

Holocaust Denial Cases and Freedom of Expression in the United States,  
Canada and the United Kingdom

By Charla Marie Boley

Submitted to Central European University, Department of Legal Studies

*In partial fulfillment of the requirements for the degree of ...*

M.A. in Human Rights

Supervisor: Professor Vladimir Petrovic

Budapest, Hungary

2016

Copyright 2016  
Central European University

## EXECUTIVE SUMMARY

Freedom of expression is an internationally recognized fundamental right, crucial to open societies and democracy. Therefore, when the right is utilized to proliferate hate speech targeted at especially vulnerable groups of people, societies face the uncomfortable question of how and when to limit freedom of expression. Holocaust denial, as a form of hate speech, poses such a problem. This particular form of hate speech creates specific problems unique to its “field” in that perpetrators cloak their rhetoric under a screen of academia and that initial responses typically discard it as absurd, crazy, and not worth acknowledging. The three common law jurisdictions of the United States, Canada, and the United Kingdom all value free speech and expression, but depending on national legislation and jurisprudence approach the question of Holocaust denial differently.

The three trials of Holocaust deniers Zundel, Irving, and the the Institute for Historical Review, a pseudo academic organization, caught the public’s attention with a significant amount of sensationalism. The manner in which the cases unfolded and their aftermath demonstrate that Holocaust denial embodies anti-Semitism and is a form of hate speech. Furthermore, examination of trial transcripts, media response, and existing scholarship, shows that combating denial in courtrooms can have the unintended consequence of further radicalizing deniers and swaying more to join their ranks.

As an international movement, Holocaust denial requires a layered and consistent response by states. Appropriate responses should focus on public education that recognizes Holocaust denial as a form of hate speech and manifestation of anti-Semitism. Public education focuses on education and the promotion of inclusive societies may be an alternative to the courtroom and in the very least must accompany legal action.

## ACKNOWLEDGMENTS

I have found myself especially fortunate over the past eight years to have been inspired and guided by outstanding professors and academics. In my early undergrad years I was introduced to the topic of mass atrocities and genocide by Professor Katherine Sadler, professor of history at Clark College, Vancouver, WA. Although it is likely the most depressing course she offers, it is also one of her most impassioned and heartfelt. I was further encouraged in my interests by Professor David Champion, professor of history at Lewis & Clark College, Portland, OR, who I credit with instilling in me a drive for exploration and a commitment to the historical perspective — a perspective invaluable in the field of human rights and which I attempted to bring to my work here. Further, Professor Sejal Palmer of Central European University, Budapest, opened the door to a subject I had not too closely examined before: freedom of expression. The impression she made in her course resonates with me still and had no small part in shifting the focus of my studies toward this topic. I would also like to thank my alma mater, Lewis & Clark College, for the use of their library for a significant portion of my research conducted as I resided in the United States.

In the days leading up to submission, my close friends and family gave valuable support and encouragement, reading through drafts or covering for my sudden disappearance from the world. I am most thankful, though, to my advisor, Professor Vladimir Petrovic, for his good humor and faith throughout. And to my peers Nehl Hirani and Janice Ayarzagotia Resenfeld for providing constant motivation, laughter, and friendship. As Professor Petrovic always saw fit to remind me, it is important to enjoy the journey.

# TABLE OF CONTENTS

Executive Summary .....	ii
Acknowledgments .....	iii
Introduction.....	1
<b>What is Denial?</b> .....	2
<b>A Broader Look at Denial</b> .....	5
<b>Who Denies</b> .....	7
<b>Existing Scholarship</b> .....	9
Chapter 1: International law and freedom of Expression.....	17
<b>International Law Protecting Freedom of Expression</b> .....	18
<b>International Law Limiting Hate Speech</b> .....	19
<b>The Legal Movement toward Criminalizing Holocaust Denial</b> .....	21
Chapter 2: Holocaust Denial in the United States.....	23
<b>The Law</b> .....	24
<b>The Denier</b> .....	27
<b>The Case</b> .....	29
<b>Reflections</b> .....	36
Chapter 3: Holocaust Denial in Canada.....	37
<b>The Law</b> .....	38
<b>The Deniers</b> .....	41
<b>The Case</b> .....	45
<b>Reflections</b> .....	53
Chapter 4: Holocaust Denial in the United Kingdom.....	55
<b>The Law</b> .....	55
<b>The Denier</b> .....	59
<b>The Case</b> .....	61
<b>Reflections</b> .....	69
Conclusion .....	71
Bibliography .....	76
Appendix.....	85

## INTRODUCTION

Among the many problems faced by liberal democracies today rests the persistent and unavoidable dilemma of combatting racism while protecting freedom of thought, expression and political association.<sup>1</sup> Such an issue is hardly anything new to liberal democracies which perpetually balance individual liberties against something akin to a greater good. In the case of speech, liberal democracies have long debated where to draw such a line, looking to establish “where the intolerable and impermissible coincide.”<sup>2</sup> On the one hand, freedom of speech and expression represents one of the cornerstones of democracy, a fundamental right facilitating political debate, self-realization, and discovery. And yet, the exercise of this right can and does conflict with other, equally, important societal rights and values. In a general sense, speech can offend, it can threaten, and it can lead to violence. Ultimately, freedom of expression is not an absolute right. Societies must determine when and how to regulate speech and they must do so with clear intention. Because it is fashioned as scholarly research, relates to the field of history, and manifests as a, sometimes thinly, disguised form of hate speech, Holocaust denial represents an area where speech and regulation intersect problematically.

The denial of the Holocaust deserves especial attention because of the veracity of its supporters and the quasi “industry” that has emerged to promote it — Holocaust denial is vaster than any other movement of systematic denial of a historical event.<sup>3</sup> In the Western world, deniers rely on pseudo research and a pretense of academia to convey their ideas. This coupled with the

---

<sup>1</sup> Erik Bleich, *The Freedom to be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford Scholarship Online, 2011, 3.

<sup>2</sup> W. Gunther Plaut, “Book Review: The Report of the Special Committee on Hate Propaganda in Canada,” *Osgoode Hall Law Journal*, 1967, 5,2, 313.

<sup>3</sup> Giblert Achcar, “Assessing Holocaust Denial in Western and Arab Contexts,” in *Journal of Palestine Studies*, 41, 1 (2011) 84.

xenophobic and racist motivations behind denial make the issue of combating these ideas of paramount interest in Western states.<sup>4</sup> In fact, many scholars take a hardline stance that Holocaust deniers' positions and views exist *because* they are anti-Semitic. David Patterson writes:

Inasmuch as the war against the Jews is a war against memory, Holocaust deniers are among those who systematically and fervently heed the call of Hitler's dying words to 'resist mercilessly the poisoner of all nations, international Jewry.' They deny the Holocaust not because they believe it never happened but precisely because they know it happened: they do not initiate but rather *continue* the war against the Jews in the mode of a war against memory.<sup>5</sup>

The importance of this interpretation of deniers' motives lies in the perception that they belong to an organized and cohesive movement targeting the Jewish people. Rather than fringe academics mistakenly latching on to an alternative version of reality, deniers are considered blatant adversaries, both capable of and intending harm. At its most harmful, Holocaust denial is but one form of "Holocaust-based racism" — a form of racism consisting of statements glorifying, approving of, minimizing, or denying the Holocaust.<sup>6</sup>

## What is Denial?

It is worth noting at the outset that deniers themselves take issue with the term denial. In his opening remarks in his libel suit against Professor Deborah Lipstadt, David Irving argued the following:

As a phrase, it is of itself quite meaningless. The word "Holocaust" is an artificial label commonly attached to one of the greatest and still most unexplained tragedies of this century. The word "denier" is particularly evil because no person in full command of his mental faculties, and with even the slightest understanding of what happened in World War II, can deny that the tragedy actually happened, however much we dissident historians way wish to quibble about the means, the scale, the dates and the other minutia.<sup>7</sup>

---

<sup>4</sup> Ibid, 84.

<sup>5</sup> David Patterson, "Denial, Evasion, and Antihistorical Antisemitism – the Continuing Assault on Memory," in *Deciphering the New Antisemitism*, Alvin H. Rosenfeld (ed), Indiana University Press: Bloomington, 2015, 326.

<sup>6</sup> Erik Bleich, *The Freedom to be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford Scholarship Online, 2011, 46.

<sup>7</sup> David Irving, *Irving v Penguin Books Ltd.*, WL 362478 (2000), trial transcripts from *Holocaust Denial On Trial*, <<https://hdot.org/day01/#>> Accessed October 5, 2016, 24.

Irving, and his peers, would much rather present themselves as “revisionists.” The term, however they try to spin it, equates to a euphemism for denial.<sup>8</sup> Deniers have pointed reasons for spinning their work as revisionist history. For one thing, doing so implies that legitimate historians do not already engage in reviewing and studying the Holocaust on a regular basis, that there is no open debate on any aspect of the Holocaust.<sup>9</sup> Additionally, the term revisionism comes with a significant amount of ambiguity, allowing deniers to assert that they belong in the category. While revisionism ought to encompass “provocative, controversial nonconformist questioning of entrenched beliefs” it is not always so easily distinguished from “denial of crimes, distortion of the truth [and] apologetic of extreme policies.”<sup>10</sup> The connotation of the term revisionist at first brings to mind a new wave of historians championing for a new look at the past and the revelation of previously unexamined evidence. This is likely why historian Jan van Pelt, a key witness in the Irving case, prefers to use the term “negationist” rather than “revisionist.”<sup>11</sup> Holocaust denial, no matter how fervently the deniers spin it, is not legitimate historical revisionism. Holocaust deniers see themselves in this role, but their work clearly falls in with the various other myths perpetuated by anti-Semitism throughout history.<sup>12</sup>

---

<sup>8</sup> In relation to laws against Holocaust denial, the German government defines revisionism as, broadly, “the attempts to correct the alleged wrong depiction of the history of the Second World War and the Third Reich to give a more favourable picture of National Socialism” and narrowly as “the denial of the proven historical fact that during the course of the Second World War millions of European Jews were murdered in gas chambers, etc.”

Wolfgang Benz, “The Motivations and Impact of Contemporary Holocaust Denial in Germany,” In *Demonizing the Other: Antisemitism, Racism and Xenophobia*, Robert S. Wistrich (ed), Harwood Academic Publishers: Amsterdam, 1999, 337.

<sup>9</sup> Stern qualifies this by stating that historians just refrain from doing so with neo-Nazis.

Kenneth Stern, *Holocaust Denial*, The American Jewish Committee: New York, 1993, 12.

<sup>10</sup> Vladimir Petrović, “From Revisionism to ‘Revisionism,’” in *Past in the Making: Historical Revisionism in Central Europe after 1989*, Michal Kopeček (ed), Central European University Press: Budapest, 2008, 21.

<sup>11</sup> The problem with the term “negationist” is that it implies the outright dismissal of the Holocaust. As is discussed more later, deniers often selectively question aspects of the Holocaust, choosing to minimize it in some cases rather than assert it did not happen at all.

Robert Jan van Pelt, *The Case for Auschwitz: Evidence from the Irving Trial*, Indiana University Press: Bloomington, 2002, ix.

<sup>12</sup> Marvin Perry and Frederick M Schweitzer’s book discusses the various anti-Semitic myths that have emerged throughout time and includes a description of the “Holocaust Myth.”



Holocaust denial takes many different shapes and sizes, presented by wide range of personalities.<sup>13</sup> The forms of denial vary greatly, whether it be in the mode of conveyance or in content. Rather than dispute the entirety of the Holocaust, deniers may single out specific aspects, such as the number of Jews murdered, the existence of gas chambers, or the authenticity of Anne Franks' diary.<sup>14</sup> Andrew Altman helpfully classifies Holocaust denial into three main categories or foci:

- A) The treatment of Jews by the Nazi regime during the Second World War;
- B) The evidence on which is based the conventional account of the treatment of Jews; and
- C) The reasons explaining why the conventional account has been so widely and firmly accepted.<sup>15</sup>

This strategy allows deniers to cast their theories in academic and neutral language, a dangerous combination as it can obscure anti-Semitic views.

Despite the best efforts of deniers to present their rhetoric as respectable, there is no doubt that Holocaust denial is hate speech and therefore responses to it must be examined in that context.<sup>16</sup> The detriment of denial is similar to the harmful effects of more well-known forms of

---

Marvin Perry and Frederick M. Schweitzer (eds), *Antisemitic Myths: A Historical and Contemporary Anthology*, Indiana University Press: Bloomington and Indianapolis, 2008, 283.

<sup>13</sup> In Morris's film, Holocaust denier Fred Leuchter comes across simultaneously supremely confident in his intellectual prowess and absurdly and pitifully simpleminded. His anti-Semitic views appear to arise after he received high levels of negative publicity for testifying in Zundel's case, and are not portrayed as motivating him to come out in favor of Holocaust denial in the first place. The sincerity of this story, of course, may be questioned, but it is unclear how to prove one way or another.

Errol Morris, *Mr. Death: The Rise and Fall of Fred A. Leuchter Jr.* Channel Four Films: United Kingdom, January 14, 2000.

<sup>14</sup> "Holocaust Denial Timeline," in *Holocaust Encyclopedia*, United States Holocaust Museum 2016, < <http://www.ushmm.org/wlc/en/article.php?ModuleId=10008003> > Accessed February 10, 2016.

<sup>15</sup> Andrew Altman, "Freedom of Expression and Human Rights: The Case of Holocaust Denial," in *Speech and Harm, Controversies Over Free Speech*, Ishani Maitra and Mary Kate McGowan (eds), Oxford Scholarship Online, 2012, 4. Altman goes on to explain the main theses given by deniers under each of these subjects, including how deniers warp historical fact to reach their conclusions.

<sup>16</sup> The European Parliament Working group on Antisemitism explains that it includes "Denying the fact, scope, mechanisms (e.g. gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust);" "Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust;" and "Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions."

hate speech. Raphael Cohen-Almagor explains that denial contributes to a climate of xenophobia, “generates hate,” “desensitises members of the public” on the nature of the Holocaust — all of which are clear societal negatives.<sup>17</sup> He goes on to list the consequences for the group targeted by the instance of denial as it “interferes with their right to equal respect and treatment,” may cause “emotional upset, fear and insecurity,” and may “undermine the individual’s self-esteem and standing in the community.”<sup>18</sup> Ultimately, Holocaust denial is a form of hate speech that targets key components of the Jewish identity — namely a portion of their past that involved extreme violations of their fundamental rights.<sup>19</sup>

## A Broader Look at Denial

A variety of mass atrocities face denial and it is helpful to further contextualize Holocaust denial as one example of the broader category of genocide denial. Doing so further illuminates one of the ways in which it harms society.<sup>20</sup> Genocide denial encompasses a wide array of mass atrocities and many different types of individuals who deny at varying degrees. Deniers may include perpetrators, state actors as well as academics, bigots, racists, and well-meaning but misinformed individuals. Israel W. Charny goes so far as to consider debates over definitions as a form of denial

---

European Parliament Working Group on Antisemitism, “EUMC Working Definition of Antisemitism,” <<http://www.antisem.eu/projects/eumc-working-definition-of-antisemitism/>> Accessed November 7, 2016.

<sup>17</sup> Raphael Cohen-Almagor, “Holocaust Denial is a Form of Hate Speech,” in *Amsterdam Law Forum*, University of Amsterdam, 2009, 36.

<sup>18</sup> Ibid 36.

<sup>19</sup> Kathleen E. Mahoney, “Speech, Equality, and Citizenship in Canada,” in *Common Law World Review*, 39 (2010), 72.

<sup>20</sup> Holocaust denial is not always distinguished from the wider category of genocide denial or the denial of mass atrocities. Paolo Lobba writes: “By way of illustration, states punishing only the denial of the Holocaust include: Germany, France, Austria and Belgium; states banning denial of a wider class of crimes include: Spain, Luxembourg, Liechtenstein, Switzerland, Slovenia, Latvia and Malta. Furthermore, a number of (ex-Soviet Bloc) countries additionally prohibit denial of crimes committed by former communist regimes: see e.g. Czech Republic, Poland, Hungary, Slovakia and Lithuania.”

Paolo Lobba, “Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime,” in *The European Journal of International Law*, 26, 1 (2015), 238.

and even to declare those who promote freedom of expression to the extent of allowing genocide denial to be deniers themselves.<sup>21</sup> Charny along with Eric Markusen define other forms of denial as well, distinguishing between “innocent denial” and “deliberate denial.” The former occurs “when the denier truly does *not* know the facts of the genocide.”<sup>22</sup> Innocent denial make the work of deliberate denials more dangerous as they can take advantage of this ignorance to convince a growing number of people of their ideology. On a more extreme level, some scholars consider denial to be the final act of genocide. Gregory Stanton, president of Genocide Watch, asserts that denial

is the final stage that lasts throughout and always follows a genocide. It is among the surest indicators of further genocidal massacres. The perpetrators of genocide dig up the mass graves, burn the bodies, try to cover up the evidence and intimidate the witnesses. They deny that they committed any crimes, and often blame what happened on the victims. They block investigations of the crimes, and continue to govern until driven from power by force, when they flee into exile.<sup>23</sup>

Stanton writes about a specific kind of denial, that of the perpetrator. He goes on to say that “The response to denial is punishment by an international tribunal or national courts. There the evidence can be heard, and the perpetrators punished,” and it is unclear what exactly his views on third party denial might be.<sup>24</sup> Yet, the placement of denial at the end of the continuum of a genocidal policy demonstrates that acts of denial are no small matter. While some make the direct correlation between denier and perpetrator,<sup>25</sup> others claim that it may increase the likelihood of future

---

<sup>21</sup> Israel W. Charny, “A classification of denials of the Holocaust and other genocides,” in *Journal of Genocide Research*, 5, 1 (2003) 20, 22.

<sup>22</sup> Israel W. Charny and Eric Markusen, “Denial of Genocide, Psychology of,” in *Encyclopedia of Genocide*, 159.

<sup>23</sup> Gregory Stanton, “The Ten Stages of Genocide,” in *Genocide Watch: The International Alliance to end Genocide*, 2013, <<http://www.genocidewatch.org/genocide/tenstagesofgenocide.html>> Accessed December 11, 2015.

<sup>24</sup> Ibid

<sup>25</sup> In his essays on Holocaust denial, Vidal- Naquet compares French Holocaust denier, Faurisson to Adolf Eichmann, writing: “Eichmann crossed Europe to organize the train transport system. Faurisson does not have trains at his disposal, but paper.”

Pierre Vidal-Naquet, *Assassins of Memory: Essays on the Denial of the Holocaust*, Jeffry Mehlman (trans), Columbia University Press: New York, 1992, 24.

genocides, particularly in denial cases where state actors “obscure the reality of genocide.”<sup>26</sup> In cases where the denier is not a perpetrator, but an individual who denies many years after the mass atrocity, the danger may be compounded as collective memory fades over time.

Despite this and the added complexity of the connection of this form hate speech to a genocide, there exists a danger of underestimating the dangers. Kathleen E. Mahoney, for example, wonders “whether or not states have learned lessons from past genocides about the dangers of unhindered dissemination of hate speech [and concludes that it] is doubtful in the face of the free-wheeling ability of hate mongers to use the Internet and other forms of media to target minorities for hatred and violence.”<sup>27</sup>

## Who Denies

Those who deny the Holocaust are more and more frequently deemed members of a “denial movement.”<sup>28</sup> Referencing Deborah Lipstadt’s work, Jonathan Petropoulos refers to a group “which one might call a subculture.”<sup>29</sup> Evidence abounds to support this claim. Deniers often know each other, and definitely of each other — citing one another’s work within their own publications. In fact, Holocaust denial in the western world exhibits a surprising level of cooperation and interdependency.

---

<sup>26</sup> Eric Markusen and Israel W. Charny, “Denial of Genocide, Psychology of,” in *Encyclopedia of Genocide*, Israel W. Charny (Ed), ABC – CLIO: Santa Barbara, 1999, 159.

<sup>27</sup> Kathleen E. Mahoney, “Speech, Equality, and Citizenship in Canada,” in *Common Law World Review*, 39 (2010), 75.

<sup>28</sup> Lawrence Baron, “Holocaust Awareness and Denial in the United States: the Hype and the Hope,” in *Lessons and Legacies III: Memory, Memorialization, and Denial*, Peter Hayes (ed), Northwestern University Press: Evanston, Illinois, 232.

<sup>29</sup> Johnathan Petropoulos, “Holocaust Denial: A General Typology,” in *Lessons and Legacies III: Memory, Memorialization, and Denial*, Peter Hayes (ed), Northwestern University Press: Evanston, Illinois, 239.

In 1988 David Irving flew to Canada to testify at Ernst Zundel's trial in his defense.<sup>30</sup> Fred Leuchter, an American execution machine entrepreneur of sorts also made his way there to testify the conclusions of his infamous *Leuchter Report*.<sup>31</sup> Leuchter's work in turn influenced German Holocaust denier Germar Rudolf who was inspired to create the *Rudolf Report*.<sup>32</sup> The anti-Semitic organization known as the Australian League of Rights flew Leuchter to Australia where he was interviewed for radio.<sup>33</sup> Additionally, the Australian League of Rights directs those who view its site to an obscure publisher, Veritas, where at least four of David Irving's books may be purchased.<sup>34</sup> There have been international conferences hosted by the Holocaust denying organization known as the Institute for Historical Review all over the world bringing deniers together (although there have not been any since 2004).<sup>35</sup>

<sup>30</sup> Deborah Liptstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, Plume: New York, 1994, 161.

<sup>31</sup> Fred Leuchter grew up shadowing his father on visits to various United States prisons and as an adult maintained his connections and fascination with executions. While he had no formal training in engineering, he developed a reputation for being the best at repairing execution equipment.

Morris, Errol (director). *Mr. Death: The Rise and Fall of Fred A. Leuchter Jr.* Channel Four Films: United Kingdom, January 14, 2000.

Deborah Liptstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, 161.

<sup>32</sup> Stephen E. Atkins, *Holocaust Denial as an International Movement*. Praeger: Westport, Connecticut, 2009, 112.

<sup>33</sup> Deborah Liptstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, 13.

*The Australian Times* states that the founder of the league, Butler, published such books as *The International Jew -- The Truth About 'The Protocols of Zion'* and *Anne Frank's Diary: a Hoax*.

Christian Kerr, "An Insult to the Memory of Many," in *The Australian Times*, August 25, 2012

<<http://www.theaustralian.com.au/business/media/an-insult-to-the-memory-of-many/story-e6frg99o-1226457631662>> Accessed November 5, 2016.

The League's website is still up and running.

*Australian League of Rights*, 2016 <<http://alor.org/>> Accessed November 21, 2016.

<sup>34</sup> Scrolling down to the bottom of the Australian League's main page leads to the link to Veritas. It is somewhat unclear if Veritas is directly run by the league or rather in partnership.

*Australian League of Rights*, 2016 <<http://alor.org/>> Accessed November 21, 2016.

*Veritas Books Publishing Company*, <<http://veritasbooks.com.au/cat/censored-history>> Accessed November 21, 2016.

<sup>35</sup> According to the Anti-Defamation League, the "IHR's most significant recent activity was a conference it conducted together with the neo-Nazi National Alliance in Sacramento, California, in April 2004."

"Institute for Historical Review," in *Extremism in America*, the Anti-Defamation League: 2005, <[http://archive.adl.org/learn/ext\\_us/historical\\_review.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=3&item=ihr](http://archive.adl.org/learn/ext_us/historical_review.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=ihr)> Accessed November 5, 2016.

Meanwhile in the United States politician and Holocaust denier Larry Darby invited Irving to speak at his Atheist Law Association, claiming that the man was a legitimate historian, more qualified than “mainstream” historians to speak on the Holocaust.<sup>36</sup>

It only makes sense that, as they grasp for any support possible, deniers tend to rely on one another. As Deborah Lipstadt writes, “liberal borrowing was not something out of the ordinary for deniers, who make it a practice to draw on other deniers not only for their sources but for verification.”<sup>37</sup>

## Existing Scholarship

Robert A. Kahn’s book, *Holocaust Denial and the Law: a Comparative Study*, examines the key problems with legislating denial, including the particular issues that arise in the inquisitorial and adversarial systems. To do this, he looks at case studies in Canada, the United States, France, and Germany. In his comparison, Kahn recognizes that both prosecuting deniers and tolerating them have costs. He suggests that failing to take action against Holocaust deniers “insults the memory of the Holocaust” while also acknowledging that prosecuting deniers “raises the Orwellian image of the state policing the official truth.”<sup>38</sup> Kahn fails to offer any satisfactory solution to these opposing forces. He asserts that “the only long-term solution to the problem of Holocaust denial is general acceptance that deniers will be part of the landscape for some time to come,” and that this acceptance will hopefully lead to the gradual decline of “the era of free publicity for the

---

<sup>36</sup> In 2006 Darby ran for Alabama attorney general with Holocaust denial as part of his platform. While the Democratic Party, under which Darby ran for office, found this “completely unacceptable,” his opponent appeared just flabbergasted stating that he was “astonished” that someone would run for state office on these grounds. Associated Press, “Alabama Democrat Views Shock His Party,” in *NBC News*, May 12, 2006 <<http://www.nbcnews.com/id/12762671/ns/politics/t/alabama-democrats-views-shock-his-party/#.WC6JgPkrLIU>> Accessed November 17, 2016.

Stephen E. Atkins, *Holocaust Denial as an International Movement*, Praeger: Westport, Connecticut, 2009, 191.

<sup>37</sup> Deborah Liptstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, 106.

<sup>38</sup> Robert A. Kahn, *Holocaust Denial and the Law: A Comparative Study*, 153.

deniers” — a phenomena he attributes to scandals both within and outside the courtroom.<sup>39</sup> He seems to accept that given the difference in legal systems, historical context, and culture, the differences in how societies address the problem of Holocaust denial are understandable.

Ioanna Tourkochoriti’s conclusions are somewhat more forceful. She argues in her article, “Should Hate Speech be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide Between (France) Europe and the United States,” that laws criminalizing hate speech are necessary in terms of protecting minority rights and that free speech arguments fail to justify toleration of such ideas. She asserts that the U.S. legal distinction “between speech and action cannot be justified” and that “harm caused by speech is significant enough to justify limitations and is in fact as significant as the harm caused by actions.”<sup>40</sup> In the same work, however, she concludes that “criminalization of the contestation of historical facts that seem offensive is an inappropriate measure.”<sup>41</sup> She supports this stance by pointing to the nature of historical evaluation and the aims of historians. That is, historians form their narrative and choose supporting facts as a means of addressing a contemporary societal problem.<sup>42</sup> The way they address their chosen problem relies on an unavoidable subjectivity. Therefore, the contestation of historical facts must be treated differently than hate speech generally. Given that legislation prohibiting the “contestation” of the Holocaust do so on the grounds that “revisionism” is a form of hate speech, Tourkochoriti’s lack of a coherent explanation for why Holocaust denial does not constitute hate speech confuses. Does she mean that after weighing and balancing, that preserving the integrity of the historian’s field is more important than protecting minorities? This seems also to imply that

---

<sup>39</sup> Ibid, 160.

<sup>40</sup> Ioanna Tourkochoriti, “Should Hate Speech be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide Between (France) Europe and the United States,” in *Columbia Human Rights Law Review*, 45, 552 (2014) 15.

<sup>41</sup> Ibid, 25.

<sup>42</sup> Ibid, 24.

the protection of freedom of expression more generally is not more important than protecting minorities.

Perhaps Deborah Lipstadt's approach to Holocaust denial eases the tension invited by Tourkochoriti's conclusions. Thankfully, in Lipstadt's view, those who deny the holocaust cannot be included in the realm of "responsible historiography."<sup>43</sup> According to Lipstadt, one of the most glaring dangers of a Holocaust denier is their "aim to confuse the matter by making it appear as if they are engaged in a genuine scholarly effort when, of course, they are not."<sup>44</sup> If a denier's work is not considered historiography, than it can more easily be dealt with under the category of hate speech. The question then becomes who has the authority to determine what is and is not legitimate historiography and historical scholarship. Like any academic field, this determination is made through the peer evaluation and review of other scholars. It is natural for them to declare who is on the fringe of their discipline or outright beyond it. In this case, Tourkochoriti's assertion that historiography not be judged within the courts and the law is absolutely correct. Just as it is inappropriate for a court to determine the standards of practice in other professions, so too it is inappropriate for them to declare what is an appropriate standard for historical scholarship — and that may include which subjects are studied and reviewed.

In fact, Lipstadt places a high level of responsibility on historians in combatting deniers. Whether she is criticizing historians for failing to properly distinguish the Holocaust from other

---

<sup>43</sup> Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, A Plume Book: New York, 1994, 1.

<sup>44</sup> Ibid, 2.



mass atrocities<sup>45</sup> or for presenting a historical narrative that empowers denier discourse,<sup>46</sup> Lipstadt calls on the historical community to take responsibility for the Holocaust denier movement and take action against it. She writes that “Much of the onus is on academe, portions of which have already miserably failed the test. Educators, historians, sociologists, and political scientists hold one of the keys to a defense of the truth.”<sup>47</sup> They must do this by being “scrupulously careful about the information they impart so as not inadvertently to provide the deniers with room to maneuver” and by refraining from using the Holocaust as a justification for political policies.<sup>48</sup> Outside the realm of academia, Lipstadt calls for the “purveyors of popular culture” to resist providing a forum for denier’s ideas and condemns legal action as making deniers into martyrs.<sup>49</sup>

Lipstadt seems to gauge the level of influence deniers have on the public, in part, through her interactions with her students. She writes:

“Too many of my students have come to me and asked, ‘How do we know there really were gas chambers?’ ‘Was the *Diary of Anne Frank* a hoax?’ ‘Are there actual documents attesting to a Nazi plan to annihilate the Jews?’ Some of these students are aware that their questions have been informed by deniers. Others are not; they just know that they have heard these charges and are troubled by them.”<sup>50</sup>

---

<sup>45</sup> Lipstadt writes that historians “create immoral equivalencies” when they compare the events of the Holocaust to “the brutal Armenian tragedy” or to “the Khmer Rouge massacre.” She asserts that comparisons that leave out crucial differences between these atrocities amounts to “historical distortion,” and that such scholarship seeks to “help Germans embrace their past by telling them that their country’s actions were no different than those of countless others – an effort that at times disturbingly parallels” the actions of Holocaust deniers. Strangely, Lipstadt herself engages in oversimplifying and distorting both the Armenian and Cambodian genocides in her efforts to distinguish them from the Holocaust. Additionally, these mass atrocities of comparison are hardly anything to be proud of or anything that would in any way shape or form result in normalizing mass atrocities more generally.

Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, 212, 213.

<sup>46</sup> Lipstadt states that German historian “Diwald had unwittingly given the deniers the scholarly respectability they so craved” in his work on the ethnic German expulsion from Eastern Europe post WWII. Ibid, 210.

<sup>47</sup> Ibid 219.

<sup>48</sup> This “scrupulous” standard of evaluating which information to impart and which not, is unsettling. It seems to imply that certain aspects of the truth are dangerous and should be hidden from the general public. But who sets the standard of what can and cannot be made known, and does this not amount to its own form of historical manipulation – albeit one with more altruistic purposes?

Ibid 219.

<sup>49</sup> While this is written before David Irving’s libel suit against Lipstadt, her view today is likely the same in that she means criminal trials.

Ibid 221.

<sup>50</sup> Ibid, 221.

On the one hand, her growing concern based on these questions makes sense. On the other hand, students of history are often taught to question and to follow the sources. The fact that these students are asking questions is perhaps a very positive indication and points to the role Lipstadt herself makes for academia to address Holocaust denial. All of these questions have answers based in historical evidence.

In a heartfelt call to Facebook to remove Holocaust denial groups from its interface, scholar Raphael Cohen-Almagor also points to the need to hold those in mainstream media and popular culture responsible for the content which is exposed to the public.<sup>51</sup> Within his call to action, Cohen-Almagor is careful to distinguish the ability to question or challenge historical fact from Holocaust denial. According to him, legitimate challenges to historical fact bring new evidence which can properly support new theories and claims.<sup>52</sup> To him, Holocaust denial as a form of hate speech is identifiable by the absence of such evidence and likely, and most importantly the motivations of denial.<sup>53</sup> He asserts that “we should always probe the content of the speech and the intention of the speaker.”<sup>54</sup> Cohen-Almagor’s expectation that social media outlets such as Facebook analyze Holocaust denier pages to determine the organizer’s motivations and level of general ignorance may be problematic.<sup>55</sup> The line of reasoning suggests that Facebook must distinguish between an individual misstating facts on the Holocaust out of ignorance and an

---

<sup>51</sup> Raphael Cohen-Almagor, “Holocaust Denial is a Form of Hate Speech,” in *Amsterdam Law Forum*, University of Amsterdam, 2009, 33.

<sup>52</sup> Ibid 34.

<sup>53</sup> Ibid 35.

<sup>54</sup> Ibid 34.

<sup>55</sup> Facebook may find need to heed Cohen-Almagor’s call soon. Last year German Justice Minister Heiko Maas said that Facebook fails to adequately address hate speech in its social media platform, and said “Holocaust denial and inciting racial hatred are crimes in Germany and it doesn’t matter if they’re posted on Facebook or uttered out in the public on the market square,” with the expectation that Facebook follow German laws if it would like to continue operating in Germany.

Reuters, “Germany Warns Facebook: Clamp down on Holocaust denial — or else,” in *The Jerusalem Post*, August 8, 2015

<<http://www.jpost.com/Diaspora/Germany-warns-Facebook-Clamp-down-on-Holocaust-denial-or-else-413595>>

Accessed November 22, 2016.

individual misstating facts on the Holocaust out of anti-Semitic sentiment.<sup>56</sup> One is hate speech, the other ignorance.

Scholars like Erik Bleich present a more balanced approach, acknowledging the equal importance of fighting racist speech and protecting freedom of expression. He argues that “balancing public values is most constructive when the trade-offs are fully recognized and openly debated,” pointing out that “antiracists have to argue their position while fully admitting the cost of proposed laws to freedom.”<sup>57</sup> As a part of this process, individuals must consider “principles, context, and effects of political decisions” on a case-by-case basis.<sup>58</sup> His solution relies almost completely on the underpinnings of freedom of expression — the ability to hold open and honest debates in societies.

The majority of literature on Holocaust denial at least touches on the appropriate means of addressing the problem. Not everyone, however, views Holocaust deniers as the most pertinent issue — at least in regard to the general consciousness and knowledge of the Holocaust demonstrated by the public. Lawrence Baron, in a conference lecture, went so far as to say:

Although Holocaust educators and survivors should not ignore the falsification of history promoted by the denial movement, they should be more concerned about how the memory of the Holocaust will be distorted by being relativized, simplified, trivialized, or universalized by teachers lacking a background in the subject.<sup>59</sup>

---

<sup>56</sup> David Irving’s facebook fan page openly posts anti-Semitic content. See Appendix, Item 2 for an example. Andrew Carrington Hitchcock, further discussed in the conclusion, actively uses facebook to promote his anti-Semitic rhetoric. Aside from a disturbing profile picture, however, there do not seem to be any explicit comments on the page itself, only links to such content.

<<https://www.facebook.com/andrewcarrington.hitchcock.3>> Accessed November 5, 2016.

<sup>57</sup> Erik Bleich, *The Freedom to be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford Scholarship Online, 2011, 5.

<sup>58</sup> Erik Bleich, *The Freedom to be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford Scholarship Online, 2011, 7.

<sup>59</sup> Lawrence Baron, “Holocaust Awareness and Denial in the United States: the Hype and the Hope,” in *Lessons and Legacies III: Memory, Memorialization, and Denial*, Peter Hayes (ed), Northwestern University Press: Evanston, Illinois, 232.

He further laments the “sensationalistic” works by the “entertainment industry,” implying that these pose more of a threat to how the Holocaust is remembered and understood than deniers.<sup>60</sup>

Perhaps legal action, then, is not the most convincing approach for countering denial. Memory laws” or the “legislation of memory,” that is legislation that criminalizes what we say about the past, exists in several states around the world. Artūrs Kučs work implies that such laws do not readily come to mind when we think about the ways in which states infringe on our freedoms. He writes that the legislation of memory is one of the less obvious encroachments on freedom in Europe and, he continues in a troubling manner, that “more and more countries have laws saying you must remember and describe this or that historical event in a certain way, sometimes on pain of criminal prosecution if you give the wrong answer.”<sup>61</sup> The existence of these “memory laws” results from the specific historical background and societal contexts in different regions. Such laws exist in many European Union member states.<sup>62</sup> In most cases, the laws purport to protect society from dangerous racist, and divisive ideology associated with the causes of genocide.<sup>63</sup> In most Western states, with distinctly different histories, laws explicitly criminalizing Holocaust denial do not exist.

---

<sup>60</sup> Ibid, 232.

<sup>61</sup> Artūrs Kučs, “Denial of Genocide and Crimes against Humanity in the Jurisprudence of Human Rights Monitoring Bodies,” in *Journal of Ethnic and Migration Studies*, 40, 2, 2014, 301-302.

<sup>62</sup> Austria, Belgium, the Czech Republic, France, Germany, Hungary, Luxembourg, Poland, Romania, Slovakia, Slovenia, and Switzerland have criminalized genocide denial. Consequences of genocide denial range from fines to long prison sentences.

Sean Gorton, “The Uncertain Future of Genocide Denial Laws in the European Union,” in *The George Washington International Law Review*, 47, 2015, 423.

Vladimir Petrovič adds Lithuania, Portugal, Spain, and Israel to the list.

Vladimir Petrovič, “From Revisionism to ‘Revisionism’: Legal Limits to Historical Interpretation”, in *Past in the Making: Historical Revisionism in Central Europe after 1989*, Michael Kopeček (ed), Central European University Press: Budapest, 2008, 22.

<sup>63</sup> Yakaré-Oulé Jansen, “Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda’s Genocide Denial Laws,” in *Journal of International Human Rights*, Vol. 12, Issue 2, (2014), 194.

Jansen refers to a 2009 study by the Harvard Kennedy School of Government that estimates 51,000 people (10% of perpetrators) participated in the genocide because of exposure to Radio Télévision Libre des Mille Collines propaganda.

The United States, Canada, and the United Kingdom do not outright criminalize denial or minimization of the Holocaust. Yet, these three jurisdictions have each seen a Holocaust denier in their courtrooms. The public focus in such cases has often been — in what Stanley Fish lamentedly dubs “rhetorical overkill” — the “honor of history itself and the honor of Truth.”<sup>64</sup> The sensationalism surrounding denial is indeed troubling, and yet another tool utilized by deniers.<sup>65</sup> The Holocaust, after all, is not just any historical event to be debated and the subject in itself draws headlines.<sup>66</sup> The ramifications for denying are significant and include serious and merited allegations of hate speech, specifically anti-Semitism. But often the publicity surrounding denier trials focus on the validation of truth and the “sanctity of fact.”<sup>67</sup> The truly troubling issue around Holocaust denial, however, is the ways in which deniers twist their fundamental right to free expression to justify a targeted agenda of hate against the Jewish people.

This “brand” of academically disguised or justified Holocaust denial is unique to the western world.<sup>68</sup> Furthermore, North American is something of a bastion for the most influential Holocaust denial organizations.<sup>69</sup> Because of First Amendment protections in the United States, those who would be barred from promoting hate speech in other countries, like Canada and the United Kingdom, can do so in the U.S. Thus comparing the approach to combatting it in the United

---

Sean Gorton writes that “The seriousness of genocide as a crime, coupled with the fact that genocide denial extends the genocide to surviving generations, has prompted a number of E.U. member states to take affirmative and, in some cases, drastic steps to eradicate genocide denial”

Sean Gorton, “The Uncertain Future of Genocide Denial Laws in the European Union,” 423.

<sup>64</sup> Stanley Fish, “Seegers Lecture: Holocaust Denial and Academic Freedom,” in *Valparaiso University Law Review*, 35, 499.

<sup>65</sup> See Appendix, Items 5 – 7 for images of deniers in the media as a result of their trials.

<sup>66</sup> Mark Oliver and agencies, “Irving shows little remorse on return to Uk,” *The Guardian*, December 22, 2006, <<https://www.theguardian.com/uk/2006/dec/22/thefarright.austria>> Accessed October 22, 2016.

<sup>67</sup> Stanley Fish, “Seegers Lecture: Holocaust Denial and Academic Freedom,” 499.

<sup>68</sup> Gilbert Achcar, “Assessing Holocaust Denial in Western and Arab Contexts,” 86.

<sup>69</sup> Brian Levin, “History as a Weapon: How Extremists Deny the Holocaust in North America,” in *American Behavioral Scientists*, California State University: San Bernadino, 1003.

States, Canada, and the United Kingdom provide useful context for evaluating how denial is perceived and the social and legal tools utilized to diffuse it.

## CHAPTER 1: INTERNATIONAL LAW AND FREEDOM OF EXPRESSION

Described by international human rights activists as “vital to humanity,”<sup>70</sup> “central to living in an open and fair society,”<sup>71</sup> and the “bellweather” for determining the treatment of minorities in societies,<sup>72</sup> it is no wonder that the international community recognizes freedom of expression as a fundamental right. The Human Rights Committee General Comment No. 34, in providing guidance to states on what upholding the right means in reality, declares that the rights to freedom of opinion and expression “are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society.”<sup>73</sup>

While such words wax strongly for freedom of expression, the right is not absolute. International law protect freedom of expression even to the point of shocking, insulting, and disturbing speech, but most international agreements do not protect hate speech and, indeed, require that states legally prohibit it.<sup>74</sup> In recent years, international bodies increasingly look toward legally limiting hate speech, and in recognizing Holocaust denial as a form of such speech.

---

<sup>70</sup> Index, “About Free Expression,” in *Index: the Voice of Free Expression*, 2016

<<https://www.indexoncensorship.org/about-free-of-expression/>> Accessed November 11, 2016.

<sup>71</sup> Amnesty International, “Freedom of Expression,” in *Amnesty International*, 2016

<<https://www.amnesty.org/en/what-we-do/freedom-of-expression/>> Accessed November 11, 2016.

<sup>72</sup> Human Rights Watch, “Free Speech,” in *Human Rights Watch*: New York, 2011, <<https://www.hrw.org/topic/free-speech>> Accessed November 11, 2016.

<sup>73</sup> General Comment No. 34 of the Human Rights Committee, 102<sup>nd</sup> Session, Geneva, 11 – 29 July 2011, par 2.

<sup>74</sup> Article 19, “Hate Speech,” in *Article 19: Defending Freedom of Expression and Information*, Free World Center: London, 2016 <<https://www.article19.org/pages/en/discrimination.html>> Accessed November 11, 2016.

Still, there remains a divide between those who call for protecting all forms of speech, including hate speech, ending at the point at which such speech incites violence or imminent harm, and those who advocate for prohibiting hate speech as inherently harmful to minorities and societies.<sup>75</sup> United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye explains that:

there is an all-too-common world view that imagines words as weapons. True, some forms of expression can impose legally cognizable harm, by interfering, for instance, with privacy or equal protection of the law. However, expression may not be restricted lawfully unless a Government can demonstrate the legality of the action and its necessity and proportionality in order to protect a specified legitimate objective. The United Nations has long promoted the idea that expression is fundamental to public participation and debate, accountability, sustainable development and human development, and the exercise of all other rights. Indeed, expression should provoke controversy, reaction and discourse, the development of opinion, critical thinking, even joy, anger or sadness — but not punishment, fear and silence.<sup>76</sup>

Holocaust denial, as not clearly or overtly inciting to violence or leading to imminent harm, falls within the parameters of this divide. As efforts around the world to suppress free expression grow,<sup>77</sup> the debate on where to draw the line on acceptable speech must also receive more intense scrutiny.

## International Law Protecting Freedom of Expression

The International Covenant on Civil and Political Rights (ICCPR)<sup>78</sup> along with the Universal Declaration of Human Rights (UDHR) together represent international protections on freedom of expression. Article 19 of the UDHR states that “everyone has the right to freedom of opinion and

---

<sup>75</sup> The INGO Index on Censorship takes the stance that freedom of expression be protected to the point of incitement to violence or imminent danger.

Index, “About Free Expression,” in *Index: the Voice of Free Expression*, 2016  
<<https://www.indexoncensorship.org/about-free-of-expression/>> Accessed November 11, 2016.

<sup>76</sup> David Kaye, “Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,” to the United Nations General Assembly, September 6, 2016, Seventy-first session Item 69 (b) of A/71/150, 3.

<sup>77</sup> Human Rights Watch, “Free Speech,” in *Human Rights Watch*: New York, 2011, <<https://www.hrw.org/topic/free-speech>> Accessed November 11, 2016.

<sup>78</sup> The United States ratified on June 8<sup>th</sup>, 1992, Canada on May 19<sup>th</sup>, 1976 and the United Kingdom on May 20<sup>th</sup>, 1976. “Status of Ratification interactive Dashboard,” in *United Nations Human Rights Office of the High Commissioner*, August 26, 2016, <http://indicators.ohchr.org/>, Accessed September 12, 2016.

expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”<sup>79</sup> The first half of Article 19 of the ICCPR in near identical language reaffirms this, stating that the right to freedom of expression include “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>80</sup> This principle presents itself in regional instruments as well. Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>81</sup> also explicitly state the importance of freedom of expression as does Article 13 of the American Convention on Human Rights.<sup>82</sup> These instruments also dictate under what circumstances the right to free expression may be broached, notably 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>83</sup>

Such permissible checks on freedom of expression, especially the protection of health or morals and the protection of the reputation or rights of others, lean toward support of laws against Holocaust denial.<sup>84</sup>

## International Law Limiting Hate Speech

Article 19 of the International Convention on Civil and Political Rights strictly states that the exercises of freedom of expression “carries with it special duties and responsibilities. It may

---

<sup>79</sup> Universal Declaration of Human Rights, General Assembly Resolution 217A, Paris, December 10, 1948.

<sup>80</sup> International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), December 16, 1966, Article 19 (2).

<sup>81</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950, Article 10.

<sup>82</sup> American Convention on Human Rights, Inter-American Specialized Conference on Human Rights, San Josi, Costa Rica, November 22, 1969, Article 13.

<sup>83</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR

<sup>84</sup> *Garaudy v. France*, ECHR No.65831/01 (2003).



therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.”<sup>85</sup> Freedom of expression can thus be compromised if it targets the rights or reputations of others, or compromises national security, public order, or public health and morals.<sup>86</sup>

More specifically, Article 19 calls for legislation banning “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”<sup>87</sup> States party to the ICCPR are expected to take such measures. Additional international bodies call for similar action, like the International Convention on the Elimination of All Forms of Racial Discrimination. Holocaust denial is widely considered a form of religious hatred, anti-Semitic, and, depending on circumstances, may fulfill the characteristics of inciting “discrimination, hostility or violence.” Clearly, restricting an individual’s ability to perpetuate Holocaust denial serves the function of protecting vulnerable groups in society. The importance of maintaining an open society where ideas can flourish and prosper, “the foundation stone for every free and democratic society,”<sup>88</sup> must be measured against the rights of those vulnerable to certain kinds of speech.

International non-governmental organization Article 19 states: “The inherent dignity and equality of every individual is the foundational axiom of international human rights”<sup>89</sup> and recognizes the need for legal checks on hate speech. At the same time it presents the 2001 UN, OSCE and OAS Special Mandates on the right to freedom of expression recommendations for such laws:

- No one should be penalised for statements which are true
- No one should be penalised for the dissemination of hate speech unless it has been shown that they did so with the intention of inciting discrimination, hostility or violence

<sup>85</sup> International Covenant on Civil and Political Rights, Art 19, 3, March 23, 1976.

<sup>86</sup> Ibid.

<sup>87</sup> Ibid, Art 20, 2.

<sup>88</sup> General Comment No. 34 of the Human Rights Committee, 102<sup>nd</sup> Session, Geneva, 11 – 29 July 2011, par 2.

<sup>89</sup> Article 19, “Hate Speech,” in *Article 19: Defending Freedom of Expression and Information*, Free World Center: London, 2016 <<https://www.article19.org/pages/en/discrimination.html>> Accessed November 11, 2016.

- The right of journalists to decide how best to communicate information and ideas to the public should be respected, particularly when they are reporting on racism and intolerance
- No one should be subject to prior censorship
- Any imposition of sanctions by courts should be in strict conformity with the principle of proportionality.<sup>90</sup>

Laws criminalizing hate speech are compatible with freedom of expression when they follow these guidelines. Criminalizing denial of the Holocaust, then, may be compatible with the right so long as the punishments match the harm of denial.

## The Legal Movement toward Criminalizing Holocaust Denial

Holocaust denial very rarely receives explicit mention in international bodies, and it is only within recent years that the international community has begun to recognize the need to do so.<sup>91</sup> Most significant have been actions on the part of the United Nations. In 2005 it designated January 27 as “the International Day of Commemoration in Memory of Victims of the Holocaust” and two years later passed a nearly unanimous resolution condemning the Holocaust.<sup>92</sup> The resolution states:

Noting that 27 January has been designated by the United Nations as the annual International Day of Commemoration in memory of the victims of the Holocaust,  
 1. Condemns without any reservation any denial of the Holocaust;  
 2. Urges all Member States unreservedly to reject any denial of the Holocaust as a historical event, either in full or in part, or any activities to this end.<sup>93</sup>

<sup>90</sup> Article 19, “Hate Speech,” in *Article 19: Defending Freedom of Expression and Information*, Free World Center: London, 2016 <<https://www.article19.org/pages/en/discrimination.html>> Accessed November 11, 2016.

<sup>91</sup> Michael Whine’s article points to many European examples such as: the Declaration of the Stockholm International Forum on the Holocaust; the European Parliament Resolution on Remembrance of the Holocaust, Antisemitism and Racism; the Organization for Security and Cooperation in Europe declarations such as: the 2004 Permanent Council Resolution; 2004 Berlin Declaration, 2005 Cordoba Declaration, the 2006 Brussels Declaration.

Michael Whine, “Expanding Holocaust Denial and Legislation Against it,” in *Extreme Speech and Democracy*, Ivan Hare and James Weinstein (eds), Oxford Scholarship Online, 2009, 541.

<sup>92</sup> Iran dissenting.  
 Ibid, 542.

<sup>93</sup> General Assembly, Resolution adopted by the UN General Assembly on Holocaust denial (A/RES/61/255, 26 January 2007), in *The Holocaust and United Nations Outreach Programme*, <<http://www.un.org/en/holocaustremembrance/docs/res61.shtml>> Accessed November 7, 2016.

These words indicate an international acceptance that Holocaust denial represents hate speech and must be addressed, in the very least from an education standpoint.

The Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems stands out because it actually identifies denial of a mass atrocity or genocide as a hate crime and therefore requires legal action. Under Article 6 — Denial, gross minimization, approval or justification of genocide or crimes against humanity — it states:

**1** Each Party shall adopt such legislative measures as may be necessary to establish the following conduct as criminal offences under its domestic law, when committed intentionally and without right: distributing or otherwise making available, through a computer system to the public, material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity, as defined by international law and recognised as such by final and binding decisions of the International Military Tribunal, established by the London Agreement of 8 August 1945, or of any other international court established by relevant international instruments and whose jurisdiction is recognised by that Party.

**2** A Party may either

- a. require that the denial or the gross minimisation referred to in paragraph 1 of this article is committed with the intent to incite hatred, discrimination or violence against any individual or group of individuals, based on race, colour, descent or national or ethnic origin, as well as religion if used as a pretext for any of these factors, or otherwise
- b. reserve the right not to apply, in whole or in part, paragraph 1 of this article.<sup>94</sup>

There is a clear trend toward categorizing Holocaust denial as hate speech, and more than legitimizing laws against it, advocating for them.

While it is high time that Holocaust denial formally be recognized as hate speech, criminal laws that result in trials do not necessarily deter deniers. As the following chapters discuss, a trial can serve as a flash point for expanding the, admittedly small, Holocaust movement, and create further fodder for the movement's claims of persecution.

---

<sup>94</sup> Council of Europe, Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, No 168, Strasberg, 2003  
<<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008160f>> Accessed November 7, 2016.

## CHAPTER 2: HOLOCAUST DENIAL IN THE UNITED STATES

The United States serves as a crucial hub for Holocaust deniers, a staging area where websites such as Irving's Focal Point Publications,<sup>95</sup> Ursula Haverbeck's "The Zündelsite"<sup>96</sup> and the Institute for Historical Review<sup>97</sup> run uninhibited by the law.<sup>98</sup> The US has also seen Holocaust controversy in its Universities as a result of Bradley Smith's (who has the distinction of being both the founder and only member of the Committee for the Open Debate on the Holocaust) campaign to publish advertisements denying the Holocaust in student run papers.<sup>99</sup> Other areas of controversy relate to higher education. This extends to Universities like Columbia and Harvard that have failed to acknowledge their role in supporting the Nazi regime leading into WWII by awarding honorary degrees to Nazi officials and welcoming them to campus.<sup>100</sup> These controversies often overshadow legal cases of Holocaust denial for one simple reason. Hate

---

<sup>95</sup> David Irving, *Focal Pont Publications*, <<http://www.fpp.co.uk/>> Accessed October 4, 2016.

<sup>96</sup> Ursula Haverbeck, Ernst Zundel's wife created this site in 1995. Its original mission statement begins by stating: "Zundelsite documents will chip away at a World War II Propaganda monstrosity – the so-called 'Holocaust.' Zundelsite web pages will prove in many different ways – statistically, forensically, and logically – that it is historically inaccurate, emotionally misleading and cruelly unfair to claim the 'Holocaust' took place in the form portrayed by conventional media."

Ursula Haverbeck, *The Zündelsite*, <<http://www.zundelsite.org/index.html>> Accessed October 4, 2016.

<sup>97</sup> *Institute for Historical Review*, <<http://www.ihr.org/>> Accessed October 4, 2016.

<sup>98</sup> Michael Whine, "Expanding Holocaust Denial and Legislation Against it," in *Extreme Speech and Democracy*, Ivan Hare and James Weinstein (eds), Oxford Scholarship Online, 2009, 540.

<sup>99</sup> On October 24, 1991, the *Michigan Daily* published a full page advertisement by Smith which presented a "case" that during WWII the deaths of Jews be attributed to disease and that a Jewish conspiracy is to blame for current beliefs in the Holocaust.

Katherine Bischooping, "Responses to Holocaust Denial: A Case Study at the University of Michigan," in *Contemporary Jewry*, 18, 1997, 44.

<sup>100</sup> Norwood's article calls out US higher education institutions such as Harvard, Columbia, University of Wisconsin, University of Minnesota, and the University of Texas for having welcomed Nazi officials to their campuses in the 1930s and for having failed to criticize the regime. He further laments the lack of accountability on the part of these institutions in contemporary times to acknowledge such actions. He writes: "It is disconcerting that, more than six decades after the Holocaust, prominent American educators appear more concerned with protecting their institutions' reputations than with acknowledging the consequences of their predecessors' complicity with the most barbaric regime in human history." Norwood attempted to speak on the matter at both Harvard and Columbia. Both institutions turned him away.

Stephen H Norwood, "In Denial: American Universities' Response to the Third Reich, Past and Present," in *Journal of Ecumenical Studies*, 46, 4, 2011, 501, 503, 509.

speech, and therefore Holocaust denial, is not prohibited by law in the United States and cases dealing with the subject limited. The case of note in this jurisdiction is a civil suit, brought by a Holocaust survivor against a Holocaust denial organization.

## The Law

The First Amendments of the United States famously reads:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.<sup>101</sup>

Unlike other legal protections of freedom of expression, the First Amendment does not point to any instances in which the state may withhold these rights. Because of this absence, the US Supreme Court has continually addressed this issue, interpreting how and when expression may be limited. Since US jurisprudence “rejects as a violation of freedom of speech any legal punishment for public expressions of denial,” a case challenging the constitutionality of a law against Holocaust denial would perhaps be one of the easiest for a court to decide.<sup>102</sup>

*Schenck v. United States* is a key case in the jurisprudence indicating why Holocaust denial laws do not exist in the US.<sup>103</sup> During WWI a Socialist headquarters mailed flyers with the intention of obstructing recruitment and enlistment for the war effort. As the secretary for the Socialist party, Schenck was held responsible for the mailer and convicted under the Espionage Act.<sup>104</sup> In the majority opinion affirming Schenk’s conviction, Justice Holmes points to the fact that extraordinary circumstances allow for restraints on free speech that otherwise would not be permissible. He writes that “the most stringent protection of free speech would not protect a man

---

<sup>101</sup> U.S. Const. Amend. I.

<sup>102</sup> Andrew Altman, “Freedom of Expression and Human Rights Law: The Case of Holocaust Denial,” in *Speech and Harm: Controversies Over Free Speech*, Ishani Maitra and Mary Kate McGowan (eds), Oxford University Press: Oxford, 2012, 24-25.

<sup>103</sup> *Schenck v. United States*, 249 US 47 (1919).

<sup>104</sup> *Ibid*, 48.

in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.”<sup>105</sup> Furthermore, Justice Holmes writes that Congress has a right to prevent speech that “create[s] a clear and present danger” and that in each case “it is a question of proximity and degree.”<sup>106</sup> The standard set in *Schenk* is so high that it is extremely unlikely a judge would find a Holocaust denier to have met it.<sup>107</sup>

Further dividing the US from international norms on freedom of expression is the principle of viewpoint neutrality. Viewpoint neutrality has been the leading explanation in decisions striking laws against “flag burning, pornography, racist speech, and the infamous Nazi march that had been planned to take place in Skokie, Illinois, a town where many Holocaust survivors lived.”<sup>108</sup> Examining two leading cases on Viewpoint Neutrality clarify the issue.

In the landmark case *Brandenburg v. Ohio*,<sup>109</sup> the appellant was convicted of violating Ohio’s 1919 Criminal Syndicalism Act, a statute making it criminal to advocate for “the duty necessity or propriety of crime sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform” as well as to “voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrine of syndicalism.”<sup>110</sup> The appellant had organized a Ku Klux Klan rally and invited a reporter to film the proceedings. The

---

<sup>105</sup> Ibid, 52.

<sup>106</sup> Ibid, 52.

<sup>107</sup> *Schenk* received negative treatment in two later US Supreme court cases: *American Family Mut. Ins. Co. v. Roth* on the issue of the intention behind distributing material and in *Chicago Tribune Co. v. N.L.R.B.* which finds that the clear and present danger test is not an appropriate formula for every situation, specifically as justification for Unions to obtain the names of replacement workers.

*American Family Mut. Ins. Co. v. Roth*, 2005 WL 3700232 (N.D.Ill.,2005)

*Chicago Tribune Co. v. N.L.R.B.*, 965 F.2d 244, 247 (C.A.7,1992)

<sup>108</sup> Andrew Altman, “Freedom of Expression and Human Rights: The Case of Holocaust Denial,” in *Speech and Harm, Controversies Over Free Speech*, Ishani Maitra and Mary Kate McGowan (eds), Oxford Scholarship Online, 2012, 14.

<sup>109</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1996)

<sup>110</sup> “*Brandenburg v. Ohio*,” in Cornell University Law School <<http://www.cornell.edu/supremecourt/text/395/444>> Accessed November 13, 2016.

footage from the rally was then aired on a local television station. In the film the appellant is seen calling for revenge against those seeking to “suppress the white, Caucasian race.”<sup>111</sup> Individuals participating in the rally carried weapons and burned a cross. The appellant faced a \$1000 fine and ten years prison. The US Supreme Court held that the Syndicalism Act violated the First and 14<sup>th</sup> Amendments and reversed the conviction.<sup>112</sup>

They did so by arguing that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation” unless the intention of such actions are to produce or incite imminent lawless action.<sup>113</sup> With this ruling, the Court distinguished between abstract instruction of circumstances in which force is necessary to achieve an organization’s aims and the actual preparation of a group to commit this violence.<sup>114</sup> The court took a strong stance that advocacy of lawless action is not on par with incitement. The threshold for free speech is therefore extremely high.

A second and more recent leading case, *R.A.V. v. City of St. Paul*, further demonstrates the principle.<sup>115</sup> A teenager in St. Paul Minnesota was convicted of violating the city’s Bias-Motivated Crime Ordinance criminalizing the display of symbols known to cause anger, alarm, or resentment in others. The teenager had burned a cross in a black family’s yard.<sup>116</sup> The Supreme Court found that the ordinance unconstitutional in that it prohibited speech with specific content, that being “‘fighting words’ that insult, or provoke violence, ‘on the basis of race, color, creed, religion, or gender.’”<sup>117</sup> The Court’s ruling was meant to protect individuals “express[ing] views on disfavored

---

<sup>111</sup> Stone, R Geoffrey, Louis Michael Seidman, Cass R Sunstein, Mark V Tushnet and Pamela S Karlan, *Constitutional Law* 5<sup>th</sup> edition, New York: Aspen, 2005, 1062.

<sup>112</sup> *Ibid*, 1063.

<sup>113</sup> *Ibid*, 1062.

<sup>114</sup> *Ibid*, 1063.

<sup>115</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>116</sup> Stone, R Geoffrey, Louis Michael Seidman, Cass R Sunstein, Mark V Tushnet and Pamela S Karlan, *Constitutional Law* 5<sup>th</sup> edition, 1231.

<sup>117</sup> *Ibid*, 1231, 1232.

subjects” and also expressed that the “selectivity” of the law “creates the possibility that the city is seeking to handicap the expression of particular ideas.”<sup>118</sup> The Court was not condoning the burning of crosses in yards, but rather pointing to the fact that the state could have alternatively offered content-neutral restrictions.<sup>119</sup>

Given the nature of US law, a civil case against a denier really represents the most likely scenario in which a Holocaust denier might find him or herself in a US courtroom as a result of expressing such views. The case of *Mermelstein v. the Institute for Historical Review* is such a scenario. The events leading Mermelstein to sue likely caused him significant distress and a desire for justice. Criminal charges were impossible and so he brought a civil suit.

## The Denier

Willis Carto and David McCalden (also known as Lewis Brandon) co-founded the Institute for Historical Review (IHR) in 1978. Created under the “parent organization” known as the Legion for the Survival of Freedom, the IHR held the primary purpose of questioning and spreading doubt over the Holocaust.<sup>120</sup> Carto, who died last October of heart failure at 89, left a legacy of anti-Semitism and racism. The IHR, while only one of many projects, was his most memorable.<sup>121</sup>

---

<sup>118</sup> Idid, 1233, 1234.

<sup>119</sup> Justices White, Blackmun, O’Connor and Stevens concurred in the ruling save for one aspect. They thought the majority’s exception to the content-neutral rule, the prohibition of threats against the president, undermined the argument’s reasoning. In particular, the question settled on why groups “historically subjected to discrimination” cannot also have a justifiable exception. Ibid, 1235.

<sup>120</sup> “Willis Carto,” in *The Extremist Files*, Southern Poverty Law Center, <<https://www.splcenter.org/fighting-hate/extremist-files/individual/willis-carto>> Accessed November 5, 2016.

“Institute for Historical Review,” in *Extremism in America*, the Anti-Defamation League: 2005, <[http://archive.adl.org/learn/ext\\_us/historical\\_review.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=3&item=ihr](http://archive.adl.org/learn/ext_us/historical_review.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=ihr)> Accessed November 5, 2016.

<sup>121</sup> His founding of the IHR and the law suit with Mermelstein feature prominently in his obituaries.

David Colker, “Willis Carto, right wing activists whose publications called Holocaust a ‘hoax,’ dies at 89,” in *The L.A. Times*, November 1, 2015, <<http://www.latimes.com/local/obituaries/la-me-willis-carto-dead-20151031-story.html>> Accessed November 5, 2016.

Douglas Martin, “Willis Carto, 89, Activist for the Far Right Who Said Holocaust Was a Hoax,” in *The New York Times*, November 1, 2015, <[http://www.nytimes.com/2015/11/02/us/willis-carto-far-right-figure-and-holocaust-denier-dies-at-89.html?\\_r=0](http://www.nytimes.com/2015/11/02/us/willis-carto-far-right-figure-and-holocaust-denier-dies-at-89.html?_r=0)> Accessed November 5, 2016.



David McCalden, who died much before Carto at the age of 39, directed the IHR and was also remembered most for his work with the IHR.<sup>122</sup> Not only did the IHR serve as a beacon for anti-Semitism, it presented their views with quasi-respectability and an academic façade.<sup>123</sup> Whereas before deniers “labored mostly in isolation and obscurity,” the IHR united deniers through a publishing house, Noontide press, organization of conferences, and distribution of newsletters.<sup>124</sup>

At the IHR’s first such conference in 1979, David McCalden announced the beginning of a major publicity campaign. A featured component of the campaign was a contest calling for evidence proving the use of gas chambers to exterminate Jews during WWII with a \$50,000 reward.<sup>125</sup> The IHR never considered this a legitimate contest, and rather used it as a means of mocking survivors and the Jewish community.

As the IHR had hoped, their antics did not escape notice. In August of 1980, Holocaust survivor and California businessman Mel Mermelstein wrote a letter to the editor of the *Jerusalem Post International Edition*. In the letter he called out the Institute for Historical Review as a pseudo historical organization denying the Holocaust and thereby spreading “lies, hatred and bigotry.”<sup>126</sup> It was this letter which first directed the Institute of Historical Review’s attention toward

---

<sup>122</sup> The title of McCalden’s obituary is troubling in that it neglects to comment on McCalden’s anti-Semitism and implies that he legitimately sought to prove the Holocaust did not happen. This is but another example of how commonly the anti-Semitism of denial is overlooked.

Burt A Folkart, “David McCalden: Failed to Disprove the Holocaust,” in the *LA Times*, October 25, 1990 <[http://articles.latimes.com/1990-10-25/news/mn-4132\\_1\\_david-mccalden](http://articles.latimes.com/1990-10-25/news/mn-4132_1_david-mccalden)> Accessed November 14, 2016.

<sup>123</sup> Although this academic presentation in no way fooled true scholars. According to the Anti-defamation League, the IHR sent their mailer to various journals and was not only rejected but openly debunked.

“Institute for Historical Review,” in *Extremism in America*, the Anti-Defamation League: 2005, <[http://archive.adl.org/learn/ext\\_us/historical\\_review.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=3&item=ihr](http://archive.adl.org/learn/ext_us/historical_review.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=ihr)> Accessed November 5, 2016.

“Willis Carto,” in *The Extremist Files*, Southern Poverty Law Center.

Deborah Liptstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, 138.

<sup>124</sup> “Institute for Historical Review,” in *Extremism in America*, the Anti-Defamation League.

<sup>125</sup> Deborah Liptstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, 136.

<sup>126</sup> Mel Mermelstein, “Revising the History of the Holocaust,” in *The Jerusalem Post International Edition*, No. 1,003, August 1980.

Mermelstein and prompted the reopening of their “contest” for Mermelstein.<sup>127</sup> His acceptance of the challenge was the beginning of a saga of legal actions between the two parties that spanned over a decade.

## The Case

At this point in time, American Jewish organizations hoped Holocaust denial would fizzle out if it was largely ignored. As Robert F. Kahn explains, Organizations like the Anti-Defamation League believed that “a well-publicized repudiation might even have been counterproductive if it drew attention to the existence of Holocaust denial.”<sup>128</sup> The Anti-Defamation League was founded in 1913 with the purpose of countering defamation of the Jewish people and with an emphasis on social justice, therefore their reluctance to take direct action is somewhat surprising.<sup>129</sup> According to Kenneth Stern, “most of the Jewish community declined to dignify the offer with a response, for good reason.”<sup>130</sup> Among those reasons were the knowledge that the IHR’s panel of judges would not be impartial, a court challenge could prove difficult due to the structure of the reward offer, the IHR would receive free publicity, and it seemed to offer some sort of validation to meet the challenge since the Holocaust is a proven fact in the first place.<sup>131</sup>

These reservations did not, however, dissuade Mel Mermelstein from challenging the contest. Two years prior to receiving a letter from the IHR, he had founded the Auschwitz Study

---

<sup>127</sup> The contest was opened in 1979 and a personalized letter sent to Mermelstein in late 1980.

Letter from Lewis Brandon to Mel Mermelstein, November 20, 1980. Presented in: Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 272.

<sup>128</sup> Robert Kahn, *Holocaust Denial and the Law: A Comparative Study*, Palgrave MacMillan: New York, 2004, 29.

<sup>129</sup> Today the League’s mission is still focused on the Jewish people and fighting anti-Semitism, but it has expanded to include “all forms of bigotry,” “democratic ideals,” and “civil rights.”

“About the Anti-Defamation League,” in *ADL: Anti-Defamation League*, 2016 <<http://www.adl.org/about-adl/>> Accessed November 21, 2016.

<sup>130</sup> Kenneth Stern, *Holocaust Denial*, 16.

<sup>131</sup> *Ibid*, 16.

Foundation where he created a small-scale museum of the Holocaust and spoke to students.<sup>132</sup> As a survivor of the Holocaust, Mermelstein believed passionately in a duty to promote Holocaust Education.<sup>133</sup> On April 19, 1944, the Nazis transported a seventeen-year-old Mel Mermelstein and his family from their home in the Carpathian Mountains, Hungary, to a nearby ghetto where they stayed for one month.<sup>134</sup> In May the boxcars shipped them to Auschwitz-Birkenau where Mermelstein would be the sole survivor of his family.<sup>135</sup> As a survivor and a passionate educator, he was determined to directly respond to the IHR's provocation.

Mermelstein brought six complaints against the IHR: 1) Breach of Contract 2) Anticipatory Repudiation 3) Libel 4) Injurious Denial of Established Fact 5) Intentional Infliction of Emotional Distress and 6) Declaratory Relief.<sup>136</sup> His council's strategy prioritized establishing the Holocaust as historical fact in the eyes of the court through a concept called judicial notice. Judicial notice is the court's ability to accept presented evidence as fact and without formal presentation of this evidence.<sup>137</sup>

<sup>132</sup> The ASF is still listed as an operating organization by the International Holocaust Remembrance Alliance, although its website, <http://www.ASFoundation.org>, no longer operates.

"Auschwitz Study Foundation, Inc.," in *International Holocaust Remembrance Alliance*, <<https://www.holocaustremembrance.com/itfdirectory/organization/show/2332>> Accessed November 6, 2016.

<sup>133</sup> In the preface to his memoir Mermelstein writes: "It never leaves me. It never recedes into the past. It never fades away, but only urges me on. It spends my money and it collects books on the Holocaust, which line my shelves at home. It collects hundreds of photos of the past, and snaps new ones of the places that still dot the battlefields, the ghettos and the death camps. It drives me to write scores of letters, pushes me into lecture halls, it guides my pen, it remains the aster, and I have no choice but to do its bidding."

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, xiii-xiv.

A mini series depicting the Mermelstein trial, if perhaps a bit heavy on emotion and drama, creates a vivid image of Mel Mermelstein the passionate activist for Holocaust Education. The film is currently available for viewing on youtube. <[https://www.youtube.com/watch?v=qQOE64\\_12UM](https://www.youtube.com/watch?v=qQOE64_12UM)> accessed November 6, 2016.

Joseph Sargent (director), *Never Forget*, Released by TNT on April 8, 1991.

<sup>134</sup> His family comprised of 15 year old and 20 year old sisters, 19 year old brother, mother and father.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 1-2, 31, 67, 84.

<sup>135</sup> Ibid, 109-110, 238.

<sup>136</sup> Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 287.

<sup>137</sup> "judicial Notice," in *The Legal Information Institute*, Cornell University School of Law <[https://www.law.cornell.edu/wex/judicial\\_notice#](https://www.law.cornell.edu/wex/judicial_notice#)> Accessed November 19, 2016.

On October 9, 1981 Judge Thomas T Johnson ruled that in the summer of 1944 Jews were gassed at Auschwitz.<sup>138</sup> Apparently, Judge Johnson made the ruling unobtrusively and without fanfare, and as but one item on a list of practical matters to get through. Robert Kahn explains that Judge Johnson “had to dispose of a bevy of issues” and that “whatever the symbolic impact of judicial notice as a repudiation of Holocaust denial, it played a secondary role in terms of the trial.”<sup>139</sup> Most of Judge Johnson’s concerns focused on contract law.<sup>140</sup> The ruling on judicial notice states, concisely, the following:

Under Evidence Code Section 452 (h), this court does take judicial notice of the fact that Jews were gassed to death at the Auschwitz Concentration Camp in Poland during the summer of 1944. It just simply is a fact that falls within the definition of Evidence Code Section 452 (h). It is not reasonably subject to dispute. And it is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. It is simply a fact.<sup>141</sup>

The defense responded by asking “What sources?” to which the judge said “Any number of sources, any number of books, publications of really indisputable accuracy.”<sup>142</sup> And with that the matter was closed. The defense would not have an opportunity to use the courtroom as a platform to argue its points for Holocaust denial, but would be forced to stick to the technical aspect of the IHR contest and the effects of such a contest on survivors.

Following the ruling, Mermelstein expressed his somewhat confused satisfaction, saying in an interview: “I feel relieved. But I wonder why I should feel that way, because it is an established fact.”<sup>143</sup> Judge Johnson’s ruling on judicial notice often seems to overshadow the

---

<sup>138</sup> Associated Press, “California Judge Rules Holocaust Did Happen,” in *New York Times*, October 10, 1981.

<sup>139</sup> Robert Kahn, *Holocaust Denial and the Law: A Comparative Study*, Palgrave MacMillan: New York, 2004, 29.

<sup>140</sup> *Ibid*, 29.

<sup>141</sup> Admittedly, the brevity of the judicial notice matter is somewhat of an assumption. Robert Kahn explains that the judge’s decision was made orally at a pretrial conference and that we do not have the majority of the hearing transcript. It is possible that the judge had more to say. What we do have from the hearing was presented in Mermelstein’s memoir.

Robert Kahn, *Holocaust Denial and the Law: A Comparative Study*, 28.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 288.

<sup>142</sup> *Ibid*, 288.

<sup>143</sup> Jay Mathews, “Assertion is Dismissed In No-Holocaust Matter,” *the Washington Post*, October 10, 1981

conclusion of the case four years later.<sup>144</sup> The case settled on August 5, 1985 with much less fanfare. The Court found that:

Defendants Liberty Lobby, Willis Carto, Elsiabeth Carto, Legion for Survival of Freedom, Institute for Historical Review, and Noontide Press, and each of them, are jointly and severally libelous to plaintiff Mel Mermelstein for the sum of One Hundred Fifty Thousand Dollars (\$150,000.00), reduced to the sum of Ninety Thousand Dollars (\$90,000.00).<sup>145</sup>

The ruling went on to require the defendants to “issue and execute, by a duly authorized representative, a letter of Apology to Mel Mermelstein.”<sup>146</sup>

While the Settlement of the case in Mermelstein’s favor held much significance for the man himself, it hardly swayed the IHR at all. The organization, indeed, worked hard to spin the events in its favor and explain away its written apology to Mermelstein — a reaction so unsurprising it could hardly disappoint.<sup>147</sup> Tom Marcellus, director of IHR, issued the following statement in the organizations newsletter following the trial:

With so many wild rumors still being circulated about the IHR/Mermelstein settlement, we want to remind our readers that, contrary to what has gone out through the press and media:

1. The settlement agreement did not include any provision for a payment of any reward offer, and in fact was not such a payment.
2. The IHR did not accept or in any way agree with Judge Johnson's ridiculous 1981 "judicial notice" that Jews were "in fact" exterminated in "gas chambers" at Auschwitz.
3. The IHR has not retreated one inch from its well-known position that there is no credible evidence to support the theory that Germans allegedly used homicidal poison gas chambers to exterminate the Jews of Europe.

---

<https://www.washingtonpost.com/archive/politics/1981/10/10/assertion-is-dismissed-in-no-holocaust-matter/9d11fe64-bf57-479d-b88d-661bf32631f7/> > Accessed November 2, 2016.

<sup>144</sup> Robert Kahn, *Holocaust Denial and the Law: A Comparative Study*, Palgrave MacMillan: New York, 2004, 25. Mermelstein’s memoir highlights the judicial notice ruling on its back cover and does not mention at all the final ruling in 1985.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*.

<sup>145</sup> *Mel Mermelstein v. Institute for Historical Review, et al*, Superior Court of CA C 356 542 (1985), 1-2.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 290.

<sup>146</sup> *Mel Mermelstein v. Institute for Historical Review, et al*, Superior Court of CA C 356 542 (1985), 1-2.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 290.

<sup>147</sup> By court order, the apology read “Each of the answering defendants do hereby officially and formally apologize to Mr. Mel Mermelstein, a survivor of Auschwitz-Birkenau and Buchenwald, and all other survivors of Auschwitz for the pain, anguish and suffering he and all other Auschwitz survivors have sustained relating to the \$50,00 reward offer for proof that ‘Jews were gassed in gas chambers at Auschwitz.’”

*Mel Mermelstein v. Institute for Historical Review, et al*, Superior Court of CA C 356 542 (1985), 2.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 291.

4. The letter of apology addressed the "suffering" some Jews said they experienced around the \$50,000 award offer. It did not apologize for revisionist theory or revisionist literature in any way.<sup>148</sup>

The statement speaks for itself. The IHR would continue to use the trial as a means of propagating Holocaust denial, even after the close of proceedings. The IHR failed to keep the backlash within its publications. In what comes across as a childish retaliation, the IHR and Willis Carto sued Mermelstein on August 6, 1986 for alleged libelous statements he made of them on a New York City radio broadcast following the trial.<sup>149</sup> The IHR and Carto voluntarily dropped the charges a little under two years later.<sup>150</sup>

Despite this and the original legal victory, and likely because of their unrepentant handling of that legal decision, Mermelstein was not finished with the IHR. Mermelstein's case against what can be referred to as "the Carto defendants," was a consolidation of two libel suites. The first was in response to an IHR publication that claimed to expose errors in his testimony in the 1985 trial,

---

<sup>148</sup> This statement was presented at the end of O'Keefe's article attempting to spin the trial to the IHR's advantage. Theodore J. O'Keefe, "'Best Witness': Mel Mermelstein, Auschwitz and the IHR," in *The Journal of Historical Review*, 14, 1, 1994, 25.

<sup>149</sup> Mermelstein was participated in a phone interview with New York based radio station WMCA on the subject of the original lawsuit.

*Mel Mermelstein v. Legion for the Survival of Freedom, individually, and doing business as Institute for Historical Review, Willis Carto, Liberty Lobby, Inc., etc., et al*, Sup Crt CA C 629 224, 3.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 302

"Institute for Historical Review," in *Extremism in America*, the Anti-Defamation League: 2005, <[http://archive.adl.org/learn/ext\\_us/historical\\_review.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=3&item=ihr](http://archive.adl.org/learn/ext_us/historical_review.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=ihr)> Accessed November 5, 2016.

<sup>150</sup> The lawsuit was voluntarily dropped on February 29, 1988.

*Mel Mermelstein v. Legion for the Survival of Freedom, individually, and doing business as Institute for Historical Review, Willis Carto, Liberty Lobby, Inc., etc., et al*, Sup Crt CA C 629 224, 3.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 302

calling him a “demonstrable fraud.”<sup>151</sup> The Second was a malicious prosecution suit that was in response to the 1986 suit brought against him.<sup>152</sup> Mermelstein dropped the suit in 1991.<sup>153</sup>

The issue of judicial notice had once more been brought up in Mermelstein’s suit against the IHR’s parent organization, the Legion for the Survival of Freedom. Judge O’Neil’s delivery of his judgement on judicial notice carried much more impatience than Judge Johnson had in the original case. The following exchange between defense council and judge show this stark difference:

The Court: Well, there’s also a society in England, I believe, called the Flat Earth Society.

Mr. Hulsey: True.

The Court: So, I mean, some people may not want to take Caribbean cruises for fear of falling off the end of the earth -- you know. But reasonably indisputably accurate, I’d say the earth is a sphere. I mean -- you know -- how far are we going to carry this?<sup>154</sup>

Judge O’Neil’s frustration is not difficult to relate too, yet his comparison is troubling non-the-less. Relating a flat earth society to one that specifically targets the Jewish people and is motivated by anti-Semitism downplays the danger of such groups. They are not merely crackpots (no offense meant to the flat earth believers), but purveyors of hate speech.

Not only did the IHR and supporters continue in the dissemination of Holocaust denial propaganda, they viewed the courtroom as a means of drawing further support and publicity. After the appeal was decided in 1992, Mermelstein’s lawyer received yet another letter from the

---

<sup>151</sup> Case No. C 629224.

*Mel Mermelstein v. Legion for the Survival of Freedom, individually, and doing business as Institute for Historical Review, Willis Carto, Liberty Lobby, Inc., etc., et al*, Sup Crt CA C 629 224, 3.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 302

<sup>152</sup> Case No. SOC 95211.

*Mel Mermelstein v. Legion for the Survival of Freedom, individually, and doing business as Institute for Historical Review, Willis Carto, Liberty Lobby, Inc., etc., et al*, Sup Crt CA C 629 224, 3-4.

Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 302-303.

<sup>153</sup> “Institute for Historical Review,” in *Extremism in America*, the Anti-Defamation League: 2005, <[http://archive.adl.org/learn/ext\\_us/historical\\_review.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=3&item=ihr](http://archive.adl.org/learn/ext_us/historical_review.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=ihr)> Accessed November 5, 2016.

<sup>154</sup> Trial transcript of *Mel Mermelstein v Legion for the Survival of Freedom, etc., et al.*, Superior Court of the State of California, Los Angeles, No. C 629224 & No. SOC 95211, January 10, 1991. Copy presented in: Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 295.

representative of Carto and an organization called Liberty Lobby, Mark Lane. Lane wrote a lengthy description of how Mermelstein's legal actions against his clients in addition to public statements countering or refuting deniers amounted to "malicious prosecution, defamation, intentional infliction of emotional distress and conspiracy to inflict emotional distress."<sup>155</sup> Mermelstein's lawyer's assessment of this threat to bring suite has a certain persuasiveness to it. In his reply to Lane, he writes:

We have reviewed and assessed the claims contained in your letter asserted on behalf of Willis Carto, Liberty Lobby and "those other organizations and individuals" who you claim to represent. We have determined that your assertions lack any merit whatsoever. Your contentions furthermore exhibit a fundamental misunderstanding of the California law of malicious prosecution. *Indeed it is our opinion that you are in the process of concocting another harrasive claim against Mr. Mermelstein for fundraising and publicity purposes.* The institution of any such litigation as threatened in your correspondence would clearly be frivolous and in bad faith.<sup>156</sup>

Maroko was exactly right when he pinpointed the IHR's motivations. Legal actions against Mermelstein were not the extent to IHR's activities.

In 1984, for example, David McCalden sued the California Library Association (CLA) after they refused to permit him to display an exhibit denying the Holocaust. He had originally signed a contract with the CLA to display an exhibit titled "Free Speech and the Holocaust -- An overview from several speakers of the severe censorship and intellectual terrorism which inhibits any objective, open discussion of this controversial subject."<sup>157</sup> When the American Jewish Committee (AJC) learned of McCalden's scheduled exhibit, they, along with the Los Angeles City Council and the Eli Wiesenthal Center, pressured the CLA to void the contracts.<sup>158</sup> As is typical

---

<sup>155</sup> Emphasis added.

Letter from Mark Lane, Esq., to Michael Maroko, Esq., February 19, 1993. Copy presented in Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 321.

<sup>156</sup> Letter from Michael Maroko, Esq., to Mark Lane, Esq., March 8, 1993. Copy presented in Mel Mermelstein, *By Bread Alone: The Story of A-4685*, 321.

<sup>157</sup> Greg Henderson, "Court stays clear of fray over free speech, Holocaust history," in *United Press International*, June 1, 1992 <<http://www.upi.com/Archives/1992/06/01/Court-stays-clear-of-fray-over-free-speech-Holocaust-history/8156707371200/>> Accessed November 14, 2016.

<sup>158</sup> Ibid.



of deniers, McCalden's claim rested on what he perceived as a violation of his civil rights.<sup>159</sup> A federal circuit court decided against hearing the law suit, but the U.S. Court of Appeals for the Ninth Circuit reversed.<sup>160</sup> The case nearly made it to the U.S. Supreme Court which declined to review the case. McCalden died before the case saw fruition, and while his widow was granted the right to continue the case, she eventually withdrew the suit.<sup>161</sup> Even though McCalden's widow claimed to pursue the suit because her Husband's first amendment rights had allegedly been violated, it is hard to believe this was not yet another publicity stunt – albeit one fueled by anger and perhaps later grief, but all the same it generated a whole lot of hype for Holocaust deniers.

## Reflections

Seventeen years after the first proceedings, the IHR's online presence continued to have influence in California. Writing of a scandal involving a college professor's denial of the Holocaust, an article in the *Los Angeles Times* supposed that the individual appeared "to have swallowed the revisionist line of the so-called Institute for Historical Review, now based in Newport Beach."<sup>162</sup> The author's suggested response, following his clear exasperation at the IHR's continued activities, focused on public education. He writes that deniers "would do well to talk to survivors or visit one of the museums. Or they might consider taking one of the fine courses on the Holocaust offered at UC Irvine, Cal State Fullerton or Chapman University, or Prystowsky's at Irvine Valley College."<sup>163</sup> While these suggestions are directed to the deniers, they are far more suited for the

---

<sup>159</sup> Kenneth Stern, *Holocaust Denial*, 16.

<sup>160</sup> Greg Henderson, "Court stays clear of fray over free speech, Holocaust history," in *United Press International*.

<sup>161</sup> Kenneth Stern, *Holocaust Denial*, 16

<sup>162</sup> Benjamin J Hubbard, "The Truth Must Be Shown When the Holocaust is Denied," *The Los Angeles Times*, March 7, 1998, <<http://articles.latimes.com/1998/mar/07/local/me-26462>> Accessed November 2, 2016.

<sup>163</sup> Benjamin J Hubbard, "The Truth Must Be Shown When the Holocaust is Denied," *The Los Angeles Times*, March 7, 1998, <<http://articles.latimes.com/1998/mar/07/local/me-26462>> Accessed November 2, 2016.

general public. They also fail to acknowledge the anti-Semitic nature of denial and the underlying reasons propelling deniers onward.

Today the IHR's legacy is no less felt, as is seen by a contest in David McCalden's name was running as recently as 2009.<sup>164</sup> Public education that addresses the Holocaust and anti-Semitism is an appropriate response to counter the potential fallout of denial activities such as these, however short reaching they may be. Kenneth Stern calls for such figures as "University presidents, chairs of departments, members of the board of trustees and others" to take a leadership role in this public education.<sup>165</sup> Such an approach would be more effective, surely, if the net were cast wider. From journalists to judges, Holocaust denial must be recognized for the hate speech it is.

## CHAPTER 3: HOLOCAUST DENIAL IN CANADA

Similarly to the United States, Canada has long valued freedom of expression and sought to protect this right. Unlike the US, however, Canada's stance on the right more closely aligns with international law.<sup>166</sup> This is seen by the laws it has in place protecting other Charter rights from the detrimental effects of hate speech. In fact, in Canada it is possible to not only convict Holocaust deniers, but to deport them as well.<sup>167</sup> Consequently, this is the only case of the three examined that takes place in a criminal court.

---

<sup>164</sup> The contest ran for six years at least through the medium of this website, and was called the "Annual David McCalden Most Macabre Halloween Holocaust Tale Challenge." The latest contest awarded the first prize \$200 and the second \$50 for "essays" supposedly debunking Holocaust historiography. Alarming, this website comes up in a general google search for David McCalden and it took at least several seconds of reading before it became clear it was not an amateur project on studying the Holocaust, but a platform for deniers.

"Contest Zone," in *The Holocaust Historiography Project*,  
<<http://www.historiography-project.com/contest/index.php>> Accessed November 14, 2016.

<sup>165</sup> Kenneth Stern, *Holocaust Denial*, 14.

<sup>166</sup> Brian Levin, "History as a Weapon: How Extremists Deny the Holocaust in North America," 1020.

<sup>167</sup> *Task Force for International Cooperation on Holocaust Education, Remembrance, and Research: Canada*, Liaison Projects, April 15, 2008, Council of Ministers of Education Canada and Department of Canadian Heritage, 25.

## The Law

Section 2(b) of the Canadian Charter of Rights and Freedoms states everyone has the fundamental “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communications.”<sup>168</sup> Yet, Canada regulates hate speech with the purpose of protecting the equality of its citizens.<sup>169</sup> Section 1 of the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>170</sup> In so far as hate speech negatively impacts citizens’ ability to live in a “free and democratic society,” appropriate laws punishing such speech have support from the Charter.

Kathleen Mahoney distinguishes the state’s approach to addressing hate speech between two branches, criminal and civil.<sup>171</sup> The Criminal code of Canada includes prohibitions on advocating or promoting genocide, inciting hatred against an “identifiable group,” and the “willful promotion” of hatred against such a group.<sup>172</sup> The civil approach relies on the Canadian Human Rights Act, which under section 3(1) states the following prohibited grounds for discrimination:

race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.<sup>173</sup>

In the civil arena, punishing the perpetrator is not the aim but rather the rectifying or compensation of harm.<sup>174</sup> The key difference between the two approaches, according to Mahoney, is that the

---

<sup>168</sup> Canadian Charter of Rights and Freedoms, Section 2(b).

<sup>169</sup> Kathleen E. Mahoney, “Speech, Equality, and Citizenship in Canada,” 70.

<sup>170</sup> Canadian Charter of Rights and Freedoms, Section 1.

<sup>171</sup> *Ibid*, 77.

<sup>172</sup> Mahoney points to “Sections 184.2, 320 and 319(4) of the Criminal Code authorize[ing] the interception, seizure, and forfeiture of hate material by agents of the state. All of these provisions are related to the offences defined in ss 318, 319(1), or 319(2).”

*Ibid*, 77.

<sup>173</sup> Canadian Human Rights Act, R. S. C., 1985, c. H-6, section 3 (1).

<sup>174</sup> *Ibid*, 77.

Human Rights Act is concerned with the experience of the victim of hate speech, not with the motivations or intentions of the perpetrator.<sup>175</sup> Ultimately, the Canadian Supreme Court balances the ideal of freedom of expression with upholding equality for minority groups.<sup>176</sup>

Historically, Canada has placed high importance on racial equality and addressing hate. In January of 1965 the Canadian Minister of Justice created a committee to investigate hate propaganda in the country and to make recommendations on how best to apply the law to such issues.<sup>177</sup> A year later the 327 page report was published.<sup>178</sup> While the Committee's report addresses hate propaganda directed at various groups, identified by the report "as any section of the public distinguished by religion, colour, race language, ethnic or national language,"<sup>179</sup> the Committee was especially concerned with the treatment of Jews.<sup>180</sup> In his review of the report, W. Gunther Plaut goes so far as to imply that the publication represents Canada's attempt to address genocide. Plaut sees the steps proposed by the report as preventative measure informed by the Holocaust and aimed against future genocides.<sup>181</sup> The report's concluding chapter leaves off with a series of recommendations. These include creating "indictable offenses" for the promotion or advocacy of genocide, for inciting hatred against an identifiable group likely to lead to a "breach

---

<sup>175</sup> Ibid, 77.

<sup>176</sup> Here Mahoney implies that the ideal of free expression unfairly and dangerously compromises the rights of minority groups.

Ibid, 82.

<sup>177</sup> The Committee was made up of the following legal professionals: "Dr. J. A. Corry, Principal of Queen's University; L'Abbé Gerard Dion of Laval University; Mr. Saul Hayes, Q.C., of the Canadian Jewish Congress; Professor Mark R. MacGuigan of the University of Toronto; Mr. Shane McKay, Editor of the Winnipeg Free Press; and Professor Pierre-Elliott Trudeau of the University of Montreal."

W. Gunther Plaut, "Book Review: The Report of the Special Committee on Hate Propaganda in Canada," *Osgoode Hall Law Journal*, 1967, 5,2, 313.

<sup>178</sup> Ibid, 313.

<sup>179</sup> The Report of the Special Committee on Hate Propaganda in Canada, Quoted in Plaut's book review. Ibid, 314.

<sup>180</sup> Ibid, 316.

<sup>181</sup> Ibid, 317.

of the peace,” for the willful communication of statements promoting hatred against an identifiable group.<sup>182</sup>

As a result of these recommendations, Parliament enacted criminal code section 281.1 and section 281.2. The first made it a crime to advocate or promote genocide. The second states that “Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such hatred is likely to lead to a breach of the peace” and “every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group” is contrary to law and an indictable offence and can serve up to two years in prison.<sup>183</sup>

On the subject of freedom of expression and Canadian law, Samuel LaSelva explains the following:

First, while hate propaganda is speech under the Charter’s free expression provision, it is only marginally connected to the core speech values, such as truth and political speech, protected by the Charter’s reasonable limits clause. Second, there are risks in censoring hate propaganda, including “the chilling effect”; but the risks are significantly diminished by the existence of multiple safeguards such as the defenses of good faith communication and if statements are relevant to the public interest. Third, the willful promotion of hatred is not reducible to offensiveness; rather, it is the source of significant harm to individuals and society. Fourth and finally, Canadian society, as a functioning multicultural (and multinational) polity committed to deep diversity and equal dignity, cannot exist if hate propaganda circulates freely and is left unchecked.<sup>184</sup>

LaSelva’s support of criminal prohibitions find support from W. Gunther Plaut over 40 years earlier who spoke to frequently raised concern that courts may find themselves a “sounding-board for hatred.” On the subject he explained that “I think it is essential that we trust the Court to provide proper safeguards in this regard, and past procedure gives us no reason to doubt that this will be

---

<sup>182</sup> Ibid, 314.

<sup>183</sup> Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression, and the Law of Nations*, Martinus Nijhoff Publishers: The Hague, 1998, 262.

<sup>184</sup> Samuel V. LaSelva, “Toleration Without Hate Speech: The *Keegstra* Decision, American Free Speech, Exceptionalism, and Locke’s *Letter*,” in *Canadian Journal of Political Science*, 48, 3, 2015, 708.

done.”<sup>185</sup> Unfortunately, this is not always the case. Perhaps because the tenacity and anti-Semitic nature of Holocaust denial has been underestimated in the past.

## The Deniers

Two cases on Holocaust denial stand out in Canadian jurisprudence: *R. v. Keegstra* and *R. v. Zundel*.<sup>186</sup> The two deniers faced charges from different sections of the Canadian criminal code, the former a violation of section 281.2(2), previously mentioned, and the latter section 177 for spreading false news. The two deniers met different ends with the Zundel leading to much greater controversy with respect to whether or not the courtroom presents the most appropriate place to respond to the issue.

James Keegstra was a school teacher in Eckville, Alberta who taught 9<sup>th</sup> and 12<sup>th</sup> grade social studies.<sup>187</sup> Keegstra’s anti-Semitic rhetoric was varied and his denial of the Holocaust one item on a long list of transgressions. In his classes the disparaging and hateful comments made about Jews ranged from describing them as “treacherous” and “money-loving” to calling them “child killers.” The Holocaust was but a plan “to gain sympathy.”<sup>188</sup> According to Lipstadt, Keegstra taught his students for 14 years that the Holocaust was “a hoax” without a remark against his curriculum.<sup>189</sup> On January 11, 1984 he was charged with “willfully promoting hatred against

---

<sup>185</sup> This is precisely what many contemporary critics of legal action complain of and there is considerable evidence that this has in fact happened.

W. Gunther Plaut, “Book Review: The Report of the Special Committee on Hate Propaganda in Canada,” *Osgoode Hall Law Journal*, 1967, 5,2, 317.

<sup>186</sup> *R. v. Keegstra*, 3 S.C.R. 697 (1990).

*R v Zundel*, 2 S.C.R. 731 (1992).

<sup>187</sup> Bruce P. Elman, “The Belzberg Lecture: Honouring Memory, Doing Justice: Holocaust Denial Hate Propaganda and Canadian Law,” in *The Holocaust’s Ghost: Writings on Art, Politics, Law and Education*, F.C. Decoste and Bernard Shaw (eds), Alberta Press: Alberta, 2000, 316.

<sup>188</sup> *R v. Keegstra*, Supreme Court of Canada, 1990, CarswellAlta 192.

<sup>189</sup> Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, The Free Press: New York, 1993, 160.

the Jewish people.”<sup>190</sup> Keegstra’s proceedings occurred during the same time period during Zundel’s, but finished first. The outcomes from the Keegstra trial would be cited later by the judges presiding over the final Zundel decision in 1992.

Holocaust denier Ernst Zundel was born during WWII in the village Calmbach in the Black Forest region of Germany.<sup>191</sup> At 18 years old he immigrated to Canada at 18 years old to avoid military service.<sup>192</sup> It was here, in the 1960s, that Zundel acquired the view that the Holocaust was a hoax.<sup>193</sup> “Canadian Fascist, Adrien Arcand – known as Canada’s Hitler,” introduced him to the idea, and likely it appealed to him because his “German identity” was threatened by a climate of anti-German stereotypes that prevailed in Canada at this time.<sup>194</sup> As a result of a developing anti-Semitism, Zundel further believed that the Holocaust was the result of a world Jewish conspiracy.<sup>195</sup> Ernst Zundel applied for Canadian citizenship in 1966 and was denied “without reason.” At the time of his trial he had immigrant status.<sup>196</sup> While merely speculation, Zundel’s growing anti-Semitism may have contributed to this denial.

Ernst Zundel’s public, and international, denial of the Holocaust began in the 1970s when he started his publishing business, Samisdat Publications.<sup>197</sup> Strangely, two of the three pieces he produced in this time connected the idea of UFOs with Nazis and Holocaust denial: *UFOs: Nazi*

---

<sup>190</sup> Bruce P. Elman, “The Belzberg Lecture: Honouring Memory, Doing Justice: Holocaust Denial Hate Propaganda and Canadian Law,” in *The Holocaust’s Ghost: Writings on Art, Politics, Law and Education*, 316.

<sup>191</sup> Stephen E. Atkins, *Holocaust Denial as an International Movement*, 191.

<sup>192</sup> Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zundel,” in *Patterns of Prejudice*, 34,3, 2000, 5.

<sup>193</sup> *Ibid*, 5.

<sup>194</sup> *Ibid*, 6.

Zundel speaks to his relationship with Arcand during his cross examination by Griffiths in his first trial. He described him as “one of the finest men in a regiment in Canada.”

Griffiths cross examination of Zundel, trial transcript, 4287.

*R v. Zundel*, 7 W.C.B. (1988).

<sup>195</sup> Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zundel,” 6.

<sup>196</sup> Thomas D.C.J., Judgement, in:

*R v. Zundel*, 7 W.C.B. (1988), (2d) 26, par 13.

<sup>197</sup> Zundel’s publications were distributed in the United States, West Germany, and Canada.

Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zundel,” 6.

*Secret Weapons?*<sup>198</sup> *Hitler's Secret Antarctic Bases: Nazi Super-Weapons*.<sup>199</sup> The third was more openly anti-Semitic with the title *The Hitler We Loved and Why*. Historian Richard Evans writes that “there could be no doubt as to which worlds of thought Ernst Zundel belonged to, then: unusually, perhaps, he combined in one person two of the most bizarre fantasies in modern America.”<sup>200</sup> Despite the absurd nature of the combination, Zundel likely chose the “genre” of Nazi UFOs to publish anti-Semitic materials more covertly.<sup>201</sup> In addition to his publishing business, Zundel founded two organizations that promoted Holocaust denial: the German-Jewish Historical Commission and Concerned Parents of German Dissent.<sup>202</sup>

Zundel came to the attention of the Canadian Holocaust Remembrance Association (CHRA) after his materials were found in West Germany.<sup>203</sup> The German Ministry of Interior had identified Zundel as one of the more significant suppliers of Neo-Nazi propaganda in the country.<sup>204</sup> When the Association failed to legally block Zundel from mailing abroad in 1981,<sup>205</sup> a member of the CHRA, Sabrina Citron, pursued other avenues for addressing his hate speech.<sup>206</sup> Like Mel Mermelstein in the United States, Citron was also a Holocaust survivor. In 1981 Zundel published a pamphlet titled “Did Six Million Really Die?” and one titled “The West, War and

---

<sup>198</sup> See Appendix Item 6 to view the cover of this bizarre pamphlet.

<sup>199</sup> Zundel even went so far as to advertise the selling of seats on an expedition to search for the hidden Antarctic bunkers concealing Nazi UFOS. Seats went for the hot price of \$9999.00.

“Achtung! Samisdat News Bulletin: Samisdat Hollow Earth Expedition \$9999.00 – In Search of Holes in the Poles,” in *The Nizkor Project*, 1991-2012,

<<http://www.nizkor.org/hweb/people/z/zundel-ernst/flying-saucers/expedition.html>> Accessed November 17, 2016.

<sup>200</sup> Richard J Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, New York: Basic Books, 2002, 114.

<sup>201</sup> Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zundel,” 6.

<sup>202</sup> Stephen E. Atkins, *Holocaust Denial as an International Movement*, 195.

<sup>203</sup> Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zundel,” 6.

<sup>204</sup> Stephen E. Atkins, *Holocaust Denial as an International Movement*, 191.

<sup>205</sup> Ibid, 198.

<sup>206</sup> Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in R. v. Zundel,” 6.



Islam.”<sup>207</sup> It was in response to these publications that Citron pressed charges against him on the basis of section 177 of the Canadian criminal code.<sup>208</sup> The first publication claimed that around one million Jews died as opposed to six and mostly as a result of disease. It does so by discrediting survivors and accusing Jews of “inventing the story as an excuse for extortion.”<sup>209</sup> The second asserted the existence of a Jewish conspiracy with bankers and free masons.<sup>210</sup>

Citron brought charges on the basis of section 177 which states that “Every one who willfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.”<sup>211</sup> The law originates from a few hundred years ago and was designed to allow private persons to bring complaints against the distribution of false news that they felt threatening to themselves.<sup>212</sup> While not her first choice of options, she had been informed by prosecutors that it was the only route available.<sup>213</sup> She had originally petitioned Attorney General McMurty to bring charges under section 281.2, the charges faced by Keegstra, but at this time it was commonly believed that the success of a 281.2 charge was unlikely.<sup>214</sup> Citron

---

<sup>207</sup> Zundel’s defense lawyer, Douglas Christie, explained at the start of the trial that Zundel admits to writing *War the West and Islam*, and “that he sent it to certain specific people.” The contention being that this did not constitute publication.

*R. v. Zundel*, District Court of Ontario, 1985, Trial Transcript, 3.

<sup>208</sup> Stephen E. Atkins, *Holocaust Denial as an International Movement*, 196.

Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in *R. v. Zundel*,” 6

<sup>209</sup> H.R.S. Ryan, “The Trial of Zundel: Freedom of Expression and Criminal Law,” in *Criminal Reports - Articles*, 44,334, 1985, 2.

<sup>210</sup> *Ibid*, 1.

<sup>211</sup> Justice McLachlin, Majority Decision in:

*R v Zundel*, 2 S.C.R. 731 (1992).

<sup>212</sup> Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in *R. v. Zundel*,” 6.

<sup>213</sup> .R.S. Ryan, “The Trial of Zundel: Freedom of Expression and Criminal Law,” 2.

<sup>214</sup> Ryan explains that Attorney General McMurty might have had concerns over Zundel’s intentions, that he might argue his purpose was not to target the Jewish people but to “clear the name” of the German people. He may also have been worried about interpretation of the law since it had only been used once and the case was at the time under appeal. R.S. Ryan, “The Trial of Zundel: Freedom of Expression and Criminal Law,” 4.

actually convinced a justice of the peace to issue a warrant for Zundel for the offence of spreading false news at which point the Attorney General had little choice but to proceed.<sup>215</sup>

## The Case

The Zundel case, like the events surrounding the Mermelstein case, was long and drawn out with a total of three appeals, two retrials, and one Supreme Court decision. Even though both involved a Holocaust survivor, the Zundel case did not turn into a personal battle between the two parties, likely because Zundel was a criminal trial rather than a civil one. The original case was heard in 1985 when Zundel was found guilty and sentenced to 15 months prison.<sup>216</sup> As far as effectively dealing with Holocaust denial in the court room, this case fared poorly. Between the sensational media coverage and the long drawn out presentations of historical fact, Zundel actually received quite the opportunity to galvanize other Holocaust deniers and further spread his agenda to the public. Zundel would actually arrive to his trial in a bullet proof vest and blue hard hat and his supporters could be identified by their yellow hard hats.<sup>217</sup> As such, the *Zundel* case represents a critical example of how the criminalization of Holocaust denial can inappropriately facilitate historical debate and provide a highly public venue for deniers to share their views.

Prosecuting attorney Griffiths' stance on the issues of the trial are somewhat peculiar. He explains that "the first non-issue, I would suggest, in this trial, is freedom of expression," and that "the Holocaust at large and the persecution of those who deny the Holocaust are not issues in this trial."<sup>218</sup> He instead points to four questions as the main issues. He asks whether or not the

---

<sup>215</sup> Ibid, 4.

<sup>216</sup> Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, The Free Press: New York, 1993, 159.

<sup>217</sup> Manuel Prutschi, "The Zündel Affair," in *The Nizkor Project*, 1996  
<<http://www.nizkor.org/hweb/people/p/prutschi-manuel/zundel-affair/za-02.html>> Accessed November 22, 2016.

<sup>218</sup> Griffith's address to the Jury, trial transcript, 4617.  
*R v. Zundel*, 7 W.C.B. (1988).

publication of Zundel's pamphlet was intentional, whether the information contained in the pamphlet is true, whether or not Zundel knew at the time of publication that this information was not true, and exactly what "mischief or injury" was caused by the dissemination of this pamphlet.<sup>219</sup> Griffiths hoped to get away from the common denier claim of persecution and international conspiracy, to avoid the validation of a martyr whose Charter right to free expression was violated. Throughout the course of the trial, however, it felt most like the Holocaust itself was the issue at hand.

A clear reason for this settled on the fact that the Crown had to prove that Zundel knowingly published false news.<sup>220</sup> The prosecution had to prove this beyond a reasonable doubt along with the fact that they were "likely to cause injury or mischief to a public interest by causing racial or religious intolerance."<sup>221</sup> The pamphlet "War, the West and Islam," took second stage to "Did Six Million Really Die," and the majority of evidence heard had to do with facts of the Holocaust.<sup>222</sup> The prosecutor called mostly Holocaust survivors for witnesses along with Holocaust historian Raul Hilberg. On the other side, the defense called witnesses like Holocaust denier Robert Faurisson, a member of the Institute for Historical Review, Ditlieb Felderer, and James Keegstra.<sup>223</sup> This line up clearly pits denier against legitimate witnesses and historians and the appearance risks validating the debate. The defense would assert that their lineup influenced and

---

<sup>219</sup> Ibid, 4617.

<sup>220</sup> Douglas Christie, trial transcript, 4, *R v. Zundel*, 7 W.C.B. (1988).

<sup>221</sup> R.S. Ryan, "The Trial of Zundel: Freedom of Expression and Criminal Law," 5.

<sup>222</sup> Ibid, 5.

<sup>223</sup> Robert Kahn, "Rebuttal versus Unmasking: Legal Strategy in *R. v. Zundel*," 7. Keegstra testified to support claims a state sponsored silencing of Holocaust deniers. Griffiths closing remarks to the jury, trial transcript, 4632, *R v. Zundel*, 7 W.C.B. (1988).

convinced Zundel to adopt his views. The prosecution would assert that “this is as pathetic a band of crazies and misfits, frustrated men, as have ever graced a courtroom.”<sup>224</sup>

Like in the *Mermelstein* case, the issue of judicial notice arose in the first case. If Griffiths had succeeded in convincing Judge Locke to take judicial notice, the debate on whether or not the Holocaust happened would not have played out in court. In this case, Judge Hugh Lock, after some debate, decided taking judicial notice would compromise legal fairness.<sup>225</sup> Since he was charged with spreading false news, judicial notice on the Holocaust was akin to passing judgement on the case and Judge Lock feared this might prejudice the jury against the defendant.<sup>226</sup>

Because Judge Lock did not establish the Holocaust as a legally indisputable fact, the defense could and did question almost every aspect of the Holocaust. Raul Hilberg underwent a provoking cross examination by Christie.<sup>227</sup> In the following exchange Christie provokes Hilberg by seriously questioning his authority as a historian and his ability to draw reasonable conclusions:

Q. The words you read from the report were "relocated" - right?

A. That's correct. Yes, that is the correct ....

Q. Now, that doesn't say, it doesn't indicate an intention to annihilate, to me. Does it to you?

A. Yes. That is the difference between us, you see, because I have read thousands of German documents and. you haven't.

Q. Sure. And you have the view that to relocate, in the German language, is to annihilate.

A. No. No.

Q. No?

A. It means to relocate in certain contexts.

Q. And you alone know the context?

A. I am not alone in knowing the context. I have mentioned colleagues and fellow workers who know the context also.<sup>228</sup>

---

<sup>224</sup> Griffiths closing remarks to the jury, trial transcript, 4655,

*R v. Zundel*, 7 W.C.B. (1988).

<sup>225</sup> Robert Kahn, *Holocaust Denial and the Law: A Comparative Study*, Palgrave MacMillan: New York, 2004, 1.

<sup>226</sup> *Ibid*, 1.

<sup>227</sup> This youtube video compiled various Canadian public television broadcast footage covering Christie's cross examination of Hilberg and demonstrates how discussing the historicity of the Holocaust in a court of law can create doubt and confusion in the public.

< <https://www.youtube.com/watch?v=24gDVNXDwTo> > Accessed November 22, 2016.

<sup>228</sup> Christie's cross examination of witness Raul Hilberg, Trial Transcript, 796.

*R v. Zundel*, 7 W.C.B. (1988).

Christie seemed to spin clear statements Hilberg made on German language translations on specific words, especially those words used by the Nazis to order the mass murder of Jews.

The prosecuting attorney, Griffins, repeatedly found himself refuting the credibility of the defenses' historical claims. For example, in his closing address Griffins devotes time to reassuring the jury that the historical evidence of the Einsatzgruppen exterminations of around 1 million Jews is in fact sound and well supported by historians. He says, in his rambling and somewhat inarticulate manner:

Exhibit 1 next deals with the Einsatzgruppen, and you remember those are the four battalions, three thousand men each, on the Eastern front, that were charged with the responsibility for shooting Jewish Bolshevik Commissars, I think was the phrase, and the article says that there is no statistical basis for the figures of a million - I think Dr. Hilberg said 1.4 million people shot, mass shootings by that action. The article says no statistical basis for that. Well, I suggest to you that there is evidence before you from - again from Dr. Hilberg that there were daily reports that were sent in to Berlin setting out, in detail, the numbers of Jewish dead, statistically. Those daily reports written by the Nazis. Dr. Hilberg's evidence is the only evidence you have on that, because Dr. Faurisson said that, although he was familiar with those things, he'd read them and seen them, he didn't care to comment on them until the revision answer to him had come out, the official version - not exactly an independent thinker, Dr. Faurisson. In any event, Dr. Hilberg's figures on the death by mass shooting of Einsatz-gruppen is uncontradicted - 1.4 million - and it forms a part, a significant part of the total number of dead from the Holocaust that he attributed at about 5.1 million.<sup>229</sup>

Not only was this extremely tedious, it did not stop with facts and figures. Zundel's council also took it upon itself to call into question witness accounts given by Holocaust survivors.

The following exchange took place as Christie cross examined Holocaust survivor Dr.

Vrba:

Q. MR. CHRISTIE: I think, Dr. Vrba, you were telling us why you were of exceptional value that you should have been given a surgical operation to save your life.

A. I am quite sure I didn't tell it in those words.

Q. No. I asked in those words. I suggested to you that that could be the only explanation why you would be saved and given a surgical Operation and nobody else, and everybody else be killed when they are sick.<sup>230</sup>

<sup>229</sup> R v. Zundel, court transcript, January 7, 1985, 4629-4630

<sup>230</sup> Christie's cross examination of witness Vrba, Trial Transcript, 1461.  
*R v. Zundel*, 7 W.C.B. (1988).

It hardly bares writing on the insensitivity that possessed Christie to ask a survivor why he was “special” for having survived. Dr. Vrba’s tone demonstrates, in the very least, his frustration. Unfortunately, Dr. Vrba spent multiple days on the stand during his cross examination and addressed more than one offensive scenario. Equally outrageous is the following question posed by Christie on whether or not internees played sports in the camps:

Q. Nobody ever played sports there?

A. Not to my knowledge.

Q. You deny that other survivors have said they've played sports there?

A. Not to me, but it is quite possible that some of them did play sports.

Q. Right beside the crematoria,' in fact. I put it to you ---

A. I don't have that information.

Q. You don't have that information.

A. No.

Q. I put it to you that the reason for those crematoria was to deal with the bodies of people who had died from typhus.

A. This is ridiculous.

Q. what?

A. This is a ridiculous statement.<sup>231</sup>

In response to this treatment, Griffiths could do very little. In his closing remarks, however, he emphasizes the trustworthiness and sincerity of those heard and the realness of their pain, saying that “each and everyone of those men is worthy of your belief. Their testimony is worthy of your belief.”<sup>232</sup> Had Griffiths strategy been more focused on presenting Zundel’s anti-Semitic motivations than on addressing the content of the pamphlets, it is very likely that the Holocaust would not have “been on trial” so to speak.<sup>233</sup>

On February 28, 1985 the Jury found Zundel guilty on one charge of spreading false news for “Did Six Million die?”<sup>234</sup> At sentencing Judge Locke declared:

You will be sentenced to imprisonment for nine months. I don’t intend to impose any terms of probation. I don’t intend to require you to perform any community service. I simply say to you that it may be that you wish to be a martyr, and I was tempted to frustrate you in

<sup>231</sup> Ibid, 1549.

<sup>232</sup> Griffiths closing remarks to the jury, trial transcript, 4632.

*R v. Zundel*, 7 W.C.B. (1988).

<sup>233</sup> Robert Kahn, “Rebuttal versus Unmasking: Legal Strategy in *R. v. Zundel*,” 10.

<sup>234</sup> Manuel Prutschi, “The Zündel Affair.”

that purpose that you have, but I am required to send a message to any other persons like yourself that this community won't tolerate hate mongers. You'll be sentenced to nine months with no other additional penalty. Remove the accused.<sup>235</sup>

Locke's sentencing likely makes many pro speech activists cringe at first glance. The chilling effect that could carry over to others in society causes pause. But Locke likely sought to promote the idea "that it is not in the public interest to have one segment of the community racially or religiously intolerant against another segment of the community. In essence, an attack on one segment of the community is an attack on the whole community."<sup>236</sup>

Zundel appealed the decision and in 1987 the Ontario Court of Appeals granted a retrial on procedural grounds. Specifically, it questioned the admissibility of evidence, the jury selection, and the manner in which Judge Locke handled judicial notice.<sup>237</sup> The retrial began in January of 1988. As is often the case, the new cast of prosecuting attorney and judge had learned a few things from the first go. Prosecuting attorney John Pearson decided to focus his strategy away from the Holocaust itself, and more on the man Zundel.<sup>238</sup> Unlike the first time around, the judge did take judicial notice, but only in the broadest terms of the "historical character of the mass murders," which still allowed for the defense to call into question key aspects of the Holocaust.<sup>239</sup> Of especial note, Pearson determined not to call survivors to the witness stand.<sup>240</sup> This decision prevented a round two of troubling attacks on survivor's character by the defense.

Another difference of note concerns the prosecutor's expert witness. Raul Hilberg declined to appear a second time and in his stead his past student Christopher Browning testified. Holocaust

---

<sup>235</sup> Thomas D.C.J., Judgement, 26, par 20, *R v. Zundel*, 7 W.C.B. (1988).

<sup>236</sup> Thomas D.C.J., Judgement, 26, par 4, *R v. Zundel*, 7 W.C.B. (1988).

<sup>237</sup> Robert Kahn, "Rebuttal versus Unmasking: Legal Strategy in *R. v. Zundel*," 7.

<sup>238</sup> *Ibid*, 13.

<sup>239</sup> Manuel Prutschi, "The Zündel Affair."

<sup>240</sup> *Ibid*.

denier Robert Faurisson accuses Hilberg of cowardice and an inability to stand up to another cross examination.<sup>241</sup> As previously discussed, Hilberg's cross examination was far from pleasant in the original trial. His reluctance to appear once more, however, likely had much more to do with the fact that the defense likely would have spent an inordinate amount of time comparing testimony between the two trials and making a huge deal out of any perceived discrepancies. Hilberg's evidence from the original trial was admitted into the second trial and its legitimacy is not in question by anyone other than Holocaust deniers.<sup>242</sup> In 1990 Zundel was once more convicted, this time sentenced to nine months prison time.<sup>243</sup> Zundel once more appeal, this time was to the Canadian Supreme Court who heard the case in 1992.<sup>244</sup>

The Supreme Court found in Zundel's favor. The majority opinion expressed concerns on the chilling effect the false news law could potentially have on free speech, and stated that the objective of the law was too broad "and more invasive than necessary" to achieve its proposed aim of "social harmony."<sup>245</sup> Further, the opinion states that "The criterion of falsity falls short of this certainty, given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity."<sup>246</sup> The dissenting opinion took the opposite view in that it found the false news law, while it violated the Charter under section 2(b), was sufficiently precise and justified. The opinion pointed to three sections in the Charter that counterbalance the right to

---

<sup>241</sup> Robert Faurisson, "The Zündel Trials (1985) (1988)," in *The Institute for Historical Review*, 1988 <[http://www.ihr.org/jhr/v08/v08p417\\_faurisson.html](http://www.ihr.org/jhr/v08/v08p417_faurisson.html)> Accessed November 19, 2016.

<sup>242</sup> Manuel Prutschi, "The Zündel Affair."

<sup>243</sup> Ibid.

<sup>244</sup> *R v Zundel*, 2 S.C.R. 731 (1992).

<sup>245</sup> La Forest, L'Heureux-Dubé, Sopinka and McLachlin JJ, Majority opinion *R v Zundel*, 2 S.C.R. 731 (1992).

<sup>246</sup> Ibid.



free speech.<sup>247</sup> Their main point was that democracy is more than freedom and entails a “community committed to equality, liberty and human dignity.”<sup>248</sup>

Two key points resulted from the Supreme Court’s decision. First, a false statement framed as satire is protected speech under the Charter, section 2(b), and second, section 181 of the criminal code is unconstitutional given that punishments are not proportionate to the danger produced from violations.<sup>249</sup> It is easy to contemplate how different Zundel’s fate may have been had he been charged for hate speech rather than spreading false news. Some, at least, that had he been charged under the hate speech section of the criminal code he would have been sentenced to prison without successful appeal.<sup>250</sup>

The initial hesitancy of the district attorney to bring charges against Zundel speaks to the uncertainty around prosecutions limiting freedom of speech. Some scholars and lawyers encourage such prosecutions, finding them essential tools for combatting extremism.<sup>251</sup> Unfortunately, prosecutions can also serve as an international rallying point for Holocaust deniers as well as sway those on the fence. Both Fred Leuchter and David Irving came into the pseudo field as a result of

---

<sup>247</sup> Section 7: right to security of person; section 15(1): “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”; Section 27: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

The Canadian Charter of Rights and Freedoms.

Gronthier, Cory, Iacobucci, Dissenting judgement in:

*R v Zundel*, 2 S.C.R. 731 (1992).

<sup>248</sup> Gronthier, Cory, Iacobucci, Dissenting judgement in:

*R v Zundel*, 2 S.C.R. 731 (1992).

<sup>249</sup> Law Commission of Canada (ed), *What is a Crime? Defining Criminal Conduct in Contemporary Society*, UBC Press: Vancouver, 2004, 139.

<sup>250</sup> Mark Sandler, “Dr. Bernie Vigod Memorial Lecture: Hate Crimes and Hate Group Activity in Canada,” in *University of New Brunswick Law Journal*, 43, 269, 1994, 5.

<sup>251</sup> Mark Sandler, “Dr. Bernie Vigod Memorial Lecture: Hate Crimes and Hate Group Activity in Canada,” 1, 5. Bruce P. Elman, “The Belzberg Lecture: Honouring Memory, Doing Justice. Holocaust Denial, Hate Propaganda and Canadian Law,” F.C. Decoste and Bernard Schwartz (eds), *The Holocaust’s Ghost: Writings on Art, Politics, Law and Education*, The University of Alberta Press: Alberta, 2000, 320.

the trial.<sup>252</sup> Furthermore, the sensationalism of a trial is simply absent from the strategy of public education.

## Reflections

Following the final trial, Zundel faced more challenges. His troubles include the firebombing of his house, causing damages at just under half a million dollars, an investigation by the Canadian Human Rights Commission on his use of the internet to spread hate, deportation to Germany, and a conviction in Germany for hate speech with a five year prison sentence.<sup>253</sup> Among other comments he made at to a group of supporters at his release, Zundel said “It’s kind of a sad situation; there’s a lot to say. I’ll certainly be careful not to offend anyone and their draconian laws”<sup>254</sup> On the one hand Zundel still has supporters and his beliefs remain. On the other hand, and if he can be believed, he intends to keep silent into the future on them. Holocaust survivor and witness in Zundel’s initial trial, Friedman, informed a Toronto paper in frustration that “They

---

<sup>252</sup> In a 2000 documentary on Leuchter’s rise to notoriety, Zundel speaks to how Leuchter entered the Holocaust denial world, going to the extreme of saying “Fred Leuchter was our only hope.”

Morris, Errol (director). *Mr. Death: The Rise and Fall of Fred A. Leuchter Jr.* Channel Four Films: United Kingdom, January 14, 2000, 00:30:30.

While Faurisson’s article gloats over David Irving’s “conversion” to Holocaust denial in typical denialist fashion, it is true that Irving’s testimony in the second Zundel trial is his first publicly made statement indicating he had changed his mind.

Robert Faurisson, “The Zündel Trials (1985) (1988),” in *The Institute for Historical Review*, 1988 <[http://www.ihr.org/jhr/v08/v08p417\\_faurisson.html](http://www.ihr.org/jhr/v08/v08p417_faurisson.html)> Accessed November 19, 2016.

Finally, the Anti Defamation League also points to the Zundel trial as David Irving’s turning point.

“David Irving,” in *Extremism in America*, Anti-Defamation League, 2005

<[http://archive.adl.org/learn/ext\\_us/irving.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=2&item=irving](http://archive.adl.org/learn/ext_us/irving.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=2&item=irving)> Accessed November 20, 2016.

<sup>253</sup> Zundel married an American woman and moved to the US in 2000. The US deported him to Canada in 2003 for overstaying his visa. Canada then deported him to Germany as a national security risk.

See Appendix, Item 5 for image of Zundel leaving court in Germany.

Peter Cheney, “Zundel verdict satisfies camp survivor,” in *The Toronto Globe and Mail*, February 16, 2017, <<http://www.theglobeandmail.com/news/world/zundel-verdict-satisfies-camp-survivor/article679555/>> Accessed November 19, 2016.

<sup>254</sup> The Associated Press, “Holocaust denier Zundel released from German prison,” in *CTV News*, March 1, 2010 <<http://www.ctvnews.ca/holocaust-denier-zundel-released-from-german-prison-1.487540>> Accessed November 19, 2016.

should lock him in a mental institution. Even after all this he's still yelling that it didn't happen."<sup>255</sup> Still, Zundel has managed to stay out of the paper since his 2010 release.

Claims that "the fact that Holocaust deniers have lost most of their court cases has turned them into martyrs to Holocaust deniers the world over"<sup>256</sup> are not completely unfounded. As was shown in the Mermelstein case, deniers commented on and spun the trials to their advantage. Robert Faurisson, for example, published an article on the Institute for Historical Review's website that summarized two of the Zundel trials and disparaged the prosecutor's witnesses as well as the judges.<sup>257</sup>

Canada strongly supports Holocaust education in its schools where the subject is mandatory, included in social studies and sometimes language arts classes.<sup>258</sup> Students are exposed to the subject multiple times throughout their education, be it formally through class curriculum or through community wide recognition of Remembrance Day.<sup>259</sup> Canadian Holocaust Memorial Day resulted from a 2003 Act of Parliament and has occurred yearly since 2004 with the purpose of commemorating "the deaths of millions of Jews and others who perished as a result of a policy of hatred and genocide during the Second World War."<sup>260</sup> Ultimately, by the age of ten to twelve, students have been taught in some capacity about the Holocaust.<sup>261</sup> Even with all of this, some Canadians still fear that deniers have a "support base."<sup>262</sup> It seems unlikely that the issue of denial

---

<sup>255</sup> Peter Cheney, "Zundel verdict satisfies camp survivor," in *The Toronto Globe and Mail*, February 16, 2017, <<http://www.theglobeandmail.com/news/world/zundel-verdict-satisfies-camp-survivor/article679555/>> Accessed November 19, 2016.

Christie cross examination of Friedman, trial transcript, 355, *R v. Zundel*, 7 W.C.B. (1988).

<sup>256</sup> Stephen E. Atkins, *Holocaust Denial as an International Movement*, 193.

<sup>257</sup> Robert Faurisson, "The Zündel Trials (1985) (1988)," in *The Institute for Historical Review*, 1988 <[http://www.ihr.org/jhr/v08/v08p417\\_faurisson.html](http://www.ihr.org/jhr/v08/v08p417_faurisson.html)> Accessed November 19, 2016.

<sup>258</sup> *Task Force for International Cooperation on Holocaust Education, Remembrance, and Research: Canada*, 28.

<sup>259</sup> *Ibid*, 32.

<sup>260</sup> *Ibid*, 38.

<sup>261</sup> *Ibid*, 32.

<sup>262</sup> *Ibid*, 25.

in Canadian society will disappear any time soon. A policy of public education that aggressively discusses anti-Semitism and the ways Holocaust denial fit under this category might go a long way toward easing this concern.

## CHAPTER 4: HOLOCAUST DENIAL IN THE UNITED KINGDOM

The most high profile Holocaust denial case in the United Kingdom was self-initiated by the denier himself. It stands apart from the previously discussed cases because of this, but also because it is widely recognized as a clear victory against Holocaust denial. Likely the most high profile of the cases, it has been the subject of numerous books and now a film.

### The Law

The United Kingdom has strong laws on hate speech that include the distribution of material intending to spread hate toward particular racial groups.<sup>263</sup> The United Kingdom has strengthened its approach to hate speech since the 1960s. In 1965 the British Race Relations Act prohibited discrimination “on the ‘grounds of colour, race, or ethnic or national origins’ in public places and covers both British residents and overseas visitors” but received quite a bit of criticisms from anti-racism groups.<sup>264</sup> The Race Relations Board, a body resulting from the act a year later, called for the inclusion of housing, employment, and financial institutions. The first two measures were added to the act in 1968 and by 1976 direct and indirect discrimination were included and the Commission for Racial Equality was established.<sup>265</sup> By the 1980s, the Jewish people were

---

<sup>263</sup> Dan Cohn-Sherbok, “Neo-Nazism, Holocaust Denial, and UK Law,” in *European Judaism*, 43, 1, 2010, 114.

<sup>264</sup> “1965 New UK race law ‘not tough enough,’” in *On this Day: 1950-2005*, BBC News, <[http://news.bbc.co.uk/onthistday/hi/dates/stories/december/8/newsid\\_4457000/4457112.stm](http://news.bbc.co.uk/onthistday/hi/dates/stories/december/8/newsid_4457000/4457112.stm)> Accessed October 9, 2016.

<sup>265</sup> Ibid.

protected by these measures.<sup>266</sup> Further developments in the 1990s in the Public Order Act of 1994 and the Crime and Disorder Act of 1998 made it possible for the police to arrest those responsible for distributing material that incites hatred and to arrest those responsible for “racially motivated public-order offences” without a warrant<sup>267</sup>

Lady Jane Birdwood’s conviction in 1991 and 1994 for her racist literature demonstrated that these laws had teeth.<sup>268</sup> Prominent among her many racist views was her denial of the Holocaust. She was known to insist that the Jews died of typhoid and made such statements as “it’s their Holocaust. Why do they have to bother us with it?”<sup>269</sup> Combat 18 and the National Front were also affected by these laws which Michael Whine states “effectively put a stop for some years to the widespread dissemination of Holocaust-denial material in Britain by the far Right.”<sup>270</sup> Based on these laws, UK courts prosecuted Holocaust denial literature. Apparently, the lack of specific measures against Holocaust denial did not create significant barriers.<sup>271</sup>

A more recent development came in Section 29C of the Racial and Religious Hatred Act of 2006 that deals with the publication and distribution of written material. Publications must be threatening in nature to be criminal.<sup>272</sup> The Act is also very careful to make note of protecting freedom of expression. Section 29J states that:

Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or Racial and Religious Hatred against persons on religious

---

<sup>266</sup> Erik Bleich writes that this originated from the case of *Mandla v. Dowell Lee* (1983) 2 AC 548 (HL).

Erik Bleich, *The Freedom to be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford Scholarship Online, 2011, oce24.

<sup>267</sup> Michael Whine, “Expanding Holocaust Denial and Legislation Against it,” in *Extreme Speech and Democracy*, Ivan Hare and James Weinstein (eds), Oxford Scholarship Online, 2009, 539.

<sup>268</sup> “The Dowager Lady Birdwood,” in *The Telegraph*, June 29, 2000  
<<http://www.telegraph.co.uk/news/obituaries/1345459/The-Dowager-Lady-Birdwood.html>> Accessed November 20, 2016.

<sup>269</sup> Ibid.

<sup>270</sup> Michael Whine, “Expanding Holocaust Denial and Legislation Against it,” 539.

<sup>271</sup> Ibid, 539.

<sup>272</sup> Racial and Religious Hatred Act 2006, 29C, 3,4.

grounds urging adherents of a different religion or belief system to cease practising their religion or belief system.<sup>273</sup>

The Racial and Religious Hatred Act, therefore, is unlikely to successfully silence Holocaust denial, which due to its nature does not come across as particularly threatening and rather contributes in a more insidious way to extremist views.

While the UK lacks specific legislation against Holocaust denial, the European Union does provide legal guidance on the issue. Given Brexit, a look at the 2008 Council of the European Union Framework on Combatting Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law, may seem somewhat pointless. European Union laws, however, will remain in effect until the Brexit negotiations are complete.<sup>274</sup> Article 1 calls for the criminalization of “intentional conduct” that, under point (c), fits the following criteria:

publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;<sup>275</sup>

Point (d) more specifically alludes to the Holocaust:

publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.<sup>276</sup>

The United Kingdom has yet to implement a law from this recommendation. Exiting the European Union need not mean every aspect of previous cooperation be discarded and perhaps in the future a law like this may come about.

---

<sup>273</sup> Racial and Religious Hatred Act 2006, 29J, 6,7.

<sup>274</sup> Andy McSmith, “15 EU Laws and Regulations we will Miss in post-Brexit UK,” in *The Independent*, June 25, 2016 <<http://www.independent.co.uk/news/uk/politics/brexit-15-eu-laws-we-will-miss-in-britain-a7103031.html>> Accessed October 9, 2016.

<sup>275</sup> Council Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by means of criminal law, in *Official Journal of the European Union*, 328, 2008, 56, Article 1 (c).

<sup>276</sup> *Ibid*, 56 Article 1 (2).

It may also not be needed. In 2009 Stephen Whittle & Simon Sheppard were convicted in the United Kingdom for inciting racial hatred.<sup>277</sup> The pair had published a series of offensive images hateful of ethnic minorities, including graphic photos of murdered Jews.<sup>278</sup> They first drew the attention of authorities after distributing an anti-Semitic comic titled “Tales of the Holohoax.”<sup>279</sup> The prosecuting attorney explained how “The general theme of the article was that Auschwitz-Birkenau was in fact a holiday camp provided by the Nazi regime. A constant theme was that the Jewish people had made up the story of the Holocaust as a slur on the German people.”<sup>280</sup> In this case, however Whittle and Sheppard disseminated more than Holocaust denial propaganda. It is likely that because this material was accompanied by much more overtly shocking statements and themes that they faced the charges they did. Their case was quite sensational, mostly due to the fact that the pair skipped out on bail and fled to the United States where they, unsuccessfully, claimed they were persecuted on political grounds.<sup>281</sup> Naturally, fellow Holocaust deniers who use their prosecution as another case of so called persecution have embraced them.<sup>282</sup>

---

<sup>277</sup> Matthew Taylor, “British extremists who fled to US jailed for inciting racial hatred online,” in *The Guardian*, July 10, 2009, <<https://www.theguardian.com/world/2009/jul/10/first-racial-hatred-online-conviction>> Accessed July 21, 2016.

<sup>278</sup> Ibid.

<sup>279</sup> See Appendix, Item 6 to view front page of the comic.

Ibid.

<sup>280</sup> Ibid.

<sup>281</sup> Ibid.

<sup>282</sup> Mark Weber, who testified in the second Zundel trial for the defense and who has directed the Institute for Historical Review since 1991, devotes considerable time “analyzing” the comic and justifying its publication. He writes “The obvious main purpose of this booklet is to discredit the generally-accepted Holocaust story of the systematic killing of some six million European Jews during World War II, or at least on some aspects of it. A notice at the top of the booklet’s front cover, ‘A Journal of Satire,’ serves as a disclaimer, warning the reader that this is not to be regarded as a scholarly publication. Adding to its obviously polemical and satirical character is the booklet’s ‘comic book’ format and irreverent title.” He goes on to assert that even though he has not checked *all* of the endnotes, the citations are accurate throughout.

Mark Weber, “‘Tales of the Holohoax,’: a Historian’s Assessment,” in *the Heretical Press*, <<http://www.heretical.com/holofun/weberep2.html>> Accessed November 22, 2016.

Despite successful prosecution of deniers in UK courts, at present time Holocaust publications do originate out of the UK.<sup>283</sup> Perhaps, as happened in the case of Zundel, a concerned person must bring the existence of such material to the attention of authorities in order to instigate proceedings, or perhaps some other event or circumstance is necessary to bring the distribution of such material into the public eye.

## The Denier

When deniers present their views in dryer, more academic formats, as opposed to eye catching comics for example, they receive less notice. David Irving would probably have never found himself in a British court room had he not instigated the affair himself.

Despite no formal training as a historian,<sup>284</sup> David Irving produced historical books at a prolific rate and spent years in various archives.<sup>285</sup> Irving himself admitted that “History was the only subject I flunked when I was in school” while insisting that his lack of a degree in the field hardly disqualified him from professionally pursuing history.<sup>286</sup> Peter Hoffmann, like many

---

<sup>283</sup> Germar Rudolf, *Fail: “Denying the Holocaust,” How Deborah Lipstadt Botched her Attempt to Demonstrate the Growing Assault on Truth and Memory*, Castle Hill Publishers: Uckfield, September 2016.

Kollerstrom, Nicholas. *Breaking the Spell: The Holocaust: Myth and Reality (Holocaust Handbooks) (Volume 31)*, Castle Hill Publishers: Uckfield, United Kingdom, 2014.

<sup>284</sup> According to the Southern Poverty Law Center’s brief of Irving, he attended classes at Imperial College in London and gained his initial experience as a writer in journalism.

“David Irving,” in *Extremist Files*, Southern Poverty Law Center, Montgomery, Alabama, <<https://www.splcenter.org/fighting-hate/extremist-files/individual/david-irving>> Accessed October 4, 2016.

According to the Anti-Defamation League Irving pursued a physics degree at Imperial college and later returned to school for a couple of years at University College, London, but again decided not to complete his degree.

“David Irving,” *The Anti-Defamation League*, 2005

<[http://archive.adl.org/learn/ext\\_us/irving.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism in America&xpicked=2&item=irving](http://archive.adl.org/learn/ext_us/irving.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=2&item=irving)> Accessed October 4, 2016.

<sup>285</sup> Some titles by Irving are: *The Destruction of Dresden* (1963), *The Mare’s Nest* (1964), *The Virus House* (1967), *The Destruction of Convoy PQ17, and the Accident – The Death of General Sikorski* (1967), *Hitler’s War* (1977), *The Trail of the Fox* (1977), *The War Path* (1978), *The War Between Generals* (1981), *Uprising!* (1981), *Churchill’s War* (1987), *Rudolf Hess: The Missing Years* (1987), *Göring: A Biography* (1989), *Goebbels: Mastermind of the Third Reich* (1996).

Richard J. Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, New York: Basic Books, 2002, 4-5.

<sup>286</sup> Irving is quoted from a speech he gave at the Elangani Hotel in Durban South Africa in 1986.

Richard J. Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, 5.



reviewers of Irving's works, acknowledged his skills as a researcher but deplored his interpretation and consistent bias. In 1989 Hoffman lamented how "It is unfortunate that Mr. Irving wastes his extraordinary talents as a researcher and writer on trivializing the greatest crimes in German history, on manipulating historical sources and on highlighting the theatrics of the Nazi era."<sup>287</sup> Irving, impossible to ignore, was mostly acknowledged in a sort of grudging, reluctant manner. But as Erik Bleich explains, "David Irving is emblematic of the trend toward enforcing Holocaust denial laws principally because his personal history has taken him from moderately respected amateur historian to the principle spokesman for challenging the Holocaust."<sup>288</sup> And in fact, as his anti-Semitic views became increasingly public, what credibility he had possessed quickly deteriorated. A series of legal problems in the 1990s met an interesting turn of events when he sued Professor Deborah Lipstadt and Penguin Ltd. in 1996 for her 1993 book *Denying the Holocaust: The Growing Assault on Truth and Memory*. As a result of the resulting trial, he was soundly ousted as Holocaust denier and frankly a sorry excuse for a historian.<sup>289</sup>

---

<sup>287</sup> Quoted in Evan's book, Hoffmann's full review can be read online in the *New York Times*.

Richard J. Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, 9.

Peter Hoffmann, "Hitler's Good Right Arm," May 28, 1989, < <http://www.nytimes.com/1989/05/28/books/hitler-s-good-right-arm.html?pagewanted=all> > Accessed October 4, 2016.

<sup>288</sup> Erik Bleich, *The Freedom to be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford Scholarship Online, 2011, 51.

<sup>289</sup> In 1983 he was arrested and deported from Austria, in the early 1990s Irving was convicted in Germany for "insulting the memory of the dead," and banned from entering Germany, Canada, and Austria.

Richard J. Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, 14.

Irving would continue to deal with serious legal problems connected to his denial of the Holocaust. In 2006 he was sentenced to three years prison by a Vienna court for denying the Holocaust.

Staff and agencies, "David Irving jailed for Holocaust denial," *The Guardian*, February 20, 2006,

<<https://www.theguardian.com/world/2006/feb/20/austria.thefarright>> Accessed October 22, 2016.

Irving spent over 13 months in jail before his early release in December of 2006.

Mark Oliver and agencies, "Irving shows little remorse on return to UK," *The Guardian*, December 22, 2006,

<<https://www.theguardian.com/uk/2006/dec/22/thefarright.austria>> Accessed October 22, 2016.

## The Case

Deborah Lipstadt grew up in a traditional Jewish family that encouraged education and strong ties to the Jewish community and culture.<sup>290</sup> Growing up, her family rarely spoke of the Holocaust and her education in the Jewish schools she attended provided a limited look at the genocide.<sup>291</sup> As an undergraduate student she traveled to Jerusalem to study for a time at the Hebrew University. It was in this period of her life that she began to focus her studies on the Holocaust.<sup>292</sup> She began her career as a professor of Jewish studies at University of Washington while completing her PhD. After teaching at various universities she found herself at Emory University in Atlanta Georgia. Here she taught in the Department of Religion on the subject of “modern Jewish experience with particular emphasis on the Holocaust.”<sup>293</sup> During her time at Emory, Lipstadt received multiple teaching awards and was highly regarded by students and faculty.<sup>294</sup> In addition to her academic career, Lipstadt received a presidential appointment to the United States Holocaust Memorial Council, worked on the United States Department of State Advisory Committee on Religious Freedom Abroad, worked closely on the development and running of the United States Holocaust Memorial Museum, and actively participated as a member of the American Jewish community.<sup>295</sup>

All this is to say, Deborah Lipstadt is a highly regarded and respected professional in the field of Jewish studies and there was no reason at the time of her writing and publishing of *Denying the Holocaust: the Growing Assault on Truth and Memory* to think that she would be facing any sort of legal trouble as a result of this book. Lipstadt’s book provides a history of Holocaust denial,

---

<sup>290</sup> Deborah Lipstadt, “Witness Statement of Deborah E. Lipstadt,” in *Holocaust Denial on Trial*, Emory University: Atlanta, Georgia, 2016 <<https://www.hdot.org/ws-dlipstadt/>> Accessed November 22, 2016, par 4.

<sup>291</sup> Ibid, 36.

<sup>292</sup> Ibid, par 5.

<sup>293</sup> Ibid, par 7, 12.

<sup>294</sup> Ibid, par 14-16.

<sup>295</sup> Ibid, par 18-24.

connects the movement to far Right and anti-Semitic extremist groups, and includes David Irving among the Holocaust deniers discussed.<sup>296</sup> After her book's publication, Lipstadt received harsh treatment from deniers. Attacks on her character took place on the internet and she also received threatening phone calls.<sup>297</sup> David Irving, who had brought libel suits in the past, responded to the criticism in the book first in the fall of 1995 demanding the publishers remove the book from circulation and, when that failed, by suing for defamation a year later.<sup>298</sup>

A bit ironically, Irving's role in Lipstadt's book was quite minor. He appears on about 16 out of the book's 278 pages.<sup>299</sup> Lipstadt explains that at the time of writing Irving had only recently converted to a fully-fledged Holocaust denier, tipped over the edge following Ernst Zundel's trial.<sup>300</sup> In his opening statements to the court, Irving opted to represent himself, he declared that Lipstadt's work "vandalized [his] legitimacy as a historian."<sup>301</sup> Irving complained of several passages in Lipstadt's book. He took issue with statements from pages 14, 111, 161, 179, 181, 213, and 221.<sup>302</sup> One of the key issues in the trial would be found on page 181 where Lipstadt writes

---

<sup>296</sup> Deborah Lipstadt, *Denying the Holocaust: the Growing Assault on Truth and Memory*, The Free Press: New York, 1993.

<sup>297</sup> Richard J Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, 3.

<sup>298</sup> Ibid, 6.

<sup>299</sup> Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, 275.

<sup>300</sup> Deborah Lipstadt, "Witness Statement of Deborah E. Lipstadt," par 117-119.

<sup>301</sup> Quoted in the official transcript of Justice Gray's judgement.

Justice Gray judgement in *Irving v Penguin Books Ltd.*, WL 362478 (2000), 11 April 2001, par 2.5.

<sup>302</sup> Justice Gray judgement in *Irving v Penguin Books Ltd.*, WL 362478 (2000), 11 April 2001, par 2.4.

On page 14 Irving writes of a "world anti-Zionist conference scheduled in Sweden in November 1992," and that while it was canceled by the Swedish government, "scheduled speakers included Black Muslim leader Louis Farrakhan, Faurisson, Irving, and Leuchter."

On page 111 she first asserts that "Irving, who had frequently proposed extremely controversial theories about the Holocaust, including the claim that Hitler had no knowledge of it, has become a Holocaust denier." She goes on to explain how Holocaust deniers "misstate, misquote, falsify statistics, and falsely attribute conclusions to reliable sources," among other things.

On page 161, when writing of the second Zundel trial she writes of how Irving went to Toronto to testify for the defense. Justice Gray quotes practically the entire page, but to summarize, Irving likely took offense to a few of these points mentioned by Lipstadt: she writes that he "is best known for his thesis that Hitler did not know about the Final Solution," that as "an ardent admirer of the Nazi leader, Irving placed a self-portrait of Hitler over his desk, described his visit to Hitler's mountaintop retreat as a spiritual experience, and declared that Hitler repeatedly reached out to help the Jews." She also writes that "he is an ultranationalist who believes that Britain has been on a steady path of decline accelerated by its misguided decision to launch a war against Nazi Germany," and that "Irving seems to conceive of himself as carrying on Hitler's legacy."

“Irving is one of the most dangerous spokespersons for Holocaust denial. Familiar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda.”<sup>303</sup> It was on this point that Lipstadt’s defense team would focus. Throughout the trial it would be on David Irving, in Justice Gray’s words, “to establish, as a matter of probability,” that the reader’s opinions of him were significantly damaged.<sup>304</sup>

Interestingly, the trial largely focused on the methodology rather than the substance of his work.<sup>305</sup> According to Wendie Schneider, the strategy of the defense shaped this angle by identifying Irving’s — and the pseudo field of Holocaust deniers as a whole — greatest weakness. The defense sought to portray Irving as having systematically and purposefully misjudged the evidence of the Holocaust.<sup>306</sup> This directly contrasts many denier’s ridiculous assertion that they apply a “more rigorous standard to historical evidence than do scholars who assert the Holocaust occurred.”<sup>307</sup>

Very early in the trial Irving clarified his own perception of his historical expertise:

I have never held myself out to be a Holocaust expert, nor have I written books about what is now called the Holocaust. If I am an expert in anything at all, I may be so immodest to submit

---

On page 179, also quoted in full by Justice Gray, Lipstadt writes such things as “during the Zundel trial [Irving] declared himself converted by Leuchter’s work to Holocaust denial and to the idea that the gas chambers were a myth, described himself as conducting a ‘one-man intifada’ against the official history of the Holocaust.”

On page 213 she writes “As we have seen above, Nolte, echoing David Irving, argues that the Nazi ‘internment; of Jews was justified because of Chaim Weizmann’s September 1939 declaration that the Jews of the world would fight Nazism.”

Finally, on page 221 she writes “Another legal maneuver has been adopted by a growing number of countries. They have barred entry rights to known deniers. David Irving, for example, has been barred from Germany, Austria, Italy, and Canada. Australia is apparently also considering barring him.”

<sup>303</sup> Deborah Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, The Free Press: New York, 1993, 181.

<sup>304</sup> Irving had a list of 11 specific complaints in response to passages in Lipstadt’s book ranging from being perceived as “an historian who has inexplicably misled academic historians” and “applauds the internment of Jews in Nazi concentration camps,” to an assertion that he damaged plates from the Russian archives to impede the further study by other academics.

Justice Gray judgement, *Irving v Penguin Books Ltd.*, 2000 WL 362478, 11 April 2001, par 2.9, 2.10.

<sup>305</sup> Wendie Ellen Schneider, “Past Imperfect: Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478 (Q. B. Apr. 11), appeal denied (Dec. 18, 2000),” in *The Yale Law Journal*, 110, 8, 2001, 1533.

<sup>306</sup> Ibid, 1533.

<sup>307</sup> Ibid, 1533.

that it is in the role that Adolf Hitler played in the propagation of World War II, and in the decisions which he made and the knowledge on which he based those decisions.<sup>308</sup>

He continues on, however, to claim that because of attacks such as the one he suffered at the hands of Deborah Lipstadt, he has expanded his knowledge:

I have been obliged *willy-nilly* to become something of an expert through no desire of my own. To my utmost distaste, it has become evident that it is no longer possible to write pure history, untrammelled and uninfluenced by politics, once one ventures into this unpleasant field.<sup>309</sup>

Ironically, Irving then moved to emphasize that the events in “what they [the defense] call the Holocaust” is not actually relevant to the trial but rather “what happened over the last 32 years on my writing desk.”<sup>310</sup> The defense team actually seemed to share his opinion, focusing not so much on proving the Holocaust as proving the intentional distortions made by Irving as he wrote about it.

Five historians made up the defense research team: Professor Richard Evans, Professor Robert Jan van Pelt, Professor Christopher Browning, Dr. Peter Longerich, and Professor Hajo Funke — whose total submitted evidence exceeded 2,000 pages.<sup>311</sup> Throughout the trial their testimonies would take center stage. Like the second Zundel trial, the defense refrained from putting Holocaust survivors on the stand, a decision that likely served to keep the focus off of the validity of the Holocaust as a part of history and on David Irving’s anti-Semitism and his lack of legitimacy as a scholar and historian. Additionally, the defense likely believed that in cross examination Irving would verbally abuse survivors. In the second Zundel trial he told the Court that witness testimony from survivors was not credible.<sup>312</sup> Worse, in past speeches Irving had made disparaging comments about survivors, the most notorious being his joke that he was forming an

---

<sup>308</sup> David Irving opening remarks in *Irving v Penguin Books Ltd.*, 2000, in *Holocaust Denial On Trial*, <<https://www.hdot.org/day01/#>> Accessed November 22, 2016, 12.

<sup>309</sup> Emphasis added.

<sup>310</sup> Ibid, 13.

<sup>311</sup> Ibid, 14, 15.

<sup>312</sup> Justice Gray, *Irving v Penguin Books Ltd.*, 2000 WL 362478, 11 April 2001, par 4.17.

<sup>312</sup> Richard J Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, 131.

association for survivors called “The Auschwitz Survivors, Survivors of the Holocaust, and Other Liars,” creating the acronym “A.S.S.H.O.L.E.S.”<sup>313</sup> Irving’s provocations would be saved for the defenses’ expert witnesses in the field of history, he would not have the opportunity to directly cast doubt or belittle survivor experiences.

Expert witness Christopher Browning, having testified in the second Zundel trial, was no stranger to David Irving.<sup>314</sup> In London Browning prepared a witness statement titled “Evidence for the Implementation of the Final Solution,” in which he established for the Court the breadth and quality of evidence on this topic.<sup>315</sup> Irving approached his cross examination of Browning with the purpose of rationalizing his own work denying the Holocaust. He latched onto the example of Professor Hilberg’s decision to remove all references to an order from Hitler on the Holocaust in a later edition of his book. Irving’s intention on quizzing Browning about why Hilberg made the decision to do this was to persuade the judge that Hilberg had doubts about Hitler ordering the mass murder of the Jews.<sup>316</sup> If a widely recognized Holocaust historian could be shown to have doubts, could that not validate his own? What Browning sought to make clear was that Hilberg made the change because of the changing perceptions around the term “order,” not because he doubted Hitler’s role in orchestrating the Holocaust. Although, Irving seemed reluctant to accept this explanation.<sup>317</sup>

---

<sup>313</sup> Ibid, 133.

<sup>314</sup> During Irving’s cross examination of Browning, he brings up past testimony in the second Zundel trial. David Irving cross examination of Christopher Browning, *Irving v Penguin Books Ltd.*, 2000, in *Holocaust Denial On Trial*, Emory University: Atlanta, Georgia, 2016 <<https://www.hdot.org/day17/#>> Accessed November 22, 2016, 121-122.

<sup>315</sup> Christopher Browning, ““Evidence for the Implementation of the Final Solution,” in *Holocaust Denial on Trial*, Emory University: Georgia, Atlanta, 2016 <[https://www.hdot.org/browning\\_toc/](https://www.hdot.org/browning_toc/)> Accessed November 22, 2016, section II.

<sup>316</sup> David Irving cross examination of Christopher Browning, *Irving v Penguin Books Ltd.*, 2000, in *Holocaust Denial On Trial*, Emory University: Atlanta, Georgia, 2016 <<https://www.hdot.org/day17/#>> Accessed November 22, 2016, 121-122.

<sup>317</sup> Ibid, 123-124.

Irving's strategy ultimately failed to distract from the stark truth that he manipulated evidence in a systematic way, and not on the basis of honest misinterpretation. In summary of defense witness Richard Evan's testimony, defense council Rampton explains

By the Defendants' estimate, there are, in relation to Hitler alone, as many as 25 major falsifications of history, as well as numerous subsidiary inventions, suppressions, manipulations and mistranslations employed to support the major falsifications. If those relating to Auschwitz, Dresden and other matters are added in, the number goes well over thirty.<sup>318</sup>

The evidence was damning, and Irving's insistence in his own closing remarks that his work and discoveries were no different than the processes undertaken by other historians were essentially ineffective.<sup>319</sup> Irving's distortions of history, however, were only half the issue.

Other defense witness material and testimony dealt with Irving's motivations for his manipulations. The defense team spent a significant amount of time arguing that Irving's anti-Semitism and desire to rehabilitate Hitler spurred him on to spin evidence to deny the Holocaust. German Political Scientist Hajo Funke's report, "David Irving, Holocaust Denial, and his Connections to Right Wing Extremists and Neo-National Socialism (Neo-Nazism) in Germany," relied heavily on the 59 volumes of David Irving's private diaries and played an important role in the defense argument that Irving is anti-Semitic and his work supports anti-Semitic and Neo-Nazi groups, particularly within Germany.<sup>320</sup> Judaic Studies professor Steven M. Wasserman also provided witness testimony in regard to Irving's connections to far Right extremist groups in the Portland, OR area.<sup>321</sup> Wasserman, who attended a talk by Irving at Mount Hood Community

---

<sup>318</sup> Richard Rampton Closing Statements, in *Holocaust Denial on Trial*, Emory University: Georgia, Atlanta, 2016 <<https://www.hdot.org/day32/#>> Accessed November 22, 2016, 7.

<sup>319</sup> David Irving Closing Statements, in *Holocaust Denial on Trial*, Emory University: Georgia, Atlanta, 2016 <<https://www.hdot.org/day32/#>> Accessed November 22, 2016, 70.

<sup>320</sup> Hajo Funke, "David Irving, Holocaust Denial, and his Connections to Right Wing Extremists and Neo-National Socialism (Neo-Nazism) in Germany," in *Holocaust Denial On Trial*, Emory University: Atlanta, Georgia, 2016 <<https://www.hdot.org/funke/#>> Accessed November 22, 2016.

<sup>321</sup> Steven M. Wasserman, "Witness Statement of Steven M. Wasserman," in *Holocaust Denial On Trial*, Emory University: Atlanta, Georgia, 2016 <<https://www.hdot.org/wasserstrom/>> Accessed November 22, 2016.

College in Gresham, OR, noted that the audience included mostly white middle aged men, and included quite a few skinheads.<sup>322</sup> Wasserman's statement also provided evidence of Irving's contact with far Right organizations in the area, including Michael T. Clinton, leader of the Siegfried Society in Portland, OR, who introduced him at the aforementioned event.<sup>323</sup>

Irving responded to the defense assertion that he is anti-Semitic during his closing remarks. He favored two main arguments in justification for the anti-Semitic statements presented by the defense. The first was that the full context, extending metaphorically in Irving's words to "the broader surrounding countryside," needed to be taken into account.<sup>324</sup> That his offensive statements could not be taken at face value but rather allowance be made depending on the audiences spoken to,<sup>325</sup> the total number of anti-Semitic statements he made.<sup>326</sup> His second justification is most revealing. With his flair for the dramatic, Irving asked the Court:

If a writer's books are banned and burnt, his bookshops are smashed, his hands are manacled, his person insulted, his printers are burnt down, his access to the world's archives is denied, his family's livelihood is destroyed, his phone lines are jammed with obscene and threatening phone calls, death threats, his house is beset by violent, angry mobs, the walls and posts around his address are plastered with stickers inciting the public to violence against him, and a wreath is sent to him with a foul and taunting message on the death of his oldest daughter, then it ill-behoves people to offer cheap criticism if the

<sup>322</sup> Ibid, par 4.

<sup>323</sup> The Siegfried Society is a group of individuals practicing an offshoot of Odinism known as Asatrú that emphasizes white supremacy and has close ties to anti-Semitism. Michael T. Clinton is known to have associated closely with skinheads. David Irving himself must recognize the disadvantage of an association with Clinton as on his own website he denies it. Aside from two sworn witnesses identifying the connection, it is further difficult to take him seriously as he name calls one witness a "sick bunny," a juvenile and immature response.

"A racist brand of neo-Paganism, related to Odinism, spreads among white supremacists," in *Southern Poverty Law Center*, March 15, 1988 <<https://www.splcenter.org/fighting-hate/intelligence-report/1998/new-brand-racist-odinist-religion-march>> Accessed November 22, 2016.

David Irving, Response to defense witness Jonathan Gary Mozzochi's statement, *Focal Point*, 1998 <<http://www.fpp.co.uk/Legal/Penguin/Mozzochi/dignitycoaln130598.html>> Accessed November 22, 2016.

Steven M. Wasserman, "Witness Statement of Steven M. Wasserman," par 5.

<sup>324</sup> David Irving Closing Statements, in *Holocaust Denial on Trial*, 184.

<sup>325</sup> In respect to anti-Semitic statements Irving made publicly at various events, he explained to the judge that "My colourful language, my tasteless language, was a rhetorical way of bringing that extraordinary revelation home to audiences.

Ibid, 189-190.

<sup>326</sup> Irving seemed to think that because the percentage of anti-Semitic statements in his diaries was pretty small, the statements that were taken from his diaries had less validity. He also attempted to downplay an exceptionally racist nurse rhyme he created and sang for his nine-month-old daughter that was recorded in his diary.

Ibid, 187-188.



writer finally commits the occasional indiscretion and lapse in referring to the people who are doing it to him.<sup>327</sup>

Here Irving declares himself the victim and then suggests that his victimhood ought to allow him to make anti-Semitic statements. The end result of these justifications is a picture of a man who is fully aware of his anti-Semitic views and the ways in which he has expressed those views, but is desperately trying to cover for it.

Justice Gray delivered his judgement to the Court on April 11, 2000. At the outset, and recognizing the possible controversy over debating history in a courtroom, Justice Gray emphasizes a boundary between his work as a judge and the field of history:

I do not regard it as being any part of my function as the trial judge to make findings of fact as to what did and what did not occur during the Nazi regime in Germany. It will be necessary for me to rehearse, at some length, certain historical data. The need for this arises because I must evaluate the criticisms of or (as Irving would put it) the attack upon his conduct as an historian in the light of the available historical evidence. But it is not for me to form, still less to express, a judgement about what happened. That is a task for historians. It is important that those reading this judgment should bear well in mind the distinction between my judicial role in resolving the issues arising between these parties and the role of the historian seeking to provide an accurate narrative of past events.<sup>328</sup>

Justice Gray's judgement carefully maintains this distinction throughout the 349 page document in which he provides detailed summaries of the defense and plaintiff's arguments. While there were three charges of defamation Justice Gray found unaddressed by the defense,<sup>329</sup> he ultimately found:

that Irving has for his own ideological reasons persistently and deliberately misrepresented and manipulated historical evidence; that for the same reasons he has portrayed Hitler in an unwarrantedly favourable light, principally in relation to his attitude towards and

---

<sup>327</sup> Video footage of a speech Irving made in 1999 at the so-called Real History Conference in Cincinnati is another example of Irving's attempt to cast himself as a victim.

"David Irving's Real History Conference, Cincinnati, USA 1999 Two Hours," in *Conference Road*, February 28, 1999 <<http://conferenceroad.com/2016/02/28/david-irvings-real-history-conference-cincinnati-usa-1999-two-hours/>> Accessed November 22, 2016, 00:07:30 - 00:00:00.

David Irving Closing Statements, in *Holocaust Denial On Trial*, 186-187.

<sup>328</sup> Justice Gray's judgement, in *Holocaust Denial On Trial*, Emory University: Atlanta, Georgia, 2016 <<https://www.hdot.org/judge/#>> Accessed November 23, 2016, par 1.3.

<sup>329</sup> Justice Gray found that the defense failed to prove true three statements: "that Irving was scheduled to speak at an anti-Zionist conference in 1992," "Lipstadt's claim that Irving has a self-portrait of Hitler hanging over his desk," and statements Irving made regarding Irving's treatment of Goebbels diaries in the Moscow archives. Ibid, par 13.165.

responsibility for the treatment of the Jews; that he is an active Holocaust denier; that he is anti-semitic and racist and that he associates with right wing extremists who promote neo-Nazism.<sup>330</sup>

The fact that Justice Gray so clearly connects Irving's anti-Semitism to his denial of the Holocaust represents a true triumph over the Movement. Perhaps most significantly, it strips deniers of their façade of respectability and validity.

## Reflections

One of the common fears associated with trials involving Holocaust deniers is that the resulting publicity serves primarily to give the denier a higher soap box, a wider audience. In Richard J Evan's account of the trial, he writes that "So many people wanted to get into the public gallery that the judge moved the trial to a larger court, Court 73, after the first couple of days, and even then there were perpetual queues outside the courtroom." Among the spectators he lists "Holocaust survivors, Jewish activists, academics, and right-wing extremists."<sup>331</sup> Later, Evans writes that "If, as some had suspected, he had intended the whole case as a media event designed to gain a favorable hearing for his own views once more, then by his own confession he had lamentably failed to achieve his own objective."<sup>332</sup> Irving's suit truly did backfire, at least financially. At the same time, it did bring into higher profile the Holocaust denial movement and brings to mind the old saying that there is no such thing as bad publicity. After the trial radio and television interviews provided Irving with many opportunities "to brand the defense experts as corrupt tools of a monied Jewish conspiracy."<sup>333</sup> Since his reputation as a legitimate historian is in tatters, Irving now plays supposed violations of his free expression rights.<sup>334</sup>

---

<sup>330</sup> Ibid, 13.167.

<sup>331</sup> Richard J Evans, *Lying About Hitler: History, Holocaust, and the David Irving Trial*, New York: Basic Books, 2002, 196.

<sup>332</sup> Ibid, 226.

<sup>333</sup> Ibid, 232.

<sup>334</sup> Featured in Irving's personal website is the phrase: "The path of Free Speech and Real History has often been a difficult one."

David Irving, *Focal Point Publications* <<http://www.fpp.co.uk/>> Accessed November 20, 2016.

The October release of the film *Denial*, has drawn renewed attention to the controversy and brought to light another fear — that courtrooms present deniers a platform to debate. To this day, misperceptions of the Irving case persist. *The Nation*, for example, wrote that Lipstadt “had to prove the Holocaust happened and establish a critical truth for humanity.”<sup>335</sup> Such statements actually lend deniers credibility. They imply that deniers pose a legitimate threat to the historical fact of the Holocaust. While surely more dramatic than the actuality of the situation — that Lipstadt’s team had to prove Irving, fueled by his anti-Semitic views, intentionally perverted evidence to support his denial of the Holocaust — such statements are unsettling and irresponsible. The fact that Holocaust denial is a form of hate speech again takes back seat to the sensationalism of preserving truth and memory.

The movie itself concludes in a troubling manner. After the trial when addressing a reporter’s question on her views on freedom of expression, movie-Lipstadt replies that she believes wrong opinions hold less value than factual ones and jokes about flat earth theories. Unfortunately, she makes no comment on the harmful effects of Holocaust denial on the Jewish people or on a policy perspective in regard to denial encouraging the far Right on an ideological level.<sup>336</sup> It is not that the movie fails to connect Holocaust denial to anti-Semitism, but that it misses a truly important moment to reinforce the *why* of combatting denial and risks trivializing the entire saga just portrayed.

Perhaps prompted by knowledge of the production of *Denial*, Holocaust denier Germar Rudolf published *Fail: “Denying the Holocaust,” How Deborah Lipstadt Botched her Attempt to*

<sup>335</sup> “Special Letters: David Irving and Aryeh Neier,” in *The Nation*, 303, 17, 2016, 8.

<sup>336</sup> The film was viewed in theaters and a precise citation of where in the film this scene takes place is now unavailable. However, it is approximately ten minutes from the ending credits. Jackson, Mick (director). *Denial*, Bleeker Street: September 2016.

*Demonstrate the Growing Assault on Truth and Memory*, a month before the film's release.<sup>337</sup> The normal reasons notwithstanding, it is incredibly difficult to take the books seriously. The front cover consists of a tile backdrop of Deborah Lipstadt's face made somewhat skeletal and a barbed wire heart framing the latter half of the title.<sup>338</sup> The summary of the book drips of petty scorn and hurt pride.<sup>339</sup> Even with the ease of dismissing this work, it must be taken seriously and as yet another sign that the Holocaust denial movement remains active and responsive to public discourse that calls it out.

In the Irving case, even with all the publicity and hysteria over "putting the Holocaust on trial," ultimately resulted in a resounding defeat for Holocaust deniers. The clear trend of evidence manipulation and a racially motivated agenda established Irving for exactly what he is — an anti-Semitic and poor scholar. The ability to expose Irving in this way resulted from the type of trial, from the fact that it was a libel case explicitly concerned with how and why Irving produced his works.

## CONCLUSION

While Holocaust denial laws have become more internationally accepted, Holocaust denial ideology has not faded away. A simple search on Amazon for "Holocaust denial" produces quite a few books published within the last five years by known Holocaust deniers. Alarming, they

---

<sup>337</sup> Germar Rudolf, *Fail: "Denying the Holocaust," How Deborah Lipstadt Botched her Attempt to Demonstrate the Growing Assault on Truth and Memory*, Castle Hill Publishers: Uckfield, September 2016.

<sup>338</sup> See Appendix, Item 8.

<sup>339</sup> A brief sample: "Rather than dealing thoroughly with factual arguments, Lipstadt's book is full of ad hominem attacks on her opponents. It is an exercise in anti-intellectual pseudo-scientific arguments, an exhibition of ideological radicalism that rejects anything which contradicts its preset conclusions. Since she admits herself that her opponents' motives are irrelevant, as an inescapable consequence, so is her book. F for FAIL"

Germar Rudolf, *Fail: "Denying the Holocaust," How Deborah Lipstadt Botched her Attempt to Demonstrate the Growing Assault on Truth and Memory*, Castle Hill Publishers: Uckfield, September 2016.

are interspersed among legitimate scholarship.<sup>340</sup> Most of these works are available as Kindle downloads and many have 100 plus (fairly positive reviews). While the Institute for Historical Review is largely inactive,<sup>341</sup> its successor, the Barns Review, is going strong. The website boasts of a blog, free newsletter, radio show and podcast fronted by Andrew Carrington Hitchcock, and book store.<sup>342</sup> The Barns Review appears very streamlined and respectable at first glance, and viewers have to investigate further to find clear signs of anti-Semitism,<sup>343</sup> This demonstrates that the strategy of Holocaust deniers in the 2010s continues to rest heavily on subtle attempts to appear professional and scholarly.

While Holocaust deniers insist on a narrative of victimhood and persecution of their freedom of expression, their dissemination of hate speech poses the real threat to this fundamental right. As INGO Article 19 states,

Racism, xenophobia, sexism and other intolerances limit people's ability to express their views and ideas freely. ARTICLE 19 challenges discrimination, identifies hate speech and advocates a diverse press and free speech to tackle intolerance.<sup>344</sup>

Public discourse on the nature and forms of hate speech, and specifically anti-Semitism, in combination with strong education programs on the Holocaust are best suited to counter these

---

<sup>340</sup> A sample of books that come up in the search:

Carlo Mattogno and Germar Rudolf, *Fail: "Debunking Holocaust Denial Theories": How James and Lance Morcan botched their Attempt to Affirm the Historicity of the Nazi Genocide*, Castle Hill Publishers, Uckfield, UK: Jul 15, 2016.

Peter Winter, *The Six Million: Fact or Fiction?* The Revisionist Press: April 16, 2014.

Richard Harwood, *Did Six Million Really Die? Fourth Edition*. The Historical Review Press: 2014.

Robert Faurisson, *Dissecting the Holocaust: The Growing Critique of "Truth" and "Memory" (Holocaust Handouts Book 1)*, Theses and Dissertations Press, 2<sup>nd</sup> Edition, Chicago: November 28, 2014.

[https://www.amazon.com/s/ref=nb\\_sb\\_noss\\_2?url=search-alias%3Daps&field-keywords=Holocaust+Denial](https://www.amazon.com/s/ref=nb_sb_noss_2?url=search-alias%3Daps&field-keywords=Holocaust+Denial)

<sup>341</sup> The IHR Newsletter and the IHR Review are both defunct, but the website is still in existence.

"Institute for Historical Review," in *Extremism in America*, the Anti-Defamation League: 2005, <[http://archive.adl.org/learn/ext\\_us/historical\\_review.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=3&item=ihr](http://archive.adl.org/learn/ext_us/historical_review.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=3&item=ihr)> Accessed November 5, 2016.

<sup>342</sup> The Barns Review, <<http://barnsreview.org/blog/>> Accessed November 5, 2016.

<sup>343</sup> Andrew Carrington Hitchcock does not even attempt to distort his views, but openly presents them.

Andrew Carrington Hitchcock.com, <<http://andrewcarringtonhitchcock.com/>> Accessed November 20, 2016.

<sup>344</sup> Article19, "Discrimination," in *Article 19: Defending Freedom of Expression and Information*, Free World Center: London, 2016 <<https://www.article19.org/pages/en/discrimination.html>> Accessed November 11, 2016.

claims. A study of University of Michigan student's responses to exposure to Holocaust denial in 1997 concludes that "even though their levels of factual knowledge do not appear especially high, the diversity of sources from which they have learned about the Holocaust and the positive emotional associations the Holocaust has for many are both significant" in explaining the student's rejection of Holocaust denial.<sup>345</sup> Therefore, it may make sense to turn more toward the approach of diversifying the sources and approaches of Holocaust education and promoting inclusive societies, rather than relying only on the courts to confront denial.

States have, actually, engaged the issue on a policy level, particularly in the realm of education. The United States, Canada, and the United Kingdom are all members of the International Holocaust Remembrance Alliance. The alliance currently has 31 members<sup>346</sup> and has seven permanent partners who attend the Alliance work groups: the United Nations, UNESCO, OSCE/ODIHR, International Tracing Services (ITS), the European Union Agency for Fundamental Rights (FRA), Council of Europe, and the Claims Conference.<sup>347</sup> To be a member of the alliance, states must be democratic and must agree to the Declaration of the Stockholm International Forum on the Holocaust. Of especial note, member states agree that:

3. With humanity still scarred by genocide, ethnic cleansing, racism, antisemitism and xenophobia, the international community shares a solemn responsibility to fight those evils. Together *we must uphold the terrible truth of the Holocaust against those who deny it*. We must strengthen the moral commitment of our peoples, and the political commitment of our governments, to ensure that future generations can understand the causes of the Holocaust and reflect upon its consequences.
4. We pledge to strengthen our efforts to promote education, remembrance and research about the Holocaust, both in those of our countries that have already done much and those that choose to join this effort.

---

<sup>345</sup> Katherine Bischooping, "Responses to Holocaust Denial: A Case Study at the University of Michigan," in *Contemporary Jewry*, 18, 1997, 54.

<sup>346</sup> "Member Countries," *International Holocaust Remembrance Alliance*, <<https://www.holocaustremembrance.com/member-countries>> Accessed November 7, 2016.

<sup>347</sup> "Permanent International Partners," *International Holocaust Remembrance Alliance*, <<https://www.holocaustremembrance.com/permanent-observers>> Accessed November 7, 2016.

5. We share a commitment to encourage the study of the Holocaust in all its dimensions. We will promote education about the Holocaust in our schools and universities, in our communities and encourage it in other institutions.

6. We share a commitment to commemorate the victims of the Holocaust and to honour those who stood against it. We will encourage appropriate forms of Holocaust remembrance, including an annual Day of Holocaust Remembrance, in our countries.<sup>348</sup>

The US, UK, and Canada's membership in this international organization is a positive indication that the states recognize the importance of Holocaust education within educational institutions but also within more general public discourse. A commitment to growing Holocaust education is worthy, and needed, as general knowledge of the Holocaust could face an uncertain future. The increasing instances of public denial, the fact that survivors are dwindling rapidly in number, the emotional difficulty of the subject, and the risk of trivialization of the Holocaust through media productions may contribute to a distortion of the historical memory of the Holocaust.<sup>349</sup>

The law may be a reflection of the responsibilities of states to protect vulnerable members of society, but initiatives outside the law, and outside the courtroom, are perhaps more important. The law can be reactionary rather than preventative. Therefore, other sectors of society must address the problem of Holocaust denial as well. English professor Elizabeth Jane Bellamy's take on Holocaust denial is to create "laboratories" to combat deniers. This idea originates from her examination of French scholar Vidal-Naquet's analysis of effective countering of Holocaust denial. She writes:

All too often, intellectuals have chosen silence as the only appropriate response to the outrages of Holocaust denial. Thus, one cannot fail to be impressed by the courage of Vidal-Naquet's call for more historical 'laboratories' to analyze the excrement of 'revisionism' – his call for a new directness in confronting Holocaust denial as the suppression of history.<sup>350</sup>

---

<sup>348</sup> Emphasis added.

Declaration of the Stockholm International Forum on the Holocaust, in *International Holocaust Remembrance Alliance*, <<https://www.holocaustremembrance.com/about-us/stockholm-declaration>> Accessed November 7, 2016.

<sup>349</sup> Scott Darnell, "Measuring Holocaust Denial in the United States," in *Policy Analysis Exercise*, Harvard Kennedy School of Government, Spring 2010, 5.

<sup>350</sup> Elizabeth Jane Bellamy, "'Laboratories' Against Holocaust Denial – Or the Limits of Postmodern Theory," in *Parallax*, 10, 1 (2014), 88.

Such laboratories, it would seem, could originate from various disciplines in the field of academia, and expand beyond the world of historians. If this idea were broadened further to reach those outside of universities and college campuses, a laboratory would include multiple sectors of society. Social media like Facebook and blog servers like Wordpress could be one aspect in building a lab, by first understanding that Holocaust denial is in fact hate speech and secondly by publicly endorsing a policy identifying and branding such speech for what it truly is. It is not for historians alone to shoulder the responsibility of combating denial, just as the responsibility cannot rest only with the law and the courts.



## BIBLIOGRAPHY

### Primary

#### Freedom of Expression

American Convention on Human Rights, Inter-American Specialized Conference on Human Rights, San Josi, Costa Rica, November 22, 1969.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4.XI.1950.

International Covenant on Civil and Political Rights, General Assembly Resolution 2200A (XXI), December 16, 1966.

Universal Declaration of Human Rights, General Assembly Resolution 217A, Paris, December 10, 1948.

#### Hate Speech

Additional Protocol to the Convention on Cybercrime, concerning the criminalization of acts of a racist and xenophobic nature committed through computer systems.

Council Framework Decision 2008/913/JHA on combatting certain forms and expressions of racism and xenophobia by means of criminal law, in *Official Journal of the European Union*, 328 (2008), 55-58.

Declaration of the Stockholm International Forum on the Holocaust, 27-29 January 2000.

General Assembly, Resolution adopted by the UN General Assembly on Holocaust denial (A/RES/61/255, 26 January 2007).

*Garaudy v. France*, 65831/01 ECHR (2003).

#### Reports

Kaye, David. "Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression," to the United Nations General Assembly, September 6, 2016, Seventy-first session Item 69 (b) of A/71/150

Report from the Commission to the European Parliament and the Council on the Implementation of Council Framework Decision 2008/913/JHA on Combating Certain Forms and Expressions of Racism and Xenophobia by Means of Criminal Law.

*Task Force for International Cooperation on Holocaust Education, Remembrance, and Research: Canada, Liaison Projects*, April 15, 2008, Council of Ministers of Education Canada and Department of Canadian Heritage.

## United States Law

United States Constitution

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

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

*Schneck v. United States*, 249 US 47 (1919).

## Canadian Law

Canadian Charter of Rights and Freedoms

## United Kingdom Law

Crime and Disorder Act, 1998

Public Order Act, 1994

Race Relations Act, 1965

Racial and Religious Hatred Act, 2006

*Mandla v. Dowell Lee* 2 AC 548 (HL) (1983).

## Holocaust Denial Cases

*Irving v. Penguin Books Ltd.*, 1996-1-1113 WL 362478v (2000).

*Mel Mermelstein v. Legion for the Survival of Freedom, individually, and doing business as Institute for Historical Review*, Sup Crt CA C 629 224 ().

*Mel Mermelstein v. Institute for Historical Review, et al*, Sup Crt of CA C 356 542 (1985).

*Mel Mermelstein v. Institute for Historical Review, et al*, Sup Crt CA C 356 542 (1986).

*R. v. Keegstra*, 3 S.C.R. 697 (1990).

*R v. Zundel*, 7 W.C.B. (1988).

*R v. Zundel*, 1075 , Ont. C.A. (1990)

*R v Zundel*, 2 S.C.R. 731 (1992).

## Newspapers

*The Australian*

*The Guardian*

*The Independent*

*The Jerusalem Post*

*The Los Angeles Times*

*The New York Times*

*The Times*

*The Telegraph*

*The Toronto Globe and Mail*  
*The Washington Post*  
*United Press International*

## Publications Denying the Holocaust

*The Barns Review*, <<http://barnesreview.org/>> Accessed November 17, 2016.

Butz, A. R. *The Hoax of the Twentieth Century*, The Noontide Press: Los Angeles, 1977.

Felderer, Ditlieb. *Anne Frank's Diary: A Hoax*, 1979.

Germar Rudolf, *Fail: "Denying the Holocaust," How Deborah Lipstadt Botched her Attempt to Demonstrate the Growing Assault on Truth and Memory*, Castle Hill Publishers: Uckfield, September 2016.

———. *Germar Rudolf's Site*, 2016 <<http://germarrudolf.com/2016/09/introduction-to-fail-denying-the-holocaust/>> Accessed November 20, 2016.

Haverbeck, Ursula. *The Zündelsite*, <<http://www.zundelsite.org/index.html>> Accessed October 4, 2016.

Hoggan, David. *The Myth of the Six Million*

*The Holocaust Historiography*, <<http://www.historiography-project.com/index.php>> Accessed November 14, 2016.

Irving, David. *Focal Pont Publications*, <<http://www.fpp.co.uk/>> Accessed October 4, 2016.

———, "David Irving's Real History Conference, Cincinnati, USA 1999 Two Hours," in *Conference Road*, February 28, 1999 <<http://conferenceroad.com/2016/02/28/david-irvings-real-history-conference-cincinnati-usa-1999-two-hours/>> Accessed November 22, 2016

*Institute for Historical Review* (Mark Weber, Director), <[www.ihr.org](http://www.ihr.org)> Accessed October 3, 2016.

Kollerstrom, Nicholas. *Breaking the Spell: The Holocaust: Myth and Reality (Holocaust Handbooks) (Volume 31)*, Castle Hill Publishers: Uckfield, United Kingdom, 2014.

Leuchter, Fred. *The Leuchter Report*

Rassinier, Paul. *Debunking the Genocide Myth: A Study of the Nazi Concentration Camps and the Alleged Extermination of European Jewry*, Adam Robbins (trans), Noontide Press: Los Angeles, 1978.

Verrall, Richard (Richard Hardwood). *Did Six Million Really Die?*

Weber, Mark. *The Heretical Press: A Public Service Website*, <<http://www.heretical.com/main.html#directory>> Accessed November 22, 2016.

## Memoirs

Lipstadt, *History on Trial: My Day in Court with a Holocaust Denier*, Harper Perennial: New York, 2005.

Mermelstein, Mel. *By Bread Alone: the Story of A-4685*, Auschwitz Study Foundation, Inc: Huntington Beach, CA, 1993.

## Secondary

### Books

Atkins, Stephen E. *Holocaust Denial as an International Movement*, Praeger: Westport, Connecticut, 2009.

Bleich, Erik. *The Freedom to be Racist?: How the United States and Europe Struggle to Preserve Freedom and Combat Racism*, Oxford Scholarship Online, 2011.

Charny, Israel W. (ed). *Encyclopedia of Genocide*, ABC-CLIO: Santa Barba, 1999.

Cole, Tim. *Selling the Holocaust. From Auschwitz to Schindler: How History is Bought, Packaged, and Sold*, Routledge: New York, 2000.

Decoste, F. C. and Bernard Schwartz (eds). *The Holocaust's Ghost: Writings on Art, Politics, Law and Education*, The University of Alberta Press: Alberta, 2000.

Evans, Richard J. *Lying About Hitler: History, Holocaust, and the David Irving Trial*, New York: Basic Books, 2002.

Hare, Ivan and James Weinstein (eds). *Extreme Speech and Democracy*, Oxford University Press: Oxford, 2009.

Jan van Pelt, Robert. *The Case for Auschwitz: Evidence from the Irving Trial*, Indiana University Press: Bloomington, IN, 2002.

Jones, Thomas David. *Human Rights: Group Defamation, Freedom of Expression, and the Law of Nations*, Martinus Nijhoff Publishers: The Hague, 1998.

Kahn, Robert A. *Holocaust Denial and the Law: A Comparative Study*, Palgrave Macmillan: New York, 2010.

Kopeček, Michal. *Past in the Making: Historical Revisionism in Central Europe after 1989*, Central European University Press: Budapest, 2008.

Law Commission of Canada (ed), *What is a Crime? Defining Criminal Conduct in Contemporary Society*, UBC Press: Vancouver, 2004.

Lawson, Tom. *Debates on the Holocaust*, Manchester University Press: New York, 2010.

Lipstadt, Deborah. *Denying the Holocaust: The Growing Assault on Truth and Memory*, The Free Press: New York, 1993.

Maitra, Ishani and Mary Kate McGowan. *Speech & Harm: Controversies Over Free Speech*, Oxford University Press: Oxford, 2012.

Perry, Marvin and Frederick M. Schweitzer (eds). *Antisemitic Myths: A Historical and Contemporary Anthology*, Indiana University Press: Bloomington and Indianapolis, 2008.

Rosenfeld, Alvin H. (ed). *Deciphering the New Antisemitism*, Indiana University Press: Bloomington and Indianapolis, 2015.

Shapiro, Shelly (ed). *Truth Prevails: Demolishing Holocaust Denial: the End of the "Leuchter Report,"* London, 1989.

Shermer, Michael and Alex Grobman. *Denying History: Who Says the Holocaust Never Happened and Why do they Say it?* University of California Press: Berkeley, 2000.

Stern, Kenneth. *Holocaust Denial*, the American Jewish Committee: New York, 1993.

Stone, R Geoffrey, Louis Michael Seidman, Cass R Sunstein, Mark V Tushnet and Pamela S Karlan, *Constitutional Law* 5<sup>th</sup> edition, New York: Aspen, 2005.

Weimann, Gabriel and Conrad Winn. *Hate on Trial: the Zundel Affair, the Media and Public Opinion in Canada*, New York: 1986.

Vidal-Naquet, Pierre. *Assassins of Memory: Essays on the Denial of the Holocaust*. Jeffrey Mehlman (trans), Columbia University Press: New York, 1992.

## Journal Articles

Achcar, Gilbert. "Assessing Holocaust Denial in Western and Arab Contexts," in *Journal of Palestine Studies*, 41,1 (2011) 82-95.

Anand, Sanjeev S. "Beyond Keegstra: The Constitutionality of the Willful Promotion of Hatred Revisited," in *National Journal of Constitutional Law*, 9, 117 (1998).

Behrens, Paul. "Genocide Denial and the Law: a Critical Appraisal," in *Buffalo Human Rights Law Review*, 21, (2014-2015) 27-52.

Bellamy, Elizabeth Jane. "'Laboratories' Against Holocaust Denial – Or the Limits of Postmodern Theory," in *Parallax*, 10, 1 (2004), 88-99.

Bischoping, Katherine. "Responses to Holocaust Denial: A Case Study at the University of Michigan," in *Contemporary Jewry*, 18 (1997), 44-59.

Charny, Israel W. "A classification of denials of the Holocaust and other genocides," in *Journal of Genocide Research*, 5, 1 (2003) 11-34.

———, "Innocent Denials of Known Genocides: A Further Contribution to a Psychology of Denial of Genocide," in *Human Rights Review*, 1, 3 (2000) 15-39.

Cohen-Almagor, Raphael. "Freedom of Expression v. Social Responsibility: Holocaust Denial in Canada," in *Journal of Mass Media Ethics*, 28, 2013, 42-56.

———, "Holocaust Denial is a Form of Hate Speech," in *Amsterdam Law Forum*, University of Amsterdam, 2009, pages????? >.< srsly? You didn't write down the pages?!?!?

Cohen, Carl. "Free Speech and Political Extremism: How Nasty are We Free to be?" in *Law and Philosophy*, 7 (1989), 263-279.

Cohn-Sherbok, Dan. "Neo-Nazism, Holocaust Denial, and UK Law," in *European Judaism*, 43, 1 (2010) 105-115.

Darnell, Scott. "Measuring Holocaust Denial in the United States," in *Policy Analysis Exercise*, Harvard Kennedy School of Government, Spring 2010

<<https://www.hks.harvard.edu/ocpa/pdf/HolocaustDenialPAE.pdf>> Accessed October 10, 2016.

Fish, Stanley. "Seegers Lecture: Holocaust Denial and Academic Freedom," in *Valparaiso University Law Review*, 35 (2000-2001), 499 – 524.

Golden, Audrey. "Comment: Monkey Read, Monkey Do: Why the First Amendment Should Not Protect the Printed Speech of an International Genocide Inciter," in *Wake Forest Law Review*, vol. 43, no. 1-4 (2008), 1149 – 1185.

Gorton, Sean. "The Uncertain Future of Genocide Denial Laws in the European Union," in *The George Washington International Law Review*, 47 (2015) 421-445.

Kahn, Robert. "Rebuttal versus Unmasking: Legal Strategy in R. v. Zundel," in *Patterns of Prejudice*, 34:3, (2000) 3-15.

Kallen, Evelyn and Lawrence Lam. "Target for Hate: the Impact of the Zundel and Keegstra trials on a Jewish-Canadian Audience," in *Canadian Ethnic Studies*, vol. 25, issue 1 (1993), 9-16.

Keane, David. "Attacking Hate Speech Under Article 17 of the European Convention on Human Rights," in *Netherlands Quarterly of Human Rights*, Vol. 25, No. 4, 641-643.

Kučs, Artūrs. "Denial of Genocide and Crimes Against Humanity in the Jurisprudence of Human Rights Monitoring Bodies," in *Journal of Ethnic and Migration Studies*, 40, 2 (2014), 301-319.

LaSelva, Samuel V. "Toleration without Hate Speech: The *Keegstra* Decision, American Free Speech Exceptionalism and Locke's Letter," in *Canadian Journal of Political Science*, 48, 3 (2015), 699-718.

Levin, Brian. "History as a Weapon: How Extremists Deny the Holocaust in North America," in *American Behavioral Scientist*, 44, 6, 2001, 1001 – 1031.

Lobba, Paolo. "Holocaust Denial Before the European Court of Human Rights: Evolution of an Exceptional Regime," in *The European Journal of International Law*, 26, 1 (2015), 238.

Mahoney, Kathleen. "Speech, Equality, and Citizenship in Canada," in *Common Law World Review*, 39 (2010), 69-99.

Mathis, Andrew E. "General Semantics and Holocaust Denial," in *Institute of General Semantics*, January 63,1 (2006), 52-61.

Mulvihill, Dennise. "Irving v. Penguin LTD: Historians on Trial and the Determination of Truth Under English Libel Law," in *Fordham Intellectual Property, Media and Entertainment Law Journal*, 11, 6 (2001), 217 – 266.

Norwood, Stephen H. "In Denial: American Universities' Response to the Third Reich, Past and Present," in *Journal of Ecumenical Studies*, 46, 4 (2011), 501-509.

Plaut, W. Gunther. "Book Review: The Report of the Special Committee on Hate Propaganda in Canada," in *Osgoode Hall Law Journal*, 5, 2 (1967), 313-317.

Ryan, H.R.S. "The Trial of Zundel: Freedom of Expression and Criminal Law," in *Criminal Reports - Articles*, 44,334 (1985), 1-11.

Sandler, Mark. "Dr. Bernie Vigod Memorial Lecture: Hate Crimes and Hate Group Activity in Canada," in *University of New Brunswick Law Journal*, 43, 269 (1994), 5.

Schneider, Wendie Ellen. "Past Imperfect: Irving v. Penguin Books Ltd., No. 1996-I-1113, 2000 WL 362478 (Q. B. Apr. 11), appeal denied (Dec. 18, 2000)," in *The Yale Law Journal*, 110, 8 (2001), 1531-1545.

"Special Letters: David Irving and Aryeh Neier," in *The Nation*, 303, 17 (2016), 8.

Stav, Shira. "Nakba and Holocaust: Mechanisms of Comparison and Denial in Israeli Literary Imagination," in *Jewish Social Studies*, 18, 3 (2012) 85-98.

Tourkochoriti, Ioanna. "Should Hate Speech be Protected? Group Defamation, Party Bans, Holocaust Denial and the Divide Between (France) Europe and the United States," in *Columbia Human Rights Law Review*, Winter 2014, 45, 552.

Weiler, J. H. H. "The Law of Holocaust Denial in Europe: Towards a (qualified) EU-wide Criminal Prohibition," in *The Jean Monnet Working Paper Series*, The Jean Monnet Center for International and Regional Economic Law and Justice, NYU School of Law, New York, NY, 2009.

Weisberg, Richard H. "Fish takes the bait: Holocaust denial and postmodernist theory," in *Critical Quarterly*, 43, 4, 19-27.

Weisenburger, Stephen. Review of *Willis Carto and the American Far Right* by George Michael, Gainesville: University of Florida Press, 2008, in *Journal of Southern History*, 75, 4, (2009), 1106-1108.

## Websites

"1965 New UK race law 'not tough enough,'" in *On this Day: 1950-2005*, BBC News, <[http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid\\_4457000/4457112.stm](http://news.bbc.co.uk/onthisday/hi/dates/stories/december/8/newsid_4457000/4457112.stm)> Accessed October 9, 2016.

Amnesty International, 2016 <<https://www.amnesty.org/en/>> Accessed November 11, 2016.

*Article 19: Defending Freedom of Expression and Information*, Free World Center: London, 2016 < <https://www.article19.org/index.php?lang=en>> Accessed November 11, 2016.

*Australian League of Rights*, 2016 <<http://alor.org/>> Accessed November 21, 2016.

CTV News, 2016 <<http://www.ctvnews.ca/>> Accessed November 19, 2016.

"David Irving," *The Anti-Defamation League*, 2005 <[http://archive.adl.org/learn/ext\\_us/irving.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=2&item=irving](http://archive.adl.org/learn/ext_us/irving.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=2&item=irving)> Accessed October 4, 2016.

"Denial of the Holocaust and the Moral Equivalence. An Interview with Deborah Lipstadt," in *Jerusalem Centre for Public Affairs*, August 1, 2003, < <http://www.jcpa.org/phas/phas-11.htm> > Accessed December 11, 2015.

Dilhac, Marc-Antoine. "They used the oven to get tanned, you know," in *Free Speech Debate*, St. Antony's College, Oxford February 6, 2014, <<http://freespeechdebate.com/en/discuss/talking-about-the-holocaust-between-the-walls/>> Accessed January 30, 2016.

European Parliament Working Group on Antisemitism, "EUMC Working Definition of Antisemitism," <<http://www.antisem.eu/projects/eumc-working-definition-of-antisemitism/>> Accessed November 7, 2016.

*Extremist Files*, Southern Poverty Law Center, Montgomery, Alabama, <<https://www.splcenter.org/fighting-hate/extremist-files/individual/david-irving>> Accessed November 4, 2016.

*Holocaust Denial on Trial*, Emory University: Atlanta, Georgia, 2016 <<https://www.hdot.org/>> Accessed November 22, 2016.



*Human Rights Watch*: New York < <https://www.hrw.org/> > Accessed November 11, 2016.

*Index: the Voice of Free Expression*, 2016 <<https://www.indexoncensorship.org/>> Accessed November 11, 2016.

*International Holocaust Remembrance Alliance*,  
< <https://www.holocaustremembrance.com/about-us> > Accessed November 7, 2016.

*Legal Information Institute: Open Access to Law Since 1992*, Cornell University Law School,  
<<https://www.law.cornell.edu/>> Accessed November 13, 2016.

*NBC News*, 2016 <<http://www.nbcnews.com/>> Accessed November 17, 2016.

*The Nizkor Project*, B'nai Brith Canada, 1991-2012, < <http://www.nizkor.org/> > Accessed November 17, 2016.

*Genocide Watch: International Alliance to End Genocide*, Washington DC, 2013,  
<<http://www.genocidewatch.org>> Accessed December 11, 2015.

“Status of Ratification interactive Dashboard,” in *United Nations Human Rights Office of the High Commissioner*, August 26, 2016, <http://indicators.ohchr.org/>, Accessed September 12, 2016.

*Veratis Books Publishing Company*, <<http://veritasbooks.com.au/cat/censored-history> > Accessed November 21, 2016.

## Films

Morris, Errol (director). *Mr. Death: The Rise and Fall of Fred A. Leuchter Jr.* Channel Four Films: United Kingdom, January 14, 2000.

Sargent, Joseph (director). *Never Forget*, Nimoy/Radnitz Productions and Turner Pictures: April 8, 1991.

Jackson, Mick (director). *Denial*, Bleeker Street: September 2016.

## APPENDIX

### Item 1.



This banner immediately informs viewers of Hitchcock's anti-Semitic leanings.

From <http://andrewcarringtonhitchcock.com/> Accessed November 5, 2016.

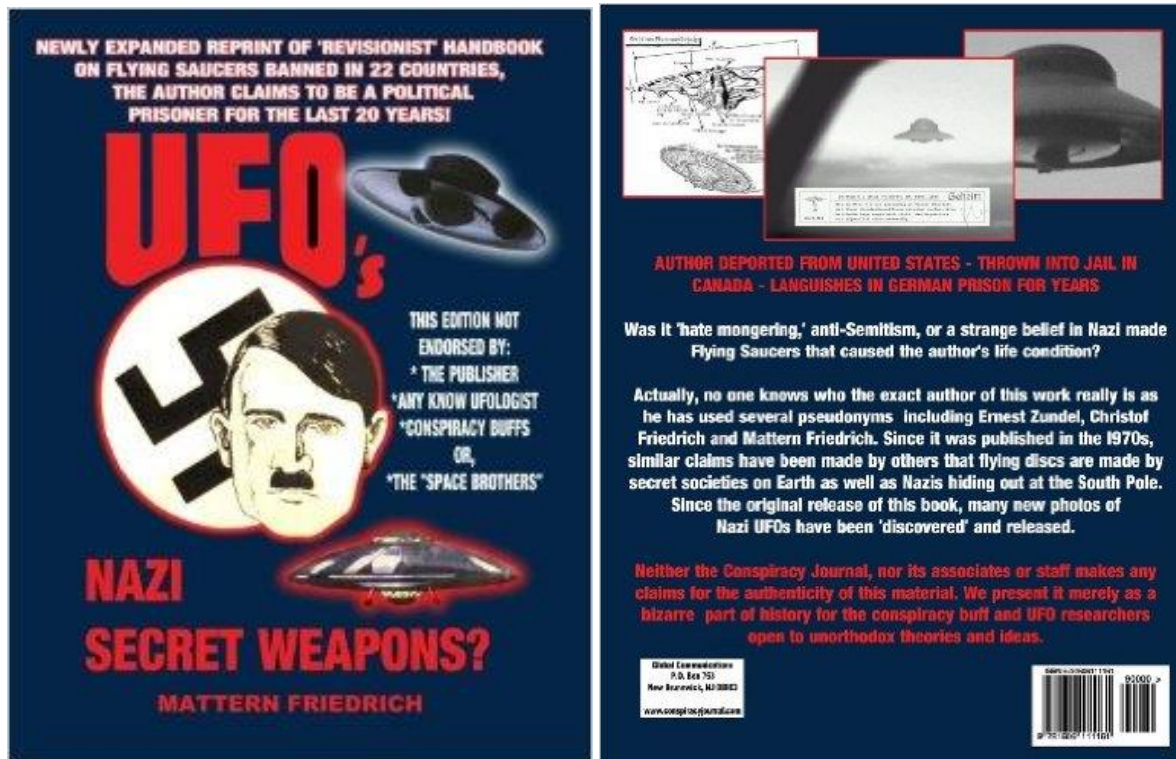
### Item 2.



David Irving's facebook fan page clearly presents anti-Semitic content.

From <https://www.facebook.com/David-Ingving-Official-Fan-Page-343659606556/?ref=nf> Accessed November 15, 2016.

Item 3.



The first work published by Ernst Zundel. Images from:

<https://www.amazon.com/UFOs-Secret-Weapons-Mattern-Friedrich/dp/1606111167>

Accessed November 17, 2016.

Item 4.



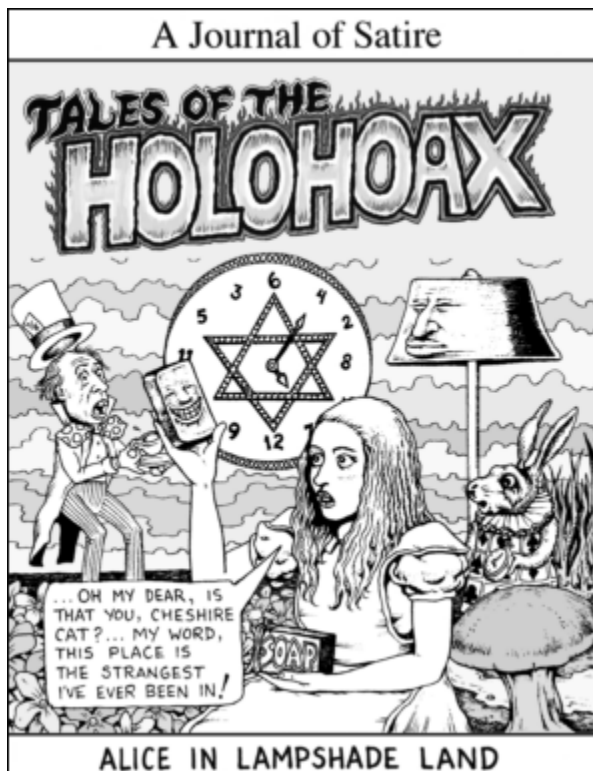
Zundel wore a hard hat to his trial as did his supporters who rallied outside. Zundel left, lawyer Christie right. From Holocaust denial website: <<http://codoh.com/library/document/1466/>> Accessed November 18, 2016.

Item 5.



March 2, 2005, Ernst Zundel departs a Mannheim courthouse in the back of a police car.  
Associated Press Photo, Thomas Kienzle, *CTV News*, March 1, 2010  
<<http://www.ctvnews.ca/holocaust-denier-zundel-released-from-german-prison-1.487540>> Accessed November 19, 2016.

Item 6:



The "comic" that contributed to Sheppard's criminal prosecution in the United Kingdom in 2009 for incitement to racial hatred. Image from Holocaust denier and director of the Institute for Historical Review, Mark Weber's website <<http://www.heretical.com/holofun/weberep2.html>> Accessed November 22, 2016.



Item 7.

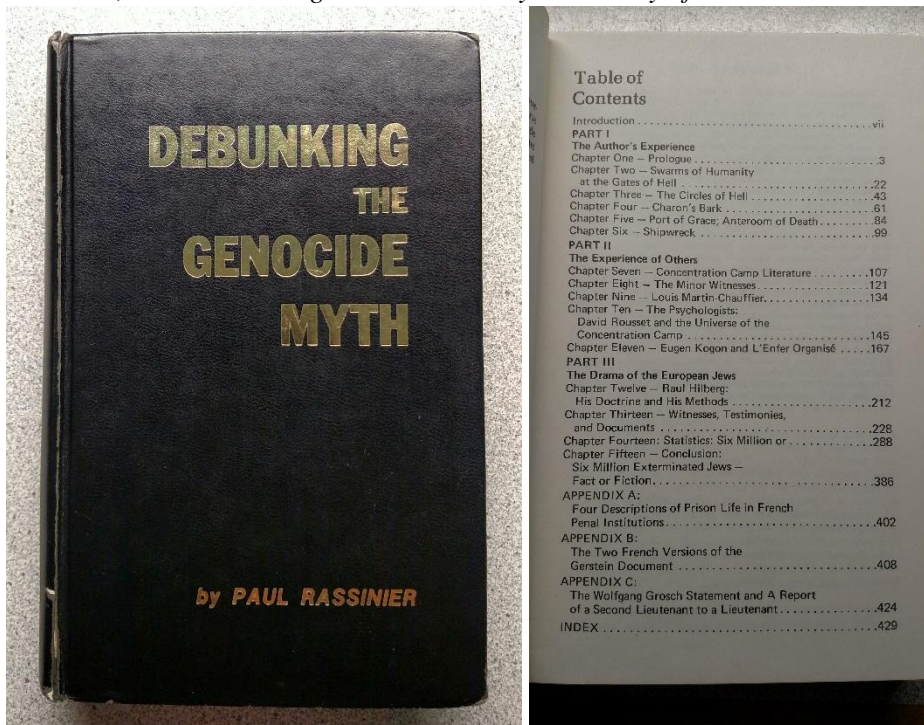


“Handcuffed and wearing a navy blue suit, he arrived at the court carrying a copy of one of his most controversial books, Hitler's War, which challenges the extent of the Holocaust.”

Caption from: Staff and agencies, “David Irving jailed for Holocaust denial,” *The Guardian*, February 20, 2006, <<https://www.theguardian.com/world/2006/feb/20/austria.thefarright>> Accessed October 22, 2016.

Item 8.

Rassinier, Paul. *Debunking the Genocide Myth: A Study of the Nazi Concentration Camps and the*

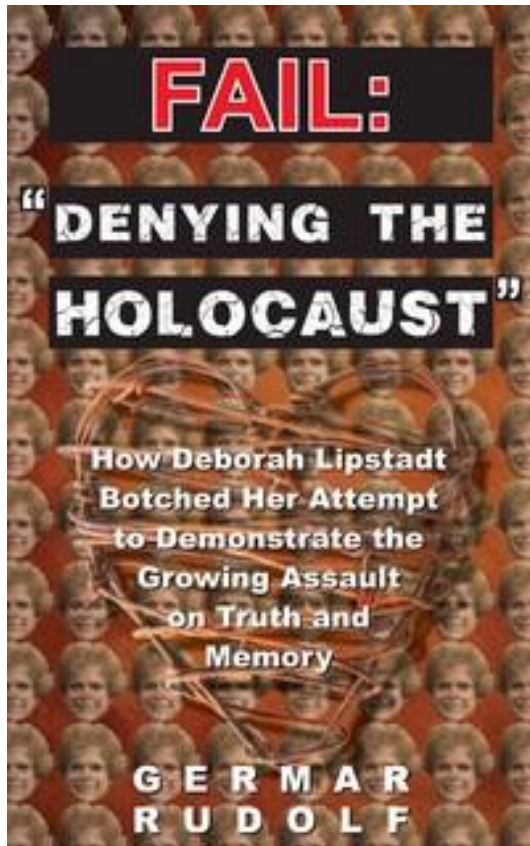


*Alleged Extermination of European Jewry*, Adam Robbins (trans), Noontide Press: Los Angeles, 1978.

Rassinier's book is formatted like any reputable academic publication.

Images taken of the book at the Aubrey R. Watzek Library, Lewis & Clark College, Portland OR.

Item 9.



Germar Rudolf's immature cover to his recent book supposedly refuting Lipstadt's book *Denying the Holocaust*. Image from *Germar Rudolf's Site*, <http://germarrudolf.com/2016/09/introduction-to-fail-denying-the-holocaust/> Accessed November 20, 2016.