The Treatment of Hate Speech in German Constitutional Law (Part II)

by Winfried Brugger

E. Analysis and Critical Evaluation of Specific Cases

As pointed out by the Federal Constitutional Court, a specific determination of the appropriateness of hate speech prohibitions can be based only on the circumstances of individual cases. Some particularly prominent cases are now reviewed.

I. Insult of Individuals

Hate speech is commonly directed at groups of individuals on the basis of such unalterable shared characteristics as race, ethnicity, and gender. However, such speech can also be directed against lone individuals and still be punishable under criminal law if the verbal attack meets the definition of insult in § 185 of the Penal Code. If such an insult is made in public and involves assertions of fact that sully the honor of a person, then §§ 186 and 187 of the Penal Code apply. To what degree is honor guaranteed protection in such cases? What degree and what type of criticism must one tolerate without recourse to law? To better answer these questions, it is useful to divide the concept of honor into three levels.

(A) In its most basic sense, honor describes the status of a person who enjoys equal rights and who is entitled to respect as a member of the human community irrespective of individual accomplishments (*menschlicher Achtungsanspruch*). Thus, even lazy or dumb persons and criminals deserve this level of respect. The constitutional point of reference for this level of honor is the protection of the dignity of all human beings found in Art. 1 (1) BL. Honor in this sense is violated, and an insult occurs, when, for example, a human being is called subhuman or worthless or when a verbal attack is based on assertions of racial inferiority.

(B) A second level of honor is concerned with the preservation of minimum standards of mutual respect in public—the outward show of respect for people irrespective of one's feelings about them (*sozialer Respekt* or *Achtungsanspruch*). This level of honor is rooted in the constitutional protection of the personality as provided by Art. 2 (1) BL. Instances of disrespect and insult that violate the law include accusing another person of possessing severe moral or social character

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faults or having intellectual shortcomings—for instance, by calling the person a "swine" or a "jerk" or by making obscene gestures, such as "giving a person the finger."[67]

(C) A third level of honor covers defamation. Respect for this level of honor prohibits making factual assertions that tend to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him. Most of these violations of honor fall under §§ 186 and 187 of the Penal Code. Constitutionally, they are based on the right to the free development of the personality in Art. 2 (1) and the meaning of "honor" in Art. 5 (2) BL. The provision of Art. 12 BL, assuring the liberty to choose and work in a profession, provides additional strength to these interests insofar as damage to social reputation may result in professional and financial harms.[68]

According to the Federal Constitutional Court, political criticism may be robust, aggressive, explicit, sharp, and even exaggerated, particularly when sharp repartees are involved,[69] but less aggressiveness is generally allowed in private feuds. As stated by the Federal Constitutional Court:

The spontaneity of free speech…is a precondition for the force and variety of public debate, which is in turn a basic condition for coexistence in freedom. If that force and variety are to be generally upheld, then in individual cases harshness and excess in the public clash of opinion or a use of freedom of opinion that can contribute nothing to appropriate opinion-

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[67] For many other examples, see WHITMAN, pp. 1292 ff.; for a discussion of insult as an outward display of disrespect, see pp. 1288 f., 1290, 1292 f., 1382, 1337. A subcategory of this level is the failure to acknowledge the status of the person addressed. Speaking to another in the familiar (*Du*) instead of the formal (*Sie*) form of address may be considered a violation of a person's honor and be punishable under § 185 of the Penal Code. Such cases are brought before the criminal courts and are occasionally successful. The courts often, but not always, dismiss mere rudeness as nunpunishable behavior. See id., at 1295, 1297, 1299, and SCHÖNKE/SCHRÖDER, § 185 marginal notes 12 f. Whitman observes that in the United States this second level is usually not protected by law; American "defamation" law is largely confined to the third level of honor, but in fact it is preservation of reputation that lies at the core of American defamation law. See supra note 43 and infra note 68. As to the first level, American law does not protect against hate speech based on racial theories of superiority or inferiority. See supra note 48 discussing the Skokie controversy and note 87 discussing the R.A.V. Case.

[68] American law mostly addresses defamation (libel and slander) suits as described in category three, but not violations of honor as described in categories one and two, as indicated by the cases mentioned in the text above. On this divergence, see WHITMAN, pp. 1282 f., 1292 ff., 1344, 1372 ff.

[69] See BVerfGE 12, 114, Decision of 25 January 1961, Schmid-Spiegel Case = Decisions 21 and, recently, Landgericht Mainz, Decision of 9 November 2000, Neue Juristische Wochenschrift 2001, p. 761. In this case, a TV station used strong words in its call for a boycott of banks that had provided services to the right-wing *Nationaldemokratische Partei Deutschlands*. The court stated: "A political party that, like the NPD, enters the arena of political debate must tolerate derogatory criticism and even polemics; it must be prepared to engage in sharp and drastic intellectual rebuttal." Headnote provided by Neue Juristische Wochenschrift.

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formation must be accepted into the bargain (cf. BVerfGE 30, 336 [347]; 34, 269 [283] — Soraya). The fear of being exposed to severe judicial penalties because of an evaluative statement brings with it the danger of crippling or narrowing all debate and thereby bringing about effects that run counter to the function of freedom of expression of opinion in the order constituted by the Basic Law….[70]

Legitimate political criticism, however, does not include formal vilification or contemptuous criticism marked by strictly derogatory statements unrelated or entirely marginal to any political message (*Schmähkritik*). The Strauß Caricature Case[71] presents an illustration of such illegal criticism in violation of human dignity in the sense of the first level of honor. In that case, a satirical magazine had portrayed Franz-Josef Strauß, then the state prime minister of Bavaria, as a pig engaged in sexual activity. The pig bore the facial features of Strauß and copulated with another pig wearing a judge's robe. As a satire, the caricature was covered by the freedom-of-art provision of Art. 5 (3) BL, which contains no explicit limitation clause. Despite acknowledging that satire and caricature characteristically resort to exaggeration, distortion, and alienation, the Federal Constitutional Court reasoned that, in this case, the rights to human dignity and personality found in Art. 1 (1) and Art. 2 (1) BL trumped the right to artistic freedom. As stated by the Court in that case:

[What] was plainly intended was an attack on [the] personal dignity of the person caricatured. It is not his human features, his personal peculiarities, that are brought home to the observer through the alienation chosen. Instead, the intention is to show that he has marked "bestial" characteristics and behaves accordingly. Particularly the portrayal of sexual conduct, which in man still today forms part of the core of intimate life deserving of protection, is intended to devalue the person concerned as a person, to deprive him of his dignity as a human being…a legal system that takes the dignity of man as the highest value must disapprove of [such a portrayal].[72]

That this case would have been decided differently in the United States can be gleaned from the outcome of Hustler Magazine v. Falwell.[73] In that similar case, a public figure, Jerry Falwell, a nationally known preacher, was depicted in a parody

[70] BVerfGE 54, 129, 139, Decision of 13 May 1980, Römerberg Speech Case = Decisions 181, at 187 f.
[71] BVerfGE 75, 369, Decision of 3 June 1987, Strauß Caricature Case = Decisions 420.
[72] Id., 379 f. = Decisions at 425. See also BVerfGE 82, 272, Stern-Strauß Case (Coerced Democrat Case) = Decisions 463. There, the Bavarian state prime minister Strauß was characterized in a publication as a coerced democrat who did not genuinely believe in democracy. The Federal Constitutional Court acknowledged in principle that, taken as a personal attack, such a characterization would be a "belittlement" and that Strauss' being portrayed as a Nazi sympathizer would go beyond the legitimate scope of political criticism. But because the lower courts had not adequately demonstrated that this interpretation was necessary and appropriate, the case was remanded.
[73] 485 U.S. 46 (1988). For a detailed discussion of these differences and the two cases, see NOLTE.

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advertisement in Hustler Magazine as having had a drunken sexual rendezvous with his mother in an outhouse. As in the Strauß Case, this parody was obviously not intended as an assertion of fact, but as a normative judgement. A lower court awarded Falwell $ 150,000 in damages on a tort action for "intentional infliction of emotional distress," a cause of action that does not require a showing that the alleged facts are false (although Falwell certainly denied them). The Supreme Court struck down the damage award against the magazine due to Falwell's status as a public figure.

The differences between the German and American approaches are seen when extreme or vicious value judgements attack honor at the first two levels described above. In such cases, insults are either voiced without related factual assertions or any factual assertions made are overshadowed by the sheer vitriol of the criticism. One reason for the different outcomes in the two judicial systems lies in the fact that Germany's constitution does not give the right to free speech higher status than the rights to dignity, personality, and honor. A second reason is that Germany, due to its recent past, is especially sensitive to threats to human dignity and is determined to prevent attacks on the equal status of all human beings. A third reason for the different treatment of this category of insults is that Germany, unlike the United States, has a tradition of state-sponsored civil discourse.[74]

II. Collective Insult and Hate Speech

The rules underlying political debate also apply to other cases of public affairs. Opinions may be robust and exaggerated and even diminish regard for others; however, in view of the protections afforded by Art. 1 (1) and Art. 2 (1) BL, criticism must stop short of defamation or degradation of individuals' human dignity. According to the Federal Constitutional Court, this limitation is exceeded in cases where hate speech is directed at individuals and, in some cases, even when it is directed at groups. Thus, individual and collective defamation[75] can fall under §§ 185 ff. of the Penal Code. According to the Federal Constitutional Court, only "a delimitable, graspable group"[76] can collectively be insulted. In addition, the attacked feature,

[must be] present in all members of the collective, whereas association with features applying to some but obviously not all members does not…diminish the personal honour of each individual member. Since [to] every addressee of such a statement [it] is clear that not

[74] See the preceding citations to WHITMAN.

[75] As to the wide and the narrow meanings of "insult" and "defamation" and the narrow American notion of "defamation," see supra notes 43, 67 f.

[76] BVerfGE 93, 266, 300, Decision of 10 October 1995, Soldiers are Murderers = Decisions 659, at 685.

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all can be meant but particular persons are not named, no one is defamed by such a statement.[77]

Large groups, such as all Germans, Americans, women, Catholics, etc., could possibly be considered identifiable groups susceptible to insult; however, insults directed at such large groups rarely satisfy the requirement for individualization. As stated by the Federal Constitutional Court, "The larger the collective to which a disparaging statement relates, the weaker the personal involvement of the individual member can be…."[78] The situation changes as soon as minorities are involved, in which case the courts tend to lean more toward finding collective insult. However, there is a strong requirement that in each case the utterance must clearly implicate all, rather than most or some, of the members of the group. The Federal Constitutional Court is more likely to find that all members of a group are the target of the defamation in cases where the collective criticism refers to criteria that are commonly tied to hate speech, and it specifically mentions "ethnic, racial, physical or mental characteristics from which the inferiority of a whole group of persons and therefore simultaneously each individual member is deduced."[79] Such characteristics are usually immutable and are often the result of external ascription rather than internal identification.

In sum, collective insult can be punished as an attack on human dignity pursuant to §§ 185 ff. of the Penal Code under the following conditions: (1) a small, rather than a large, group is attacked; (2) the group's characteristics differ from those of the general public; (3) the defamatory statement assaults all members of the group rather than single or typical members; and (4) the criticism is based on unalterable criteria or on criteria that are attributed to the group by the larger society around them instead of by the group itself.

The Federal Constitutional Court developed these criteria most recently in the Soldiers-are-Murderers Case (or Tucholsky Case). In that case, posters and leaflets accusing soldiers of being murderers were distributed to the public. After active members of the German armed forces complained to the police, the individuals who had distributed these materials were arrested, tried, and sentenced for collective insult under § 185 of the Penal Code. The criminal courts ruled that every active member of the German armed forces had been publicly accused of being the worst of criminals and that the group affected could be sufficiently identified. The convictions were set aside and the case was remanded to the lower courts after the

[77] Id., 300 f. = Decisions, at 685.
[78] Id., 301 = Decisions, at 686.
[79] Id., 304 = Decisions, at 687. For a more detailed analysis of group insult in criminal law, see SCHÖNKE/SCHRÖDER, Vorbemerkung zu §§ 185 ff., marginal notes 3 ff.; LACKNER/KÜHL, Vorbemerkung zu § 185, marginal notes 3 f., and WANDRES, pp. 201 ff.

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Federal Constitutional Court held that the accusations did not constitute an attack on human dignity, but rather represented a severe and harsh form of criticism regarding a matter of public interest, i.e., the role played by soldiers and the German armed forces. In balancing the interests involved, the Court acknowledged that the personal honor of the soldiers had been severely attacked by the group that called them "murderers." However, the Court ruled that it was not entirely clear whether every German soldier, only certain German soldiers, or every soldier in the world was the target of the attack.[80] The words chosen by the defendants were not the only relevant issue—the specific circumstances of the case and the linguistic context also mattered. As stated by the Constitutional Court, "The decisive thing is…neither the subjective intention of the utterer nor the subjective understanding of those affected by the utterance, but the meaning it has for the understanding of an unbiased, reasonable audience."[81] The Federal Constitutional Court held that the criminal courts must sort out the reasonable meaning of the speaker's criticism prior to sentencing the accused for collective insult. In other words, the State's interest in the freedom of opinion in public affairs requires that critical utterances be limited only when they are clearly defamatory. According to the Court, "If…[the] wording or [the] circumstances allow an interpretation that does not affect honour, then a penal judgement that has overlooked this violates [freedom of speech]."[82]

In addition to §§ 185 ff. of the Penal Code, § 130[83] also punishes cases of collective insult if the facts suggest hateful attacks on "sections of the population," especially if they are based, as listed in paragraph 2 of that provision, on criteria such as "nationality, race, religion, or ethnic group origin." However, the legal interest protected by § 130 is different.[84] This provision of the Code aims to preempt the climate conducive to hate crimes that can be created by collective verbal attacks. It is important to note that incitement of others to hatred and violence against minority groups becomes punishable well before the conduct would be considered concrete incitement to a specific criminal act, which is punishable under different provisions of the Penal Code.[85] § 130 (1) and (2) of the Penal Code expresses

[80] If it had been evident that each and every active German soldiers was meant, and no one else, then "the criminal courts [would not have been] constitutionally prevented from seeing the (active) soldiers of the Bundeswehr as an adequately graspable group, so that a statement referring to them may also insult each individual member of the Bundeswehr, if it is associated with a feature that manifestly or at least typically applies to all members of the collective." Id., 302 = Decisions, at 686.

[81] BVerfGE 93, 266, 295, Decision of 10 October 1995, Soldiers are Murderers (Tucholsky Case) = Decisions 659, at 681.

[82] Id., 296 = Decisions, at 682.

[83] For the text of this section, see supra note 49.

[84] See WANDRES, pp. 210 ff.

[85] See §§ 26 and 30 of the German Penal Code (Instigation and Attempted Instigation) and § 111 of the German Penal Code (Public Encouragement to Commit Criminal Acts).

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legislative determination that incitement to hatred and violence need not result in provable immediate heightened endangerment of a specific minority in order to be punishable. Instead, incitement to racial hatred is viewed by the legislature as heightening the general danger of disruption of the public peace, including violations of the dignity and honor of minority groups and the occurrence of hate crimes.[86]

This provision constitutes a far-reaching limitation on public speech that would be considered overly broad by American jurisprudence. In America, hateful messages can only be prohibited if (i) they directly lead to a clear and present danger of an illegal act being committed, (ii) they constitute "fighting words," or (iii) they advocate the imminent use of wrongful force or illegal conduct and they are likely to succeed in producing such action.[87] If one wanted to limit the range of § 130 (1) and (2) of the Penal Code in favor of freedom of opinion, then it would be reasonable to only prohibit assaults on human dignity that are aimed at denying basic equality. Another speech-friendly possibility would be a restrictive interpretation of what constitutes likely endangerment of the public peace. A third area in which "incitement to hatred" could be interpreted narrowly in the interest of free speech is in cases where forceful and severe verbal attacks made against groups concern matters of public concern.

The interpretation by the criminal courts of the poem *The Fraudulent Asylum-Seeker in Germany* illustrates that the latter approach is not always used. This poem includes exaggerated assertions about the misuse of the right to asylum. The author calls Germans stupid for tolerating and financing abuses of the system by asylum seekers. According to the poem, asylum seekers bring AIDS and drugs to Germany. Writing poems and making them public falls under the freedom of the arts protected by Art. 5 (3) BL, and disseminating an existing poem is covered by Art. 5 (1) BL. The criminal courts nevertheless insisted that the creation and distribution of the poem was an incitement to hatred for purposes of § 130 of the Penal Code, which rightfully restricts the constitutional rights provided by Art. 5 BL. In the Court's opinion, the poem attacked the human dignity of asylum seekers irrespective of the existence or nonexistence of their right to asylum, "because the people concerned are generally and therefore without justification accused of

[86] The technical legal term is *abstraktes Gefährdungsdelikt*—criminal law provisions prohibiting acts that in general heighten the danger that some person will commit a specified category of crimes. See WANDRES, pp. 224 ff. and LACKNER/KÜHL, Vorbemerkung zu § 13, marginal note 32. In part, § 130 is thought to require something between concrete and abstract danger to the public peace. See Bundesgerichtshof (BGH), Decision of 12 December 2000, in Neue Juristische Wochenschrift 2001, p. 624, which, in principle, lets an abstract endangerment of public peace suffice but allows the defendant to argue that the conduct could not have led to concrete danger.

[87] See Brandenburg v. Ohio, 395 U.S. 444 (1969) and R.A.V. v. St. Paul, 505 U.S. 377 (1992).

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spreading AIDS; of seducing children into taking drugs; of being particularly despicable, ungrateful parasites; and of, morally speaking, not even reaching the lowest level of human existence."[88]

Such an assault on human dignity is not as clear as the Court suggests. Nothing in the poem explicitly attacks asylum seekers' status as human beings. While it is possible that, as found by the Court, the author of the poem placed asylum seekers on the lowest level of human existence, this reading is not the only one possible. The text of the poem indicates only a severe moral rebuke and harsh criticism of asylum seekers. In addition, it is unclear that the attack is directed at all asylum seekers, in the sense of every one of them without exception. The poem uses the definite article in its reference to its subject (*The* Fraudulent Asylum Seeker), but that term could refer to all, or many, or typical asylum seekers or simply to "too many" in the author's view. An interpretation favoring freedom of expression would assume that not each, and therefore not every, individual asylum seeker was concerned. Under this interpretation, the poem would still be hyperbole; however, because public policy toward asylum seekers is a highly political matter, such declarations of opinion would be allowed to contain strong, exaggerated, and extreme value judgements, if common criteria of interpretation applied.[89] Considering the Court's decision in the Soldiers-are-Murderers Case, even the fact that the word "deceiver" (*Betrüger*) is used in the poem need not mean that the author was alleging criminal fraud.[90] Finally, a free-speech-friendly interpretation could assume that the primary reason for the exaggeration was not to be intentionally derogatory, and thus defamatory, but rather to discuss a concrete political concern supported by existing or perceived facts and backed up by the author's real indignation.[91] At the time the poem was written, it was commonly known that the approval rate of asylum claims in Germany was well below 10 percent, that some or even many asylum seekers did in fact sell drugs, and that asylum seekers were more likely to commit certain crimes in greater numbers than citizens. The accuracy and interpretation of these numbers were and are still

[88] Bayerisches Oberstes Landesgericht (BayObLG), Decision of 31 January 1994, Neue Juristische Wochenschrift 1994, pp. 952, 953. The text of the poem is on p. 952. See also Bundesverwaltungsgericht (BVerwG), Decision of 23 January 1997, NJW 1977, p. 2341.

[89] See supra note 29 and the Soldiers-are-Murderers Case, Decisions, at 680: "[Exaggerated] or even downright rude criticism does not in itself yet make a statement vilificatory. Instead, it must also be that in the statement it is no longer discussion of the issue but defamation of the person that it is to the fore….For this reason, vilificatory criticism will only exceptionally be present in statements on a matter that affects the public…."

[90] See id. at pp. 682 f.

[91] American jurisprudence acknowledges and accepts that strong evaluative judgments are often combined with strong emotions and that strong emotions often lead to exaggerated claims or the use of stereotypes which, in the interest of an unfettered exchange of opinions about public issues, should not be interfered with. See, e.g., Cohen v. California, 403 U.S. 15 (1971).

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debatable, and the poem can certainly be shown to contain distinct exaggerations, but one cannot stipulate that it was composed without real concerns. So viewed, the poem would have to be considered as more than a simple hateful assault on the human dignity of every asylum seeker in Germany and could not be perceived as nothing more than a work of defamatory criticism.

Another example illustrates a similar tendency. According to German postal law, every person has a right to use the postal service for shipping through the mail, but the postal service is permitted to deny service if such denial is in the public interest. The administrative court in Frankfurt affirmed such a public interest in a case involving the shipment of printed materials belonging to the right-wing National Democratic Party of Germany.[92] Among other questions, the printed materials asked, "Should criminal foreigners be deported? Or should we, as [the other parties] demand, allow even more foreigners to enter our country in order to turn Frankfurt into a multi-cultural and multi-criminal metropolis?" One of several responses to the question read, "I am definitely in favor of putting an end to the immigration of foreigners. Already two-thirds of all criminal acts in Frankfurt are committed by foreigners and 80 percent of all drug dealers are asylum seekers...." The administrative court considered these utterances to be in violation of the criminal prohibition of incitement to hatred—specifically incitement to racial hatred. The Court supported its conclusion by referring to Arts. 1 and 4 of the *International Convention on the Elimination of all Forms of Racial Discrimination*, which in the Court's opinion forbid such acts of verbal hostility against foreigners.

In terms of protecting free speech, this decision is even more problematic than the judgement in the Fraudulent Asylum-Seeker Case. Here, the speaker had a clear and specific cause for concern (the extent of criminal conduct among foreigners), and the issue is evidently political in nature (the State's policy on foreigners). The statement may be exaggerated as far as actual statistics are concerned, but these inaccuracies could be corrected during the course of a public debate. Not every foreigner was characterized as a criminal, and human dignity was not clearly affected in the narrow sense of denying the basic right to life or equal respect.

Not all decisions handed down addressing these issues stretch the concepts of "incitement to hatred," "assault on human dignity," or "defamatory criticism" in similar fashion.[93] However, there is a sufficient number of rulings to demonstrate

[92] Verwaltungsgericht (VG) Frankfurt, Decision of 22 February 1993, Neue Juristische Wochenschrift 1993, p. 2067.

[93] See the references in this ruling to decisions by other courts on p. 2069. For a critique of this ruling, see ROELLECKE, pp. 3306 ff. The Federal Constitutional Court's ruling in the Historical Falsification Case, BVerfGE 90, 1 = Decisions 570, also favors the freedom of opinion. In this ruling, the Federal Constitutional Court emphasizes the enlightening power of the marketplace of ideas, where erroneous

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that the possibility of criminal punishment does have a chilling effect on robust, fierce, or exaggerated criticism in areas such as Germany's policies concerning foreigners. In terms of international law, such restrictions of free speech often make sense, given the extensive definition and prohibition of hate speech in the *International Convention on the Elimination of all Forms of Racial Discrimination*. In terms of German constitutional law, the extensive protections afforded human dignity, personal honor, and the right to personality may be read as supporting such free speech restrictions. Nevertheless, if, as the Federal Constitutional Court consistently claims, free speech is constitutive for the speaker and necessary for open debate, democracy, and stable society, then this right should be protected accordingly, even in (or especially in) cases where we do not like the speaker's message.

III. Simple Holocaust Denials and Qualified Holocaust Lies

The German rules concerning collective insult and incitement to hatred assume special significance in Holocaust cases. Therefore, these cases will be discussed separately, but first a distinction ought to be made between simple and qualified Holocaust lies.

Advocates of the "simple" Holocaust lie (or simple Holocaust denial) insist that no genocide took place during the years of the Third Reich or that, if Jews were killed, this did not happen in the magnitude reported or by means of a massive gassing campaign. Proponents of this view might say, "The Holocaust never happened," or "Reports about the Holocaust are greatly exaggerated."

A simple denial of the Holocaust becomes "qualified" as soon as it is accompanied by additional normative conclusions or calls to action. For instance, additional conclusions are drawn when a speaker alleges that interested parties or the Jews themselves maliciously falsify history in order to enrich themselves by keeping Germany susceptible to extortion. Holocaust denial can also be tied to a general call to action or to ideological support of Nazi beliefs. One holding such a view might say, "Something ought to be done about the use of extortion as a political tool against Germany by Jews spreading lies about Auschwitz."

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facts or one-sided interpretations are commonly ironed out by argument and counterargument. See id. 20 = Decisions, at 585: "As a rule, the democratic state trusts that an open debate between varying opinions will result in a multifaceted picture, against which one-sided views based on a falsification of facts generally cannot win out." For more recent speech-friendly decisions of the Federal Constitutional Court, see First Chamber of the First Senate rulings dated 24 March 2001, 7 April 2001, 12 April 2001, and 1 May 2001 in Neue Juristische Wochenschrift 2001, pp. 2069 ff., and the analysis of these decisions by BATTIS/GRIGOLEIT.

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These variations of Holocaust lies are all punishable under the Penal Code: simple denial of the Holocaust constitutes a criminal offence under § 130 (3), and qualified Holocaust lies can be punished under §§ 130 and 185 ff.[94] The Federal Constitutional Court considers these provisions to be justified limitations of the freedom of opinion. Simple Holocaust denial is not protected as speech under Art. 5 (1) BL because, as pointed out by the Federal Constitutional Court, "…a factual assertion that the utterer knows is, or that has been proven to be, untrue [is not covered by the freedom of opinion]."[95] The reasoning behind such a view is that the State's interest in promoting the discovery of truth is not furthered by permitting the spread of clearly false statements.

The rationale used to refuse simple Holocaust denial the character of "opinion" under Art. 5 (1) BL is not convincing.[96] Statements such as these are not individual facts that can be clearly isolated from the formation of opinions or the development of complex views of historical events, as if they were quotations or pieces of statistical information. Denial of the Holocaust is usually based on selective interpretation of many data. Such a process supports placing the simple denial of the Holocaust under the protection afforded by the free speech clause. It would then count as an "opinion" as does the qualified Holocaust lie.[97] Thus, all variations of the Holocaust lie would fall under the definitional coverage of Art. 5 (1) BL.

What about justifying the criminalization of simple Holocaust denial in terms of the goals served by free speech? It is doubtful that free speech rationales support criminalization. Why should we presume that truth finding would suffer if such lies were propagated? Public denial of the Holocaust would certainly meet with loud rejection in Germany, and the ensuing discussion might serve to educate the ignorant or even some neo-Nazis. A public discussion would undoubtedly guarantee that the terrible events of the Second World War would not sink into historical oblivion. Therefore, the consequentialist arguments are not persuasive. If

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[94] In American constitutional law, none of these statements would be punishable, provided they did not reach the limits described supra notes 3, 60, 87. See, e.g., the Skokie controversy, supra note 48. One of the reasons for this permissiveness is that the United States did not experience a Holocaust on their soil. Another reason is that there is no set of American collective defamation laws to speak of. This can be explained by the fact that offensive or hate speech has occasionally had liberating effects in the United States, for example in the civil rights movement and in the protest against the Vietnam War, whereas Europe in general and Germany in particular have experienced mainly bad consequences of hate speech. See SULLIVAN, p. 4. The contrast is striking. In Germany, hate speech is prohibited as early as possible, in the United States as late as possible.

[95] See supra notes 34 f., BVerfGE 90 241, 247, Decision of 13 April 1994, Holocaust Denial Case = Decisions 620, at 625.

[96] For a similar assessment, see HUSTER.

[97] See supra note 36.

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this speech were permitted, more good things than bad things might happen in the long run.

Furthermore, the autonomy interest of the speaker must not be forgotten. Barring clear evidence to the contrary, and using traditional free speech doctrine, one must assume that the utterer of the Holocaust denial speaks his mind, and being able to develop one's self through speaking one's mind irrespective of consequences is an important value associated with the freedom of expression. In terms of standard free speech doctrine and rationales, simple Holocaust denial should count as protected free speech in Germany.

However, the fact that such expression should be considered speech for constitutional purposes does not mean that the right to this speech must outweigh all the other constitutional rights served by speech-prohibitive laws. Which constitutionally protected rights are impaired by simple denial of the Holocaust? It cannot be a right to know the truth about this historical event, because the lie does not obliterate the ample proof of what actually happened. Moreover, it would be difficult to comprehend why criminal law should protect "historical truths" with sanctions against dissent, other than to enforce the specific duties of witnesses to tell the truth about facts relevant to particular judicial proceedings. Thus, again, it must be a concern about individual and collective insult and incitement to hatred that justifies this infringement of free speech. Indeed, both the German courts and prevailing German opinion assume that freedom from personal or collective insult and freedom from incitement to hatred each deserve more protection than freedom of opinion: young people are to be protected from being misguided by the falsification of history or by fallacious racial ideologies. Individual Jews and German Jews collectively must be able to rely on their dignity as human beings as well as on their right to personality. Public peace is essential for broad communities of people and necessarily bans racial doctrines questioning the equality of all human beings. It has been said that, "The horrors of hate speech [prohibited in § 130 of the Penal Code] are 'pogrom', 'massacre' and 'genocide.'"[98]

Some scholars have been critical of the criminalization of the simple Holocaust lie.[99] One of the questions asked is whether the Jews are really insulted collectively by denial of the Holocaust. The limitations to collective defamation were mentioned earlier: a collective group must be clearly identifiable, and it should be a minority; the criticism must refer to every member of the group; and an attack on the honor of each and every member must be present. The Federal Constitutional Court has

[98] WANDRES, p. 212.

[99] See WANDRES, pp. 140 ff., and the references in the Holocaust Denial Case of the Federal Constitutional Court, BVerfGE 90, 241, 252 = Decisions 620, at 629.

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affirmed all these conditions in cases dealing with the denial of the Holocaust. It emphasizes that

The historical fact alone that human beings were singled out according to the criteria of the "Nuremberg Acts" and robbed of their individuality with the goal of exterminating them puts the Jews who live in the Federal Republic of Germany into a special relationship vis-à-vis their fellow citizens; the past is still present in this relationship today. It is part of their personal self-perception and their dignity that they are comprehended as belonging to a group of people who stand out by virtue of their fate, and in relation to whom all others have a special moral responsibility. Indeed, respect for this self-perception is for each of them one of the guarantees against a repetition of such discrimination, and it forms a basic condition for their life in the Federal Republic. Whoever seeks to deny these events denies to each one of them the personal worth to which they are entitled. For the person affected this means the continuation of the discrimination against the group to which he belongs as well as against himself (BGHZ 75, 160 [162 ff.])[100]*….[Nor is anything changed] when one considers that Germany's attitude to its Nazi past and the political consequences thereof…is a question of essential concern to the public. It is true that in that case a presumption exists in favour of free speech. But this presumption does not apply if the utterance constitutes a formal criminal insult or vilification, of if the offensive utterance is based on factual assertions that have been proven untrue.*[101]

In summary, this means that every person who denies, minimizes, or approves of the Holocaust assaults the dignity and violates the honor of all Jews living in Germany. These utterances can therefore be punished as insults pursuant to §§ 185 ff. and as hate speech under § 130 of the Penal Code. By following this policy, Germany has effectively succeeded in suppressing such statements and thereby taken a major step toward leaving its National Socialist past behind. Furthermore, with this far-reaching ban, Germany is in agreement with pertinent international norms and with many other countries who have made denial of the Holocaust punishable under criminal law.[102]

However, it should be noted that making even the simple denial of the Holocaust punishable under criminal law is in tension with some accepted functions and doctrines of free speech. The Federal Constitutional Court chooses to selectively emphasize the dignity interests of the addressee, leaving the dignity interest of the speaker untouched. In addition, the full range of consequentialist possibilities is deliberately shortchanged by the premise that false statements cannot contribute to the truth. The Court also makes no effort to interpret such expressions of denial in ways that would allow the speech to escape sanctions as insult or racially

[100] Id., 251 f. = Decisions, at 628 f.
[101] Id., 254 = Decisions, at 630.
[102] See WANDRES, pp. 142 ff.; ZIMMER, Part III.

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motivated hate speech. However, the Court would have to do exactly that if it were to follow its own prescription to lower courts, namely to not specifically select the punishable interpretation of a statement if reasonable alternative interpretations are found to exist after mandatory careful analysis. Instead of following this policy, the Court uses four arguments to actually stretch the interpretation of the simple Holocaust lie into prohibited speech: (1) due to the Holocaust, there exists a special moral relationship between Germans and Jews; (2) this moral duty can be transformed into a positive legal obligation to acknowledge the Holocaust through use of the criminal law; (3) the Holocaust even now is a constitutive part of the collective self-perception and dignity of the Jews; and (4) denial of the Holocaust attacks the dignity and security of all Jews in Germany and is a form of discrimination.

Whereas the first argument seems reasonable, the second is problematic. At least when the criminal law, as *ultima ratio*, is applied in an effort to acknowledge a terrible historical fate, additional arguments regarding the necessity of the means and the protected interest should be raised. Regarding the third argument, a collective application of the dignity argument to all Jews, on the one hand, makes sense, given the group terror of the Nazi regime. On the other hand, it may turn out to be counterproductive if dignity is seen as protecting mainly the individual Jewish persons living in Germany, but not Jews collectively. In the fourth argument, the Court bundles past experiences and present life, and construes "denial" as an "attack" on the life, liberty, dignity, and equality of Jews living in Germany. The problem with these interpretations is not that they could not be viewed as tenable or plausible by many listeners or readers, but the fact that the Federal Constitutional Court does not exclude, in every individual case, other, non-punishable interpretations based, for example, on ignorance. In addition, the Court does not examine other, less restrictive ways of preserving the memory of the Holocaust and securing peace and security for Jews in Germany.[103] Instead, the Court chooses the punishable variant of the statement, and does so quite elaborately, without hardly developing free speech arguments supporting the speaker's side . This imbalance and divergence from its own free speech doctrines becomes especially striking during a comparison between the treatment of the Holocaust denial with the Soldiers-are-Murderers Case, in which the Court took great pains to come up with a non-punishable reading of the message "Soldiers are Murderers." Whatever the interpretation of this message may mean, it certainly

[103] Germany commemorates the Holocaust in many ways, and the Nazi past is a regular subject of school curricula and discussions in the mass media. The best political guarantee to protect the lives of everybody, majority and minority alike, is a spirit of liberty and tolerance, and the best legal guarantees are police regulations and sanctions that effectively deter or at least punish violations of physical integrity. See HUMAN RIGHTS WATCH, pp. 70 f.

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represents more of an "attack" on honor than the assertion that "The Holocaust never happened," and the addressees are easier to identify as well.

All of this supports the conclusion that the criminalization of simple denial of the Holocaust can be justified only against the background of the singular significance of the Holocaust to the self-image of all Germans.[104] Millions of Jews and other minorities were killed in the Nazi era; for German identity, this is still a traumatic event that is best expressed in the famous words, "Never Forget, Never Again!"[105] Based on this maxim, the use of criminal law to encroach upon the freedom to deny the Holocaust is considered justified, even if the usual doctrinal safeguards to the freedom of opinion are substantially skirted in the process.

Constitutional qualms abate or vanish concerning the prohibition of qualified Holocaust lies. When calls for action based on theories of racial superiority and inferiority are aired, hate speech approaches hate crime, consequentialist arguments point to harmful results, and the autonomy argument applies equally well to the addressee as to the speaker.[106] Punishment of such speech under § 130 or §§ 185 ff. of the Penal Code is justified. Offenders are viewed as having violated the right to human dignity and honor of the group attacked and as having threatened its members' rights to life and physical integrity, even though the offender's conduct may fall short of criminal instigation and no clear and present danger to public peace resulted. Another group of cases concerns normative assessments and conclusions in conjunction with denying or minimizing the Holocaust. What should be the government's response when a person states, "Special interest groups and Jews use the Holocaust lie to extort money from Germany"? Although these statements are also criminally punished in Germany, the threat to the life and liberty of the verbally attacked minority is not as clear as in the call-for-action cases, and, as long as no reference to racial inferiority or superiority is made, the insult to dignity or honor is less evident. Considering the admonishment of the Federal Constitutional Court to give opinions a free-speech-friendly interpretation rather than immediately focusing on the punishable meaning, these cases are not easily resolved.

In general, apart from the Holocaust cases, interest groups and politicians often take advantage of the moral failures and political mistakes of others for their own benefit, and this may be justified or contradict moral and political values. It may lead, for example, to reparations and apologies – as illustrated most recently at the

[104] See WANDRES, pp. 35 ff., 240.
[105] See MINSKER, p. 157 with note 297.
[106] This argument is supported by Art. 1 (1) BL, which requires government to respect the human dignity of the speaker as well as the human dignity of the addressee.

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anti-racism conference in Durban, South Africa by resolutions to apologize to former slaves. However, open and robust discussion should prevail whenever consequences of political mistakes or harmful actions in the past or in the present are at stake. Why then punish allegations about the way the Holocaust has been treated? Maybe because in these cases, heavily disliked extremists make ideological use of historical events and falsify them? If so, is there really a significant difference between their interpretation of history and other instances of one-sided portrayals of historical events by mainstream politicians or less despicable extremists? I do not think so. After all, distinctions made between different kinds of extremism often reflect more the *Zeitgeist* or political correctness than principled differentiation. Simply assuming that all right-wingers are die-hard neo-Nazis who are either unwilling or unable to change their world view would amount to constitutionally suspect stereotyping.

Moreover, it is usually as difficult to disprove as it is to prove accusations of historical falsification or ideological manipulation of statistics and events. Also, the assumption that only neo-Nazis resorting to qualified Holocaust lies give historical events an ideological slant, while other groups or politicians do not, is highly improbable.

Finally, the presumption that all criticisms directed against "the Jews" refer to each and every individual Jew may not be accurate, as such general assertions are commonly directed at "many," "typical," or "too many" of the group, from the speaker's point of view, instead of "all." Such a more selective insult would not meet the usual requirement that collective insults be directed against every member of the group. The presumption that the insult in such cases is directed at all Jews is valid only when these assertions are viewed not as empirical, but rather as stereotypical, attributions of negative characteristics against which individuals cannot defend, there being no proof or counterproof possible.[107] German jurisprudence, which criminalizes such speech as a category of Holocaust lie, may be justified under this rationale.

F. Concluding Remarks

Particular hate speech messages often form part of more complex ideologies such as theories of racial superiority. While Germany, Europe, and many non-European modern democracies are determined to effectively fight such ideologies by prohibiting them as early as possible, dominant American constitutional doctrine is equally determined to allow propagation of such messages. Not until there is a call to immediate illegal action or fisticuffs is the American government permitted to

[107] See WANDRES, p. 206 (referring to Nazi literature claiming that all Jews are liars and parasites).

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step in. As long as only ideas, even destructive ideas, are advocated, United States constitutional law requires the State to remain neutral. For the State to lose its neutrality is considered a cardinal sin.

Germany, many other countries, and international law all view hate speech and the spread of fallacious racial ideologies as sufficiently harmful to justify their prohibition. The broad definition of what may be prohibited found in the pertinent United Nations agreement illustrates that, in this context, racial discrimination includes prejudiced acts based on nearly any unalterable and invariable criterium that is likely to be of personal importance, such as gender, religion, or ethnic affiliation. According to the United Nations agreement, uttered opinions as well as physical acts of discrimination may be punished. That is exactly what Germany has done in §§ 185 ff. and 130 of its Penal Code.

Similar to applicable provisions of international law, German statutes specifically refrain from requiring that racist messages lead to a clear and present danger of imminent lawless action before becoming punishable. A distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself. Having viewed the horrors of the Second World War as well as more recent racial conflicts on the Balkan peninsula, in Rwanda, and elsewhere, countries following this legal theory collectively believe that tolerating fallacious racial ideologies has the potential for severe consequences. In these legal systems, there need not be any certainty, nor even a particular likelihood, of violence—the spectre of future racial strife suffices. Although the dangers of hate speech are concededly abstract, they are nevertheless seen as being real enough to warrant management by the government, whose task in this area can be termed as control of the political climate.[108] Admittedly, even in these countries, there are certain restrictions on the prohibition of hate speech that favor the freedom of opinion: the hate utterance must be made in public, the hate utterance can occasionally be defended by a showing that it poses no danger, and hate utterances that are considered artistic or scholarly are often permitted.[109] However, hate speech is generally prohibited—it is "speech minus" or "low-value speech," even if it addresses issues of high political importance. The right to speech is limited by the perceived higher value of eliminating all kinds of racism in the broadest sense. In Germany, many other countries, and international law, this control of racism is considered the preferred duty of governments—a "duty plus."

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[108] The word *Klimakontrolle* (control of the political climate) is used. See ZIMMER, in which this term often occurs, and further references in LACKNER/KÜHL, § 130, marginal note 1.
[109] See supra notes 31, 59, 86. But see also the Strauß Caricature Case, supra notes 71 f.

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Common rallying cries in Germany are "Nip it in the bud" (*Wehret den Anfängen*) and "Never again" (*Nie wieder*). These slogans were initially directed only against a recurrence of the Nazi regime of terror but are now used to condemn hate speech writ large. Although no person of good will could dispute the wisdom of these admonishments, constitutional scholars must be concerned that they not be used to support undue encroachment upon free speech. Otherwise, the abstract dangers of hate speech might be replaced by the concrete danger of minimizing speech, that "most direct expression of human personality in society" which is "one of the foremost human rights of all…'the matrix, the indispensable condition of nearly every other form of freedom.'"[110]

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[110] See supra note 19.

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