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# Defending Truth: Legal and Psychological Aspects of Holocaust Denial

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**DEFENDING TRUTH**  
*Legal and Psychological Aspects of Holocaust Denial*

**By Kenneth Lasson\***

*The things I saw beggar description. I made the visit deliberately, in order to be in a position to give firsthand evidence of these things if ever, in the future, there develops a tendency to charge these allegations merely to propaganda.*

– General Dwight D. Eisenhower after liberating a Nazi concentration camp<sup>1</sup>

From the still-burning embers of the Holocaust we have come once again to learn the terrible truth, that the power of Evil still lurks among the nations of the world, and cannot be underestimated. Nor can the effect of the spoken and written word, which in modern times must be taken in tandem with the violence of terrorism.

It has been but a half-century since the liberation of Nazi death camps, a little more than two decades since the First International Conference on the Holocaust and Human Rights,<sup>2</sup> and a few

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<sup>1</sup> Eisenhower's words, written in a letter to Chief of Staff George C. Marshall on April 12, 1945, are etched in stone at the United States Holocaust Memorial Museum in Washington, D.C. Eisenhower went on to say that "The visual evidence and the verbal testimony of starvation, cruelty, and bestiality were so overpowering as to leave me a bit sick. In one room, where there were piled up 20 or 30 naked men killed by starvation, George Patton would not even enter. He said he would get sick if he did so." See THE PAPERS OF DWIGHT DAVID EISENHOWER: THE WAR YEARS 2616 (ALFRED D. CHANDLER, JR., ED., 1970).

<sup>2</sup> Sponsored by the Boston College Law School Holocaust/Human Rights Research Project and the

short years since the United States Holocaust Memorial Museum first put on display its documentation of horror. Yet today that form of historical revisionism popularly called “Holocaust denial” abounds worldwide in all its full foul flourish – disseminated not only on Arab streets but in

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\* Professor of Law, University of Baltimore School of Law. Earlier analyses of this topic appeared in part in the BALTIMORE JEWISH TIMES (April 13, 2007) and in 6 GEO. MASON L. REV. 35 (1997). American university newspapers, not only in books, articles, and speeches but in mosques and over the Internet.

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Anti-Defamation League of B'nai Brith, the conference took place on April 17, 1986. *See* Debate, *Freedom of Speech and Holocaust Denial*, 8 CARDOZO L. REV. 559 (1987).

“Israel must be wiped off the face of the map,” declares Mahmoud Ahmadinejad, the elected president of Iran. His primary justification – that the Jewish State’s existence is predicated upon events that never happened – is echoed throughout the Muslim world. Ahmadinejad’s true colors came through in a much ballyhooed international conference in Tehran, officially sponsored by the Iranian Foreign Ministry and billed as a “Review of the Holocaust: Global Vision,” in December of 2006.<sup>3</sup>

In a global environment increasingly dominated by mass media of manifold form and format, we have also begun to understand that what is printed on paper or broadcast on television or bitten into cyberspace affects everyone, actually or subliminally. Conversely, what is rejected or otherwise left out is doomed to a world of communication failure, ignorance, and misunderstanding.

As the generation of survivors dwindles, whose words will win? Who decides what is to appear in the vast and burgeoning marketplace of ideas?

Many of those important choices are vested in editors and publishers, upon whom the Constitution confers almost unfettered discretionary authority. For the most part journalists can write, say, depict, or ignore anything they want. Freedom of thought and expression is quintessentially American – one of our most hallowed liberties, limited only by circumstances where actual harm has been caused or is reasonably perceived as imminent. If a line can be drawn at all between unfair suppression of thought on the one hand and good editorial judgment on the other, it is sometimes exceedingly faint, often entirely arbitrary, and always fundamentally subjective. The greater the opportunity for excess in the exercise of the power of the press, the more profoundly difficult the consequences in the protection of civil liberties for individuals.

That axiom has been brought into sharp focus by Holocaust deniers, whose goal is both facilitated and confused by the aura of “political correctness” which nowadays surrounds a great deal of editorial decision-making. Nowhere is this more pervasive than in Academia. What should be the most receptive place for honest intellectual inquiry and discourse has instead become one where all

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<sup>3</sup> *International Conference on Holocaust Opens in Tehran*, BBC Worldwide Monitoring, December 11, 2006.

assumptions are open to debate – even documented historical facts. This has had an unsettling effect on students (especially those editing university newspapers) who have long been subjected to the pressures of political correctness. When they become entangled in the black and nefarious thickets of Holocaust denial, their exercise of editorial discretion can be acutely conflicting psychologically and confounding intellectually.

So can the emotional pain suffered by victims of group libel. Remedies for that malady have not been clearly established in American law. Explored least of all is the effect upon a free society when the dissemination of demonstrably false ideas is Constitutionally protected. Must writers and speakers who deny the Holocaust be guaranteed equal access to curricula and classrooms? Should the misrepresentation of historical fact be suppressed when it is motivated by nothing more than racial animus? Should responsible libraries collect and classify work born of blatant bigotry? Have survivors been injured when their victimization has been repudiated?

More profoundly, can we reject spurious revisionism, or punish purposeful expressions of hatred, and still pay homage to the liberty of thought ennobled by the First Amendment? Are some conflicts between freedom of expression and civility as insoluble as they are inevitable? Can history ever be proven as Truth?

This article attempts to answer those questions. Part I describes the background and nature of Holocaust denial, tracing the Nazis' adoption of a plan for the "Final Solution of the Jewish Problem" through the post-War Nuremberg Trials to the present day. Part II examines the tension between free speech and historical revisionism, presenting various arguments in deference to principles of liberty and opposed to group defamation. Part III addresses the quest for truth in a free society, including psychological and geopolitical analyses of denial and anti-Semitism.

## I. Holocaust Denial

*We will show you these concentration camps in motion pictures, just as the Allied armies found them when they arrived . . . . Our proof will be disgusting and you will say I have robbed you of your sleep . . . . I am one who received during this war most atrocity tales with suspicion and scepticism. But the proof here will be so overwhelming that I venture to predict not one word I have spoken will be denied.*

– Sen. Thomas Dodd (1947)<sup>4</sup>

Alas, both Eisenhower<sup>5</sup> and Dodd seriously understated the possibilities. In recent years, the contention that there was no mass extermination of Jews and no deaths in gas chambers at the hands of the Nazis has given rise to a pervasive (if predictable) revisionist industry. Holocaust-denial books have made their way into academic and public libraries across the country and around the world, not to mention widespread dissemination over the Internet.

The Nazis themselves recognized that the incredibility of what they had done would cast shadows of doubt upon any shocking eyewitness reports. Inmates at concentration camps testified that they were frequently taunted by their captors: “Even if some proof should remain and some of you survive, people will say that the events you describe are too monstrous to be believed; they will say that they are the exaggerations of Allied propaganda and will believe us, who will deny everything, and not you.”<sup>6</sup>

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<sup>4</sup> 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INT’L MILITARY TRIBUNAL 130 (1947). Sen. Dodd served as the executive counsel to the American prosecutorial team.

<sup>5</sup> *See supra* note 1.

<sup>6</sup> PRIMO LEVI, THE DROWNED AND THE SAVED 11-12 (Raymond Rosenthal trans., Vintage Int’l 1989).

Indeed early newspaper accounts of the death camps were obscured by dispatches about the war's progress, if not questioned for their veracity.<sup>7</sup> That is why Eisenhower, after the Nazis were conquered, ordered every American soldier not committed to the front lines to bear witness to places like Auschwitz, Belsen, and Buchenwald.<sup>8</sup> It likewise explains why the International Military Tribunal at Nuremberg was so intent on documenting all of the atrocities found by the Allied liberators.

Without the past, without memory, without history, we are nothing, adrift. We place our destiny and dignity in the hands of the misfits and their projected psychoses. This movement is not an attack on the Holocaust, but on the very notion of historical meaning. It is a revolt against reality, a threat not only to the past but to the future.<sup>9</sup>

### *The Nature of Denial*

Holocaust deniers argue that the genocide of Jews and other minority groups during World War II either did not occur – that it was a deliberate Jewish hoax, or a conspiracy to advance the interests of Zionism – or that it was greatly exaggerated. They maintain that the Nazi government never had a policy of deliberately targeting Jews, that many fewer than six million Jews lost their lives, and that there were no tools of mass extermination such as gas chambers or incinerators in the concentration camps.

Although such denial has been going on ever since the Holocaust occurred, as the years pass and the number of survivors diminishes it has become more virulent.

Many Holocaust deniers reject the term, describing themselves instead as “revisionists.” But deniers can be differentiated from revisionists, who consider their goal to be historical inquiry using

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<sup>7</sup> Both the *New York Times* and the *New York Herald Tribune* published limited reports of the camps as early as 1942. See WALTER LAQUEUR, *THE TERRIBLE SECRET: SUPPRESSION OF THE TRUTH ABOUT HITLER'S "FINAL SOLUTION"* 74, 93 (1980).

<sup>8</sup> See ROBERT H. ABZUG, *INSIDE THE VICIOUS HEART: AMERICANS AND THE LIBERATION OF NAZI CONCENTRATION CAMPS* 128 (1985).

<sup>9</sup> *Id.* at .

evidence and established methodology.<sup>10</sup>

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<sup>10</sup> Holocaust deniers, on the other hand, argue that the Holocaust did not occur regardless of historical evidence. *See* DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 183-208 (1993) at 25.



In Australia, an Islamic cleric named Sheik Taj Din al-Hilali, called the Holocaust “a Zionist lie.”<sup>11</sup> Mel Gibson and his father both support the Australian League of Rights, a group that denies the Holocaust.<sup>12</sup>

In Denmark, Al-Jazeera Television broadcast a meeting between Arab and Danish student groups, following the controversy over cartoons about Muhammad. During the meeting, Arab Students Union Chairman Ahmad Al-Shater referred to the Holocaust as “the imaginary Holocaust.”<sup>13</sup>

In France, George Theil, a 65 year-old former adviser to the extremist National Front party, was convicted of denying the Holocaust for having said on French Television that the Nazi gas chambers were “a fantasy.” Robert Faurisson was convicted by a Paris court in October of Holocaust denial, after he said on Iranian Television that no gas chambers were used by the Germans to kill Jews.<sup>14</sup>

In Germany, Germar Rudolf went on trial in a Mannheim court for denying the Holocaust. Rudolf had written an article in 1991 claiming the Nazis did not gas Jews in Auschwitz, and was sentenced to 14 months in prison in 1995. He fled Germany to avoid jail and sought political asylum in the United States. That request was rejected, and Rudolf was sent back to German in November 2005 to serve his original sentence. During the trial's opening session, Rudolf declared that the

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<sup>11</sup> Natalie O'Brien, *Muddle Headed Mufti*, THE AUSTRALIAN, October 27, 2006 at p. 17.

<sup>12</sup> When he was asked in an interview, “The Holocaust happened, right?” Gibson responded by minimizing its uniqueness: “Yes, of course. Atrocities happened. War is horrible. The second World War killed tens of millions of people. Some of them were Jews in concentration camps. Many people lost their lives. In the Ukraine, several million starved to death between 1932 and 1933. Rafael Medoff and Alex Grobman, *Holocaust Denial: A Global Survey - 2006*, Wyman Institute for Holocaust Studies, available at <http://www.wymaninstitute.org/articles/HolocaustDenial2006.pdf>, (hereinafter, Wyman Survey 2006). See also news report, *Mel Gibson's Racist Tirade*, DAILY TELEGRAPH (Australia), July 31, 2006 at p. 1.

<sup>13</sup> Special Dispatch #1135, Middle East Media Research Institute (hereinafter M.E.M.R.I.), April 6, 2006, available at <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP113506>.

<sup>14</sup> U.S. Fed News, *Top Academics, Political Leaders, Seek 'Incitement to Genocide' Charges Against Iran, President Ahmadinejad*, Dec. 12, 2006.

Holocaust was “a gigantic fraud.”<sup>15</sup>

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<sup>15</sup> Reuters, Nov. 14, 2006.

Ernst Zundel was born in Germany and lived in Canada from 1958 until 2005, when he was deported to because of his Holocaust-denial activity. That activity included hosting radio and television shows, publishing books and pamphlets, and managing a web site.<sup>16</sup>

A report in January by the Moscow-based Holocaust Foundation and the Moscow Bureau on Human Rights found that Holocaust-denial is widespread in Russia. There are least four Russian web sites that are devoted to denying the Holocaust, according to the report.<sup>17</sup>

Ukrainian Foreign Minister Boris Tarasyuk in January condemned the largest private Ukrainian university, the Interregional Academy of Personnel Management (MAUP) for promoting antisemitism and Holocaust-denial.<sup>18</sup>

Holocaust denial in the United States is not a popular phenomenon, even though America remains the lone Western democracy to protect it as free speech. But it does occur. In January, Sheik Fadhel as Sahlani, the leader of a prominent mosque in Brooklyn, was quoted as asserting that the Holocaust “has been exaggerated.” In April, Holocaust-denier Larry Darby, a candidate for the Democratic nomination for attorney general of Alabama, was a featured speaker at a conference organized by the neo-Nazi National Vanguard in Elmwood Park, New Jersey. (The event included a performance by the neo-Nazi Holocaust-denying teenage singing duo “Prussian Blue.”) In June, Darby won 44% of the vote in the Alabama race. Darby claims the figure of six million Jews murdered by the Nazis was concocted by “the Holocaust industry,” insisting that no more than 140,000 Jews swere killed, and most of those by typhus.<sup>19</sup>

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<sup>16</sup> Wyman Survey 2006, *supra* note 12. *See infra* notes 66-70 and accompanying text.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

The Institute for Historical Review held its major event of the year at an unnamed restaurant meeting room in Arlington Virginia in July of 2006. IHR director Mark Weber spoke about “the Jewish Zionist role in determining American foreign policy” and praised the recent study about the “Israel Lobby” by Stephen Walt and John Mearsheimer. Paul Fromm, director of the extremist Canadian Association for Free Expression, focused on the imprisonment of David Irving in Austria and Zundel in Germany.<sup>20</sup>

Like the United States, Japan has never passed a law prohibiting Holocaust denial. But that has much less to do with free speech than with Japan’s longstanding refusal to admit publicly its World War II crimes against humanity.<sup>21</sup>

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But all of these were relatively isolated incidents compared to what is happening in the Middle East. Holocaust denial has grown rapidly in Muslim countries, including American allies Egypt, Qatar and Saudi Arabia – all of which receive significant U.S. economic and military aid. Members of the Syrian and Iranian governments, as well as Hizbollah and the Palestinian political group Hamas, openly publish and promote such claims.<sup>22</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Japan Should Respect History, Recognize Reality: U.S. Historian*, Xinhua General News Service, April 21, 2005. Although there is a Holocaust museum in Hiroshima, Holocaust education is virtually non-existent in Japan. Jenny Hazan, *Hana’s Suitcase Wins Yad Vashem Award*, CANADIAN JEWISH NEWS, Nov. 16, 2006 at p. 1.

<sup>22</sup> *Id.*

In his 1982 doctoral dissertation Mahmoud Abbas, a co-founder of Fatah and the current president of the Palestinian Authority, wrote: “It seems that the interest of the Zionist movement . . . is to inflate this figure [six million deaths] in order to gain the solidarity of international public opinion. . . . Many scholars have [determined] the number of Jewish victims at only a few hundred thousand.” That claim was repeated in Abbas’ 1983 book, *The Secret Connection between the Nazis and the Leaders of the Zionist Movement*.<sup>23</sup>

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<sup>23</sup> See entry on Holocaust Denial, at [http://en.wikipedia.org/wiki/Holocaust\\_denial#Notable\\_Holocaust\\_deniers](http://en.wikipedia.org/wiki/Holocaust_denial#Notable_Holocaust_deniers).

As Israeli cabinet minister Isaac Herzog noted, Abbas' view "is not a matter that can be brushed under the carpet, because at issue is a moral question whose importance cannot be overstated."<sup>24</sup>

Abbas is well-known for waffling in consideration of the current political situation. In a March, 2006 interview with *Ha'aretz*, Abbas stated: "I have no desire to argue with the figures. The Holocaust was a terrible, unforgivable crime against the Jewish nation, a crime against humanity that cannot be accepted by humankind. The Holocaust was a terrible thing and nobody can claim I denied it."<sup>25</sup> But at a rally in Ramallah in early January of this year, Abbas said, "The sons of Israel are mentioned [in the Quran] as those who are corrupting humanity on earth."<sup>26</sup>

No such waffling from Ahmadinejad.

"As to the Holocaust," he said in a *Time Magazine* interview, "I just raised a few questions. And I didn't receive any answers to my questions. I said that during World War II around 60 million were killed. All were human beings and had their own dignities. Why only six million?" A fair question, perhaps, when taken out of the context in which it was uttered – that Israel is the cause of the world's problems. Here are the official translations of some of Ahmadinejad's other statements:

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<sup>24</sup> Edward I Koch and Rafael Medoff, *What Can Be Done About Holocaust Deniers?*, THE JERUSALEM REPORT, Jan. 8, 2007 at p. 47.

<sup>25</sup> Akiva Eldar, *Interview with Mahmoud Abbas*, HA'ARETZ, March 30, 2006.

<sup>26</sup> Jeff Jacoby, *Statehood for Palestine? Take A Good Look*, BOSTON GLOBE, Feb. 14, 2007 at p. A9. See also Rosie Dimanno, *No Guarantee This 'Map' Leads Anywhere*, TORONTO STAR, May 1, 2003 at A10..

“The real cure for the conflict is elimination of the Zionist regime.” “The way to peace in the Middle East is the destruction of Israel.” “Like it or not, the Zionist regime is heading toward annihilation.”<sup>27</sup>

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<sup>27</sup> See generally Mark Mazzetti, *Some in G.O.P. Say Iran Threat Is Played Down*, N.Y. TIMES, August 24, 2006 at A1.

Ahmadinejad strutted like peacock at his Holocaust denial conference in Tehran in December of 2006. Officially sponsored by the Iranian Foreign Ministry and billed as a “Review of the Holocaust: Global Vision,” it was a well-orchestrated group polemic attended by delegates from thirty countries, including former Du Klux Klan leader David Duke, French revisionists Robert Faurisson and Georges Thiel, and Australian denier Frederick Toben.<sup>28</sup>

In addition, several members of the extremist anti-Zionist Jewish sect Neturei Karta were prominently featured participants.<sup>29</sup>

All of the representatives were said simply to be “exercising their rights of free speech” in questioning the facts of World War II. In so doing they were treated to an exhibit of photographs of dead Jews labeled “Myth” and “Typhus Victims,” and of smiling Holocaust survivors under the

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<sup>28</sup> *Iran Hosts Anti-Semitic Hatefest in Tehran, report of Anti-Defamation League*, Dec. 14, 2006, available at [http://www.adl.org/main\\_International\\_Affairs/iran\\_holocaust\\_conference.htm?Multi\\_page\\_sections=sHeading\\_5](http://www.adl.org/main_International_Affairs/iran_holocaust_conference.htm?Multi_page_sections=sHeading_5). In fact there were several Arab commentators who condemned the conference. See M.E.M.R.I. Special Dispatch Series - No.1425, *Criticism of Tehran Holocaust Denial Conference in Arab and Iranian Media*, Jan. 16, 2007.

<sup>29</sup> *Id.* See also Bill Hutchinson, *Rabbi Among the Rabble-Rousers*, NEW YORK DAILY NEWS, Dec. 13, 2006 at p.7.



heading of “Truth.”<sup>30</sup> In addition, the conference enabled the Iranians to score propaganda points about Western hypocrisy – preaching free speech but disallowing “dangerous” views.<sup>31</sup>

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<sup>30</sup> *Id. See also* Katrin Bennhold, *Ties Cut With Iran Institute Over Holocaust*, NEW YORK TIMES, Sep. 16, 2006 at p.A9.

<sup>31</sup> James S. Robbins, *Adrift on Denial: The Threat from Iran*, NATIONAL REVIEW, Dec. 13, 2006 (“Not that speech in Iran is particularly free – I am waiting for the conference that brings together those who deny the divinity of the Koran.”)

(In fact many Holocaust revisionists claim their work falls under a “universal right to free speech,” and seek to rely on Article 10 of the European Convention on Human Rights, which guarantees freedom of expression, when faced with criminal sanctions against their statements or publications.<sup>32</sup> But the European Court of Human Rights, for one, has consistently declared such arguments are without merit. Nothing in Article 17 of the Convention may be construed so as to justify acts that are aimed at destroying any of the very rights and freedoms contained therein. Invoking free speech to propagate denial of crimes against humanity is, according to the Court, contrary to the spirit in which the Convention was adopted. Reliance on free speech in such cases would thus constitute an abuse of a fundamental right.)<sup>33</sup>

Iran also announced plans to establish an institution to conduct ongoing “research” concerning the Holocaust. Additional support is likely by virtue of the creation of the new English-language division of the Qatari government-funded Al Jazeera television network, which broadcasts remarks by Holocaust-deniers.<sup>34</sup>

Islamic deniers may be inflamed by the attention on Jewish victimization, which in their view has caused them to pay the price for Europe’s treatment of the Jews. They thus seek to de-legitimize both Europe (pluralistic and tolerant, committed to human rights and human dignity) and Israel (which sees itself as the legacy of the Nazis’ victims and the antidote to another Holocaust. They also denigrate any country (especially the United States) where the Holocaust has come to occupy a prominent place in the moral discourse of then people.<sup>35</sup> A press release by Hamas in April 2000

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<sup>32</sup> See D. D. Guttenplan, *Should Freedom of Speech Stop at Holocaust Denial?*, INDEX OF FREE EXPRESSION 2005.

<sup>33</sup> See *X. v. Federal Republic of Germany*, European Commission of Human Rights 16 (July 1982); *Lehideux and Isorni v. France*, 1998-VII, no. 92 (European Court of Human Rights 23 (September 1998); and *Faurisson v France*, 2 BHRC UN Doc. CCPR/C/58/D/550/1993, 1 (United Nations Human Rights Committee 1996). D. D. Guttenplan, *Should Freedom of Speech Stop at Holocaust Denial?*, INDEX OF FREE EXPRESSION 2005.

<sup>34</sup> Wyman Survey 2006, *supra* note 12.

<sup>35</sup> Michael Berenbaum, *Holocaust Denial: Iranian Style*, BRITANNICA BLOG, April 19, 2007. Berenbaum suggests that it would be wise for the West to distinguish between Holocaust denial in the Islamic world and that elsewhere. *Id.*

denigrated “the so-called Holocaust” as “an alleged and invented story with no basis.” In August 2002, an Arab League think-tank promoted a Holocaust denial symposium in Abu Dhabi. Hamas leader Abdel Aziz al-Rantissi declared that the Holocaust never occurred, and that Zionists funded Nazism.<sup>36</sup>

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<sup>36</sup> Rosie Dimanno, *No Guarantee This Map 'Leads Anywhere*, TORONTO STAR, May 1, 2003 at A10.

In a speech that was broadcast on Al-Jazeera Television on February 3, Lebanese Hezbollah leader Hassan Nasrallah said: “A few years ago, a great French philosopher, Roger Garaudy . . . wrote a scientific book, . . . research of an academic nature, in which he discussed the alleged Jewish Holocaust in Germany. He proved that this Holocaust is a myth. [He] was put to trial. He was offended and humiliated. It did him no good that freedom of expression is considered a human right in France. Why? Because freedom of expression extends to the Jews, but it does not extend to the Prophet of 1.4 billion Muslims. That’s hypocrisy.”<sup>37</sup>

In June of 2006 Lebanon’s New Television aired an interview with Norman Finkelstein, author of the book *The Holocaust Industry*. In his introductory remarks, the interviewer said: “The ‘Holocaust’ is the Jewish term for burning the sacrificial offering to ashes. Never has there been an issue subject to as many contradictions, lies, and exaggerations regarding the number of victims as the issue of the Jewish Holocaust. The number of people killed in the Holocaust was estimated, in the film *Night and Fog* by the French director Alain Resnais, to be between eight and nine million, on the basis of documents invented by the Jews. The number dropped to four million Jews in the Soviet report to the Nuremburg trials. The figure dropped further, to 300,000 victims, according to British historian David Irving, and reached only 50,000, according to Raul Hilberg the Jew.”<sup>38</sup>

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<sup>37</sup> *Hizbullah Leader Nasrallah: Great French Philosopher Garaudy Proved Holocaust A Myth*, Middle East Media Research Institute (MEMRI), Special Dispatch No.1088, Feb. 7, 2006, available at <http://memri.org/bin/articles.cgi?Page=archives&Area=sd&ID=SP108806>.

<sup>38</sup> Lebanon’s New TV: ‘Contradictions, Lies, and Exaggerations’ in Number Killed in ‘Jewish Holocaust,’ MEMRI press release No. 1194, June 29, 2006, available at <http://www.normanfinkelstein.com/article.php?pg=11&ar=245>.

During the interview, Finkelstein said: “There has been a gross inflation of the number of survivors of the Nazi Holocaust. In fact, as all the historians have shown, Hitler’s extermination of the Jews was very efficient. It was like a factory, an assembly line. Jews were processed to be murdered. When you have such an efficient system there can’t be very many survivors. In fact, the best estimates show that by May 1945, that is, at the end of World War II, about 100,000 Jews had survived the death camps, the ghettos, and the labor camps. If 100,000 Jews survived the camps and ghettos in 1945, then 60 years later – that is, roughly around now – there can’t be more than a few thousand survivors still alive. But the Holocaust industry wanted to blackmail Europe in order to get compensation moneys. And in order to blackmail Europe they said there were hundreds of thousands of needy Holocaust victims who were still alive, and they started to inflate the number of survivors in order to blackmail Europe.”<sup>39</sup>

In an interview on the U.S. television network PBS on March 30, Syrian president Bashar Assad echoed similar sentiments: “If you ask many people in the region they would say to you that the West exaggerated the Holocaust. People say there was a Holocaust but they exaggerated it. It’s not a matter of how many were killed, half a million, six million or one person. Killing is killing. For example, eight million Soviets were killed, so why don’t we talk about them? The problem is not the number of those killed but rather how they use the Holocaust ... Definitely there were massacres that happened against the Jews during the Second World War, but I’m talking about the concept and how they use it. But I don’t have any clue how many were killed or how they were killed, by gas, by shooting – we don’t know.”<sup>40</sup>

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In 2006, according to the Wyman Institute for Holocaust Studies, there was a noticeable

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<sup>39</sup> *Id.* See Patricia Cohen, *A Bitter Spat Over Ideas, Israel and Tenure*, N.Y. TIMES, April 12, 2007. See also David Remnick, *The Apostate: A Zionist Politician Loses Faith in the Future*, THE NEW YORKER, July 30, 2007 at p.32 (interviewing Avraham Burg, former head of the World Zionist Organization: “Didn’t we cheapen the sanctity of the Holocaust by using it about everything?”) *Id.* at 35.

<sup>40</sup> *An Hour With Syrian President Bashar al-Assad*, Charlie Rose Show, March 27, 2006, Public Broadcasting System, available at

decline in denial activity following the jailing of the movement's best-known figure, the aforementioned Irving, in Austria, and the prosecution of the prominent activists Zundel and Rudolf in Germany. (Irving had been arrested while visiting Austria in November 2005, and prosecuted for speeches he had delivered in Austria in 1989. The appeals judge, Ernest Maurer, said the sentence should be reduced because the offending statements were made "a long time ago, 17 years," and because the judge did not expect Irving would repeat the crime.)<sup>41</sup>

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<sup>41</sup> See Wyman Survey 2006, *supra* note 12 at 6.

Revisionists have also taken to late-night public-access television to assert that claims of Nazi genocide against the Jews during World War II are part of an elaborate hoax. Slickly produced videos purport to show that concentration camps like Auschwitz and Birkenau were recreational facilities, not death camps.<sup>42</sup> Holocaust deniers claim that archival materials concerning Nazi atrocities – voluminous detailed lists of victims, miles of gruesome film footage, and vividly remembered accounts of eyewitnesses--have all been forged.<sup>43</sup>

Meanwhile, as use of the computer Internet has burgeoned, its millions of subscribers provide a vast new target audience for the efforts of numerous hate groups. Catering to white supremacists, anti-government survivalists, militiamen and would-be terrorists, Holocaust deniers have set up enough new sites on the World Wide Web to reach a larger potential constituency than any revolutionaries in history.<sup>44</sup>

### *The Academic Voice*

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<sup>42</sup> See Alan Dershowitz, *It's Time for a Holocaust Video*, TIMES-UNION, Sept. 4, 1995, at A6.

<sup>43</sup> For a detailed analysis of the use of film as evidence of the Holocaust, see Lawrence Douglas, *Film as Witness: Screening Nazi Concentration Camps before the Nuremberg Tribunal*, 105 YALE L.J. 449 (1995). The principal film described by Douglas also has been used to prove the falsity of Holocaust denials. See Leonidas E. Hill, *The Trial of Ernst Zundel and the Law in Canada*, 6 SIMON WIESENTHAL CENTER ANN. 165, 184 (1989).

<sup>44</sup> See Greg Beck, *Hate War's New Battleground: The Internet*, SAN FRANCISCO EXAMINER, June 10, 1996, at A1; see generally Michael Shermer, *Proving the Holocaust*, 2 SKEPTIC 32 (1994).

The gradual ascension of Holocaust revisionism into academic respectability is perhaps shocking only to those unfamiliar with the excesses of modern scholarship.<sup>45</sup>

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<sup>45</sup> See KENNETH LASSON, *TREMBLING IN THE IVORY TOWER: EXCESSES IN THE PURSUIT OF TRUTH AND TENURE*, (Bancroft Press, 2003).



In the 1980's, the Committee on Open Debate on the Holocaust (CODOH) began to place small notices in college newspapers with its address and telephone number. By the 1990's these paid advertisements had become long essays, written in the academic voice, arguing that Holocaust statistics were vastly overstated and that allegations of Nazi gas chambers were frauds aided by doctored photographs.<sup>46</sup> Over time, in high schools and colleges across the country, a number of teachers have come to tell their students that the Holocaust was a myth, while professors write "scholarly" articles and school newspapers print denial advertisement/essays saying the same thing.<sup>47</sup> By 1995, the Anti-Defamation League had reported numerous incidents on American campuses concerning Holocaust denial.<sup>48</sup>

Group defamation in the academic voice persists to this day, most notoriously in the form of the infamous "blood libels" which claim that Jews kill Christian children for ritual purposes. Such

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<sup>46</sup> See Lipstadt, *supra* note 10 at 183-208 (1993). Some campus papers published the advertisements on free-speech grounds, while others refused to do so. See *infra* notes 83ff. and accompanying text. CODOH is largely the work of Bradley Smith. Apparently in response to Smith's campaign, classes on the Holocaust have been increasing.

<sup>47</sup> See generally KENNETH S. STERN, HOLOCAUST DENIAL (1993).

<sup>48</sup> See Text of ADL Audit of Anti-Semitic Incidents 1995, U.S. Newswire, Feb. 28, 1996, available in LEXIS, Nexis Library, USNWR File [hereinafter ADL Audit].

myths are occasionally aided and abetted by “historical” accounts (not one of which has ever been buttressed by facts).<sup>49</sup>

*Speakers*

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<sup>49</sup> The most famous of the modern blood libels is *The Protocols of the Elders of Zion*, first published in Russia in 1905 and still in widespread circulation today. See *infra* notes 259-60 and accompanying text. A detailed account of the book’s evolution is on display at the United States Holocaust Museum in Washington, D.C. Three new books on Jewish ritual killings have been published in the past year by Jewish scholars themselves. See Hillel Halkin, *Bloody Jews?*, COMMENTARY, May 2007, and David Abulafia, *The Blood Libel, Then and Now*, THE TIMES LITERARY SUPPLEMENT, March 2, 2007.

In an academic environment charged with political correctness, the choice of campus speakers appears to be highly subjective. In the 1990's, noted figures who have uttered anti-Semitic words – like Louis Farrakhan,<sup>50</sup> Tony Martin,<sup>51</sup> Khalid Abdul Muhammad,<sup>52</sup> and Leonard Jeffries<sup>53</sup>

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<sup>50</sup> See ADL Quotes Farrakhan One Year After Million-Man March, U.S. Newswire, Oct. 9, 1996; Richard Cohen, *Why the Silence on Farrakhan*, WASHINGTON POST, July 26, 1985, at A25; *The Farrakhan Show*, WASHINGTON POST, Aug. 1, 1984, available in 1984 WL 2024765; Garry Wills, *Perot's Anti-Semitic Company*, TIMES-UNION, Aug. 15, 1996, at A15.

<sup>51</sup> See Ken Ringle, *Of History and Politics: A Classicist at War*, Int'l Herald Trib., June 12, 1996; Text of ADL Report on Writings of Professor Tony Martin, U.S. NEWSWIRE, Oct. 12, 1995; *see also* Selwyn R. Cudjoe, *Academic Responsibility and Black Scholars*, Baltimore Sun, Mar. 23, 1994 at 19A.

– were regularly invited by student groups to appear on protected campus venues. When challenged, the sponsors often claim that they and their guests are exercising their First Amendment rights, the same argument that was used to justify the Holocaust-denial conference in Iran in 2006.<sup>54</sup>

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<sup>52</sup> See Nat Hentoff, *The Return of Khalid Muhammad: "Hitler Used the Same Words About Jews,"* THE VILLAGE VOICE, Nov. 26, 1996, at 10 (quoting Jesse Jackson's characterization of Khalid Muhammad's Kean College speech as "racist, anti-Semitic, divisive, untrue, and chilling"); Stephen A. Holmes, *Farrakhan Is Warned Over Aide's Invective*, N.Y. TIMES, Jan. 25, 1994, at A12; Jon Nordheimer, *Divided by a Diatribe: College Speech Ignites Furor Over Race*, N.Y. TIMES, Dec. 29, 1993, at B1; Steven Lubet, *That's Funny, You Don't Look Like You Control the Government: The Sixth Circuit's Narrative on Jewish Power*, 45 HASTINGS L.J. 1527, 1527-28 (1994); Speech: *The Secret Relationship Between Blacks and Jews*, N.J.L.J., Jan. 24, 1994, at 17 (entire text of Khalid Muhammad's Kean College speech).

<sup>53</sup> See ADL Audit, *supra* note 48; Joseph Berger, *College Chief Calls Jeffries 'Racist,' But Defends Keeping Him*, N.Y. TIMES, Nov. 5, 1991, at B1; Donna Prokop, Note, *Controversial Teacher Speech: Striking A Balance Between First Amendment Rights and Educational Interests*, 66 S. CAL. L. REV. 2534, 2536 (1993); Jacques Steinberg, *CUNY Professor Criticizes Jews*, N.Y. TIMES, Aug. 6, 1991, at B3; Wills, *supra* note 50. See also Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71, 83 n.75 (1996).

<sup>54</sup> See, e.g., Michael W. Sasser, *Speakers Find Cozy Home at Universities*, PALM BEACH JEWISH J., July 23, 1996, at 1.

In recent years such speeches have become commonplace. Perhaps the most notorious among them was Khalid Abdul Muhammad's address at Kean College in 1993, in which he called Jews "blood-suckers of the black nation."<sup>55</sup> At the Black Holocaust Nationhood Conference, attended by some 2,500 people in Washington, D.C. prior to the "Million Man March" (in October of 1995), participants included noted anti-Semitic speakers who delivered unvarnished diatribes against Jews.<sup>56</sup> "We have lost over 600 million at the hands of the white man in the last 6000 years," said Khalid. "That is [one hundred] times worse than the so-called Holocaust of the so-called Jew, the imposter Jew."<sup>57</sup> Several months earlier, Farrakhan had said, "Little Jews died while big Jews made money [during World War II] . . . little Jews were being turned into soap while big Jews washed themselves with it."<sup>58</sup>

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<sup>55</sup> See Muhammad Speech, *supra* note 52.

<sup>56</sup> See ADL Audit, *supra* note 48. The Black Holocaust Nationhood Conference was held at two Washington, D.C., high schools. *See id.*

<sup>57</sup> *Id.* Other conference speakers included Professors Martin and Jeffries.

<sup>58</sup> Text of ADL Report, *Federal Funds for NOI Security Firms: Financing Farrakhan's Ministry of Hate*, U.S. NEWSWIRE, Sept. 22, 1995.

The range of controversial speakers runs the gamut from anti-abortionists to xenophobic

## *Books*

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isolationists, but even an analysis limited to garden-variety hate speech can run well beyond the scope of this article, which limits itself to the subject of Holocaust denial. An examination of the multifarious First Amendment issues regarding the rights that universities must accord to controversial speakers invited onto campus by student groups – for example, who bears the responsibility for payment of fees and honoraria, security, assurance of equal time for other speakers and student groups, the guarantee of an open forum – is likewise farther afield. *But see* Kenneth Lasson, *Controversial Speakers on Campus: Liberties, Limitations, and Common-Sense Guidelines*, 12 ST. THOMAS LAW REVIEW 39 (1999).

Many of the Holocaust-denial books are published by the so-called Institute for Historical Review, a once-obscure revisionist think-tank which also produces a glossy periodical called the *Journal of Historical Review*.<sup>59</sup> The Institute was founded by a notorious anti-Semite, Willis Carto,<sup>60</sup> and for years operated out of Newport Beach, California under the auspices of a non-

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<sup>59</sup> A self-described "historical revisionist society," the Institute supports the idea that the Holocaust was a distortion of history. *See* 1 *ENCYCLOPEDIA OF ASSOCIATIONS* 9 (15572) (Sandra Jozczak ed., 31st ed. 1996); *see also* See Lipstadt, *supra* note 10 at 105; Yonover, *supra* note 53, at 76 n.30.

<sup>60</sup> *See* Doreen Carvajal, *Extremist Institute Mired in Power Struggle*, L.A. TIMES, May 15, 1994, at A3. Carto had already organized the Liberty Lobby, a Washington-based group considered to be one of the most active anti-Semitic organizations in the country. *Id.*

academic named Bradley Smith.<sup>61</sup> Among its most popular tracts are *The Hoax of the Twentieth Century*<sup>62</sup> by Northwestern University Professor Arthur Butz, and *Debunking the Genocide Myth*<sup>63</sup> by Paul Rassinier. Both present the now-familiar argument that reports of the systematic killing of Jews in Nazi concentration camps were myths propagated by Zionists in an effort to create support for a Jewish state in Palestine.<sup>64</sup>

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<sup>61</sup> See Lipstadt, *supra* note 10 at 185; *ADL Report Reveals Split in Holocaust Denial Movement that is as Hateful as Their Anti-Semitic Propaganda*, BUSINESS WIRE, available in Lexis Nexis Library, BW File; News Brief, HOUSTON CHRON., Jan. 25, 1992, at A12.

<sup>62</sup> ARTHUR BUTZ, *THE HOAX OF THE TWENTIETH CENTURY* (Noontide Press 1976). Noontide Press and the Institute for Historical Review are closely related. See Lipstadt, *supra* note 10 at 152-53; see also *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1296 (Bork, J.) (D.C. Cir. 1988) (describing the relationship as the “Liberty Lobby/Legion/ Noontide/IHR network”). In 2006 Butz, a tenured professor of electrical engineering at Northwestern, wrote a column in the campus newspaper expressing support for the Holocaust-denial activities of Iranian President Mahmoud Ahmadinejad. See Jodi S. Cohen, *NU Rips Holocaust Denial, President Calls Prof An Embarrassment But Plans No Penalty*, CHICAGO TRIBUNE, Feb. 7, 2006.

<sup>63</sup> PAUL RASSINIER, *DEBUNKING THE GENOCIDE MYTH* (Noontide Press 1978); see also See Lipstadt, *supra* note 10 at 51-64.

<sup>64</sup> See Prokop, *supra* note 53, at 2564; See Lipstadt, *supra* note 10 at 123-36, 51-65.



Even more notoriety comes to people like Zundel, Irving, and Garaudy.

Zundel became front-page news in Canada for contributing to a book entitled *The Hitler We Love and Why*<sup>65</sup> and distributing a tract entitled *Did Six Million Really Die?*,<sup>66</sup> which claimed that the Holocaust was in fact a Zionist swindle.<sup>67</sup> He was charged with violating a little-used portion of the Canadian criminal code prohibiting the publication of false statements “likely to cause injury or mischief to a public interest.”<sup>68</sup> He was also featured on CBS’ top-rated television program *60 Minutes*.<sup>69</sup> The case became, in effect, an international symposium on the Holocaust denial movement.<sup>70</sup>

Irving is a prominently controversial English historian whose biography of Nazi propagandist Josef Goebbels suggested that Hitler was not personally responsible for the Holocaust. He had gained prominence as far back as 1959, when he announced his admiration of the Nazi regime in World War II Germany and claiming that the British press was “owned by Jews.” His best-known book,

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<sup>65</sup> CHRISTOFF FRIEDRICH & ERIC THOMSON, *THE HITLER WE LOVED AND WHY* (White Power 1977); *see also* See Lipstadt, *supra* note 10 at 157-58.

<sup>66</sup> RICHARD HARWOOD, *DID SIX MILLION REALLY DIE?* (1974). “Richard Harwood” was a pseudonym for Richard Verrall, the editor of *Spearhead*, a neofascist publication. *See* Lipstadt, *supra* note 10 at 104.

<sup>67</sup> *See* Lipstadt, *supra* note 10 at 157-59.

<sup>68</sup> *See* Douglas, *supra* note 43 at 478 (citing R.S.C., ch. C-34, § 177 (1970) (Can.)). Zundel’s conviction was overturned on appeal.

<sup>69</sup> *60 Minutes*, CBS television broadcast, Mar. 27, 1994.

<sup>70</sup> Zundel was sentenced to nine months in prison after the Ohio Court of Appeals upheld two lower-court convictions for spreading false information. In 1992 the Supreme Court of Canada overturned the conviction. Zundel was deported to Germany in 2005, where in February 2007 he was sentenced to five years in prison for inciting hatred and denying the Holocaust. Paul Lungen, *Zundel Gets Five Years for Inciting Hate*, *CANADIAN JEWISH NEWS*, Feb. 22, 2007 at p. 40. The prosecution chose to prove the falsity of Zundel’s claim solely by showing a documentary film first used at the Nuremberg Trials entitled *Nazi Concentration Camps*. Zundel was convicted and sentenced to two years in prison. On appeal, however, the conviction was overturned, on the grounds that – because the film’s nameless screenplay writer and narrator were unavailable for cross-examination – the documentary failed under the rules of hearsay. *See also* Irwin Cotler (quoted in Debate, *supra* note 2 at 564).

*Hitler's War*, argued the Fuehrer neither ordered nor even knew about the genocidal policy known as the "Final Solution." In the ensuing years, Irving made numerous speaking appearances before the aforementioned Institute for Historical Review, shared a platform with Ku Klux Klan member and neo-Nazi David Duke, and testified for the defense at Zundel's 1988 trial. In 1989, responding to Russia's publication of a list of over 74,000 Auschwitz victims, Irving asserted that there were no gas chambers or master plan: "It's just a myth and at last the myth is being eroded . . . . Eyewitness evidence is a problem for psychiatrists."<sup>71</sup>

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<sup>71</sup> *ADL Background Information on Holocaust Denier David Irving*, U.S. NEWSWIRE, June 4, 1996, available in LEXIS, Nexis Library, USNWR File [hereinafter *ADL Background Information*]. Irving's book *Hitler's War* was said to have "hundreds of errors: wrong names, wrong dates, and . . . statements about events that did not really take place. These errors . . . are not the result of inadequate research or technical mistakes or oversights. They are the result of the dominant tendency of the author's mind." John Lukacs, Book Review, NATIONAL REVIEW, Aug. 19, 1977 at p. 46. *See also* Irving's 1987 book, *Churchill's War*, which may have been his most crudely anti-Jewish work. *ADL Background Information* at 39. On the witness stand during the Zundel trial, Irving stated that he had found "no document whatsoever indicating the Holocaust occurred." *Id.* In April of 1990 he was quoted as saying that "the holocaust of the Germans of Dresden was real. The holocaust of the Jews in the Auschwitz gas chambers is a fabrication." *Id.*

Austria banned Irving from entering the country in the late 1980's. Germany did the same after a court found him guilty of Holocaust denial. Other governments followed suit. In 1994 Deborah Lipstadt, an American historian and author of the book *Denying the Holocaust*, called Irving a denier, falsifier, and bigot. He sued for libel in England, where in 2000 the High Court ruled against him and awarded 2 million pounds to Ms. Lipstadt and her publishers, resulting in Irving's bankruptcy. In November of 2005, Irving was arrested after traveling to Austria to give a lecture to students, thus flouting the ban on his entering the country. **He was convicted of Holocaust denial and sentenced to a three-year jail term.**<sup>72</sup>

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**Garaudy is a well-known French author who has made a career of denouncing what he calls Jewish "Shoah business."<sup>73</sup> His most recent book, *The Founding Myths of Israeli Politics*, claims that Israel has exploited the Holocaust to put itself above all international law.<sup>74</sup>**

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<sup>72</sup> He was released in 2006 and allowed to serve the remainder on probation. See Nicola Boden, *The Comeuppance of David Irving*, PRESS ASSOCIATION NEWSFILE, Dec. 20, 2006.

<sup>73</sup> Shoah is the Hebrew word for Holocaust. See Barry James, *Cleric Draws Rebuke by Anti-Racists*, INTERNATIONAL HERALD TRIBUNE, May 2, 1996 at p. 1. See also A Land Stained With Guilty Secrets, LONDON GUARDIAN, Aug. 9, 1997, at 21; Douglas Johnson, *French Historians and the Holocaust*, HISTORY TODAY, Oct. 1996, at 2; Julian Nundy, *Mystifying Downfall: Onetime Hero's New Belief's Embarrass France*, NEWSDAY, May 29, 1996, at B3; *With Both Eyes on the Human Condition*, FINANCIAL TIMES (LONDON), June 21, 1997, at 4.

<sup>74</sup> ROGER GARAUDY, *THE FOUNDING MYTHS OF ISRAELI POLITICS* (1996); see also Nundy, *supra* note 73 at B3.

Nowhere is the tension between the quest for truth and free speech greater than at university libraries, which like their public-library counterparts have difficulty distinguishing between legitimate Holocaust literature and the distortions of Holocaust denial.

The experience at Texas A&M University is illustrative. David Gershom Myers, an associate professor of English, was disturbed to discover that at least ten Holocaust-denial books were classified in the university's main library under Holocaust, Jewish History. Fearful that Holocaust denial passed off as scholarship will become increasingly prevalent as survivors die and time passes, Myers argued that such books do not deserve the imprimatur of credibility suggested by inclusion in a university or public library. He sought to have them removed altogether or at least taken out of general circulation, but succeeded only in getting them placed in a different sub-category called Errors and Inventions. But Myers also has evoked criticism from academics around the country who argue that any suppression of books is wrong, no matter how repugnant their message.<sup>75</sup>

Where can the line be drawn, they ask. Such censorship of material containing offensive or unpopular ideas interferes with the education of students; it sets a bad example. The proper role of the university is to ingrain critical thinking.<sup>76</sup>

Myers counters by arguing that an engineering professor would not tolerate a book advocating unsound construction practices that would cause bridges to collapse. Holocaust denial, he argues, is just as dangerous. "Survivors are going to die and we are their heirs. If we don't protect their

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<sup>75</sup> See Mary Ann Roser, *A&M Professor Stirs Debate Over Holocaust Denial Books*, AUSTIN-AM. STATESMAN, Apr. 10, 1996, at B1..

<sup>76</sup> *Id.*

memory, no one will.”<sup>77</sup>

Others sympathize with Myer's view but would not remove the offensive books – because they can be used to research anti-Semitism. But all find it unacceptable that an innocent student could discover denial books classified under Holocaust.<sup>78</sup>

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* Even more confusing may be the fictionalized accounts of the Holocaust. For a defense of their utility, see Douglas, *supra* note 43.

Holocaust revisionists have been most successful in gaining access to a respectable press in France, where they have managed to entangle academic historians in debate.<sup>79</sup> In 1985 the University of Nantes awarded a doctorate (with honors) to a sixty-five-year-old agronomist for a 371-page thesis that asserted there was no firm evidence to prove that the Nazis had gassed prisoners in concentration camps.<sup>80</sup> But in Germany, the doctorate of a seventy-year-old former judge was revoked in 1983 on the ground that he had authored a book entitled *The Auschwitz Myth – Legend or Reality*, which questioned the death of six million Jews.<sup>81</sup> And in Switzerland, a high-school teacher and military judge in the Swiss army who questioned the existence of Nazi gas chambers in World

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<sup>79</sup> See Eric Stein, *History Against Free Speech: The New German Law Against the 'Auschwitz' – and Other – Lies*, '85 MICH. L. REV. 277, 280 nn.9-11 (1986) (citing Pierre Vidanaquet, *Theses sur le Revisionnisme*, in L'ALLEMAGNE NAZIE ET LE GENOCIDE JUIF 496, 505 (1985)).

<sup>80</sup> *Id.* at 280 n.11. The paper provoked a storm of protests, and the French government ordered the doctorate be withdrawn because of improprieties in the examining process. *Id.* See also *France Revokes Thesis That Denies Nazi Acts*, N.Y. TIMES, July 3, 1986 at A2; *Frenchman Assailed for Denying Nazi Crimes*, N.Y. TIMES, June 13, 1986 at A4.

<sup>81</sup> See Stein, *supra* note 79, at 280 n.11.

War II was formally barred from teaching history.<sup>82</sup>

*Student-Edited Newspapers*

In recent years one of the most pressing journalistic decisions facing college or university newspapers has involved the controversial question of whether to publish a paid advertisement denying the existence of the Holocaust.<sup>83</sup> Most of these advertisements are promulgated and paid for by the aforementioned Committee for Open Debate on the Holocaust, which claims to encourage scholarly discussion about the Holocaust.<sup>84</sup>

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<sup>82</sup> See *Swiss Doubter of Nazi Camps Is Forbidden to Teach History*, N.Y. TIMES, Feb. 22, 1987 at A10.

<sup>83</sup> See Bob Keeler, *Assault on History*, Newsday, Feb. 24, 1994, at 68. See generally Lipstadt, *supra* note 10 at 183-208.

<sup>84</sup> See Jeff Ristine, *Ad Questioning Holocaust Takes Aim at Students*, SAN DIEGO UNION-TRIBUNE, Jan. 11, 1992 at p.A1. See also Lipstadt, *supra* note 10 at 183-208 and Leon Jeroff, *Debating the Holocaust*, TIME, Dec. 27, 1993, at 83.

The Committee is spearheaded by the aforementioned Bradley Smith, a self-employed businessman with no formal historic training.<sup>85</sup> Smith's advertisement/essays, written in reasonably well-constructed scholarly prose, question the historical legitimacy of various facets of the Holocaust--such as the existence of death-camp crematoria, the number of Jews actually killed, indeed the Nazis' very policy of genocide.<sup>86</sup>

By 1997, Smith had succeeded in placing advertisements in roughly half of the campus newspapers to which he has submitted them.<sup>87</sup> Most of the editors choosing to publish defended their decisions broadly on First Amendment grounds (freedom of speech and press), many of them noting specifically their aversion to censorship.<sup>88</sup> Those choosing not to publish argue that the proffered material is patently false and amounts to little more than thinly-disguised racial hatred, and that the First Amendment does not require any newspaper to publish any article, editorial or advertisement

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<sup>85</sup> See Dimitry Nemirovsky, *That Ad Shouldn't Have Run*, WASHINGTON POST, Feb. 4, 1992 at A15.

<sup>86</sup> See Jeroff, *supra* note 84. Smith has also been associated with the Populist Party (which ran David Duke for president in 1988) and the Liberty Party. See Nemirovsky, *supra* note 85, at A15.

<sup>87</sup> Lipstadt, *supra* note 10 at 184. See generally John Fernandez, *Holocaust Ad in UM paper Costs \$2 Million Donation*, PALM BEACH POST, Apr. 13, 1994 at 1A.

<sup>88</sup> See Lipstadt, *supra* note 10 at 189-208.



submitted.<sup>89</sup>

Smith claimed that he had been blacklisted by the media. “The Holocaust story,” he declared, “is closed to free inquiry in our universities and among intellectuals.” His message is not one of hate, he says, but of “intellectual freedom.” He has thus turned his efforts from campus newspapers to the World Wide Web.<sup>90</sup>

### *State Actors and Public Forums*

A private college or university newspaper is not a state actor (and therefore not protected by First Amendment guarantees), but is subject to the scrutiny of school administrators and bound by school policies. Although most colleges and universities adopt policies that are compatible with expressing and testing new ideas, they retain the power to impose prior restraints which could prohibit publication of certain material based on its content.

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<sup>89</sup> See Michael Kenney, *The Holocaust and the Politics of Denial*, BOSTON GLOBE, Aug. 12, 1993 at 62. See also discussion regarding the right to access, *infra* notes        and accompanying text.

<sup>90</sup> Beck, *supra* note 44 at A1. See also Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEORGE MASON LAW REVIEW 35 (1997).

In *Sinn v. Daily Nebraskan*, a federal district court held that where a state university newspaper makes decisions independent from the control of university officials, even though it may be funded by the school and operates out of a campus building, its activities cannot be considered state action. The mere subsidization of a student newspaper without the exercise of coercive power, said the court, is not sufficient to “convert its actions into that of the state.”<sup>91</sup>

The primary issue to be determined in cases involving a state-supported college or university newspaper is whether school administrators are involved in the editorial decisions of the student newspaper. Where the newspaper is free from the control of the administration, its actions are viewed as being independent of the state and not subject to constitutional scrutiny. It follows in such cases that there has been no state action where an author of proffered material is denied access to the paper based on the material’s content.

In short, the campus newspaper of a state-supported university is entitled to the First Amendment’s freedom of the press protection--including the freedom to exercise subjective editorial discretion by rejecting a proffered article, editorial, or advertisement.<sup>92</sup>

Thus editors of a state college or university newspaper have a right to editorial discretion--and school administrators do not.

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<sup>91</sup> *Sinn*, 638 F. Supp. at 149.

<sup>92</sup> *See Associates & Aldrich Co. v. Time Mirror Co.*, 440 F.2d 133, 135 (9th Cir. 1971).

For the general public to have unfettered access to a state college or university newspaper – one that is considered a state actor – it must also be demonstrated that the newspaper is a “public forum.”<sup>93</sup>

The mere fact that a student newspaper is used for the communication of ideas does not make it a public forum.<sup>94</sup> To the contrary, the very presence of editorial discretion precludes a

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<sup>93</sup> Sinn, 638 F. Supp. at 151. The Supreme Court has identified three kinds of public forums: (1) sidewalks, streets, and public parks; (2) spaces specifically set aside for public discourse; and (3) other public property. The first have always been considered places which “from time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions,” and are thus open to all on a first-come, first-served basis without regard to the content of the messages being communicated. So have the second, areas the government designates as places for public discourse and a free exchange of ideas. As for the third, the Court has found no constitutional right to access. *See Perry Educ. Assoc. v. Perry Local Educator’s Assoc.*, 460 U.S. 37, 45 (1983); *see also* *Boos v. Barry*, 485 U.S. 312 (1988). A student newspaper would not appear to fit any of the categories where access is guaranteed.

<sup>94</sup> Sinn, 638 F. Supp. at 149. In Sinn, the district court held that the *Daily Nebraskan* was not a public forum because it did not consent to unrestricted access by the general public, and did not relinquish editorial control over proffered material. *Id.* at 150-51.

constitutional right to access.<sup>95</sup> Indeed it would be difficult to argue that a state college or university newspaper, with limited funds and publishing power, must as a matter of course publish every article, editorial, and advertisement it receives.

But that very reasoning has occasionally held sway. In *Lee v. Board of Regents*, a federal district court held that a campus newspaper is “an important forum for the decimation of news and expression of opinion,” and as such “it should be open to anyone who is willing to pay to have his views published.”<sup>96</sup> In light of *Lee*, it appears that courts could find a student newspaper to be a public forum, and require the newspaper to publish all proffered material on constitutional grounds.

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<sup>95</sup> See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 252-56 (1974).

<sup>96</sup> *Lee v. Board of Regents*, 306 F. Supp. 1097, 1100-01 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971).

The holding in *Lee*, however, is decidedly a minority view. Most of the case law supports the proposition that a state college or university newspaper, as a nonpublic forum, may exercise its right to editorial discretion and constitutionally deny access. “Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity.”<sup>97</sup> Some of these distinctions may be impermissible in a public forum, but in a nonpublic forum (such as a newspaper) they are necessary in order for a newspaper to operate.<sup>98</sup>

Undoubtedly the weight of authority will eventually be amassed to support the conclusion that Holocaust-denial ads are afforded no protection by the First Amendment. No college paper need take any advertisement that is false and deceptive.<sup>99</sup>

### *Holocaust Denial and Political Correctness*

Political correctness may be on the run in the pop culture of talk radio, but it is no laughing matter in the Ivory Tower. Though scarcely reported by the media, hundreds of American colleges and universities--from the backwoods of Appalachia to the august quadrangles of Ivy League law schools – are currently engaged in an entrenched battle over both the nature of the standard curriculum and the freedom of speech on campus.<sup>100</sup>

Fifty years ago, when the Holocaust was still a new and searing cataclysmic event, the bramble-bush of political correctness was mere stubble in the wasteland of academic politics. Now universities are pushing various political correctness agendas by way of curricular reform and the promulgation of speech and conduct codes. Orthodoxies of all kinds are being challenged. Eurocentric doctrine (including that of modern Jewish history) is subjected to “deconstruction,” with

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<sup>97</sup> *Perry*, 460 U.S. at 49.

<sup>98</sup> *See Joyner v. Whiting*, 477 F.2d 456, 461 (4th Cir. 1973).

<sup>99</sup> *See Ristine*, *supra* note 84.

<sup>100</sup> *See Jenish D’Arcy & William Lowther, War of Words: Academics Clash Over ‘Correctness,’ MACLEAN’S*, May 27, 1991 at 44.

the underlying theory that all opinions are valid. Facts are said to be nothing more than received opinions. This phenomenon has enabled Holocaust deniers to elevate their cause into the realm of academic debate.

Thus when American adults were asked in 1993 if they thought it possible that the Holocaust never really ever happened, twenty percent of them answered in the affirmative.<sup>101</sup> Almost fifteen years later a Haifa University survey found that more than a quarter of Israel's Arab citizens believed the Holocaust never happened; the percentage rose to a third for college and high-school graduates.<sup>102</sup>

Such a response is not the concern of constitutional scholars, whose abiding interest in political correctness has always been the stifling effect on civil liberties and academic freedom of the restrictive speech and conduct codes that have become commonplace in the Ivory Tower.<sup>103</sup> Even though not one such code has been able to withstand constitutional scrutiny, both students and professors (as well as administrators) look and listen nervously over their shoulders for fear of

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<sup>101</sup> Deborah Lipstadt, *False Reasoning' on the Holocaust*, NEWSDAY, July 23, 1993 at p.61.

<sup>102</sup> *Poll Shows Israeli-Arab Holocaust Denial, Support for Hizbullah*, ISRAEL FAXX, March 19, 2007; *Holocaust Denial*, ISRAEL FAXX, March 30, 2007.

<sup>103</sup> See Robert Hawkins, *Some Imprints Left as 1991 Fades . . . Art-Censorship Battles Loom as Pressure Increasing From All Viewpoints*, SAN DIEGO UNION-TRIBUNE, Dec. 27, 1991 at C1.

offending mushrooming numbers of special-interest groups.<sup>104</sup>

What the Founding Fathers envisioned as vigorous disagreement in a free and open marketplace of ideas – even if some of those thoughts are abhorrent to the civil temperament – has been quashed at the very places such debates are supposed to occur most freely.<sup>105</sup> What should be one of the richest and most receptive places of honest intellectual inquiry and discourse has instead become one of the most intolerant.

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<sup>104</sup> See generally Kenneth Lasson, *Political Correctness Askew: Excesses in the Pursuit of Minds and Manners*, 63 TENN. L. REV. 689 (1996). The pernicious nature of political correctness is most clearly revealed by the absurd extremes encouraged by some campus conduct codes. Though many of them have never been tested in court and continue to be broadly implemented – some to the destruction of careers and reputations – not one of them to date has been found constitutional.

<sup>105</sup> See Stephen Reese & John D.H. Downing, *Holocaust Ad Poisons Public Debate*, AUSTIN-AMERICAN STATESMAN, May 1, 1992 at 1.

The Academy has become a decidedly unwelcome nesting place for people with traditional points of view or ways of presenting them. What were once noble and defensible goals – intellectual curiosity and sensitivity toward others – have been forged into bludgeons of moral imperatives.<sup>106</sup>

The pervasive atmosphere of the political correctness current in the Academy today complicates the question of Holocaust revisionism. In seeking to challenge traditional culture, the guardians of political correctness have been tellingly inconsistent. While they would be quick to condemn an historian who denied the evils of slavery, they have been reluctant to spurn Holocaust denial. Perhaps this is because their agenda is essentially anti-Western, -white, and -Imperialistic; Jews are not viewed as an endangered minority; Zionism is seen not as a liberation movement, but as

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<sup>106</sup> The rules regarding harassment have iced over into the first icy patch on the slippery slope to repression of unpopular ideas. They deter not only genuine misconduct but also harmless (and even desirable) speech, which in higher education is central both to the purpose of the institution and to the employee's profession and performance. Legislative remedies should not be necessary, but they are. In 1993 California saw fit to enact a new law guaranteeing "students . . . the same right to exercise their free speech on campus as they enjoy when off campus." Cal. [Schools and School Districts] Code § 4(b) (West 1997).

The clear line to be drawn between academic freedom and actionable harassment is the same as that between speech and conduct. The former is almost always protected by the First Amendment, the latter can be constitutionally proscribed.



racism.<sup>107</sup>

Pressure to be politically correct has generated a backlash against political correctness as well. The combination of the two has had an unsettling effect on student editors. Can those who would voice alarm at the modern political correctness movement's exclusion of Eurocentric culture at the same time call for exclusion of revisionists and deniers? Students might find it difficult to condemn both the excesses of political correctness and the promulgation of Holocaust-denial literature.

Here, after all, is where two principles – the freedom of speech in the quest for truth, and the suppression of racism in the quest for equality – are sometimes in conflict.

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<sup>107</sup> Some teachers have dropped references to the Holocaust studies altogether, so as to avoid offending children of certain races or religions. See Alexandra Frean, *Schools Drop Holocaust To Avoid Offence*, THE TIMES (LONDON), April 2, 2007 at p.8. See also Abraham Cooper and Harold Brackman, *You Can't Teach History Without The Holocaust*, THE GLOBE AND MAIL (CANADA), April 16, 2007 at p. A13.

It is not always easy to discern the difference between historical fact and biased opinion. When that opinion is couched in the academic voice, and aimed at students who were not alive when the events of World War II were occurring, the confusion becomes palpable.<sup>108</sup>

At least part of the increasing academic respectability of Holocaust denial can thus be traced to the political-correctness controversy. “The politically correct line on the Holocaust story,” urge people like Bradley Smith, “is, simply, it happened. You don’t debate it.”<sup>109</sup> The predictable reaction of politically incorrect people is to debate it.

When campus newspapers begin to do that, however, they render Holocaust denial a matter of opinion rather than a matter of fact. Editorial boards invoke the First Amendment to support their decisions. Although some universities argue that this has nothing to do with free speech, few cite the express policy of most campus newspapers not to run racist, sexist, or religiously offensive advertisements.

The anti-Semitic motivation of Holocaust deniers becomes clear when viewed in the very limited context of their revisionism: none of them would deny that the Second World War or even specific battles happened. It is thus all the more bizarre (and dangerous) for politically correct campuses to give safe haven to Holocaust deniers – and make their cause a free-speech issue at that.<sup>110</sup>

Another aspect of political correctness that affects recognition of the Holocaust is its tendency to view events in relative and subjective terms. Thus when the Holocaust is portrayed as just another example of man’s inhumanity to man – and perceived solely in the context of other social dilemmas such as abortion, child abuse, discrimination against homosexuals, and domestic violence – its impact as a unique atrocity is minimalized.<sup>111</sup>

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<sup>108</sup> See Julia Neuberger, *A Brief History of the Wickedest Lie of All*, LONDON TIMES, May 4, 1995 at Features 1.

<sup>109</sup> Kenney, *supra* note 89 at 62.

<sup>110</sup> *Id.*

<sup>111</sup> See Alvin H. Rosenfeld, *The Americanization of the Holocaust*, COMMENTARY, June 1, 1995 at 35, 36. Ironically, the concept that the Holocaust was unique has been diminished by both the United

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States Holocaust Museum in Washington, D.C., and the Simon Wiesenthal Center's Museum of Tolerance in Los Angeles. The Holocaust Museum's ultimate goal is an "en masse understanding that we are not about what the Germans did to Jews but what people did to people." *Id.* The Museum of Tolerance situates the Holocaust within a historical framework that includes such non-genocidal social problems as the Los Angeles riots and the struggle for black civil rights. *Id.*

Likewise, the politically correct inclination is to downplay (or deny) the dark and brutal sides of life and to emphasize the saving powers of individual and collective morality. Thus events are more often portrayed as uplifting human triumphs over adversity than as tragedies (witness *The Diary of Anne Frank*), and it seems to have become a more palatable proclivity to celebrate survivors and rescuers than to dwell on mourning victims (witness *Schindler's List*).<sup>112</sup>

Often overlooked in the wars of words on American campuses is that there are other ways for universities to combat the problem of hateful and bigoted speech – strategies that do not interfere with students' or professors' constitutionally protected rights. All educational institutions (both public and private), for that matter, should teach civility and tolerance along with history and scientific method. All should lead by example.

What example can be made of Holocaust denial?

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<sup>112</sup> *Id.* at 37-38.

## **II. Historical Aspects of Free Expression: Framers and Revisionists**

*If by the liberty of the press, we understand merely the liberty of discussing the propriety of public measures and political opinions, let us have as much of it as you please; but, if it means the liberty of affronting, calumniating, and defaming one another, I own myself willing to part with my share of it whenever our legislators shall please to alter the law; and shall cheerfully consent to exchange my liberty of abusing others for the privilege of not being abused myself.*

– Benjamin Franklin<sup>113</sup>

### ***Principles of Liberty***

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<sup>113</sup> Benjamin Franklin, FEDERAL GAZETTE (PHIL.), Sept. 12, 1789 at 2.

Ben Franklin's view may have been civil and proper, but the Founding Fathers were motivated by a much more libertarian philosophy when they drafted the Bill of Rights.<sup>114</sup> The First Amendment not only protects the media from government interference, but grants the press almost absolute power to print whatever it wishes.<sup>115</sup> Freedom of the press, often characterized as "the mother of all our liberties,"<sup>116</sup> had "little or nothing to do with truth-telling. . . . Most of the early newspapers were partisan sheets devoted to attacks on political opponents. . . ." Back then, freedom of the press meant "the right to be just or unjust, partisan or non-partisan, true or false, in news column or editorial column."<sup>117</sup> That same freedom also allows newspapers to reject any matter, editorial or advertising.

Constitutional interpretation often begins with speculation about the intent of the Founding Fathers.<sup>118</sup> As to the First Amendment, much has been made of Thomas Jefferson's libertarian

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<sup>114</sup> See, e.g., Jeffrey A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 457-58 (1987).

<sup>115</sup> "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const. amend. I.

<sup>116</sup> 4 ADLAI E. STEVENSON, THE ONE-PARTY PRESS, IN THE PAPERS OF ADLAI E. STEVENSON 75, 78 (Walter Johnson ed., 1974) ("The free press is the mother of all our liberties and of our progress under liberty."). See also Junius, *Dedication to the English Nation*, in THE LETTERS OF JUNIUS 7, 8-9 (John Cannon ed., Oxford Univ. Press 1978) (1772) ("Let it be impressed upon your minds, let it be instilled into your children, that the liberty of the press is the palladium of all the civil, political, and religious rights. . . ."); Edmund Randolph, *Essay on the Revolutionary History of Virginia*, reprinted in 44 VA. MAG. OF HIST. & BIOGRAPHY 43, 46 (1936) (stating that freedom of the press was one of "the fruits of genuine democracy and historical experience").

<sup>117</sup> Charles Beard, *St. Louis Post-Dispatch Symposium on Freedom of the Press* 13 (1938) (quoted in Commission on Freedom of the Press, *A Free and Responsible Press* 131 (Univ. of Chicago Press 1947)).

<sup>118</sup> The ideas expressed in this section were originally presented in Kenneth Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77, 97-101 (1984).

perspective on free speech: that the best way to deal with error is to permit its correction by truth.<sup>119</sup> “The bar of public reason,”<sup>120</sup> said Jefferson, will generally provide the remedy for abuses occasioned by the unfettered dissemination of information. Only when security and peace are threatened should the discussion of political, economic, and social affairs be restrained.<sup>121</sup> James Madison, often called the architect of the Bill of Rights, thought likewise: freedom of speech and press, he wrote in *The Federalist*, would engender a reasoned citizenry – that would in turn keep the government in check.<sup>122</sup>

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<sup>119</sup> See, e.g., W.O. DOUGLAS, *AN ALMANAC OF LIBERTY* 362 (1954), and DAVID N. MAYER, *THE CONSTITUTIONAL THOUGHT OF THOMAS JEFFERSON* 166-84 (Univ. Press of Virg. 1994).

<sup>120</sup> Thomas Jefferson, *First Inaugural Address* (Mar. 4, 1801), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 297, 300 (Adrienne Koch & William Peden eds., 1993).

<sup>121</sup> See Douglas, *supra* note 119 at 362. Justice Douglas naturally interpreted Jefferson's meaning as in accord with his own absolutist stance. But the argument made by the state in favor of any given abridgment of speech is always that social peace and security is being threatened.

<sup>122</sup> John Finnis, “Reason and Passion”: *The Constitutional Dialectic of Free Speech and Obscenity*, 116 U. PA. L. REV. 222, 229 (1967). See also David A. Anderson, *The Origins of the Press Clause*, 30 U.C. L. A. L. REV. 455 (1983).

It can also be argued that the Framers would not have wanted to protect racial defamation, which deliberately exacerbates group tensions and plays negatively upon the heterogeneous, pluralistic character of American society.<sup>123</sup> The goal of casting contempt on an ethnic group is not to participate in political debate founded on the principle of pluralism, but to destroy it. In this sense, racial defamation is subversive speech. Unlike political extremism, in which, (however distorted its form) the Framers' principle of self-government is evident, the principle underlying racial defamation is pure-form discrimination.<sup>124</sup>

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<sup>123</sup> The stirring up of racial or ethnic "fears, hate, guilt and greed" is fundamentally opposed to the Framers' intent to ensure cooperative social pluralism. DERRICK A. BELL, *RACISM IN AMERICAN LAW* 59 (1973).

<sup>124</sup> The positive intent of the Framers to found a nation based on pluralism should not, therefore, be distorted to tolerate the free rein of vindictive attack which is unrelated, except in appearance, to any constitutional or national purpose. *See, e.g.*, Benjamin R. Epstein & Arnold Forster, *The Radical Right* 40 (1967); Brendan F. Brown, *Racialism and the Rights of Nations*, 21 *NOTRE DAME L. REV.* 1, 13 (1945). Note also that invidious racial and ethnic discrimination has been rejected as antithetical to American national policy. *See* *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).



Other historians, however, conclude that there was no clear “intent” underlying the First Amendment.<sup>125</sup> Rather, the Framers perceived issues of individual rights as concerns to be addressed not by the newly established general government, but by the respective states. In fact not all freedoms were easily recognized by the drafters of the Constitution. On the final day of the constitutional convention, for example, a provision that “the liberty of the Press should inviolably be observed” was proposed but was promptly voted down because (said the delegates) “it is unnecessary--the power of Congress does not extend to the Press.”<sup>126</sup> Eventually, say some historians, the Bill of Rights was adopted less as an additional guarantor of liberty<sup>127</sup> than as a bargaining chip to procure state ratification.<sup>128</sup>

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<sup>125</sup> See JAMES MACGREGOR BURNS, *THE VINEYARD OF LIBERTY* 60-62 (1982); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978); Franklyn S. Haiman, *How Much of Our Speech Is Free?*, 2 CIV. LIB. REV. 111, 113 (1975).

<sup>126</sup> *Id.* at 62, 539-40.

<sup>127</sup> Jefferson, *supra* note 120, at 403, 405 (quoting from a letter to James Madison, Dec. 20, 1787, “a bill of rights is what the people are entitled to against every government on earth, general or particular”).

<sup>128</sup> Burns, *supra* note 125 at 542-43; see also Alexander Meiklejohn, *The First Amendment is An Absolute*, 1961 SUP. CT. REV. 245, 264.

Thus one should not expect that understanding the intent of the Framers will resolve the question of precisely what they sought to protect by the First Amendment. There appears to have been no extensive, carefully considered debate on the subject of individual freedom.

For some constitutional scholars, the principle of self-government sufficiently identifies the parameters of the First Amendment: Congress is forbidden from abridging the freedom of a citizen's speech whenever it has anything to do with political, economic, and social issues.<sup>129</sup> Put more succinctly, the Founding Fathers envisioned “the free and robust exchange of ideas and political debate.”<sup>130</sup> The federal-state system of checks and balances was devised to prevent government tyranny.<sup>131</sup> Similarly, the various guarantees of the Bill of Rights effectively prevent a “tyranny of opinion” from being concentrated in any one institution or person, and serve to ensure social, political, and religious pluralism; it should be virtually impossible for popular self-government to be defeated by consolidation of control.<sup>132</sup> The Framers may have perceived government to be a necessary evil,<sup>133</sup> but it is probably more accurate to suggest that they drafted the Constitution to make the cooperation of competing interests the price for protecting the liberty of each.<sup>134</sup> The

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<sup>129</sup> See Meiklejohn, *supra* note 138, at 255. To Meiklejohn the goal appears to be the acquisition by voters of “intelligence, integrity, sensitivity, and generous devotion to the general welfare” – a weighty purpose indeed for speech to play. *Id.*

<sup>130</sup> *Miller v. California*, 413 U.S. 15, 34 (1973); see also Finnis, *supra* note 122 at 238.

<sup>131</sup> Burns, *supra* note 125 at 60-61.

<sup>132</sup> *Id.*

<sup>133</sup> See PETER USTINOV, *MY RUSSIA* 204, 209 (1983).

<sup>134</sup> It can also be argued that the Framers would not have wanted to protect racial defamation, which deliberately exacerbates group tensions, playing negatively upon the heterogeneous character of American society. The stirring up of racial or ethnic “fears, hate, guilt and greed” is fundamentally opposed to the Framers’ intent to ensure cooperative social pluralism. Bell, *supra* note 123 at 59. The goal of casting contempt on an ethnic group is not to participate in debate founded on the principle of pluralism, but to destroy it. In this sense, racial defamation is subversive speech. Unlike political extremism, in which (however distorted its form) the Framers’ principle of self-government is evident, the principle underlying racial defamation is pure discrimination. Invidious racial and ethnic

guarantee of free speech enabled the citizens to express their will to a representative government.<sup>135</sup>

Thus the narrowest historical interpretation of the free speech clause would limit its protection to the expression of purely political ideas.<sup>136</sup> The broadest interpretation would allow for an absolutist intent on the part of the Framers. The Supreme Court, however, has adopted neither extreme. Instead, it has identified political speech as merely the central value to be protected. Such an evaluation logically requires a consideration of content: that is, what the speaker wants to say.<sup>137</sup>

The Founding Fathers' debate on the First Amendment was brief, for they recognized that the rights of free expression were inherent and belonged to the people.<sup>138</sup> "There are rights," wrote

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discrimination has been rejected as antithetical to American national policy. *See* *Bob Jones Univ.*, 461 U.S. at 574. The positive intent of the Framers to found a nation based on pluralism should not, therefore, be distorted to tolerate the free rein of vindictive attack which is unrelated, except in appearance, to any constitutional or national purpose. *See, e.g.*, Epstein & Forster, *supra* note 124 at 40; Brown, *supra* note 124 at 13.

<sup>135</sup> The free speech guarantee is thus a means to the end, not the end in itself. *See* FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 920 (1976) (claiming that "free speech is seen as an instrument of good, not as a good in itself"). *See also* Burns, *supra* note 125 at 62 ("Both sides [federalists and anti-federalists] invoked the Declaration of Independence and its call for the supreme values of liberty and equality. But what kind of liberty and equality? . . . The issue that would become the grandest question of them all – the extent to which government should interfere with some persons' liberties in order to grant them and other persons more liberty and equality – this issue lay beyond the intellectual horizons.")

<sup>136</sup> For example, the Supreme Court's willingness to protect the wearing of a jacket with offensive words lettered on it or black armbands in school can be explained by the political nature of resistance to the unpopular war in Vietnam. *See* Schauer, *supra* note 135 at 13-14.

<sup>137</sup> The motivation behind particular protected speech as a basis for regulation cannot be questioned. *Cf.* *Eastern R.R. Presidents Conf. v. Noerr Motor Freight*, 365 U.S. 127, 138 (1961) (holding that protected speech aimed at elimination of competition did not violate antitrust laws); *Henrico Prof. Firefighters Assoc. v. Board of Supervisors*, 649 F.2d 237, 245 n.12 (4th Cir. 1981) (holding that a speaker's motivation is irrelevant to First Amendment analysis). Any analysis of a speaker's motivation would necessarily scrutinize both the sincerity of his belief in certain ideas and his reasons for expressing them. *See* *Young v. American Mini Theaters*, 427 U.S. 50, 64-66 (1975); Finnis, *supra* note 122 at 222-23.

<sup>138</sup> 1 ANNALS OF CONG. 731-32 (J. Gales ed. 1789), reprinted in Bernard Schwartz, *The Bill of Rights: A Documentary History* 1029 (1971).

Thomas Jefferson in March of 1789, “which it is useless to surrender to the government, and which yet, governments have always been fond to invade. These are the rights of thinking and publishing our thoughts by speaking or writing; the right of free commerce; the right of personal freedom.”<sup>139</sup>

Nevertheless, Jefferson’s conception of the inalienable rights of speech and press was not absolute. In his draft constitution for Virginia, he had proposed freedom of the press “except so far as by commission of private injury cause may be given of private action.”<sup>140</sup> And in a letter to James Madison in August of 1789, Jefferson proposed to qualify what would become the First Amendment as follows: “The people shall not be deprived or abridged of their right to speak or to write or otherwise to publish any thing but false facts affecting injuriously the life, liberty, property, or reputation of others. . . .”<sup>141</sup>

In short, interpreting the First Amendment to mean that suppression of ideas is not a legitimate governmental purpose is but one of several readings equally well-rooted in language and history.<sup>142</sup>

### *The Right of Access*

Regardless (or because) of interpretations of the Framers’ intent, clear law has evolved around the right of access to newspapers, limitations on government interference with them, and the characterization of public forums.

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<sup>139</sup> Jefferson, *supra* note 120 at 428, 429 (quoting from a letter to Col. David Humphreys, Mar. 18, 1789).

<sup>140</sup> Mayer, *supra* note 119 at 169.

<sup>141</sup> *Id.* at 171 (quoting from a letter to James Madison, Aug. 28, 1789).

<sup>142</sup> See David S. Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429 (1983).

While for the most part individuals may be guaranteed freedom from government regulation of their privately-owned presses, citizens have never had the right of access to someone else's printed pages. The Constitution does not grant a print forum to those without the wherewithal to start up their own newspapers, nor has Congress.<sup>143</sup>

Is there any difference between the First Amendment rights afforded a privately-owned commercial newspaper and one sponsored by a private college or university? Is a public college or university newspaper any less protected by the Constitution?

Since newspapers have limited publishing space (and funds), editors must use their subjective judgment on a regular basis to determine exactly what will be published and what will not. A paper may refuse to print certain editorial material because of its content or due to lack of space or, in the case of advertising, out of financial considerations. While rejection based on space or financial considerations does not constitute an infringement on free speech, a content-based rejection may. The constitutionality of editorial discretion depends on the status of the publication--that is, whether it is an instrumentality of the state (in the language of the law, a "state actor"), or is privately owned, funded, and operated.<sup>144</sup>

Editors always make choices about what to publish, nurturing a bond of trust between them and their readers. That trust is violated if they knowingly disseminate historical lies like Holocaust-denial advertisements. With the power to publish comes the responsibility to seek truth, as well as to

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<sup>143</sup> Congress has recognized the unfairness of broadcast monopolies, which are regulated by the Federal Communications Commission and subjected to various egalitarian measures such as equal-time requirements in political campaigns.

<sup>144</sup> See *Leeds v. Meltz*, 85 F.3d 51, 54-55 (2d Cir. 1996); *Sinn v. Daily Nebraskan*, 829 F.2d 662, 664 (8th Cir. 1987).

avoid defamatory propaganda.<sup>145</sup>

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<sup>145</sup> See Miriam Colton, *Leading Liberal Mag Yanks Ad Denying Holocaust*, THE FORWARD, April 30, 2004.

The Supreme Court has held that a private newspaper had a constitutional right to determine whether or not to publish a specific article, editorial, or advertisement. In *Miami Herald Publ'g Co. v. Tornillo*, the Court rejected a Florida statute requiring newspapers to publish replies to political editorials. Its decision was based upon the First Amendment's guarantee of freedom of the press and freedom of speech: "the clear implication [of precedent] has been that any . . . compulsion to publish that which 'reason' tells editors should not be published is unconstitutional."<sup>146</sup>

In essence, the Court held that editorial discretion under the First Amendment is almost absolute. Newspapers have a right to publish or refuse to publish whatever they choose – articles, editorials, or advertisements. Even if the newspaper is the only one in town, or the biggest, or the most widely read, it can still print or reject practically anything. That an individual or group has the wherewithal to pay for an advertisement does not guarantee access to a newspaper owned or operated by others. It can even discriminate against a particular advertiser if it so desires. In the absence of fraud or monopoly,<sup>147</sup> "it is immaterial whether such [discrimination] is based upon reason or is the

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<sup>146</sup> 418 U.S. 241, 256 (1974)(quoting *Associated Press v. United States*, 326 U.S. 1, 20 n.18 (1945)).

<sup>147</sup> See *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (holding that publisher's policy of refusing to accept advertising from companies which also placed ads with publisher's competitors constituted a Sherman Act violation); *Kansas City Star Co. v. United States*, 240 F.2d 643 (8th Cir. 1957).

result of mere caprice, prejudice or malice. It is a part of the liberty of action which the Constitutions, State and Federal, guarantee to the citizen."<sup>148</sup>

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<sup>148</sup> *Poughkeepsie Buying Serv., Inc. v. Poughkeepsie Newspapers, Inc.*, 131 N.Y.S.2d 515, 517 (N.Y. Sup. Ct. 1954). This position appears to be the uniform holding among the states, with one exception. In *Uhlman v. Sherman*, 22 Ohio N.P.(n.s.) 225 (1919), the court reasoned that the newspaper business was clothed with public interest and that a newspaper was in the class of a quasi-public corporation bound to treat all advertisers fairly and without discrimination. Courts in other states have expressly rejected *Uhlman*. *See, e.g.*, *In re Louis Wohl, Inc.*, 50 F.2d 254, 256 (E.D. Mich. 1931); *Shuck v. Carroll Daily Herald*, 247 N.W. 813 (Iowa 1933); *Friedenberg v. Times Publ'g Co.*, 127 So. 345 (La. 1930). *See also* Zachary Berman, *Say What You Will: Not in My Newspaper*, N.Y. TIMES, Jan. 18, 1992 at A22.



Prior restraints are seldom countenanced under the Constitution<sup>149</sup> – the rare exceptions relate to the publication of editorial matter advocating acts likely to incite imminent lawless action<sup>150</sup> or disclosing state secrets<sup>151</sup> – but newspapers may be punished after the fact for publishing libelous<sup>152</sup> or obscene<sup>153</sup> material. Thus private commercial newspapers may be prohibited from publishing information deemed damaging to national security<sup>154</sup> and exhortations to violence or civil disobedience,<sup>155</sup> and punished for publishing defamatory stories<sup>156</sup> and material considered

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<sup>149</sup> *See* *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>150</sup> *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

<sup>151</sup> *See* *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>152</sup> *See* *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>153</sup> That is, which offends contemporary community standards. *See* *Miller v. California*, 413 U.S. 15 (1973).

<sup>154</sup> *See* *New York Times*, 403 U.S. at 713.

<sup>155</sup> *See* *Feiner v. New York*, 340 U.S. 315 (1951).

obscene.<sup>157</sup>

On balance, though, privately owned and operated newspapers have virtually unfettered discretion about what to publish, and what not to publish. Just as editors are free to print almost anything, so can they decide what to reject. While the public might have a moral claim to have opinions expressed on editorial pages, it has no constitutional right of access to them.

### *Arguments in Deference to Freedom of Expression*

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<sup>156</sup> Sullivan, 376 U.S. at 254.

<sup>157</sup> See, e.g., Miller v. California, 413 U.S. 15, 23 (1973) (defining obscenity as sexually explicit matter offensive to “contemporary community standards”); Roth v. United States, 354 U.S. 476, 487 (1957).

The traditional justification for viewing the First Amendment's guarantee of free expression as virtually absolute – the exceptions are few and narrow in scope – is to encourage an open and unfettered exchange of ideas.<sup>158</sup> Thoughts that are abhorrent to a free society, the argument goes, will wither when aired but fester if suppressed.<sup>159</sup> Moreover, who is to decide which ideas are abhorrent? Certainly not the government, reasoned the Constitution's Framers. Free speech is so precious and delicate a liberty it must be preserved at great cost.<sup>160</sup> Thus the depth of conviction in Voltaire's oft-quoted declaration: "I disapprove of what you say but I will defend to the death your right to say it."<sup>161</sup>

The interest which the First Amendment guards and which gives it its importance, said Learned Hand, presupposes that there are no orthodoxies – religious, political, economic, or

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<sup>158</sup> See *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

<sup>159</sup> *Whitney*, 274 U.S. at 375-76.

<sup>160</sup> See Lasson, *supra* note 118, at 78.

<sup>161</sup> There is some doubt that Voltaire actually made this statement, although it is indicative of an attitude attributed to him. See BURT STEVENSON, *THE HOME BOOK OF QUOTATIONS* 726, 2776 (10th ed. 1967), and S.G. TALLENTYRE, *THE FRIENDS OF VOLTAIRE* 199 (1907).

scientific – which are immune from debate.<sup>162</sup>

Others have pointed to the First Amendment's goal of ascertaining the truth: "Through the acquisition of new knowledge, the toleration of new ideas, the testing of opinion in open competition, the discipline of rethinking its assumptions, a society will be better able to reach common decisions that will meet the needs and aspirations of its members."<sup>163</sup>

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<sup>162</sup> See *International Bhd. of Elec. Workers Local 501 v. NLRB*, 181 F.2d 34, 40 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951).

<sup>163</sup> Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 854, 882 (1963). Professor Emerson's seminal article suggested three other First-Amendment values besides truth-seeking: individual self-fulfillment; securing participation by members of society in social and political decision-making; and maintaining a balance between stability and change.

A more current statement of jurisprudential philosophy justifying traditional First-Amendment principle – particularly the notion that American concepts of tolerance are noble and defensible – was voiced by Lee Bollinger in his oft-cited 1986 book entitled *The Tolerant Society*.<sup>164</sup> Extolling the virtue of magnanimity and the First Amendment’s function in developing a capacity for tolerance, Bollinger claims that the toleration of verbal acts inculcates a “tolerance ethic,” which he describes as “a general disposition of being able to put aside our beliefs, of overcoming the instinct to have things our own way, to control, to dominate. It is to live in a world of difference, and to do so comfortably.” In essence, he says, “tolerance is to democracy what courage is to war.”<sup>165</sup>

Among the most frequently cited arguments in favor of protecting offensive expression are to preserve legitimate scientific and scholarly inquiry, to document bigotry in all its forms, and to avoid the dangers of line-drawing that censorship and criminalization often encumber.

Both legitimate scientific method and traditional scholarly inquiry demand that all evidence be recognized, investigated, and analyzed before conclusions can be drawn.<sup>166</sup> This standard applies not only to orthodox views, but to unpopular (even offensive) ones as well.

In a true democracy the government may not dictate what is right or wrong, true or false. No

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<sup>164</sup> LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* (1986).

<sup>165</sup> Lee C. Bollinger, *The Tolerant Society: A Response to Critics*, 90 COLUM. L. REV. 979, 986-88 (1990).

<sup>166</sup> *See, e.g.*, ERNEST NAGEL, *THE STRUCTURE OF SCIENCE: PROBLEMS IN THE LOGIC OF SCIENTIFIC EXPLANATION* 1-14 (1961).

matter how obvious the distinctions may appear to be between historical fact and racist theory – a differentiation perhaps best illustrated by Holocaust denial – only the People can reject the expression of any thought, whether spoken or written, and even then only as a matter of individual choice.<sup>167</sup>

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<sup>167</sup> See Debate, *supra* note 2, at 588 (statement by Alan Dershowitz).

It follows that we should educate our children to tolerate the diverse views of a pluralistic society. Just as we countenance others who advocate different ways of looking at the world--even as we may disagree with them--our textbooks should reflect the existence (if not the soundness) of denial theories. Thus, if public schools teach the Holocaust as a historical event, they must also teach that it may not have happened; if parents object to what they consider a historical fabrication, their children should be excused from class; if a state university funds speakers, it must tolerate deniers. Just as Holocaust denial may be seen as a threat to the ultimate power of reason, belief in the ultimate power of reason requires recognition of denial theories.<sup>168</sup>

If reason is to prevail, the existence of racism in all forms must be documented. This is true of both fact and fiction. If we are to learn from history, what is the difference between the Nazis' foul deeds and their descendants' denial of them? It is as important for later generations to witness the propaganda of genocide as to see its effects, to hear the exhortations of racism as well as its results. Why should we suppress Holocaust denial when we have the benefit of the Nazis' own diabolically meticulous record keeping – the millions of personal effects they confiscated and itemized, the identification numbers burned into the flesh of their victims' arms, the logs of scientific experiments in torture, and ultimately the precise tallies of lives snuffed out? Both the propaganda and the facts depict the personification of evil. To expurgate either would blur the facts of history and blot out the memory of all those martyred because of their ethnicity, murdered because of their race.

Few Americans want the government to decide for them what they can hear on the street corner, read in the library, or see in the cinema. It is not difficult to find abuses in the name of fair play, especially in countries which (unlike the United States) permit censorship and criminalization of that which the government finds to be hate speech.<sup>169</sup>

Criminalization illustrates the difficulties of line-drawing. For example, the distinguished historian Bernard Lewis was recently found guilty, in Paris, France, of expressing doubts that the

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<sup>168</sup> See Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 483-84 (1996). But see *infra* notes 243 and accompanying text (suggesting the Holocaust is a crime that lies outside both speech and reason).

<sup>169</sup> For a list of those countries, see *infra* notes 208ff.

massacre of 1.5 million Armenians early in this century by the Ottoman Empire could be correctly termed a “genocide.”<sup>170</sup>

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<sup>170</sup> At first several Armenian groups sought to have Prof. Lewis prosecuted under France’s criminal Holocaust denial law, but a court ruled that the statute applied only to the Nazi regime of terror. The groups were more successful before a subsequent civil tribunal, which found Lewis guilty and fined him \$2000 (while declining to rule on whether his opinion as expressed was right or wrong). *See ‘Hate Speech’ Again, Abroad*, WASH. POST, Sept. 9, 1995, at A16: “When a court is willing to punish a scholar – or anyone, for that matter, for expressing an ‘insulting’ opinion on a historical matter, even when debate on the point in question has been raging worldwide for years, the absurdity and perniciousness of such laws is on full display.” *Id.*



In Germany, a relatively recent law makes it a crime to deny the Holocaust “or another violent and arbitrary dominance.”<sup>171</sup> This clause became quite contentious, the resulting controversy centering around the issues of restricting historical facts, promoting national consciousness, attributing collective guilt, and identifying the role of courts in punishing lies. Should denial of the violent expulsion of Germans from Soviet-occupied East Germany be punishable? In other words, was the Holocaust a unique phenomenon?<sup>172</sup>

If Auschwitz is unique, the argument goes, then the clause “or another violent and arbitrary dominance” should have been eliminated; this addition renders the Holocaust unjustifiably relative, and offends both the memory of those murdered and the sensibilities of survivors.<sup>173</sup>

In addition, the experience with earlier legislation shows that hate-speech defendants, almost without exception, remain convinced if not strengthened in the truth of their contentions. Not only is deterrence unlikely, there is a real danger of backlash. The lie is forbidden but liars remain. The judicial process cannot carry the burden of education that should fall to family, school, and political discourse. To the contrary, the German courts have become forums for neo-Nazi propaganda.<sup>174</sup>

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<sup>171</sup> Stein, *supra* note 79, at 323-24 (translating Art. 194 StGB). Germany also recently used its presidency of the European Union to replicate its strict laws prohibiting Holocaust denial. See David Charter, *EU Declares Trivializing Genocide A Crime*, NSW COUNTY EDITION, April 21, 2007 at p. 14.

<sup>172</sup> See Correspondence, *On the ‘Auschwitz Lie,’* 87 MICH. L. REV. 1026, 1031 (1989).

<sup>173</sup> *Id.* at 1030.

<sup>174</sup> See Stein, *supra* note 79 at 315.

Moreover, the task of drawing a line between “good” and “bad” is exceedingly difficult. Every year in the United States, various books are banned by public libraries. They have included everything from Thomas Paine’s *The Age of Reason* and John Steinbeck’s *The Grapes of Wrath* to Charles Darwin’s *On the Origin of the Species* and the King James version of the Holy Bible.<sup>175</sup> In recent years the growing influence of the religious right has been reflected in challenges to books about the occult, homosexuals, and racial minorities.<sup>176</sup>

In Canada, customs officials issue a list of imported materials that are reviewed for their potential to stir up racial hatred. Of the ninety titles on a recent list, only four were banned, including the standard anti-Semitic text, *The Protocols of the Elders of Zion*; Henry Ford’s *The International Jew: The World’s Foremost Problem*; and Arthur Butz’s *The Hoax of the Twentieth Century*. Those that were not banned included Neal Gabler’s *An Empire of Their Own: How Jews Invented Hollywood* and a CD entitled *Aryan Outlaws in a Zionist Police State*.<sup>177</sup>

There is little evidence that banning hate speech and literature serves to inhibit it. On the other hand, line-drawing has proven all but impossible.<sup>178</sup>

### ***Arguments in Favor of Regulating Hate Speech***

A persistent American shibboleth is that the First Amendment is virtually absolute--that the Constitution guarantees everyone the freedom of self-expression, and anything which restricts this right is a step on the road toward tyranny. In the vernacular, “It’s a free country and I can say

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<sup>175</sup> See Rekha Basu, *Banned Books Given Spotlight*, DES MOINES REG., Sept. 29, 1995, at 1.

<sup>176</sup> For example, in Queens, N.Y., a book about Martin Luther King was opposed by a schoolboard member who viewed him as a “leftist hoodlum with significant Communist ties.” *Id.* at 1.

<sup>177</sup> See Carol Berger, *Hate Book Sparks Debate of Freedom*, EDMONTON J., Jan. 24, 1995, at A7.

<sup>178</sup> For a recent learned article arguing why democratic principles of free speech should trump laws that prohibit Holocaust denial, see Peter R. Teachout, *Making Holocaust Denial A Crime: Reflections on European Anti-Negationist Laws from the Perspective of U. S. Constitutional Experience*, 30 VT. L. REV. 655 (2007).

whatever I want.”<sup>179</sup>

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<sup>179</sup> Justices Hugo Black and William O. Douglas generally took the First Amendment literally to mean that Congress could make no law abridging free speech “without any ‘ifs’ or ‘buts’ or ‘whereases.’” *Beauharnais v. Illinois*, 343 U.S. 250, 275 (1952) (Black, J., dissenting); *see also* *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 156 (1973) (Douglas, J., concurring) (“The First Amendment is written in terms that are absolute. . . . The ban of ‘no’ law that abridges freedom of the press is in my view total and absolute.”).

That it is difficult to draw a line between acceptable and nonacceptable expression, however, and hard to allocate responsibility for deciding what speech should be restricted, is too facile a rationale to justify a rule of absolute construction. The carefully drawn exceptions to the rule of free speech are based on logical demonstrations that there are certain utterances which must be limited even (if not especially) in a democratic society.<sup>180</sup>

The very existence of the doctrines in exception – “fighting words,” “clear and present danger,” “captive audience,” “legitimate time, place, and manner restrictions”<sup>181</sup> – belies the simplistic popular understanding of free speech.<sup>182</sup> Such contextual limitations are joined by those which regulate content like obscenity and pornography,<sup>183</sup> matters of national security,<sup>184</sup> and threats against the

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<sup>180</sup> Lasson, *supra* note 118, at 79.

<sup>181</sup> For a comprehensive discussion, see RODNEY A. SMOLLA, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 10, 32-34 (3d ed. 1996).

<sup>182</sup> See generally Kenneth Lasson, *Racial Defamation as Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 20-30 (1985).

President.<sup>185</sup> It is unarguable that there should be absolute freedom to think what one wants; it does not follow, however – either legally, logically, or philosophically – that one may openly express whatever one thinks, whenever and wherever one desires.<sup>186</sup>

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<sup>183</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982); *Young v. American Mini Theaters*, 427 U.S. 50 (1976); *Roth v. United States*, 354 U.S. 476 (1957).

<sup>184</sup> See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951); *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919).

<sup>185</sup> See, e.g., *Watts v. United States*, 394 U.S. 705 (1969).

<sup>186</sup>

See Mayer, *supra* note 119 at 171-72 (discussing Jefferson's views on the liability of publishers for false facts printed, despite freedom of the press, and criminal acts dictated by religious error as punishable despite guarantee of free exercise of religion); see generally Lasson, *supra* note 118 at 97.

A majority of civil libertarians continue to advocate the First Amendment ideology that no orthodoxies should be immune from debate and dispute, but a growing number of constitutional scholars have begun to argue that that view should be “bemoaned and resisted rather than accepted or celebrated.”<sup>187</sup>

Those in favor of regulating hate speech are often held to a higher standard (if not regarded in lower esteem) by First Amendment purists. For example, historian Leonard Levy’s sponsors refused to publish his conclusion that (contrary to his earlier beliefs) the Framers of the Constitution had a far narrower conception of free speech and press.<sup>188</sup> Other arguments in support of regulating hate speech are often stigmatized by the widely accepted ideology that urges courts to offer even greater protections of free speech.<sup>189</sup>

Even Prof. Bollinger concedes that “tolerance has its limits” and that different societies must of necessity treat hate speech differently.<sup>190</sup> The slippery slope theory so often invoked by civil libertarians – dubbed by one doubter as “trickle-down chilling”<sup>191</sup> – has not materialized in any other Western democracy. Yet all Western democracies but the United States have laws prohibiting the dissemination of hate speech.<sup>192</sup>

Traditional libertarians also argue that if one government can officially stipulate that the Holocaust occurred, then another government somewhere, sometime, can declare that it did not

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<sup>187</sup> Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 854 (1992).

<sup>188</sup> See generally LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

<sup>189</sup> See generally Schauer, *supra* note 187.

<sup>190</sup> Bollinger, *supra* note 233 at 995. In Germany, for example, as long as the Holocaust remains part of recent memory, it will be difficult not to punish the expression of Nazi ideology. *Id.* at 990.

<sup>191</sup> Schauer, *supra* note 187 at 867.

<sup>192</sup> See Nationmaster.com, available on the Internet at [http://www.nationmaster.com/red/graph/gov\\_law\\_aga\\_hol\\_den\\_pen\\_for\\_vio\\_min-holocaust-denial-penalties-violation-minimum&b\\_printable=1](http://www.nationmaster.com/red/graph/gov_law_aga_hol_den_pen_for_vio_min-holocaust-denial-penalties-violation-minimum&b_printable=1).

occur. Others say, “the grander the truth, the bigger the lie.”<sup>193</sup> n268 But such arguments are rendered speculative and facile, and ultimately meritless, when placed in the real life context of what happens elsewhere.

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<sup>193</sup> Debate, *supra* note 2 at 571, 582-83

A number of legal scholars have asserted that the harm of hate speech matters. Whatever form such speech takes, its purpose and effect are to deny the humanity of a group of people, making them objects of ridicule and humiliation so that acts of aggression against them, no matter how violent, are taken less seriously.<sup>194</sup> Meanwhile, the targets of such behavior often respond to it with fear and withdrawal; the more they are silenced, the deeper their inequality becomes; many suffer post-traumatic stress disorders of varying degrees.<sup>195</sup>

Hate speech may be analyzed as the first stage in a continuum of increasing violence and intimidation, followed by avoidance, discrimination, attack, and extermination. As illustrated by the history of the Third Reich, each stage is dependent upon the preceding one: it was Hitler's vocal antisemitism 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.<sup>196</sup>

The capacity of speech to cause injury in diverse ways is often viewed as a price that must be paid to ensure a truly free and democratic society. But even free societies must allocate the cost of injuries. If we permit individuals to recover damages for defamation, why not permit groups to prove

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<sup>194</sup> See Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 96 U. ILL. L. REV. 789, 792 (1996).

<sup>195</sup> See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Mari M. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

<sup>196</sup> See GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 14-15 (1954).



that they (i.e., their members) have suffered injury from hate speech?<sup>197</sup>

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<sup>197</sup> See Lasson, *supra* note 182 at 108-28.

The argument that it is too difficult to draw the line between what is acceptable speech and what is not often fails to countenance the idea that the entire history of law could be described in terms of reasonable linedrawing. This has been true even in First Amendment cases, such as those involving false advertising,<sup>198</sup> offensive pornography,<sup>199</sup> state secrets,<sup>200</sup> and defamation.<sup>201</sup> People who feel they have been grievously hurt by someone else's words – such as Holocaust survivors whose suffering has been denied<sup>202</sup> – ought to have a civil remedy. Free speech should not mean speech without cost.<sup>203</sup>

A tort action for intentional infliction of emotional distress would seem to be an appropriate remedy for racial insults, but courts have generally limited recovery to plaintiffs who suffered some physical injury caused by “extreme and outrageous conduct.”<sup>204</sup> In many instances racial insults would fall short of that standard, particularly if they were simply statements of opinion. Calls to establish another tort, one specifically aimed at combatting racial insults, have thus far fallen on deaf ears.<sup>205</sup>

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<sup>198</sup> See, e.g., *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>199</sup> See, e.g., *New York v. Ferber*, 458 U.S. 747 (1982); *Miller v. California*, 413 U.S. 15 (1973).

<sup>200</sup> See, e.g., *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425 (1977); *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>201</sup> See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>202</sup> See *Skokie v. National Socialist Party of Am.*, 373 N.E.2d 21 (Ill. 1978) (allowing neo-Nazis to march through residential area largely inhabited by Holocaust survivors).

<sup>203</sup> See *Debate*, *supra* note 2 at 576 (quoting Arthur Berney).

<sup>204</sup> Restatement (Second) of Torts § 46 (1965). See also Stephen Fleischer, *Campus Speech Codes: The Threat to Liberal Education*, 27 J. MARSHALL L. REV. 709, 724-25 (1994). But see Geri J. Yanover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71 (1996) (arguing strongly for the viability of intentional infliction of emotional distress as a remedy for Holocaust denial).

<sup>205</sup> See Delgado, *supra* note 195 at 252. Prof. Delgado notes, however, that although his call for

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establishment of a tort for racial insults has not been heeded, over the years since his article first appeared, a number of courts have recognized various causes of action to redress racist slurs. Telephone Conversation with Richard Delgado, Professor of Law, UCLA Law School (Sept. 11, 1996).

The few plaintiffs who have been awarded damages for emotional distress caused by hate speech have not been challenged on First Amendment grounds.<sup>206</sup> If they had been, however, good counter-arguments could be made that such speech does not fall within any of the classic categories of values said to be protected by the Constitution: individual self-fulfillment; truth-seeking; securing participation by members of society in social and political decision-making; and maintaining a balance between stability and change. Bigotry stifles, rather than enhances, moral and social growth. If truth-seeking is to achieve the best decisions on matters of interest to all, most racial insults can be distinguished: a call for genocide can hardly be characterized as the best decision for all. Rather than allow all members of society to voice their opinions, racial insults contribute to a stratified society. Finally, rather than contribute to a balance between stability and change, racial insults foment discord and violence.<sup>207</sup>

#### *The Experience Elsewhere*

The Convention on the Elimination of All Forms of Racial Discrimination requires the condemnation and criminalization of “all propaganda . . . based on ideas or theories of superiority . . .

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<sup>206</sup> See Delgado, *supra* note 195 at 172; see also *Wiggs v. Courshon*, 355 F. Supp. 206 (S.D. Fla. 1973); *Agarwal v. Johnson*, 603 P.2d 58 (Cal. 1979); *Alcorn v. Anbro Eng'g, Inc.*, 468 P.2d 216 (Cal. 1970); *Contreras v. Crown Zellerbach, Corp.*, 565 P.2d 1173 (Wash. 1977).

<sup>207</sup> See Emerson, *supra* note 163, at 879-86. This function of the First Amendment has been viewed by some as limited to political *ideas*. See Delgado, *supra* note 195 at 175-79; see generally ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM* (1960).

or which attempt to justify or promote racial hatred and discrimination in any form.”<sup>208</sup> The European Commission on Human Rights has found such laws to be justifiable limits on the freedom of expression.<sup>209</sup>

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<sup>208</sup> Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 194, 3 I.L.M. 164, 166-67.

<sup>209</sup> *See* STEPHEN J. ROTH, THE LEGAL FIGHT AGAINST ANTI-SEMITISM: SURVEY OF DEVELOPMENTS IN 1993 23-26 (1995).

In fact every 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.<sup>210</sup> The debate elsewhere is not whether to control hate speech, but how. Canada, England, France, Germany, and Sweden are most notable among the countries whose values of social liberty are similar to those in the United States.

Even though Canada's Charter of Rights and Freedoms<sup>211</sup> provides a comprehensive guarantee for free speech with language even broader than that of the First Amendment, the country also has a number of other laws that effectively seek to regulate hate speech. A criminal statute prohibits three types of hate propaganda: (a) advocacy of genocide; (b) communications inciting hatred against an identifiable group where a breach of the peace is likely to follow; and (c) public and willful expression of ideas intended to promote hatred against an identifiable group.<sup>212</sup>

In addition, Canada's Human Rights Act prohibits use of the telephone to record hate messages.<sup>213</sup> The Broadcasting Act authorizes standards for radio and television, and prohibits abusive comment likely to expose individuals or groups to contempt on the basis of their race,

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<sup>210</sup> *Id.* Countries punishing hate speech generally include Belgium, Brazil, Cyprus, England, Italy, and the Netherlands. Those specifically prohibiting Holocaust denial include Austria, Belgium, France, Germany, Israel, and Switzerland.

<sup>211</sup> Canadian Charter of Rights and Freedoms, 1 S.C. V (1982).

<sup>212</sup> Criminal Code, R.S.C., ch. C-46, § 319 (1985) (Can.).

<sup>213</sup> Canadian Human Rights Act, R.S.C., ch. H-6 (1985) (Can.).

ethnicity, religion, sex, color, age, or mental or physical disability.<sup>214</sup> The Customs Act prohibits importation of hate propaganda.<sup>215</sup>

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<sup>214</sup> Broadcasting Act, R.S.C., ch. B-9, § 3 (1985) (Can.).

<sup>215</sup> Customs Act, R.S.C., ch. 1, § 181 (1985) (Can.).

Using these laws, Canadian courts have held that hate speech does not belong in any category of expression that deserves constitutional protection. Interestingly, one Canadian court expressly supported that principle by extensive references to American cases, especially *Beauharnais v. Illinois*.<sup>216</sup>

Although the most famous test case in Canada was that of Zundel (noted earlier),<sup>217</sup> which claimed that the Holocaust was in fact a Zionist swindle, equally pertinent was another challenge to the statute prohibiting Holocaust denial. There, a Canadian high-school teacher was charged with violating the Criminal Code for teaching his students that the Holocaust was a hoax and that Jews were responsible for all the world's problems; if the students' exams reflected his view, they received good grades; if not, poor ones. He argued that the law infringed upon his guaranteed right to free

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<sup>216</sup> 343 U.S. 250 (1952) (holding that defamation of groups may be treated the same way as libel of individuals); see *R. v. Keegstra* [1990] S.C.R. 697, 707, 739-41 ("Credible arguments have been made that later Supreme Court cases do not necessarily erode [*Beauharnais*'] legitimacy (see, e.g., K. Lasson, *Racial Defamation As Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11(1985)).

<sup>217</sup> *R. v. Zundel* [1987] 7 W.C.B.2d 26, *aff'd*, [1990] 9 W.C.B.2d 238, rev'd, [1992] 17 W.C.B.2d 106. See *supra* note 70 and accompanying text.



expression.<sup>218</sup>

In upholding the legislation, the Supreme Court of Canada linked the psychological and emotional harm caused by hate propaganda to the target group's constitutional right of equality. The court found that hate propaganda against particular groups must be prevented if multi-culturalism is to be preserved and enhanced; that its "truth value" is marginal; that it denies citizens meaningful participation in the democratic process; and that its contribution to self-fulfillment and human flourishing is negligible.<sup>219</sup>

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<sup>218</sup> See *R. v. Keegstra* [1990] 3 S.C.R. 697.

<sup>219</sup> *Id.* at 744-68. See also *Canadian Human Rights Comm'n v. Taylor* [1990] 3 S.C.R. 892 (denying protection to a group prosecuted for operating a telephone service which played prerecorded messages denigrating the Jewish race and religion); *R. v. Andrews* [1990] 3 S.C.R. 870 (refusing to extend constitutional protection to leaders of a white supremacist group prosecuted for publishing a newspaper that expressed anti-Semitic beliefs, including the proposition that the Holocaust was a Zionist hoax). A Canadian group also proposed that Ahmadinejad be indicted for advocacy of genocide. See "Cotler Speech to Target Iran for Genocidal Policy," CTV Television, Inc., Jan. 23, 2007.

England has sought by statute to restrict racist expression since 1936, when the Public Order Act was passed to combat anti-Semitic fascist demonstrations.<sup>220</sup> The act banned the wearing of uniforms during public demonstrations and broadened the state's power to prohibit a march or demonstration deemed likely to lead to a breach of the peace. The law was periodically strengthened, so that by 1963 the burden was placed on the speaker to prove that his words were not likely to provoke a breach of the peace.<sup>221</sup> Subsequent acts prohibited the display of any threatening signs and racial incitement by spoken or written words.<sup>222</sup>

In France, more than one famous figure has faced charges for negating crimes against humanity, a criminal offense. Most recently the French author Roger Garaudy was cited for denouncing what he called Jewish "Shoah business" and claiming that Israel has exploited the Holocaust to put itself "above all international law."<sup>223</sup>

In 1990 Jean-Marie Le Pen, leader of France's right-wing National Front party, referred to the Nazi gas chambers as "a detail of history." Outraged survivors joined in a lawsuit against him, and a local court found Le Pen guilty of trivializing the Holocaust and fined him a symbolic one franc. But

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<sup>220</sup> Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6 (Eng.).

<sup>221</sup> Public Order Act, 1963, ch. 52 (Eng.).

<sup>222</sup> Race Relations Act, 1965, ch. 73 (Eng.); *see generally* Kenneth Lasson, *Racism in Great Britain: Drawing the Line on Free Speech*, 7 B.C. THIRD WORLD L.J. 161 (1987).

<sup>223</sup> *See supra* notes 73-74 and accompanying text.

Le Pen appealed the ruling, claiming his freedom of expression was being denied. A court of appeals not only upheld the decision, but increased the fine to 900,000 francs (about \$180,000).<sup>224</sup>

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<sup>224</sup> See “Comeuppance for a Bigot,” *TIME*, Apr. 1, 1991, at 50. It was not until 1995 that France publicly admitted responsibility for deporting almost 70,000 Jews to Nazi death camps – only 2,800 of whom returned. See Gail Russell Chaddock, *Cleric’s Comments Ignite the Fury of French Media*, *CHRISTIAN SCI. MONITOR*, July 25, 1996, at 5.

In Germany, free speech claims must be weighed against the values of human dignity and personal honor.<sup>225</sup> A 1985 law – motivated primarily by the perceived need to facilitate prosecution of an increasing number of cases involving the “Auschwitz lie” (the claim that Germany’s attempts to exterminate European Jews never took place) – made it a crime in Germany to deny the Holocaust “or any other violent and arbitrary dominance.”<sup>226</sup> The law prohibits attacks on human dignity by incitement to hatred and dissemination of writings instigating hatred (both offenses against the public peace), and the less serious and less punishable offenses of insult, ridicule, and defamation.<sup>227</sup> The new law in essence eliminated the old requirement that an insult be prosecuted by way of a private petition, and added a clause that the insulted party be a member of a group that was persecuted “under the National Socialist or another violent and arbitrary dominance.”<sup>228</sup>

As noted earlier, the law’s inclusion of “another violent and arbitrary dominance” has become the source of some contention.<sup>229</sup> How much historical speech can be reasonably restricted? What role should the courts play in punishing lies? Should denial of the violent expulsion of Germans from Soviet-occupied East Germany be punishable? In other words, was the Holocaust a unique phenomenon? If Auschwitz is unique, the law should single it out as well; punishing denial of “any other violent and arbitrary dominance” offends both the memory of those murdered and the

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<sup>225</sup> See Donald P. Kommers, *The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany*, 53 S. Cal. L. Rev. 657, 693 (1980).

<sup>226</sup> Stein, *supra* note 79 at 322 (translating Art. 130 StGB) (punishing attack on human dignity by incitement to hate). The new law was prompted by a sharp increase in neo-Nazi activities in the 1980’s. *Id.* at 305.

<sup>227</sup> *Id.* at 322 (translating Art. 130 StGB). The law against insult (§ 185), which punishes offenses against personal honor, has been part of Germany’s Criminal Code since its inception in 1871. From that year until the end of World War II, although the German Supreme Court regularly utilized this article to protect Germans living in Prussian provinces, large landowners, all Christian clerics, and German military officers, it consistently refused to apply the same law to insults against the Jewish people. *Id.* at 286. That failure is in striking contrast to the current application of the law, which singles out Jews as a group for special protection.

<sup>228</sup> *Id.* at 312.

<sup>229</sup> See *supra* note 171 and accompanying text.

sensibilities of survivors. When the last victim of Nazi Germany has passed on, will there be anyone to initiate prosecution?<sup>230</sup>

Despite the law's somewhat vague language and its political implications, most German courts and prosecutors have tried seriously to apply them in specific cases. 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:

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<sup>230</sup> See Stein, *supra* note 79 at 312-13.

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.<sup>231</sup>

Although German trial courts have been somewhat reluctant to convict those charged with attacks on human dignity, their decisions have frequently been overturned by the state courts of appeal and, even more consistently, by the Federal Supreme Court. This phenomenon may be explained by the younger age of trial judges – that is, they are less likely to be burdened by oppressive memories and personal guilt about the Holocaust, and are perhaps less responsive to the national policy that has reflected both recent experience and a sensitivity to international opinion.<sup>232</sup>

A broad range of activities has been prosecuted, including remarks by teachers and students that the death of Jews in concentration camp gas chambers was “an American invention.” In one notable case, the publisher of a periodical was charged with inciting insults for printing a letter to the editor which branded the “destruction of six million Jews” a lie and declared: “Thus, once more one who opposes Jewish propaganda is silenced while Jews(!) are trained as teachers for German children.” The trial court dismissed the charge on the ground that the editor could not be held criminally responsible for merely publishing a letter addressed to him, but the appeals court reversed, reasoning that publication of the letter was likely to “disturb public peace by potentially shaking the sense of security of the attacked group or by provoking the ‘incited’ group to insults.”<sup>233</sup>

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<sup>231</sup> BGH Gr. Sen. Z. 75, 160 (161). To the extent they have considered the constitutional question at all, the lower tribunals have taken essentially the same view. *See* Stein, *supra* note 79 at 288.

<sup>232</sup> Stein, *supra* note 79 at 289-99.

<sup>233</sup> *Id.*

In 1994, Germany's constitutional court ruled that groups propagating the so-called "Auschwitz lie" cannot invoke freedom of speech as a defense.<sup>234</sup> In 1995, a state court in Berlin convicted a leader of Germany's neo-Nazi movement for spreading racial hatred and denigrating the state when he confronted visitors at the Auschwitz concentration camp with his claim that the Holocaust never happened.<sup>235</sup>

While Sweden specifically guarantees its citizens a number of liberties (including the freedoms of expression, press, and assembly), its Instrument of Government also sets explicit limits. For example, the Riksdag (Sweden's governing body) may restrict various freedoms of expression in order to achieve "a purpose which is acceptable in a democratic society."<sup>236</sup> With the same purpose, the Swedish Penal Code prohibits racial defamation.<sup>237</sup>

In the United States – by way of stark contrast – the only jurisprudential remedy against Holocaust denial has been via contract law. In 1980, the aforementioned 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

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<sup>234</sup> The decision banned a meeting at which British Holocaust-denier David Irving was to speak. The ruling also ordered regional courts in Germany to consider specifically whether defendants had insulted the dignity of Jews by propagating the Auschwitz lie. *See* "Holocaust Denial Not Covered by Free Speech," REUTERS WORLD SERVICE, Apr. 26, 1994, available in LEXIS, News Library, REUWLD File.

<sup>235</sup> The defendant, Bela Ewald Althans, has garnered considerable press attention as he seeks to build links between neo-fascist groups across Germany and around the world. Today there are approximately 40,000 neo-Nazis among Germany's population of 80 million. *See* Rick Atkinson, *Denial of Nazi Holocaust Brings 3 1/2-Year Sentence*, WASH. POST, Aug. 30, 1995 at A18.

<sup>236</sup> IG 2:12-2:14.

<sup>237</sup> Penal Code ch. 16, § 8 (1972); *see generally* Lasson, *supra* note 118, at 87-88.

“the fact that Jews were gassed at Auschwitz is indisputable,” ordered the reward paid.<sup>238</sup>

### **III. The Quest for Truth in a Free Society**

*The devastating truth about the Holocaust is that it was a fact, not a dream. And the devastating truth about the Holocaust deniers is that they will go on using whatever falsehoods they can muster, and taking advantage of whatever vulnerabilities in an audience they can find, to argue, with skill and evil intent, that the Holocaust never happened. By being vigilant to these arguments we can all fight this second murder of the Jews – fight it, and weep not only for the victims' mortality but also for the fragility, and mortality, of memory.*

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<sup>238</sup> Mermelstein v. Institute for Historical Review, No. C356 542 (Cal. Super. Ct. July 22, 1985). The case was settled when the Institute agreed to pay the \$50,000, plus \$100,000 for Mermelstein's pain and suffering caused by the revoked offer. *See also* “Lawsuit Over Proof of Holocaust Ends with Payment to a Survivor,” N.Y. TIMES, July 25, 1985, at A12.



– Sen. Orrin Hatch (1995)<sup>239</sup>

*Without the past, without memory, without history, we are nothing, adrift. We place our destiny and dignity in the hands of the misfits and their projected psychoses. This movement is not an attack on the Holocaust, but on the very notion of historical meaning. It is a revolt against reality, a threat not only to the past but to the future.*

– James S. Robbins<sup>240</sup>

*Veritas vos liberabit.  
(The truth shall make you free.)*

### ***Ignorance and Education***

In a free society, it is up to the people to determine the facts of history. Courts and governments should not be arbiters of the truth, even of whether or not a monumental event indeed occurred.<sup>241</sup>

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<sup>239</sup> 141 Cong. Rec. S16853 (daily ed. Nov. 9, 1995) (statement of Sen. Hatch) (quoting Dr. Walter Reich, Executive Director, United States Holocaust Memorial Museum).

<sup>240</sup> Robbins, *supra* note 31.

<sup>241</sup> As Justice Felix Frankfurter put it, “Courts ought not to enter this political thicket.” *Colegrove v. Green*, 328 U.S. 549, 556 (1946). Even more to the point is Alan Dershowitz: “I am categorically opposed to any court, any school board, any governmental agent taking judicial notice about any historical event, even one that I know to the absolute core of my being occurred, like the Holocaust. I don’t want the government to tell me that it occurred because I don’t want any government ever to tell me that it didn’t occur.” Debate, *supra* note 2 at 566.

But proving a crime as monstrous as genocide threatens to expose the law's limits. The capacity of the Nuremberg Tribunal to comprehend the practice of genocide in conventional terms of criminality was an overwhelming challenge, which may have contributed to a failure to grasp fully the nature and meaning of the Nazis' effort to exterminate the Jewish population of Europe.<sup>242</sup>

The argument that the Holocaust is a unique crime whose enormity puts it beyond traditional norms of trial and punishment cannot be easily dismissed. The world of Auschwitz has often been said to lie outside both speech and reason.<sup>243</sup>

Various polls have demonstrated that ignorance about the Holocaust is widespread. A 1992 survey found that thirty-eight percent of American high-school students and twenty-eight percent of American adults did not know what the Holocaust was.<sup>244</sup> A 2005 poll by the British Broadcasting

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<sup>242</sup> See Douglas, *supra* note 119 at 453. Douglas also notes that by translating evidence of unprecedented atrocity into crimes of war, the Nuremberg prosecution was able to create a coherent and judicially manageable narrative of criminality that *seemed* to defy rational and juridical explanation. *Id.* at 454.

<sup>243</sup> See GEORGE STEINER, LANGUAGE AND SILENCE 118, 123 (1966). If Auschwitz is unique, denying other violent and arbitrary dominance should be *outside* the purview of punishment. See *supra* note 243 and accompanying text.

<sup>244</sup> The poll was by Roper. See Jeroff, *supra* note 84. A poll by the same company in 2000 found that as many as eight percent of Americans may be deniers. Michael Berenbaum, *The Growing Assault on the Truth of Absolute Evil*, LOS ANGELES TIMES, Jan. 28, 2000 at p. B7.

Corporation found that sixty percent of women and people under 35 had never heard of Auschwitz, the most notorious of all Nazi death camps.<sup>245</sup>

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<sup>245</sup> David McLoughlin, *Understanding the Holocaust*, THE DOMINION POST (WELLINGTON, NEW ZEALAND), April 16, 2005 at p. 13. *See also* Alan Crawford, 'Look to Germany to Learn Lessons of Holocaust,' THE SUNDAY HERALD, Jan. 23, 2005 at p. 11.

Even supposedly well-educated people have difficulty identifying historical events related to the Holocaust. Many law students, for example, have never heard of Krystallnacht.<sup>246</sup> Law professors, on the other hand, have a special responsibility to educate law students about those who would polarize by preaching doctrines of hatred, which logically and inevitably lead to acts of persecution.<sup>247</sup>

The environment which enabled the Holocaust to happen has been described as the time “where technology was married to evil.”<sup>248</sup> The Internet provides electronic forums called newsgroups – one of which is devoted to revisionist history.<sup>249</sup> Recent patrons have included Bradley Smith’s Holocaust-denying Institute for Historical Review. “The Holocaust story,” says Smith, “is closed to free inquiry in our universities and among intellectuals. The Internet represents a huge potential audience at minimal cost.”<sup>250</sup> Due to the enormous size of the Internet, it is virtually impossible to monitor for hate speech.<sup>251</sup>

There can be little doubt that Holocaust denial will gain strength once there are no more

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<sup>246</sup> “The Night of Broken Glass,” Nov. 20, 1938, called by many the beginning of the Holocaust. *See* 141 CONG. REC. S16853 (daily ed. Nov. 9, 1995). Every year the author asks his Civil Liberties students (all of whom are upperclassmen) if they have ever heard of Krystallnacht. Few answer in the affirmative.

<sup>247</sup> This responsibility was recognized at the 2007 Silberman Seminar for Law Faculty, *The Impact and Legacy of the Holocaust on the Law*, sponsored by the Center for Advanced Holocaust Studies of the United States Holocaust Memorial Museum, June 4-15, 2007, in Washington, D.C. *See also* Bruce Levine, *An Education in Law – For What Purpose?*, 34 WASHBURN L.J. 516 (1995).

<sup>248</sup> Robert Trussell, *Couple Brings Reality of Holocaust Home to Younger Viewers with ‘Anne Frank’*, KANSAS CITY STAR, Mar. 15, 1996, at Preview 18 (quoting Mark Weitzman, Simon Wiesenthal Center).

<sup>249</sup> *See* Allison Sommer, *Free Speech Advocates and Opponents Move Their Battle to the Net*, JERUSALEM POST, Feb. 9, 1996 at 7.

<sup>250</sup> Beck, *supra* note 44 at A1.

<sup>251</sup> *See* Carlos Alcalá, *Internet Warrior Takes on Holocaust Revisionists*, SACRAMENTO BEE, Dec. 16, 1994, at A1; *see also* Daniel Akst, *Postcard from Cyberspace*, L.A. TIMES, May 17, 1995, at D4; Sommer, *supra* note 249 at 7.

victims alive to supply eyewitness testimony about Nazi atrocities.<sup>252</sup> Meanwhile, though, it has become less and less difficult for Holocaust deniers to find gullible converts among the growing numbers of young people with but a tenuous grasp of basic history.

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<sup>252</sup> See Judith Miller, *Erasing the Past: Europe's Amnesia About the Holocaust*, N.Y. TIMES, Nov. 16, 1986, § 6 (Magazine) at 30.

The need to remember is made all the more critical by the existence of well-known political figures who at various times express sympathy for accused Nazi war criminals or doubt the extent of the Holocaust. The most notable current examples in the United States are recent presidential candidate Patrick Buchanan<sup>253</sup> and Nation of Islam leader Louis Farrakhan.<sup>254</sup>

Much can be learned by way of a well-produced video or film, documenting in irrefutable detail the historical record of the Holocaust. Archival footage of the death camps themselves can be juxtaposed with statements by historians, victims, perpetrators, and liberators. Nazi records, Hitler's recorded speeches, and transcripts from the Wannasee Conference (at which the genocide was carefully planned) should also be made available. This kind of presentation should be unimpeachable and widely distributed, especially to college campuses.<sup>255</sup>

### *Psychological Aspects of Historical Revisionism*

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<sup>253</sup> See Lipstadt, *supra* note 10 at 5-6; David A. Nacht, Book Note, 90 MICH. L. REV. 1802, 1808 (1992) (reviewing ALAN DERSHOWITZ, CHUTZPAH (1991)); William F. Buckley, Jr., *In Search of Anti-Semitism*, NAT'L REV., Dec. 30, 1991, at 20; *Report of the Anti-Defamation League on Pat Buchanan*, L.A. JEWISH J., Sept. 28, 1991; Jacob Weisberg, *The Heresies of Pat Buchanan*, NEW REPUBLIC, Oct. 22, 1990, at 26-27.

<sup>254</sup> See *supra* note 58 and accompanying text. In France the highly respected cleric Abbe Pierre recently lent credence to author Roger Garaudy's book, THE FOUNDING MYTHS OF ISRAELI POLITICS, which sought to trivialize the Holocaust. See *supra* notes 46-47 and accompanying text.

<sup>255</sup> See Dershowitz, *Holocaust Video*, *supra* note 42 at A6.

In his landmark work, *The Destruction of the European Jews*, the late historian Raul Hilberg revealed, fully and clearly, the methodical development of both the technical and psychological process; the machinery and mentality whereby one whole society sought to isolate and destroy another, which for centuries, had lived in its midst.<sup>256</sup>

If any line can be drawn between racism and anti-Semitism – both of which appear to be part of the human condition, with multiple causes, some of them no doubt psychological – it would be a fine one indeed. The same holds true in attempting to make a distinction between anti-Semitism and Holocaust denial.

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<sup>256</sup> Historian Hugh Trevor-Roper, commenting on Hilberg's work.

While Holocaust denial is a form of anti-Semitism, its adherents are essentially conspiracy theorists. For them the Holocaust was and remains an enormous hoax perpetrated primarily by Zionists. The deniers view themselves as messengers sounding an alarm; their self-perceived intellectual insights have enabled them to see through the conspiracy; their refusal to be victimized is testimony to the strength of their character. Nevertheless, people living in a free society with access to the highly detailed documentary evidence surrounding the Holocaust, who nevertheless believes it did not happen, are generally unpopular if not altogether troubled souls.<sup>257</sup> The Holocaust denial conference in Iran in December 2006 brought served to validate this group to a greater extent than it had ever been before, supplying a platform for uttering unpopular thoughts and attracting global media coverage. This was particularly true among those from countries where Holocaust denial is illegal.<sup>258</sup>

Under traditional First Amendment theory – that abhorrent ideas will fester if suppressed, but die of their own false weight if aired in the marketplace of ideas – it is useless, perhaps even counterproductive, to ban them. Those who become attached to such view are said to be driven by a psychology that makes them susceptible to the conspiracy mind-set, which coexists comfortably with Holocaust denial and the *Protocols of the Elders of Zion* in its identification of Jews as the source of all evil.<sup>259</sup> The *Protocols*, published in Russia in 1905 and quickly embraced as authentic around the globe, helped to preserve and promote the myth of “a Jewish conspiracy to rule the world.” The popular dissemination and acceptance of the forgery has been characterized as a phenomenon of

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<sup>257</sup> Robbins, *supra* note 31.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*



collective psycho-pathology.<sup>260</sup>

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<sup>260</sup> AVNER FALK, *A PSYCHOANALYTIC HISTORY OF THE JEWS* (Madison and Teaneck, NJ: Fairleigh Dickinson University Press, London: Associated University Presses, 1996), p. 643.

In the early Twenty-first Century, the *Protocols* are still being widely circulated in Arab and Muslim countries as proof of Jewish perfidy and monstrosity.<sup>261</sup> As one observer put it –

The conspiracists have always existed, and always will. Thankfully, they live in such a tenuous relationship with reality that they rarely affect the lives of others in any significant way. They are mostly isolated, found singly or in small clusters. Their lives are lonely, burdened as they are with a truth that others refuse to acknowledge. As Thomas Mann wrote in Munich in 1904: “Strange regions there are, strange minds, strange realms of the spirit..... At the edge of large cities, where streetlamps are scarce and policemen walk by twos, are houses where you mount until you can mount no further, up and up into attics under the roof, where pale young geniuses, criminals of the dream, sit with folded arms and brood.”<sup>262</sup>

But (as others have pointed out) it is a mistake not to take such people seriously. The impulse to discount the extremists is itself a form of denial. If a cataclysmic event as well documented as the Holocaust can be denied, then so can anything else.

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<sup>261</sup> See Avner Falk, *Collective Psychological Processes in Anti-Semitism*, JEWISH POLITICAL STUDIES REVIEW 18:1-2 (Spring 2006) (citing Matthias Küüntzel, *National Socialism and Anti-Semitism in the Arab World*, JEWISH POLITICAL STUDIES REVIEW, Vol. 17, Nos. 1-2 (Spring 2005), pp. 99-118).

<sup>262</sup> Robbins, *supra* note 31.

Over the past few decades, the focus of the psychoanalytic study of anti-Semitism has gradually shifted from the individual to the group. The emphasis on unconscious individual defensive processes – such as repression, displacement, projection, splitting, and denial – can be extrapolated to the large group's conscious and unconscious needs for identity and boundaries, and for allies as well as enemies. In the 1980's, psychologists began to understand that prejudice was inherent in the structure of all groups. When the group's needs for boundaries, an ideology, and leaders are threatened in large entities like nations, murderous group violence, even genocide, can ensue.<sup>263</sup> “The fury which may then be unleashed is proportional to so dire a threat. . . . All manner of evil is then perceived in the dissenter [the Jew].”<sup>264</sup>

Some psycho-anthropologists maintain that for centuries Judaism and Christianity had been bound up in a reciprocal system of mutual stigmatization based on a shared father-son conflict – the unconscious origin of the Christian accusation of deicide against the Jews.<sup>265</sup> Drawing on this theory, in the 1990s the Israeli criminologist Shlomo Giora Shoham attributed anti-Semitism and the Holocaust to the conflict between Germanic and Jewish myths. The Germans are described as aggressive and materialistic, the Jews as self-sacrificing and spiritual. Shoham suggests that in northern Europe there was always a “macabre symbiosis” between Germanic aggressiveness and the Jewish propensity to self-sacrifice. Hitler is depicted as prone to become anti-Semitic because of the inner duality of his personality. Nazi propaganda demonized the Jews and prepared ordinary men to commit mass murder. Thus did the Jews, by force of circumstance as well as because of their

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<sup>263</sup> See Falk, *supra* note 261 (citing MORTIMER OSTOW, MYTH AND MADNESS: THE PSYCHODYNAMICS OF ANTISEMITISM (New Brunswick, NJ: Transaction, 1995) at p. 10); John Duckett, *Psychology and Prejudice: An Historical Analysis and Integrated Framework*, AMERICAN PSYCHOLOGIST, Vol. 27, No. 10 (1992) at pp.1182-1193; and VAM K D. VOLKAN, BLIND TRUST: LARGE GROUPS AND THEIR LEADERS IN TIMES OF CRISIS AND TERROR (Charlottesville, VA: Pitchstone, 2004).

<sup>264</sup> David Terman, *Anti-Semitism: A Study in Group Vulnerability and the Vicissitudes of Group Ideals*, PSYCHOHISTORY REVIEW, Vol. 12, No. 4 (1984), pp. 18-24, at p. 20.

<sup>265</sup> HOWARD F. STEIN, DEVELOPMENTAL TIME, CULTURAL SPACE: STUDIES IN PSYCHOGEOGRAPHY (University of Oklahoma Press, 1987) at pp. 147-79.

national character, go “like sheep to the slaughter.”<sup>266</sup>

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<sup>266</sup> SHLOMO GIORA SHOHAM, WALHALLA, GOLGOTHA, AUSCHWITZ: ÜBER DIE INTERDEPENDENZ VON DEUTSCHEN UND JUDEN, trans. Michael Levi (Vienna: Edition S., 1995) (German).

In 2004, the French Jewish journal *Pardèès: Etudes et Culture Juive* devoted a whole issue to psychoanalytic studies of contemporary anti-Semitism. One analyst asserted that anti-Semitism was “a permanent, universal phenomenon, linked to the trace of the forgotten memory of the origins of humanity.”<sup>267</sup> Similar approaches have noted the historical sources of anti-Semitism in Judaism’s rejection of Jesus as the Messiah, as well as the Nazis’ imitation of the Christian degradation of the Jews. The Shoah, then, was the culmination of two thousand years of disdain for the Jew in the Christian religion.<sup>268</sup>

Italian scholar Riccardo Calamani subsequently attempted to integrate the various theories of anti-Semitism, recounting the history of prejudice against Jews from the ancient period to the present, with particular emphasis on the Christian world, and finding a projective interpretation by Christian society of its own evils, branding the Jew as a scapegoat. **By the time of the Holocaust, the Nazis had convinced themselves that the people they were killing were not humans but monsters, demonizing them as plague-bearing rats that had to be exterminated in order to save the German nation (the Nazis’ idealized mother).**<sup>269</sup>

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<sup>267</sup> Guy Sapriel, *La permanence antisémite: Une étude psychanalytique: La trace mnésique irréductible*, *Pardèès: Etudes et culture juive*, No. 37, *Psychanalyse de l’antisémitisme contemporain*, 2004, pp. 11-20, at p. 16 (French). Nevertheless, Sapriel found the continued existence of the Jewish people after the Shoah a great riddle. *Id.* at 20.

<sup>268</sup> Falk, *supra* note 261 (citing JULES ISAAC, *GENÈSE DE L’ANTISÉMITISME: ESSAI HISTORIQUE* (PARIS: CALMANN-LÉÉVY, 1956); new ed. (Paris: Calmann-Lévy, 1985); repr. (Paris: Editions 10/18, 1998), pp. 10-18 (French) and Bééla Grunberger and Pierre Dessuant, *Narcissisme, christianisme, antisémitisme: étude psychanalytique* (Arles: Actes sud., 1997) (French). In this analysis Christians viewed Jews as symbols of evil, unredeemable because of their rejection of Jesus as the Christ and of Christian baptism. Grunberger and Dessuant concluded that “Christian narcissism” was what led to the apocalypse, the Shoah. The anti-Semite, in confrontation with reality that subverts his narcissistic illusion of omnipotence, “pours out” his narcissistic rage on the Jews rather than face the pain of his own broken dreams. Avner suggests that these psychoanalysts, like many others before them, seem to have confused individual psychological processes with group processes. *Id.* at .

<sup>269</sup> Falk, *supra* note 261 (citing RICCARDO CALIMANI, *EBREI E PREGIUDIZIO: INTRODUZIONE ALLA DINAMICA DELL’ODIO* (MILAN: OSCAR MONDADORI, 2000) (ITALIAN).

The founder of psycho-analysis himself, Sigmund Freud, believed that the roots of anti-Semitism lay in the unconscious castration fear of the uncircumcised, as well as non-Jews' envy of alleged Jewish political and sexual superiority, and their interpretation of contemporary history as the rise of Jews to world domination. German nationalism defined itself as the fight against world Jewry to the point of its extinction.<sup>270</sup>

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<sup>270</sup> *Id.* at . The modern German scholar Nicolaus Sombart, analyzing the German Catholic intellectual Carl Schmitt (1888-1985) – a racist anti-Semite with close ties to the Nazi Party – concluded that Jews became the archenemy of the German people when they continued to fight for the ideals of the Emancipation after the Germans had abandoned them; for these German anti-Semites, the Jewish enemy unconsciously represented a bad part of their selves that they sought to destroy. *Id.* at .

The roots of anti-Semitism have also been analogized to “transitional objects” like security blankets, teddy bears, or other anxiety-soothing objects used by infants and children to separate from their mothers. Under this theory Jesus unconsciously served the Christians as a “transitional object,” especially in periods of insecurity; their profound and intense need of which was one of the causes of their hostility to Judaism (which negated Christ).<sup>271</sup>

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<sup>271</sup> *Id.* at . (citing British psychoanalyst Donald Woods Winnicott and German scholar Eberhard Groener). Jean-Pierre Winter, a French-Jewish psychoanalyst, considers anti-Semitism a perversion rather than a phobia. Those who fabricated the “proof” of the false accusation of treason against the French Jewish officer Alfred Dreyfus in the late nineteenth century, he writes, knew very well their evidence was false; if they really believed there was a Jewish conspiracy to take over the world, they were psychotically delusional. *Id.* at . Olivier Nicolle, another French psychoanalyst, calls the modern discourse of anti-Semitism a “collective psychic formation” that subconsciously defends anti-Semitic groups from the anxiety of their inner conflicts. He sees contemporary anti-Semitic slogans as the product of collective fantasy scenes. These slogans range from the most eloquent (such as the anti-Semitic speech of then Malaysian premier Mahathir Mohammed in 2003) to the most laconic (as in an equation sign between the Star of David and the swastika); from the most inciting, as in “One Jew - one bullet,” to the most allusive, as in “No to communautarisme,” a French word that alludes to the Jews’ “crime” of organizing themselves into communities and betraying their pact with the French Republic. Once proclaimed, such slogans as “Bush = Sharon = murderer” acquire legitimacy as “public opinion.” *Id.* at .

Lo, classical anti-Semitism has migrated to the Islamic world, where hatred of Jews and the wish for their annihilation has begun to assume endemic proportions.<sup>272</sup>

Georges Gachnochi, another French-Jewish psychiatrist who had lived in Israel for some years, studied the transition of Christian anti-Semitism from right-wing European fascism to Islamic radicalism. In his view, anti-Semitic European Catholics identify modern Zionists (presumably the Israeli Jews) with the ancients who “crucified” Jesus, and the modern Palestinian Arabs with the suffering Christ whom the Jews had “sacrificed.”<sup>273</sup>

Referring to the French political Left, Nicolle suggested that the collective anti-Semitic fantasy of all the world’s Jews as a huge collective entity responsible for the “American-Zionist war” on Iraq or Afghanistan helps them imagine themselves as the champions of pacifism and solidarity with all victims in the world and “the Jews” as traitors. The more apprehensive the French, the more

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<sup>272</sup> Josef Joffe, *Nations We Love to Hate: Israel, America and the New Antisemitism*, Posen Papers in Contemporary Antisemitism, No. 1 (Vidal Sassoon International Center for the Study of Antisemitism, Hebrew University of Jerusalem, 2005), pp. 1-16, at pp. 2-3.

<sup>273</sup> This theory helps explain why so many Palestinians accept unquestioningly the alleged Israeli Jewish responsibility for the death of the Palestinian Arab boy Muhammad al-Dura on September 30, 2000, even though there is considerable doubt about who killed him. Georges Gachnochi, *De l’antisémitisme traditionnel à l’islamo-gauchisme: Facteurs inconscients du passage*, *Pardèès: Etudes et culture juive*, no. 37, *Psychanalyse de l’antisémitisme contemporain*, 2004, pp. 21-33, at p. 23 (French). See also James Fallows, *Who Shot Mohammad al-Dura?*, *THE ATLANTIC*, June 2003.



they idealize their “one and indivisible” republic and denigrate the Jews.<sup>274</sup>

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<sup>274</sup> Falk, *supra* note 261 (citing Nicolle).

In 2002, during the Israeli siege of the Church of the Nativity in Bethlehem (where Palestinian terrorists had taken refuge), the Italian newspaper *La Stampa* published a cartoon showing Jesus in Mary's arms asking, "Mother, do you think they will kill me a second time?" A Danish pastor publicly compared the Israeli army's actions to Herod's massacre of the innocents, and the atheist left-wing French newspaper *Libération* published cartoons showing Ariel Sharon about to crucify Yasser Arafat and devouring little children.<sup>275</sup>

### ***Liberty and Responsibility***

At the very least, if Holocaust denial is allowed to avoid the limitations we have come to put on obscenity, defamation, state secrets, and other forms of expression not accorded First Amendment protection, certain fundamental principles should be clearly recognized.

Holocaust deniers may self-publish their theories, but they are entitled to no greater access to the general press than anyone else. Their editorial and advertising matter can be constitutionally treated like that of defamers and pornographers. Moreover, it can be rejected at will by publishers who choose to do so for arbitrary reasons of ideology, space, financial considerations, or even caprice.<sup>276</sup>

Nor need public libraries carry all books and journals that are available. Indeed they cannot, nor should they have to. Even university research libraries must choose from among the vast amounts of resources procurable. Accepting material that is patently racist may be important in order to demonstrate that it exists, but few serious libraries would similarly carry a complete collection of pornography simply to satisfy a scholar's desire to analyze the difference between pornography and

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<sup>275</sup> Falk, *supra* note 261. See also Douglas Martin, *Raul Hilberg, The Historian Who Wrote of the Holocaust as a Bureaucracy, Dies*, NEW YORK TIMES, Aug. 7, 2007 at p.C11 (quoting historian Hugh Trevor-Roper, describing Hilberg's landmark book *The Destruction of the European Jews* as a work which "reveals, methodically, fully and clearly, the development of both the technical and psychological process; the machinery and mentality whereby one whole society sought to isolate and destroy another, which, for centuries, had lived in its midst.")

<sup>276</sup> See *supra* note 148 and accompanying text.

erotica.

### *Libertarians as Teachers*

Just as few people would ever debate whether slavery existed in the United States, reasonable discussion about whether the Holocaust ever happened is unlikely. On the other hand, there is a strong need to educate the public about the truth.<sup>277</sup> This is the express goal of museums like Yad Vashem in Israel and the United States Holocaust Memorial Museum in America. The enlightenment that such places offer is invaluable for future generations, and should be mandatory for the current generation. But not everyone gets to Jerusalem or Washington.

Although uninhibited discussion may indeed serve to advance the pursuit of truth, the dogmatic invocation of that principle in the context of hate speech carries the libertarian axiom too far. When speakers and writers deliberately misrepresent the work of historians, misquote witnesses, and fabricate evidence – as Holocaust deniers do – their “thoughts” turn the goal of truth-seeking in an open marketplace of ideas on its head. Contrary to the slippery slope so feared by civil libertarians – that it’s too difficult to draw the line where hate speech should be limited without prohibiting all offensive speech – the free flow of racist hate-mongering could well lead to a place where true freedom is compromised for all, as it did in Nazi Germany.<sup>278</sup>

As academic librarians have come to recognize in trying to draw distinctions between legitimate Holocaust literature and racist Holocaust denial,<sup>279</sup> there is no easy way to strike a balance between free speech and the suppression of bigotry. Advocates of hate-speech regulation offer well-reasoned arguments that dialogue is fruitless without equality among the speakers. Defenders of free speech argue with equal reason that such liberty is an important instrument for achieving social justice – that is, equality presupposes liberty. Either value may be used to suppress the other:

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<sup>277</sup> See generally Levine, *supra* note 247.

<sup>278</sup> See Lasson, *supra* note 140 at 123-29.

<sup>279</sup> See *supra* note 75 and accompanying text.

regulation of hate speech may lead to unfair censorship and coerced conformity; failure to regulate may lead to the oppression of minority groups.<sup>280</sup>

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<sup>280</sup> See generally Jean Stefancic & Richard Delgado, *A Shifting Balance: Freedom of Expression and Hate-Speech Restriction*, 78 IOWA L. REV. 737 (1993). But Stefancic and Delgado find themselves in the same unresolved conflict as Prof. Abzug, *supra* note 8 and accompanying text, as illustrated by their not-very-conclusive concluding advice: “Readers should distrust the facile urgings of both those who would dismiss the community and equal protection values at stake in the controversy over campus anti-racism rules as well as those who give little weight to the vitally important, historically rooted values of free expression and free speech.” *Id.* at 23. See also STRIKING A BALANCE: HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION (Sandra Coliver et al. eds., 1992).

In its most perfect form, speech is exercised freely in an open marketplace of ideas, and serves to promote the quest for truth. In its least perfect form, it suppresses ideas, stifles social discourse, and provokes violence. Thus there is an interdependence between the right to speak and the responsibility to speak honestly. In so doing, the dignity of the target of the speech must be preserved. If the relationship between the right of free speech and the responsibility for free speech is ignored, the traditional justification for protecting it – that it promotes the quest for truth – is denied.<sup>281</sup>

Holocaust denial is not an attempt at free inquiry, but at distortion. Universities are places where students are supposed to think critically, and have no moral responsibility to provide a platform for bigots whose sole purpose is to stir up hatred.<sup>282</sup>

It may be the case that in the long run, being offended by insensitive language or even outright bigotry might be a small price to pay for the freedom of thought and expression. And there is nothing wrong with reevaluating history; offering new interpretations of old events – in fact, challenging entrenched dogma of all kinds – is what the academic enterprise is about. Historians should be allowed to investigate any aspect of the events which have come collectively to be called the Holocaust with the same rigorous and impartial methods they would apply to any other historical event, and publish freely the results of their research. “To forbid this is itself a form of denial.”<sup>283</sup>

But discarding past culture because it is deemed “white” or “patriarchal” or “Eurocentric” can hardly be understood as the honest scholar’s quest for truth. Nor can denying the documented facts of

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<sup>281</sup> See generally Leon E. Trakman, *Transforming Free Speech: Rights and Responsibilities*, 56 OHIO ST. L.J. 899 (1995).

<sup>282</sup> See Miller, *supra* note 252 at 30.

<sup>283</sup> Peter Simple, *Denial*, LONDON DAILY TELEGRAPH, Apr. 12, 1996 at A1.

history.

### *Toward a More Responsible Press*

Various writers, commissions, and task forces have suggested new standards by which the press should be held more accountable. One of the most notable was the Hutchins Commission, which in 1947 published a report entitled *A Free and Responsible Press*.<sup>284</sup> Uncomfortable with the characterization of a free press offered by Charles Beard,<sup>285</sup> the Commission offered this alternative conception:

Today, this former legal privilege wears the aspect of social irresponsibility. The press must know that its faults and errors have ceased to be private vagaries and have become public dangers. Its inadequacies menace the balance of public opinion. It has lost the common and ancient human liberty to be deficient in its function or to offer half-truth for the whole.<sup>286</sup>

Other commentators have pointed out that there are many ways by which the press can abuse the freedom it possesses – such as excluding important points of view, actively distorting knowledge of public issues, adversely influencing the tone and character of public debate by playing to personal prejudices and fears, and fueling ignorance by avoiding public issues altogether.<sup>287</sup>

Thus came the call for a redefinition of the American concept of freedom:

For the nation to survive, freedom can no longer be conceptualized as the mere liberty to pursue selfish gain . . . . The time has come to view the matter not simply in terms of what the Constitution may do for the press, but what the press may do for the Constitution. The time has come

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<sup>284</sup> THE COMM'N ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS: A GENERAL REPORT ON MASS COMMUNICATIONS* (Univ. of Chicago Press 1947). The Commission on Freedom of the Press was chaired by Robert Maynard Hutchins.

<sup>285</sup> See *supra* note 138 and accompanying text.

<sup>286</sup> Freedom of the Press, *supra* note 284 at 131.

<sup>287</sup> See LEE C. BOLLINGER, *IMAGES OF A FREE PRESS* 26-27 (1991).

to view the matter not merely in terms of freedom for the press, but also as freedom from the press.<sup>288</sup>

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<sup>288</sup> Rodney A. Smolla, *Report of the Coalition for a New America: Platform Section on Communications Policy*, 1993 U. CHI. LEGAL F. 149, 155-56.

The Hutchins Report recommended a number of initiatives, including: (a) a truthful, comprehensive, intelligent account of events in a meaningful context; (b) a forum for the exchange of comment and criticism; (c) a means of conveying different opinions; (d) a method of presenting and clarifying social values and goals; and (e) a way to reach “every member of the society by the currents of information, thought, and feeling which the press supplies.” The Report warned that freedom of the press is in danger – that the press must become more responsible or face government regulation: “The legal right will stand if the moral right is realized or tolerably approximated.”<sup>289</sup>

Others have urged adoption of legally enforceable codes of journalistic ethics, greater access to the press by those without realistic expectations of disseminating their views, stronger laws to protect privacy and reputation, and more meaningful restrictions on hate speech and pornography. The ultimate goal of a free press should be the presentation and clarification of the goals and values of society.<sup>290</sup>

A majority of colleges and universities seek to guarantee their student newspapers the same freedom of the press that the Constitution confers upon the private commercial media. Problems arise when student editors and school administrators interpret the First Amendment too broadly, as part of an implicit obligation to foster an open and vigorous marketplace of ideas, which in turn should guarantee access by anyone (students or the general public) to editorial and advertising pages.

Such a constitutional perspective is both mistaken and misplaced. Too often overlooked is the simple logic of a free press: while a newspaper has a First Amendment right to publish what it pleases, it also has a First Amendment right to reject what it deems gratuitous or offensive. Such a rejection can be based on content, limited space, or financial considerations.

A similarly skewed argument is that, with respect to a state college or university, a refusal to publish amounts to an infringement of the author’s First Amendment rights. But student editors have

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<sup>289</sup> Freedom of the Press, *supra* note 284 at 1, 20-21, 131.

<sup>290</sup> Smolla, *supra* note 288 at 184.



the same power to exercise subjective discretion regarding the publication of proffered material as do their professional counterparts. To the contrary, for a school (or government) to guarantee a newspaper the right to freedom of the press, and then require it to publish certain material would create impossible contradictions in policy. Even if a public college or university newspaper is considered a state actor (and is guaranteed the right to freedom of the press), neither school officials nor the state nor the courts can force it to publish certain material.

### *Falseness and Truth*

As noted earlier, little has been written about the harmful effects of speech that is known to be false. To the contrary, both scholars and journalists have become increasingly reluctant to argue that some viewpoints should be beyond debate because they are simply wrong. They urge instead that in a truly democratic society everything should be open to debate: who, after all, should have the power to deem certain ideas true and others false?

While philosophers may argue that there are no demonstrably false ideas, and while scientific propositions can never be proven absolutely true, a theory whose predictions fail the test of experimentation can and should be rejected – particularly if its acceptance and application would clearly cause injury.

If we are unwilling, unilaterally, to brand scientific nonsense as just that . . . then the whole notion of truth itself becomes blurred. The need to present both sides of an issue is only necessary when there are two sides. When empirically verifiable falsehoods become instead subjects for debate, then nonsense associated with international conspiracy theories, Holocaust denials and popular demagogues . . . cannot be effectively rooted out. . . . Our democratic society is imperiled as much by this as any other single threat, regardless of whether the origins of the nonsense are religious

fanaticism, simple ignorance or personal gain.<sup>291</sup>

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<sup>291</sup> Lawrence Krauss, Opinion, *Equal Time for Nonsense*, N.Y. TIMES, July 29, 1996, at A19. Krauss is chairman of the physics department at Case Western Reserve University. He goes on to cite favorably the advice passed on by Arthur Hays Sulzberger (publisher of the New York Times from 1935-61): “I believe in an open mind, but not so open that your brains fall out.” *Id.*

Courts are authorized to take judicial notice of factual matters which are common knowledge and about which reasonable people would agree.<sup>292</sup> Factual matters and opinions do merge and intertwine, but they remain distinguishable entities. Can American courts take judicial notice of the Holocaust as a historical fact, as has been done in Canada, France, and Germany? Indeed, one might draw a disturbing inference if they do not. And indeed a California court did take judicial notice of the Holocaust (in which the plaintiff successfully sued to collect a reward offered by a Holocaust denial group).<sup>293</sup> This occurs despite libertarian arguments that historical events evolve in complex ways that cannot easily be encapsulated.<sup>294</sup>

### **Summary and Conclusion**

The Holocaust falls into that unique category of criminal malevolence whose enormity puts it beyond the purview of traditional standards of law and reason. Yet ignorance of its ever having happened is widespread – the tortured cries from the graves of the millions murdered out of madness, unheard. Indeed, as eyewitnesses to survivors of Nazi atrocities themselves pass away, Holocaust denial has gained growing acceptance.

Thus the increasing importance of understanding that the expression of such thought need not be condoned in a free society. Group-libel laws are viable even as civil liberties are fully protected. Tort actions can be pursued for intentional infliction of emotional distress; to that end American courts should adopt the Canadian view, linking the psychological and emotional harm caused by hate propaganda to the target group's constitutional right of equality.

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<sup>292</sup> See FED. R. EVID. 201; see also Debate, *supra* note 2 at 577-78.

<sup>293</sup> See *supra* note 238 and accompanying text.

<sup>294</sup> See Debate, *supra* note 2 at 567-71.

Racial hatred may be an inevitable facet of the human condition but even under the First Amendment demonstrably false ideas can be prohibited and punished. At the very least, if Holocaust denial is allowed to avoid the limitations we have come to put on obscenity, defamation, disclosure of state secrets, and other forms of expression excluded from First Amendment protection, certain fundamental principles should be clearly recognized. Holocaust deniers are not constitutionally entitled to access to someone else's press. Nor need public libraries carry their books and journals.

Holocaust denial should be recognized not as an attempt at free inquiry, but as an exercise in distortion. Universities should be regarded as places with the moral responsibility of training students to think critically, not of providing platforms for bigots whose sole purpose is to stir up hatred. Allowing them to discard the documented facts of history can hardly be understood as the honest scholar's quest for truth.

While philosophers may argue that there are no demonstrably false ideas, and while scientific propositions can never be proven absolutely true, a theory whose tenets fail the test of reason can and should be rejected – particularly if its acceptance and application would cause provable injury.

When perpetrated in an academic environment, Holocaust denial is a particularly pernicious form of hate speech. On American campuses, regardless of whether a student organization is privately or publicly funded, rejection of its right to sponsor a Holocaust-denial speaker need not be viewed as suppression of free speech. Nor has freedom of the press been infringed when an advertisement denying the Holocaust is spurned by a student newspaper. Editorial discretion in a free society allows for – indeed, requires – the ability to reject as well as to accept material submitted by outside sources.

A majority of colleges and universities seek to guarantee their student newspapers the same freedom of the press that the Constitution confers upon private commercial media. Problems arise when student editors and school administrators interpret the First Amendment too broadly, as part of an implicit obligation to foster an open and vigorous marketplace of ideas, which in turn should guarantee access by anyone (students or the general public) to editorial and advertising pages. Such a constitutional perspective is both mistaken and misplaced. An author's First Amendment rights stop at the editor's desk – as should any advertisement or essay that seeks to deny the tragedy of the

Holocaust.

Holocaust deniers, often motivated by base anti-Semitic impulses, will always find ways to disseminate their views.

Honest scholars have an obligation to confront, challenge, and when necessary condemn them.