
HOLOCAUST DENIAL LEGISLATION IN THE UNITED
KINGDOM, GERMANY, AUSTRIA, AND THE UNITED
STATES: HOW THE LAW PRESENTLY ADDRESSES THE
ISSUE AND PROPOSALS FOR REFORM

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I. INTRODUCTION

If we accept Holocaust deniers’ claims, then who do we imply is wrong? By accepting Holocaust denialism, we reject the stories and truths of the descendants of the six million Jewish victims and millions of others, the permanently scarred survivors of the Holocaust, and the perpetrators who confessed to their war crimes. Holocaust denial is a rejection of the historical fact that the Nazis attempted to exterminate the Jewish population.¹

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¹ Robert S. Wistrich, *Introduction: Lying About the Holocaust, in HOLOCAUST DENIAL: THE POLITICS OF PERFIDY* 1 (Robert S. Wistrich ed., 2012).

There is no single version of Holocaust denial—it exists on a spectrum. On one hand, there is flat-out denial that it ever took place, a total erasure of any of the atrocities that happened. This is extremely harmful, but it is not the “mainstream” version of Holocaust denial. The more prevalent form of Holocaust denial is Holocaust distortion. This includes denial of the existence of the gas chambers, the capacity of the crematoria in the camps, and the overall scale of the Holocaust.² While these deniers still acknowledge the existence of the Holocaust in the abstract, the minimization, rationalization, and modification of the facts distort the truth and the stories of millions of people. For example, the use of the term “Polish concentration camps” shifts the narrative by turning victims into perpetrators, and blurring the question of who was inherently responsible for the Holocaust.³ When deniers question the existence of gas chambers based on the false accounts of an Auschwitz guard or “scientific” evidence of scarce chemical levels in the gas chamber walls,⁴ they minimize the systematic and mass production of murder.

Holocaust denial is more a reflection of antisemitism than an alternative form of history-telling. Everyone knows a devil’s advocate who chimes in with a rebutting opinion, but Holocaust deniers do more than just provoke debate. Denial attacks, discredits, and demonizes the Jewish people.⁵ The history of Judaism and antisemitism is familiar with these pointed attacks, but denial of the Holocaust, which exterminated six million Jews, is the type of irrational antisemitism that led to the Holocaust in the first place.⁶ It is also cruel to the victims, survivors, and their families who experienced unthinkable tragedies, and has no place in a just world. Historian and academic Deborah Lipstadt explains that Holocaust deniers are committed to their ideology, and they only seek and present “facts” that support it.⁷

Holocaust survivors dispersed around the world after they escaped death, fleeing the places they once called their homes.⁸ These

² Denial Forms, AUSCHWITZ-BIRKENAU ST. MUSEUM, <https://www.auschwitz.org/en/history/holocaust-denial/denial-forms/> [https://perma.cc/R4MB-XRTH] (last visited Nov. 17, 2022).

³ *Id.*

⁴ *Id.*

⁵ Deborah Lipstadt, *Holocaust Denial: An Antisemitic Fantasy*, 40 MOD. JUDAISM 71, 74 (2020).

⁶ *Id.* at 74-75.

⁷ KENNETH S. STERN, HOLOCAUST DENIAL 60 (1993).

⁸ Norbert Wollheim, *The Survivors*, HOLOCAUST ENCYCLOPEDIA, <https://encyclopedia.ushmm.org/content/en/article/the-survivors> [https://perma.cc/8RZE-S8YG] (last visited Feb. 28, 2023).

displaced refugees likely did not consider how their new homes would handle Holocaust denial. How could anyone deny the experiences they barely survived? How could anyone deny the concentration camp tattoos that marked their experience? Every country has a different legal system, and each provides a variety of criminal and civil remedies and penalties related to Holocaust denial. For example, the United States celebrates free speech and might be more inclined to view Holocaust denial as an expression of such a right.⁹ Meanwhile, Germany, the perpetrator of the Holocaust, has codified specific legal remedies for addressing Holocaust denial.¹⁰ These differences result in different outcomes when legal action is taken against or on behalf of deniers of the Holocaust.

David Irving is one of the most infamous Holocaust deniers and engaged in a nearly six-year-long legal battle in the United Kingdom concerning his denial.¹¹ Irving ultimately lost this court battle, with Deborah Lipstadt's fierce defense proving nearly everything required to prevail.¹² This conclusion would likely not be reached by every tribunal in the world. Germany might have decided the case in Lipstadt's favor, while the United States might have decided in favor of Irving. These are the possibilities presented by different legal frameworks adopted across the world.

Where is the most favorable system of remedies and penalties in relation to Holocaust denial? What elements of each legal system provide just processes and outcomes? Who should be allowed to bring a case related to Holocaust denial? These are crucial questions that have long-standing implications for the truth, and how we preserve it and honor it. This paper proposes thoughtful answers to these questions and provides the historical and legal justifications for its conclusions based on the legal systems that are currently in place.¹³

⁹ U.S. CONST. amend. I.

¹⁰ Strafgesetzbuch [StGB] [Penal Code], https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html (Ger.).

¹¹ Lipstadt, *supra* note 5, at 74. This paper will examine a significant Holocaust denial legal battle in the United Kingdom between David Irving and Deborah Lipstadt. Though I frame my argument around Holocaust denier David Irving and how each country would have handled his persistent Holocaust denial, I am hesitant to give more attention to his name. I therefore chose not to bolster his reputation by including it in the title of this paper.

¹² *Id.*

¹³ This topic is of pressing importance, as we live among the last generation of Holocaust survivors. They soon will no longer be alive to personally share their stories and attest to the trauma of the atrocities they lived through. The future generations that have not yet learned of the Holocaust will have to accept the written and

II. DEBORAH LIPSTADT AND DAVID IRVING—THE CASE

Some remain complicit in the face of Holocaust denial and ignore it, but some also try to stop it in its tracks, either because they know the truth or they know the harm caused by Holocaust denial.¹⁴ Deborah Lipstadt falls into the latter category. In 2022, Lipstadt was confirmed by the U.S. Senate as Special Envoy to Monitor and Combat Antisemitism, with the rank of Ambassador.¹⁵ She has served as a historical consultant to the U.S. Holocaust Memorial Museum and a White House representative on the sixtieth anniversary of the Auschwitz liberation.¹⁶ U.S. Presidents Bill Clinton and Barack Obama both appointed Lipstadt to the United States Holocaust Memorial Council.¹⁷ Lipstadt has been a key figure in the preservation of historical truth in the face of Holocaust denial. She notes that “[d]enial flies in the face of not just reams of documents, but of basic logic,” considering that the Holocaust is recognized as the best-documented genocide in human history.¹⁸ She implores people to consider whose stories are “wrong” if deniers’ stories are accepted as “right.”¹⁹ Some of Lipstadt’s evidence for the existence of the Holocaust seems—for example, perpetrators of all nationalities have admitted to their war crimes and have not denied the occurrence of the events, and Germany has paid its moral and financial responsibility.²⁰ This rational and fact-supported argumentation causes deniers to double down on their anti-semitic ideas and falsely assert that the Jews told these lies and forced the alleged perpetrators to admit to crimes that they did not commit.²¹ Lipstadt observes that Holocaust deniers are implicitly—and

documented truths instead of hearing them straight from the source. This augments the dangers of Holocaust denial, and we must therefore strive to be vocal and protective of its crucial history.

¹⁴ Many rational thinkers cannot even comprehend the existence of Holocaust denial, as there is so much evidence to support the truth. *See, e.g.*, STERN, *supra* note 7; Lipstadt, *supra* note 5.

¹⁵ *Ambassador Deborah Lipstadt: Special Envoy to Monitor and Combat Antisemitism*, U.S. DEP’T OF STATE, <https://www.state.gov/biographies/deborah-lipstadt/> [<https://perma.cc/S8KD-G5MX>] (last visited Aug. 31, 2023).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Lipstadt, *supra* note 5, at 71.

¹⁹ *Id.*

²⁰ *See, e.g., id.* at 72; THE GOOD OLD DAYS: THE HOLOCAUST AS SEEN BY ITS PERPETRATORS AND BYSTANDERS 60 (Ernst Klee, Willi Dressen & Volker Riess eds., 1991) (recounting stories told by members of the Einsatzgruppen on the stresses and strains of killing).

²¹ *See* Lipstadt, *supra* note 5, at 72.

explicitly—asserting that the survivors, bystanders, endless Holocaust historians, and perpetrators who admitted their guilt are all part of a massive conspiracy theory.²² Physical evidence of the Holocaust—such as survivors’ concentration camp tattoos, photographs of the extermination camps, and documents detailing scores of Jewish families and their possessions—is also overlooked by Holocaust deniers, as the story it tells is irrefutable.

This is the dark reality of an antisemitic world, and many individuals have succeeded in gaining a platform and profiting from these false narratives. David Irving is one notable Holocaust denier, known for his lawsuit against Deborah Lipstadt and her publishing company. Holocaust denial grew in the 1980s and 1990s, when the theory was endorsed by some presidential candidates, discussed by radio shows and newspapers, and debated in Congress.²³ Deborah Lipstadt wrote a book, *Denying the Holocaust: The Growing Assault on Truth and Memory*, in which she identified David Irving as a Holocaust denier.²⁴ In 1996, Irving sued Lipstadt and Penguin Books, her publisher, in the High Court of Justice, alleging that the claims in her book constituted libel.²⁵

Lipstadt’s claims that David Irving was a Holocaust denier were well-supported. In a Canadian trial in 1988, Irving testified on behalf of Ernst Zundel,²⁶ who faced prosecution by the Canadian government for promoting Holocaust denial. In his testimony, Irving called the Holocaust a “legend.”²⁷ Irving offered his opinions as evidence, telling the court that no “overall Reich policy to kill the Jews” actually existed, there were “no documents whatsoever show[ing] that a Holocaust had ever happened,” and that the “gas chambers were an impossibility.”²⁸

Deborah Lipstadt actually wrote very little about David Irving in *Denying the Holocaust: The Growing Assault on Truth and Memory*. She devoted only a few pages to describing Irving as “a Hitler partisan, someone who knew the truth but who bent it until it fit his political ideology, and the ‘most dangerous Holocaust denier.’”²⁹ In the book,

²² *Id.*

²³ See STERN, *supra* note 7, at 2.

²⁴ Deborah Lipstadt, *Irving v. Penguin UK and Deborah Lipstadt: Building a Defense*, 27 NOVA L. REV. 243, 243 (2002).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 243-44.

²⁹ *Id.* at 244.

she described how Irving, widely known for denying that Hitler ever knew about the Final Solution, flew out to Toronto in 1988 to help with Zundel's defense.³⁰ Lipstadt explained that Irving was differentiated from other Holocaust deniers due to the accolades that his writing received.³¹ This distinction made Irving more dangerous to the public, since more people listened to him and held him in high regard. Irving wrote about varying topics, including World War II, Joseph Goebbels, and the Third Reich, and he managed to weave Holocaust denial into all of his works.³² Irving's work impacted Holocaust denial broadly because people read his books to learn about other subject matters and could not avoid his conclusions about the Holocaust.³³

Lipstadt thought that this lawsuit would be straightforward and short-lived. She felt certain that her characterization of Irving as a Holocaust denier was proper because his own words and actions confirmed it and numerous other authors agreed.³⁴ The legal battle proved to be significantly more difficult and long-lasting than Lipstadt anticipated.³⁵ Under British libel law, the defendant has the burden to prove the truth of their statement, rather than for the plaintiff to prove that it was a lie.³⁶ Lipstadt needed to prove that her claims alleging that David Irving was a Holocaust denier were true, otherwise Irving would win and his false claims about the Holocaust would be deemed legitimate.³⁷ Lipstadt characterized the gravity of this lawsuit in the following way:

This legal action was the first trial involving the Holocaust in which a denier was the plaintiff and a scholar the defendant. It was about me and what I had written, and it was about far more than me and my book. Ostensibly, it was about the past, but it was also how the past would be remembered in the future. The trial captivated the interest of both those who study the history of the Third Reich and the Holocaust, as

³⁰ DEBORAH LIPSTADT, *DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY* 161 (1993).

³¹ Lipstadt, *supra* note 24, at 244.

³² *Id.*

³³ *Id.*

³⁴ Lipstadt, *supra* note 24, at 244; see also Jonathan Petropoulos, *Confronting the "Holocaust as Hoax" Phenomenon as Teachers*, 28 *HIST. TEACHER* 523, 526 (1995) (naming David Irving, among others, as a Holocaust denier).

³⁵ Lipstadt, *supra* note 24, at 245.

³⁶ *Id.*

³⁷ *Id.*

well as those who study and combat neo-Nazi's attempts to resurrect that past. Two courts ultimately rendered a decision, the Royal High Court of Justice and the court of public opinion.³⁸

With the legal guidance of Anthony Julius, best-known for representing Princess Diana in her divorce, Lipstadt and Penguin Book Publishers began a nearly six-year legal battle against Irving.³⁹

Although Lipstadt and her legal team hoped—and even expected—that David Irving would eventually relent and drop the suit, Julius advised Lipstadt that her best defense was to prove that her statements about Irving were true.⁴⁰ Lipstadt did not want her defense to be that the words she used to describe Irving were misconstrued; she meant every word that she wrote, stood by them, and wanted to prove they were correct.⁴¹ Julius said to Lipstadt: “We will argue, exactly as you did in your book, that Irving does not follow established historical procedures and subordinates the truth for ideological purposes. His writings and comments about the Holocaust are, we will contend, designed to spread anti-Semitism and engender sympathy for the Third Reich.”⁴² Lipstadt and her team were not seeking to prove that the Holocaust actually happened, but that David Irving mischaracterized the Holocaust and its history.⁴³ As a legal strategy, Lipstadt's team wanted to avoid Holocaust survivor testimony at trial; Lipstadt did not want to rely on traumatized survivors and did not want to suggest that her defense needed to prove the existence of the Holocaust.⁴⁴ She also did not feel that it was right to burden survivors with sitting in the witness stand and being questioned by David Irving, who was acting as his own attorney, on their traumatizing experiences.⁴⁵

Lipstadt had to demonstrate the “substantial truth” of her words, which British law refers to as “proving the truth of the ‘sting’ of the libel.”⁴⁶ Gathering all the documentation, correspondence, and witnesses necessary to bolster their defense was an extensive process. The British court system requires both parties to submit their expert

³⁸ *Id.*

³⁹ *Id.* at 247.

⁴⁰ *Id.* at 248.

⁴¹ Lipstadt, *supra* note 24, at 247.

⁴² *Id.* at 249.

⁴³ *Id.* at 250-51.

⁴⁴ *See id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 249.

witness reports, interrogatories, questions, and other relevant gathered material to the court and to each other.⁴⁷ Lipstadt and her defense attorney team predicted that, after they submitted an overwhelming amount of supporting evidence to Irving, he would realize the strength of their position against him and drop the case.⁴⁸ This did not happen, however, and each side fought on the matter until a judgment was finally reached.

Deborah Lipstadt's chief historical witness was Professor Richard Evans, a specialist on German history from the University of Cambridge.⁴⁹ Lipstadt's team tasked Professor Evans with "follow[ing] Irving's footnotes" to determine whether or not Irving adhered to "generally acceptable standards of historical scholarship, or whether he deliberately distorted and falsified history."⁵⁰ The defense team utilized another expert, Professor Robert Jan van Pelt, to testify on the details relating to the Auschwitz Concentration Camp and refute Irving's claims that the gas chambers never existed.⁵¹ Van Pelt was especially familiar with Auschwitz and its history, and his expertise was used to evaluate the validity of the "evidence" that Irving used to justify his false conclusions.⁵² The next expert was Christopher Browning, a professor at the University of North Carolina and author of *Ordinary Men: Reserve Police Battalion 101 & the Final Solution in Poland*. Browning was an expert on the origins of the Final Solution, Hitler's ultimate plan to annihilate the Jewish population.⁵³ Browning's expert report demonstrated that there was a centralized plan—not a series of isolated rogue actions—to murder all Jews, and that David Irving ignored crucial evidence when claiming that Hitler did not support a "Final Solution."⁵⁴ This was not Professor Browning's first involvement in a trial related to David Irving's Holocaust denial; he testified at the Ernst Zundel trial in Canada, so he was already familiar with Irving's lies.⁵⁵ Professor Peter Longerich testified to the falsity of Irving's claims that Hitler was not directly involved in the persecution of Jews, and Professor Hajo Funke, a leading German specialist on right wing extremism, examined Irving's affiliation with the

⁴⁷ Lipstadt, *supra* note 24, at 250.

⁴⁸ *Id.* at 249.

⁴⁹ *Id.* at 251.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Lipstadt, *supra* note 24, at 252.

⁵⁴ *Id.*

⁵⁵ *Id.*

German radical right and neo-Nazi groups.⁵⁶ This lineup of expert witnesses was crucial to Deborah Lipstadt's defense strategy, bringing to light the actual history, which starkly contrasted with the lies that David Irving espoused in his writings.

Lipstadt and her lawyers found that the materials that Irving provided to the defense included irrelevant documents and, more importantly, were missing several requested documents.⁵⁷ These included Irving's correspondence with leading Holocaust deniers, antisemites, and neo-Nazis.⁵⁸ Lipstadt's defense team also requested access to Irving's complete collection of video and audiotapes, intending to demonstrate to the jury "that what he said in 'public' in his books when he was playing the part of historian was dramatically different from what he said in 'private' when he was talking to his most ardent followers, many of whom seemed to share his political ideology."⁵⁹ In an attempt to bolster their case or have Irving drop the suit, the defense also requested access to Irving's personal diary to reveal the cast of deniers with whom Irving kept company—presumably neo-Nazis and radical right-wingers.⁶⁰ These requests for additional documents took place in pre-trial proceedings conducted by Master John Trench.⁶¹

When Master Trench agreed with the defense and allowed additional document requests to be granted, Lipstadt's lawyer recalled that Irving blamed it on an underlying Jewish conspiracy that was out to get him, calling Irving's actions "desperate act[s] of a desperate man."⁶² Despite Irving's ardent opposition to the requests, nearly all of them were granted, including the request to inspect Irving's diaries.⁶³ Master Trench and Irving agreed that this was such a complex matter that it would be better decided by the judge than by a jury.⁶⁴ Lipstadt's pre-trial success now placed a greater burden on Irving, as more information than he anticipated was going to be read and scrutinized. Lipstadt still hoped that Irving would drop the case, especially

⁵⁶ *Id.*

⁵⁷ *Id.* at 254-55.

⁵⁸ *Id.* at 255.

⁵⁹ Lipstadt, *supra* note 24, at 255.

⁶⁰ *Id.*

⁶¹ *Id.* at 255-56.

⁶² *Id.* at 256.

⁶³ *Id.*

⁶⁴ *Id.* at 257.

after he was ordered to produce more information, but Lipstadt's lawyers advised her that only a "rational man might drop matters now."⁶⁵

Mr. Justice Gray oversaw the trial since both sides agreed to dispense with the jury, which was a rarity.⁶⁶ David Irving argued that Lipstadt's libel negatively impacted his financial success.⁶⁷ He asserted that Lipstadt's accusations in *Denying the Holocaust: The Growing Assault on Truth and Memory* led publishers to reject his work, refuse new commissions, and treat him as a "pariah."⁶⁸ Irving accused Lipstadt of being part of an organized international effort to destroy his career and legitimacy.⁶⁹ Irving claimed that the histories he presented proved that he was not a Holocaust denier and argued that he had simply "drawn attention to major aspects of the Holocaust."⁷⁰ Irving proclaimed that being labeled a Holocaust denier is a "verbal yellow star," a blatantly cruel comparison in the context of the Holocaust.⁷¹

Richard Rampton presented the defense's opening arguments, explaining that the defense's goal was not to defend Lipstadt by proving that the Holocaust happened, but rather that the words written in Lipstadt's book were well-supported and true.⁷² The defense did not seek to deny that the book was defamatory to Irving, which he had claimed in his opening statements, but rather sought to establish that it was true, even if defamatory.⁷³ Rampton never actually mentioned Lipstadt or Penguin Books in his opening statement; he only discussed Irving.⁷⁴ Although Lipstadt and Penguin Books established their defense as the burdened party, Rampton and the rest of the defense team laid out a foundation sufficient to put David Irving on trial, and force him to face his false representations of the well-documented history of the Holocaust.⁷⁵ The case was to be won not by oral presentations, however, but by the story that the documented evidence revealed.

After years of research, discovery, questioning, and testimony, the case had finally been fully presented to Justice Gray, who

⁶⁵ Lipstadt, *supra* note 24, at 257.

⁶⁶ D.D. GUTTENPLAN, THE HOLOCAUST ON TRIAL 24 (2002).

⁶⁷ *Id.* at 26.

⁶⁸ *Id.*

⁶⁹ *Id.* at 27.

⁷⁰ *Id.*

⁷¹ *Id.* at 28.

⁷² GUTTENPLAN, *supra* note 66, at 31.

⁷³ *Id.*

⁷⁴ *Id.* at 34.

⁷⁵ *Id.* at 35.

delivered a decision on April 11, 2000;⁷⁶ Lipstadt's justification defense succeeded.⁷⁷ When he read the decision, Justice Gray made it clear that he was not ruling on whether the Holocaust occurred—that was a task for historians.⁷⁸ The justice read the 333-page decision, which found that (1) Irving failed to prove a conspiracy against him; (2) the Defendants succeeded in proving that Hitler was at least complicit in the Final Solution; and (3) the defense, through the cross-examination of Professor Richard Evans, justified Lipstadt's statements claiming that Irving was a Holocaust denier.⁷⁹ Essentially, the judge ruled that David Irving's historical claims were contrary to the documentary evidence.⁸⁰ Justice Gray stated, “[c]ertain of Irving's misrepresentations of the historical evidence might appear to be simple mistakes on his part But there are other occasions where Irving's treatment of the historical evidence is so perverse and egregious that it is difficult to accept that it is inadvertence on his part.”⁸¹

Deborah Lipstadt won this case, but is it reasonable that so many years and judicial resources were spent on defending the truth of the Holocaust? It seems like a perversion of justice to allow costly and time-consuming battles like this one to persist, when the historical record is so blatant. However, the case necessarily unfolded this way since the party claiming libel against him did not have the burden of proof. How would David Irving's conduct be treated in different jurisdictions? In other jurisdictions, could he sit back and make the defense prove that the Holocaust took place? This paper will now turn to the legal systems of Germany, Austria, and the United States, and evaluate how they handle Holocaust deniers like David Irving.

III. THE UNITED STATES

The United States' reverence of the freedom of expression is enshrined in the First Amendment of the U.S. Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press.”⁸² The country's respect towards freedom of speech has been an issue in U.S. courts as applied to hostile expressions, such as

⁷⁶ *Id.* at 273.

⁷⁷ *Id.* at 274.

⁷⁸ GUTTENPLAN, *supra* note 66, at 274.

⁷⁹ *Id.* at 275-78.

⁸⁰ *Id.* at 278.

⁸¹ *Id.* at 282.

⁸² U.S. CONST. amend. I.

cross-burning and other Ku Klux Klan symbolism.⁸³ The Supreme Court displayed its extreme deference to freedom of expression in *R.A.V. v. City of St. Paul*, where the Court struck down an ordinance that criminalized cross-burning.⁸⁴ Five years later, the Court held in *Virginia v. Black* that states could ban cross-burning if it was done with an intent to intimidate, seemingly marking a shift away from the First Amendment absolutism trend.⁸⁵

There are no laws in the United States that provide criminal penalties for Holocaust deniers, so prosecution relies on private citizens pursuing civil suits. If Irving had been sued in the United States, the result might have mirrored litigation against prominent far-right pundit Alex Jones. Alex Jones is known for wide-ranging conspiracy theories spread through his radio show and website, InfoWars.⁸⁶ Among his conspiracy theories was the proposition that the Sandy Hook Elementary School shooting in 2012 was a hoax, and that the victims and their families were “crisis actors.”⁸⁷ As a result of Jones’s lies, parents and siblings of the murdered Sandy Hook victims faced harassment and torment from his followers.⁸⁸ Days after the elementary school massacre, Alex Jones mentioned the shooting victims and their families by name, leading to hateful messages, threats, public dissemination of their home addresses, and numerous other attacks.⁸⁹ When the victims’ families sued Alex Jones for defamation, Jones lost because of the specificity of his conspiracy attacks.⁹⁰

⁸³ See, e.g., Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 163 (2006).

⁸⁴ *Id.* at 163-64.

⁸⁵ *Id.* at 164.

⁸⁶ *What Does the Alex Jones Case Mean for the First Amendment and Disinformation? Leading Scholars, Lawyers Provide Analysis*, FIRST AM. WATCH AT N.Y.U. (Aug. 8, 2022) [hereinafter *What Does the Alex Jones Case Mean*], <https://firstamendmentwatch.org/what-does-the-alex-jones-case-mean-for-the-first-amendment-and-disinformation-leading-scholars-lawyers-provide-analysis/> [https://perma.cc/PR6S-45UH].

⁸⁷ *Id.*

⁸⁸ See, e.g., Dave Collins, *EXPLAINER: Jurors Weigh Cost of Alex Jones; Sandy Hook Lies*, AP NEWS (Oct. 7, 2022, 5:04 PM), <https://apnews.com/article/shootings-texas-violence-school-connecticut-caec37b5056fb8e2ff89c57a931d7a12> [https://perma.cc/LR7D-ZTYA]; Lauren del Valle, *Sandy Hook Parent Recounts Years of Harassment After Alex Jones Called Him a Crisis Actor*, CNN (Sept. 29, 2022, 5:12 PM), <https://www.cnn.com/2022/09/29/tech/sandy-hook-parent-harassment> [https://perma.cc/WGZ4-L27T].

⁸⁹ del Valle, *supra* note 88.

⁹⁰ *What Does the Alex Jones Case Mean*, *supra* note 86.

The First Amendment does not “police Truth writ large.”⁹¹ This means that Americans may create conspiracy theories against unnamed actors, like religious groups or government entities.⁹² As a result, broad untruths are allowed to circulate in the “marketplace of ideas”; rather than being handled by government censorship, falsities can be countered by other citizens.⁹³ Alex Jones’s speech was not protected when he targeted specific individuals and spread lies about them being crisis actors.⁹⁴ By naming the parents of the murdered children and claiming that they fabricated the deaths of their children, Alex Jones exceeded the Constitutional limits of freedom of expression. The accusations harmed the parents’ public reputations and their psyches, and the parents’ claims of defamation and intentional infliction of emotional distress were successful.⁹⁵ The nearly \$50 million verdict included punitive and compensatory damages, a large portion of which redressed the emotional distress claims.⁹⁶ Success on claims of intentional infliction of emotional distress generally requires a showing of “intentionally or recklessly ‘outrageous’ conduct that lies far outside society’s norms of acceptable behavior,”⁹⁷ and Jones was held liable under this theory.

Alex Jones’s legal outcome illustrates how a similar case against David Irving might play out in the United States. One must first assess who would be eligible to bring a lawsuit against Irving. The Sandy Hook parents had standing, as they were directly named and targeted by Alex Jones and his supporters. However, when David Irving writes historical works that reference Holocaust denial, millions of unnamed and unspecified individuals are affected. For a successful case based on the Sandy Hook parents’ approach, a survivor of the Holocaust or a relative of someone who died in the Holocaust would claim intentional infliction of emotional distress caused by Irving’s lies. However, this might only result in financial compensation, which might be a less meaningful result for those seeking justice against the harms of Holocaust denial.

Mel Mermelstein successfully brought a different kind of lawsuit against a Holocaust denier in the United States. In 1981,

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*

⁹⁵ *Id.*

⁹⁶ *See What Does the Alex Jones Case Mean, supra* note 86.

⁹⁷ *Id.*

Czechoslovakian Holocaust survivor Mel Mermelstein sued the Institute for Historical Review.⁹⁸ The Institute offered a \$50,000 prize to the first person who could offer proof that Jews had actually been gassed to death at Auschwitz.⁹⁹ Mel Mermelstein, whose entire family had been killed in the Holocaust, entered the challenge, “provid[ing] documents, eyewitness testimonies, histories, photographs and even a can that had contained Zyklon B to the institute.”¹⁰⁰ Mermelstein also shared his own memory of his mother and sister being driven into the gas chambers in 1944.¹⁰¹ Mermelstein sued the Institute because it never responded, despite the fact that Mermelstein provided what it sought.¹⁰² A Los Angeles Superior Court applied the doctrine of judicial notice and ruled that “Jews were gassed to death in Poland at Auschwitz in the summer of 1944.”¹⁰³ This was a legal recognition of the mass murder of Jews in gas chambers, and it diminished the legitimacy of the Institute for Historical Review. Ultimately, the parties settled, and the Institute agreed to give Mel Mermelstein \$90,000.¹⁰⁴ Mermelstein’s approach was very different from the Sandy Hook families’, and it ended in a different type of victory.

However, are judicial notice and monetary slaps on the wrist enough to deter Holocaust denial and its correlated antisemitism? By analyzing the legal approaches to Holocaust denial in other countries, this paper will reconsider the United States’ legal capacity for preventing Holocaust denial and suggest a more effective approach.

IV. AUSTRIA

The United States does not have a strong system of deterrence for Holocaust denial because of the constitutionally enshrined right to free

⁹⁸ See Tom Tugend, *Mel Mermelstein, Survivor Who Beat Holocaust Deniers in Court, Dies at 95*, FORWARD (Feb. 8, 2022), <https://forward.com/fast-forward/482176/mel-mermelstein-survivor-who-beat-holocaust-deniers-in-court-dies-at-95/> [<https://perma.cc/S89F-9R3A>]. The Institute, founded by Holocaust denier Willis Carto, is not a legitimate historical society. *Institute for Historical Review*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/institute-historical-review> [<https://perma.cc/55KK-XT9N>] (last visited Dec. 16, 2023).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ Tom Tugend, *LA Judge, Who Ruled Against Holocaust-Deniers, Dies*, JEWISH J. (Dec. 31, 2011), <https://jewishjournal.com/news/99655/> [<https://perma.cc/HUB5-DHQT>].

¹⁰⁴ Tugend, *supra* note 98.

expression. Austria, on the other hand, provides criminal punishment for Holocaust denial.¹⁰⁵ Due to the genocidal policies of the German Reich, Austria's Jewish population was reduced from about 192,000 to only 7,000 by 1942.¹⁰⁶ Approximately 65,000 Jews from Austria were killed during the Holocaust, and fled the country.¹⁰⁷ Post-war Austria—often considered a victim of Germany's annexation—reckoned with its complicity in the Holocaust, as questions concerning its wartime activities sparked national debate.¹⁰⁸

In 1947, Austria immediately prohibited any “form of approval, denial or trivialisation of the Holocaust or other crimes of the Nazi regime,” under the National Socialism Prohibition Act, also referred to as the Verbotsgesetz or “VerbotsG.”¹⁰⁹ The law, adopted by the provisional government in 1945 and then amended as the Prohibition Act 1947, has constitutional status, distinguishing it from other provisions of Austrian criminal law.¹¹⁰ Section 3h punishes anyone who denies, grossly trivializes, approves of, or seeks to justify the Holocaust in a printed publication, on the radio, or in another publicly accessible medium.¹¹¹ Anyone who violates the act may be subject to imprisonment ranging between one and ten years, and up to twenty years if the perpetrator is particularly dangerous.¹¹² The law goes one step further, and imposes a one-to-ten-year punishment on anyone who “obtains credible knowledge of [a National Socialist organization or affiliated association] . . . or of a person who has become involved in such a company . . . when damage could have been prevented and intentionally fails to do so.”¹¹³ In other words, if someone is aware of or in the presence of Holocaust denial and they do not report it to the authorities, they can face an equally harsh punishment as the deniers

¹⁰⁵ See, e.g., PIOTR BĄKOWSKI, EUR. PARL. RSCH. SERV., HOLOCAUST DENIAL IN CRIMINAL LAW: LEGAL FRAMEWORKS IN SELECTED EU MEMBER STATES 9 (2022), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698043/EPRS_BRI\(2021\)698043_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698043/EPRS_BRI(2021)698043_EN.pdf).

¹⁰⁶ Off. of the Special Envoy for Holocaust Issues, *The JUST Act Report: Austria*, U.S. DEP'T OF STATE, <https://www.state.gov/reports/just-act-report-to-congress/austria/> [<https://perma.cc/SW5J-3EBT>] (last visited Dec. 8, 2023).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ BĄKOWSKI, *supra* note 105, at 9.

¹¹⁰ *Id.*; STRAFGESETZBUCK [STGB] [PROHIBITION ACT 1947], <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10000207> [<https://perma.cc/S8AY-FGFZ>] (Austria).

¹¹¹ PROHIBITION ACT 1947 § 3(h) (Austria).

¹¹² *Id.* § 3(g).

¹¹³ *Id.* § 3(i).

themselves.¹¹⁴ These laws and their associated criminal penalties deter people who wish to deny the reality of the Holocaust.¹¹⁵

David Irving's Holocaust denial also faced legal scrutiny in Austria. In 1989, Irving visited Austria and gave several speeches where he openly denied the Holocaust.¹¹⁶ In these speeches, Irving called for "an end to the 'gas chambers fairy tale,'" asserted that Hitler had actually helped European Jews, and claimed that the Holocaust was a myth.¹¹⁷ In 2005, he was charged by state prosecutors with the crime of "trivialising the Holocaust."¹¹⁸ After only hours of deliberating, the jury, applying the Prohibition Act 1947, sentenced Irving to three years in Austrian prison, on the more lenient end of the potential ten years of imprisonment that the law permits.¹¹⁹

This trial was markedly different from David Irving's trial against Deborah Lipstadt in the United Kingdom. In that case, Irving sought civil remedies against Lipstadt.¹²⁰ In the Austrian case, the Austrian government pressed criminal charges against Irving.¹²¹ Importantly, the Prohibition Act 1947 provides a statute of limitations extending back to June 6, 1945, at the earliest.¹²² This type of deterrence sends a loud message to other Holocaust deniers in Austria that they will be held accountable for their denial.

V. GERMANY

As the primary perpetrator of the mass genocide of the Holocaust, Germany has made extensive efforts to remedy its destruction of European Jewry. Since 1945, Germany has paid approximately \$86.8 billion in reparations to Holocaust victims and their surviving family members.¹²³ In addition, Germany has also worked to provide

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See, e.g., David Irving Jailed for Holocaust Denial*, THE GUARDIAN (Feb. 20, 2006, 1:42 PM), <https://www.theguardian.com/world/2006/feb/20/austria.thefarright> [<https://perma.cc/XW3P-22EC>].

¹¹⁷ *Id.*

¹¹⁸ *Austria Charges Author for Denying Holocaust*, NBC NEWS (Nov. 22, 2005, 10:53 AM), <https://www.nbcnews.com/id/wbna10152694> [<https://perma.cc/22RX-8B63>].

¹¹⁹ *David Irving Jailed for Holocaust Denial*, *supra* note 116; PROHIBITION ACT 1947 § 3(g) (Austria).

¹²⁰ *See, e.g., Lipstadt*, *supra* note 24, at 243.

¹²¹ *David Irving Jailed for Holocaust Denial*, *supra* note 116.

¹²² PROHIBITION ACT 1947 § 16 (Austria).

¹²³ Off. of the Special Envoy for Holocaust Issues, *supra* note 106.

restitution to Jews whose assets and belongings were looted by the Nazis.¹²⁴ Although not everything illegally taken can be returned after so many years, nearly 16,000 objects have been returned to survivors and their families, including pieces of art, books, and objects within larger collections.¹²⁵

Germany and Nazi perpetrators and organizations were sanctioned in the aftermath of World War II.¹²⁶ The National Socialist Party (the Nazi party) was recognized as a criminal organization and subsequently banned,¹²⁷ and any insignia, written materials, or images promoting Nazi messages were criminally banned.¹²⁸ Section 86 of the German Penal Code explicitly bans “[d]issemination of propaganda material of unconstitutional and terrorist organizations,” when the “content . . . is intended to further the activities of a former National Socialist organisation.”¹²⁹ This falls under the Penal Code’s section on “Threats to the Democratic Constitutional State.”¹³⁰

The post-war government that emerged after the end of the Third Reich re-constructed its reputation and gained international respect¹³¹ through implementation of a new constitution and the Basic Law (*Grundgesetz*)—which includes the penal code—and its creation of a Federal Constitutional Court which enforces its constitutional provisions.¹³² The enforcement aspect of the Penal Code is perhaps Germany’s most effective tool in preventing Holocaust denial, as nearly every offense contains a prison sentence of at least one year, and many offenses impose a decade or longer of imprisonment.¹³³

The Penal Code of Germany contains several constitutional provisions that target Holocaust denial.¹³⁴ Sections 130, 185, 189, and 194

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Michael J. Bazylar, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, YAD VASHEM: THE WORLD HOLOCAUST REMEMBRANCE CENTER, <https://www.yadvashem.org/holocaust/holocaust-antisemitism/holocaust-denial-laws.html> [<https://perma.cc/H74T-TQDL>] (last visited Dec. 8, 2023).

¹²⁷ The International Military Tribunal at Nuremberg in 1946 also designated the Nazi Party as a criminal organization. *See id.*

¹²⁸ *Id.*

¹²⁹ Penal Code § 86(1)(4) (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/V4DL-KFQN>].

¹³⁰ Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 4 GERMAN L.J. 1, 16 (2003).

¹³¹ *Id.* at 2.

¹³² *Id.*

¹³³ *See generally* Penal Code (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/V4DL-KFQN>].

¹³⁴ *Id.*

in particular demonstrate that Germany is serious about preventing Holocaust denial by providing several legal deterrents and criminal punishments for those that deny the truth or protect deniers.¹³⁵ Section 130 of the Penal Code, "Incitement of Masses,"¹³⁶ was amended in 1994, criminalizing Holocaust denial for the first time after failing to do so for many years.¹³⁷ Section 194, "Request to Prosecute," is essential to the German criminal system's framework for addressing Holocaust denial. The section provides:

- (1) An insult is prosecuted only upon request. If the act was committed in a meeting or by disseminating or making available to the public content . . . no request is required if the victim was persecuted as a member of a group under the tyranny and arbitrary rule of the National Socialist or another regime if this group is part of the population and the insult is connected with this persecution. . . .
- (2) If the memory of a deceased person has been reviled, the relatives . . . are entitled to file a request.¹³⁸

Less explicit provisions of the Criminal Code that provide for legal action against Holocaust deniers include section 185, which criminalizes insult,¹³⁹ and section 189, which provides: "Whoever defiles the memory of a deceased person incurs a penalty of imprisonment for a term not exceeding two years or a fine."¹⁴⁰

Section 130 falls within the "Crimes Against the Public Peace" section of the Basic Law, and is aptly named, as Holocaust denial is incompatible with Germany's ongoing progress of rectifying its Nazi past.¹⁴¹ Section 130 directs that: "(1) Whoever, in a manner suited to causing a disturbance of the public peace, (2) violates the human dignity of others by insulting, maliciously maligning or defaming one of the aforementioned groups . . . incurs a penalty of imprisonment for a

¹³⁵ DIETER GRIMM, *The Holocaust Denial Decision of the Federal Constitutional Court of Germany*, in *EXTREME SPEECH AND DEMOCRACY* 557, 557 (Ivan Hare & James Weinstein eds., 2009).

¹³⁶ Penal Code § 130 (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/V4DL-KFQN>].

¹³⁷ GRIMM, *supra* note 135, at 557.

¹³⁸ Penal Code § 194(1)-(2) (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/V4DL-KFQN>].

¹³⁹ *Id.* § 185.

¹⁴⁰ *Id.* § 189.

¹⁴¹ Brugger, *supra* note 130, at 16.

term between three months and five years.”¹⁴² Section 130(3) states: “Whoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6(1) of the Code of Crimes Against International Law in a manner suited to causing a disturbance of the public peace incurs a penalty of imprisonment for a term not exceeding five years or a fine.”¹⁴³ This provision is the most explicit in terms of criminalizing Holocaust denial.

In 1994, the lawfulness of David Irving’s Holocaust denial conduct was at issue in the German Constitutional Court. The National Democratic Party of Germany (“NPD”)¹⁴⁴ had planned a meeting in Munich where Irving was poised to speak on the alleged “Jewish blackmailing of German politics by exploiting the Holocaust.”¹⁴⁵ Municipal authorities were made aware of the intended content of the speech, and they issued an order prohibiting Irving, as well as other speakers at the event and assembly participants, from denying the Third Reich’s persecution of Jews.¹⁴⁶ Although section 130 of the Penal Code was not yet so explicit, authorities nevertheless viewed Holocaust denial as a crime punishable under the Code.¹⁴⁷

In reaction to the limitations imposed on the meeting, the NPD filed a constitutional complaint under Article 5 and Article 8 of the Basic Law, which respectively protect freedom of speech and freedom of assembly.¹⁴⁸ Article 5 provides Germans the right to freely express themselves and disseminate opinions in speech, writing, and in pictures. However, this freedom is not exactly parallel to unfettered freedom of opinion.¹⁴⁹ In the case brought by the NPD, the Court confronted the issue of whether the NPD’s statements of fact fell within the “freedom of opinion” protected by Article 5.¹⁵⁰ The Court had already distinguished opinions of fact from statements of fact in its jurisprudence, and the truth or falsehood of a statement of fact was

¹⁴² Penal Code § 130(1)(2), para. 1 (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/V4DL-KFQN>].

¹⁴³ *Id.* § 130(3), para. 3.

¹⁴⁴ At the time, the NPD was not represented in the German federal parliament, the *Bundestag*.

¹⁴⁵ GRIMM, *supra* note 135, at 558.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 559.

¹⁵⁰ *Id.*

relevant to the question of constitutional protection.¹⁵¹ Based on this distinction, false statements are less protected than true statements or opinions.¹⁵² Therefore, a deliberate lie could not be protected under Article 5.¹⁵³ Because of the extensive historical record, including reports by witnesses, historical research, and the 1964-1965 Auschwitz trial in Frankfurt, the Court found that NDL's Holocaust denial constituted a false statement, unprotected by Article 5.¹⁵⁴ The Court then balanced the interests protected by the statute with the constitutional right limited by the order issued against the NPD assembly. The Court pointed to the "personality rights" of German Jewish people under Section 185 of the Penal Code¹⁵⁵ and determined that Jews were a group capable of being insulted, and the persecution and violence they experienced during Hitler's Nazi regime was presently part of their identity.¹⁵⁶ Therefore, the Court determined that denying the Holocaust denies the identity of German Jews.¹⁵⁷

Germany spent much of the twentieth century restoring its reputation and distancing itself from the atrocities the government committed in the 1930s and 1940s. If the Constitutional Court had allowed Holocaust denial in the NPD speeches, it would reject Jewish identity and all of the progress Germany made over the last several decades. Instead, the Court recognized that those who sought to deny it would not have constitutional safeguards.¹⁵⁸ In doing so, the Court reaffirmed Germany's commitment to protecting the rights of Jews nearly seventy years after the atrocities occurred. Not only do the Penal Code and relevant court decisions provide tangible penalties for and protections against Holocaust denial, they also symbolize Germany's conviction to never let mass atrocities like the Holocaust occur again.¹⁵⁹

Because of the German Constitution's laws prohibiting Holocaust denial, David Irving would face the same penalties in Germany as he did in Austria. His frequent writings and speeches denying the full reality of what happened and shifting the blame to the Jewish victims would, at a minimum, result in harsh criminal penalties under

¹⁵¹ GRIMM, *supra* note 135, at 559.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 560.

¹⁵⁶ *Id.*

¹⁵⁷ GRIMM, *supra* note 135.

¹⁵⁸ *Id.* at 561.

¹⁵⁹ *Id.*

sections 130 and 189 of the German Penal Code.¹⁶⁰ Irving's comments downplaying the focused destruction of European Jewry, the existence of the gas chambers, and Hitler's extermination plans would specifically violate sections 130(1), 130(2), and 130(3) of the Penal Code.¹⁶¹ Irving's language caused a disturbance of the public peace, incited hatred against a religious group, and violated its human dignity, and for his actions he could serve up to five years in prison.¹⁶² He could also face up to three years in prison for disseminating content that attacks the human dignity of the Jewish people by insulting and defaming them.¹⁶³ And most explicitly, he could face five years in prison for denying or downplaying an act committed by the Nazi government in a manner suited to cause disturbance of the public peace.¹⁶⁴ Under section 189, by dishonoring the memory of the six million Jews murdered in the Holocaust, David Irving could also be imprisoned for up to two years for defiling the memory of a deceased person.¹⁶⁵ Irving's extensive record of Holocaust denial might result in the particularly severe penalties under a German Penal Code that takes Holocaust denial seriously.

VI. CONCLUSION

The laws in place in the United Kingdom, the United States, Austria, and Germany can be readily distinguished from one another. The United Kingdom and the United States offer limited possibilities for those negatively impacted by Holocaust denial. In the United States, the best defense offered against denial, which is protected by free speech, is counter-speech. Otherwise, if someone publicly shares views of Holocaust denial they are protected by the First Amendment, unless they threaten violence, incite audiences to break the law, or defame a public figure or a private person.¹⁶⁶ The Alex Jones case provides an example of protected hate speech crossing the legal threshold and entering the arena of incitement of violence and defamation of

¹⁶⁰ Penal Code §§ 130, 189 (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/V4DL-KFQN>].

¹⁶¹ *Id.* § 130.

¹⁶² *Id.* § 130, para. 1.

¹⁶³ *Id.* § 130, para. 2.

¹⁶⁴ *Id.* § 130, para. 3.

¹⁶⁵ *Id.* § 189.

¹⁶⁶ STEVEN J. HEYMAN, *Hate Speech, Public Discourse, and the First Amendment*, in *EXTREME SPEECH AND DEMOCRACY* 158, 165 (2009).

private persons.¹⁶⁷ The result reached in the Alex Jones case is not likely to be shared by those pursuing Holocaust denial claims, as individuals are not normally named in Holocaust denial; rather, the Holocaust as a whole is attacked and undermined. Austria and Germany's handling of Holocaust deniers stands in stark contrast to the American and British systems. David Irving himself was imprisoned in Austria, and the Penal Code of Germany would offer no lenience for Irving's lies. *Mein Kampf* is banned in Germany and Austria but available in the United States and United Kingdom.¹⁶⁸ This is consistent with their practices related to Holocaust denial, as Germany and Austria are two countries that provide extensive legal deterrents to Holocaust denial, while the United States and the United Kingdom offer only limited civil routes for those affected by it.

While Americans can and *should* cherish the protections of the First Amendment, perhaps the United States should follow Germany's playbook of interpreting and separating speech when it relates to opinion versus when it relates to facts.¹⁶⁹ Coupled with the requirement that hate speech not be protected when it threatens violence, incites audiences to break the law, or defames a public figure or a private person,¹⁷⁰ the U.S. legal system could alter its jurisprudence to interpret Holocaust denial utterances as unprotected hate speech because they threaten violence and attack private persons, even if not specifically. Holocaust denial is a civil rights issue, and there should be additional avenues available, namely criminal procedures, to address it. Those who encounter Holocaust denial should have the option to request prosecution, like section 194 of the German Penal Code provides.¹⁷¹ The Supreme Court and other U.S. courts and judges can apply these broader interpretations of our country's laws in the interest of protecting historical truth, as well as the dignity and memory of survivors and victims of the Holocaust.

Even if protected hate speech in the form of Holocaust denial does not lead to the direct incitement of violence against Jewish people and Holocaust survivors, it will have long-term consequences. In several decades, people learning about the Holocaust for the first time without the privilege to hear the history directly from the voices of

¹⁶⁷ See *What Does the Alex Jones Case Mean*, *supra* note 86.

¹⁶⁸ See Bazylar, *supra* note 126.

¹⁶⁹ See GRIMM, *supra* note 135, at 559.

¹⁷⁰ See HEYMAN, *supra* note 166, at 165.

¹⁷¹ Penal Code § 194 (Ger.), https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html [<https://perma.cc/V4DL-KFQN>]

living survivors will have to rely on the words they read. With unfettered access to social media and other mediums of information, it will be easier to question the truth of the Holocaust. Students could read the works of David Irving and other deniers on seemingly legitimate platforms and be inclined to question the truth of the Holocaust. For the United States to allow this slow burn of disinformation over time is to allow antisemitism to prevail and become part of its history. In *Schenk v. United States*, decided over a century ago, Justice Holmes wrote: “The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”¹⁷² Holocaust denial and antisemitism are substantive evils, and even if the danger they bring is not immediate, they are imminent and harmful to society. The United States, with its white supremacist history and modern neo-Nazi presence, should act on its authority to protect the public, and carve a legal path to prevent and punish Holocaust denial.

¹⁷² *Schenk v. United States*, 249 U.S. 47, 52 (1919).