

THE LAWS BANNING HOLOCAUST DENIAL – REVISED FROM GPN ISSUE 3

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I. INTRODUCTION

Last month, I went to a villa in a suburb of Berlin called Wannsee. There, on January 20, 1942, after a hearty meal, senior Nazi officials met and decided how to exterminate the Jewish people. The detailed minutes of that meeting have been preserved by successive German governments. Here is a copy of those minutes, in which the Nazis issued precise instructions on how to carry out the extermination of the Jews. Is this a lie?

A day before I was in Wannsee, I was given in Berlin the original construction plans for the Auschwitz-Birkenau concentration camp. Those plans are signed by Hitler's deputy, Heinrich Himmler himself. Here is a copy of the plans for Auschwitz-Birkenau, where one million Jews were murdered. Is this too a lie?
- Benjamin Netanyahu, Israeli Prime Minister¹

More than sixty years later, it is difficult to believe that the truth of the Holocaust still warrants debate, let alone discussion. Yet, on September 24, 2009, Israeli Prime Minister Benjamin Netanyahu gave a speech before the United Nations General Assembly in which he provided pieces of hard evidence that the genocide of the Jewish people *did* occur during World War II. Why did he do this? The day before, Holocaust-denying Iranian President Mahmoud Ahmadinejad gave a speech before the UN, in which he espoused the same, tired antisemitic and anti-Israel rhetoric that he has become famous for.² It is shocking to the senses that a rebuttal—one that attempts to prove the existence of the Holocaust, no less—was necessary. And yet, PM Netanyahu found that it was.

The responses to the outrageous assertions denying the Holocaust vary, from refusing to acknowledge or give credence to these falsehoods, to aggressively countering them by presenting historical facts.³ But several European countries have gone much further

than simply allowing Holocaust denial to be resolved in the marketplace of ideas. These European nations have enacted a variety of laws, ranging from the criminalization of Holocaust denial and other genocides, to criminalizing Nazi ideology promoted through speech, symbols, or public association. These laws are intended to prevent the return of Nazism “by stamping out at the earliest opportunity ... any public reemergence of Nazi views.”⁴

Currently, fourteen European countries as well as the State of Israel either explicitly prohibit the denial of the Holocaust or have enacted laws that can be used to punish Holocaust deniers.⁵ However, two questions arise with respect to these laws. First, are they effective in preventing the resurgence of Nazism and the promotion of hatred and genocide? And second, do these laws violate free speech, and if they do, is this a permissible violation?

Part II of this article will briefly discuss what the phenomenon of Holocaust denial entails. Part III will set forth the various laws in countries that either explicitly or implicitly ban Holocaust denial. Part IV will examine the questions presented above: are such laws effective in their purpose, and is it right to limit free speech in this way? Part V will briefly conclude that context is dispositive.

II. THE PHENOMENON OF HOLOCAUST DENIAL

What *is* Holocaust denial? Why is there dispute over what is known as the greatest crime perpetrated against a group of people in the modern age? Why are the voices of denial loud enough that the Prime Minister of Israel—the country that rose from the ashes of that inferno—feels he has to refute these claims? It seems this is one of the more concrete signs that the denialists are no longer a fringe group whose hateful spewing can be ignored. Indeed, extremist groups such as the Ku Klux Klan no longer exemplify Holocaust deniers. Increasingly, denialists take on the tone of scholars: “[t]hey use quotes taken out of context, accumulate footnotes that look serious, mimic the aesthetics of academic journals in their own papers and online publications, and often grant themselves the title of 'professor,' 'historian' or 'expert.’”⁶ Arguably, this new cloak makes denial more insidious and thus more dangerous, as it attracts not only those who are susceptible to conspiracy theories, but can also ensnare individuals who simply don’t have the educational background to know any better. And as fewer and fewer Holocaust survivors remain living, there are less opportunities for individuals to hear their stories directly and thus more poignantly.

What do denialists claim? To begin, Holocaust deniers conceive of themselves as revisionists—historians who re-examine accepted history and update it to reflect previously unknown facts or less biased information. As such, revisionism is an academic approach that recognizes that traditional narratives of history may not be entirely accurate and should be reviewed and revised as new information comes to the surface.⁷ But the problem with these so-called “revisionists” is that they are not engaging in a scholarly practice at all—though couched in academic terms, their claims

distort well-established facts and tarnish the memory of the dead. That is, “they reverse the proper methodology described above, thus turning the proper historical method of investigation and analysis on its head.”⁸

With respect to the Holocaust, deniers make three primary claims: (1) there was no official policy by the Nazi regime to exterminate the Jews; (2) Nazis did not employ the use of homicidal gas chambers to mass murder Jews; and (3) the death toll of European Jews has been greatly exaggerated and is well below six million.⁹

To eliminate any association with legitimate historical revision, Holocaust denial is sometimes referred to as “negationism.” Negationists deny historical crimes against humanity. They do not attempt to reinterpret or reanalyze known facts, negationists simply *deny* well-established facts.¹⁰

III. THE LAWS BANNING HOLOCAUST DENIAL

Presently, sixteen countries have enacted laws that either directly criminalize Holocaust denial or can be used to prosecute individuals who deny the Holocaust. Austria, Belgium, the Czech Republic, France, Germany, Hungary, Israel, Liechtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia¹¹, and Switzerland have instituted such laws.¹² In addition, the courts in The Netherlands often consider Holocaust denial a form of spreading hatred, which is a punishable offense.¹³

A. *Laws That Explicitly Ban Holocaust Denial*

Austria

The Verbotsgesetz 1945 (The Prohibition Act 1945) is an Austrian constitutional law that provided the legal framework for denazification and aimed to suppress any potential of revival of Nazism in Austria. Yet the law did not clearly state that Holocaust denial was a Nazi activity, although the Austrian courts interpreted the act in this way. Because it was becoming more and more difficult to apply the law to neo-Nazi endeavors, particularly when “revisionism” became part and parcel of the neo-Nazi message, the law was finally amended in February of 1992. Among the changes to the law was a section that explicitly bans the denial or gross minimization of Nazi genocide or other Nazi crimes against humanity, thus making it easier to address Nazi propaganda and historical “revisionism.”¹⁴ The text of this law is as follows:

National Socialism Prohibition Law (1945, Amendments of 1992)

§3g. He who operates in a manner characterized other than that in § § 3a – 3f will be punished (revitalizing of the NSDAP or identification with), with imprisonment from one to up to ten years, and in cases of particularly dangerous suspects or activity, be punished with up to twenty years imprisonment.¹⁵

§3h. As an amendment to § 3 g., whoever denies, grossly plays down, approves or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a print publication, in broadcast or other media.¹⁶

Belgium

The Holocaust denial law in Belgium was passed on March 23, 1995. This law makes it a crime to deny, grossly minimize, attempt to justify, or approve of the genocide committed by the Nazis during WWII. The offense is punishable by imprisonment of up to one year and a fine of up to 124 EUR, and prosecution is carried out by the Belgian Centre for Equal Opportunities.¹⁷

Negationism Law (1995, Amendments of 1999)

Art. 1 Whoever, in the circumstances given in article 444 of the Penal Code denies, grossly minimizes, attempts to justify, or approves the genocide committed by the German National Socialist Regime during the Second World War shall be punished by a prison sentence of eight days to one year, and by a fine of twenty six francs to five thousand francs. For the application of the previous paragraph, the term genocide is meant in the sense of article 2 of the International Treaty of 9 December 1948 on preventing and combating genocide. In the event of repetitions, the guilty party may in addition have his civic rights suspended in accordance with article 33 of the Penal Code.

Art.2 In the event of a conviction on account of a violation under this Act, it may be ordered that the judgment, in its entity or an excerpt of it, is published in one of more newspapers, and is displayed, to the charge of the guilty party.

Art.3. Chapter VII of the First Book of the Penal Code and Article 85 of the same Code are also applicable to this Act.

Art. 4. The Centre for Equal Opportunities and Opposition to Racism, as well as any association that at the time of the facts had a legal personality for at least five years, and which, on the grounds of its statutes, has the objective of defending moral interests and the honor of the resistance or the deported, may act in law in all legal disputes arising from the application of this Act.¹⁸

Czech Republic

The Czech Republic has made denial of the Holocaust as well as negationism of communist atrocities illegal.

Law Against Support and Dissemination of Movements Oppressing Human Rights and Freedoms (2001)

§ 260 (1) The person who supports or spreads movements oppressing human rights and freedoms or declares national, race, religious or class hatred or hatred against other group of persons will be punished by prison from 1 to 5 years. (2) The person will be imprisoned from 3 to 8 years if: a) he/she commits the crime mentioned in paragraph (1) in print, film, radio, television or other similarly effective manner, b) he/she commits the crime as a member of an organized group c) he/she commits the crime in a state of national emergency or state of war

§ 261 The person who publicly declares sympathies with such a movement mentioned in § 260, will be punished by prison from 6 months to 3 years.

§ 261a The person who publicly denies, puts in doubt, approves or tries to justify Nazi or communist genocide or other crimes of Nazis or communists will be punished by prison of 6 months to 3 years.¹⁹

France

The Gayssot Act was passed in France on July 13, 1990. The Act criminalizes questioning the existence of crimes of humanity as defined in the Charter of the International Military Tribunal, which was used at Nuremberg in 1945 to 1946 to convict Nazi leaders.²⁰ Robert Faurisson, an infamous Holocaust denier, challenged the Act but the Human Rights Commission upheld it as a necessary means to counter possible antisemitism.²¹

Law No. 90-615 to repress acts of racism, anti-Semitism and xenophobia (1990)

Art 9. – As an amendment to Article 24 of the law of July 29, 1881 on the freedom of the press, article 24 (a) is as follows written: Art. 24 (a). - those who have disputed the existence of one or more crimes against humanity such as they are defined by Article 6 of the statute of the international tribunal military annexed in the agreement of London of August 8, 1945 and which were a carried out either by the members of an organization declared criminal pursuant to Article 9 of the aforementioned statute, or by a person found guilty such crimes by a French or international jurisdiction shall be punished by one month to one years imprisonment or a fine.

Art 13. - It is inserted, after article 48-1 of the law of July 29, 1881 on the freedom of the press, article 48-2 thus written: Art. 48-2. - publication or publicly expressed opinion encouraging those to whom it is addressed to pass a favorable moral judgment on one or more crimes against

humanity and tending to justify these crimes (including collaboration) or vindicate their perpetrators shall be punished by one to five years imprisonment or a fine.²²

Germany

Volksverhetzung (“incitement of the people”) is a concept under German criminal law that prohibits the incitement of hatred against a particular group of people.

§130 Public Incitement (1985, Revised 1992, 2002, 2005)

(1) Whoever, in a manner that is capable of disturbing the public peace:

1. incites hatred against segments of the population or calls for violent or arbitrary measures against them; or
 2. assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population,
- shall be punished with imprisonment from three months to five years.

(3) Whoever publicly or in a meeting approves of, denies or belittles an act committed under the rule of National Socialism of the type indicated in Section 6 subsection (1) of the Code of Crimes against International Law, in a manner capable of disturbing the public peace shall be punished with imprisonment for not more than five years or a fine.

(4) Whoever publicly or in a meeting disturbs the public peace in a manner that assaults the human dignity of the victims by approving of, denying or rendering harmless the violent and arbitrary National Socialist rule shall be punished with imprisonment for not more than three years or a fine.²³

Section 3 above refers to the following crimes:

§ 6 Genocide

(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group:

1. kills a member of the group,
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in section 226 of the Criminal Code,
3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
4. imposes measures intended to prevent births within the group,

5. forcibly transfers a child of the group to another group, shall be punished with imprisonment for life.²⁴

Hungary

In 1992, The Hungarian Constitutional Court struck down an existing law against Holocaust denial on the grounds that criminalizing it was incompatible with the right to free speech.²⁵ However, on February 22, 2010, the Hungarian Parliament again passed legislation that criminalizes the minimization or denial of the Holocaust, and President Laszlo Solyom signed the bill into law on March 3, 2010. According to a spokesperson, the current President does not believe that this legislation contravenes the Hungarian constitutional right to free speech.²⁶

The reform was passed with a 197-1 vote, with 142 abstentions. The new law will come into effect in early April. The text reads:

Those who publicly hurt the dignity of a victim of the Holocaust by denying or questioning the Holocaust itself, or claim it insignificant, infringe the law and can be punished by prison sentence of up to three years.²⁷

Israel

The Knesset (the Supreme Court in Israel) passed a law to criminalize the denial of the Holocaust on July 8, 1986.

Denial of Holocaust (Prohibition) Law, 5746-1986

Definitions

1. In this Law, "crime against the Jewish people" and "crime against humanity" have the same respective meanings as in the "Nazis and Nazi Collaborators Law, 5710-1950.

Prohibition of Denial of Holocaust

2. A person who, in writing or by word of mouth, publishes any statement denying or diminishing the proportions of acts committed in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, with intent to defend the perpetrators of those acts or to express sympathy or identification with them, shall be liable to imprisonment for a term of five years.

Prohibition of publication of expression for sympathy for Nazi crimes

3. A person who, in writing or by word of mouth, publishes any statement expressing praise or sympathy for or identification with acts done in the period of the Nazi regime, which are crimes against the Jewish people or crimes against humanity, shall be liable to imprisonment for a term of five years.

Permitted publication

4. The publication of a correct and fair report of a publication prohibited by this Law shall not be regarded as an offence thereunder so long as it is not made with intent to express sympathy or identification with the perpetrators of crimes against the Jewish people or against humanity.

Filing of charge

5. An indictment for offences under this Law shall only be filed by or with the consent of the Attorney-General.²⁸

Luxembourg

Article 457-3 of the Criminal Code, Act of 19 July 1997 outlaws Holocaust denial in addition to the denial of other genocides. Punishment for violating this Act is imprisonment up to 6 months and/or a fine. The offense of “negationism and revisionism” applies to

...anyone who has contested, minimized, justified or denied the existence of war crimes or crimes against humanity as defined in the statutes of the International Military Tribunal of 8 August 1945 or the existence of a genocide as defined by the Act of 8 August 1985. A complaint must be lodged by the person against whom the offence was committed (victim or association) in order for proceedings to be brought, Article 450 of the Criminal Code, Act of 19 July 1997.²⁹

Poland

Poland criminalizes both Holocaust denial and the denial of crimes perpetrated by communists.

**Act of 18 December 1998 on the Institute of National Remembrance -
Commission for the Prosecution of Crimes against the Polish Nation**

Article 55

He who publicly and contrary to facts contradicts the crimes mentioned in Article 1, clause 1 shall be subject to a fine or a penalty of deprivation of liberty of up to three years. The judgment shall be made publicly known.

Article 1

This Act shall govern:

1. the registration, collection, access, management and use of the documents of the organs of state security created and collected between 22 July 1944 and 31 December 1989, and the documents of the organs of security of the Third Reich and the Union of Soviet Socialist Republics concerning:

a) crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity, nationalities in the period between 1 September 1939 and 31 December 1989:

- Nazi crimes,
- communist crimes,
- other crimes constituting crimes against peace, crimes against humanity or war crimes

b) other politically motivated repressive measures committed by functionaries of Polish prosecution bodies or the judiciary or persons acting upon their orders, and disclosed in the content of the rulings given pursuant to the Act of 23 February 1991 on the Acknowledgement as Null and Void Decisions Delivered on Persons Repressed for Activities for the Benefit of the Independent Polish State (Journal of Laws of 1993 No. 34, item 149, of 1995 No. 36, item 159, No. 28, item 143, and of 1998 No. 97, item 604),

2. the rules of procedure as regards the prosecution of crimes specified in point 1 letter a),

3. the protection of the personal data of grieved parties, and

4. the conduct of activities as regards public education.³⁰

Romania

Romania proposed an Emergency Ordinance on March 13, 2002 to prohibit Holocaust denial. The law was ratified on May 6, 2006, and also bans racist, fascist, xenophobic symbols, uniforms and gestures. Violations are punishable by up to five years in prison.

Emergency Ordinance No. 31 of March 13, 2002

Article 3. – (1) Establishing a fascist, racist or xenophobic organization is punishable by imprisonment from 5 to 15 years and the loss of certain rights.

Article 4. – (1) The dissemination, sale or manufacture of symbols either fascist, racist or xenophobic, and possession of such symbols is punished with imprisonment from 6 months to 5 years and the loss of certain rights.

Article 5. – Promoting the culture of persons guilty of committing a crime against peace and humanity or promoting fascist, racist or xenophobic ideology, through propaganda, committed by any means, in public, is punishable by imprisonment from 6 months to 5 years and the loss of certain rights.

Article 6. – Denial of the Holocaust in public, or to the effects thereof is punishable by imprisonment from 6 months to 5 years and the loss of certain rights.³¹

B. Laws That Prohibit Genocide Denial Generally

Several countries do not ban Holocaust denial specifically but instead have passed legislation criminalizing the denial of any genocide, which clearly can be enforced against Holocaust deniers as well.

Liechtenstein

Liechtenstein's criminal code prohibits the denial of genocide:

§ 283 Race discrimination

5. Whoever publicly denies, coarsely trivializes, or tries to justify genocide or other crimes against humanity via word, writing, pictures, electronically transmitted signs, gestures, violent acts or by other means shall be punished with imprisonment for up to two years.³²

Portugal

Article 240: Religious, racial, or sexual discrimination

2 - Whoever in a public meeting, in writing intended for dissemination, or by any means of media:

- a) incites violence against an individual or group of individuals because of race, color, ethnic or national origin or religion, or
- b) defames or slanders an individual or group of individuals because of race, color, ethnic or national origin or religion, particularly through the denial of war crimes or against peace and humanity;

with intent to encourage or incite to racial or religious discrimination, shall be punished with imprisonment from 6 months to 5 years.³³

Switzerland

The denial of genocide and other crimes against humanity is an imprisonable offense under Swiss law.

SR 311.0 Swiss Penal Code, Article 261 Racial Discrimination

Whoever publicly, by word, writing, image, gesture, acts of violence or any other manner, demeans or discriminates against an individual or a group of individuals because of their race, their ethnicity or their religion in a way which undermines human dignity, or on those bases, denies, coarsely minimizes or seeks to justify a genocide or other crimes against humanity ... shall be punished with up to three years imprisonment or a fine.³⁴

C. Rejections of Laws Criminalizing Holocaust Denial

Because of the First Amendment's guarantee of free speech, Holocaust denial has not been criminalized in the United States. Freedom of expression is also a cornerstone of British society, therefore Holocaust denial has not been prohibited in the United Kingdom either.³⁵ Italy approved a draft law that imposes jail terms for racially motivated crimes, but does not go so far as to prohibit Holocaust denial specifically, although this was Justice Minister Mastella's initial aim.³⁶ Italy has also rejected measures proposed by the European Union to impose EU-wide bans on Holocaust denial, on the basis of protecting freedom of speech.³⁷ In Bosnia and Herzegovina, a Bosniak member of the Parliament proposed a draft law in 2007 to criminalize Holocaust denial and the denial of genocide and other crimes against humanity. However, Bosnian Serb MPs have been repeatedly opposed to such legislation. There is concern that such a law might be used as a weapon against their community. As one delegate explains, "[w]ar crimes are a sensitive issue in Bosnia and Herzegovina. I am not sure this law would actually lead to reconciliation and justice fulfillment." He continues on to say that Bosnian Serbs "consider that [the law's] adoption would cause disagreement and even animosity."³⁸

Several countries formally banned Holocaust denial in the past but it has since been decriminalized. As discussed, the Hungarian Constitutional Court formerly struck down a law against Holocaust denial in 1992 on the grounds that doing so was incompatible with the right to free speech.³⁹ Spain banned genocide denial in general until the Constitutional Court of Spain ruled that prohibiting denial was unconstitutional. Thus, as of November 7, 2007, Holocaust *denial* is legal, but *justification* of the Holocaust (or any other genocide, for that matter) is still an imprisonable offense.⁴⁰

V. THE PROPRIETY OF HOLOCAUST DENIAL LAWS

A. Are Holocaust Denial Laws Effective in Decreasing Holocaust Denial?

Holocaust denial profoundly affronts human dignity, but does criminalizing denial lead to more respect for the victims, for their deaths, and for their suffering? With such a variety of legal mechanisms—some countries choosing to respond to Holocaust denial,

with others choosing not to—can Holocaust denial be eradicated through the rule of law?

The Internet Age complicates this question on both ends of the spectrum. On the one hand, when students—particularly young, impressionable ones—are assigned to do research on the Holocaust, they generally receive little guidance as to what websites are legitimate sources. As a result, they come into contact with the denialist propaganda that mimics serious historical research.⁴¹ Indeed, any individual seeking to learn more about the Holocaust is confronted with negationist materials, and it can be difficult to discern truth from distortions. Perhaps this is a reason to prohibit Holocaust-denying speech, but this does not seem to completely eliminate the problem.

Punishing Holocaust deniers may have the contrary and paradoxical effect of strengthening their beliefs, rather than deterring them.⁴² This enshrines the concept that States “can respond to poisonous ideas by censoring them and throwing those who disseminate them in prison, but that will only serve to drive the ideas underground where the poison will fester and spread.”⁴³ Because Holocaust denial is in essence a conspiracy theory, those who feel politically powerless are more likely than others to be attracted to it.⁴⁴ Conspiracy theories are attractive because they represent a populist response to government secrecy: they seem to provide an explanation for the mysterious workings of political power.⁴⁵ Thus, in the eyes of denialists, or anyone else susceptible to its lure, “suppressing” Holocaust denial appears to directly legitimize the conspiracy theory itself.

In the next step, the poisonous idea is driven underground, which today is made readily accessible through the Internet. Therefore, if one country prohibits Holocaust denial, the Internet makes the community of like-minded individuals a simple click away. Indeed, there has been a proliferation of websites, of varying degrees of sophistication, that question the Holocaust and offer “evidence” that it never occurred.⁴⁶

The following example is illustrative of how denialists turn to the Internet: Holocaust denial is criminalized in Romania, but the sixth hit under a Google search for “holocaust denial Romania” leads to a forum where a Romanian not only laments the limit on freedom of speech, but goes on to spew deeply racist, hateful remarks:

Am I asking too much in wanting what the US has got ??? U know that little thing called freedom of speach guaranteed by the constitution!!!! At least the Jews were not able to change that!!!

A life where freedom of speach, freedom of free thinking is not permitted is not a country worth living in and a life without these rights is not a life worth living.

...

So what do I plan to do about this b.s. law?? Next time I am back home go in from of the Victoria Palace raise my right hand at a aprox 120 degree and angle and salute.⁴⁷

If this poster's experience is any indication, the punishment of Holocaust deniers appears to fuel their convictions rather than disarm them. This basis alone may be enough to make a State think twice before criminalizing Holocaust denial, but it remains a difficult balancing act. The Internet can become a trap for the uninformed and a breeding ground for lies, but it does not seem that criminalization can fully counter either result. In this respect, perhaps a stronger commitment to Holocaust education and the dissemination of actual historical facts will prove to be a more effective tool in combating denial. One eminent British historian, Sir Martin Gilbert, believes that in the end, the truth will win out. He explains that "[t]he number of deniers and the amount of denial literature is miniscule compared with the serious literature, not only the memoirs but the history books, the specialist books, and books which cater for every age group on the Holocaust."⁴⁸ If his opinion is to be relied on, it seems that continuing in this vein may ultimately prove to be the most fruitful approach.

B. Freedom of Speech Concerns

It is difficult enough to determine the efficacy of laws that criminalize Holocaust denial, but answering whether these laws violate freedom of speech raises a whole new set of concerns. Traditionally, the United States has placed a much higher premium on freedom of speech than most European countries. Indeed, it is almost inconceivable to think that Holocaust denial would be criminalized in the U.S., as that concept is so at odds with First Amendment jurisprudence. Yet in certain European countries, there may be good reasons to prohibit Holocaust denial. In fact, the underlying principle may be in line with the American Constitution when applied to the European context.

Many European countries were complicit in the perpetration of the Holocaust, and this responsibility serves as the basis for their laws that prohibit Holocaust denial. Germany, Austria, and France are particularly morally self-critical in this matter, so it unsurprising that these countries take antisemitism, Holocaust denial, and any red flag of Nazi resurgence very seriously. Here, context becomes a critical issue.

Virginia v. Black is a seminal case in the United States that distinguished between the two types of cross burning—one version is constitutionally protected, while the other is not. A state may ban cross burning that is carried out with the intent to intimidate an individual, but cross burning that simply expresses an idea (even one as odious as racial superiority) is a form of protected speech.⁴⁹ Thus far, the debate over Holocaust denial laws seems to conceive of Holocaust denial as the mere expression of an idea, one that despite how sick or twisted it may be, is one that individuals should have the right to believe in. This notion is what sparks such heated debate over whether or not criminalizing Holocaust denial is a permissible free speech violation.

Yet there may be another way to examine the message of Holocaust denial. The spectrum of negationism is vast, with some deniers “merely” challenging established notions of history, while others accompany their denial with openly vitriolic, antisemitic speech. But at the core of any Holocaust denial is the minimization of the dignity of those that were murdered: Jews. The Holocaust itself stemmed from a disregard for the value of Jewish lives, and that disregard began through speech. Antisemitism, which eventually became encapsulated in law, was the vehicle through which the Final Solution first gained steam. First Jews lost their dignity through insults, then their livelihoods when their businesses were confiscated from them, until ultimately, they lost their lives.

As Justice Thomas explains in his dissent in *Virginia v. Black*, “[i]n every culture, certain things acquire meaning well beyond what outsiders can comprehend. That goes for both the sacred, and the profane. I believe that cross burning is the paradigmatic example of the latter.”⁵⁰ His argument is essentially that cross burning is always a threat of some kind and should never be protected speech for this reason. In Europe, the soil upon which so much Jewish blood was shed, perhaps Holocaust denial is better thought of as such a paradigmatic example of profane, threatening speech. Thus, countries that played a heavy hand in executing the genocide of the Jews in WWII might consider Holocaust denial precisely the type of expression undeserving of protection.

VI. CONCLUSION

Unfortunately, both the questions of efficacy and propriety of Holocaust denial laws are not easily resolved. There are strong arguments on either side of these debates, and ultimately, a combination of several approaches will most likely be necessary to combat Holocaust denial. The law may be an effective means, but only to a certain extent and in a particular context. When the Holocaust—and by extension, the denial of it—have gained particular meaning in a society, it seems proper to treat Holocaust denying speech as unworthy of protection. On the other hand, in societies where complicity in the perpetration of the Final Solution was not as great, laws criminalizing Holocaust denial may cause further harm by pushing deniers out of public discourse and into circles where their odious beliefs are strengthened. Though it is not possible to formulate a solution that is applicable universally, it *does* seem possible to criminalize Holocaust denial in a manner that even conforms to freedom of speech jurisprudence under the American Constitution.

¹ Netanyahu Speech at UN: Full Text Transcript and Video, <http://www.nowpublic.com/world/netanyahu-speech-un-full-text-transcript-and-video> (Sept. 24, 2009).

² Ewen MacAskill, *Mahmoud Ahmadinejad's renewed attack on Israel hastens walkout*, THE GUARDIAN, Sept. 24, 2009, <http://www.guardian.co.uk/world/2009/sep/24/mahmoud-ahmadinejad-un-speech-criticised>.

³ See, e.g., WIKIPEDIA, *Holocaust denial*, §6.1 Types of Reactions, http://en.wikipedia.org/wiki/Holocaust_denial#Types_of_reaction (last visited Nov. 24, 2009)

(explaining that the first type of reaction is typified by scholars who refuse to engage Holocaust deniers or their arguments at all, since this might lend Holocaust deniers unwarranted legitimacy. The second group of scholars attempts to raise awareness of the methods and motivation of Holocaust denial, but tries to avoid legitimizing the deniers themselves. The third group responds to the claims of Holocaust deniers head on, by pointing out errors in the deniers' evidence).

⁴ MICHAEL J. BAZYLER, INTERNATIONAL INSTITUTE FOR HOLOCAUST STUDIES, YAD VASHEM, HOLOCAUST DENIAL LAWS AND OTHER LEGISLATION CRIMINALIZING PROMOTION OF NAZISM 1 (2006), http://www1.yadvashem.org/about_yad/departments/audio/Prof_Bazyler.html.

⁵ See generally, WIKIPEDIA, *Holocaust denial*, §7 Laws against Holocaust denial, http://en.wikipedia.org/wiki/Holocaust_denial#Laws_against_Holocaust_denial (last visited Nov. 24, 2009); WIKIPEDIA, *Laws against Holocaust denial*, http://en.wikipedia.org/wiki/Laws_against_Holocaust_denial (last visited Nov. 24, 2009).

⁶ Holocaust Denial, <http://modiya.nyu.edu/handle/1964/251> (last visited Nov. 23, 2009).

⁷ JAMES MCPHERSON, REVISIONIST HISTORIANS (2003), <http://www.historians.org/perspectives/issues/2003/0309/0309pre1.cfm>.

⁸ See Gordon McPhee, *Why Revisionism Isn't*, May 15, 1999, <http://www.holocaust-history.org/revisionism-isnt/> (“‘Revisionism’ ... denies events that have been objectively and empirically proved to have occurred, and ... works backward from the conclusion to the facts, thus necessitating the distortion and manipulation of those faces where they differ from the preordained conclusion (which they almost always do)”).

⁹ Andrew E. Mathis, *Holocaust Denial, A Definition*, July 2, 2004, <http://www.holocaust-history.org/denial/abc-clio/>.

¹⁰ KOENRAAD ELST, NEGATIONISM IN INDIA: CONCEALING THE RECORD OF ISLAM, *Chapter One – Negationism In General*, *The Voice of India* (2002), available at <http://voiceofdharm.org/books/negaind/ch1.htm>.

¹¹ Despite a Wikipedia entry which states that Slovakia repealed its laws prohibiting Holocaust denial in 2005, a Jerusalem Post article explains that Slovak lawmakers rejected a government proposal to decriminalize Holocaust denial. Denial is currently punishable by up to three years in prison. *Slovaks keep Holocaust denial a crime*, THE JERUSALEM POST, Feb. 9, 2005, abstract available at <http://pqasb.pqarchiver.com/jpost/access/791232191.html?dids=791232191:791232191&FMT=ABS&FMTS=ABS:FT&date=Feb+9%2C+2005&author=AP&pub=Jerusalem+Post&edition=&startpage=06&desc=Slovaks+keep+Holocaust+denial+a+crime> (last visited Nov. 29, 2009).

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