstration technique*") the applicant had indeed denied the reality of the mass extermination of the Jews during WWII. Again, it rested its decision on article 17 of the ECHR, finding that to allow the use of free speech toward anti-democratic goals "would contribute to the destruction of the rights and liberties guaranteed by the Convention."[372] Elsewhere, too, the Court found the *loi Gayssot* to be pursuing a legitimate aim ("whether it be the general aim of fighting anti-Semitism or that of punishing behavior that seriously threatened public order or damaged the reputation and honor of individuals") and within the margin of appreciation of the state members.[373] In so doing, it expressed the view that "[d]enying crimes against humanity is…one of themost serious forms of racial defamation of Jews and of incitement to hatred of them."[374] At the same time, one should keep in mind that, much like the German *Bundesverfassungsgericht* distinguished Holocaust denial from discussing German responsibility for the War, so too the ECtHR found the prosecution of

[371] The case is that of Pierre Marais, Requête no. 31159/96, June 24, 1996 (rejected). All ensuing citations are the author's translation.
[372] *Ibid.*
[373] The case is that of Roger Garaudy, Application no. 65831/01, June 24, 2003 (rejected).
[374] *Ibid.*

"revisionism" to be different from attempts at rehabilitating convicted war criminals such as Marshal Pétain.[375]

Perhaps the most detailed analysis of the *loi Gayssot* and its language came in 1993, in a case involving the famous French Holocaust denier Robert Faurisson.[376] The criticism of the *loi Gayssot* mentioned already—that its language is imperfect with potentially hazardous consequences—was also formulated by some of the judges of the UN Human Rights Committee in *Robert Faurisson v. France*. Though the decision was favorable to the French state, one of the judges severely criticized the law:

> The Gayssot Act is phrased in the widest language and would seem to prohibit publication of bona fide research connected with matters decided by the Nuremberg Tribunal. Even if the purpose of this prohibition is to protect the right to be free from incitement to anti-Semitism, the restrictions imposed do not meet the proportionality test. They do not link liability to the intent of the author, nor to the tendency of the publication to incite to anti-Semitism. Furthermore, the legitimate object of the law could certainly have been achieved by a less drastic provision that would not imply that the State party had attempted to turn historical truths and experiences into legislative dogma that may not be challenged, no matter what the object behind that challenge, nor its likely consequences.[377]

The fear of "legislative dogma" taking over any discussion related to the Holocaust is a common criticism of anti-denial laws. Given the "wide language" employed in the *loi Gayssot* particularly, it would seem that the potential for establishing a state-sponsored, unique historical truth is present. As was discussed in the above section on enforcement, in the French case, this risk was to some extent avoided when applying the law in court. The more complex aspect implied in the formulation of the *loi Gayssot* is that it seems to create an "absolute liability in respect of which no defense appears to be possible."[378] By leaving

[375] *Lehideux and Isorni v. France*, Application no. 55/1997/839/1045, Grand Chamber, September 23, 1998. The Court distinguished this decision from its previous ones by emphasizing that the articles under discussion did not involve the glorification of Nazi crimes (which the applicants had actually condemned), but an attempt at the rehabilitation of a man (Pétain).
[376] *Robert Faurisson v. France*, Human Rights Committee (United Nations), UN Doc CCPR/58/D/550/1993 (1996).
[377] Judges Elizabeth Evatt and David Kretsmer, concurring in *Ibid*.
[378] Judge Rajsoomer Lallah, concurring in *Ibid*.

out the element of incitement, the law does not point to the intent of the authors of negationist literature or speech, and instead presupposes the threat they pose to society. As will be seen in the Belgian case below, the *Cour d'arbitrage* there intervened and clarified precisely this point, with reference to the judge's role of determining pernicious intent behind negationism.

2.3 Belgium

With respect to Belgian jurisprudence, of note is the 1996 decision by the *Cour d'arbitrage*[379] discussing a so-called *recours en annulation*[380] around the Act of 23 March 1995.[381]

The case concerns an appeal, brought by two defendants,[382] attacking the said Act on several points of law. The attack was levied on two distinct fronts: on the one hand, it was claimed that the Act in question was too broad, because its definition of the crime extended excessively to include legitimate forms of scientific research, as well as journalistic work. On the other hand, the argument went, the law was also too narrow, due to the sole inclusion of the National Socialist crimes perpetrated during the Second World War, to the exclusion of other genocides or mass atrocities. The defendants rested their claims on several articles of

[379] *Arrêt no. 45/96 du 12 juillet 1996 de la Cour d'arbitrage*, available at http://arbitrage.be/public/f/1996/1996-045f.pdf (hereinafter *Arrêt no. 45/96*) (last accessed March 31, 2008). All citations of the decision are translations of the author.

[380] These can be brought by individuals if they can prove an interest in the case involved. See article 2.2 of the *Loi Speciale du 6 janvier 1989 sur la Cour d'arbitrage*, January 7, 1989, available at http://www.arbitrage.be/fr/common/home.html (last accessed March 31, 2008).

[381] For a discussion of the decision, see van Drooghenbroeck (2002), pp. 19-24 and Jean-Paul Moerman, "Les limites aux atteintes à la liberté d'expression à travers quelques arrest d la Cour d'arbitrage de Belgique," Speech presented at the VIIIe Conférence internationale de Erevan en coopération avec la Cour constitutionnelle de la République d'Arménie: "Les critères de base des restrictions aux droits de l'homme dans la pratique de la justice constitutionnelle," October 3-4, 2003, available at http://concourt.am/armenian/almanakh/almanac2003/papers/20.doc (last accessed March 31, 2008).

[382] The two defendants' claims are discussed separately in the decision, but the main attack on the criminalization of Holocaust denial comes from the first appellant, a certain S. Verbeke (*affaire numéro 858*). On this centers the main discussion of the decision here. The second defendant's claim was that the law did not go far enough and based his *recours* on the personal offense he took with it, rather than an objective interest. The Court dismissed it.

the Belgian Constitution. Article 24(1),[383] disposing that education and parents' choice shall be free and preventive measures forbidden, was invoked, emphasizing the need for ideological neutrality in teaching. Articles 10 and 11 of the Constitution, proclaiming the equality of Belgian citizens and prohibiting discrimination, were strongly appealed to. The defendants argued on their basis that, by creating two distinct categories of persons (those who express their (negationist) views and those who abstain), the law is discriminatory. Furthermore, they claimed that the definitional difficulties, relating to the description of the crime (denying, grossly minimizing, attempting to justify, or approving of Nazi crimes) makes the law overly vague, difficult to predict, and prone to unwanted effects. Finally, the *recours* invoked article 19 of the Constitution, regulating the freedom of expression. The claim here was that the state was trying to impose a historical dogma ("*C'est incontestablement un dogme historique qui est imposé*"), stifling scientific debate and as such exaggeratedly interfering with free speech norms.

Of great interest is the discussion surrounding the legislative aims behind the Act of 23 March 1995. Three distinct goals were identified: one political (linking Holocaust denial with anti-Semitism and the surge in racism in Belgian society), the others the protection of the honor and memory of the victims of the Holocaust and their defendants, and the guarding of historical truth. With respect to these, the *recours* argued that the law was inconsistent and ineffectual. For instance, the defendants claimed that the racism argument of the Government was overstated, and that if it was racism it sought to curb, it should have done so by appropriate means, not via a law aimed at free expression (pointing to the Act of 30 July 1981

[383] The full text of article 24(1) of the Belgian Constitution reads:
Education is free; any preventative measure is forbidden; the repression of offences is only governed by law or decree.
The community offers free choice to parents.
The community organizes neutral education. Neutrality implies notably the respect of the philosophical, ideological or religious conceptions of parents and pupils.
The schools organized by the public authorities offer, until the end of obligatory scholarity, the choice between the teaching of one of the recognized religions and non-denominational moral teaching.

as the seat of such anti-racism goals). They further argued, concerning the protection of victims and their descendants, that the unilateral inclusion of Holocaust victims, to the exclusion of those of other atrocities such as Stalinist crimes or the Armenian genocide, was unacceptable. With regard to historical truth, as noted above, the *recours* contested the imposition of a dogma on the study of the Holocaust and pleaded for scientific freedom. It is thus interesting to understand how the central argument of the *recours* was shaped, with its main pillar in equality rather than freedom of speech:

> [T]he violation, of the law in contention, of the right to the free expression of opinion does not constitute the object of the *recours*. But the subjectivity of the criterion used…combined with the considerable consequences which have been exposed show that the effects of the law are not proportional to the aims pursued and are hence unreasonable [*déraisonnable*].[384]

For its part, the Belgian Government responded point by point to these claims, dismissing all of them as unfounded. It argued that the law was not overly broad, as it specifically and intentionally described the types of activities which come under its aim. It rejected the equality-rooted argument of the defendants, explaining that it was not uncommon for the law to make distinctions between different categories of persons, as long as they are justified. This it also believed to be the case here. The Government advanced as its rationales the need to protect public order, the prevention of crime, and the protection of the reputation and rights of others. It also made the point, invoking ECtHR jurisprudence, that democracy itself was under attack from Holocaust deniers and as such needs to be defended: "the democratic order deserves special protection, which is equivalent to the protection of the rights of others, the exercise of which presupposes such an order."[385] Noteworthy is also how the Belgian Government chose to defend its focus on Holocaust denial, to the exclusion of the denial of other genocides. It noted that "this is presently the only one in Belgium with respect

[384] *Arrêt no. 45/96*, p. 15.
[385] *Ibid.*, p. 12.

to which one attempts to manipulate opinion and to falsify history."[386] In other words, because only Holocaust denial posed a specific set of dangers, only it was at present criminalized; the Government did not close the door on the potential expansion of the Act's reach, should other genocide denials prove equally pernicious.

The *Cour d'arbitrage*, for the most part, accepted all of the Government's points and rejected the *recours* on its merits. It did, however, manage to clarify the meanings given to the four different types of negationism. Thus, it explained that to deny (*nier*) referred to the total contestation of the existence of the genocide; to approve (*approuver*) referred to expressing approval for and subscribing to Nazi ideology; attempting to justify (*chercher à justifier*) went less far than approval but tended to present the Nazi genocide as acceptable and as such to legitimize its ideology; and, finally, grossly minimizing (*minimiser grossièrment*) implied the minimization to the extreme and of a grave nature, outrageous (*outrancière*) or offending. The Court also clarified the legislative aims of the Act of 23 March 1995 and, as one observer put it, thereby "save it."[387] Looking at the *travaux préparatoires*, the Belgian Court identified behind the criminalized activities the intent to "rehabilitate a criminal and hostile to democracy ideology" and to "gravely offend one or more categories of human beings."[388] If the legislature didn't include this intent requirement in the law, the Court reasoned, it was solely due to the difficulty of its being proven. It would be, though, up to the judge to determine it, based on the circumstances of each case.[389]

To sum up, the Belgian *Cour d'arbitrage* was not convinced that the law against denial of the Holocaust too extensively or unwarrantedly infringed on the freedom of expression (or, for that matter, that it led to unlawful discrimination). It pointed to the existence of anti-denial laws in other European countries as proof of the legitimacy of the

[386] *Ibid.*, p. 10.
[387] Van Drooghenbroeck (2002), p. 21.
[388] *Arrêt no. 45/96*, p. 27.
[389] The Court also noted the subtlety of some forms of denial, including presenting themselves as pseudo-scientific research, and as such further trusted with the judge to apply the law correctly. *Ibid.*, p. 31.

legislature's goals in wanting to fight anti-Semitism. Interestingly, it also expressed its concern that to do otherwise might leave Belgium prone to becoming a safe heaven of denial ("*le refuge du négationnisme*"). As to some of the details of the decision, they are not uncontestable. The explanation given to the singling out of the Holocaust, as opposed to all genocides, has not convinced all observers. As one pointed out, the rarity of an event does not automatically have to mean its non-criminalization,[390] even more so as the denial of the Armenian genocide, for instance, is at least as visible as that of the Holocaust. Nevertheless, the Belgian Court made sure to shift the focus of the discussion from a simple question of the freedom of expression of the negationists to a more complex understanding of their effects upon the victims of their speech. That it understood these "concurrent" liberties[391] to be at stake ensured that its decision was grounded on considerations of all interests involved, and did not automatically give precedence of one over the other.

2.4 Hungary

So far, the jurisprudence of various national and international bodies has been reviewed, all of which ultimately upheld those legal provisions aimed at prosecuting Holocaust denial. The case law of the Hungarian Constitutional Court to be discussed here will serve to balance this. It should be noted that the HCC adopted a broader view of the freedom of speech, in between American absolutism and European-style limitations.[392] In a

[390] Van Drooghenbroeck (2002), p. 23.
[391] *Ibid.*, pp. 24.
[392] See Michel Rosenfeld and András Sajó, "Spreading liberal constitutionalism: an inquiry into the fate of free speech rights in new democracies," in ed. Choudry (2006), p. 158, seeing the Hungarian free speech jurisprudence as a mix of the American and German approaches. Some have referred to the HCC jurisprudence as creating a "Hungarian First Amendment." László Sólyom, "The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary," *International Sociology*, Vol. 18, No. 1 (March, 2003), p. 145.

1992 decision,[393] the Court tackled the constitutional problems set forth by article 269 of the Penal Code, which stated:

> (1) One who in front of a large public gathering,
> (a) against the Hungarian nation or any other nationality,
> (b) against any people, creed or race, furthermore certain groups among the population, incites hatred, commits a criminal offence and is to be punished by imprisonment for a period of up to three years.
> (2) One who in front of a large public gathering uses an offensive or denigrating expression against the Hungarian nation, any other nationality, people, creed or race, or commits other similar acts, is to be punished for the offense by imprisonment for up to one year, corrective training or a fine.

In finding article 269(1) in line with the Constitution, the HCC considered the very real harm caused by incitement to hate. It noted that expression of hate,

> intensifying the emotional or social tension existing within a given, smaller or larger, community tears society asunder, strengthens extremism, prejudice and intolerance. Combined, they weaken the prospect of creating a society based on a pluralist value system, one based on tolerance, multiculturalism, recognition of the right to be different, embracing equal dignity of all human beings, one which refuses to recognize discrimination as a value.

It is noteworthy how many of the philosophical justifications for the prohibition of hate speech discussed in Chapter One have found their way into the Hungarian decision. Thus, by reference to a pluralist society which embraces tolerance and the dignity of its members to the exclusion of extremism, the HCC upheld the constitutionality of a provision making incitement to hatred a crime.[394]

The HCC went further and considered the pitfalls of not outlawing incitement to hatred. In wording that, again, echoes the considerations canvassed in Chapter One above, the Court explained that, in this case, the freedom of speech clashes with other pillars of the Hungarian system of values, including those of equality and dignity. The HCC reasoned that

[393] 30/1992 (V. 26) AB Decision of the HCC, May 18, 1992, available at http://mkab.hu/en/enpage3.htm (last accessed March 31, 2008).
[394] A similar point, also grounded on the specific Canadian version of a multicultural society, was made in *R v. Keegstra* [1990] 3 S.C.R. 697, available at http://csc.lexum.umontreal.ca/en/1990/1990rcs3-697/1990rcs3-697.html (last accessed March 31, 2008), where the Canadian Supreme Court upheld the conviction of the Holocaust denier.

> [t]o afford constitutional protection to the incitement of hatred against certain groups under the guise of the freedom of expression and freedom of press would present an indissoluble contradiction with the value system and political orientation expressed in the Constitution: the democratic rule of law, the equality of human beings, equality of dignity, as well as the prohibition of discrimination, the freedom of religion and conscience, the protection of national and ethnic minorities—as recognized by the various articles of the Constitution.

The HCC understood the impact of hate speech as broader than solely its direct consequences might show. Thus, it considered both the threats to honor and dignity of individuals of a certain target group and the "intimidation restrict[ing] them in the exercise of their other rights as well (including the right to freedom of expression)." This is clearly reminiscent of the silencing arguments detailed in Chapter One. These referred to the indirect, less visible effects of hate speech as diminishing the eagerness of its targets to express themselves within public discourse.

Last but not least, the HCC touched upon another main consideration of the present study, namely, the role that *criminal* law plays. The Court explained that "criminal law is the *ultima ratio* in the system of legal responsibility" and saw its social function as serving as "the sanctioning foundation of the overall legal system." Accepting the very serious nature of the harm that hate incitement may cause, the HCC emphasized the necessity of employing penal—as opposed to other forms of—liability. In so doing, the message of disapproval of the law and the preservation of legal and moral norms would be strengthened.[395]

In contrast to the above considerations, the HCC rejected article 269(2) as unconstitutional. It held that, unlike incitement to hatred, the use of "offensive" or "denigrating" language is not clearly capable of disturbing the peace. Instead, the Court reasoned, the real aim of article 269(2) is to "classif[y] opinion on the basis of its content"

[395] The Court's decision went on to say:

> The emphatic expression of disapproval and condemnation of such behavior, the fortification of those democratic ideas and values which are attacked by the perpetrators of these activities, and the restoration of the violated legal and moral order requires the application of the instruments of penal law.

and as such unconstitutional. The HCC therefore distinguished the harm of incitement to hatred, with article 269(1) as "an abstract protection of the public order and peace," from merely offensive language as included in article 269(2), the impact of which on public peace remained "hypothetical or a statistical probability." For the latter there remain only civil remedies (even though, as has been noted, these are not very efficient).[396] Subsequent Hungarian attempts to criminalize hate speech, particularly in light of the frequent acquittals of racists, have not been successful.[397]

2.5 Spain

If the HCC decision above did not deal with an anti-denial law *per se*, the Spanish case law surrounding article 607(2) of the *Código Penal* did engage fully with such a law. It concerns proceedings brought forth against a library owner by the name of Pedro Varela Geiss. The owner of the *"Librería Europa"* in Barcelona, which sold neo-Nazi and negationist publications and audio-visual material (alongside a small amount of art and history publications), was charged under article 607(2) of the Penal Code for denial and justification of genocide, as well as under article 510(1) for incitement to racial hatred. The suit was brought against him by the public prosecutor's office with the *Comunidad Israelita de Barcelona* and two anti-racist organizations as civil parties. The verdict of the trial court[398] was unequivocal. It found the defendant guilty on all accounts and sentenced him to the maximum cumulative prison sentence (five years) and a fine. That court held that the materials in question denied and justified the Nazi genocide "in a reiterated and

[396] Rosenfeld and Sajó (2004), p. 162.
[397] *Ibid.*, p. 163. See also 18/2004 (V.25) AB Decision of the HCC, available at http://www.mkab.hu/en/enpage3.htm (last accessed March 31, 2008), finding a proposal to ban public speech which is "disparaging or humiliating" to a group unconstitutional.
[398] *Sentencia del Juzgado de lo Penal No. 3 de Barcelona*, November 26, 1998. The full text of the verdict can be accessed at http://www.der.uva.es/constitucional/verdugo/sentencia_varela_europa.html (last accessed March 31, 2008). All ensuing citations of the decision refer to this document and are the translations of the author.

unequivocally abusive form to the social group formed by the Jewish community." In a sentence making ample reference to international jurisprudence and the fact that other European countries penalize Holocaust denial as well, the Barcelona tribunal also emphasized the "direct attack on the human dignity of the social or ethnic group" involved. It also highlighted what in its view was the essence of the crime: "the unequivocal message of hostility and disdain toward the collectivity affected by the genocide." This message, the court reasoned, led to a climate of violence and hostility that could easily translate into acts of violence or discrimination by third parties. Thus, the trial court saw behind denial of genocides not only an indirect threat to public order, but also a symbolic message: that violence is what the Jewish community in Spain should expect. The tribunal thus viewed the intervention of the law as not only allowed, but necessary.

Varela appealed the verdict and the court of appeals submitted section 607(2) of the Criminal Code for a review of constitutionality to the Spanish Constitutional Tribunal. The latter issued its decision STC 235/2007 in November 2007 with an extensive and contested ruling.[399] It reasoned that the two crimes included in article 607(2), denial and justification of genocide, were to be distinguished. It reasoned that denial of genocide may be constituted by a neutral distribution of material of an offensive and disliked ideology, yet it did not include a showing of further constitutional injury. The tribunal dismissed the arguments of the *Abogado del Estado* (public prosecutor) with regard to the harm posed by negationism. The public prosecutor had reasoned that denial of genocide was conducive to a climate of hostility and hence, indirectly, to acts of discrimination and even potential violence against the Jewish community. The society at large was also harmed, the public prosecutor reasoned, by the creation of such a climate, especially in light of the European resurgence in xenophobia of

[399] *Sentencia STC 235/2007, de 7 de noviembre de 2007*, available at http://tribunalconstitucional.es/jurisprudencia/Stc2007-235.html (last accessed March 31, 2008). All ensuing citations of the decision refer to this document and are the translations of the author.

which Spain was not spared.[400] Justification, conversely, would pose more than this abstract danger, the court opined. Being a value judgment, the biased element ("*el elemento tendencial*") was distinguishable and allowed the legislature to prevent incitement to the perpetration of genocide.

Interestingly for the purposes of this study, all constitutional values discussed in Chapter One appear in the tribunal's decision. Thus, with regard to democracy, it emphasized that Spain did not follow a militant democracy model but instead encouraged the positive adhesion of its citizens to the constitutional order. It argued that freedom of expression, even of odious beliefs, was at the core of democracy and pluralism:

> The value of pluralism and the necessity of the free exchange of ideas as the substratum of the representative democratic system prohibit any activity of the public powers tending to control, select, or gravely restrict the mere public circulation of ideas or doctrines.

This, the court explained, was true even in cases involving ideas which are "repulsive from the point of view of the human dignity constitutionally guaranteed" in Spain. Its final reasoning was that the "justification" portion of article 607(2) was constitutional, while the part relating to denial of genocides was unconstitutional and void[401] and the Barcelona appeals court was left to rule on the outcome of Varela's case.[402]

The court made it explicit that its decision was in line with two of its previous rulings which dealt with similar situations. In STC 214/1991 (a decision before the entering into force of the current criminal code),[403] the Tribunal had ruled on a case brought by a Jewish

[400] The public prosecutor opined that the crime did not aim at suppression of opinions, as reprehensible as they were, but at preventing society from a climate of violence made acceptable by the "systematic psychological preparation" via propaganda.
[401] The discussion also involved a distinction between the crimes in article 607.2 and that of "apology" (*apologia*) of certain crimes. For reasons of space and relevance, this cannot be covered here.
[402] "El librero Pedro Varela, condenado a siete meses de prisión por justificar el Holocausto," *El País*, March 3,2008, available at http://elpais.com/articulo/espana/librero/Pedro/Varela/condenado/meses/prision/justificar/Holocausto/elpepuesp/20080305elpepunac_23/Tes (last accessed March 31, 2008).
[403] *Sentencia STC 214/1991, de 11 de noviembre de 1991*, available at

concentration camp survivor against the editor of an article and the interviewee, the latter of which had made negationist claims and anti-Semitic remarks. It had found in favor of the defendant, but not on account of the historical "revisionism" involved. Instead, the tribunal had ruled on the other offensive language and upheld the right to honor or reputation of the plaintiff, in light of human dignity and non-discrimination principles. In STC 176/1995,[404] the Tribunal had also ruled in favor of several Jewish associations that had complained against the editor and director of a neo-Nazi magazine (entitled "Hitler-SS"). Here too, the Constitutional Tribunal had found against the protection of the speech, but had insisted on the *injuries* (offensive expressions), and not the denial of history, as its basis. In both of these cases, therefore, the Tribunal balanced its ban on insult as a speech category, while at the same time maintaining that "revisionist" speech was protected.[405]

The Constitutional Tribunal's decision did not go uncontested, however. Four justices dissented, on multiple grounds. Some of these included the impossibility to distinguish the two crimes (denial and justification). Others admitted the public prosecution's reasoning of the danger in the creation of a climate of violence. One judge relied precisely on the pluralism argument to indicate that anti-pluralist groups should be contained (as they represent a "clear and present danger") in order to maintain the basis of dignity upon which the democratic order relies. Noteworthy are also the remarks by some of the justices that Spain would be out of step with the rest of Europe, as the latter moves toward banning Holocaust denial and Spain decriminalizes it. The leader of Spain's Federation of Jewish Communities called for the reinstitution of a criminal ban on denial soon after the decision was rendered. Addressing Parliament, he emphasized that Holocaust denial was "the

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http://boe.es/g/es/bases_datos_tc?doc.php?coleccion=tc&id=SENTENCIA-1991-0214 (last accessed March 31, 2008).

[404] *Sentencia STC 176/1995, de 11 de diciember de 1995*, available at http://boe.es/g/es/bases_datos_tc/doc.php?coleccion=tc&id=SENTENCIA-1995-0176 (last accessed March 31, 2008).

[405] See also discussion of these two cases in Ferreres Comella (2002).

threshold of hate speech" and "depenalization" could lead to a rise in the distribution of Nazi propaganda.[406]

Putting these decisions into the broader perspective adopted in this study, it is quite obvious that all the normative considerations discussed in Chapter One find their way, some more so than others, into constitutional considerations of the laws against Holocaust denial. They do so, however, in distinct forms in each context, with the same value at times constituting the basis for upholding the law and at times for its rejection. This shows that a purely theoretical discussion will always remain insufficient in this respect. How the law actually is shaped by judicial review rests on a number of factors, including the place of different norms in the constitutional system, the type of society envisioned, and the presumed threat posed by negationism as a form of hate speech.

[406] Jacobo Israel Garzon, quoted in "Spanish Jewish leader urges jail terms for Holocaust denial," *European Jewish Press*, November 29, 2007, available at http://ejpress.org/article/23776 (last accessed March 31, 2008).

CONCLUSION

This study has proposed a discussion of Holocaust denial on three fronts: on the normative front, it illuminated the various justifications for and against the prohibition of hate speech generally, and negationism in particular; on the textual front, it detailed the provisions of anti-denial laws, pointing to the different constitutive elements of the crime; and finally, on the jurisprudential front, it illustrated the practical application of such laws, as well as the result of their examination by judicial review bodies. The initial theoretical discussion of Chapter One set up the stage for the more empirical Chapters Two and Three. The different constitutional values discussed in the former emerge as the bases for legislative intent behind and court interpretations of anti-negationist laws. Which value is given how much weigh, however, differs from one case study to the other. Thus, while the protection of dignity and the reputation of others is the centerpiece of German case law, a broader fight against racism, and specifically anti-Semitism, is sought by the Belgium law, for instance. In countries where the protection of democracy is constitutionally mandated, the arguments in favor of regulation are also framed as defending the democratic order and are at the core of ECHR jurisprudence upholding anti-denial bans. The implication of the French law, that the very utterance of Holocaust denial is an aggression on the target group, is far-reaching indeed. Other laws, such as that of Spain, particularly in the aftermath of the Constitutional Tribunal's 2007 decision, accept a more limited view of the harm involved and restrict the reach of the law to the justification of Nazi crimes.

Also evident from the preceding analysis is the high degree of contestation surrounding these laws in all national *milieus*. They have been rigorously criticized, with arguments against them based on their tenuous effectiveness in the fight against racism, their high censorial potential, and their use as promoters of official historical dogma. Some

scholars even point to anti-negationist laws' counter-productive effects. They note the "sanitized language" adopted by deniers in the aftermath of the adoption of such laws, potentially "making their messages of hate more acceptable to a broader audience."[407] The same authors conclude that the rise in European racism and xenophobia, despite anti-hate speech laws, "calls into question the effectiveness of such laws in the promotion of tolerance and non-discrimination."[408]

Emerging from the case law, however, is also a broader understanding of the role of these laws, one which goes beyond their direct use in the fight against anti-Semitism. Some courts have clearly indicated that they view these laws as significant in and of themselves, as a signaling mechanism of the values society embraces, the expression and behavior it does not, and of the extent to which the apparatus of law will be employed in this vein. This is, in part, connected with the role law generally plays within a given society. In the words of one commenter, "the role of legal instruments remains a crucial one. We need them as a vehicle by which society can express its values and the limits of what it will tolerate."[409] But the role of anti-denial laws especially goes even further. In their absence, one could argue, the message sent to the victims of this form of hate speech is a contradictory one: on the one hand, their dignity, freedom from discrimination, and full participation in society are provided for via constitutional and other stipulations; on the other hand, the lack of *de facto* state involvement in giving substance to these provision may render them ineffectual. There is also a message sent to society more generally, which again has to do with the reinforcement of certain values and the demarcation of the unacceptable. As the Spanish Government argued in its defense of the criminalization of Holocaust denial, its concern was not just with the individual victims, but with the general climate following the acceptance and legitimization of negationists. It could easily be assumed to be, the Spanish authorities said,

[407] Coliver (1992), p. 374.
[408] *Ibid.*
[409] Errera (1992), p. 157.

one in which discrimination is not always adequately ostracized, and where violence may thus ensue. This line of reasoning ties into the main argument of this thesis, one having to do with the symbolic role of anti-Holocaust denial laws. By "symbolic," I have pointed to the more indirect effects of this type of legislation, most of the times fully accounted for by the legislators themselves. These involve the communicative function of law, both internally and externally. In what the international role of the law is concerned, the Romanian case made it clear that sometimes countries adopt anti-hate speech laws in spite of (even strong) internal opposition in an effort to comply with international standards. But EU and NATO conditionality are not the only external factors involved in the decision of whether—and how—to legally tackle Holocaust denial. ECHR jurisprudence in the domain of hate speech offers guidance to European countries with respect to what constitutes legitimate interference with the freedom of speech in a democratic society. Furthermore, the case law discussed in Chapter Three indicates the great degree to which national courts rely on guidance from Strasbourg in their own interpretations of negationist laws. Not only that, but they reference other national contexts in an effort to extricate a transnational, European anti-denial standard.

My multi-tiered argument of an internal-individual/internal-societal/external symbolic function of anti-negationist laws is not entirely novel. Scholars such as Ruti Teitl also identify the main justifications to such laws as being victim- and society-oriented: "these censorship laws have generally been justified in terms of the historical justice owned persecution's victims and of the potential harmful impact of a counteraccount."[410] Teitl, however, does emphasize that victims play a lesser role in passing anti-Holocaust denial legislation. Instead, she posits, it is competing historical accounts (notably, those denying national responsibility during the Holocaust) that are the primary aim of such laws. The shift from civil to criminal sanctions against denial, Teitl writes, denotes the view that "competing

[410] Ruti G. Teitl, *Transitional Justice* (Oxford University Press, 2000), p. 106.

accounts are not merely insults to individual victims but also wrongs done to the community."[411] There is, therefore, a felt need to "ensure a distinct conceptualization of historical justice,"[412] one that leaves no room for counter-conceptualizations and which punishes attempts at denial as criminal offences. Teitl's emphasis on history as the root of the energetic fight against Holocaust denial is, as has been seen, echoed by other observers as well. The present analysis, however, goes further, and sheds light on the broader normative values—and their distinctive national appropriation—incorporated into denial laws. It also elaborates on the international element, which Teitl neglexts, and its influence upon political actors' behavior.

The special function of criminal, as opposed to other, types of legislation has also been predicted as relevant for the purposes of this analysis. The discussion in Chapter One noted the heavy burden carried by such legislation, as it constitutes the harshest sign of disapproval and form of punishment society may employ. Some scholars see this as a broader trend, finding that "[i]n the last half century, criminal law has increasingly been used in several societies with a view to teaching a particular interpretation of the country's history, one expected to have a salubrious impact on its solidarity."[413] Again, this view emphasizes history teaching to the exclusion of other goals, such as of a particular *mélange* of civic values within a pluralist society. The special interaction between anti-Holocaust denial laws and history did not go unnoticed, however. The legislators and courts alike acknowledged the dangers involved in placing speech concerning a historical event in the realm of law, and criminal law no less. The German FCC decision showed that there, the approach was to treat the Holocaust as historical fact, thus making its negation a demonstrably untrue statement of fact. In other contexts, such as the Belgian and French, the legislative intent seems to have

[411] *Ibid.*, p. 107.
[412] *Ibid.*
[413] Osiel (1996), p. 466.

been precisely "to prevent the judge from having to act as a historian, or deliberate on historical methodology and facts, which he is not qualified for."[414]

Of no less importance, for the present purposes, has been the discussion of one case in which an anti-group defamation law was not upheld. The Hungarian Constitutional Court, while accepting the need for a penal law against incitement to hatred, refused to take the further step of criminalizing insult to an entire community. This brings to the fore another point, briefly touched upon so far: is the criminalization of Holocaust denial necessary if there are other, effective penal laws in place? The latter generally involve anti-incitement and anti-discrimination laws, but sometimes include anti-defamation laws as well, making the negationist laws potentially redundant or, as some noted, useless.[415] The response seems to be that specific anti-negation laws both make prosecution of denial certain and send out a clearer message: "[t]he law [i]s thus seen as a necessary legal instrument to ostracize and discredit deniers and officially stigmatize negationism."[416]

This study has endeavored to show, via a minute analysis of normative justifications, textual provisions, and relevant case law, how anti-Holocaust denial laws operate, from before their adoption until they become socially accepted (or not). By taking a comparative approach, the discussion has attempted to go beyond the more typical analyses of negationist legislation, which generally focus on a limited number of cases. An answer to the initial question, Why do countries choose to adopt anti-Holocaust denial laws?, has become, in light of the presented evidence, less difficult. It rests on each country's self-understanding with regard to the historical event of the Holocaust; on its system of rights protection; and, no less, on the availability of "triggering" factors, such as a strong civil society or external conditionality. In the end, whether implemented a few dozen times a year or hardly at all, there does seem to be evidence for anti-denial laws being perceived as "bear[ing] witness to

[414] Troper (1999), p. 1251.
[415] Errera (1992), p. 155 about the *loi Gayssot*.
[416] Bourrette in *Bilan de la Loi Gayssot*, p. 57.

the will of [the] country," [417] both with a view toward the painful past, and with concern for the amelioration of the present and safeguarding of the present.

[417] Jean-Louis Nadal in *Ibid.*, p. 11.

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