

A DIALOGUE ON HATE SPEECH

ARNOLD H. LOEWY*

Americans and Europeans have very different ideas of the strength of their respective free speech guarantees. In an article by Professors Russell Weaver, Nicolas Delpierre, and Laurence Boissier on the Gayssot laws of France, we encounter an account of a free speech regime that would be an anathema to most Americans.¹ In this Essay, I explore the different thoughts an American lawyer and a European lawyer have to help us understand why arguments that are persuasive to lawyers of one country might not be similarly persuasive to lawyers from other countries with very different cultures.

On an imaginary flight from Frankfurt, Germany, to Washington, D.C., two lawyers previously unknown to each other are seated next to each other in seats 7A and 7B in the airplane's business class section. The lawyers, Hans Schmidt of Frankfurt and John Smith of Washington, introduce themselves, and the following dialogue begins:

Hans: I understand that in America you construe your constitutional free speech clause to allow anyone to say anything regardless of who might be offended.

John: Well, that's basically right, although a bit overstated. We don't constitutionally protect fighting words,² and we do limit the time, place, and manner of speech.³

Hans: Oh, good. Then you wouldn't allow such horrible things as Holocaust denial or race-baiting hate speech.

John: No, that's not right. Both of those types of speech are constitutionally protected.⁴

* George R. Killam Jr. Professor of Criminal Law at Texas Tech University School of Law. I would like to thank the participants of the First Amendment Symposium, held at the University of Louisville School of Law, and the faculty at the University of Mainz for their helpful suggestions. I would also like to thank my research assistants, Michael Kirkland and Andrew Porter, recent graduates of the Texas Tech School of Law, Katherine Binkley, a second year student at Texas Tech School of law, and especially Matthew Rittmayer, a third year student at Texas Tech School of Law, for their helpful assistance.

1. Russell Weaver et al., *Holocaust Denial and Government Declared "Truth": French and American Perspectives*, 41 TEX. TECH. L. REV. (forthcoming 2009).

2. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

3. See, e.g., *Hill v. Colorado*, 530 U.S. 703, 722-26 (2000) (upholding a Colorado statute as constitutional because the location restriction served a legitimate governmental interest, was content-neutral, and was narrowly tailored); *Kovacs v. Cooper*, 336 U.S. 77, 83, 85-89 (1949) (noting that noise regulations are not unconstitutional when the restrictions protect the public and do not stifle the communication of ideas).

4. Because Holocaust denial has never been outlawed in the United States, there are no decisions explicitly holding that it could not be outlawed. There is, however, no First Amendment theory of which I am familiar that would even arguably allow such a prohibi-

Hans: But why? I thought I heard you say that fighting words are not protected.

John: I did, but fighting words have to be face-to-face. Thus, if one man says to another during a face-to-face dialogue like we're having here, "You're a no-good dirty faggot"—that would constitute fighting words.⁵ But if he writes a book or carries a sign that attacks homosexuals as the cause of all that is wrong in America, he could not be punished for his words.⁶

Hans: And the same goes for race, gender, religion, or anything else? You can insult any group of people with outlandish characterizations and be protected by the First Amendment?

John: That's right, Hans.

Hans: But why do you do it? I thought that the United States renounced bigotry after the civil rights revolution of the 60s.

John: It did.

Hans: Well, how can you renounce bigotry and allow constitutionally protected bigoted speech? It seems like a contradiction to me.

John: Where's the contradiction?

tion. Race-baiting hate speech is clearly protected. *See, e.g.,* *Virginia v. Black*, 538 U.S. 343, 363-67 (2003) (noting that burning a cross can be protected political speech and invalidating a Virginia statute that made burning a cross prima facie evidence of an intent to intimidate); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386, 392 (1992) (invalidating a St. Paul ordinance that prohibited fighting words containing messages of some "bias-motivated" hatred because the government cannot regulate speech based on the underlying message expressed); *Brandenburg v. Ohio*, 395 U.S. 444, 444-45, 448-49 (1969) (overturning an Ohio statute that punished mere advocacy of violence as applied to Ku Klux Klan hate speech).

5. *See* *Chaplinsky*, 315 U.S. at 572 (noting that fighting words include face-to-face words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

6. *Cf. Gooding v. Wilson*, 405 U.S. 518, 528 (1972) (invalidating a Georgia law as overbroad because it was not limited to face-to-face fighting words).

Hans: Well, either you're for racial justice or you're against it. You can't piously claim that you are for racial justice and allow people to speak against it. That's blatant hypocrisy.⁷

John: And what about your country? You claim that you support free speech, but you deny it the only time that it matters, namely when people say disgusting or revolting things.⁸

Hans: Tell you what, you answer my question first. You tell me why what you do isn't hypocritical. Then I'll tell you why my system isn't.

John: Okay, you're on. Let me give you an illustration from one of our cases. Clarence Brandenburg, a Ku Klux Klan leader, burned a cross at a Klan rally. During the course of that rally, Mr. Brandenburg said, "Personally I believe the nigger should be returned to Africa, the Jew returned to Is-

7. Although this is predominantly a European view, *see generally* Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1549-50, which discussed Germany's adoption of content-based speech regulation in order to repudiate the country's Nazi past, there are a few American scholars who normatively endorse this position. *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 435-49 (arguing that the liberty of free speech is in conflict with the elimination of racism and the debate has advanced the cause of racial oppression); *cf.* Mark S. Kende, *Regulating Internet Pornography Aimed at Children: A Comparative Constitutional Perspective on Passing the Camel Through the Needle's Eye*, 2007 BYU L. REV. 1623, 1647-60 (arguing that hate speech should be treated as low-value speech).

8. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, BGBl. I § 189, *available at* http://bundesrecht.juris.de/stgb/_189.html (last visited Nov. 12, 2008), *translated in* IUSComp, The Comparative Law Society, <http://www.iuscomp.org/gla/statutes/StGB.htm#189> (last visited Nov. 12, 2008) ("Whoever disparages the memory of a deceased person shall be punished with imprisonment for not more than two years or a fine."); *see also* Eric Stein, *History Against Free Speech: The New German Law Against the 'Auschwitz'-and Other—'Lies'*, 85 MICH. L. REV. 277, 289 (1986) (discussing the German Penal Code, article 189, which deals with disparaging the memory of the dead). Additionally, Germany prohibits speech that "assaults the human dignity of others by insulting, maliciously maligning, or defaming segments of the population" and punishes such speech "with imprisonment from three months to five years." Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, BGBl. I § 130, *available at* http://bundesrecht.juris.de/stgb/_130.html (last visited Nov. 12, 2008), *translated in* IUSComp, The Comparative Law Society, <http://www.iuscomp.org/gla/statutes/StGB.htm#130> (last visited Nov. 12, 2008); *see also* Friedrich Kübler, *How Much Freedom for Racist Speech?: Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 342-43 (1998) (discussing the German Penal Code, article 130).

rael.’”⁹ The Supreme Court effectively reversed his conviction.¹⁰

Hans: Precisely my point. You allow a speaker to add insult to the injury that African Americans were suffering at that time in your nation’s history, and you let minorities know that it is okay for bigots to spew their hate. What kind of message of inclusiveness is that?

John: You’re missing the whole point. You can *say* anything you want, but you can’t *do* anything you want. Clarence Brandenburg can express his desire for the deportation of groups that he finds undesirable. But the government cannot implement his views. Thus, in the highly unlikely event that Brandenburg was able to persuade Congress to enact his political agenda, the Supreme Court would declare it unconstitutional. Hence, there is no possibility that Brandenburg’s views would ever become the law of the land.

Hans: Au contraire. Perhaps you are not familiar with German history. We allowed Hitler his free speech in the streets. Eventually, he was able to take over the government, appoint his own judges, and implement a system far worse than anything envisaged by Clarence Brandenburg.¹¹

John: As a matter of fact, you did have repressive speech statutes in place under the Weimar Republic when Hitler was making his speeches in the streets. You just didn’t bother to enforce them.¹² Not that I recommend enforcing them. What you should have done is to distinguish speech from conduct. You should have stopped the Nazis when their conduct became intolerable.

9. *Brandenburg*, 395 U.S. at 447.

10. *Id.* at 448-49.

11. See FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE SOCIETY* 97 (1981) (“Repeatedly the point is pressed that Hitler’s rise to political power in Germany might have been stopped if his early speeches and rallies had been suppressed.”).

12. UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 15-37 (Louis Greenspan & Cyril Levitt eds., 1993). Paragraph 130 of the Criminal Code, “Incitement to Class Struggle,” reads as follows: “Whoever publicly incites different classes of the population to violent actions against one another in a way that jeopardizes the public peace will be punished with a fine of 600 marks or with a prison term of up to two years.” *Id.* at 16-17. Additionally, Germany had statutes limiting speech with regard to “Religious Insult” (Paragraph 166, Criminal Code) and “Insult” generally (Paragraphs 185-87, 189, 190, 192-96, Criminal Code). *Id.* at 17.

Hans: That, unfortunately, is easier said than done.

John: I will grant you that free speech has its risks. If you don't tightly cabin ideas, it is possible that some very bad ones will prevail, as unfortunately happened in your country. But what is the alternative? If some ideas aren't allowed, one or more government officials have to decide which ideas are in and which are out. I don't trust any such official to make that choice for me.

Hans: What's the big deal? You don't have to be a rocket scientist to know that hate speech is beyond the pale.

John: And who's going to decide what hate speech is?

Hans: The trial judge, and if he gets it obviously wrong, the appellate court. But frankly, we haven't had many problems with judges reaching wrong verdicts, and when they do, they can be fixed like any other mistake.¹³

John: I'm not so sure. You guys even consider Holocaust deniers to be guilty of hate speech.¹⁴

Hans: Of course we do. Why? Is that a problem?

John: Sure it is. If people can't even debate historical facts, what happens if somebody discovers evidence that Jesus wasn't really born in Bethlehem,¹⁵ or that he didn't really cleanse lepers?¹⁶ Are we going to punish the publication of that person's studies because we believe that they are false and highly offensive to Christians?

Hans: That's different.

John: How?

13. See generally Rosenfeld, *supra* note 7, at 1548-54 (discussing Germany's Constitutional Court's reversal of the lower court's decision in the Tucholsky case, interpreting Tucholsky's bumper sticker with the slogan "soldiers are murderers" as an expression of his opinion rather than a defamatory incitement to hatred).

14. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, BGBl. I § 130; see Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law* (pt. 1), 3 GERMAN L.J. No. 12 (2002), available at <http://www.germanlawjournal.com/article.php?id=212> (noting that Holocaust denial is not protected speech); cf. Weaver et al., *supra* note 1 (noting that the French Gayssot laws prohibiting Holocaust denial fall under human dignity law as opposed to hate speech).

15. Despite that *Matthew* 2:1-6 says he was.

16. Despite that *Mark* 1:40-42 says he did.

Hans: Well, we know that Holocaust deniers are wrong. Furthermore, it is excruciatingly painful to Holocaust survivors who are still alive.

John: I see. So one hundred years from now, Holocaust denial will be protected speech, like Christ denial is today. But as long as people are sufficiently offended, a contrary view of history from that officially espoused is punishable.¹⁷

Hans: Well, I wouldn't exactly put it that way, but basically yes. But tell me, don't you guys care as to who is hurt or offended by speech in the United States? Do you really want to defend scum like Clarence Brandenburg?

John: Candidly, I wish people like that didn't exist. It does make me sick to listen to them.

Hans: So why protect them?

John: Well, there was a time when we didn't protect hate speakers. Back in the 1950s, a man named Joseph Beauharnais distributed leaflets filled with hate directed at the black race. Beauharnais was seeking people to sign a petition for his group, the White Circle League, which, so far as I can tell, was a white supremacist organization that wanted to put blacks in their place: jail, or at least another neighborhood. The Supreme Court upheld his conviction for group libel.¹⁸ In the course of its opinion, the Court specifically upheld the denial of his opportunity to prove the truth of his remarks on the grounds that even if they were true, they were not published with good motives and for justifiable ends.¹⁹

Hans: That sounds pretty good to me. So why did the Court jump the rails and stop taking human dignity seriously?

John: I think that the seeds of *Beauharnais's* demise were in the dissenting opinion of the case itself. Justice Black ominously warned, "If there be minority groups who hail this

17. Germany distinguishes between expressions of opinion and fact. Since the German government officially denounces the actions of the Nazi regime and recognizes the atrocities committed during the Holocaust, any expression to the contrary is unprotected speech and opens the speaker up to criminal liability. *See supra* notes 8, 14.

18. *Beauharnais v. Illinois*, 343 U.S. 250, 267 (1952).

19. *Id.* at 265-67.

holding as their victory, they might consider the possible relevancy of this ancient remark: ‘Another such victory and I am undone.’²⁰

Hans: Why on earth would African Americans consider this a Pyrrhic victory? Are you telling me that it would be better for them to have been allowed to demean whites, rather than to be free from being demeaned by whites? That seems like a strange set of values to me.

John: Well, one of the reasons that African Americans do have civil rights today is because they fought for them on the streets. Led by the great Martin Luther King, Jr., African Americans held various sit-in demonstrations throughout the South. For the most part, their demonstrations were deemed constitutionally protected.²¹ But let us assume that the *Beauharnais* rule had prevailed. I firmly believe that Southern judges would have held these demonstrations to be libelous to the white race, thereby affirming the conviction and jailing of the protestors.

Hans: Come on now. How could a demand for equality possibly be deemed libelous?

John: Because it demeaned the white race by suggesting that they were no better than blacks and should be integrated with them.

Hans: That’s not libel.

John: Says you and says me. But the judges that populated Southern state courts at that time would have thought it was libelous.²² And it is, after all, the judges as a branch of

20. *Id.* at 275 (Black, J., dissenting).

21. *See, e.g.,* *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (noting that the First Amendment embraces a “right in a peaceable and orderly manner to protest by silent and reproachful presence . . . the unconstitutional segregation of public facilities”).

22. *See* Mary Ellen Maatman, *Speaking Truth to Memory: Lawyers and Resistance to the End of White Supremacy*, 50 *HOW. L.J.* 1, 28-38 (2006) (describing various “elite Deep South . . . judges [who] used a remarkably consistent rhetoric to defend White Supremacy”); Richard N. Winfield, *The Wasting Disease and a Cure: Freedom of the Press in Emerging Democracies*, 20 *COMM. LAW.* 22, 24-25 (2002) (“During the Civil Rights Movement, the national press . . . covered the upheaval in the American South in a way that was powerful and sympathetic to the demonstrators. Throughout the South, white politicians . . . filed countless libel suits against the national press . . . [and] easily convinced white judges and all-white juries to impose heavy damages.”); *see also* A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 127-51 (1996) (describing racism in the courts as a symptom and signal of racism in society—“when judges overruled defense objections to . . . racist actions” they “symbolically were affirming the racist myths and stereotypes”—and stating that the segregation of the races in courtrooms, courthouse cafeterias, and restrooms also perpetuated racism in and out of the courthouse); *cf.* *N.Y. Times Co. v. Sullivan*, 376 U.S.

government that make that call. At least it would have been if we lived in a regime where hate speech, or speech libelous of groups, could be punished. So if the Court had continued to follow *Beauharnais* or the German system seriously, the entire civil rights movement may have been significantly retarded.

Hans: So you think that because a generation ago, a bunch of no-nothing judges couldn't tell the difference between libel and legitimate protest, today's society should have to suffer with a rule that subordinates dignitary interest to the protection of free speech excesses?

John: No. Not because of that, but as illustrated by that.

Hans: What do you mean?

John: It was not because of what adherence to *Beauharnais* did or could have done to the civil rights movement. In fact, because we were no longer adhering to *Beauharnais*,²³ the harm that I hypothesized never materialized. But that possibility gives us an important historical retrospective on what could happen by trusting judges. Are there judges out there today who would deem tomorrow's conventional wisdom so hateful that saying it today can render one a criminal? Candidly, I don't know. But, I'm not willing to find out.

Hans: So, because of the theoretical possibility that some judge will wrongly punish an idea, you would let speech prevail over dignity.

John: It is not so much that the judge would punish the wrong idea, although that is surely possible. It is that they would punish any idea at all. That is the problem that I have with your system. As Mr. Justice Powell once put it, "there is no such thing as a false idea."²⁴

Hans: Well, I think that Justice Powell was wrong. There are false ideas. Unfortunately, my country was governed by them during World War II. If we can nip them in the bud, everybody wins and nobody, except the purveyor of false ideas, loses.

254, 279-80 (1964) (stating a new libel rule for public officials trying to recover against the press—when dealing with a public official there must be proof that the press acted with "actual malice").

23. See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 229-30, 236-38 (1963) (holding that "[t]he Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views" and reversing the convictions of 187 peaceful protesters who demonstrated at the state house and drew a large crowd).

24. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974).

John: Well, if you trust a government official to distinguish good ideas from bad ones, then maybe your system wouldn't be so bad. But, frankly, I don't have that kind of confidence. I trust the marketplace of ideas to distinguish good ideas from bad, and if the bad ones occasionally prevail, then that is the price of living in a free society.

Hans: Well, at least we understand our differences. That's a cost I'm not willing to pay. To the extent that an unregulated market on speech allows dignitary interests to be subordinated to such a simon-pure regime of deregulation, I don't want to be a part of it.

John: Even at the cost of suppressing a true idea that a judge misperceives as false?

Hans: Yes. Even at the cost of an occasional error such as that.

John: Well, I guess we're just going to have to agree to disagree on this one. Now let's talk about the incongruities in your system.

Hans: What incongruities?

John: Well, you say you believe in free speech. But when the speech becomes disagreeable enough, you punish it.²⁵ Let's face it, no government punishes speech that it agrees with or is neutral about. In fact, very few governments punish mildly distasteful speech. It is only when speech gets really bad, like hate speech or Holocaust denial, that any government would even want to punish it.²⁶

Hans: You think so. Take a look at this. (Hans hands John a copy of a German newspaper with several stories and editorials highly critical of the German government).

John: (after reading the articles): So what's your point?

Hans: Nobody on this newspaper was prosecuted or threatened with prosecution, because contrary to what you said, we do take free speech seriously.

John: Frankly, I think that any country that calls itself a democracy will allow that kind of political attack. To take

25. See, e.g., *supra* notes 8, 14.

26. See Arnold H. Loewy, *Free Trade in Ideas Is (or Ought to Be) Absolute for Adults*, 2007 BYU L. REV. 1585, 1585 (2007) (suggesting that no democratic government would ever want to punish speech unless they thought it was very harmful).

free speech seriously, I think you need to protect more than pure political speech.²⁷

Hans: Oh, really? You guys weren't always so great. Early last century, you sent a former presidential candidate to jail for giving an antiwar speech.²⁸

John: Touché. You are right. Some of our First Amendment history is nothing to be proud of.²⁹ But just as you have attempted to shed your image as a Nazi state, we too wanted to shed our image as a country where speech is repressed. Ironically, to prove how non-Nazi you are, you criminalize the support of Nazi ideology.

Hans: That's because Nazi ideology is extreme, and we are not an extreme country.

John: And you stay that way by silencing the opposition.

Hans: Well, shouldn't we?

John: Well, the Nazis did that to their opposition. How is what you are doing any different?

Hans: They silenced *all* of their opposition. We only silence a tiny percentage, the lunatic fringe if you will.

John: So, you don't believe in free speech for the lunatic fringe?

Hans: We do believe in free speech. But we also believe in moderation.

John: So you believe in the 90% rule—90% of the speech is protected. But the 5% fringes on each side are not.

Hans: I wouldn't put it that way. It is more like the 99% rule. Maybe ½% at each end of the political scale is limited.³⁰

27. See *id.* at 1585-87 (arguing that speech cannot conflict with other values and that people have a right to voice an unpopular opinion, because the safeguards of the Constitution prevent the idea from being implemented).

28. See *Debs v. United States*, 249 U.S. 211, 213-16 (1919) (affirming the conviction of a candidate who expressed his opinion against the war and encouraged opposition from the public).

29. In addition to *Debs*, its famous companion case, *Schenck v. United States*, 249 U.S. 47 (1919), upheld a conviction for antiwar advocacy directed towards draftees. In addition to *Beauharnais*, a substantially contemporaneous case, *Feiner v. New York*, 340 U.S. 315 (1951), upheld the conviction of a speaker for little more than refusing to stop speaking on the command of a police officer.

30. Germany allows all speech with the exception of hate speech or Holocaust denial. See Kübler, *supra* note 8, at 336-38, 340-47 (discussing that while Germany generally follows the American example of speech regulation, their specific history has led them to pun-

John: But you still won't go for 100%. So, if that is what you mean by free speech, I can see why you say you believe in it. I prefer the 100% rule. Frankly, it's safer that way.

Hans: And how is it safer?

John: We don't risk squelching a true idea.

Hans: Like civil rights?

John: Like civil rights.

Hans: You are sure trying to get a lot of mileage out of that one.

John: Yes. Because the risk of losing that is not worth all of the personal security you think your system gives you.

Hans: Well, once again we understand our differences. Hey, they are about to start the in-flight movie. What's it about?

John: It's called "Taking the First," starring Beau Bridges and Martha Plimpton.³¹ Ironically, it is about a campus speaker who delivers what you might consider an unprotected white supremacist hate speech. Following the speech, his followers hunt down and kill a Hispanic heckler, who was giving the speaker a hard time. The victim's parents sue the speaker, and the movie explores whether and under what circumstances the speaker can be held liable for the conduct of his followers.

Hans: Easy question in Germany. Speaker gave an unprotected speech. Speech proximately caused a death. Speaker is liable.³²

John: In America, the question is much harder. The speech is generally protected.³³ Liability can only be predicated upon proof of the speaker's intent that his followers act illegally. The movie presents a close case, concluding that the speaker did cross the line between speech and conduct. The

ish anti-Semitic speech, Holocaust deniers, and any other hate speech directed against a group within Germany).

31. THE DEFENDERS: TAKING THE FIRST (Paramount Television 1998).

32. See Kübler, *supra* note 8 at 344-47 (discussing section 130 of the German Penal Code—Germany holds speakers liable when they incite hatred against parts of the population, which can include speeches and the production and distribution of racist materials by print or electronic media).

33. See cases cited *supra* notes 9, 21, 24.

good thing about America is that the plaintiff (or prosecutor) has to prove that the line has been crossed.³⁴

Hans: And the good thing about Germany is that he does not.³⁵

John: Well, again, we'll have to agree to disagree. At least we understand our differences.

Hans: Well, we agree on something anyway, even if it's just understanding where we disagree.

34. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (noting that the Constitution allows for the advocacy of ideas, and states can only punish individuals when advocacy directly incites lawless action or conduct).

35. See Kübler, *supra* note 8, at 341 (noting that Germany links speech with conduct when prosecuting insulting or defamatory statements made against a person).