

12-1-2021

The Good, the Bad, and the Historically Anti-Semitic: An Analytical Comparison of Anti-Hate Laws in Germany and the United States

Jamie Rauch

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [European Law Commons](#), [First Amendment Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), [Legal History Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Jamie Rauch, *The Good, the Bad, and the Historically Anti-Semitic: An Analytical Comparison of Anti-Hate Laws in Germany and the United States*, 47 *Brook. J. Int'l L.* 260 (2021).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol47/iss1/6>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

THE GOOD, THE BAD, AND THE HISTORICALLY ANTI-SEMITIC: AN ANALYTICAL COMPARISON OF ANTI-HATE LAWS IN GERMANY AND THE UNITED STATES

“There is no easy way to strike a balance between free speech and the suppression of bigotry Either value may be used to suppress the other: regulation of hate speech may lead to unfair censorship and coerced conformity; failure to regulate may lead to the oppression of minority groups.”¹

INTRODUCTION

How do the scales of justice weigh hate speech against the fundamental right to freedom of speech,² while the undeniable right to human dignity³ hangs precariously in the balance? Is it even possible to place a value on an individual’s human dignity? Germany, along with a significant majority of other European countries, has answered in the affirmative through its legislative framework and approach to hate speech regulation.⁴ In stark contrast, the United States (US) has forsaken any meaningful emphasis on human dignity in exchange for a quasi-absolute primacy regarding its citizens’ right to freedom of speech.⁵ Due to each nation’s underlying philosophies,

1. Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 81 (1997). See generally Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction Essay*, 78 IOWA L. REV. 737 (1993) (an essay from a collection of papers that seek to address the delicate balance between freedom of expression and freedom from discrimination); STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver ed., 1992) (detailing a collection of laws through which hate expression is addressed, controlled, or punished, along with a wide array of viewpoints on how to enforce such laws, and the related issues that inevitably arise).

2. See *infra* Part II.

3. See *infra* Part II.

4. See generally Claudia E. Haupt, *Regulating Hate Speech—Damned if You Do and Damned If You Don’t: Lessons Learned from Comparing the German and U.S. Approaches*, 23 B.U. INT’L L.J. 299 (2005) (examining the historical and philosophical underpinnings of the value placed on free speech in Germany and the United States).

5. See generally Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. CAL. L. REV. 657

the US and Germany reside on diametrically opposite sides of the spectrum in the global war on hate,⁶ with neither able to provide effective and non-infringing legislation to regulate the internationally prevalent problem of hate speech.⁷

(1980) (a comparison of the constitutional differences between the court system of the U.S. and the court system of Germany, and the distinct free speech ideals that dictate each).

6. Largely in response to “current alarming trends of growing xenophobia, racism and intolerance, violent misogyny, anti-Semitism and anti-Muslim hatred around the world,” in 2019, the UN launched the United Nations Strategy and Plan of Action on Hate Speech as an attempt to grapple with these worldwide instances of hate. *United Nations Strategy and Plan of Action on Hate Speech*, U.N. OFFICE OF GENOCIDE PREVENTION AND THE RESPONSIBILITY TO PROTECT, <https://www.un.org/en/genocideprevention/hatespeech-strategy.shtml> (last visited Sept. 16, 2021). The plan sets out “strategic guidance for the United Nations system to address hate speech at the national and global level” and most notably establishes four principles with which it commits to act:

- (i) The strategy and its implementation to be in line with the right to freedom of opinion and expression. The UN supports more speech, not less, as the key means to address hate speech;
- (ii) Tackling hate speech is the responsibility of all – governments, societies, the private sector, starting with individual women and men. All are responsible, all must act;
- (iii) In the digital age, the UN should support a new generation of digital citizens, empowered to recognize, reject and stand up to hate speech;
- (iv) We need to know more to act effectively – this calls for coordinated data collection and research, including on the root causes, drivers and conditions conducive to hate speech.

Id.; *United Nations Strategy and Plan of Action on Hate Speech*, UNITED NATIONS (May 2019), <https://www.un.org/en/genocideprevention/documents/UN%20Strategy%20and%20Plan%20of%20Action%20on%20Hate%20Speech%2018%20June%20SYNOPSIS.pdf>.

7. See Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549, 1607 (2004) (“The legal systems, and indeed, both the legal and broader cultures, achieve different results by design, and not by accident...Examination of the German law of free expression reminds one once again how easily two well-intentioned societies starting from substantially identical premises, can arrive at significantly different results.”); see also Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 785–87 (2005); Lasson, *supra* note 1, at 70–71. See generally John C. Knechtel, *Holocaust Denial and the Concept of Dignity in the*

The primary purpose of this Note is to assess and compare the state of anti-hate and anti-Semitism prevention laws in the US and Germany, noting the pertinent historical events and cultural factors that played a pivotal role in shaping the legislation each country is left with today. For the purposes of this Note, it is necessary to analyze both countries in terms of their cultural and historical approach to hate speech, as well as the laws that govern it. The US relies almost exclusively on the First Amendment to the US Constitution⁸ to establish a nearly impenetrable significance regarded to its citizens' right to freedom of speech.⁹ Across the Atlantic, Germany's sacrosanct commitment to the protection of human dignity and personal honor originates from provisions of the Basic Law,¹⁰ the German federal constitution upon which the country's entire legislative system is based.¹¹

By juxtaposing the traditionally pro-free speech attitude exemplified in the US' legislation against the absolute value placed on safeguarding human dignity by Germany's constitutional and statutory laws, this Note makes the case that neither nation's approach to anti-hate regulation is the superior option to eradicate hate speech and hate crimes at a national level. Rather, this Note will posit that taking elements from the foundational principles underlying the legislative framework of hate speech regulation in both countries, together with additional factors, would produce more effective legal regulation of hate crimes and hate speech within their borders. The flawed present state of anti-hate laws in Germany and the US can be resolved by narrowly tailoring the existing laws to country-specific circumstances,

European Union, 36 FLA. ST. U. L. REV. 41 (2008) (a comparison of the opposing philosophies underlying the U.S. approach and the German approach of regulating hate speech and the relevant laws in each country); Thomas J. Webb, *Verbal Poison—Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L. J. 445 (2011) (an analysis of hate speech regulation in the United States and how it pertains to current international law).

8. U.S. CONST. amend. I.

9. Haupt, *supra* note 4, at 317.

10. GRUNDGESETZ [BASIC LAW], *translation at* https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [hereinafter GG].

11. See Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech On the Internet*, 38 SAN DIEGO L. REV. 817, 861–63 (2001) (explaining that Germany's commitment to free expression, while significant, is not deemed to be an absolute constitutional right and is therefore superseded by the country's devotion to the preservation of human rights and personal dignity); Lasson, *supra* note 1, at 74–75.

investing in education to deter future hate crimes, and aligning their domestic laws to international precedent. Accordingly, incorporation of these proposed changes would better situate these two nations to address and prevent the increasing instances of hate crimes.

Part I of this Note will serve as a background to the historically significant events and movements that have underscored the presence of discrimination and hate in the two countries over the course of history and to this day. Part I will also begin to touch upon the founding constitutional documents and key doctrinal pieces of legislation that make up each country's current stance on hate speech and hate crime regulation. Next, Part II will delve into the opposing methodologies exhibited by Germany and the US, as well as the unique legal framework relied on by each country for support. Further, Part II will expand upon the First Amendment, which provides and protects the US' absolutist view of freedom of speech, as compared to the Basic Law, which substantiates Germany's principle of placing human dignity above all else. Part III will focus the scope of this Note on ancillary pieces of legislation that represent fruitless attempts by both countries to combat acts of discrimination and hate. Subsequently, Part IV will propose a solution in the form of a multi-factor approach, combining each country's relevant historical circumstances with methods akin to widely-utilized international legislation on hate speech. Finally, this Note concludes by advancing the suggested multi-factor approach as the precise kind of change that countries like the US and Germany so desperately require to prevail in the ever-present war against hate.

I. BACKGROUND

A. *A Tale of Two Countries*

In order to foster a better understanding of what led to the legislation in place today, the comprehensive analysis of the US and Germany herein highlights the relevant similarities, differences, and fundamental priorities outlining each country's set of laws.¹² Beyond similarities in their respective social and political

12. Haupt, *supra* note 4, at 316. Regarding the opposing viewpoints of Germany and the United States on free speech and hate speech, Haupt explains, "Because of different historical and philosophical paths in the United States and Germany, the development of free speech doctrine has diverged. Dominant

systems,¹³ both Germany and the US are countries with written constitutions¹⁴ that include their respective versions of a bill of rights, which further denotes protections for their citizens and their right to freedom of speech.¹⁵ Despite a handful of shared commonalities, the legislative framework, historical circumstances, and cultural philosophies regarding freedom of speech evidence a sharp divide in the core values between the US and Germany.¹⁶ The fundamental differences between the two countries' approaches to freedom of speech inevitably resulted in extremely contradictory legislation regarding the regulation and criminalization of hate speech.¹⁷ In addition to incongruous philosophical ideologies, the US and Germany have undergone critically different historical events, which ultimately played a crucial role in both countries' outlook on the value of free speech.¹⁸ The historical and philosophical dissimilarities between the US and Germany has had the effect of generating these opposing approaches to hate speech regulation, which eventually became indoctrinated into the nation's legislation.¹⁹

Notwithstanding the two countries' similar constitutional makeup, it is critical to this Note's analysis to point out the inherent differences existing between the countries' founding documents.²⁰ These differences lay the foundation for each country's

opinions in the two countries are arguably polar opposites on the hate speech issue." *Id.*

13. Kommers, *supra* note 5, at 658. Discussing common ground shared by Germany and the United States, Kommers points out that "Both states are committed to constitutional government and individual rights; both are western democracies with secular political cultures; both are advanced technological and pluralistic societies; and both are troubled by similar problems of political order." *Id.*

14. Compare U.S. Const., with GG.

15. U.S. CONST. amend. I.; GG art. 5.

16. See Haupt, *supra* note 4, at 303.

17. *Id.*

18. *Id.* at 313.

19. *Id.* at 316.

20. Compare U.S. CONST. amend. I., with GG art. 1; see also Krotoszynski, *supra* note 7, at 1555. Krotoszynski remarks:

Another major difference between the Basic Law and the First Amendment is the Basic Law's textual inclusion of express limits on the scope of free speech rights. The United States Supreme Court has found that the First Amendment's free speech guarantee is not, in any meaningful sense of the word, absolute. It has, accordingly, examined the

position on hate speech regulation and how it is enforced.²¹ Grundgesetz für die Bundesrepublik Deutschland (The Basic Law)²² is the constitution of the Federal Republic of Germany that came into effect shortly following the end of World War II (WWII) and the collapse of Nazi Germany.²³ The very first right articulated in the Basic Law is Article 1, which firmly establishes the protection of human dignity as Germany's first and most important enumerated principle.²⁴ In contrast, the Bill of Rights²⁵ makes the First Amendment, and the rights it protects, the US' first and most sacred amendment.²⁶

After WWII, several European countries experienced a frenzied proliferation of hate speech legislation, drafted with the intent of curbing the incitement of acts of racial or religious hatred.²⁷ Consequently, national hate speech laws all over Europe

government's claim for a need to regulate speech on a case-by-case basis and weighed the government's asserted interests against the values advanced by the free speech guarantee In Germany, by way of contrast, the Federal Constitutional Court has a textual mandate to balance some interests against the free speech guarantee.

Id.

21. See Haupt, *supra* note 4, at 313.

22. See GG.

23. Nazi Germany, known as the "German Reich" from 1933 to 1943, and the "Greater German Reich" from 1943 to 1945, was the German State between the years of 1933 and 1945 when Adolf Hitler and the Nazi Party rose to power, eventually transforming it into a dictatorship. See *Third Reich: An Overview*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/third-reich-an-overview?series=152> (last visited Oct. 15, 2020).

24. Beate Rudolf, *Human Rights in Germany – A View from Germany's National Human Rights Institution*, 44 INT'L J. LEGAL INFO. 50 (2016). In describing Article 1 of the Basic Law, Rudolf notes, "This provision and its position within the constitution make clear that it is the first and foremost purpose of the German State to make human rights a reality for everyone in the country."

Id.

25. U.S. CONST. amend. I–X. The first ten amendments to the U.S. Constitution make up the Bill of Rights. See *The Bill of Rights: What Does It Say?*, NATIONAL ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say> (last visited Sept. 16, 2021).

26. Haupt, *supra* note 4, at 313 ("In the Bill of Rights to the United States Constitution, freedom of speech takes a prominent position whereas Article 1 of the German Basic Law articulates the protection of human dignity.").

27. Michael J. Bazylar, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, YAD VASHEM,

have increasingly been invoked to criminalize speech that is deemed to be insulting to an individual's race, ethnicity, religion, or nationality, but presently remain enforced and regulated to significantly varying degrees.²⁸ Individual countries within the European Union (EU),²⁹ like Germany, have adopted their own hate speech legislation, which derive further support from a number of international agreements with provisions protecting individual freedom of expression, while disallowing hate speech.³⁰

B. A Dark Cloud Over the Continent: The United States' Lengthy History of Discrimination and Hate

Books and texts detailing US history will forever bear the shameful mark of racism, injustice, and hatred memorialized by the country's centuries of slavery and discrimination.³¹ The presence of racial discrimination and acts of hate in the US predate even the Declaration of Independence.³² Despite the weighty words inscribed in this founding document's preamble,³³ the inescapable truth remains that although "all men are created

<https://www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html> (last visited Sept. 30, 2020); Van Blarcum, *supra* note 7, at 785.

28. Paul Iganski, *Legislating Morality, and Competing 'Rights': Legal Instruments Against Racism and Antisemitism in the European Union*, 25 J. ETHNIC & MIGRATION STUD. 509, 513 (1999).

29. Black Law's Dictionary defines "European Union" as "an association of European countries whose purpose is to achieve full economic unity (and eventual political union) by agreeing to eliminate barriers to the free movement of capital, goods, and labor among the member-countries." *European Union*, BLACK'S LAW DICTIONARY (11th ed. 2019).

30. See *infra* Part II (A).

31. See Ibram X. Kendi, *A History of Race and Racism in America*, in 24 *Chapters*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/books/review/a-history-of-race-and-racism-in-america-in-24-chapters.html?smid=tw-nytbooks&smtyp=cur&mtrref=www.nytimes.com&_r=1.

32. THE DECLARATION OF INDEPENDENCE (U.S. 1776). The Declaration of Independence is the document that officially recognized the birth of a new nation (consisting of the thirteen original American colonies) and a severance of all ties to the British crown under its then monarch, King George III. See *Declaration of Independence*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Declaration-of-Independence> (last visited Sept. 16, 2021).

33. THE DECLARATION OF INDEPENDENCE pmbl. (U.S. 1776). "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." *Id.*

equal,”³⁴ all men were *not* treated equal, an unforgiving reality that persists today.³⁵ Blatant racial discrimination of this magnitude has plagued the US since its inception and in spite of the ratification of the Thirteenth Amendment, which ended legal slavery in the US in 1865.³⁶ The racist undertones perpetuated and personified by members of the Confederacy throughout the Civil War continue to be felt in the words and actions of individuals in today’s society.³⁷

Racial discrimination exemplified by hundreds of years of slavery and bigotry was by no means the end of the road for hatred and racism in the US.³⁸ Notions of racial superiority, fear of immigrants and minorities, and the desire to sustain a largely white majority population is certainly not a novel concept in the US; in fact, it is one that can be traced all the way back to the country’s origin.³⁹ White supremacists⁴⁰ and white nationalist

34. *Id.*

35. See SIMON CLARK, CENTER FOR AMERICAN PROGRESS, HOW WHITE SUPREMACY RETURNED TO MAINSTREAM POLITICS 1 (2020), <https://www.americanprogress.org/issues/security/reports/2020/07/01/482414/white-supremacy-returned-mainstream-politics/>. Clark connects the U.S.’ origins of racial inequality with modern events in touching upon the 2017 ‘Unite the Right’ Rally that took place in Charlottesville, Virginia. In discussing the rally and ex-president Trump’s refusal to publicly condemn the white nationalist rioters, Clark notes that “the glorification of the Confederacy and of a time in American history that sought to oppress and erase people of color is part of a project to re-define true Americans as only those with European heritage.” *Id.* at 10; see also Rosie Gray, *Trump Defends White-Nationalist Protestors: ‘Some Very Fine People on Both Sides’*, THE ATLANTIC (Aug. 15, 2017), <https://www.theatlantic.com/politics/archive/2017/08/trump-defends-white-nationalist-protesters-some-very-fine-people-on-both-sides/537012/>. Gray explains how ex-president Trump defended the white nationalists and Neo-Nazis involved in the ‘Unite the Right’ Rally in Charlottesville, Virginia, while resolutely maintaining that the “counterprotesters deserve[d] an equal amount of blame for the violence.” *Id.*

36. U.S. CONST. amend. XIII. Section 1 of the Thirteenth Amendment provides: “Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.” *Id.* § 1.

37. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html>.

38. *Id.*

39. See CLARK, *supra* note 35, at 1–2.

40. The identifier “white supremacist” refers to “a person who believes that the white race is inherently superior to other races and that white people

groups in the US both operate with the ideology that racial discrimination is not only a clear benefit to society, but further propose that it should become a fixture in US laws and policies.⁴¹ Unsurprisingly, First Amendment freedoms have provided ample coverage and protection to these groups throughout history.⁴²

The Neo-Nazi movement,⁴³ which extols white supremacist ideals, was delivered a monumental victory, courtesy of the First Amendment in the 1978 Seventh Circuit case *Collin v. Smith*.⁴⁴ Known colloquially as the “Skokie Case,”⁴⁵ *Collin v. Smith* involved a constitutional claim brought by the Nationalist Socialist Party of America, a Neo-Nazi group, against the village of Skokie, Illinois, a city home to a largely Jewish population, including many Holocaust survivors.⁴⁶ In bringing legal action, the Nationalist Socialist Party of America demanded that a town ordinance that would prevent the organization from holding a Neo-Nazi demonstration in Skokie be declared unconstitutional.⁴⁷

should have control over people of other races.” *White Supremacist*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/white%20supremacist> (last visited Oct. 15, 2020).

41. Amanda Taub, ‘*White Nationalism, Explained*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/22/world/americas/white-nationalism-explained.html>. Individuals that support white nationalism (earning them the title of “white nationalists”), are individuals that believe “national identity should be built around white ethnicity, and that white people should therefore maintain both a demographic majority and dominance in the nation’s culture and public life.” *Id.*

42. See Haupt, *supra* note 4, at 318–21.

43. Neo-Nazis are “one of the main segments of the white supremacist movement in the United States.” *Neo-Nazis*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/neo-nazis> (last visited Oct. 15, 2020). A group identified by their strong reverence for Adolf Hitler and Nazi Germany, Neo-Nazis often “adopt Nazi principles to their own times and geographic location.” *Id.*

44. *Collin v. Smith*, 578 F.2d 1197 (7th Cir.1978); see also Bazylar, *supra* note 27 (“In the United States, the First Amendment protects the freedoms of speech, press and association; such guarantees prohibit suppression of the Nazi message.”).

45. See David Goldberger, *The Skokie Case: How I Came to Represent the Free Speech Rights of Nazis*, ACLU (Mar. 2, 2020), <https://www.aclu.org/issues/free-speech/rights-protesters/skokie-case-how-i-came-represent-free-speech-rights-nazis>; see also Meghan Keneally, *Skokie: The Legacy of the Would-Be Nazi March in a Town of Holocaust Survivors*, ABC NEWS (June 22, 2018, 1:44 PM), <https://abcnews.go.com/US/skokie-legacy-nazi-march-town-holocaust-survivors/story?id=56026742>.

46. *Collin*, 578 F.2d 1197, 1199.

47. *Id.* at 1201.

The Seventh Circuit in *Collin v. Smith* cited First Amendment protections in rendering its decision, reasoning that “a state may not make criminal the peaceful expression of unpopular views . . . [and] mere public intolerance or animosity cannot be the basis for abridgement of these constitutional freedoms.”⁴⁸ Ultimately, the *Collin* court held that the ordinance invoked by the town in order to prevent the Neo-Nazi organization from holding its demonstration was overly broad and therefore constitutionally impermissible.⁴⁹ As a result, the Skokie Case cleared the way for Neo-Nazis and other white supremacist groups to forge a path forward with the knowledge and security that they would be reliably shielded by the First Amendment.⁵⁰ Affording such groups a certain level of protection under the First Amendment has led to grave repercussions, many of which are dangerously center-stage in present-day.⁵¹

C. Denial is Not Just a River in Egypt: The Holocaust and its Aftermath in Germany

As one of the most horrific instances of attempted mass extermination and unconscionable crimes against humanity to date, the Holocaust reigns as a formidable example of the rampant discrimination and hate that plagued the European continent during the 20th century.⁵² Six million Jews tragically lost their lives at the hands of Adolf Hitler and the Nazi Regime during the short six-year period of WWII, one of the most notorious and devastating outcomes in the history of humankind.⁵³ If the sheer magnitude of lives lost was not disturbing enough, the unimaginable amount of acts of torture and wickedness enacted on the Jewish people by Hitler’s regime remains inconceivable still to this day.⁵⁴

48. *Id.* at 1206 (internal citation omitted).

49. *Id.* at 1207.

50. See Haupt, *supra* note 4, at 318–19.

51. See CLARK, *supra* note 35, at 10; see also *infra* Part I (D).

52. See generally *Introduction to the Holocaust*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/introduction-to-the-holocaust> (last visited Oct. 2, 2020).

53. See *World War II in Europe*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/world-war-ii-in-europe> (last visited Oct. 2, 2020).

54. See *Introduction to the Holocaust*, *supra* note 52.

Between 1939 and 1945, Hitler and the Nazis set out to confine Jews to life in uninhabitable ghettos⁵⁵ all over Nazi-occupied Europe,⁵⁶ eventually deporting over six million to various concentration camps, otherwise known as “extermination” camps,⁵⁷ as part of Hitler’s “Final Solution.”⁵⁸ Although Jews were the primary target of Nazi anti-Semitism throughout WWII, there was no shortage of other minority groups that faced merciless persecution and violence by the Nazis.⁵⁹ The rampant anti-Semitism

55. For a detailed history of the word “ghettos” both during and predating WWII, see *The Jewish Ghettos: Separated from the World*, FACING HISTORY & OURSELVES, <https://www.facinghistory.org/holocaust-and-human-behavior/cha-pter-8/jewish-ghettos-separated-world> (last visited Sept. 16, 2021).

Beginning in 1939, Jews throughout German-controlled Poland were forced to move into ghettos—specific areas of cities and towns that were separated from the rest of the population. Jews had to leave behind their homes and most of their possessions when they moved to ghettos; while families were generally able to stay together, space was crowded, with multiple families sharing one apartment...Some ghettos, like Warsaw’s, were sealed off from the outside world by walls, barbed wire, and guards. Others were more open, and Jewish residents were able leave the ghetto to work, most often as forced laborers for the Nazis or companies that supported the Third Reich.

Id.

56. *Introduction to the Holocaust*, *supra* note 52.

57. *Id.*

58. “Final Solution” is a shortened version of the Nazi term, “the Final Solution of the Jewish Question,” (die Endlösung der Judenfrage), which refers to the systematic mass destruction of Europe’s Jews. See *The “Final Solution,”* UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/the-final-solution> (last visited Oct. 2, 2020).

59. Jews were only one of a number of minority groups that suffered discrimination, bigotry, and violence at the hands of Hitler and the Nazis. See *Introduction to the Holocaust*, *supra* note 52.

While Jews were the priority target of Nazi racism, other groups within Germany were persecuted for racial reasons, including Roma (then commonly called “Gypsies”), Afro-Germans, and people with mental or physical disabilities. By the end of the war, the Germans and their Axis partners murdered between 250,000 and 500,000 Roma. And between 1939 and 1945, they murdered at least 250,000 mentally or physically disabled patients As Nazi tyranny spread across Europe, the Germans and their collaborators persecuted and murdered millions of other people seen as biologically inferior

and inhumane killings that dominated parts of Europe for the majority of WWII evidence some of the most severe hate crimes against a select number of minority groups to date.⁶⁰

Irrespective of the overwhelming volume of heavily documented acts of cruelty and anti-Semitism exhibited by the Nazi Regime towards the Jewish people,⁶¹ the enduring force of the Holocaust Denial Movement remains alive and well.⁶² Purportedly in contrast with the loathsome crimes against humanity that defined Hitler's reign in Germany, the Holocaust Denial Movement was born out of the desire by its constituents to perpetuate the message that history's generally accepted account of what took place during the Holocaust is falsified.⁶³ Made up of two primary bodies of thought, the Holocaust Denial Movement consists of Negationists, individuals who claim that the Holocaust never even occurred, and Revisionists, individuals who concede that although an event like the Holocaust did occur, the scope of the crimes committed, the egregious methods undertaken by the Nazis, the number of mass deaths, and other substantive details are exaggerated, embellished, or blatantly untrue.⁶⁴ In an attempt to spare themselves from being labeled as "anti-Semites,"⁶⁵ members of the Holocaust Denial Movement

or dangerous From the earliest years of the Nazi regime, German authorities persecuted homosexuals and other Germans whose behavior did not conform to prescribed social norms (such as beggars, alcoholics, and prostitutes), incarcerating thousands of them in prisons and concentration camps.

Id.

60. See *The FAQs*, *The Holocaust Resource Center*, YAD VASHEM, <https://www.yadvashem.org/holocaust/faqs.html> (last visited Sept. 30, 2020).

61. See *The "Final Solution," supra* note 58.

62. For a comprehensive explanation of the Holocaust Denial Movement, see Michelle L. Picheny, *A Fertile Ground: The Expansion of Holocaust Denial Into the Arab World*, 23 B.C. THIRD WORLD L. J. 331 (2003); see also Knechtle, *supra* note 7, at 44.

63. Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz" – and Other – "Lies,"* 85 MICH. L. REV. 277, 280 (1986).

64. See Picheny, *supra* note 62, at 338; see also Knechtle, *supra* note 7, at 44–45; Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 FLA. ST. J. TRANSNAT'L L. & POL'Y 253, 260 (2003).

65. The term "anti-Semite" refers to "a person who discriminates against or is prejudiced or hostile toward Jews." *Anti-Semite*, DICTIONARY.COM, <https://www.dictionary.com/browse/anti-semite?s=t> (last visited Oct. 2, 2020). Encyclopedia Britannica defines "Semite" as a "member of a people speaking

allege that their movement seeks only to set straight “the facts of history,” rather than commit further acts of anti-Semitism against the Jewish people.⁶⁶ At its core, this movement seeks only to minimize and attempt to justify the truly appalling acts of discrimination and hate that took place during a calculated effort to extinguish an entire race of human beings through use of a large-scale genocide.⁶⁷

As the years go by and the distance between modern-day and the horror of the Holocaust grows, a new fear, the fear of forgetting, gains strength. There can be little doubt that the Holocaust Denial Movement will continue to grow in size and support once there are no more victims alive to supply eyewitness testimony about Nazi atrocities.⁶⁸ Furthermore, the abundance of misinformation and miseducation in connection with the Holocaust is a sizeable problem in today’s society, accentuating the pressing need for improvements to teaching methods in and outside of schools.⁶⁹

any of a group of related languages presumably derived from a common language, Semitic.” *Semite*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Semite> (last visited Oct. 2, 2020).

66. See Susan Pentlin & Shelly Shapiro, *Anti-Semitism and Holocaust Denial in the Classroom*, Address at The Second International Conference on the Holocaust and Education (Oct. 12, 1999), <https://www.yadvashem.org/download/education/conf/pentlinandshapirortf.pdf>; see also Picheny, *supra* note 62, at 336–37.

67. See Picheny, *supra* note 62, at 337–39.

68. See Judith Miller, *Erasing the Past: Europe’s Amnesia About the Holocaust*, N.Y. TIMES MAG., §6, at 30 (Nov. 16, 1986), <https://www.nytimes.com/1986/11/16/magazine/erasing-the-past-europe-s-amnesia-about-the-holocaust.html>.

69. See Maggie Astor, *Holocaust is Fading from Memory, Survey Finds*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/holocaust-education.html>. Astor reports some of the unnerving statistics surrounding society’s miseducation of the Holocaust:

Thirty-one percent of Americans, and 41 percent of millennials, believe that two million or fewer Jews were killed in the Holocaust; the actual number is around six million. Forty-one percent of Americans, and 66 percent of millennials, cannot say what Auschwitz was. And 52 percent of Americans wrongly think Hitler came to power through force.

Id.

D. Hatred Remains Alive and Well: Anti-Semitism in the Twenty-First Century

The gut-wrenching reality of anti-Semitism in our society did not begin and end with Hitler's Nazi Germany during World War II.⁷⁰ Feelings, words, and actions of hate towards Jews span continents and are illustrated by the staggering number of violent, anti-Semitic, and discriminatory crimes taking place all over the world, especially in the US and Germany.⁷¹ With the numbers of incidents reported growing larger and larger with every passing day, the need for adequate protection and effective legal remedies has never been more evident.⁷² Furthermore, the lightspeed pace of communication today has given anti-Semitic organizations and political movements an unencumbered, vast public forum in which to effortlessly spread anti-Semitic propaganda and hateful vitriol.⁷³

Since 1979, the Anti-Defamation League (ADL), has been tasked with monitoring, tracking, and eradicating anti-Semitism throughout the US, as well as on a global scale.⁷⁴ The ADL provides annual updates of the alarming increases in anti-

70. See Daniel Miller, *Anti-Semitism is on the Rise, 75 Years After the End of the Holocaust and Second World War*, THE CONVERSATION, <https://theconversation.com/anti-semitism-is-on-the-rise-75-years-after-the-end-of-the-holocaust-and-second-world-war-132141> (last visited Sept. 30, 2020); see also *Holocaust Denial and Anti-Semitism on Social Media up 30 Percent in January 2018 Compared to 2016, WJC Report Finds*, WORLDJEWISHCONGRESS.COM (Feb. 14, 2018), <https://www.worldjewishcongress.org/en/news/holocaust-denial-and-anti-semitism-on-social-media-up-30-percent-in-january-2018-compared-to-2016-wjc-report-finds-2-3-2018> [hereinafter *Holocaust Denial and Anti-Semitism on Social Media Up 30 Percent*].

71. See Christina Goßner, *Racial Discrimination On the Rise in Germany*, EURACTIV.COM (June 10, 2020), <https://www.euractiv.com/section/non-discrimination/news/racial-discrimination-on-the-rise-in-germany/>; see also Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged with 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/us/active-shooter-pittsburgh-synagogue-shooting.html>; Marcy Oster, *Fire at University of Delaware Chabad Ruled Arson*, HAARETZ.COM (Aug. 28, 2020, 2:10 PM), <https://www.haaretz.com/jewish/.premium-fire-at-university-of-delaware-chabad-ruled-arson-1.9109240>; Amanda Ripley, *Seven Days of Hatred*, TIME MAG. (Nov. 30, 2003), <http://content.time.com/time/subscriber/article/0,33009,552065,00.html>.

72. See Goßner, *supra* note 71; Robertson, Mele & Tavernise, *supra* note 71; Ripley, *supra* note 71.

73. See Tsesis, *supra* note 11, at 832–34.

74. *Who We Are*, ANTI-DEFAMATION LEAGUE, www.adl.org/who-we-are (last visited Oct. 10, 2020).

Semitic incidents happening throughout the world.⁷⁵ The ADL's 2019 "Audit of Antisemitic Incidents"⁷⁶ revealed a 12 percent surge in anti-Semitic crimes and acts of hate in the US alone from the prior year; the report cited more than 2,100 acts of assault, vandalism, and harassment.⁷⁷ The terrifying yet eye-opening reality is that these daunting numbers are reflective only of crimes that have been reported and documented.⁷⁸ Understandably, the ADL is unable to account for those crimes that often go underreported, if reported at all.⁷⁹ Of the trends that the ADL can monitor, the results show that modern-day ties to deep-seated racism and anti-Semitic ideologies are profound and growing at a rapid pace.⁸⁰

Beyond their annual audits, the ADL has reported a dramatic uptick in anti-Semitic hate crimes across the US in the past five years.⁸¹ A short time ago, in August 2017, it seemed like the entire world watched with bated breath when a protest of hundreds of white nationalists at a "Unite the Right"⁸² march in

75. *Id.*

76. The ADL monitors incidents of anti-Semitic harassment, vandalism, and assault that occur in the United States and publishes the information in an annual audit. See *Audit of Anti-Semitic Incidents 2019*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/audit2019> (last visited Oct. 10, 2020).

77. *Id.* "Jews and Jewish institutions were the overwhelming target of religion-based hate crimes last year – as they have been every year since 1991... Nearly 60% of hate crime attacks were targeted against Jews and Jewish institutions in 2018." *ADL Urges Action After FBI Reports Jews Were Target of Most Religion-Based Hate Crimes in 2018*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/adl-urges-action-after-fbi-reports-jews-were-target-of-most-religion-based-hate> (last visited Sept. 29, 2020).

78. See *Audit of Anti-Semitic Incidents 2019*, *supra* note 76; *ADL Urges Action After FBI Reports Jews Were Target of Most Religion-Based Hate Crimes in 2018*, *supra* note 77.

79. See *Audit of Anti-Semitic Incidents 2019*, *supra* note 76; *ADL Urges Action After FBI Reports Jews Were Target of Most Religion-Based Hate Crimes in 2018*, *supra* note 77.

80. See *Audit of Anti-Semitic Incidents 2019*, *supra* note 76; *ADL Urges Action After FBI Reports Jews Were Target of Most Religion-Based Hate Crimes in 2018*, *supra* note 77.

81. *Anti-Semitic Incidents Surged Nearly 60% in 2017, According to New ADL Report*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/anti-semitic-incidents-surged-nearly-60-in-2017-according-to-new-adl-report?print=1> (last visited Sept. 29, 2020); see also *Holocaust Denial and Anti-Semitism on Social Media Up 30 Percent*, *supra* note 70.

82. Deemed to be one of the largest and most violent gatherings in the U.S. in decades, the "Unite the Right" rally involved a variety of different racist,

Charlottesville, Virginia erupted into violence, utter chaos, and death.⁸³ Over 300 armed Neo-Nazis and white supremacists marched through downtown Charlottesville⁸⁴ wielding Nazi and Confederate insignia and chanting anti-Semitic slogans⁸⁵ to protest the proposed removal of a statute memorializing Confederate General Robert E. Lee.⁸⁶ Once again, the First Amendment reigned supreme.⁸⁷ In response to criticisms regarding the lack of action by the nearby University of Virginia,⁸⁸ the university's then-president cited the First Amendment rights of free speech and freedom of assembly as the reasoning behind the

anti-Semitic, white nationalist, and white supremacist groups, including Neo-Nazis and the Ku Klux Klan. See Andrew Katz, *Unrest in Virginia*, TIME MAG., <https://time.com/charlottesville-white-nationalist-rally-clashes/> (last visited Oct. 15, 2020).

83. *Id.*

84. See James Loeffler, *An Abandoned Weapon in the Fight Against Hate Speech*, THE ATLANTIC (June 16, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/lost-history-jews-and-civil-rights/590929/>.

85. The white supremacist and white nationalist protestors in Charlottesville chanted “blood and soil,” the English translation of a Nazi slogan used during WWII to evoke the idea of a pure “Aryan” race and all of the domain it would ultimately conquer. See *Origins of Neo-Nazi and White Supremacist Terms and Symbols*, THE UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/antisemitism/what-is-antisemitism/origins-of-neo-nazi-and-white-supremacist-terms-and-symbols> (last visited Oct. 15, 2020). Protestors were also reported chanting “Jews will not replace us,” a variant on “You will not replace us,” a slogan attributed to the white supremacist belief that the white race is in danger of extinction by other non-whites being controlled and manipulated by the Jews. See Loeffler, *supra* note 84.

86. Considered to be one of the Confederacy's top generals during the Civil War, General Robert E. Lee has gained historic notoriety as the leader of the largest Confederate army in some of the Civil War's bloodiest fights, driving the southern states' attempt at succession from the Union following the election of Abraham Lincoln as President of the United States. See Jacey Fortin, *The Statute at the Center of Charlottesville's Storm*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-rally-protest-statue.html>; Jenny Woodley, *Charlottesville, Virginia: The History of the Statute at the Centre of Violent Unrest*, THE CONVERSATION (Aug. 15, 2017, 8:52 AM), <https://theconversation.com/charlottesville-virginia-the-history-of-the-statue-at-the-centre-of-violent-unrest-82476>.

87. See Loeffler, *supra* note 84.

88. Despite protestors marching through the UVA campus the evening before the rally, the University officials' response was no response at all. *Id.* With the exception of barring those protestors carrying lit torches as an imminent threat to public safety, the First Amendment protections prevented them from taking any further action. *Id.*

university's powerlessness against the protestors.⁸⁹ The sad fact is that there is no shortage of hate crimes taking place every single day in the US, whether they be religiously-motivated, racially-motivated, or otherwise.⁹⁰ Hate crimes of all types are notoriously underreported, making statistics inaccurate, undermining trend analyses, and slowing law enforcement response.⁹¹

II. PRO-SPEECH VERSUS PRO-DIGNITY

The current legislative framework enacted in Germany and the US to address hate speech, hate crimes, and anti-Semitic acts could not be more different.⁹² Nevertheless, the two share one distinct commonality: the overall, systemic failure of their anti-hate regulations.⁹³ Both approaches err on the side of extreme, but their distinct differences often garner the same reaction: ineffective legislation unable to solve for the widespread climate of hatred and bigotry abundantly prevalent in both nations.⁹⁴ The US, with its unwavering emphasis on an individual's right to freedom of speech, remains the sole Western country with laws functioning to protect hate speech rather than protect against it.⁹⁵ Conversely, Germany, in an ongoing attempt to rewrite the evils of its past, has enacted certain laws so strict and all-encompassing that they have detrimentally far-reaching

89. Loeffler, *supra* note 84. The protestors received further support by ex-president Donald Trump, who expressed sympathy for the demonstration and remarked that there were "some very fine people on both sides." See Gray, *supra* note 35; see also Katz, *supra* note 82.

90. A 2020 report from the Center for the Study of Hate and Extremism at California State University, San Bernardino showed that "anti-Semitic hate crimes in New York, Los Angeles and Chicago — the nation's three largest cities — are poised to hit an 18-year peak...The report, which uses the most recent police data, found that Jews in all three cities are being targeted at the highest numbers seen since 2001." See Adeel Hassan, 'A Different Era': Anti-Semitic Crimes, and Efforts to Track Them, *Climb*, N.Y. TIMES (Jan. 3, 2020), <https://www.nytimes.com/2020/01/03/us/anti-semitism-hate-crimes.html>.

91. See Noa Yadidi, *DOJ Report: Majority of Hate Crimes Go Unreported*, CNN (June 29, 2017, 2:57 PM), <https://www.cnn.com/2017/06/29/politics/doj-hate-crime-report/index.html>.

92. See Haupt, *supra* note 4, at 303.

93. See Krotoszynski, *supra* note 7, at 1609.

94. See *id.*

95. See Lasson, *supra* note 1, at 72 ("[E]very Western democracy with the exception of the United States has laws which punish various forms of hate speech, and a number of them specifically prohibit Holocaust denial. The debate elsewhere is not whether to control hate speech, but how.").

consequences with the potential of encroaching on individual civil liberties.⁹⁶ Neither approach should be deemed the “gold standard” in hate crime prevention, nor would either approach work seamlessly if substituted for the laws of the other country.⁹⁷

At the heart of the First Amendment to the US Constitution lies the integral right to freedom of speech. The ability to speak and express one’s ideas freely without fear of government censorship or persecution is an individual liberty afforded protection under the First Amendment.⁹⁸ The inclusion of the Bill of Rights, and within it, the first ten amendments, was the Framers’ solution to the heated discord between the thirteen states concerning the proposed Constitution’s ratification.⁹⁹ Freshly freed from the unyielding grip of the British monarchy, the founding fathers of the new American nation were deeply concerned about safeguarding their citizens’ newly solidified individual liberties, like the paramount right to freedom of speech.¹⁰⁰ Concern turned to consequence, resulting in the US Constitution, with its newly enacted Bill of Rights, becoming the law of the land.¹⁰¹

96. See Knechtle, *supra* note 7, at 49; see also *infra* Part III (B)–(C).

97. Haupt, *supra* note 4, at 303 (“[G]iven the fundamental differences between the two approaches to free speech and consequently to hate speech regulation, the result of comparing the U.S. approach with the German one should not be to call for the implementation of the German system or its elements in the United States.”).

98. See *U.S. Institutions – Why is the First Amendment Important?*, EDITORIALS VOICE OF AMERICA (Feb. 20, 2017), <https://editorials.voa.gov/a/the-importance-of-the-first-amendment-/3733070.html>; see also *Freedom of Speech*, HISTORY.COM (Dec. 4, 2017, updated Oct. 7, 2021), <https://www.history.com/topics/united-states-constitution/freedom-of-speech>.

99. The need for a Bill of Rights was spurred from a conflict between Federalists and Anti-Federalists at the then state of the US Constitution. “The Federalists opposed including a bill of rights on the ground that it was unnecessary. The Anti-Federalists, who were afraid of a strong centralized government, refused to support the Constitution without one.” See *The Bill of Rights: A Brief History*, ACLU, <https://www.aclu.org/other/bill-rights-brief-history> (last visited Sept. 16, 2021).

100. *Id.*

101. “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI §2.

Entirely absent from the US' founding legal documents, but nowhere near any less important, is the right to human dignity.¹⁰² As a core concept of human rights, the right to human dignity boils down to the requirement of treating all other individuals with respect, tolerance, and understanding.¹⁰³ Promulgated into the international sphere by the Universal Declaration of Human Rights,¹⁰⁴ the right to human dignity became an integral fixture that all human beings are born with.¹⁰⁵ The international community has cemented this human right as one that is "universal, inalienable, indivisible," and one that transcends religious, racial, and cultural differences, ultimately intrinsically linking all humankind with one another.¹⁰⁶

A. *The United States and the First Amendment*¹⁰⁷

Plain and simple, the value that the US places on the freedoms of speech, expression, association, and all of the other rights enumerated in the First Amendment is unmistakable.¹⁰⁸ As one of the most cherished and fundamental rights enshrined in the US Constitution, the roots of the right to freedom of speech can be

102. "Dignity' appears nowhere in the US Declaration of Independence. Ditto for the US Constitution." See Remy Debes, *A History of Human Dignity*, FORUM FOR PHILOSOPHY (Feb. 5, 2018), <https://blogs.lse.ac.uk/theforum/a-history-of-human-dignity/>.

103. See *Universal Declaration of Human Rights – In Six Cross-Cutting Themes*, UN HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/udhr/pages/crosscuttingthemes.aspx> (last visited Sept. 16, 2021).

104. See text accompanying *infra* note 125.

105. See Emmaline Soken-Huberty, *What is Human Dignity? Common Definitions*, HUMAN RIGHTS CAREERS, <https://www.humanrightscareers.com/issues/definitions-what-is-human-dignity/> (last visited Sept. 16, 2021).

106. See Maria Ron Balsera, *Human Rights: Universal, Inalienable, and Indivisible*, ACTIONAID INT'L (Dec. 9, 2019), <https://actionaid.org/opinions/2019/human-rights-universal-inalienable-and-indivisible>; see also Harvey Slade, *What is Dignity and What Does it Have to Do With Our Rights?*, EACH OTHER (Aug. 7, 2017), <https://eachother.org.uk/what-is-dignity-and-what-does-it-have-to-do-with-our-rights/>.

107. The language of the First Amendment to the US Constitution 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." U.S. CONST. amend. I.

108. See generally Webb, *supra* note 7 (arguing that the U.S. is in opposition to the international norm of hate speech regulation because of its absolute protection of the First Amendment freedom of speech above all other rights, including human dignity).

traced back to the country's founding as a young, newly-minted sovereign nation.¹⁰⁹ The Framers'¹¹⁰ goal of encouraging "an open and unfettered exchange of ideas" served as the justification for viewing the First Amendment guarantee of free expression as virtually absolute.¹¹¹ It is an unavoidable fact, however, that "virtually absolute" is *not* "absolute," therefore, the Supreme Court has held that certain categories of expression may be regulated without a constitutional violation of the First Amendment.¹¹²

The constitutional standard for determining whether speech is granted First Amendment protection was set forth in the 1969 Supreme Court case *Brandenburg v. Ohio*.¹¹³ There, in deciding whether any First Amendment rights had been infringed, the Court drew the line at speech used to incite violence.¹¹⁴ The rigid standard conceived in *Brandenburg* remains the constitutional standard in force today.¹¹⁵ By drawing a hard line at "incitement to violence," the US turns a blind eye to the potential for harm

109. See Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1529 (2003); see also Kommers, *supra* note 5, at 665. On the significance of free speech in the United States, Kommers emphasizes, "Decades of judicial interpretation have underscored the critical importance of this freedom under the American governmental system." *Id.*

110. The Founding Fathers of the United States of America can be divided into two distinct subgroups: the Signers of the Declaration of Independence and the Framers of the U.S. Constitution. See *The Framers of the Constitution*, BOUNDLESS.COM, <http://kolibri.teacherinabox.org.au/modules/en-boundless/www.boundless.com/political-science/textbooks/boundless-political-science-textbook/the-constitution-and-the-founding-of-america-2/the-constitutional-convention-25/the-framers-of-the-constitution-148-7498/index.html> (last visited Sept. 16, 2021). The Framers were a group consisting mainly of political delegates to the Constitutional Convention of 1787, who aided in drafting the document that would eventually become the U.S. Constitution. *Id.*

111. Lasson, *supra* note 1, at 64.

112. See Haupt, *supra* note 4, at 317.

113. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that speech cannot be punished for merely advocating violence except when the "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.").

114. *Id.*

115. See Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 KANSAS L. REV. 575, 577 (2007) ("The Supreme Court generally has been zealous in its protection of the First Amendment speech rights of all, reflecting an apparent longstanding and deeply held American commitment to free speech as a cornerstone of our society.").

caused by any hate speech that falls short of incitement to violence.¹¹⁶ Accordingly, the US risks repeating the mistakes ingrained in its own history, one that is fraught with hundreds of years of discrimination, racial inequality and organized hate movements that entered and eventually became part of the social norm.¹¹⁷

In an effort to promote human dignity and protect minorities from needless persecution, hate speech is presently regulated and criminalized by the majority of Western nations.¹¹⁸ “The US, however, rests in the minority, and it remains the only country to expressly protect” hate speech.¹¹⁹ Under the guise of guarding the individualism of its nation’s population as a foundational principle, the US and the First Amendment aid in providing near complete protection of the freedom of speech, thereby extending an identical degree of protection to hate speech.¹²⁰ The US’ approach functions to lift the right of freedom of speech miles above other rights, like that of human dignity and the social good, in effect making hate speech virtually untouchable.¹²¹

By failing to adequately incorporate the value of human dignity in the balancing test of free speech and hate speech regulation, the US’ current approach to hate crimes and hate speech falls short in providing any constructive remedy within its borders.¹²² Instead, its stance on freedom of speech forces the US to constantly clash with the international norm of regulating hate speech.¹²³ Due to the unwavering protection that the US allots hate speech on First Amendment grounds, the US currently

116. See Lasson, *supra* note 1, at 68.

117. *Id.* at 70. Lasson notes:

It was Hitler’s vocal Anti-Semitism that led Germans to avoid their Jewish neighbors and friends, which in turn enabled easier enactment of the blatantly discriminatory Nuremberg laws, which in turn made synagogue desecration and street mugging more acceptable, which in turn allowed for creation of the killing fields in the death camps.

Id. See also Tsesis, *supra* note 11, at 873.

118. See Webb, *supra* note 7, at 446.

119. *Id.*; see also Lauren E. Beausoleil, Note, *Free, Hateful, and Posted: Rethinking First Amendment Protection of Hate Speech in a Social Media World*, 60 B.C. L. REV. 2101, 2112–13; see also Van Blarcum, *supra* note 7, at 808–09.

120. See Webb, *supra* note 7, at 446.

121. *Id.*

122. *Id.* at 446–47.

123. *Id.* at 467.

finds itself in direct violation of numerous international treaties and legislations,¹²⁴ including but not limited to the Universal Declaration of Human Rights (UDHR),¹²⁵ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹²⁶ and the International Covenant on Civil and Political Rights (ICCPR).¹²⁷

Passed in direct response to the inhumane atrocities that took place during WWII, the UDHR is a United Nations (UN)¹²⁸ treaty that maintains that certain individual liberties, like freedom of speech, may be restricted in order to preserve human dignity and promote tolerance among religious and racial groups.¹²⁹ The UDHR's widespread adoption and application across nations has solidified the declaration as binding, legal precedent at the international level.¹³⁰ Further, the UDHR contains a provision expressly establishing the freedom from being attacked with hate speech.¹³¹ As a result, the First Amendment right

124. See generally Webb, *supra* note 7, at 454–58 (evaluating some of the international laws that contain specific provisions protecting against hate speech, hate crimes, and attacks on human dignity).

125. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR]. In particular, the UDHR details the idea that individual liberties, such as free expression, may be limited to secure “due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.” *Id.* art. 29. The UDHR provides that all people “are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination.” *Id.* art. 7; see also Webb, *supra* note 7, at 455 (“[T]he UDHR explicitly provides for a freedom against being attacked with hate speech. Due to its widespread adoption and application, the UDHR is binding law.”).

126. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (Jan. 4, 1969) 660 U.N.T.S. 194 [hereinafter ICERD]. The ICERD requires the condemnation and criminalization of “all propaganda . . . based on ideas or theories of superiority . . . or which attempt to justify or promote racial hatred and discrimination in any form.” *Id.* art. 4.

127. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) 999 U.N.T.S. 171 [hereinafter ICCPR].

128. See *About Us*, UNITED NATIONS, <https://www.un.org/en/about-us> (last visited Oct. 15, 2020).

129. Webb, *supra* note 7, at 455.

130. Jeremy Rabkin, *What We Can Learn About Human Dignity From International Law*, 27 HARV. J.L.

& PUB. POL’Y 145, 161 (2003) (“The Universal Declaration of Human Rights is now, many authorities assure us, ‘binding law.’”).

131. See UDHR, *supra* note 125, art. 7.

protecting freedom of speech, including hate speech, puts the US in direct violation of binding international law.¹³²

The ICERD is another international human rights treaty implemented by the UN, with a mandatory legal obligation that its signatory nations condemn or criminalize racist policies and practices.¹³³ Despite ratifying the ICERD, the US made distinct reservations regarding its requirements under the treaty, which serve to preserve all fundamental rights enumerated in the First Amendment.¹³⁴

The ICCPR is an additional international treaty adopted by the UN, with provisions requiring its signatory nations to protect and preserve basic human rights.¹³⁵ Articles 19¹³⁶ and 20¹³⁷

132. Webb, *supra* note 7, at 455.

133. Joshua Cooper, *Maximizing the Convention on the Elimination of Racial Discrimination*, CULTURAL SURVIVAL Q. MAG. (June 2016), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/maximizing-convention-elimination-racial-discrimination>; see also *Committee on the Elimination of Racial Discrimination*, INT'L JUST. RES. CTR., <https://ijrcenter.org/un-treaty-bodies/committee-on-the-elimination-of-racial-discrimination/> (last visited Sept. 30, 2020).

134. Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence*, 4 DEPAUL J. SOC. JUST. 263, 273 (2011).

135. ICCPR, *supra* note 127.

136. See *id.* art. 19. Article 19 of the ICCPR provides:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall 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.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

Id.

137. See ICCPR, *supra* note 127, art. 20 (prohibiting “any propaganda for war” and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.”).

of the ICCPR work to provide a balance between the fundamental rights afforded to all individuals and the legal restrictions in place concerning hate speech, or when it is otherwise necessary to protect the rights and reputations of anyone involved.¹³⁸ In particular, Article 2(2) of the ICCPR compels the governments of the treaty's signatory nations to enact legislation enforcing its provisions.¹³⁹

In yet another instance of the US doing everything in its power to protect the First Amendment, the US signed and ratified the ICCPR with explicit exceptions eliminating any obligation on the US to restrict the freedom of speech of its citizens, putting it in unequivocal conflict with the treaty's intended purpose.¹⁴⁰ The general consensus across the international community and within several international treaties is that acts of racism and anti-Semitism are a direct result of harms perpetuated by bigotry.¹⁴¹ While the danger of hate speech is indisputable, the US has continued to disregard such dangers and acted in defiance of the international community and the laws it has in place.¹⁴²

B. Germany and the Basic Law

The most fundamental difference between the US Constitution and the German Basic Law is that under Germany's constitutional framework, all rights must be weighed against the value of human dignity, which ultimately reigns supreme over all other values.¹⁴³ Using an "objective ordering of values" established by the Basic Law and enforced by the Federal Constitutional Court, any and all free speech claims made in Germany must be weighed against the values of human dignity and

138. Webb, *supra* note 7, at 456.

139. See ICCPR, *supra* note 127, art. 2(2) (establishing that each nation that is a party to the treaty must undertake the "necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights" recognized in the ICCPR.) *Id.*

140. Webb, *supra* note 7, at 456.

141. See ICERD, *supra* note 126. The ICERD obligates signatory parties to criminalize "all dissemination of ideas based on racial superiority or hatred" and "incitement to racial discrimination." *Id.* art. 4(a).

142. For more on this point, see Tsesis, *supra* note 11. Tsesis remarks "United States jurisprudence, along with the incitement and danger to democracy attached to it, makes it more difficult for other countries to eliminate hate speech." *Id.* at 859; see also Webb, *supra* note 7, at 481.

143. Haupt, *supra* note 4, at 314.

personal honor.¹⁴⁴ Article 5 of the Basic Law exists as the central freedom of speech provision for Germany.¹⁴⁵ Notably, the Basic Law does contain several provisions that expressly protect speech activity in different forms and contexts.¹⁴⁶

The Basic Law guarantee of freedom of opinion and speech is subject to express limitations, and to a much more severe degree than those of the First Amendment.¹⁴⁷ Most significantly, despite provisions providing and protecting the freedom of speech, German law serves primarily to reject free speech protections when there has been an attack on an individual's human dignity.¹⁴⁸ Furthermore, Germany has specific hate law provisions that include regulations that "protect against insult, defamation and other forms of verbal assault," such as attacking an individual's honor or integrity, damaging another's reputation, and disparaging the memory of the dead.¹⁴⁹

144. See Krotoszynski, *supra* note 7, at 1555–56; Kommers, *supra* note 5, at 693.

145. Article 5 of the GG provides:

(1) Every person shall have the right to freely express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.

(2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.

(3) Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.

GG art. 5.

146. Article 5(3) denotes that academic freedom enjoys textual protection. See GG art. 5(3).

147. GG art. 5(2); see also Stein, *supra* note 63, at 278–79.

148. GG art. 1 (Article 1 of the German Basic Law declares that "Human dignity shall be inviolable."); see also Webb, *supra* note 7, at 462 n.181 (noting that, "although the U.S. values individualism over societal interests, Germany weighs all individual rights against the value of human dignity, and human dignity trumps individual rights."); see also Tsesis, *supra* note 11, at 861–62 (detailing Article 5 of the German Basic Law, which guarantees freedom of expression).

149. Rosenfeld, *supra* note 109, at 1551.

The adoption of the Basic Law, with its strong emphasis on the preservation of human dignity, is plainly attributable to Germany's commitment to eradicating the kind of racial and religious prejudice and Nazi ideology fostered by the events of the Holocaust.¹⁵⁰ It was in direct response to the atrocities orchestrated by Hitler and the Nazi regime during WWII that human dignity has been afforded such a heightened level of protection in German law.¹⁵¹ The German Criminal Code¹⁵² utilizes concepts introduced by the Basic Law to specifically target crimes related to the Holocaust.¹⁵³ Germany's criminal codes have also evolved in order to facilitate prosecution of individuals advancing and disseminating the "Auschwitz Lie,"¹⁵⁴ a propaganda theme increasingly employed by the German neo-Nazi

150. See Knechtle, *supra* note 7, at 49–50.

Germany, with its unique history of horrific racial violence, has adopted some of the most restrictive speech regulations on the continent. The reconstruction process that was carried out in Germany after World War II included the enactment of many German statutes aimed at eliminating Nazism and its ideology of racial hatred altogether.

Id. See also Timofeeva, *supra* note 64, at 260.

151. Webb, *supra* note 7, at 462.

152. STRAFGESETZBUCH [GERMAN CRIMINAL CODE], *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.pdf (Ger.) [hereinafter STGB].

153. See *id.* § 130; *Contra*, the only jurisprudential remedy against Holocaust denial in the United States has been via contract law.

In 1980, the [...] Institute for Historical Review offered a \$50,000 reward for proof that Jews were gassed at Auschwitz. A Holocaust survivor named Mel Mermelstein claimed the reward, submitting as proof declarations by other survivors who witnessed friends and relatives being taken away to their deaths by the Nazis. His own testimony described how he watched his mother and sister led to gas chambers. When the Institute told him the offer had been withdrawn because there had been no takers, he sued. The court, finding "the fact that Jews were gassed at Auschwitz indisputable," ordered the reward paid.

Lasson, *supra* note 1, at 77 (citing *Mermelstein v. Institute for Historical Review*, No. C356 542 (Cal. Super. Ct. July 22, 1985)); see also *Lawsuit Over Proof of Holocaust Ends with Payment to a Survivor*, N.Y. TIMES (July 25, 1985), <https://www.nytimes.com/1985/07/25/us/lawsuit-over-proof-of-holocaust-ends-with-payment-to-a-survivor.html>.

154. See Stein, *supra* note 63, at 280.

movement.¹⁵⁵ Additional provisions of the German Criminal Code aid in criminalizing acts closely tied to Holocaust denial.¹⁵⁶ Moreover, numerous rulings passed down by Germany's Federal Supreme Court have reinforced Germany's pro-dignity position on hate speech and acts of anti-Semitism.¹⁵⁷ Additionally, Germany's Federal Constitutional Court has also sought to address and put an end to the "Auschwitz Lie" and other forms of reprehensible propaganda advanced by the Holocaust Denial Movement and its supporters.¹⁵⁸

155. *Id.* The concept of the "Auschwitz Lie" originated as a claim that the Nazi genocide of the Jews during WWII did not occur but was rather a conspiracy theory concocted by the Jewish people. See Marjorie Miller, *German Ban on Holocaust Denial Upheld: Justice: Rightists sued Munich after a Speech was Forbidden but High Court Says the 'Auschwitz Lie' is Not Protected*, L.A. TIMES (Apr. 27, 1994, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1994-04-27-mn-50950-story.html>. For an explanation of the "Holocaust Denial case" see Haupt, *supra* note 4, at 328.

156. Section 130(3) of the German Criminal Code makes it a crime to approve of, deny, or downplay "an act committed under the rule of National Socialism" and details the applicable criminal prosecution process that follows. STGB, *supra* note 152, art. 130(3). Section 4 of Article 130 criminalizes and lays out the applicable sentencing for any individual that "disturbs the public peace in a manner which violates the dignity of the victims by approving of, glorifying or justifying National Socialist tyranny." *Id.* § 4. Article 189 of the German Criminal Code details the punishment doled out for "Defiling Memory of Dead." *Id.* art. 189.

157. See Lasson, *supra* note 1, at 75.

The Federal Supreme Court, the country's highest tribunal in civil and criminal matters, took judicial notice that the Holocaust occurred and summarily dismissed the constitutional free-speech question: "No one who denies the historic fact of the murder of the Jews in the 'Third Reich' can invoke the guarantee of freedom of opinion... Even in a confrontation on a question that concerns substantially the public as is the case here, no one has a protected interest to publicize untrue allegations. The documents about the destruction of millions of Jews are overwhelming."

Id. (citing BUNDESGERICHTSHOF [BGH] [Federal Court of Justice] Gr. Sen. Z. 75, 160 (161) (Ger.)).

158. BUNDESVERFASSUNGSGERICHT [Federal Constitutional Court], BvR 435/68, Feb. 24, 1971 [hereinafter BVERFGE] (holding that human dignity is an essential value to the system of fundamental rights and free speech protections under Article 5 of its constitution might be limited to ensure the protection of human dignity); see also Haupt, *supra* note 4, at 329. Haupt recounted the position of the court in BVERFGE April 13, 1994, 90 ENTSCHIEDUNGEN DES BUNDESVERFASSUNGSGERICHT [BVERFGE] 241, 249 (F.R.G): "It is a

Despite each country's disparate approach regarding the regulation of hate speech, much like the US, Germany has been unable to institute adequate legislation to effectively combat hate speech and hate crimes within its borders.¹⁵⁹ Undeterred by the Basic Law's criminalization of speech advocating for the overthrow of the present constitutional order, German citizens have continued to form and join organizations with this very objective.¹⁶⁰ Furthermore, similar to its American counterpart, Germany has faced a dramatic increase in reports of anti-Semitism and acts of violence against ethnic minorities in the last few decades, which speaks to the ineffectiveness of Germany's current laws meant to prevent such crimes.¹⁶¹ Germany's flawed approach is substantiated by a number of court holdings involving biases and ignorance by law enforcement officials and the risk of censorship to legitimate pieces of political, literary and artistic expression.¹⁶² Finally, in practice, the balancing of values set forth by the Basic Law leads to a devaluing of the freedom of expression in order to advance other constitutional interests, inadvertently doing away with any semblance of a real balance at all.¹⁶³

demonstrably false fact that the Holocaust never occurred; the accounts of eyewitnesses, the research of historians, and the findings of judicial proceedings dismiss any doubt that the Holocaust occurred and that Germany was responsible." *Id.*

159. Haupt, *supra* note 4, at 333.

The central lesson that the comparison of United States and German hate speech regulation yields is that the German approach is far from providing a clear answer to the problem. The German Court is caught in an intricate balancing act for which it has not found a universally applicable solution that can be applied to solve the hate speech dilemma.

Id.

160. Krotoszynski, *supra* note 7, at 1598–99.

161. Miller, *supra* note 70 ("In 2017, anti-Semitism began its latest easily visible upsurge, with Germany, France, the United States and Canada witnessing a troubling climb in violent anti-Semitic episodes the next year.").

162. Rosenfeld, *supra* note 109, at 1559.

163. See Krotoszynski, *supra* note 7, at 1609.

III. ADDITIONAL LEGISLATION

A. Anti-Semitism Awareness Act of 2019

Originally introduced in 2016, the latest iteration of the Anti-Semitism Awareness Act (ASAA) was re-introduced to Congress by lawmakers in 2019.¹⁶⁴ At first blush, the ASAA¹⁶⁵ sounds like just the type of legislation the US would benefit from in its ongoing effort to combat the recent resurgence of anti-Semitic hate crimes within its walls.¹⁶⁶ Despite its seemingly all-encompassing title, the language incorporated into the ASAA is so narrowly tailored that its guidelines apply solely to incidents related to educational programs, activities, or events taking place on college campuses.¹⁶⁷ Significantly, critics of the ASAA and scholars of anti-Semitism alike have pointed out that the proposed bill incorporates a definition of “anti-Semitism” that is erroneously overbroad and ambiguous, to the extent that it risks chilling constitutionally protected free speech by mistakenly equating criticism of the State of Israel with acts of anti-Semitism.¹⁶⁸ Furthermore, Section 3(2) of the ASAA fails to include a considerable amount of anti-Semitic symbols and tropes that have become

164. Anti-Semitism Awareness Act of 2016, S.10, 114th Cong. (2016); Anti-Semitism Awareness Act of 2018, S.2940, 115th Cong. (2018); Anti-Semitism Awareness Act of 2019, S.852, 116th Cong. (2019).

165. Anti-Semitism Awareness Act of 2019, S.852, 116th Cong. (2019) [hereinafter ASAA]. While the Anti-Semitism Awareness Act was originally introduced in 2016, the most recent iteration was introduced in the House of Representatives in 2019 and bares no contextual or structural difference from the 2016 version.

166. *Id.* § 2(12).

167. *Id.* § 2.

168. Section 3(1) of the ASAA utilizes the following definition of “anti-Semitism” delineated by the International Holocaust Remembrance Alliance (IHRA): “Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” Press Release, IHRA Plenary (May 26, 2016), https://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf; see also Joe Cohn, *Anti-Semitism Awareness Act Continues to Threaten Free Speech on Campus*, THEFIRE.ORG (Apr. 12, 2019), <https://www.thefire.org/anti-semitism-awareness-act-continues-to-threaten-free-speech-on-campus/>; Cary Nelson, *A Criticism of the Anti-Semitism Awareness Act*, INSIDEHIGHERED.COM (June 12, 2018), <https://www.insidehighered.com/views/2018/06/12/criticism-anti-semitism-awareness-act-opinion>.

extremely commonplace on social media platforms and in political campaigns in recent years.¹⁶⁹ The American Civil Liberties Union (ACLU)¹⁷⁰ even issued a letter to both the House of Representatives and the Senate opposing the act because of its inevitable First Amendment implications.¹⁷¹ With its dangerously

169. Section 3(2) of the ASAA utilizes the following contemporary examples of actions that constitute anti-Semitism provided in the IHRA definition:

Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion; making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as a 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; accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews; 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; accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interest of their own nations; denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor; applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation; using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis; drawing comparisons of contemporary Israeli policy to that of the Nazis; and holding Jews collectively responsible for actions of the state of Israel.

Press Release, IHRA Plenary (May 26, 2016), https://www.holocaustremembrance.com/sites/default/files/press_release_document_antisemitism.pdf; see also Suzanne Nossel, *Congress's Anti-Semitism Act Won't Stop Hate Crimes Against Jews*, FOREIGN POL'Y (May 1, 2019), <https://foreignpolicy.com/2019/05/01/congresss-anti-semitism-act-wont-stop-hate-crimes-against-jews/>.

170. The American Civil Liberties Union (ACLU) is a nationwide non-profit organization devoted to the defense and protection of the rights and civil liberties of all individuals. See *About the ACLU*, ACLU, <https://www.aclu.org/about-aclu> (last visited Sept. 16, 2021).

171. See Press Release, ACLU, ACLU Statement on Senate Introduction of 'Anti-Semitism Awareness Act,' (May 23, 2018), <https://www.aclu.org/press-releases/aclu-statement-senate-introduction-anti-semitism-awareness-act>.

vague definitions juxtaposed by its exceptionally limited scope, the ASAA invites clear constitutional challenges while proving to be completely ineffective in the fight against anti-Semitism in America.¹⁷²

B. Network Enforcement Act (NetzDG)

Within the last few decades, the immeasurable growth of the Internet and the incalculable volume of content transmitted through digital platforms has led many countries,¹⁷³ like Germany, to implement regulations geared toward the prosecution and criminalization of online hate speech.¹⁷⁴ In early 2018, Germany took a severe and extremely targeted approach in regulating the content of social media platforms with the enactment of the Network Enforcement Act (NetzDG),¹⁷⁵ hoping to effectuate a significant suppression of the hate speech being spread online.¹⁷⁶ The law seeks to address hate crimes and acts of terrorism transmitted and accessible via the Internet, however, due

172. See Nossel, *supra* note 169.

173. See Tsesis, *supra* note 11, at 866; Van Blarcum, *supra* note 7, at 782–84.

174. Lasson, *supra* note 1, at 79 (“Due to the enormous size of the Internet, it is virtually impossible to monitor for hate speech.”); see also Adam Satariano, *Europe is Reining In Tech Giants. But Some Say It’s Going Too Far*, N.Y. TIMES (May 6, 2019), <https://www.nytimes.com/2019/05/06/technology/europe-tech-censorship.html>; Lucinda Southern, *What to Know about Europe’s Fight on Platform Hate Speech*, DIGIDAY.COM (July 12, 2019), <https://digiday.com/media/what-to-know-about-europes-fight-on-platform-hate-speech>.

175. GESETZ ZUR VERBESSERUNG DER RECHTSDURCHSETZUNG IN SOZIALEN NETZWERKEN [NETWORK ENFORCEMENT ACT], July 12, 2017, *translation at* <http://perma.cc/72JK-3KNM> (Ger.) [hereinafter NETZDG].

176. For a detailed explanation of the law, see generally Imara McMillan, *Enforcement Through the Network: The Network Enforcement Act and Article 10 of the European Convention on Human Rights*, 20 CHI. J. INT’L L. 252 (2019).

The crux of the law provides that when a social media company receives a complaint about a piece of controversial content, if that company has more than two million German users it must spring into action to determine whether the content is “manifestly unlawful” according to eighteen separate provisions of German criminal law. If the company determines that the content is unlawful, access to it must be removed within twenty-four hours. For borderline cases, companies have seven days to remove the content. The consequences for noncompliance are fines of up to five million euros (5.8 million dollars in December 2018).

Id. at 254.

to the legislation's hefty procedural requirements and often dramatically disproportionate system of remedies, the new law has garnered tremendous criticism from the general public.¹⁷⁷ NetzDG's opposers view it as a clear violation of freedom of expression that teeters dangerously on the cusp of total censorship.¹⁷⁸

In spite of the law's prima facie conceptual simplicity, NetzDG has palpable, far-reaching implications in the freedom of expression sphere, bringing with it valid concerns of censorship and chilling effects on an individual's freedom of speech.¹⁷⁹ Thanks to the internet, consequences of Germany's passage of NetzDG can be felt across the globe, and most pertinent to this Note, implications of NetzDG work in direct opposition to the First Amendment right to freedom of speech.¹⁸⁰ Due to the internet's near limitless scale, when sharing, creating, or posting content online, individuals located in the US are extremely susceptible to violating NetzDG, despite acting well within their First Amendment protections.¹⁸¹

In an effort to regulate the harmful effects of racist and anti-Semitic speech conveyed on the internet, Germany, through its misguided enactment of NetzDG, goes a number of steps too far.¹⁸² NetzDG extends Germany's criminal provisions in such an exhaustive manner that the outcome inevitably results in sanctions and fines incommensurate to the crimes alleged, as well as genuine censorship concerns.¹⁸³ NetzDG also thrusts the responsibility of monitoring the online sites for occurrences of hate speech onto the shoulders of the social media platforms.¹⁸⁴

177. *Id.* at 259–61.

178. *Id.* at 262.

179. On this point, McMillan offers the following as an illustration of the law: "If an American college student visits a German news site for a class and is moved to insult the person in the article, the First Amendment and the Network Enforcement Act could have the ultimate legal showdown, with social media companies trapped in the middle." *Id.* at 267.

180. See Beausoleil, *supra* note 119, at 2144. Studies by "social psychologists studying the psychological impacts of social media on behavior and psychologists who have studied the psychology behind hate speech" have indicated that "that harms that online hate speech present extend far beyond dignitary harms to victims, reaching society as a whole by promoting violence and disorder." *Id.*

181. See McMillan, *supra* 176, at 268.

182. *Id.* at 289.

183. See *id.* at 284–87.

184. *Id.* at 284.

In doing so, NetzDG forces a company's employees to take on the role of both content regulator and law enforcement task force, two daunting undertakings demonstrably missing from their job descriptions.¹⁸⁵ This places a wholly unfair burden on the tech companies, who are simply not meant to act as subsets of governmental agencies or administrative bodies.¹⁸⁶ As drafted and presently applied, the rapidly growing concern in the US regarding NetzDG is that individuals' First Amendment rights will be negatively implicated as the "chilling of speech is inevitable."¹⁸⁷ The passage of NetzDG has provided further proof that Germany's current anti-hate laws span such untenable depths into other unrelated areas, but nonetheless remain incapable of bringing about the intended goal of extinguishing online hate speech.¹⁸⁸

C. Berlin's State Anti-Discrimination Act

Stemming from the belief that the German General Act on Equal Treatment (AGG),¹⁸⁹ a federal anti-discrimination law in Germany that went into effect in 2006, was not substantially successful in protecting civil rights, the city of Berlin took matters into its own hands.¹⁹⁰ In June of 2020, Berlin became the

185. *See id.*

186. *Id.*

187. *Id.* at 288.

188. *See id.* at 289–90.

189. ALLEGEMEINES GLEICHBEHANDLUNGSGESETZ [GENERAL ACT ON EQUAL TREATMENT], *translated at* https://www.gesetze-im-internet.de/englisch_agg/englisch_agg.html [hereinafter AGG]. Allgemeines Gleichbehandlungsgesetz, otherwise known as the General Act on Equal Treatment, is the federal law that incorporates four anti-discrimination directives compiled by the EU into German law. Section 1 of the AGG sets forth the Act's purpose. *Id.* Section 1 identifies the law's purpose as "to prevent or stop discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age, or sexual orientation." *Id.* § 1. The act has discernable limits, most notably that it applies only to areas of employment and civil law. *Id.*

190. *See* Jenny Gesley, *Germany: Berlin Adopts Antidiscrimination Act*, LIBRARY OF CONGRESS (June 30, 2020), <https://www.loc.gov/law/foreign-news/article/germany-berlin-adopts-antidiscrimination-act/>; *see also* Stephen Ndegwa, *Berlin's Anti-Discrimination Law is Both a Good and Bad Thing*, CGTN.COM (June 8, 2020, 1:55 PM), <https://news.cgtn.com/news/2020-06-08/Berlin-s-anti-discrimination-law-both-a-good-and-bad-thing-R9pzZmfAZy/index.html>; Rob Schmitz, *Berlin Passes Sweeping Anti-Discrimination Law*, NPR (June 5, 2020, 10:41 AM), <https://www.npr.org/sections/live->

first German state to improve the legal protections of their residents against discrimination by police officers with the passage of an anti-discrimination law.¹⁹¹ Entitled the “State Anti-Discrimination Act,” Berlin’s recent legislation seeks to enhance the available legal protections to a larger range of groups than those to which protection is afforded under the AGG.¹⁹²

The State Anti-Discrimination Act also prohibits Berlin public authorities, like law enforcement, public school and university faculty or personnel, from discriminating against any individual on the grounds of that individual’s skin color, gender, ethnic origin, religion, disability, illness, age, sexual orientation, class, education, or gender identity.¹⁹³ Prior to the law’s enactment, victims of discrimination were saddled with the burden of proof in establishing that they had in fact been discriminated against before a lawsuit could take place.¹⁹⁴ Under the new law, victims in Berlin are entitled to damages and compensation, while the public authority figure implicated can choose to either accept or refute the discrimination claims being made.¹⁹⁵ Once the law went into effect, critics of the State Anti-Discrimination Act wasted no time voicing their concerns and subsequently labeled the law an “anti-police act” in disguise, with the potential to open up a Pandora’s box of disingenuous litigation aimed broadly at all law enforcement officials.¹⁹⁶ Further, critics cited the numerous relevant pieces of legislation already in existence in Germany¹⁹⁷ to support claims that the law added nothing new that would assist in the country’s ongoing battle against racial and religious inequality.¹⁹⁸

updates-protests-for-racial-justice/2020/06/05/870391770/berlin-passes-sweeping-anti-discrimination-law.

191. Schmitz, *supra* note 190; *see* Gesley, *supra* note 190; Ndegwa, *supra* note 190.

192. *See* Gesley, *supra* note 190; Schmitz, *supra* note 190.

193. Gesley, *supra* note 190; Ndegwa, *supra* note 190; Schmitz, *supra* note 190.

194. Schmitz, *supra* note 190; *see* Gesley, *supra* note 190.

195. Gesley, *supra* note 190; Ndegwa, *supra* note 190; Schmitz, *supra* note 190.

196. Gesley, *supra* note 190; *see* Ndegwa, *supra* note 190; Schmitz, *supra* note 190.

197. *See* GG; *see also* AGG.

198. *See* Ndegwa, *supra* note 190.

IV. A PROPOSAL (AND HOPE) FOR THE FUTURE

In light of the analysis above, as well as the works of the plethora of scholars that have attempted to address this issue, hate speech arguably poses “the hardest free speech question of all.”¹⁹⁹ Much like any other difficult and delicate problem one faces in life, it makes sense that due to the complex nature of this issue there is no one-stop, catch-all, immediate solution available. However, using a multi-factored approach to address insufficient hate speech and hate crime legislation can provide countries with the necessary tools for a better chance at a future filled with much less hate.

*A. History Has Its Eyes on You*²⁰⁰

The significance of any country’s historical background cannot be understated, for historical events almost always become one of the core driving forces behind a piece of legislation, often as an attempt to right a past wrong. Due to the important role history plays in modern-day society, it is necessary to look to any relevant, historical, accounts of ethnic, racial and religious violence, genocide, and discriminatory practices that have occurred, when contemplating a change, an addition, or a total rewrite of current legislation. Looking to the historical and circumstantial elements involved would assist in narrowing the scope of legislation that all too frequently consists of sweeping concepts and overly broad terms, which ultimately result in weak and ineffective laws.

One size does not fit all, and this applies tenfold to anti-hate legislation. Scholars and historians have advocated for the consideration of a “historical wrong” factor in both the regulation and criminalization of hate speech and hate crimes on a global scale.²⁰¹ Without narrowing legislation to consider the specific

199. See SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 3 (1994) (quoting RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY, 151 (Alfred A. Knopf ed., 1992)).

200. CHRISTOPHER JACKSON, *History Has Its Eyes on You*, HAMILTON (Original Broadway Cast Recording 2015).

201. Knechtle, *supra* note 7, at 52.

The “historical wrong” aspect of this first factor means that, for example, while a law specifically criminalizing Holocaust denial may be appropriate for Germany because it addresses a significant historical wrong committed by the German State, the same law would be inappropriate in Indonesia

historical events that an individual country has endured or experienced, any law or policy becomes a futile attempt to provide a universal method that is lacking in the contextual and circumstantial precision necessary to make it successful. By tailoring hate speech legislation according to a nation's unique historical and cultural challenges, the laws put in place will be better served to address the specific situations in that nation and among its citizens.

B. Taking Cues from Across the Ocean

In spite of cognizable flaws in the international approach to regulating hate crimes and hate speech, the US remains the lone Western democracy with laws that work to allow and even protect the dissemination of hate speech.²⁰² Due to the protection that the US allots hate speech under the First Amendment, the US finds itself in clear violation of international law on several different fronts.²⁰³ Deemed a “safe haven” for the promotion of hate speech, the refusal of the US to adopt hate speech regulations has disastrous international implications.²⁰⁴ Without a concrete method for tackling hate speech within its borders, the US effectively undermines the efforts of all other Western nations in their attempts to eradicate hate speech.²⁰⁵

To align the US with its international neighbors, the US should reconcile its approach with that of many European nations. By following the emerging international norm of regulating hate speech, the US will adequately promote and adhere to the values expressed in several of its existing laws.²⁰⁶ Moreover, the language of the nation's founding documents champion the

because the historical wrong that the law addresses (i.e., the Holocaust) was not committed by Indonesia or a faction within Indonesian society.

Id.

202. Lasson, *supra* note 1, at 69.

203. Webb, *supra* note 7, at 455–58. Here, Webb lays out five of the major international treaties and covenants that serve to “condemn and regulate hate speech,” all of which the US is in direct opposition of due to its absolute prioritization of the First Amendment freedom of speech. *Id.* at 455.

204. *Id.* at 446–47.

205. Beausoleil, *supra* note 119, at 2132.

206. See Webb, *supra* note 7, at 473. On this point, Webb opines that “the Thirteenth and Fourteenth Amendments illustrate the nation's adherence to the principles of equality and non-discrimination.” *Id.*

ability of its citizens to live free from discrimination and personal attacks, and make clear that ensuring those rights is a task that falls flatly on the shoulders of the US government.²⁰⁷ With legislation already in place prohibiting discrimination based on race, religion, and other grounds,²⁰⁸ the US should act in accordance with the same rationale that prompted the enactment of such laws in order to adopt effective regulations restricting and punishing hate speech, finally falling into step with the international norm.

C. Fighting Ignorance with Education

At present, the few remaining Holocaust survivors are faced with a losing battle against time. Tragically and all too soon, the scarce number of individuals able to provide first-hand recounts of the unimaginable atrocities endured during the Holocaust will be no more. This grim truth has even graver implications in terms of the global perception of the Holocaust, as well as the growing strength of the Holocaust Denial Movement. Due to this profound and inescapable fact, the need for the preservation of history on an international scale has never been more vital. The only way to ensure that the horrors of the past never become the events of the future is through education. A 2018 survey revealed that 41 percent of millennials think 2 million or fewer Jews were killed in the Holocaust, while nearly half of all Americans are unable to name a single concentration camp.²⁰⁹ The jarring statistics detailing widespread misinformation and a general lack of knowledge regarding Hitler, the events of the Holocaust, and the prevalence of anti-Semitic acts occurring still today are all indications of society's critical need for re-education.²¹⁰

207. *See id.* at 473–74. Affirming this concept, the author goes on to remark that “the Declaration of Independence recognizes that ‘all Men are created equal,’ and that they are ‘endowed’ with the inalienable right of ‘the Pursuit of Happiness.’” *Id.* at 474.

208. *Id.* at 473–75 (identifying the Declaration of Independence, the Gettysburg Address, and the Thirteenth and Fourteenth Amendment as examples of founding U.S. documents that recognize equality and human dignity as part of traditional United States jurisprudence).

209. *See Astor, supra* note 69.

210. *Id.*; *see also* Miller, *supra* note 70.

Education is one of humankind's strongest tools in the war on hatred and bigotry.²¹¹ Ignorance, misleading information, and false stereotypes all have detrimental consequences when perpetrated by organizations hell-bent on rewriting history. To confront the global miseducation issue, new laws and policies should be put in place to ensure that educators, law enforcement officials, and members of government are adequately trained in the wide variety of manifestations and definitions of bigotry—including regular updates on how such concepts evolve. With such legislation and regulatory procedures in place, only then will countries be adequately equipped to tackle the kinds of hate crimes, racial discrimination, and acts of anti-Semitism that continually arise all over the globe.

CONCLUSION

The comparative analysis above has demonstrated that neither Germany nor the US has been able to institute anti-hate and anti-Semitism prevention legislation that effectively and justly address the global epidemic of hatred currently plaguing society. The US stands firm in its protection of freedom of speech under the First Amendment to the US Constitution. Comparatively, Germany exists as its polar opposite, with a federal constitution and subsequent laws working to defend and preserve an individual's right to human dignity, above all else. The underlying ideologies, strongly supported by the respective histories of each nation, have helped shape the laws and policies that govern current regulation against hate speech in Germany and the US. That being said, due to the weight the US places on First Amendment protections, the US is actively in breach of several international laws and treaties. On the other side, Germany, in an attempt to atone for the cruelty of its past, has enacted laws that are overly restrictive and potentially infringing on individual liberties.

Therefore, the two nations should employ a multi-factored approach in adopting and instituting new laws regulating hate speech and hate crimes. When interpreting the language of a law, accounting for a country's relevant historic circumstances

211. "Education is the most powerful weapon which you can use to change the world." See Peter Schworm, *Nelson Mandela's 1990 Visit Left Lasting Impression*, THE BOSTON GLOBE (December 7, 2013, 12:00 AM), <https://www.bostonglobe.com/metro/2013/12/07/mandela-visit-boston-high-school-left-lasting-impession/2xZ1QqkVMTbHKXiFEJynTO/story.html>.

will allow that law to properly address the problems and posture of that specific country. Additionally, the US and Germany should comply with the major international laws and treaties that provide for protections against hate crimes and hate speech, in an effort to achieve seamless regulation across nations. Lastly, the greatest tool against ignorance and bigotry that we have as a society is information. Nations need to prioritize the importance of adequate education, especially because forms of hatred and discrimination are constantly evolving. In order to be better equipped to address and eliminate bigotry and inequality, nations and their citizens need to have the knowledge suitable to do so. Adopting these proposed measures will hopefully get these two nations, and potentially many more, that much closer to winning the global war on hate, once and for all.

*Jamie Rauch**

* B.A., University of Miami (2017); J.D., Brooklyn Law School (Expected 2022); Notes Editor, Brooklyn Journal of International Law (2021–2022). A tremendous thank you to my editors, Margaret Foster, Kristin Kuraishi, and Harpreet Kaur, all of whom played an invaluable role in this Note's publication. I would also like to thank my friends and family for their constant encouragement, support, and seemingly endless ability to listen to me complain. Lastly, but most significantly, I want to express my infinite gratitude to my parents, Sue and Eli Rauch, for always being my greatest champions and for filling my life with love, humor, and just a "smidge" of Judaism. Everything that I am today is owed entirely to the two of you. All errors or omissions are my own.