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Denying the undeniable: Holocaust denial, the criminal law, and free speech

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**DENYING THE UNDENIABLE: HOLOCAUST
DENIAL, THE CRIMINAL LAW, AND FREE
SPEECH**

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TABLE OF CONTENTS

I	INTRODUCTION	5
II	HOLOCAUST DENIAL: A REVIEW	11
A	<i>Holocaust Denial Summarized</i>	11
B	<i>Origins and early years</i>	12
C	<i>The Institute for Historical Review</i>	14
D	<i>Committee for Open Debate on the Holocaust</i>	16
E	<i>Holocaust Denial today: the Influence of the Internet and Iran</i>	16
F	<i>The connection between Holocaust Denial and anti-Semitism</i>	18
III	THE LEGAL RESPONSE: LAWS AGAINST HOLOCAUST DENIAL	19
A	<i>The Nature of the Laws</i>	19
B	<i>Holocaust Denial Laws in Context: Hate Speech</i>	21
1	<i>Defining hate speech</i>	21
2	<i>The case for Holocaust denial as hate speech</i>	23
3	<i>The distinction between hate speech and Holocaust denial</i>	25
IV	EUROPE AND FREEDOM OF SPEECH	27
A	<i>Historical Background</i>	27
B	<i>Germany as a Case Study</i>	27
C	<i>Europe</i>	30
D	<i>European Court of Human Rights</i>	31
V	HOLOCAUST DENIAL AND THE PRINCIPLES OF FREE SPEECH	32
A	<i>The Theory of the "Marketplace of Ideas"</i>	32
1	<i>Good ideas v bad ideas</i>	34
2	<i>Governmental incompetence</i>	35
3	<i>Content neutrality</i>	35
4	<i>Counter-speech</i>	36
B	<i>Criticism of the Marketplace of Ideas</i>	39
C	<i>The Marketplace of Ideas and Holocaust Denial</i>	40
D	<i>Adopting the Marketplace of Ideas Rationale</i>	42
E	<i>Consistency</i>	42
VI	RESPONDING TO HOLOCAUST DENIAL	45
A	<i>The Power of Truth</i>	45
B	<i>Public Opprobrium</i>	47
C	<i>Information Dissemination on the 'net as Counter-speech</i>	48

<i>D</i>	<i>Education</i>	49
<i>E</i>	<i>The dilemma: to debate or not to debate?</i>	50
VII	HOLOCAUST DENIAL LAWS ARE INEFFECTIVE	52
<i>A</i>	<i>Trials are counter-productive</i>	52
<i>1</i>	<i>Publicity</i>	53
<i>2</i>	<i>The dock as a pulpit</i>	54
<i>3</i>	<i>Legitimacy</i>	55
<i>4</i>	<i>The danger of martyrdom</i>	56
<i>5</i>	<i>Distinguishing Irving v Lipstadt</i>	58
<i>B</i>	<i>Legitimisation of Less Obvious but more Dangerous Anti-Semitism</i>	59
<i>C</i>	<i>Catching Holocaust Deniers in the Age of the Internet</i>	60
VIII	HOLOCAUST DENIAL LAWS ARE DANGEROUS	61
<i>A</i>	<i>Chilling of Legitimate Historical Inquiry</i>	61
<i>B</i>	<i>The Stain of Hypocrisy</i>	62
IX	CONCLUSION	63
X	BIBLIOGRAPHY	64

ABSTRACT

This paper considers laws, prevalent in Europe, which criminalise denial of the Holocaust. It first gives an overview of the dangerous form of anti-Semitism that is Holocaust denial, before examining European laws that ban Holocaust denial in their contemporary context. The majority of the paper is devoted to arguing that Holocaust denial laws are unjustified intrusions into the important right that is freedom of speech. The paper argues that Holocaust denial laws are unprincipled because they violate the classical free speech notion of the “marketplace of ideas”, and place too much faith in government, rather than trusting people. The correct response to Holocaust denial is counter-speech: public opprobrium and marshaling the forces of history and truth. The paper then goes on to argue that Holocaust denial laws are counterproductive. Trials of Holocaust deniers allow them to use the dock as a pulpit for their noxious beliefs, attract wide publicity, and turn the denier into a martyr. The paper then finally argues that Holocaust denial laws are dangerous, because they chill legitimate historical inquiry and make Europe look hypocritical when lecturing other countries on freedom of speech.

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1 INTRODUCTION

There are interesting laws for freedom of speech in Europe. In September 2005 the Danish newspaper *Jyllands-Posten* published cartoons satirizing the prophet Muhammad.¹ One cartoon portrayed Muhammad as a terrorist with a bomb in his

¹John Stuart Mill, *On Liberty and Other Essays* (ed. Stefan Collingridge, Cambridge University Press, 1998), 193-203.

²“Guardian Weekly (pape)”, *Weekly Guard on Anti-Denialism in Japan*, The Great Council on Ethics, Guide to Defining and Combating Anti-Semitic Propaganda, www.guide-to-defining-and-combating-anti-semitic-propaganda.org (accessed 18 September 2007).

³“BBC News”, *Inquests: living still* (20 February 2007).

http://www.bbc.co.uk/1/health/07022007_01.shtml (accessed 17 September 2007).

⁴The cartoons are widely available on the World Wide Web.

If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind.

John Stuart Mill, *On Liberty* (1859)¹

The alleged Hitlerian gas chambers and the alleged genocide of the Jews form one and the same historical lie, which permitted a gigantic financial swindle whose chief beneficiaries have been the State of Israel and international Zionism, and whose main victims have been the German people and the Palestinian people as a whole.

Robert Faurisson (1991)²

I am not happy when censorship wins, and I don't believe in winning battles via censorship... The way of fighting Holocaust deniers is with history and with truth.

Deborah Lipstadt³

I INTRODUCTION

These are interesting times for freedom of speech in Europe. In September 2005 the Danish newspaper *Jyllands-Posten* published cartoons satirizing the prophet Muhammad.⁴ One cartoon portrayed Muhammad as a terrorist with a bomb in his

¹ John Stuart Mill *On Liberty and Other Writings* (ed. Stefan Collini, Cambridge University Press, Cambridge, 1859, 1989) 20.

² *Guardian Weekly* (April 7, 1991). Cited on Anti-Defamation League: Holocaust Denial: An Online guide to Exposing and Combating Anti-Semitic Propaganda. www.adl.org/holocaust/denier_quotes.asp (accessed 16 September 2007).

³ BBC News "In quotes: Irving Jailed" (20 February 2006) <http://news.bbc.co.uk/2/hi/europe/4734096.stm> (accessed 17 September 2007).

⁴ The cartoons are widely available on the World Wide Web.

turban.⁵ Muslims around the world reacted with outrage. Kuwait called the cartoons "despicable racism." Iran's foreign minister termed them "ridiculous and revolting."⁶ Western embassies in Syria, Lebanon, Indonesia and Iran were attacked. At least ten people died around the world in protests against the cartoons.

Between October 2005 and the end of January 2006, examples of the cartoons were reprinted in major European newspapers from the Netherlands, Germany, Scandinavia, Belgium and France, with most newspapers doing so in order to make a point about freedom of speech.⁷ The Danish government, for its part, refused to meet ambassadors from eleven Islamic countries, citing, in part, the country's commitment to free speech.⁸

Barely three months later in December, the English writer David Irving traveled to Austria to give a lecture to a far-right student fraternity. He was stopped by police on a motorway in southern Austria and arrested on a warrant dating back to 1989, when he had given a speech and interview denying the existence of gas chambers at Auschwitz during World War Two.⁹ On 20 February 2006 he was found guilty of denying the Holocaust and sentenced to a year's imprisonment, his appeal against his criminal conviction being denied in September 2006.¹⁰ On 21 December 2006 he was released on probation and returned to the United Kingdom, immediately telling a press conference that he supported the drunken anti-Semitic comments made by Mel Gibson in July 2006 (that Jews were responsible for all modern wars).¹¹

⁵ John Ward Anderson "Cartoons of Prophet Met With Outrage" (31 January 2006) Washington Post Washington A12 www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html

⁶ Ibid.

⁷ "Mutual incomprehension, mutual outrage" (9 February 2006) The Economist London www.economist.com/world/displaystory.cfm?story_id=E1_VQJQGQG

⁸ A copy of the letter itself can be found at: <http://gfx.master.tv2.dk/images/Nyhederne/Pdf/side3.pdf>

⁹ Peter R Teachout "Making 'Holocaust Denial' a Crime: Reflections on European Anti-Negationist Laws from the Perspective of US Constitutional Experience" (2006) 30 *Vt L Rev* 655, 657.

¹⁰ BBC News "Holocaust Denial is Jailed" (20 February 2006)

<http://news.bbc.co.uk/2/hi/europe/4733820.stm> (accessed 17 September 2007); BBC News "Holocaust denier verdict upheld" (4 September 2006)

<http://news.bbc.co.uk/2/hi/europe/5313504.stm> (accessed 19 September 2007).

¹¹ Dan Bell "Irving renews racist diatribe after release" (December 23 2006) The Guardian www.guardian.co.uk/race/story/0,,1978186,00.html (7 September 2007)

Whilst Irving was imprisoned in Austria, the trial of Ernst Zündel in Germany commenced. Zündel, a 67-year-old German citizen, stood accused of disputing the historical fact that Nazi Germany systematically slaughtered six million European Jews during World War Two. Zündel had left Germany for Canada at the age of 19. He became the “chief disseminator of hate propaganda in Canada, but also the chief exporter of material to centers in Europe and elsewhere”.¹² He was tried in Canada in 1987 for the crime of “spreading false news causing or likely to cause racial or religious intolerance” in relation to his pamphlet “Did Six Million really die?”¹³ Zündel was deported in March 2005 on a German arrest warrant¹⁴ and in February 2007 was convicted of holocaust denial and sentenced to the maximum punishment of five years’ imprisonment.¹⁵

Laws like that which imprisoned David Irving in Germany and Ernst Zündel in Austria also exist in twelve other European countries. Although the elements of the offence and the punishment available to be meted out vary from country to country, the core element is that it is an offence to deny the Holocaust as an event of historical fact.

On 1 January 2007 Germany assumed the Presidency of the European Union.¹⁶ The German Justice Minister, Brigitte Zypries, said she wanted Holocaust denial to become punishable by up to three years in prison in all 27 of the bloc's member

¹² Professor Irwin Cotler in “Debate: Freedom of Speech and Holocaust Denial” (1987) 8 *Cardozo L Review* 559, 560-561. [Transcript of the proceedings of The Holocaust and Human Rights: The First International Conference, held at Boston College Law School on April 17, 1986]

¹³ Zündel was convicted in 1987, but the Supreme Court of Canada overturned the verdict, finding that the “false news” section of the Criminal Code was an unjustifiable violation of freedom of speech. See *R v Zündel* [1992] 2 SCR 731 (SCC).

¹⁴ Deutsche Welle “German Holocaust denial case proceeds as EU moves on a Ban” (26 January 2007) www.dw-world.de/dw/article/0,2144,2328344,00.html (last accessed 20 September 2007)

¹⁵ Canadian Press “German Court sentences Ernest Zündel to five years in prison for Holocaust denial” (15 February 2007) www.canada.com/topics/news/world/story.html?id=c61ce061-50b2-42a5-bb2f-a7bbaeccceb&k=32537 (accessed 15 September 2007).

¹⁶ The six-month long Presidency rotates around each state in the European Union in turn.

states.¹⁷ In 2005, Luxembourg had used its Presidency to push for a similar measure, but was blocked by Italy. Soon after the law was proposed, the United Nations passed a resolution urging members to "reject any denial of the Holocaust as a historical event."¹⁸ The German proposal failed to gain enough support from EU countries and was dropped in April 2007.¹⁹

Europe's schizophrenic attitudes towards free speech should be immediately apparent from the preceding paragraphs. On the one hand, European countries defend the right of a free press to publish what they want (the Muhammad cartoons); yet most of them have in their criminal codes and their statute books laws which specifically prohibit citizens from expressing their views about the historical fact of the Holocaust. This contradiction did not, understandably, go unnoticed by Muslims around the world at the time of the cartoon controversy²⁰, and has continued to raise the ire of Muslim leaders ever since.²¹

The purpose of this paper is to critique laws in European countries that criminalise Holocaust denial or "Holocaust negationism".²² I argue against extending Holocaust denial laws to all states in the European Union. The better alternative would be to abolish them altogether. They are inconsistent with the principles of freedom of speech, ineffective and counterproductive, and harmful to historical inquiry.

In the first part of the paper I give a brief overview of the "part hatred, part conspiracy theory...perhaps part misinformation"²³ that is Holocaust denial, or

¹⁷ Deutsche Welle "Germany moves to silence Holocaust deniers across the EU" (19 January 2007) <http://www.dw-world.de/dw/article/0,2144,2317216,00.html> (accessed 17 May 2007).

¹⁸ UNGA Resolution 60 VII (1 November 2005).

¹⁹ BBC News "EU agrees new racial hatred law" (19 February 2007)

<http://news.bbc.co.uk/1/hi/world/europe/6573005.stm> (accessed 17 May 2007).

²⁰ Richard Bernstein "Europa: Civility vs. free speech: A democratic quandary" (May 5 2006) The International Herald Tribune www.ihf.com/articles/2006/05/04/news/europa.php?page=2

²¹ Timothy Garton Ash "This is the moment for Europe to dismantle taboos, not erect them" (October 19 2006) The Guardian www.guardian.co.uk/comment/story/0,,1925401,00.html.

²² Both terms are used in the literature. For the purposes of this paper, I adopt the term "denial" (and "denier").

²³ Credence Fogo-Schensul "More than a river in Egypt: Holocaust denial, the internet, and international freedom of expression norms" (1997/1998) 33 *Gonzaga Law Review* 241, 242.

“Holocaust revisionism”, as it is euphemistically called by those who engage in it. I examine the origins of Holocaust denial, and look at its key actors, what they claim, and its connection to anti-Semitism. I then turn to examining laws against Holocaust denial across Europe. I distinguish Holocaust denial laws from more generic hate speech laws, while acknowledging their similarities. I further explain the background to such laws in Europe, using Germany as a case study, where it is “understandable” that a law exists, in light of its history.²⁴

I then argue that Holocaust denial laws are offensive in principle: they run contrary to freedom of speech, the marketplace of ideas, and the power of truth. In liberal democracies, even democracies with histories of violent anti-Semitism, there should be no place for state-sanctioned history enforced through the criminal law. As Alan Dershowitz puts it, “I don’t want government to tell me that it occurred because I don’t want any government ever to tell me that it *didn’t* occur.”²⁵

Moreover, Holocaust denial laws are ineffective and counterproductive. First, prosecuting Holocaust deniers brings them welcome attention and highlights their cause. Deniers are able to use the courtroom as a pulpit to appeal to their supporters and spread their message of hate. Secondly, punishing Holocaust denial arguably ensures that more dangerous anti-Semitism and speech which minimises (rather than denies) the Holocaust is tolerated. Third, in the age of the internet and untrammelled access to media, it is near impossible to stamp out speech which denies the Holocaust.

I posit that the battle over historical truth – and there is no doubt that the Holocaust, in its monstrous, terrible way, did occur – must be won in the marketplace of ideas through more, not less speech. State-imposed historical orthodoxy merely gives Holocaust denial a frisson of respectability. It lends it credibility where none exists.

²⁴ Professor Deborah Lipstadt, comments in Jamie Glazov (FrontPageMagazine) “Symposium: Criminalizing Holocaust Denial” (July 27, 2007) www.frontpagemagazine.com/Articles/Read.aspx?GUID=%7B80D0BF73-5861-4B31-968E-98F0F9E81317%7D

²⁵ Professor Gerald Tishler in “Debate: Freedom of Speech and Holocaust Denial”, above n 12, 566.

The historical truth of the Holocaust is undoubted – which is precisely why it does not need legal protection. Adding the imprimatur of the criminal law implies the State has something to hide.

There are further harms, such as the deleterious effects on historical scholarship into the Holocaust. The State's decree of a version of history that is unimpeachable and enforcement of that history through coercion creates a chilling effect on legitimate historical enquiry. Finally, returning to where this paper started: holocaust denial laws are fundamentally at odds with Europe's commitment to free speech and liberal values. In a world where ideas matter more than ever before, Europe should be standing up for freedom and all that it entails; not hypocritically diminishing it, well-intended as those aims are.

It is perhaps helpful to also explain what I do *not* argue in this paper. First, I obviously accept absolutely that the that the Holocaust – the systematic genocidal extermination of approximately six million Jews during World War Two by the National Socialist regime in Germany²⁶ – did occur.²⁷ The purpose of this paper is only to query whether or not it should be a criminal offence to deny those facts. Secondly, I do not consider tortious²⁸ or civil remedies²⁹ for Holocaust denial which

²⁶ Robert Angove "Holocaust Denial and Professional History-Writing" (MA Thesis, University of Saskatchewan, Saskatoon, 2005) 6 "Despite the fact that professional historians do not always agree about specific aspects of the tragedy, they do share one common belief: between 1941 and 1945, millions of Jews (and Gypsies, Jehovah's Witnesses, homosexuals, and others) were murdered by various means – via firing squad, as guinea pigs for so-called medical experiments, in mobile gas chambers, and, of course, en masse in the concentration camps across Germany and German-controlled territories. The evidence attesting to the fact that the Holocaust happened is overwhelming and far beyond reasonable dispute."

²⁷ It is regrettable, but necessary to state that position in light of the Hayward controversy in New Zealand in the early part of this decade. See Rebecca Walsh "A-plus equals anger for Jewish groups" (December 22 2000) *New Zealand Herald* www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=166126 (accessed 3 September 2007).

²⁸ In the 1980s, the Institute for Historical Review offered to pay 50,000 USD to anyone who could prove that Jews were gassed at Auschwitz. Mel Mermelstein filed an affidavit with the Institute, and sued for breach of contract and the intentional infliction of emotional distress (IIED) when the Institute refused to pay. The Institute settled with the plaintiff (and is thus unreported) before full trial for the promised \$50,000 as well as \$100,000 damages. See Lawrence Douglas "Wartime Lies: Securing the Holocaust in Law and Literature" (1995) 7 *Yale LJ & Human* 367, 371-372. See Geri J Yonover "Anti-Semitism and Holocaust denial in the academy: A tort remedy" (1996) 101 *Dickinson Law*

may be available. My focus is on the prohibition of holocaust denial through the criminal law. Thirdly, I do not concern myself with arguments about what the response from the academy should be to Holocaust denial.³⁰

The issue of hate speech regulation presents difficulties. As discussed below, a powerful argument in favour of Holocaust denial is that it is a form of hate speech. In this paper I broadly accept the validity of laws which proscribe the promotion of hatred against identifiable groups in society. However, hate speech laws and holocaust denial laws differ in a number of important respects, which I detail below. I accept that the distinctions are fine ones. I also accept that the repeal of hate speech legislation may be the logical corollary of my stance on free speech in this paper.

II HOLOCAUST DENIAL: A REVIEW

A Holocaust Denial Summarised

Holocaust deniers make three primary claims.³¹ First, "the gas chambers and crematoria were used not for mass extermination but rather for delousing clothing and disposing of people who died of disease and overwork." The gas installations were also intended to be used as crematoria for those who died in the "genocidal" Allied bombing campaigns.³² In particular, there were no homicidal gas chambers at Auschwitz-Birkenau (where historians believe over 1 million Jews were murdered). Second, "the six million figure is an exaggeration by an order of magnitude - that

Review 71 for a fascinating exposition of how IIED could be used by plaintiffs to recover for holocaust denial speech without (allegedly) implicating free speech concerns.

²⁹ Canada, for example, has extensive federal and provincial anti-discrimination legislation, dealt with on a civil rather than criminal basis. Such a process has been advocated for by Professor Irwin Cotler of McGill University Law School. See comments by Irwin Cotler in "Debate: Freedom of Speech and Holocaust Denial", above n 12, 565.

³⁰ See Stanley Fish "Holocaust denial and academic freedom" (2001) 9 Valparaiso University Law Review 499; Catriona McKinnon "Should we tolerate Holocaust Denial?" (2007) Res Publica 6.

³¹ Michael Shermer & Alex Grobman *Denying History: who Says the Holocaust Never Happened and why Do They Say It?* (University of California Press, California, 2000) 3.

³² See also Udo Walendy "The Fake Photograph Problem" (1980) Journal for Historical Review 59, as well as "60 Minutes: Profile: Who says it never happened? Ernst Zündel and other "Holocaust deniers" promote their message that the extermination of millions of Jews during World War Two never happened" (CBS Television broadcast, March 20, 1994).

about six hundred thousand, not six million, died at the hands of the Nazis.” Third, “there was no intention on the part of the Nazis to exterminate European Jewry and that the Holocaust was nothing more than the unfortunate by-product of the vicissitudes of war.”³³

B Origins and Early Years

It seems remarkable that Holocaust denial has ever existed. After all, “[d]espite the Nazis’ best efforts to hide their atrocities, it is difficult to imagine an event of recent history for which the factual record is more complete.”³⁴ Almost as soon as WW2 had ended and the Holocaust came to light, writers in Europe were defending the Nazi regime. One of the early prominent deniers was Paul Rassinier, elected as a member of the French National Assembly in 1945. During the war, he had been a member of the French Resistance. He was arrested in 1943 and spent time in Buchenwald, the first major concentration camp created by the Hitler regime – and crucially, one without gas chambers.³⁵ In 1948 he published *Le Passage de la Ligne*, and, in 1950, *The Holocaust Story and the Lie of Ulysses*. He argued that while some atrocities were committed by the Germans, they were exaggerated and the inmates who ran the concentration camps instigated them – not the Germans.³⁶ Rassinier is credited by current Holocaust deniers as having been one of the earliest founders of the movement.³⁷

Another early denier was Harry Elmer Barnes, who was convinced of the correctness of Holocaust denial by Rassinier.³⁸ Barnes was a distinguished American history professor and one of the leading World War One revisionist historians. He

³³ Shermer & Alex Grobman, above n 31, 3.

³⁴ Lawrence Douglas “Policing the past: Holocaust denial and the law” in Robert C Post (ed.) *Censorship and silencing: Practices of cultural regulation* (Los Angeles, CA: Getty Research Institute, 1998) 70 [“Policing the Past”]

³⁵ Angove, above n 26, 21.

³⁶ Ben S Austin “A Brief History of Holocaust Denial” www.mtsu.edu/%7Ebaustin/denhist.htm (accessed 18 September 2007).

³⁷ Angove, above n 26, 21.

³⁸ *Ibid.* See also Ben S Austin, above n 36.

likely came to Holocaust denial because of his memory of the atrocities that Germany was (falsely) alleged to have committed during World War One. Barnes was the funder and backer of David Hoggan, who wrote a dissertation at Harvard University which claimed that no Jewish people were killed during or in the immediate aftermath of the *Kristallnacht*.³⁹ The dissertation, which also blamed Britain for World War Two and presented Hitler as a victim of Allied manipulation, was later published in Germany in 1961 under the title *Der Erzwungene Krieg (The Forced War)*.⁴⁰

However, Angove rejects that there was a prominent Holocaust denial movement in the 1950s and 1960s: "...it seems that Barnes and Rassinier were simply the most legitimate of an entirely corrupt collection of fascist sympathizers and anti-Semites".⁴¹ Their importance lies in their historical legacy: in Barnes, Holocaust deniers have a reputable historian; in Rassinier, they have a "survivor" of the camps. It is from Barnes that Holocaust deniers have appropriated the term "revisionism", one of the techniques used to cloak their arguments with historical credibility.⁴²

C *The Institute for Historical Review*

Rassinier's two works were republished in 1977 by Noontide Press under the title *Debunking the Genocide Myth*. The Noontide Press was, and remains, the primary outlet for the Institute of Historical Review ("IHR") a "pseudo-think tank

³⁹ Yonover, above n 28, 74. After extensive re-writing, it was published, in Germany in 1961, under the title, *The Forced War*.

⁴⁰ Ben S Austin, above n 36. Lipstadt notes, "Barnes read the dissertation before it was turned into a book and was in contact with Hoggan for a full six years before the book was published. Barnes helped get it published and provided a blurb for its jacket, obviously playing a significant role in turning this "solid conscientious piece of work" into a Nazi apologia. Deborah Lipstadt *Denying the Holocaust: the Growing Assault on Truth and Memory* (The Free Press, New York, 1993) 73. ["Denying the Holocaust"]

⁴¹ Angove, above n 26, 21. See Ben S Austin, above n 36 who states that "[b]y the mid to late 1960s, all the ingredients of contemporary Holocaust denial were in place."

⁴² Shermer & Alex Grobman, above n 31, 40. Lipstadt further notes: "[t]hese are not people who are revising anything. These are simply people who are denying.... Historians revise. Revisionism is the historian's craft.... these people do not revise, they deny. Words are exceptionally important. The deniers understand this and, therefore, have chosen this appellation, revisionist. See Deborah Lipstadt "Holocaust Denial and the Extreme Right" *The Sydney Papers* (Spring 1994) (Lecture to the Sydney Institute on 21 July 1994) ["Holocaust Denial and the Extreme Right"]

headquartered in Southern California, which [has] acted as the worldwide clearinghouse for [Holocaust] denial materials.”⁴³ The Institute was founded and incorporated by a notorious anti-Semite, Willis Carto in 1978.⁴⁴ In 1980 it established the quarterly periodical, the “Journal for Historical Review”.⁴⁵ The Institute holds (approximately) annual conventions to bring Holocaust deniers together⁴⁶ and remains the world's single most important outlet for Holocaust-denial propaganda. It regularly publishes tracts from leading Holocaust deniers.

The IHR purports to facilitate the pursuit of historical “revisionism” By this they mean.⁴⁷

There is no dispute over the fact that large numbers of Jews were deported to concentration camps and ghettos, or that many Jews died or were killed during World War II. Revisionist scholars have presented evidence... showing that there was no German program to exterminate Germany's Jews, and that the estimate of 6 million dead is an irresponsible exaggeration. The Holocaust... is a hoax and should be recognized as such by Christians and all informed, honest and truthful men, everywhere.

The IHR has played an important role in transforming Holocaust denial from “the enterprise of political extremists and other radicals” disseminated through “unscholarly and [obviously] anti-Semitic media”, to one that has the appearance of academic credibility and the façade of legitimacy.⁴⁸ It has achieved a status as the “friendly”⁴⁹ face of Holocaust-denial. Angove describes how the IHR, and the authors it publishes, have created an “ethos” of “credibility” and “authority” through mimicking the scholarly style used by professional historians. Authors write in the third person. They cite their sources in footnotes and bibliographies, creating an

⁴³ Fogo-Schensul, above n 23, 244.

⁴⁴ Kenneth Lasson “Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society” (1997-1998) 6 Geo Mas L Rev 35, 41.

⁴⁵ Angove, above n 26, 29.

⁴⁶ Ibid.

⁴⁷ Teachout, above n 9, 662.

⁴⁸ Angove, above n 26, 28.

⁴⁹ Fogo-Schensul, above n 23, 248.

image of proper research.⁵⁰ Some authors, like Arthur Butz (see below) and Robert Faurisson, have academic qualifications and the rank of Professor, even if in a different field than that of history.⁵¹ As Yonova puts it, “when these academic suppressors of truth and mongers [sic] of anti-Semitism speak, they do so in voices that we are accustomed to hearing as reasoned, enlightened and scholarly. As such, they carry the cache of academia, even if they lack academic imprimatur.”⁵²

One author who has published regularly in the *Journal for Historical Review* is Arthur Butz. In 1976, as a tenured Professor of electrical engineering at Northwestern University, he published *The Hoax of the Twentieth Century*. Butz “radically chang[ed] the texture and substance of denial literature”.⁵³ He made his work appear academically legitimate and authentic by writing in a complicated style, and using footnotes, appendices, and a bibliography. He made tactical concessions – he admitted that the Nazi Party was slightly anti-Semitic, and the Nazi government committed some atrocities during World War Two, but claimed that the Holocaust was a propaganda hoax to further “Zionist ends”. Pierre Vidal-Naquet, a French historian who has fought against Holocaust deniers has called him “the most skillful of all deniers.”⁵⁴ In *The Hoax of the Twentieth Century*, “the reader is persuasively led by the hand and brought little by little to the idea that Auschwitz is a tendentious rumor that skillful propagandists have gradually transformed into a truth.”⁵⁵ *The Hoax of the Twentieth Century* remains one of the IHR’s most popular tracts.⁵⁶

D *Committee for Open Debate on the Holocaust*

⁵⁰ Angove, above n 26, 33.

⁵¹ Ibid, 38-40. Robert Faurisson earned a PhD in literature from the University of Lyon.

⁵² Yonover, above n 28, 77.

⁵³ Angove, above n 26, 24.

⁵⁴ Pierre Vidal-Naquet *Assassins of Memory: Essays on the Denial of the Holocaust* (Columbia University Press, New York, 1992) 2. Cited in Angove, above n 26, 25.

See Yonover, above n 28, 75 for the point that Butz’s scholarship is tainted at various points by his rejection as counter-evidence as “lies”, “insanity”, “absurd[ity]”, and “nonsense”.

⁵⁵ Vidal-Naquet, above n 54, 51. Cited in Angove, above n 26, 26.

⁵⁶ Lasson, above n 44, 41.

In the United States, probably better known than the IHR is the Campaign for Open Debate on the Holocaust (“CODOH”). In the early 1990s, the group attempted to place advertisements in a number of college magazines in the United States, calling for an “open debate” on whether the Holocaust occurred or not, by appealing to students’ belief in academic freedom and the First Amendment.⁵⁷ The advertisements included such titles as “The Holocaust story: How much is False? The Case for Open Debate”, “The Holocaust Controversy”, “The ‘Human Soap’ Holocaust Myth” and “A Revisionist Challenge to the US Holocaust Memorial Museum”. The ads ran in 68 campus newspapers between 1991 and 1995.⁵⁸ Since 2000, almost all newspapers have refused to run the ads.

E Holocaust Denial today: the Influence of the Internet and Iran

Writing in 1996, Credence Fogo-Schensul stated that Holocaust denial on the internet was becoming “increasingly pervasive”.⁵⁹ As access to, and the size of, the internet has increased exponentially Holocaust denial websites have increased as well. CODOH’s founder, Bradley Smith, continues to maintain the CODOH website.⁶⁰ The IHR maintains the www.ihr.org address with many articles available for download. Ingrid Rimland's “The Zündelsite” (www.zundelsite.org) is dedicated to the life and work of famous Canadian Holocaust denier Ernst Zündel. Willis Carto, who established the IHR, runs www.barnesreview.org and publishes a bi-monthly newsletter.

The internet has undoubtedly led to the global spread of Holocaust denial. Angove notes that there are now prominent deniers in North America, England, mainland Europe, Russia, Japan, Australia,⁶¹ and the Middle East.⁶² Fogo-Schensul notes that

⁵⁷ Fogo-Schensul, above n 23, 249.

⁵⁸ Ibid. See Lasson, above n 44, 41 for a discussion of how student editors agonized as to whether to run the advertisements or not.

⁵⁹ Fogo-Schensul, above n 23, 242.

⁶⁰ He also maintains a blog, which makes for disturbing reading: see Bradley R Smith “My Life as a Holocaust Denier” <http://mylifeasaholocaustrevisionist.blogspot.com> (accessed 11 September 2007).

⁶¹ See Jeremy Jones “Holocaust Denial ‘Clear and Present’ Racial Vilification” [1994] *Australian Journal of Human Rights* 10.

the “internet has merely permitted freelance deniers to distribute their works more widely...what was once a cottage industry is now big business.”⁶³ Holocaust deniers revel in the potential of the internet; it has “given [them] a new lease on life.”⁶⁴ Bradley Smith, who runs CODOH, has said that “the Holocaust story is closed to free inquiry in our universities and among intellectuals. The internet represents a huge potential audience at minimal cost.”

The latest initiative in Holocaust denial has come from the Middle East.⁶⁵ In December 2006 the Iranian government held a Holocaust conference, attended by 67 participants from 30 countries. Presenters ranged from American white supremacists (the Ku Klux Klan), to European neo-Nazi propagandists, members of the anti-Israel Naturei Karta sect, and an anti-Hindu Dhalit rights campaigner. At the end of the conference, the Iranian government announced the establishment of the Foundation of Holocaust Studies, to promote ‘the study of the Holocaust’.⁶⁶ There is some evidence that the Iranian initiative has given deniers in Europe and the United States renewed enthusiasm to continue their work.⁶⁷

F The connection between Holocaust Denial and anti-Semitism

That there is a connection between the publication of material which denies the Holocaust and anti-Semitism is undoubted. Behind the deniers is an “unhappy efflorescence of anti-Semitism”.⁶⁸ Deborah Lipstadt explained the theoretical

⁶² Angove, above n 26, 30.

⁶³ Fogo-Schensul, above n 23, 244-245.

⁶⁴ Interview with Deborah Lipstadt on Three Monkeys Online “Deborah Lipstadt and Holocaust Denial” (November 2006) <http://www.threemonkeysonline.com/article3.php?id=391> (accessed 3 September 2007).

⁶⁵ Michael Whine “Holocaust Denial” (Conference on Extreme Speech and Democracy, 21-22 April 2007, University of Cambridge Centre for Public Law) Available at www.thecst.org.uk/docs/University%20of%20Cambridge5.doc (accessed 12 September 2007).

⁶⁶ Ibid.

⁶⁷ Ibid. Whine notes that “The Iranian initiative has undoubtedly reinvigorated the denial movement, as was no doubt the intended outcome.”

⁶⁸ Roger Kimball, comments in Jamie Glazov (FrontPageMagazine) “Symposium: Criminalizing Holocaust Denial” (July 27, 2007) www.frontpagemagazine.com/Articles/Read.aspx?GUID=%7B80D0BF73-5861-4B31-968E-98F0F9E81317%7D

underpinnings of the connection in 1994. She stated that the deniers ask “who benefited from the Holocaust?” to which the answer is “the Jews”, because the Holocaust led to the creation of the State of Israel. They also state that the Jews benefited from the Holocaust because of the “reparations” paid to Israel by Germany. Therefore the Holocaust must be a myth perpetuated by a “Zionist conspiracy”.

In making these claims, Holocaust deniers draw upon long-standing anti-Semitic stereotypes and create an image of the conniving, powerful, manipulative, lying, money-grubbing Jew. Holocaust denial thus simultaneously relies on, and buttresses, anti-Semitism.⁶⁹ It is no surprise that Butz’s *The Hoax of the Twentieth Century* “within a short time span, became a handbook for anti-Semites”.⁷⁰

Nor is it surprising that David Irving and other deniers often speak to and fraternize with far-right groups in Europe,⁷¹ for there is frequently a political motivation behind Holocaust denial: to rehabilitate National Socialism and make fascism acceptable again.⁷² In 1994 Lipstadt claimed that neo-Nazis had done a *volte face* from their arguments fifteen years previously, that “the only thing Hitler got wrong was that he didn’t kill all the Jews”. They now argue that the Holocaust never happened. The reason for this, according to Lipstadt, is to make their ideology acceptable to ordinary voters. It is part of the rehabilitation of National Socialism: if the Holocaust never occurred, were the Nazis that bad?⁷³ So “the real aim of Holocaust deniers...is to make the world safe for anti-Semitism again.”⁷⁴

III THE LEGAL RESPONSE: LAWS AGAINST HOLOCAUST DENIAL

⁶⁹ “Holocaust Denial and the Extreme Right”, above n 42, 82. See also “Policing the Past”, above n 34, 70.

⁷⁰ Jones, above n 61.

⁷¹ When Irving was arrested in 2005, he was on his way to speak to a far-right student group in Austria.

⁷² See Scott Miller “Denial of the Holocaust” (Oct 1995) 59 *Social Education* 342 for a concise description of how many of the authors who publish in the JHR have far-right and anti-Semitic links.

⁷³ “Holocaust Denial and the Extreme Right”, above n 42, 84-85.

⁷⁴ *Denying the Holocaust* 65.

A *The Nature of the Laws*

A variety of European countries have enacted laws to criminalise expression of Holocaust denial: Austria, Belgium, Czech Republic, France, Germany, Israel, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, Spain and Switzerland.⁷⁵ However, the elements of the offence and the severity of the punishment for it vary between the jurisdictions.⁷⁶

In France, for example, the "Gayssot Act", passed in 1990, states that imprisonment of up to one year or a fine of up to 300,000 francs, or both, "shall be applied to anyone who contests...the existence of one or several crimes against humanity as defined in Article 6 of the International Military Tribunal" [the Nuremberg Tribunal].⁷⁷ It was under this statute that Robert Faurisson, Professor of Literature at the University of Lyon, was convicted for publishing his contention that there were no gas chambers at Auschwitz.⁷⁸

In Austria, it is an offense "if in print, over the radio or through another medium or otherwise on a public manner accessible to many people," a person "denies, grossly trivialises, approves or seeks to justify the national socialist genocide or other National Socialist crimes against humanity."⁷⁹ It was under this law that David Irving was charged and arrested in 2005.⁸⁰

⁷⁵ Teachout, above n 9, 679.

⁷⁶ McKinnon, above n 30, 13.

⁷⁷ Law No 90-615 of July 13, 1990, JO, July 14, 1990, at 8333; 1990 JCP No 64046 (Fr). Douglas in notes that "the French law, if read narrowly (and perhaps somewhat mockingly), in light of the French case presented at Nuremberg, would not even touch Holocaust Denial, as the extermination of the Jews was not, judging by the evidence submitted by the French prosecution, one of the "several crimes against humanity..." See "Policing the Past", above n 34, 75.

⁷⁸ The United Nations Human Rights Committee upheld Faurisson's conviction, and held that the conviction did not violate his right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights. See *Robert Faurisson v France*, GAOR Hum Rt. Comm, 58th Sess, CCPR/C/58/D/550/1993 (1996).

⁷⁹ Federal Constitutional Law amending the Prohibition Law, Law No 148 Bundesverfassungsgesetz [BVG] Bundesgesetzblatt [BGBl] 57/1992 (Aus).

⁸⁰ BBC News, "Holocaust Denial is Jailed" (20 February 2006) <http://news.bbc.co.uk/2/hi/europe/4733820.stm> (accessed 17 May 2007);

In Germany, since its amendment in 1994, section 130(3) of the Criminal Code also prohibits the approval, denial, or qualified denial of the Holocaust in the following terms:

Whoever, in a manner apt to disturb public order, publicly or in a gathering approves or denies or makes appear harmless an act committed under the National Socialist period... shall be punished by up to [five] years in prison or by a fine.

Fronza notes that not all European laws punish solely “negationist” behaviour – Germany (along with Switzerland⁸¹ and Czech Republic⁸² and Liechtenstein⁸³) for example, also prohibits the “approval” or attempted justification of the Nazi regime. Moreover, the definition of the banned conduct varies in form. Germany punishes only manifestations likely to disturb the public peace, while in France (and Belgium) the denial of the Holocaust constitutes an offence in any circumstance.⁸⁴ Holocaust denial in Austria can be punished by 20 years in prison, and can attract a custodial sentence of 5 years in Israel and Germany, whereas in Belgium and France the maximum sentence is 1 year.⁸⁵

The United Kingdom has no specific laws against Holocaust Denial. In February 1997 a Private Member’s Bill was tabled in the House of Commons in the United Kingdom by Mike Gapes, Labour MP for Ilford, which would have inserted an additional clause into section 18 of the Public Order Act 1965 to make it an offence to deny the Holocaust in writing or orally.⁸⁶ Then Leader of the Opposition, and soon-to-be Prime Minister, Tony Blair said at the time that there was “a very strong case” for a law against Holocaust denial.⁸⁷ Gapes’ Bill received an unopposed First

⁸¹ Article 261 of the Penal Code.

⁸² Article 261a of the Penal Code.

⁸³ Article 283(5) of the Penal Code.

⁸⁴ Emanuela Fronza “The punishment of negationism: The difficult dialogue between law and memory” (2006) 30 *Vt Law Rev* 609, 619.

⁸⁶ On 3rd October 1996, delegates at the Labour Party Conference voted unanimously to introduce such legislation should the party have won the next general election (which they did). See David Butler “Holocaust Denial in England” 1997(4) *Web Journal of Current Legal Issues*.

⁸⁷ D D Guttenplan “Europe: How many Jews does it take? Should freedom of speech stop at holocaust denial” (27 January 2005). Available from Index for Free Expression.

Reading in the House of Commons, and subsequently passed its committee stage. However, it was not allowed sufficient parliamentary time to proceed any further. At EU meetings since 1997 the United Kingdom has consistently opposed the introduction of continent-wide Holocaust denial laws.

B Holocaust Denial Laws in Context: Hate Speech

1 Defining hate speech

One of the strongest arguments put forward for the acceptability of Holocaust denial laws is that Holocaust denial functions as a form of hate speech – “speech designed to promote hatred on the basis of race, religion, ethnicity or national origin”.⁸⁸ If hate speech laws are an acceptable limit on free speech then so too, it follows, must be Holocaust denial laws. Hate speech laws, in a variety of forms, exist in most liberal western democracies,⁸⁹ with the notable exception of the United States. In Canada, for example, section 319(2) of the Canadian Criminal Code provides that: “Every one who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of an offence.

In Britain, incitement to racial hatred was criminalised in 1965 through the Race Relations Act. It has remained an offence in the Public Order Act 1986 to stir up hatred against any racial group by the use of threatening insulting or abusive language or images.⁹⁰

www.indexonline.org/en/news/articles/2005/1/europe-should-freedom-of-speech-stop-at-holo.shtml (accessed 12 August 2007)

⁸⁸ Michel Rosenfeld “Conference: Hate Speech in Constitutional Jurisprudence: A Comparative Analysis” (2003) 24 *Cardozo L Rev* 1523.

⁸⁹ This point was specifically noted by the majority in *R v Zündel*, above n 13, para 169.

⁹⁰ Geoffrey Bindman “Outlawing Holocaust denial: The possibility of a more confident and vigorous prosecution policy” (28 March 1997) 147 (No 6785) *New Law Journal* 466

In New Zealand, it could be said that hate speech is prohibited under the Human Rights Act 1993.⁹¹ Section 61 makes it unlawful to publish or distribute "threatening, abusive, or insulting...matter or words likely to excite hostility against or bring into contempt any group of persons...on the ground of the colour, race, or ethnic or national or ethnic origins of that group of persons."⁹² Remedies are civil, not criminal. Criminal sanctions apply to convictions under section 131 of the Human Rights Act 1993, which prohibits speech "with intent to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons in New Zealand".

It is important to draw a distinction between general hate speech laws that are concerned with hatred or vilification towards certain groups, and speech that incites violence. The criminal law has long concerned itself with speech that incites violence, because it is imminent harm which society rightly has an interest in quelling. Hate speech regulation, as Rosenfeld points out, is "largely a post World War II phenomenon"⁹³ and, for the most part, does not concern itself directly with violence. The harm it seeks to address are words that provoke "fear, vulnerability and shame..."⁹⁴ and "victimise and alienate"⁹⁵ the recipient. As Rosenfeld writes:⁹⁶

the key question is not whether speech likely to lead to immediate violence ought to be protected, but rather whether hate speech not likely to lead to such

⁹¹ Although note the Office of Film & Literature Classification considers that the term "hate speech" has no legal significance in New Zealand. See Office of Film & Literature Classification "Submission to Government Administration Committee" (29 October 2004) www.censorship.govt.nz/pdfword/Hate%20Speech%20Inquiry%20Submission.pdf (accessed 20 August 2007).

⁹² Human Rights Act 1993, s 61 (a)-(c). New Zealand's legislation notably excludes sexual orientation from the grounds on which hostility is illegal. A parliamentary enquiry to the adequacy of the New Zealand legislation, prompted by the Court of Appeal's decision in *Living Word Distributors Limited v Human Rights Action Group* [2000] 3 NZLR 570 (CA) commenced in 2005. The issue is a controversial one in New Zealand: see Stuart Dye "Backlash on hate Speech Proposal" (March 18 2005) *New Zealand Herald* www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10115936 (accessed 21 August 2007).

⁹³ Rosenfeld, above n 88, 1525.

⁹⁴ Charles R Lawrence "If He Hollers Let Him Go: Regulating Racist Speech on Campus" 1990 *Duke Law Journal* 431, 461. Cited in Office of Film & Literature Classification, above n 92, 4.

⁹⁵ *Living Word Distributors Limited v Human Rights Action Group* [2000] 3 NZLR 570. para 67 (CA) per Thomas J. Cited in Office of Film & Literature Classification, above n 92, 5.

⁹⁶ Rosenfeld, above n 88, 1530.

immediate violence, but capable of producing more subtle and uncertain evils, albeit perhaps equally pernicious, ought to be suppressed or fought with more speech.

2 *The case for Holocaust denial as hate speech*

A variety of interlocking arguments are put forward as to why explicit Holocaust denial is a form of hate speech. It is first argued that Holocaust deniers are “defaming the dead”.⁹⁷ To deny the Holocaust is to deny survivors their horrific experience: it devalues them as people and demeans their human dignity. Guttenplan argues that:⁹⁸

[t]o fail to acknowledge the pain felt by Holocaust survivors at the negation of their own experience — or to treat such pain as a particularly Jewish problem which need not trouble anyone else — is to deny our common humanity.

Secondly, it is argued that Holocaust denial creates a feeling of anger, fear, and intimidation in Jewish people generally. There is no doubt, of course, that Holocaust denial is a form of anti-Semitism. The Institute for Jewish Policy Research, a United Kingdom think-tank, states that:⁹⁹

Holocaust denial is anti-Semitic not only because of the negative image of the Jew it implicitly depicts, but also because of its direct impact upon the feelings of Jews: it produces immeasurable offence and anger, and can cause those who are directly targeted by the material to feel fearful and intimidated.

The third argument made is that Holocaust denial is a form of hate speech because of the effects it has on other groups in society: anti-Semitic speech engenders anti-

⁹⁷ Elie Wiesel “Address at the Hofstra University Conference on Group Defamation and Freedom of Speech” (April 20, 1988). Cited by Professor Alan Dershowitz in “Debate: Freedom of Speech and Holocaust Denial”, above n 12, 567.

⁹⁸ D D Guttenplan, above n 87.

⁹⁹ Jewish Policy Institute “Combating Holocaust denial through law in the United Kingdom”, Jewish Policy Institute “Combating Holocaust denial through law in the United Kingdom” (Report No 3 of 2000) http://www.jpr.org.uk/Reports/CS_Reports/no_3_2000/index.htm (accessed 14 May 2007).

Semitism in others, leading to discrimination, or even worse consequences. Arthur Berney, recalling how Nazism started in the first place, puts this well:¹⁰⁰

These things are more than annoying and uncomfortable... To deny a people their history is to deny them the most essential element of their group existence. It is always a precursor to the subordination, diminishment and ultimately the destruction of a people.

The Supreme Court of Canada summarised all of the arguments in *R v Zündel*:¹⁰¹

Holocaust denial has pernicious effects upon Canadians who suffered, fought and died as a result of the Nazis' campaign of racial bigotry and upon Canadian society as a whole. For Holocaust survivors, it is a deep and grievous denial of the significance of the harm done to them and thus belittles their enormous pain and loss. It deprives others of the opportunity to learn from the lessons of history. To deliberately lie about the indescribable suffering and death inflicted upon the Jews by Hitler is the foulest of falsehoods and the essence of cruelty. Throughout their tragic history, the circulation of malicious false reports about the Jewish people has resulted in attacks, killings, pogroms and expulsions. They have indeed suffered cruelly from the publication of falsehoods concerning their culture.

Hate speech, and its consistency with free speech, is one of the most popular topics of the last decade of rights scholarship. Writing in this field is voluminous, and full discussion of hate speech is outside the scope of this paper. I do not argue against hate speech legislation *per se*, but instead seek to draw a distinction between speech denying the Holocaust, and hate speech.

3 *The distinction between hate speech and Holocaust denial*

There are important differences between Holocaust denial and hate speech. As Peter Teachout says:¹⁰²

¹⁰⁰ Professor Gerald Tishler in "Debate: Freedom of Speech and Holocaust Denial", above n 12, 572.

¹⁰¹ *R v Zündel*, above n 13, para 169 per Cory and Iacobucci JJ.

¹⁰² Teachout, above n 9, 670-671.

It is one thing to say a state may legitimately censor and punish speech that serves to incite racial suspicion and hatred under a law that makes that factor the central determining element; it is quite another to say a state may censor and punish the exact same speech because the views expressed fail to conform to some state-established, orthodox version of history.

Teachout states that “there are dangers presented by the latter type of law not presented by the former”.¹⁰³ It is those dangers – the unacceptability of state-sanctioned history enforced through the criminal law and the discouraging of legitimate historical scholarship – which I partly focus on in this paper.

Rosenfeld draws a distinction between “hate speech in form” and “hate speech in substance”. The former, he says, includes “obvious” hate speech such as crude racist insults or invectives. The latter, he says, may include utterances such as Holocaust denials or other coded messages that do not explicitly convey insults, but are nonetheless designed to convey hatred or contempt.¹⁰⁴ I argue that hate speech “in form” is probably a legitimate restriction on freedom of expression; “in substance” hate speech is objectionable.

It may well be that Holocaust denial speech in some contexts *is* hate speech that is rightly punished through the criminal law (“hate speech in form”). However, it cannot, I argue, be the case that *all* public denials of the Holocaust are implicated as hate speech. If a piece of Holocaust denial speech can be proven through the normal criminal process to lead to incitement of hatred against Jewish people, then that should present no difficulties.¹⁰⁵ There is academic¹⁰⁶ and legislative¹⁰⁷ support for

¹⁰³ Ibid.

¹⁰⁴ Rosenfeld, above n 88, 1527.

¹⁰⁵ In *Jones v Toben* [2002] FCA 1150, the Federal Court of Australia held that the respondent had published material on the World Wide Web which was reasonably likely to offend, insult, humiliate and intimidate Jewish Australians, thereby breaching Part IIA of the Racial Discrimination Act 1975 (Cth). Jones was the director of the Adelaide Institute, a Holocaust “revisionism” organization in Australia. A key part of the material published on the Web was Holocaust Denial: “To date, there has been no proof offered to the world... We proudly proclaim that to date there is no evidence that

that proposition. It is when bare, unvarnished Holocaust denial – the maintenance of a website, for example, or the publication through mail order of Holocaust denial literature – is criminalised, that problems, which I seek to ventilate in this paper, arise.

That there are situations where Holocaust denial is qualitatively and substantively different from mere hate speech is evidenced by the fact that some countries – Germany, notably – have different laws for each offence. In Germany, Article 130 of the Criminal Code prohibits attacks on human dignity by incitement to hate. Article 131 prohibits race-hatred writings. Article 185 creates the offence of insult. All of these provisions stand alongside article 130(3) which specifically prohibits Holocaust denial. These jurisdictions clearly contemplate that Holocaust denial *in and of itself* should be a crime.

IV EUROPE AND FREEDOM OF SPEECH

Having summarised Holocaust denial and European laws that prohibit it, in this next section of the paper I consider the background of the laws, focusing on Germany, the European Union, and the European Court of Human Rights.

millions of people were killed in homicidal gas chambers.” See para 12 of the judgment, per Carr J for the Court.

¹⁰⁶ Dan Meagher “Regulating History: Australian Racial Vilification Law and History Denial” [2005] UQLJ 29. The author argues that the Racial Discrimination Act 1975 (Cth) can regulate meaningfully history denial as racial vilification.

¹⁰⁷ On Friday 20 April 2007, The Minister of State for the Home Office (Baroness Scotland of Asthal) in response to a question from Lord Stoddart of Swindon in the House of Lords stated that:

“...successive [UK] Governments have taken the view that criminalising Holocaust denial in the UK would represent an unnecessary infringement of freedom of expression. It is of course the case that, if Holocaust denial is expressed in a way that is threatening, abusive, or insulting and incites racial hatred, or is likely to do so, then that would be unlawful under the Public Order Act 1986.” See Hansard of the House of Lords (20 April 2007) Column WA93.

www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70420w0001.htm (accessed 29 September 2007).

A Historical Background

It is trite, to say that "each society that respects basic values determines the position of freedom of expression in relation other freedoms according to its own history, institutions, sense of security, and tolerance of dissent."¹⁰⁸ This is certainly what Europe has done with Holocaust denial, for it is only in European countries that Holocaust denial is explicitly prohibited. The obvious and simple explanation for this is that it was in Europe where Nazism originated and where its horrific effects were felt the most. It is also unsurprising therefore that Austria and Germany have the toughest holocaust (in terms of punishment) denial laws in Europe, as it was in those countries where Nazism had its roots.¹⁰⁹ These states remain committed to ensuring that the conditions for the Holocaust and Nazism are never repeated.

B Germany as a Case Study

In Germany, "the experience with the abuse of freedoms that contributed to the demise of the Weimar Republic and the suppression of the National Socialist regime left a deep imprint upon the Basic Law [Germany's Constitution] and subsequent legislation."¹¹⁰ Germany's Basic Law was originally intended as a temporary constitution pending reunification with East Germany.¹¹¹ It established what has been called a "military democracy" in West Germany, where the State "has the right, if not the duty, to defend itself by suppressing anti-constitutional activities...The state

¹⁰⁸ Eric Stein "History against free speech: The German law against the "Auschwitz"-and other 'lies'" (1986) 85 Michigan Law Review 277, 278.

¹⁰⁹ As Lipstadt has put it "When there are attacks on Jewish institutions in Germany or Austria the civilized world reacts in a different way than when similar acts occur in Birmingham England. There is far higher sensitivity level to such behaviors when they occur in the countries which count the Holocaust as part of their national legacy. See

Comments by Professor Lipstadt, "Symposium: Criminalizing Holocaust Denial", above n 68.

¹¹⁰ Stein, above n 109, 279.

¹¹¹ David Weiss "Striking a difficult balance: Combating the threat of neo-Nazism in Germany while preserving individual liberties" (1994) 27 The Vanderbilt Journal of Transnational Law 899, 917.

need not constitutionally observe a stoical silence even in the face of verbal assaults on its constitutional structure.”¹¹²

The Basic Law commits itself to freedom of speech. Article 5(1) provides that everyone has the right to disseminate his or her opinions and the right to receive information from generally accessible sources. Press and broadcasting freedom are also guaranteed by the same article, which explicitly forbids censorship. However, that article is expressly subject to limitations defined in “the general laws, the provisions of laws for the protection of youth, and by the right to inviolability of personal honour.”¹¹³ The latter right is the most important right in the Constitution and more fundamental than even freedom of speech.

Freedom of expression is interpreted by the German Constitutional Court in the light of other guarantees in the Constitution.¹¹⁴ The German Constitution also incorporates the doctrine of abuse of rights. Article 18 reads: “[w]hoever abuses freedom of expression...in order to combat the free democratic basic order, shall forfeit these basic rights.” Stein posits that “[t]he doctrine evolved by the Federal Constitutional Court postulates a community employing the law in the defense of the Basic Law’s political values: free speech claims must be weighed against the values of human dignity and personal honor that are grounded in the Basic Law itself.”¹¹⁵

The result of these constitutional doctrines is a legal culture that readily tolerates fairly extensive intrusions on freedom of speech. For example, Article 21(1) of the Constitution states that political parties may be freely established, but section 2 empowers the Constitutional Court to eliminate those parties that seek to impair or abolish the free democratic basic order.¹¹⁶ Within the first seven years of the inception of the Basic Law, two parties were banned by the Constitutional Court – the Socialist

¹¹² Donald P Kommers “The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany” (1980) 53 S Cal L Rev 657, 674.

¹¹³ Article 5(2), German Basic Law.

¹¹⁴ Eric Barendt “Free Speech in Australia: A Comparative Perspective” (1994) 16 Sydney L Rev 149, 158-159.

¹¹⁵ Stein, above n 109, 279.

¹¹⁶ Weiss, above n 112, 917.

Reich Party in 1952 and the Communist Party of Germany in 1956. The Court held that "it is fundamentally inconsistent to allow parties to function in a constitutional system that presupposes basic values rejected by those parties".¹¹⁷ Neo-Nazi symbols, slogans, and paraphernalia are also prohibited. And as described above, there are extensive laws relating to incitement of hatred, insult, and Holocaust denial.¹¹⁸

The question of whether Holocaust denial laws can be reconciled with free speech came before the German Constitutional Court in 1994 in the *Holocaust Denier* case.¹¹⁹ A far-right party in Germany had issued David Irving with an invitation to speak at a conference. He was allowed to enter Germany by the government only after agreeing not to make any statements constituting Holocaust denial. This was challenged in the Constitutional Court as an unjustified interference with freedom of expression under the Basic Law.¹²⁰ The Constitutional Court affirmed the judgment of the lower court, which dismissed the challenge. In doing so, the Court commented:¹²¹

The very historical fact that humans were segregated according to their origin under the so-called Nuremberg laws, and were robbed of their individuality with a view to their extermination, gives the Jews living in the Federal Republic a special personal relationship with their fellow citizens; in this relationship the past is present even today. They are entitled, as a component of their personal self-image, to be viewed as a part of a group, singled out by fate, to which all others owe a particular moral responsibility, and that is an aspect of their honor. The respect of this self-image constitutes for every one of them one of the guarantees against a repetition of discrimination and a basis for their life in the Federal Republic. Whoever attempts to deny these events deprives each and every one of them of the personal worth to which they are entitled.

¹¹⁷ Peter E Quint "Free Speech and Private Law in Germany Constitutional Theory" (1989) 48 MD L Rev 247, 251. In 2003 the German government moved to ban the National Democratic Party (the NPD), but the move foundered after it was found that important witnesses, including the NPD chief for the state of North Rhine-Westphalia, had worked as informants for the Office for the Protection of the Constitution. David Crossland "Letter from Berlin: Germany seems powerless to outlaw far-right NPD" SpiegelOnline International (28 August 2007). <http://www.spiegel.de/international/germany/0,1518,502487,00.html> (accessed 29 August 2007).

¹¹⁸ Weiss, above n 112, 917.

¹¹⁹ 90 BVerfGE 245.

¹²⁰ Teachout, above n 9, 671.

¹²¹ Cited and translated in Stein, above n 109, 303

In other words, as Teachout states, "freedom of speech in Germany is 'protected' but that freedom is limited by the requirement that one may only think and speak of members of this particular group in terms of the group's own 'self-perception'"¹²² This is an extraordinary restriction on free speech, but is perhaps understandable in light of Germany's past.

C Europe

The European Union as an entity has set itself resolutely against racism, xenophobia, and Holocaust denial. However, the constituent states of the EU have never managed to reach agreement on whether or not Holocaust denial as a specific offence should be a crime throughout the EU. Criminal justice is an issue which is still the preserve of national governments, and unanimity within the EU is needed before EU legislation can proceed on these fronts.

The European Parliament on April 21 1993 passed a "Resolution on the resurgence of racism and xenophobia in Europe and the danger of right-wing extremist violence"¹²³ The resolution, "emphasis[ed] the insidious nature of revisionist theories, some of which go so far as to claim that the Holocaust did not take place", and considered "essential" a number of measures, including "the adoption by Member States of appropriate legislation condemning any denial of the genocide perpetrated during the Second World War and any justification and attempt at rehabilitation of the regimes and institutions which were responsible for and parties to it".

In March 1996, the Council of Justice and Home Affairs of the European Union agreed to implement a "Joint Action Plan against Racism and Xenophobia". The EU proposed that all Member States should make it a criminal offence: "to deny publicly

¹²² Teachout, above n 9, 672.

¹²³ Resolution A3-0127/93 (April 21 1993).

the crimes committed by those arraigned at Nuremberg in a manner which insults an ethnic group." However, after much debate, the legislation was watered down to a proposal that all states should prohibit conduct which is "threatening abusive or insulting and is accompanied with the intention or is susceptible to incite racial hatred."¹²⁴

In 1997, the EU established a European Monitoring Centre for Racism and Xenophobia, as part of European Year against Racism.¹²⁵ The EU Commission proposed an EU-wide anti-racism law in 2001, but no agreement on its wording could be reached between the states.¹²⁶ When it held the Presidency of the Union in 2005, Luxembourg tried to push through legislation to unify legal standards for Holocaust denial, but was blocked by Italy on the grounds that the proposed rules breached freedom of speech.¹²⁷ Recently, as has been discussed above, Germany attempted to do the same in the first six months of 2007.

D European Court of Human Rights

The European Court of Human Rights has consistently upheld the validity of hate speech legislation, as well as Holocaust denial laws, refusing to rule them inconsistent with Article 10 of the European Convention on Human Rights ("ECHR"). The Court uses Article 17 (prohibition of abuse of rights) of the ECHR to declare the claims manifestly unfounded.

One recent decision is particularly noteworthy. In *Garaudy v France*, the ECHR was required to consider a challenge to the French courts' conviction of the applicant for

¹²⁴ Bindman, above n 91. Note also that declarations were issued by Greece, France, Denmark, and the United Kingdom: Dominic McGoldrick and Therese O'Donnell "Hate speech laws: Consistency with national and international human rights law" (1998) 18 *Legal Studies* 453, 457.

¹²⁵ McGoldrick and O'Donnell, above n 125, 459.

¹²⁶ Reuters "No EU ban on swastika, Holocaust denial: Germany (January 29 2007) *Washington Post* Washington www.washingtonpost.com/wp-dyn/content/article/2007/01/29/AR2007012901600.html (accessed 30 September 2007).

¹²⁷ Deutsche Welle, above n 14.

the denial of crimes against humanity, the publication of racially defamatory statements and incitement to racial hatred.¹²⁸ The Court stated:¹²⁹

There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust...does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others.

V HOLOCAUST DENIAL AND THE PRINCIPLES OF FREE SPEECH

In this next section of the paper I argue that Holocaust denial laws are wrong in principle. I first explain the theoretical underpinnings of the “marketplace of ideas” (and the criticism of it), before considering how Holocaust denial fits into that conceptual framework. I posit that the importance of the marketplace of ideas requires Holocaust denial speech to be unfettered. Finally, I argue that Holocaust denial laws raise real problems of consistency and the neutrality of the liberal State.

A The Theory of the “Marketplace of Ideas”

Thomas Emerson’s 1963 seminal article “Toward a General Theory of the First Amendment”¹³⁰ is often cited for delineating the basic rationales for why freedom of important is important and should be protected. Emerson’s second rationale was “as

¹²⁸ *Garaudy v France* (Inadmissibility decision of the European Court of Human Rights (Fourth Section) of 24 June 2003, Application No 65831/01).

¹²⁹ *Ibid*, 23 of the official English translation of excerpts from the decision.

¹³⁰ Thomas Emerson “Toward a General Theory of the First Amendment” (1963) 72 *Yale LJ* 877

a means of attaining the truth”¹³¹. He wrote that “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.”¹³²

The idea of “the search for truth” is close related to the marketplace of ideas, perhaps the most famous and pervasive idea underlying freedom of speech. Its origins stretch back to John Milton and the famous liberal philosopher, John Stuart Mill. In *Areopagitica*, Milton wrote:¹³³

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?

And in his celebrated tract *On Liberty*, Mill wrote:¹³⁴

The peculiar evil of silencing the expression of opinion is that it is robbing the human race ... those who dissent from the opinion still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose the clear perception and livelier impression of truth, produced by the collision with the error.

The most famous judicial expression of these ideas came in *Abrams v United States*, decided in 1919. Justice Oliver Wendell Holmes wrote in dissent:¹³⁵

If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition...But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in

¹³¹ Ibid, 879.

¹³² Ibid, 882.

¹³³ John Milton *Areopagitica* (ed. Sir Richard C Jebb) (1971), (Ams Pr Inc, Cambridge) 43.

¹³⁴ John Stuart Mill, above n 1, 21.

¹³⁵ 250 US 616 (1919) Holmes J (dissenting)

ideas – that the best test of truth is the power of the thought to get accepted in the competition of the market, and truth is the only ground upon which their wishes safely can be carried out.

1 *Good ideas v bad ideas*

A number of points of principle flow from the above statements. The first is that “good ideas” (truth) will defeat “bad ideas” (like Holocaust denial, for example) so long as discussion remains possible. In the Supreme Court of Canada’s words, the “process will proliferate an abundance of varied perceptions which will expose the weaknesses of certain ideas and the strengths of others.”¹³⁶ According to Rosenfeld, “Mill’s strong endorsement of free speech was rooted in his optimistic belief in social progress.... even potentially harmful speech should be tolerated as its potential evils could best be minimized through open debate.”¹³⁷

Rosenfeld notes that although expressing similar sentiments, Justice Holmes was “driven by skepticism and pessimism.” His justification for the free marketplace was justified by pragmatism. Unlike Mill, Holmes expressed grave doubts about the possibility of truth. Because of this, Holmes justified his free marketplace approach on pragmatic grounds:¹³⁸

Since most strongly held views eventually prove false, any limitation on speech is most likely grounded on false ideas....a marketplace of ideas was thus likely to lower the possibility that expression would be needlessly suppressed based on falsehoods; and it would encourage most people who tend stubbornly to hold on to harmful or worthless ideas to develop a healthy measure of self-doubt.

2 *Governmental incompetence*

¹³⁶ *Committee for the Commonwealth of Canada v Canada* [1991] 1 SCR 139, para 74 (SCC) La Forest J.

¹³⁷ Rosenfeld, above n 88, 1534.

¹³⁸ *Ibid.*

The second point is that governments, by their very nature are not competent in the matters of truth and falsity; in fact they are positively dangerous. As Schauer states:¹³⁹

Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of government determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a general sense.

One of the reasons for this is that the concept of "truth" is not immutable. What is valued by society is constantly changing in light of changing circumstances. Moreover, the "truth" is subjective concept. Government cannot hope to be a proper judge: "one generation's truth is another generation's fallacy."¹⁴⁰

Robert Sharpe wrote in 1987:¹⁴¹

The essence of the market-place of ideas argument is that control and regulation of expression is intolerable because we can trust no government to know the truth. *Those who purport to legislate the truth invariably turn out to be tyrants. The market-place of ideas argument prescribes an open process precisely because we cannot agree on what is the truth.* [Emphasis added.]

3 *Content neutrality*

The third point, which flows from the above, is that government should remain neutral as to what views find favour with the citizenry and what views do not. It is for people, not governments, to decide what speech is acceptable, and what is not. People should be allowed to conceive of, and work towards, their own conception of "the good life" and it is governments role to allow them to do that by acting as a

¹³⁹ Frederic Schauer *Free Speech: a Philosophical Enquiry* (Cambridge University Press, Cambridge) 86.

¹⁴⁰ *Committee for the Commonwealth of Canada v Canada*, above n 137, para 75 La Forest J.

¹⁴¹ Robert Sharpe "Commercial Expression and the Charter" (1987) 37 UTLJ 229, 236.

neutral arbiter, protecting everyone's *ability* to speak freely (by not restricting it); but not involving itself with the *content* of that speech.

This idea is regularly referred to as "content (or viewpoint) neutrality" and is another core idea underlying freedom of speech. Some messages should not be favoured over others on the basis that one prefers the messages they contain. This is the "bedrock principle" of the First Amendment: the "government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."¹⁴² The Supreme Court stated this aptly in 1943 in *West Virginia State Board of Education v Barnette*, which involved a challenge to a West Virginia law that required students to pledge allegiance to a US flag at the start of each school day.¹⁴³ Justice Robert Jackson wrote for the Court:¹⁴⁴

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

The famous case of *R.A.V v City of St Paul*¹⁴⁵ also provides a good illustration. The defendant in the case placed a burning cross on the lawn of a black family that had moved into a formerly all-white neighbourhood. He was charged under the St Paul bias-motivated crime ordinance which prohibited "burning crosses which caused alarm or resentment in others on the basis of race, color [sic], creed, religion or gender". The Supreme Court struck down the ordinance as unconstitutional on the basis that it prohibited speech solely on the basis of the subjects the speech addressed.¹⁴⁶ In Justice Scalia's words, "[the city of] St Paul has no such authority to

¹⁴² *Texas v Johnson* 491 US 397, 414 (1989) Stevens J concurring.

¹⁴³ 319 US 624 (1943)

¹⁴⁴ *Ibid*, 642.

¹⁴⁵ 505 US 377 (1992)

¹⁴⁶ *Ibid*, 396.

licence to side of a debate to fight freestyle, while requiring the other to fight Marquis of Queensberry rules.”¹⁴⁷

Another example of content neutrality, and one that has particular resonance given the subject-matter of this paper, comes from the case of *Collin v Smith*.¹⁴⁸ The Court of Appeal for the Seventh Circuit in the United States held that the First Amendment protected from prior restraint the planned march of a group of neo-Nazis, in full SS uniform, wearing swastikas, through Skokie, Illinois, a suburb of Chicago where a large number of Holocaust survivors lived. The suburb was chosen for that very reason. The Court held that the march was protected speech and invalidated the Skokie group defamation law (the means by which the village had tried to stop the march). In a powerful statement the Court stated that: “It is, after all, in part the fact that our constitutional system protects minorities unpopular at a particular time or place from governmental harassment or intimidation that distinguishes life in this country from life under the Third Reich.”¹⁴⁹

Freedom of speech thus applies to minority beliefs which the majority regards as wrong or false.¹⁵⁰ As the Supreme Court of Canada said in *R v Zündel*, “tests of free expression frequently involve a contest between the majoritarian view of what is true or right and an unpopular minority view.”¹⁵¹ The view of the majority does not need constitutional protection: it has credibility because it is expressed by the majority. Freedom of speech equally protects those who wish to dissent from the status quo ante.

The corollary is that speech that is considered distasteful, wrong, abhorrent, and offensive is protected, just as speech that is interesting, fulfilling, and pleasant. The Supreme Court of the United States put this well in 1929:¹⁵²

¹⁴⁷ Ibid, 392 Scalia J.

¹⁴⁸ 578 F 2d 1197 (7th Cr 1978).

¹⁴⁹ 578 F 2d 1201 (7th Cr 1978).

¹⁵⁰ *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 SCR. 927, 968 (SCC).

¹⁵¹ *R v Zündel*, above n 13, para 22.

¹⁵² *Schwimmer v United States* 279 US 644 (1929).

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate.

In the marketplace of ideas, some speech will be made that is offensive, anger-inducing, and even hurtful. All, under a libertarian conception of freedom of speech, are protected for the reasons given above: it is not for government to choose between right and wrong, good and evil, acceptable and unacceptable. Lord Justice Sedley put this well in a recent case in the United Kingdom:¹⁵³

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak inoffensively is not worth having.

4 *Counter-speech*

The fourth point to be made is that for “good ideas” to defeat “bad ideas”, counter-speech must be engaged in; and is far more effective than censorship. I consider this below. As Justice Brandeis wrote in *Whitney v California*, another classic First Amendment case (emphasis added):¹⁵⁴

The fitting remedy for evil counsels is good ones...[N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, *the remedy to be applied is more speech, not enforced silence*” [Emphasis added.]

B *Criticism of the marketplace of ideas*

¹⁵³ *Redmond Bate v Director of Public Prosecutions* (1999) 163 JP 789, 791 (DC) Sedley LJ.

¹⁵⁴ 274 US 357 (1927) Brandeis and Holmes JJ.

The marketplace of ideas rationale for free speech has not been without its critics. The noted American constitutional scholar, Lawrence Tribe, for example, has noted that it “may at times serve liberty well, but it relies too dangerously on metaphor for a theory that purports to be more hard-headed than literary.”¹⁵⁵ Other concerns are more pressing. Calling the theory “incoherent”, Barendt notes that the statement “the best test of truth is the power of the thought to get itself accepted in the competition of the market” is a denial of the notion of objective truth: “The success of an idea in the market-place does not necessarily show its truth, but perhaps only its attractiveness.”¹⁵⁶

Other objectors to the marketplace of ideas concern themselves with the nature of that market, particularly disparities in wealth and power which may hinder access to the market. A “free trade in ideas” cannot occur when some people are disenfranchised and unable to have their voice heard in the market. Other speakers, such as those with greater access to the media, may “dominate, shout down, or silence weaker but possibly truer voices.”¹⁵⁷ Moreover, citizens in the market may not have the ability to choose between competing ideas. Douglas-Scott notes that Mill assumed a “middle class, educated audience whose members would be able to make up their own minds.”¹⁵⁸ Moreover, people approach the marketplace with biases, and assumptions, and culturally conditioned values, reducing the ability of speech to persuade and be accepted.¹⁵⁹

The marketplace of ideas may also produce undesirable outcomes. Douglas-Scott makes the point that “if truth is merely that which survives in any particular marketplace of ideas, then surely this view implies that National Socialism was “right” in Germany in the 1930s...” and wonders if people are willing “to accept the

¹⁵⁵ Cited in A Wayne MacKay “Freedom of Expression: Is it All Just Talk?” (1989) 68 Can Bar Rev 713, 718.

¹⁵⁶ Barendt, above n 115, 156.

¹⁵⁷ Sionadh Douglass-Scott “Hatefulness of Protected Speech: A Comparison of the European and American Approaches” (1999) 7 Wm & Mary Bill of Rts J 305, 336

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

implications of this unpalatable form of moral relativism.”¹⁶⁰ Despite these valid objections, and many more which space prevents me from addressing, the marketplace of ideas rationale provides a compelling justification for why free speech is important. It also provides a compelling justification for why Holocaust denial laws are unprincipled.

C The Marketplace of Ideas and Holocaust Denial

The explication of the above principles indicates the major objections to the criminalization of Holocaust denial. Holocaust denial laws indicate a lack of faith – in the marketplace of ideas, the historical truth of the Holocaust, and people generally. Conversely, the laws place huge trust in government.

First, holocaust denial laws show a profound lack of faith in the marketplace of ideas. The Holocaust is one of, if not the most documented historical events in world history.¹⁶¹ It seems bizarre then, to argue that laws are required to stop people arguing against obviously verifiable fact.¹⁶²

Secondly, Holocaust denial laws indicate a lack of faith in the evidence that the Holocaust occurred. It is as if the government has something to hide: why else would they ban denial of history, if the evidence for that history was so obvious?¹⁶³ The effect of that may in fact be very dangerous. Deborah Lipstadt argues that prohibiting denial “renders the censored item into forbidden fruit, making it more appealing, not less so”.¹⁶⁴ She adds that “it seems to suggest that we don’t have the historical documentation to prove the deniers are liars and distorters and must, therefore, fall back to a “reliance” on the law.”¹⁶⁵

¹⁶⁰ Ibid.

¹⁶¹ “Policing the Past”, above n 34, 70.

¹⁶² Alan Dershowitz “Symposium: Criminalizing Holocaust Denial”, above n 24.

¹⁶³ Ibid.

¹⁶⁴ Deborah Lipstadt “I was not dancing the Hora” (February 22 2006)

<http://lipstadt.blogspot.com/2006/02/i-was-not-dancing-hora.html> (accessed 28 September 2007) [“I was not dancing the Hora”]

¹⁶⁵ Deborah Lipstadt “Symposium: Criminalizing Holocaust Denial”, above n 24.

Thirdly, Holocaust denial laws show a distinct lack of faith in people in a democratic society with “citizens to be treated as children, guided and guarded at every turn”.¹⁶⁶ Dershowitz again:¹⁶⁷

Today it’s anti-Holocaust material. Tomorrow it’s something else. And in the end, the choice is between a system of censorship, whether it’s civil, criminal, administrative or judicial, and a basic trust in the ability of citizens to choose what they want to believe and what they want to reject. I’m for trust.

Finally, Holocaust denial laws also place enormous trust in government to be able to distill and discern truth. It is not for government to be in the business of history verification. “Truth” is a concept that changes. It is not immutable. All that can be done is for governments to equip citizens with the tools to decide what “the truth” is for themselves, rather than dictate what it is. Professor Alan Dershowitz, again, makes this point well:¹⁶⁸

...if the government can say the Holocaust occurred, then another government somewhere sometime, can say it didn’t occur. And I want that to be left to truth. From my experience, government is one of the worst judges of truth.

Dershowitz also makes the point that what is “the truth” can change:¹⁶⁹

In the end, the worst truths are the grand truths. Women belong in the home. Boy, was that a grand truth. That was a truth that was recognized for years and years and years. Jesus is god. Jehovah is God. The earth is at the centre of the universe. The grander the truth, the bigger the lie. Segregation is bad. That’s a grand truth today. Segregation is good. That was a grand truth a few years ago.

D Adopting the Marketplace of Ideas Rationale

¹⁶⁶ Timothy Garton-Ash, above n 21.

¹⁶⁷ Professor Alan Dershowitz “Debate: Freedom of Speech and Holocaust Denial”, above n 12, 584.

¹⁶⁸ *Ibid*, 571.

¹⁶⁹ *Ibid*, 582.

There are two major effects which result from the adoption of the marketplace of ideas in relation to Holocaust denial. The first is that Holocaust denial speech is tolerated and able to be accessed and disseminated without punishment. That is the price that is paid for living in a society that does not judge the validity (the content) of speech, and a society that does not have a government that sits in judgment over history. Alan Dershowitz puts this well:¹⁷⁰

[I] support publication of Holocaust denial material even though I know it hurts, I know it causes pain, and I know that somebody who suffered the Holocaust can have no worse fate than having been looked in the eye by somebody who says it didn't happen...we have to tolerate a great deal of very annoying, very uncomfortable, very erroneous, very wrong-headed lies.

The second effect is the raising of a troubling question: once the option of legal prohibition through the criminal law is closed off, how does one respond to Holocaust denial? I argue below that the consistent and principled thing to do is to take Holocaust deniers on and prove them wrong; to ridicule them, shame them and embarrass them through the means available to those who have truth on their side.

E Consistency

A ban on Holocaust denial also raises problems of consistency. If denial of the Jewish Holocaust is acceptable, why not other atrocious crimes against humanity? As Timothy Garton-Ash put it in *The Guardian* recently, arguing against the proposed EU-wide ban on Holocaust denial:¹⁷¹

Let the British parliament now make it a crime to deny that it was Russians who murdered Polish officers at Katyn in 1940. Let the Turkish parliament make it a crime to deny that France used torture against insurgents in Algeria. Let the German parliament pass a bill making it a crime to deny the existence of the Soviet

¹⁷⁰ Ibid, 569.

¹⁷¹ Timothy Garton-Ash, above n 21.

gulag. Let the Irish parliament criminalise denial of the horrors of the Spanish Inquisition. Let the Spanish parliament mandate a minimum of 10 years' imprisonment for anyone who claims that the Serbs did not attempt genocide against Albanians in Kosovo. And the European parliament should immediately pass into European law a bill making it obligatory to describe as genocide the American colonists' treatment of Native Americans. The only pity is that we, in the European Union, can't impose the death sentence for these heinous thought crimes. But perhaps, with time, we may change that too.

Sadly, this process has already occurred. On 12 October 2006 the French parliament passed a law that made denial of the genocide against the Armenians a punishable offence.¹⁷² Ironically, in Turkey it is an offence to publicly state that Turkey *committed genocide* against the Armenians. Perhaps even more unfortunately, the Armenian genocide law is only the latest in a series of French laws that deal with historical issues.¹⁷³ The wellspring from which these laws have flowed is the 1990 Gaysot Act, which criminalised the denial of the Holocaust. Pierre Nora states that:¹⁷⁴

This was the beginning of an official version of history. This path, which was taken with the best intentions, has led to more and more groups wanting their interpretation of history to be prescribed by law.

As soon as Germany announced that it would push for an EU-wide ban on Holocaust denial, Latvia announced that it wanted the proposed law to also include provisions about the Soviet occupation of its country.¹⁷⁵ Such difficulties occur, of course, when governments get into the business of dictating what is historical truth and what is false. The criminal law should not be being used to enforce two states' differing accounts of history. It should be left to historians.

¹⁷² Sabine Seifer (EuroTopics) "Should Holocaust Denial be Banned?" (18 April 2007) www.eurotopics.net/en/magazin/holocaust_leugnung_2007_04/debatte_holocaustleugnung/ (accessed 29 September 2007).

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ EUBusiness.com "Latvia wants anti-totalitarian clause in EU racism law" (14 February 2007) www.eubusiness.com/news_live/1171476010.08/ (accessed 28 September 2007).

In and of itself, the objection that “if you ban one you have to ban all the others”, is not a particularly compelling argument (the easy retort is that, consistent with principle, a ban on the denial of all demonstrably proven atrocities would be acceptable). However there are two other important points to make. The first is that the more speech that is prohibited, the greater the risk of legitimate and non-harmful speech being captured by the ban, such as legitimate historical scholarship. I explore this practical argument in more detail below.

The second point is that if only denial of the Jewish Holocaust is banned, then the State is “abandon[ing] its putative neutrality in order to protect the sensitivities of a particular group within a heterogeneous community”.¹⁷⁶ This is because the State is “provid[ing] the facticity of the Holocaust a degree of legal insulation not offered other facts.”¹⁷⁷ The conclusion is therefore that “perhaps...it can be argued that Holocaust denial...insults the very notions of meaning upon which the liberal concept of public discourse is predicated...”¹⁷⁸

One retort to this may be that the Holocaust is a unique event in world history, so the law is justified in treating it differently. In one sense, that is true: no holocaust has ever killed so many people, in such a systematic, ritualistic, and barbaric manner. In other senses though, the Holocaust just sits as a particularly gruesome example of the ability of people to fall prey to animal instincts and descend into barbarism.¹⁷⁹ The differences between Armenia, Srebrenica, and Rwanda of 1994 are not vast: only lives lost, method, and location. The underlying idea remains the same: which is precisely why other groups are attempting to have their conception of history inserted into law.

¹⁷⁶ “Policing the Past”, above n 34, 71.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ Lipstadt rejects the notion that the Holocaust was “uniquely unique”. According to her, there is no historical event which is “*sui generis*”: “every event can be compared and contrasted with another event.” She prefers the term, “unprecedented”. See Interview with Deborah Lipstadt on Three Monkeys Online, above n 64.

VI RESPONDING TO HOLOCAUST DENIAL

The marketplace of ideas rationale for free speech dictates that the answer to Holocaust denial is counter-speech: not to use the criminal law to censor speech, but to argue against Holocaust deniers and prove them wrong. As Roger Kimball says:¹⁸⁰

The best way to delegitimize something like Holocaust denial is to subject it to the astringent light of public scrutiny, not force it to fester in the fetid corners of whispered rumor and superstition.

Or, as Deborah Lipstadt has stated:¹⁸¹

Rather than law, there is another "weapon" in our arsenal. That is the quick and forceful condemnation by scholars, political and religious leaders, and other people of stature of denial and deniers.

Below I suggest four ways in which Holocaust deniers can be argued against: using the power of truth, through public opprobrium, information dissemination, and education. I then consider the dilemma that historians face when asked to "debate" Holocaust deniers in public.

A *The Power of Truth*

The power of truth to destroy the ideas of Holocaust deniers was seen clearly in the *Irving v Lipstadt* trial of 2000.¹⁸² In 1993 Penguin Books published Deborah Lipstadt's book *Denying the Holocaust: The Growing Assault on Truth and Memory*.¹⁸³ In it, David Irving was described as:

¹⁸⁰ Roger Kimball in "Symposium: Criminalizing Holocaust Denial", above n 68.

¹⁸¹ Deborah Lipstadt on Three Monkeys Online, above n 64

¹⁸² *Irving v Lipstadt*

¹⁸³ "Denying the Holocaust", above n 40.

one of the most dangerous spokespersons for Holocaust denial. Familiar with historical evidence, he bends it until it conforms with his ideological leanings and political agenda. A man who is convinced that Britain's great decline was accelerated by its decision to go to war with Germany, he is most facile at taking accurate information and shaping it to conform to his conclusions.

Irving issued a writ of defamation in 1996 after Penguin, the publishers, refused to withdraw the work. In response, Lipstadt relied on the defence of justification (truth), so that Irving's methods as an historian were put on trial, rather than the Holocaust itself. The trial began in early January 2000 and ran until mid-March. Irving acted as his own counsel. Lipstadt put together a team of top libel lawyers from the United Kingdom to defend the case, as well as expert historians to provide evidence.

In his eventual judgment, Gray J found that: "Irving treated the historical evidence in a manner which fell far short of the standard to be expected of a conscientious historian", that he "misrepresented and distorted the evidence which was available to him", that his denial of the existence of gas chambers and the systematic nature of the murders of the Jews was "contrary to evidence",¹⁸⁴ and that "the Defendants had established that Irving had a [right-wing, pro-Nazi] political agenda. It is one which, it is legitimate to infer, disposes him, where he deems it necessary, to manipulate the historical record in order to make it conform with his political beliefs".¹⁸⁵

The *Irving v Lipstadt* trial was a shattering blow for Holocaust deniers. This has even been recognized by the deniers themselves. Bradley Smith – who created CODOH – has said:¹⁸⁶

Then there was the stupidly conceived libel suit against Deborah Lipstadt, where during the trial he was brilliant and wrong-headed and utterly full of himself. Irving's defeat at that trial was the most serious single blow that revisionism has

¹⁸⁴ Cited in McKinnon, above n 31, 12.

¹⁸⁵ *Ibid.*

¹⁸⁶ Bradley R Smith "Will David Irving Betray Himself, and Us" (November 27 2005) <http://mylifeasaholocaustrevisionist.blogspot.com/2005/11/will-david-irving-betray-himself-and.html> (accessed 12 September 2007)

ever received. Only last week a correspondent reminded me that it was the Lipstadt trial that convinced serious people that, okay, revisionists had taken an interesting run at the Holocaust story, they had failed in full view of the Western world, and there was no reason to worry about Holocaust revisionism any longer.

B Public Opprobrium

There have been notable instances of public revulsion, led by opinion-makers and leaders, at Holocaust deniers. For example, international pressure by citizens and criticism by other leaders forced the Croatian President Franjo Tudjman to publicly retract statements in his book doubting that the Holocaust had taken place. In Austria, the Freedom Party leader Jorg Haider was ostracized for his comments that appeared favourable to the SS.¹⁸⁷ In France, the far-right leader of the National Front, Jean Marie Le Pen, has been ridiculed for questioning the existence of the gas chambers and stating that the Holocaust was a “detail of history” in 1987.¹⁸⁸ When the Iranian President, Mahmoud Ahmadinejad, commented in 2006 that the Holocaust was a “myth”, he faced mass opprobrium from the international community.¹⁸⁹

The *Collin v Smith* case discussed above provides evidence of the community’s ability to mobilise in support of the concept of truth and against racist views. At first glance, the decision is shocking: how could the courts countenance a neo-Nazi rally through a public street, deliberately designed to offend Holocaust survivors and their families? But the end result of the case, which is rarely reported, is actually quite inspirational. The organisers of the march moved the demonstration to a sparsely populated area of Chicago because of the massive public backlash against them. But

¹⁸⁷ Raphael Medoff “Likely PA Prime Minister a Holocaust-Denier” (February 26 2003) www.frontpagemag.com/Articles/Read.aspx?GUID={FFC2DC9C-82D3-4A6A-9B9B-1FE22B9C5BD4} (accessed 17 September 2007).

¹⁸⁸ BBCNews “Le Pen WWII remark triggers probe” (12 January 2005) <http://news.bbc.co.uk/2/hi/europe/4169963.stm> (accessed 16 September 2007).

¹⁸⁹ Karl Vick “Iran’s President Calls Holocaust ‘Myth’ in Latest Assault on Jews” (December 15 2005) *Washington Post* A01 Washington www.washingtonpost.com/wp-dyn/content/article/2005/12/14/AR2005121402403.html

counter-protestors followed, so at the eventual march, counter-protestors massively outnumbered the neo-Nazis. As Teachout says:¹⁹⁰

The Skokie controversy played out, in other words, exactly as Justice Brandeis would have predicted. The noxious ideas were publicly ventilated, a previously inert public was roused to action, and there was vital public discussion of the issues, both locally and nationally, and in the end the whole event proved a public relations disaster for the march promoters.

Indeed, Rosenfeld states:¹⁹¹

the actual march by the Neo-Nazis did much more to showcase their isolation and impotence than to advance their cause. Under those circumstances, allowing them to express their hate message probably contributed more to discrediting them than a judicial prohibition against their march.

C *Information Dissemination on the 'net as Counter-speech*

I have discussed (above) the quick uptake of the internet by Holocaust deniers, who recognised its enormous potential to spread their message. Initially, those opposed to deniers took a while to respond. However, the internet is now full of sophisticated anti-denier websites making their case. The Nizkor Project¹⁹² for example contains a rich array of factual background material on the Holocaust; with common claims about the Holocaust by deniers extensively rebutted. McVay links Holocaust denial and hate sites directly with his site and asks the webmasters of those sites to link their sites with his.

The site sits in contradistinction to the Simon Wiesenthal Center which is in favour of Holocaust denial bans.¹⁹³ There are other websites on the internet that fight against Holocaust denial, such as the Holocaust History Project

¹⁹⁰ Teachout. Above n 9, 682.

¹⁹¹ Rosenfeld, above n 88, 1523.

¹⁹² www.nizkor.org

¹⁹³ Teachout, above n 9, 688, fn 148.

(www.holocausthistory.org). In July 2006, the United States, Germany and the United Kingdom signed an agreement to make public 30 million Nazi files describing the implementation of Holocaust policy.¹⁹⁴ It is to be hoped that these documents will reach an audience on the internet. All the transcripts and arguments presented in the *Irving v Lipstadt* trial are also available on the internet at www.hdot.org.

D Education

Public education about the Holocaust is very important. Rather than censorship, "Holocaust denial speech should become the occasion for Holocaust education."¹⁹⁵ This operates as a way of countering the deniers, because it promotes the truth. Lipstadt makes the point that:¹⁹⁶

[t]he best way to counter Holocaust deniers is to teach as many people as possible this history. That is why courses on history of the Holocaust have proven so popular and important. Students who take those courses will never fall prey to the David Irving-like distortions.

Western societies since World War II have done an enormous amount to educate citizens about the Holocaust. There are many Holocaust memorials and museums, the most famous being the Holocaust Memorial Museum in Washington, DC and the Holocaust memorial in Berlin. There are Holocaust days of remembrances in many countries.¹⁹⁷ Many popular films have been made about the Holocaust, such as the Academy-award winning *Schindler's List*, which graphically reenacted the brutality and barbarism of the Nazi regime. The Holocaust is the subject of countless documentaries. Perhaps most importantly, the Holocaust is a core part of most school history curriculums.

¹⁹⁴ Ibid.

¹⁹⁵ Alan Dershowitz "Symposium: Criminalizing Holocaust Denial", above n 24.

¹⁹⁶ "I was not dancing the Hora", above n 165.

¹⁹⁷ Italy designated January 27 as "the day of remembrance of the Holocaust" in 2000 (giornata della memoria della Shoah) See Fronza, above n 84, 609.

E The dilemma: to debate or not to debate?

One interesting question arising out Holocaust denial is whether or not historians and other scholars should actually engage with deniers in debate in public. Historians such as Deborah Lipstadt worry that by engaging in public debates with Holocaust deniers, they are not dismissed as the ideologically-motivated, anti-Semitic racists that they are but rather are "accorded the status of a "different perspective," a "dissenting point of view," and "another opinion""¹⁹⁸. This is dangerous because there is no "other side" to the Holocaust debate. The deniers are simply wrong. They are not "revising" history, they are denying it. By being juxtaposed with legitimate historians like Lipstadt, the deniers attain a credibility and legitimacy that is wholly undeserved. The authors are "engage[ing] in the kind of ideological warfare that corrupts the very nature of opinion in order to promulgate historical falsehood"¹⁹⁹ and debating them is a "capitulation to the very strategies of Holocaust revisionism."²⁰⁰

So it is that Lipstadt deliberately refuses to debate Holocaust deniers. She is critical of those who are "[u]nable to make the distinction between genuine historiography and the deniers' purely ideological exercise". In 1994 she recalled being asked to appear on a nationally televised talk show in the US with Holocaust deniers. She refused to appear, saying "I will not dignify them by sitting in a debate with them." She went on: "You would not ask an historian of the American south to sit and debate with someone whether slavery ever existed...or ask someone who teaches astronomy to debate whether the earth is round or flat."²⁰¹

It might be said that to take this stance is inconsistent with the marketplace of ideas: that if "truth" is the best remedy to falsity, then Lipstadt and others should seek to ventilate it wherever possible. There are two responses to that. The first is that this mistakenly conflates the "marketplace" down into a single debate, or talk-show, or

¹⁹⁸ Deborah Lipsadt "Symposium: Criminalizing Holocaust Denial", above n 24

¹⁹⁹ Ibid.

²⁰⁰ "Policing the Past", above n 34, 70.

²⁰¹ "Holocaust Denial and the Extreme Right", above n 42, 86.

radio programme, etcetera. The “marketplace of ideas” is a far broader concept than that; involving the aggregate of every debate, newspaper column, radio show, and educative conversation in the public realm. So by refusing to debate deniers directly Lipstadt is merely recognising that that particular forum is not the best mechanism to win the “battle” of the truth about the Holocaust.

The second response is that refusing to debate deniers actually helps the cause of Holocaust truth, because, counter-intuitively, it actually denies Holocaust deniers the publicity they seek to achieve. Lipstadt explained in 1994 how this works in relation to talk-shows in the USA, whose overriding objective is ratings:²⁰²

If there is no one to engage in debate then there are no fireworks. And if there are no fireworks then all there is on the show is someone spouting ludicrous notions. It would be the equivalent of having a debate among political candidates when only the most fringe candidate appears. Usually when credible historians refuse to appear the show is cancelled. No fireworks, no show.

Stanley Fish provides support for this position in his fascinating essay on Holocaust denial and academic freedom.²⁰³

The proper response to Holocaust deniers is to say that they have not met our criteria for being considered seriously and that we are sending them away, without apology and without any further justifications. And if they persist in their work...one must denounce them, ridicule them, harass them...

Holocaust deniers claim that by refusing to debate them, historians are shutting down their “free speech.” But this misunderstands the actors and the forces at play in decisions about what speech enters the “marketplace of ideas”. It has long been recognized that with free speech comes editorial freedom. To speak is a choice, not an obligation. When historians refuse to debate Holocaust deniers, they are exercising that choice. When television networks decide not to run programmes because no credible alternative viewpoint can be put; they are exercising the choice

²⁰² Ibid, 87.

²⁰³ Fish, above n 30. 524.

to speak or not. Freedom of speech does not comport freedom of forum. This was precisely the reasoning in *Miami Herald Publishing Company v Tornillo*, when the US Supreme Court rejected a Florida statute requiring newspapers to public replies to political editorials.²⁰⁴

VII HOLOCAUST DENIAL LAWS ARE INEFFECTIVE

In this part of the paper I argue that Holocaust denial laws are ineffective because the trials that result from Holocaust denial prosecutions are actually counterproductive to the cause of truth: they give publicity to deniers; allowing them to advance their message, the criminal justice process gives them legitimacy, and there is a danger of martyrdom. Secondly, Holocaust denial laws are dangerous because they make more subtle and less extreme anti-semitism seem less dangerous than it actually is. Thirdly, because of the internet, finding and convicting Holocaust deniers is extremely difficult.

A Trials are counter-productive

The starting point is that "...in a system of self-government, it is ultimately the *public* who must decide social truth – whom to believe, how to act, and whom to elect. The impressions left on the public psyche are, therefore of foremost importance."²⁰⁵ Holocaust denial trials should *promote* the cause of historical truth; rather than the reverse. Below I consider whether trying Holocaust deniers actually achieves that.

1 Publicity

Trials of Holocaust deniers inevitably attract huge media interest, so deniers and their views automatically get coverage in media outlets that would never think about

²⁰⁴ 418 US 241 (1974)

²⁰⁵ Stefan Braun "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes: *Regina v Zundel*" (1987) 11 Dalhousie LJ 492.

running any remotely Holocaust denial related material, if it were not for the trial. The trial provides media with the imperative to report. Moreover, trials frequently last for a long time; giving deniers the chance to remain embedded in the public consciousness.

The two trials of Ernst Zündel in Canada are good examples of this process.²⁰⁶ In 1985, Zündel was charged under a section of the Canadian Criminal Code which made it an offence for someone to willfully spread false news causing or likely to cause racial or religious intolerance. In March 1985 Zündel was convicted and sentenced to 15 months in jail. In 1987 the decision was quashed due to legal errors and a retrial was ordered. In his second trial, from January to May 1988, he was again convicted and sentenced to nine months in jail. Zündel appealed to the Supreme Court of Canada, arguing the "false news" section of the Criminal Code was unconstitutional. The Supreme Court agreed in 1992 and quashed his conviction.²⁰⁷

Before the trials, Zündel was basically unknown in Canada outside the far-right circles he was active in. He is now known as "Canada's most notorious Holocaust denier"; but his notoriety has all been achieved because he was prosecuted.²⁰⁸ The danger must be that more people were encouraged to find out about Zündel and his beliefs, as opposed to never hearing about them. Fears of this at the time of the Zündel trials lead to big debate within judicial circles over the propriety of trying Zündel.

Other trials or court battles about Holocaust denials have had similar results. The *Mermelstein* case discussed above, widely reported in the United States, gave publicity to the IHR and what they stood for. The message that "IHR demands proof of Holocaust" permeated out into public consciousness. This was precisely the

²⁰⁶ Evelyn Kallen "Never Again: Target Group Responses to the Debate concerning Anti-Hate Propaganda" (1991) 11 Windsor YB Access Just 46, 50-51.

²⁰⁷ See [1992] 2 SCR 731 (SCC).

²⁰⁸ Kallen, above n 207, 54.

reason the IHR advertised in such a provocative and outrageous manner in the first place. The fact that the IHR lost so badly in court did not matter.

2 *The dock as a pulpit*

Prosecuting deniers means they are able to use the courtroom as a chance to justify their beliefs and promote themselves and their work. In short, the dock can be used as a pulpit for the advancement of Holocaust denial theory. Consistent with basic principles of natural justice, courts have been careful to allow Holocaust deniers the maximum opportunity to advance a defence. Often this involves calling revisionist “scholars” to present evidence that the Holocaust never occurred.

The Zündel case again provides a good example. His case included evidence from revisionists including Robert Faurisson, Udo Walendy (author of *Forged War Crimes Malign the German Nation*), and David McCalden, one of the founders of the IHR. In his trial he was assisted by the above revisionists, but also David Irving, Mark Weber, editor of *The Journal of Historical Review*, and Fred Leuchter, who produced a methodologically flawed report on the Auschwitz gas chambers that concluded that “...the alleged gas chambers at the inspected sites could not have then been, or now, be utilized or seriously considered to function as execution gas chambers.”²⁰⁹ All of the deniers’ testimony was prominently reported in the media.

Trying Holocaust deniers also allows them to spread their more subtle messages, which are sometimes more important than the actual facts they are allegedly based upon. For example, one of the underlying messages of Holocaust deniers is that Western governments are in the “pockets” of the Jewish “lobby” – that the Holocaust is a Zionist conspiracy perpetrated on governments by a Jewish cabal and weak-minded western governments. These messages emanating from a trial are

²⁰⁹ Ibid, 60.

impossible to stop, as they are so insidious. In many ways they are more pernicious than the allegation that the Holocaust is a hoax.²¹⁰

On some occasions, the courts have taken "judicial notice" of the Holocaust. In other words, the courts have accepted that the existence of the Holocaust is a matter of common knowledge and not something on which most reasonable people would disagree, so deniers are prohibited from advancing that as a defence. This has been the approach of the German courts.²¹¹ However, treatment of this has been inconsistent, and even when judicial notice is taken of the Holocaust, deniers still have an opportunity in the dock to deny the evidence.

David Irving was even able to spread hateful messages after his recent trial had finished and he had been released from prison. At a press conference after his release, he reportedly endorsed the drunken anti-Semitic comment of Mel Gibson that "the Jews" are responsible for all the wars in the world.²¹² Such a comment would have prompted no publicity in the ordinary course of events; it was only the fact that he had just been released that made it newsworthy.

3 *Legitimacy*

Prosecuting Holocaust deniers gives them a legitimacy they do not deserve. This is achieved in a number of ways. First, the "legal procedures of the criminal trial give a sense of moral equivalence or dignity of innocence to intolerant views."²¹³ By its very nature the trial process must protect the deniers' message through the presumption of innocence, the burden of proof, the defence, and the rules of evidence. Second, the trial distorts the image of the Holocaust denier: "what reaches the public is synthetic and artificial...what ultimately emerges is a judicially "packaged" version of the man and his message. He appears "composed, reflective,

²¹⁰ Braun, above n 206, 495.

²¹¹ Irwin Cotler in "Debate: Freedom of Speech and Holocaust Denial", above n 12, 563.

²¹² Timothy Garton Ash, above n 21.

²¹³ Braun, above n 206, 492.

intelligent, oppressed” and not “shrill, vindictive, intolerant, arrogant.” The “medium” becomes the “message”.²¹⁴ Douglas puts it like this:²¹⁵

By casting the trial as a truth-seeking device, the revisionists are able to justify strategically their appropriation of the rhetorical conventions of counsels arguing in an adversarial context. In so doing, they are able to present the most tendentious and partisan hyperbole as a proper contribution to public debate and historical instruction.

Thirdly and finally, the highly technical nature of criminal trials may allow Holocaust deniers to succeed in appeal on procedural or evidentiary points of law, but claim judicial vindication of his views. This is particularly the case if the Holocaust denier is retried – the denier can claim a moral victory and that he is being persecuted by being tried a second time. Interestingly, this was precisely the route that Zündel took in Canada: he claimed vindication when on a technical point, his appeal was allowed the first time; he adopted the persona of the persecuted martyr when re-tried, then claimed victory again when the Supreme Court deemed the “false news” provision of the Criminal Code to be unconstitutional.²¹⁶

4 *The danger of martyrdom*

Rather than suppressing a Holocaust deniers’ speech, prosecuting them allows them to stand as martyrs for free speech. Again, the trial of Ernst Zündel in Canada is a good example. Zündel turned his trials into a media circus, arriving at court each day in a flak jacket and hard hat emblazoned with the words “freedom of speech”.²¹⁷ Deniers play to public sympathy over the fact that their right to free speech is being denied. This is dangerous because as Alan Dershowitz says, “[the] right sometimes becomes confused with the rightness of their speech.”²¹⁸

²¹⁴ Ibid, 493.

²¹⁵ “Policing the Past”, above n 34, 79.

²¹⁶ Ibid.

²¹⁷ “Policing the Past”, above n 34, 67.

²¹⁸ Alan Dershowitz “Symposium: Criminalizing Holocaust Denial”, above n 24.

Those who are prosecuted for Holocaust denial become martyrs for the cause. In their eyes they are a victim of a terrible conspiracy against free speech and the "truth" that the Holocaust never happened. They are seen as the innocent victims of an oppressive state. The forces of the State are massed against the Holocaust denier; it is easy for them to play to the media as the underdog and the persecuted "revisionist", merely trying to put their views into the "marketplace of ideas."

There is evidence that Holocaust deniers welcome court cases; indeed, actively seek them out. The recent trial of David Irving in Austria is a case in point. It has been said that the Austrian case would never have been brought unless Irving had decided to deliberately court prosecution by returning.²¹⁹ Lipstadt notes:

David Irving was well aware of the warrants for his arrest. Nonetheless, he decided to go to Austria. He made no secret of the fact that he was coming. The students who invited him were also not secretive about his visit. He chose to make this trip even though he knew the potential consequences.

In the Zündel trials, Judge Thomas expressed misgivings about sending Zündel to jail, for it may have achieved precisely what Zündel wanted. The judge said:²²⁰

I simply say to you that it may be that you wish to be a martyr, and I was tempted to frustrate you in that purpose that you have, but I am required to send a message to any other persons like yourself that this community won't tolerate hate mongers...

And when Fredrick Toben, director of Australia's right wing Holocaust denial group, the "Adelaide Institute", was arrested in Germany in April 1999, David Irving commented favourably on the arrest, saying "[t]he cause needs another martyr."²²¹

²¹⁹ Deborah Lipsadt, *Ibid.*

²²⁰ Campaign for Open Debate on the Holocaust "Portrait: Ernst Zündel" www.codoh.com/author/portraits/port5zue.html (accessed 30 September 2007).

²²¹ Anthony Long "Forgetting the Fuhrer: the recent history of the Holocaust denial movement in Germany" *Australian Journal of Politics and History* (2002) 72, 74.

Stein notes that the experience in Germany under previous versions of the Holocaust denial law (and Germany's other hate speech laws) was that "the courts [became] a forum for neo-Nazi propaganda that [helped] make new heroes and martyrs for the moment."²²² This is exactly what happened at Zündel's most recent trial in Germany. The trial has been described as "a circus". Zündel's solicitor was barred from the court at one stage after making what observers said were neo-Nazi speeches. One speech ended with the phrase "Heil Hitler!" The 80-100 Zündel supporters in the courtroom raised their arms in what appeared to be the Nazi salute.²²³ All that Germany has done by prosecuting Zündel has "helped to create a thrilling sense of illicit community and radical solidarity among those interested in rebellion against the established moral order."²²⁴

5 Distinguishing *Irving v Lipstadt*

I have argued above that the *Irving v Lipstadt* defamation trial is a good example of the power of truth and history winning out over deliberate falsehoods. One might ask why *Irving v Lipstadt* is apparently a victory for truth, but prosecuting Holocaust deniers under Holocaust denial laws is not. The differences are important. The first is that Irving sued Lipstadt in defamation, rather than the State prosecuting Irving. This is an important distinction, because it made Irving's claims of "defending free speech" ring hollow; as it was he who had taken judicial action to suppress speech that was critical of him. Secondly, the claim was a civil one, rather than a criminal one. It is a lot easier to appear a martyr for free speech when it is the State through the sanction of the criminal law that is prosecuting, as opposed to personally taking a claim in tort. Indeed, in *Irving v Lipstadt* the odds were stacked in Irving's favour, as the burden was on Lipstadt to prove the truth of what she had alleged because of the peculiarities of English defamation law.

²²² Stein, above n 109, 315.

²²³ <http://www.iht.com/articles/2006/05/04/news/europa.php>

²²⁴ Richard Bernstein, above n 20.

The third key difference is that the case *required* Lipstadt to present masses of historical evidence to refute each of Irving's allegations. Irving had taken exception to being called a liar and falsifier of history. This required Lipstadt's defence team to trawl back through Irving's writings over the years and find where he had taken information out of context and ignored counter-evidence. In Holocaust denial prosecutions this detailed examination will not be required of the State; conversely deniers have a chance to challenge the veracity of the Holocaust because of the need to ensure fairness for the accused.

B Legitimation of Less Obvious but more Dangerous Anti-Semitism

The second argument as to why Holocaust denial laws are ineffective is that they make other less extreme forms of anti-semitism seem acceptable. Holocaust deniers operate on the lunatic fringe of anti-Semitic movements and anti-Semitic sentiment. Because Holocaust deniers are so extreme – “there were no gas chambers, it is a Jewish conspiracy”, “only 600,000 died, not six million”, – anti-Semites who accept the reality of the Holocaust; but in actuality are equally as racist, look more respectable.

Deborah Lipstadt likens this to “‘pro-lifers’ who are against abortion in any circumstances, even if it is a matter of incest, the mother's life is in terrible danger, and the victim is a young girl. They make life easier for those who will allow it only if the mother is certain to die. The latter look more reasonable.”²²⁵ Dershowitz believes that it is not those who deny the Holocaust, but those who “minimize it, comparativise it, deny its uniqueness, [and] question the veracity of survivors and try to turn it against the Jews or the Jewish state” who are the more dangerous.²²⁶

C Catching Holocaust Deniers in the Age of the Internet

²²⁵ Deborah Lipsadt “Symposium: Criminalizing Holocaust Denial”, above n 24.

²²⁶ *Ibid.*

The last general point to make about effectiveness is that in the age of the internet, actually catching Holocaust deniers is very difficult. It has been easy for prosecutors to target people like David Irving, Ernst Zündel and other prominent deniers, because they have written books and have appeared in public. However, "Thanks to the internet it is [now] virtually impossible to stop the dissemination of lies and propaganda."²²⁷ Holocaust deniers can hide behind anonymity on the internet, as the difficulty in tracking down virus creators, hackers, and cyber-criminals shows. Moreover, there are problems with jurisdiction: many Holocaust denial sites, for example, are hosted in the United States, where they are legal; but of course are able to be accessed from around the world.

A comment from Germany is telling. In 1995, the German government requested (and was granted) the extradition of Gary Rex Lauck from Denmark. Lauck had spent his life distributing anti-Semitic publications and swastika emblems worldwide. He was convicted in Germany of disseminating Nazi propaganda. The prosecutor later commented: "It was our last chance to get hold of someone who spread these ideas in a classic sense, in a newspaper...it's true propaganda can now be spread on the internet and there is technically and legal no chance to curb this."²²⁸

However; the fact that a law may not capture *everyone*, or will be difficult to enforce, is not a particularly good argument against law; there are many laws on states' statute books that would meet that description. However it is a point to bear in mind and balance when considering the other arguments.

VIII HOLOCAUST DENIAL LAWS ARE DANGEROUS

I have argued that Holocaust denial laws are unprincipled and ineffective. But there is also a case to be made that they are actively harmful. First, they chill legitimate historical research into the Holocaust. Secondly, they make Europe look hypocritical

²²⁷ David Cesarani "There is no martyrdom in this pathetic denouement (February 22 2006) The Guardian www.guardian.co.uk/comment/story/0,,1715176,00.html (accessed 14 September 2007).

²²⁸ Fogo-Schensul, above n 23, 53.

in an age when to stand up for liberty and enlightenment values is more important than ever before.

A Chilling of Legitimate Historical Inquiry

History by its very nature is constantly changing. The role of the historian is to interpret the past in light of evidence. But interpretation is a constantly evolving process because time continues to move forward, and new evidence becomes available about the past. Moreover, as Alan Dershowitz says:²²⁹

historical events evolve and unfold in very complicated manners. The Holocaust didn't happen exactly the way we think it happened. The detention of Japanese Americans in concentration camps in this country [the USA] didn't happen exactly the way we or the Japanese communities think it happened...these events [are] far more complex than the romanticised, or whatever the word is for romanticizing a horrible event, makes it seem in later history.

The same complications apply to the Holocaust. There is much we do not know about it; and even though it is one of the most documented events in history; scholars are still investigating it: when, if indeed he ever did, did Hitler order the "Final Solution" for the Jews? Just how many Jews died at Auschwitz, Bergen-Belsen, or Dachau? What does "Holocaust denial" actually even mean?

Because of the complexities of history, and the problem of definition, there is a great danger that legitimate historical inquiry into the Holocaust will be chilled through Holocaust denial laws. When the criminal law punishes those who deviate from the state-sanctioned version of history, there is a disincentive to research controversial historical issues for fear of running afoul of the law. There should never be anything that is beyond the reach of research. The Holocaust requires, and will continue to require (as more material becomes available) dedicated research which is not discouraged.

²²⁹ Alan Dershowitz in "Debate: Freedom of Speech and Holocaust Denial", above n 12, 567.

B *The Stain of Hypocrisy*

It is appropriate to end this paper by returning to the ideas introduced at the start. When European leaders refused to prevent (or even condemn, in some cases) the publication of the Muhammad cartoons in 2005, the Muslim world was rightly outraged. It is nearly impossible to argue that Holocaust denial laws are valuable and justified infringement restrictions on free speech because of the hurt and offence that such claims bring to Jews in Europe, but defend the right of the media to public cartoons that clearly had a similar effect on the sizeable Muslim minority in Europe. The two positions cannot be reconciled.

Huntingdon may have been exaggerating when he wrote of a “Clash of Civilisations” but there is no doubt that in this age of global terrorism, Iraq, and a potential coming conflict over Iran, there is a faultline separating the West from the rest of the world. On the edge of that faultline is freedom of speech. One of the West’s strengths is the legacy of the Enlightenment: a fundamental belief in human rationality, truth and the power of reason. The Enlightenment ironically enough began in Europe. Holocaust denial laws are a disgrace to that historical legacy. Their presence in Criminal Codes is an invitation to authoritarian governments, which need no invitation anyway, to further repress free speech. The EU preaches to the rest of the world about human rights, liberty, and freedom. It is time it stood up for those values itself.

Europe was right to stand up for the right of a free press in the face of cries for censorship of the Muhammad cartoons. But to be consistent it should remove the odious blot in its criminal codes that are Holocaust denial laws.

IX CONCLUSION

Holocaust denial is fraudulent history disguised as legitimate scholarship. Its very nature is anti-Semitic. But the response to such idiocy is not to ban the free expression of those ideas, as hurtful as they may be to some people. In this paper I have examined the history of Holocaust denial and European responses to the phenomenon, placing Holocaust denial laws in historical and jurisprudential context in Europe. I have argued that Holocaust denial laws are indefensible on principle because they violate the marketplace of ideas and require the State to be inconsistent, or to violate its neutrality. The correct response to Holocaust is ridicule, opprobrium, education, and information dissemination – relying on the power of truth, history, and reason, rather than the criminal law.

I have also argued that Holocaust denial laws are ineffective and counter-productive. It is extraordinarily hard to catch Holocaust deniers in the age of the internet. Holocaust denier trials give added publicity and legitimacy to the denier and create martyrs. Going after the most extremist and obvious anti-Semites – Holocaust deniers – allows more pernicious, but subtle, racists to spread their message.

Finally, Holocaust denial laws are dangerous because they chill legitimate historical inquiry. It is no place of the State to be setting the bounds of historical research. The laws are dangerous also because they tar Europe with the brush of hypocrisy. In today's climate I suggest it would be better for Europe to stand up for its core values, rather than covering behind a wall of censorship.

BILBLIOGRAPHY

***I* PRIMARY SOURCES**

***A* Cases**

1 New Zealand cases

Living Word Distributors Limited v Human Rights Action Group [2000] 3 NZLR 570

2 Canadian Cases

R v Zündel [1992] 2 SCR 731 (SCC)

Committee for the Commonwealth of Canada v Canada, above n 137, para 75 La Forest J

Irwin Toy Ltd v Quebec (Attorney General) [1989] 1 SCR. 927, 968 (SCC).

3 United States of America cases

Whitney v California 274 US 357 (1927)

Collin v Smith 578 F 2d 1197 (7th Cr 1978)

Schwimmer v United States 279 US 644 (1929).

Texas v Johnson 491 US 397 (1989)

4 Australian cases

Jones v Toben [2002] FCA 1150

5 United Kingdom cases

Redmond Bate v Director of Public Prosecutions (1999) 163 JP 789 (DC) Sedley LJ

***B* Legislation**

Law No 90-615 of July 13, 1990, JO, July 14, 1990, at 8333; 1990 JCP No 64046 (Fr).

Federal Constitutional Law amending the Prohibition Law, Law No 148
Bundesverfassungsgesetz [BVG] Bundesgesetzblatt [BGBl] 57/1992 (Aus)

***C* Hansard**

United Kingdom House of Lords Hansard (20 April 2007) Column WA93.
www.publications.parliament.uk/pa/ld200607/ldhansrd/text/70420w0001.htm (accessed 29 September 2007).

D *United Nations materials*

1 General Assembly Resolutions

UNGA Resolution 60 VII (1 November 2005).

2 Human Rights Committee Communications

Robert Faurisson v France, GAOR Hum Rt. Comm, 58th Sess, CCPR/C/58/D/550/1993 (1996).

E *New Zealand Select Committee Submissions*

Office of Film & Literature Classification "Submission to Government Administration Committee" (29 October 2004)
www.censorship.govt.nz/pdfword/Hate%20Speech%20Inquiry%20Submission.pdf

II ***SECONDARY SOURCES***

A *Journal articles*

Barendt, Eric "Free Speech in Australia: A Comparative Perspective" (1994) 16 Sydney L Rev 149, 158.

Bindman, Geoffrey "Outlawing Holocaust denial: The possibility of a more confident and vigorous prosecution policy" (28 March 1997) 147 (No 6785) New Law Journal 466.

Butler, David "Holocaust Denial in England" 1997(4) Web Journal of Current Legal Issues

Braun, Stefan "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes: Regina v Zundel" (1987) 11 Dalhousie LJ 492

Cotler, Irwin, in "Debate: Freedom of Speech and Holocaust Denial" (1987) 8 Cardozo L Review 559, 560-561. [Transcript of the proceedings of The Holocaust and Human Rights: The First International Conference, held at Boston College Law School on April 17, 1986]

Douglass-Scott, Sionadh "Hatefulness of Protected Speech: A Comparison of the European and American Approaches" (1999) 7 Wm & Mary Bill of Rts J 305, 336

Fogo-Schensul, Credence "More than a river in Egypt: Holocaust denial, the internet, and international freedom of expression norms" (1997/1998) 33 Gonzaga Law Review 241.

Fronza, Emanuela "The punishment of negationism: The difficult dialogue between law and memory" (2006) 30 Vt Law Rev 609.

Douglas, Lawrence "Wartime Lies: Securing the Holocaust in Law and Literature" (1995) 7 Yale LJ & Human 367, 371.

Freckleton, Ian "Censorship and Racial Vilification Legislation" (1994) 1 Aust J of Human Rights 327

Jones, Jeremy "Holocaust Denial 'Clear and Present' Racial Vilification" [1994] AJHR 10

Kallen, Evelyn "Never Again: Target Group Responses to the Debate concerning Anti-Hate Propaganda" (1991) 11 Windsor YB Access Just 46, 50-51

Kommers, Donald P "The Jurisprudence of Free Speech in the United states and the Federal Republic of Germany" (1980) 53 S Cal L Rev 657.

Lasson, Kenneth "Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society" (1997-1998) 6 Geo Mas L Rev 35.

Lipstadt, Deborah "Holocaust Denial and the Extreme Right" The Sydney Papers (Spring 1994) (Lecture to the Sydney Institute on 21 July 1994)

MacKay, A Wayne "Freedom of Expression: Is it All Just Talk?" (1989) 68 Can Bar Rev 713.

Meagher, Dan "Regulating History: Australian Racial Vilification Law and History Denial" [2005] UQLJ 29.

McGoldrick, Dominic and ODonnell, Therese "Hate speech laws: Consistency with national and international human rights law" (1998) 18 Legal Studies 453-485.

Miller, Scott "Denial of the Holocaust" (Oct 1995) 59 Social Education 342.

Teachout, Peter R "Making 'Holocaust Denial' a Crime: Reflections on European Anti-Negationist Laws from the Perspective of US Constitutional Experience" (2006) 30 Vt L Rev 655

Quint, Peter E "Free Speech and Private Law in Germany Constitutional Theory" (1989) 48 MD L Rev 247

Rosenfeld, Michel "Conference: Hate Speech in Constitutional Jurisprudence: A Comparative Analysis" (2003) 24 *Cardozo L. Rev.* 1523.

Sharpe, Robert "Commercial Expression and the Charter" (1987) 37 *UTLJ* 229.

Stein, Eric "History against free speech: The German law against the "Auschwitz"-and other "lies"" (1986) 85 *Michigan Law Review* 277.

Sharpe, Robert "Commercial Expression and the Charter" (1987) 37 *UTLJ* 229

Weiss, David "Striking a difficult balance: Combating the threat of neo-Nazism in Germany while preserving individual liberties" (1994) 27 *The Vanderbilt Journal of Transnational Law* 899.

Yonover, Geri J "Anti-Semitism and Holocaust denial in the academy: A tort remedy" (1996) 101 *Dickinson Law Review* 71

B *Articles*

Douglas, Lawrence "Policing the past: Holocaust denial and the law" in Robert C Post (ed.) *Censorship and silencing: Practices of cultural regulation* (Los Angeles, CA: Getty Research Institute, 1998) 70-98.

C *Theses*

Angove, Robert "Holocaust Denial and Professional History-Writing" (MA Thesis, University of Saskatchewan, Saskatoon, 2005)

D *Conference Papers*

Whine, Michael "Holocaust Denial" (Conference on Extreme Speech and Democracy, 21-22 April 2007, University of Cambridge Centre for Public Law) Available at www.theorst.org.uk/docs/University%20of%20Cambridge5.doc (accessed 12 September 2007).

E *Texts*

Lipstadt, Deborah *Denying the Holocaust: the Growing Assault on Truth and Memory* (The Free Press, New York, 1993) 73.

Mill, John Stuart *On Liberty and Other Writings* (ed. Stefan Collini, Cambridge University Press, Cambridge, 1859, 1989) 20.

Milton, John *Areopagitica* (ed. Sir Richard C. Jebb) (1971), (Ams Pr Inc, Cambridge), p 43.

Schauer, Frederic *Free Speech: a Philosophical Enquiry* (Cambridge University Press, Cambridge) 86.

F *Reports*

Jewish Policy Institute "Combating Holocaust denial through law in the United Kingdom", Jewish Policy Institute "Combating Holocaust denial through law in the United Kingdom" (Report No 3 of 2000)
http://www.jpr.org.uk/Reports/CS_Reports/no_3_2000/index.htm (accessed 14 May 2007).

G *Newspaper Articles*

"Mutual incomprehension, mutual outrage" (9 February 2006) *The Economist* London
www.economist.com/world/displaystory.cfm?story_id=E1_VQJQGQG

Anderson, John Ward "Cartoons of Prophet Met With Outrage" (31 January 2006)
Washington Post Washington A12 www.washingtonpost.com/wp-dyn/content/article/2006/01/30/AR2006013001316.html

BBC News "EU agrees new racial hatred law" (19 February 2007)
<http://news.bbc.co.uk/1/hi/world/europe/6573005.stm> (accessed 17 May 2007).

Bernstein, Richard "Europa: Civility vs. free speech: A democratic quandary" (May 5 2006) *The International Herald Tribune*
www.ihf.com/articles/2006/05/04/news/europa.php?page=2

Canadian Press "German Court sentences Ernest Zündel to five years in prison for Holocaust denial" (15 February 2007)
<http://www.canada.com/topics/news/world/story.html?id=c61ce061-50b2-42a5-bb2f-a7bbaeccceb&k=32537> (accessed 15 September 2007).

Crossland, David "Letter from Berlin: Germany seems powerless to outlaw far-right NPD" *SpiegelOnline International* (28 August 2007).
<http://www.spiegel.de/international/germany/0,1518,502487,00.html> (accessed 29 August 2007).

Dye, Stuart "Backlash on hate Speech Proposal" (March 18 2005) *New Zealand Herald*
www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=10115936 (accessed 21 August 2007).

Deutsche Welle "German Holocaust denial case proceeds as EU moves on a Ban" (26 January 2007) <http://www.dw-world.de/dw/article/0,2144,2328344,00.html> (last accessed 20 May 2007)

Deutsche Welle "Germany moves to silence Holocaust deniers across the EU" (19 January 2007) <http://www.dw-world.de/dw/article/0,2144,2317216,00.html> (accessed 17 May 2007).

Garton Ash, Timothy "This is the moment for Europe to dismantle taboos, not erect them" (October 19 2006) *The Guardian*
www.guardian.co.uk/comment/story/0,,1925401,00.html.

Walsh, Rebecca "A-plus equals anger for Jewish groups" (December 22 2000) *New Zealand Herald* www.nzherald.co.nz/section/1/story.cfm?c_id=1&objectid=166126 (accessed 3 September 2007).

H Websites

Austin, Ben S "A Brief History of Holocaust Denial"
www.mtsu.edu/%7Ebaustin/denhist.htm (accessed 18 September 2007).

Bell, Dan "Irving renews racist diatribe after release" (December 23 2006) *The Guardian*
www.guardian.co.uk/race/story/0,,1978186,00.html (7 September 2007)

BBC News "In quotes: Irving Jailed" (20 February 2006)
<http://news.bbc.co.uk/2/hi/europe/4734096.stm> (accessed 17 September 2007).

BBC News, "Holocaust Denial is Jailed" (20 February 2006)
<http://news.bbc.co.uk/2/hi/europe/4733820.stm> (accessed 17 September 2007); BBC News "Holocaust denier verdict upheld" (4 September 2006)
<http://news.bbc.co.uk/2/hi/europe/5313504.stm> (accessed 19 September 2007).

BBCNews "Le Pen WWII remark triggers probe" (12 January 2005)
<http://news.bbc.co.uk/2/hi/europe/4169963.stm> (accessed 16 September 2007).

EUBusiness.com "Latvia wants anti-totalitarian clause in EU racism law" (14 February 2007) www.eubusiness.com/news_live/1171476010.08/ (accessed 28 September 2007).

Interview with Deborah Lipstadt on Three Monkeys Online "Deborah Lipstadt and Holocaust Denial" (November 2006)
<http://www.threemonkeysonline.com/article3.php?id=391> (accessed 3 September 2007)

Guttenplan, D D "Europe: How many Jews does it take? Should freedom of speech stop at holocaust denial" (27 January 2005). Available from Index for Free Expression.
www.indexonline.org/en/news/articles/2005/1/europe-should-freedom-of-speech-stop-at-holo.shtml (accessed 12 August 2007)

Lipstadt, Deborah comments in Jamie Glazov (*FrontPageMagazine*) "Symposium: Criminalizing Holocaust Denial" (July 27, 2007)

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