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Racial Hatred: A Comparative Analysis of the Hate Crime Laws of the United States and Germany

Charles Lewis Nier III*

I. Introduction

On the night of October 29, 1993, several members of the U.S. luge team went to a pub to celebrate a teammate's birthday.¹ The team was in Oberhof, Germany, a small town about 150 miles southwest of Berlin, to train for the World Cup tour and the 1994 Winter Olympic games.² Shortly after arriving at the bar, Duncan Kennedy was alerted to the possibility of trouble when two skinheads motioned to the Americans.³ Thus, Kennedy suggested to Robert Pipkins, his African-American roommate, that they should leave the pub.⁴ Just as the group was preparing to leave, a group of fifteen skinheads marched into the pub wearing leather boots and jackets adorned with swastikas.⁵ The skinheads moved behind Pipkins and began making monkey sounds while shouting "Nigger raus [get out]."⁶ Several of Pipkins' teammates hustled him outside while Kennedy tried to facilitate the escape by blocking the door.⁷ The skinheads approached Kennedy chanting "Sieg Heil, Heil Hitler" and drove him out to the pub's parking lot.⁸ After being surrounded by the skinheads, Kennedy was punched and kicked several

* Associate, Barbin & Barbin, P.C., Harrisburg, Pa. B.A. 1990 Ohio University; J.D. 1993 The Dickinson School of Law; LL.M. (International and Comparative Law) 1994 Georgetown University Law Center.

1. Richard Hoffer, *Get Up, Stand Up: U.S. Luger Duncan Kennedy Refused to Take a Skinhead Attack on a Teammate Lying Down, and Now He Won't Give up the Fight*, SPORTS ILLUSTRATED, Dec. 13, 1993, at 56. A luge is a small sled on which the driver lies on his back sliding down an ice chute at speeds of up to 75 m.p.h. *Id.* The luge is propelled down the chute by gravity and centrifugal force. *Id.*

2. *Id.*

3. *Id.*

4. Hoffer, *supra* note 1, at 56. Duncan Kennedy is considered the best luger in the United States and among the top three in the world. *Id.* Robert Pipkins won the 1992 world junior title. *Id.* At the XVII Winter Olympics in Lillehammer, Norway, Kennedy on his fourth and final run crashed on the thirteenth of sixteen turns and failed to medal. Leigh Montville, *Hitting the Wall: Speeding After a Medal, U.S. Hopeful Duncan Kennedy Slid Out of Control and Crashed*, SPORTS ILLUSTRATED, Feb. 21, 1994, at 30.

5. Hoffer, *supra* note 1, at 56.

6. *Id.*

7. *Id.*

8. *Id.*

times.⁹ As a result, Kennedy suffered facial and body cuts and bruises to his rib cage.¹⁰

Later that evening, Kennedy returned to the bar with the police to identify his assailants.¹¹ After nearly being attacked again, he was able to identify three of the skinheads who had assaulted him.¹² Two of the accused, twenty-one-year-old Silvio Eschrich and sixteen-year-old Tino Voelkel were tried as juveniles. Nevertheless, both were convicted and sentenced to stiff prison sentences.¹³ Eschrich was sentenced to spend two years and eight months in prison, while Mr. Voelkel was sentenced to one year.¹⁴ Both had been known to the police as potentially violent right-wing extremists and were on probation for previous offenses.¹⁵

This incident was denounced throughout Germany, and the depiction of an American as a victim seemed to galvanize the press.¹⁶ However, this attack is representative of the resurgence of hate crimes in both the United States and Germany. Generally, a hate crime is a crime committed against someone by reason of their race, religion, national origin, or sexual orientation of another person or group.¹⁷ Hate crimes are not unique to the United States and Germany. At present, hate crimes, especially hate crimes based upon ethnicity, are seen throughout the world, most notably in Rwanda and Bosnia.¹⁸ Still, given the United States' history of slavery and racial discrimination and Germany's Nazi past, these two countries are often the focus of attention with regard to hate crimes. Indeed, in response to the recent hate crime resurgence,

9. Stephen Kinzer, *Germans Jailed in Attack on Athletes*, N.Y. TIMES, Jan. 18, 1994, at 3A [hereinafter *Germans Jailed in Attack*]. Kennedy described the events as follows: "They started punching me, and several times I fell down. They kept kicking me. I almost got away four times, but they kept pulling me back. Eventually I got away and ran back to the hotel." *Id.*

10. Stephen Kinzer, *Racist Attack on Americans Upsets Germany*, N.Y. TIMES, Nov. 2, 1993, at 8A.

11. Hoffer, *supra* note 1, at 57.

12. *Id.*

13. *Germans Jailed in Attack*, *supra* note 9, at 3A. German law allows judges the discretion to apply the juvenile code to defendants up to the age of 21. *Id.*

14. *Id.*

15. *Id.* Attempting to send a message to other skinheads, Judge Wolfgang Feld-Gerdes stated the following during his sentencing of the two: "Those who don't listen must be made to feel, and so must go to jail." *Id.* Five other skinheads are being investigated and may be prosecuted later. *Germans Jailed in Attack*, *supra* note 9, at 3A.

16. Hoffer, *supra* note 1, at 57.

17. See *infra* note 171 and accompanying text.

18. At the end of 1994, members of the Hutu tribe massacred more than 500,000 of the Tutsi people in Rwanda. Kenneth Auchincloss, *Bugler Sound Retreat*, NEWSWEEK, Jan. 2, 1995, at 26. During Bosnia's three-year civil war, Serb militia have killed close to a million Bosnian Muslims. Dick Kirschten, *No Refuge*, 26 NAT'L L.J. 37 (1994).

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there is renewed scrutiny of the legal methods adopted to deter and punish the commission of such crimes in both countries.

Accordingly, this article will present a comparative analysis of the criminal sanctions enacted by both the United States and Germany to combat hate crimes. The article will first examine the recent surge of hate crimes in Germany in Part II. Part III will then present a summary of the German legal system, including both a review of the origins of the German legal system and the modern German Criminal Code and its criminal sanctions of hate crimes. The U.S. hate crime jurisprudence will be analyzed, in Part IV. Particular focus will be placed on two recent Supreme Court decisions, namely *R.A.V. v. St. Paul*¹⁹ and *Wisconsin v. Mitchell*.²⁰ Part V extends this analysis to include an examination of the international human rights documents and institutions as a possible alternative source for criminal sanctions of hate crimes. In particular, emphasis will be placed upon the relevant provisions of the International Covenant on Civil and Political Rights²¹ and the Convention on the Elimination of All Forms of Racial Discrimination²² and the implementation of these provisions by the United States and Germany. Finally, in Part VI, this article will offer some thoughts and proposals on the future of hate crime jurisprudence in Germany and the United States.

II. The Resurgence of Hate Crimes and Right Extremism in Germany

In the last several years, Germany has witnessed a startling increase in the number of violent crimes associated with right-wing extremism. In 1990, the Office for the Protection of the Constitution, the German domestic intelligence agency, reported 375 acts of violence by right wing extremists.²³ In 1991, the number of violent acts rose dramatically to 1483, with three deaths.²⁴ In 1992, the number of violent acts continued to increase to 2285 incidents, with seventeen deaths.²⁵ Statistics in 1993 reflect 2,232 hate crimes.²⁶

19. ___ U.S. ___, 112 S. Ct. 2538 (1992).

20. ___ U.S. ___, 113 S. Ct. 2194 (1993).

21. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter *Covenant on Civil and Political Rights*].

22. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106(xx), U.N. GAOR, 20th Sess., Agenda Item 58, U.N. Doc. A/Res/2106 (1966) [hereinafter *Convention on Elimination of Racial Discrimination*].

23. Tamara Jones, *Germany's Troubles: The Third Reich Motto 'Germany For Germans' Is Once Again The Rallying Cry: Foreigners Are The Target: This Time Can The Hatred Be Stopped*, L.A. TIMES, Mar. 7, 1993 (Magazine), at 16.

24. *Id.*

25. *Id.*

26. Dan Freedman, *Anti-Crime League Sought with Former Soviet Bloc*, THREE STAR EDITION,

Perhaps the most alarming aspect of the violence is the dramatic rise in the use of weapons in the commission of these violent crimes.²⁷ Crimes involving the use of weapons such as firearms, incendiary devices and explosives, rose from 383 in 1991 to 701 in 1992.²⁸ These statistics are indicative of the dramatic surge in hate crimes in Germany committed by right-wing extremists.

An equally disturbing aspect of this phenomenon is the intense involvement of young people. German authorities estimate that there are 42,500 right wing extremists active in the country.²⁹ Those extremists considered dangerous number approximately 6500 with more than seventy percent of them teenagers.³⁰ Further, in 1992, of the 894 people arrested, questioned, and eventually charged or released in connection with hate crimes, only eighteen were over the age of thirty.³¹ Thus, not only are the number of hate crimes dramatically increasing, they wear the face of a disaffected youth.

An explanation for the rise of right wing extremist violence lies in a series of interrelated factors. Foremost among these factors are the economic difficulties associated with unification and a dramatic rise in the number of asylum seekers. Upon unification, eastern Germany underwent an economic collapse. Nearly three million jobs have disappeared since unification and approximately forty percent of the eastern labor force is unemployed.³² In addition to unemployment, there is shortage of housing, a tripling of rents, and a rapid increase in crime rates.³³ These factors, combined with a right wing extremist sentiment, have produced a volatile environment in which foreigners are utilized as a scapegoat for the economic woes of Germany.

Much of the anti-foreigner sentiment may be traced to Germany's asylum laws. Following World War II, as part of West Germany's punishment for the Holocaust,³⁴ the 1949 constitution established a liberal asylum law that provided that "[p]ersons persecuted on political grounds shall enjoy the right to asylum."³⁵ The right to asylum included

June 29, 1994, at A3. Since Germany's reunification in October 1990, there have been 30 bias-related murders. *Id.* This represents an average of 7.7 murders per year. *Id.*

27. Thom Shanker, *German Gun Show Is Like A Dreamland to Neo-Nazi Skinheads*, HOUSTON CHRON., Feb. 24, 1993, at 10A.

28. *Id.*

29. Jones, *supra* note 23, at 18.

30. *Id.*

31. Shanker, *supra* note 27, at 10A.

32. Daniel Benjamin Berlin, *Foreigners Go Home!*, TIME, Nov. 23, 1992, at 48.

33. *Id.*

34. Jones, *supra* note 23, at 17.

35. GRUNDGESETZ [GG] [Constitution] art. 16(2) (F.R.G.), reprinted in THE CONSTITUTION OF

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the right to receive food and shelter while German judges assessed each individual's claim of political persecution.³⁶ This policy resulted in numerous immigrants claiming political persecution, even though only about five percent who claimed asylum were ultimately adjudged victims of political persecution.³⁷ In addition, the German government's process of adjudicating claims took several years, and cost approximately 9,000 dollars a year per individual.³⁸

Initially, the number of asylum seekers was rather modest. For example, in 1972 slightly more than 5000 people sought political asylum in Germany.³⁹ However, the collapse of the Eastern bloc and the ethnic war in the former Yugoslavia dramatically increased the number of asylum seekers throughout Europe and, in particular, Germany.⁴⁰ Indeed, the number of asylum seekers in Germany rose from 121,000 in 1989 to 438,000 in 1992.⁴¹ The trend continued in the first four months of 1993, with the arrival of 161,320 asylum seekers.⁴²

In response to the flood of asylum seekers and the rise of hate crimes, on May 28, 1993, the German Parliament voted to sharply limit its policies on political asylum.⁴³ The law provides that any individual who comes from a country Germany deems free of political persecution will be immediately sent home upon entry to Germany.⁴⁴ The law went into effect in July, 1993 and immediately reduced the number of asylum seekers entering the country. In June, asylum seekers entering Germany totaled 31,123.⁴⁵ The number fell to 20,658 in July and 14,521 in August.⁴⁶ The number rose slightly in October to 16,660, but it

THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 233 (Ulrich Karpen ed., 1988).

36. Each individual's claim was judged on a case-by-case basis to afford the individual due process rights. Jones, *supra* note 23, at 17.

37. Stephen Kinzer, *Bonn Parliament Votes Sharp Curb on Asylum Seekers*, N.Y. TIMES, May 27, 1993, at 1A [hereinafter *Asylum Seekers*].

38. Jones, *supra* note 23, at 17.

39. *Asylum Seekers*, *supra* note 37, at 1A.

40. Paul Lewis, *Stoked By Ethnic Conflict: Refugee Numbers Swell*, N.Y. TIMES, Nov. 10, 1993, at 6A.

41. *Id.*

42. Robert L. Koenig, *Shadow of Violence Over Germany: Bonn Government Has Failed to Curb Right-Wing Attacks*, ST. LOUIS POST-DIS., June 6, 1993, at 4B.

43. *Id.*

44. *Asylum Seekers*, *supra* note 37, at 1A. The Interior Minister of Germany, Rudolf Seiters, explained that asylum seekers will only be returned if there is "no danger of torture or inhuman treatment." *Id.*

45. STAR TRIB., Sept. 7, 1993, at 4A.

46. *Id.*

represented a two-thirds decrease in comparison to the totals from the same period the previous year.⁴⁷

While the new law is certainly reducing the number of asylum seekers allowed entry into Germany, it is uncertain if it will have the effect of curbing right-wing extremist violence. Statistics from the Office for the Protection of the Constitution reported that the violence actually increased in the two months following passage of the law on May 28, 1993.⁴⁸ In addition, the law has no effect upon the estimated 1.5 million asylum-seekers already in Germany,⁴⁹ nor upon the 6.5 million foreigners living in Germany.⁵⁰ Such facts tend to suggest that the number of hate crimes in Germany will not be diminished simply by enforcing more stringent asylum laws. Thus, it becomes necessary to examine Germany's criminal laws to determine if they serve as an additional method of combatting hate crimes.

First, however, it is necessary to explore the history of the German legal system in order to gain an understanding of the judiciary's historical reaction to right-wing extremism and hate crimes.

III. The German Legal System

A. *The Origins of the German Legal System*

Early German history was marked by periods of both factionalism and unity.⁵¹ As such, the early German legal system consisted of both local custom law and the informal systems of legal administration that were established by Germanic tribes and migrating tribes from the east.⁵² This lack of a formal unified legal system facilitated the conditions that made it possible for the adoption of the Roman system of law when Germany became a part of the Holy Roman Empire in the late

47. Judy Dempsey, *Asylum Seekers Decline*, FIN. TIMES, Nov. 5, 1993, at 2.

48. *German Violence Rises Sharply: Anti-Asylum Law Fails to Stem Attacks on Foreigners*, CHICAGO TRIB., July 31, 1993, at 13.

49. Koenig, *supra* note 42, at 4B.

50. *Asylum Seekers*, *supra* note 37, at 1A, col. 3.

51. Until 800 A.D. and the reign of Charles the Great (Charlemagne), Germany consisted of several regions of individual tribes. During his reign, Charlemagne unified these tribes and they became part of his reestablished Western Roman Empire. NIGEL FOSTER, *GERMAN LAW & LEGAL SYSTEM* 7-10 (1993).

52. *Id.* at 7, 10-11. For more information concerning early Germany and its legal system, see FRANCIS OWEN, *THE GERMANIC PEOPLE* (1960); E.A. THOMPSON, *THE EARLY GERMANS* (1965); MALCOLM TODD, *THE NORTHERN BARBARIANS 100 BC-AD 300* (1987); SIMEON L. GUTERMAN, *THE PRINCIPLES OF PERSONALITY OF LAWS IN THE GERMANIC KINGDOMS OF WESTERN EUROPE FROM THE FIFTH TO THE ELEVENTH CENTURY* (1990).

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Middle Ages.⁵³ Soon, Roman law replaced the fragmentary local custom law.⁵⁴ Nevertheless, the Holy Roman Empire and its Roman law was not assimilated to such an extent as to impose a strong German legal system.⁵⁵

The decline of the Holy Roman Empire following the Thirty Years War was officially consummated with Napoleon's conquest and occupation of the region.⁵⁶ During his reign, Napoleon imposed the French civil code upon the occupied states.⁵⁷ Following the downfall of Napoleon, however, Germany again existed as a loose federation of states with no central legal system until 1871,⁵⁸ when rapid progress was made in achieving legal unity through the development of a variety of codes, including: (1) the 1871 penal code; (2) the 1877 code of civil and criminal procedure; (3) the Organization of the Courts Act; (4) the Law on Attorneys and the commercial and (5) the competition codes of 1879.⁵⁹ Ultimately, these codes were unified in the *Bürgerliches Gesetzbuch* (BGB) civil code, adopted in 1896.⁶⁰ This new code came into force on January 1, 1900 and remains the basis of German civil law.⁶¹ The codification of the BGB in the 19th and 20th centuries was joined by other legal developments of the 20th century, most notably those establishing the Weimar Republic and Hitler's National Socialist regime. Therefore, to obtain a full understanding of the German legal tradition, an examination of such legal developments is necessary.⁶²

53. Charlemagne's successors could not maintain the unity of the Roman empire. Accordingly, Germany returned to its fragmented state, where "emperors ruled a federation of areas or realms rather than a united realm." FOSTER, *supra* note 51, at 10. Such regions were later unified as a loose federation of states under the Holy Roman Empire in the thirteenth century and the Holy Roman Empire of the German Nation in the fifteenth century. *Id.* at 13-17.

54. *Id.* at 13. See also J. WHITMAN, *THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA* (1990).

55. FOSTER, *supra* note 51, at 15.

56. The Thirty Years War was fought from 1618-1648. *Id.* at 18. Napoleon conquered the German region in the early 1800s. *Id.*

57. *Id.*

58. *Id.*

59. FOSTER, *supra* note 51, at 21.

60. *Id.* See generally MICHAEL JOHN, *POLITICS AND THE LAW IN LATE NINETEENTH-CENTURY GERMANY: THE ORIGINS OF THE CIVIL CODE* (1989); H.W. KOCH, *A CONSTITUTIONAL HISTORY OF GERMANY IN THE NINETEENTH AND TWENTIETH CENTURIES* (1984).

61. FOSTER, *supra* note 51, at 21.

62. See *infra* part III.B.

B. The Legal Systems of the Weimar Republic and National Socialism

1. *Weimar Republic*.—Following the defeat of Germany in World War I, the Western allies attempted to radically alter the German state and government from its autocratic and monarchical past.⁶³ Specifically, the Weimar Republic was established as a means of establishing “a democratic federal republic guaranteeing rights to prevent war again, and . . . set up a dualist division of powers in government.”⁶⁴ However, this initial German experiment with democracy met with a disastrous fate. This failure can be attributed to a wide range of factors, including: (1) the economic depression of the 1920s and 1930s; (2) the perceived injustices of the Treaty of Versailles; and (3) the inherent instability of the constitutional framework of the new government.⁶⁵ Perhaps most significant in the Weimar’s demise was article 48 of the Constitution, which has been described as the “suicide clause.”⁶⁶ This article gave the President the power to make laws in cases of emergencies in order to

63. FOSTER, *supra* note 51, at 24.

64. *Id.* The Weimar Republic maintained a number of criminal provisions for hate crimes and anti-Semitic expression including:

1. Incitement to Class Struggle (Paragraph 130 Criminal Code):

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.

2. Insult (Paragraph 186 and 187 Criminal Code):

(186) Whoever asserts or spreads a fact in relation to another person that serves to make the other contemptible or demeaned in the public view will, if this fact is not demonstrably true, be punished with a fine or with arrest or with prison up to one year, and if the insult is done publicly or through the spread of literature, pictures, or representations, with a fine or prison term of up to two years.

(187) Whoever against his better knowledge asserts or spreads a fact in relation to another person that makes him contemptible in the public view or that serves to threaten his credit will be punished with prison for a term of up two years on account of defamatory insult, or if the defamation is done publicly or through the spreading of literature, pictures, or representations, with prison for not under one month. If extenuating circumstances are present, the penalty can be reduced to one day in prison or a fine.

reprinted in Cyril Levitt, *Under the Shadow of Weimar: What Are the Lessons for the Modern Democracies?* in UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 16, 17 (Louis Greenspan & Cyril Levitt eds., 1993). See also Cyril Levitt, *The Prosecution of Antisemites by the Courts in the Weimar Republic: Was Justice Served?* 36 LEO BAECK INST. Y.B. 151-67 (1991); Cyril Levitt, *Racial Incitement and the Law: The Case of the Weimar Republic in FREEDOM OF EXPRESSION AND THE CHARTER* (D. Schneiderman ed., 1991); A. HEARST, WHEN JUSTICE WAS NOT DONE: JUDGES IN THE WEIMAR REPUBLIC, 14 WIENER LIBRARY BULL. 1 (1960); U. Beer, *The Protection of Jewish Civil Rights in the Weimar Republic* in LEO BAECK INST. Y.B. (A. Pauker ed., 1988).

65. FOSTER, *supra* note 51, at 23-29.

66. *Id.* at 26.

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defend the Constitution and constitutional rights.⁶⁷ The President made liberal use of this power, and thus, it soon replaced the power and role of the parliamentary legislature.⁶⁸ This, in turn, eroded the separation of powers principle, thereby removing the basis of the democracy.⁶⁹ In the end, the Weimar Republic was unsuccessful because “too few wanted democracy and approved of the prerequisites essential to a democratic state’s establishment: liberalism, individualism, pluralism, equality and tolerance.”⁷⁰

2. *National Socialism under the Third Reich.*—The collapse of the Weimar Republic and the rise of Hitler’s National Socialism under the Third Reich marked the failure of democracy and the successful advent of right extremism in Germany. It is important to examine the National Socialist philosophical conception of the law, as it reveals a degree of insight to the resurgence of hate crimes in Germany. The Third Reich did not establish a new constitution.⁷¹ Rather, it radically altered the legal system by simply reworking or ignoring the existing constitution.⁷² These alterations were based upon the underlying philosophies of the National Socialist state. The Nazi philosophical conception of the role of law within the state was as follows:

[A]ll laws should work in favour of the state and that the *Führer’s* law was supreme. Law was conceived now no longer in terms of the rights of the individual but as the rights of the people as determined by the state. Whatever was good for the state was to be achieved, regardless of the right or morals of it.⁷³

In essence, “[t]he right of the National Socialist state totally encompassed the early existence of man, and it [was] limited neither by historical traditions nor by individual constitutional and human rights.”⁷⁴ This doctrine allowed the state to dismiss democratic order, namely notions of equality, individualism, and liberalism.

In addition to facilitating the dismissal of individual rights, National Socialism became a vehicle for the principle that some people were

67. *Id.*

68. *Id.*

69. *Id.*

70. Arthur Kaufmann, *National Socialism and German Jurisprudence from 1933 to 1945*, 9 CARDOZO L. REV. 1629, 1632-33 (1988).

71. FOSTER, *supra* note 51, at 26.

72. *Id.*

73. *Id.*

74. Kaufmann, *supra* note 70, at 1635 (citing ERIK WOLF, RICHTIGES RECHT IN NATIONALSOZIALISTISCHEN STATTE 23 (1934)).

entitled to less rights than others.⁷⁵ This principle was reiterated in a 1936 decision by the *Reichsgericht*, the pre-1945 German supreme court, which held that full rights extended only to those of German origin.⁷⁶ As the Court explained:

[F]undamental restrictions placed on aliens under former laws are renewed, and ideas are again taken up, which were recognized earlier based upon the differentiation between those with full legal responsibility and those persons with fewer rights.⁷⁷

This doctrine had obvious unfortunate implications, namely that people believed to have less rights, *artfremde* (those foreign) including Jews, could be legally persecuted.⁷⁸ When this legal doctrine was combined with the Nazi view of the *artfremde* as an enemy of the people, the consequences became all too clear and deadly. The Nazi movement could pursue its persecution as a method of preserving the state from foreign individual infiltration with the support of a law that deemed such *artfremde* as having lesser rights than Germans. Essentially, the National Socialists portrayed themselves as “heros,” those saving the German state. As scholars have explained:

The National Socialist movement took the matter of the solution of the Jewish problem firmly in hand, not in the sense of stock anti-Semitism, but in the knowledge that only in this way could they put a stop to foreign infiltration of the German nation, which had become particularly blatant in the aftermath of the war. These legislative measures, whose implementation certainly in individual cases was not possible without severity, had to be implemented with tact, but also with responsible firmness. These measures were not directed chiefly against the Jews as a people, but were only a necessary defensive measure against the threat of foreign infiltration of the German nation.⁷⁹

This logic resulted in the loss millions of lives under Hitler’s reign. Startlingly, a similar method of logical analysis is often utilized by present day right-wing extremist groups in their defense of hate crimes. To gain a better understanding of these problems in present-day Germany, it is necessary to examine the post-World War II German legal

75. *Id.* at 1636.

76. *Id.* (citing 91 SEUFFERT’S ARCHIV FÜR ENTSCHEIDUNGEN DER OBERSTEN GERICHTE IN DEN DEUTSCHEN 65 (1936)).

77. Kaufmann, *supra* note 70, at 1636.

78. *Id.* at 1641.

79. Kaufman, *supra* note 70, at 1642 (citing OTTO KOELLREUTTER, VOM SINN UND WESEN DER NATIONALEN REVOLUTION 28-29 (1933)).

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system, in particular its focus upon basic constitutional rights. An analysis of such rights will provide the necessary basis for analyzing the current criminal punishment of hate crimes.

C. The Modern German Legal System

On May 23, 1949, the Basic Law of the Federal Republic of Germany was promulgated to serve as the cornerstone of a democratic state designed to protect individual liberty.⁸⁰ Accordingly, the *Grundgesetz*, or Basic Law, is patterned upon the tradition of Western constitutionalism and is a direct historical reaction to the disastrous Weimar Republic and Third Reich.⁸¹ The Basic Law regulates two types of rights and relations.⁸² The first type, the Basic Laws, pertain to the rights of individuals and the state.⁸³ The Basic Laws are characterized by many of the classic human rights found in the U.S. Bill of Rights.⁸⁴ The second type, the Rights to a Free Democratic Order, concern the rights of governmental organs, the organization of the state, and the relationships between the various state organs.⁸⁵

1. *Basic Rights*.—The Basic Rights are enumerated in the first twenty articles of the Basic Law and are listed as a system of values and rights.⁸⁶ Article 1, titled Protection of Human Dignity, establishes a foundation for individual rights with the following proclamations:

- (1) The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law.⁸⁷

80. Ulrich Karpen, *Preface*, to *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 7* (Ulrich Karpen ed., 1988).

81. *Id.*

82. FOSTER, *supra* note 51, at 105.

83. *Id.* at 106.

84. The U.S. Bill of Rights is embodied in the 25 amendments to the U.S. Constitution. U.S. CONST. amends. 1-XXV.

85. FOSTER, *supra* note 51, at 105-06.

86. Günter Durig, *An Introduction to the Basic Law of the Federal Republic of Germany* in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 13* (Ulrich Karpen ed., 1988).

87. GRUNDGESETZ [GG], *supra* note 35, art. 1.

This article affirmatively establishes that individual rights are valid laws, not mere proclamations, as was the case with the Weimar Republic.⁸⁸ Further, the strength of these rights is compounded by the binding nature of these rights upon the executive, legislature, and judiciary.⁸⁹ The result is that laws are only valid subject to the basic rights.⁹⁰ Such a tenet stands in direct opposition to the historic German conception of the law, namely that basic rights were only valid subject to the laws.⁹¹ In short, the basic rights became inalienable and thereby represent a form of natural law.

Article 2, titled Rights of Liberty, acts in a complementary fashion to article 1, by providing that "[e]veryone shall have the right to the free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral code."⁹² This general proclamation serves as a basis for other basic rights, such as the freedom of faith and creed (article 4), the freedom of expression (article 5), the freedom of assembly (article 8), and the freedom of movement (article 11).⁹³

Article 3 provides for equality before the law and is similar to articles 1 and 2, as its principles may be also seen throughout the Basic Law.⁹⁴ It is composed of the following three basic parts:

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights.
- (3) No one may be prejudiced or favoured because of his sex, his parentage, his race, his language, his homeland and origin, his faith, or his religious or political opinions.⁹⁵

These principles have been extended to other articles such as (1) paragraph 5 of article 6, which grants illegitimate children the same opportunities as those enjoyed by other legitimate children; (2) paragraph

88. Durig, *supra* note 86, at 13.

89. *Id.*

90. *Id.*

91. *Id.*

92. GRUNDGESETZ [GG], *supra* note 35, art. 2, § 1.

93. Durig, *supra* note 86, at 13. It is important to note that the right to freedom of expression is limited "by the provisions of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honour." GRUNDGESETZ [GG], *supra* note 35, art. 5.

94. Durig, *supra* note 86, at 14. See also T. Wurtenberger, *Equality in The Constitution of the Federal Republic of Germany*, in *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY: ESSAYS ON THE BASIC RIGHTS AND PRINCIPLES OF THE BASIC LAW WITH A TRANSLATION OF THE BASIC LAW 67* (Ulrich Karpen ed., 1988).

95. GRUNDGESETZ [GG], *supra* note 35, art. 3.

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1 of article 19, which stipulates that no law that applies solely to an individual case; (3) paragraphs 1 to 3 of article 33, which state that all Germans have equal political status; (4) article 38, which mandates that everyone has the same voting rights; (5) article 101, which directs that while there may be no extraordinary courts, there is a right to a lawful judge.⁹⁶ Furthermore, article 3 applies to all, including non-nationals.⁹⁷

Finally, it is important to acknowledge article 79, which provides for amendments to the Basic Law. Article 79(3) protects articles 1 through 20 from change or amendment.⁹⁸ As a result, amendments to the Constitution that seek to change these articles are impermissible regardless of the majority in Parliament.⁹⁹ Further, the courts may not alter the rights by interpretations inconsistent with their original intent.¹⁰⁰ Thus, these rights represent the “apex of the hierarchical pyramid of legal rights in Germany. They have precedence over all other law.”¹⁰¹

2. *Rights to a Free Democratic Order.*—The preservation of a free democracy is deemed essential to preserve basic rights. Therefore, the German Constitution includes provisions designed to protect the free democratic order. The Basic Rights are directly violated by acts constituting hate crimes, and one may further assert that such crimes also violate the Rights to a Free Democratic Order.

For example, article 21(1) provides for the free establishment of political parties.¹⁰² This right, however, is restricted by granting the

96. Durig, *supra* note 86, at 14.

97. FOSTER, *supra* note 51, at 120.

98. *Id.* at 114. Article 79 states:

(1) This Basic Law can be amended only by laws which expressly amend or supplement the text thereof. In respect of international treaties the subject of which is a peace settlement, the preparation of a peace settlement, or the abolition of an occupation regime, or which are designed to serve the defence of the Federal Republic, it shall be sufficient, for the purpose of clarifying that the provisions of this Basic Law do not preclude the conclusion and entry into force of such treaties, to effect a supplementation of the text of this Basic Law confined to such clarification.

(2) Any such law shall require the affirmative vote of two thirds of the members of the Bundestag and two thirds of the votes of the Bundesrat.

(3) Amendments of this Basic Law affecting the division of the Federation into Laender, the participation on principle of the Laender in legislation, or the basic principles laid down in Articles 1 and 20, shall be inadmissible.

GRUNDGESETZ [GG], *supra* note 35, art. 79.

99. FOSTER, *supra* note 51, at 114.

100. *Id.* at 115.

101. *Id.* at 114.

102. GRUNDGESETZ [GG], *supra* note 35, art. 21. Article 21 provides in pertinent part:

Federal Constitutional Court the power to declare unconstitutional any parties that "seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany."¹⁰³ This limitation may be used to ban right-wing extremist political parties deemed a threat to the democratic order.

Additionally, article 9 establishes that "[a]ll Germans shall have the right to form associations and societies."¹⁰⁴ This right is limited, however, because "[a]ssociations, the purposes or activities of which conflict with criminal laws or which are directed against the constitutional order or concept of international understanding, are prohibited."¹⁰⁵ Such a restriction may deny right-wing extremist groups the right to association, as any hate crime activities may constitute a threat to the democratic order.

Finally, both articles 21 and 9 are supplemented by article 18, which deals with forfeiture of basic rights.¹⁰⁶ Specifically, article 18 provides that if certain Basic Rights are abused "to combat the free democratic basic order," then they are forfeited.¹⁰⁷ The rights subject to this provision are generally related to freedom of expression of opinion, including (1) freedom of press; (2) freedom of teaching; (3) freedom of assembly; (4) privacy of posts and telecommunications; or (5) the right to asylum.¹⁰⁸ Thus, an individual or group who attempts to use these rights to commit a hate crime may have these rights suspended pursuant

(1) The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for the sources and spending of their funds as well as for their financial resources . . .

(2) Parties which, by reason of their aims or the behaviour [sic] of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of constitutionality.

Id.

103. *Id.* art. 21, § 2.

104. *Id.* art. 9, § 1.

105. *Id.* art. 9, § 2.

106. GRUNDGESETZ [GG], *supra* note 35, art. 18.

107. *Id.* Specifically, article 18 provides that:

Whoever abuses freedom of expression of opinion, in particular freedom of the press (paragraph (1) of Article 5), freedom of teaching (paragraph (3) of Article 5), freedom of assembly (Article 8), freedom of association (Article 9), privacy of posts and telecommunications (Article 10), property (Article 14), or the right of asylum (paragraph (2) of Article 16) in order to combat the free democratic basic order, shall forfeit these basic rights. Such forfeiture and the extent thereof shall be pronounced by the Federal Constitutional Court.

108. *Id.*

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to article 18, as hate crimes are arguably a threat to the free democratic order.

D. German Criminal Law and Hate Crimes

Following World War II, the Allies believed that nationalism and militarism would effectively be eliminated by trying German war criminals and through “de-Nazification” of the German people.¹⁰⁹ Such a belief was embodied in the Laws of Liberation passed by the Council of Provinces in the American Zone and approved by the military government in March 1946.¹¹⁰ Germany adopted the Laws of Liberation into its Basic Law in article 139, which states: “The legislation enacted for the Liberation of the German People from National Socialism and Militarism shall not be affected by the provisions of this Basic Law.”¹¹¹ This provision ensured that the Basic Law did not supersede the ideals expressed in the Laws of Liberation.¹¹² Despite the Laws of Liberation and article 139, right extremism was not destroyed or eradicated for a number of reasons, including the advent of the Cold War, the failure to successfully complete de-Nazification, and the inability of Germany to comprehend the Nazi legacy.¹¹³ As such, Germany is experiencing a revitalization of this right wing extremism, often manifesting itself in the form of violent hate crimes.

The German Criminal Code has several provisions designed to oppose National Socialist and racist activities. These provisions are utilized against both right extremism and hate crimes to ensure the basic rights and to protect the democratic state of law and public order.¹¹⁴ Accordingly, these provisions will be discussed in a two-part analysis.

1. The German Criminal Code and Right Extremism.—Several provisions of the German criminal code address political parties. Such provisions indirectly address hate crimes because political parties are a

109. Juliane Wetzel, *The Judicial Treatment of Incitement against Ethnic Groups and of the Denial of National Socialist Mass Murder in the Federal Republic of Germany in UNDER THE SHADOW OF WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES* 83 (Louis Greenspan & Cyrill Levitt eds., 1993).

110. *Id.*

111. GRUNDGESETZ [GG], *supra* note 35, art. 139.

112. Wetzel, *supra* note 109, at 84.

113. *Id.* at 83-84.

114. Wetzel, *supra* note 109, at 87. The German Criminal Code is divided into both a general part and a special part. FOSTER, *supra* note 51, at 167. The general part, found in sections 1-79, contains rules applicable to all offenses and underlying assumptions of the code. *Id.* The special part, found in sections 80-358, gives detailed descriptions for individual offenses and the statutory requirements that must be fulfilled to punish perpetrators for violations. *Id.*

primary source of right extremism. Article 86 prohibits the dissemination of propaganda of an association or a political party that is deemed unconstitutional by the Federal Constitutional Court or that initiates propaganda whose content is directed at continuing the efforts of any former Nationalist Socialist organization.¹¹⁵ Such a prohibition applies only to propaganda whose content is directed against the free democratic constitutional order or the principle of understanding among peoples, however.¹¹⁶ In addition, this prohibition does not apply if the propaganda (1) is used for education; (2) protects against unconstitutional actions; (3) promotes art and science; (4) advances research; or (5) furthers historical purposes.¹¹⁷ Unfortunately, these exceptions often allow right extremists to distort or question facts under the guise of research for historical purposes and thereby escape prosecution.¹¹⁸

Article 86 is supplemented by article 86a, which addresses dissemination of symbols of political parties proclaimed unconstitutional under article 86.¹¹⁹ The provision defines symbols as "flags, insignia,

115. Article 86 of the Criminal Code states:

- (1) Whosoever disseminates or produces for purposes of dissemination within the territory in which this law applies, maintains a supply of imports into this territory, propaganda
1. of a political party declared unconstitutional by the Federal Constitutional Court, or of a political party about which it has been incontestably determined that it is a substitute organization for such a political party,
 2. of an association which it has been incontestably prohibited because it is ranged against the constitutional order or against the principle of understanding among peoples, or about which it has been incontestably determined that it is a substitute organization of such a political party.
 3. of a government, association or institution outside the territory in which this law applies, which is active on behalf of the purposes of the parties or associations designated under 1. and 2., or
 4. propaganda whose content are directed at continuing the efforts of a former National Socialist organization

shall be punished by a term of imprisonment of up to three years or a fine.

(2) Propaganda in the sense of Paragraph 1 are only those writings (§ 11 par. 3) whose content is directed against the free democratic constitutional order or the principle of understanding among peoples.

(3) Paragraph (1) does not apply if the propaganda or the action serves to advance political or civil education, to protect against unconstitutional actions, to promote art or science, to advance research or teaching, to report events of contemporary or historical interest or other such purposes.

(4) The court may refrain from imposing penalties according to these regulations in cases when the guilt is modest.

STRAFGESETZBUCH [StGB] [Penal Code] art. 86, *reprinted in* Wetzel, *supra* note 109, at 104 n.10.

116. *Id.* § 1(2).

117. *Id.* art. 86, § 3.

118. Wetzel, *supra* note 109, at 88.

119. Article 86a of the Criminal Code states:

- (1) Whosoever

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parts of uniforms, slogans and forms of greeting.”¹²⁰ This provision is clearly aimed at items such as SS runes, swastikas and salutes such as “Heil Hitler.”¹²¹ The Twenty-First Amendment to the Criminal Code, passed on June 13, 1985, provides several slight changes to article 86a.¹²² The amendment extended criminal sanctions to the manufacturing, storing or promoting of objects displaying the symbols of unconstitutional organizations.¹²³

The exceptions to articles 86 and 86a have been applied in a variety of manners. For example, the Provincial Court in Karlsruhe held that model airplanes with swastikas must be confiscated.¹²⁴ However, the prosecuting attorney’s office in Frankfurt did not consider the placing of Nationalist Socialist symbols on toys as criminal, believing that such symbols serve no propaganda purpose.¹²⁵ Similarly, the Bavarian Ministry of Justice permitted an auction house to sell Nazi memorabilia because the sale of such objects was “only for scholarly and historical purposes.”¹²⁶ As a result, the exception creates loopholes for enforcement against right extremism.

Despite the exception, the combination of articles 86 and 86a provide an excellent vehicle for addressing the threat of right extremism in the form of political parties. Such articles have their roots in the historical experience of the Nazi party and therefore are designed to prevent the emergence of a similar movement. An application of these provisions to a right extremist group may be seen in an incident involving the Socialist Reich Party (SRP).

1. within the territory in which this law applies disseminates symbols of one of the political parties or associations designated in Section 86 para. 1 no.1, 2 and 4 or, publicly uses them in a meeting or in writings disseminated by him, or

2. produces, maintains a supply or imports into the territory in which represent or contain these kinds of symbols for dissemination or use in ways specified in number 1

shall be punished with a term of imprisonment of up to three years or a fine.

(2) Symbols in the meaning of para. 1 are particularly flags, insignia, parts of uniforms, slogans and forms of greeting.

(3) Article 86 (3) and (4) shall correspondingly apply.

STRAFGESETZBUCH [StGB] [Penal Code] art. 86a, *reprinted in Wetzel, supra note 109, at 104-05 n.11.*

120. *Id.* art. 86a, § 2.

121. Wetzel, *supra note 109, at 87 (citing Kalinowsky 1985: 153ff).*

122. *Id.* at 99 (citing *Bundesgesetzblatt* Nr. 29, 15 June 1985).

123. *Id.*

124. *Id.* at 88.

125. *Id.*

126. Wetzel, *supra note 109, at 88 (citing Ratz 1979:1591).*

In November 1952, the German federal government considered the SRP the successor of the Nazi party. Thus, it requested the Federal Constitutional Court to determine whether the SRP was unconstitutional.¹²⁷ The Court ruled that the party was unconstitutional and therefore dissolved it and prohibited it from creating similar institutions.¹²⁸ In short, the Court concluded that the SRP was a threat to the free democratic order.

The Court based its decision on a series of interrelated factors. First, the Court explained that it was necessary to look beyond the party's platforms and aims, as these could be easily disguised. To the contrary, it was the actual behavior of the party's followers that was of importance.¹²⁹ Second, the Court explained that it suspected the SRP of attempting to resurrect rightist extremism that "had last been manifested in National Socialism"¹³⁰ Such an allegation was supported by the fact that the SRP's leadership was composed of "former 'veteran fighters' and active National Socialists."¹³¹ Third, the Court noted that the SRP had attempted to perpetuate and spread National Socialist ideology, as evidenced by the group's "loyalty to the Reich" and "superiority of the German race" principles.¹³² By comparing the SRP's actions to prior Nazi incidents, the Court deduced that, like the Nazi party, the SRP desired to destroy the free democratic order and would utilize "the same circles which had [made] it possible for Hitler to lead Germany to its ruin."¹³³ Finally, the Court found the SRP's slogans and songs evidenced anti-Semitism and violated both human rights and principles of equality before the law.¹³⁴ Consequently, the Court classified the SRP as unconstitutional, stripped the SRP leaders of their legislative assemblies, and seized party property, turning it over for public use.¹³⁵

127. *Id.* at 84-85. In the provincial elections in Lower Saxony in May 1952, the SRP received 11% of the total votes cast and 16 seats. *Id.* at 85.

128. *Id.* at 85.

129. *Id.*

130. Wetzel, *supra* note 109, at 85 (quoting Judgment of Oct. 23, 1952, Entscheidungen des Bundesverfassungsgerichts [BVerGE] 27 (F.R.G.)).

131. *Id.* at 85.

132. *Id.* at 84-85.

133. *Id.* at 86 (quoting Judgment of Oct. 23, 1952, Entscheidungen des Bundesverfassungsgerichts [BVerGE] 43, 52f (F.R.G.)).

134. *Id.*

135. Wetzel, *supra* note 109, at 85.

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2. *The German Criminal Code and Racial Hatred.*—Several provisions of the German criminal code pertain to racial hatred. First, article 130 provides in pertinent part:

[W]hoever attacks the human dignity of others disturbs the public peace by,

1. inciting hatred against sections of the population,
2. calling for violent or arbitrary measures against them, or
3. insulting them, maliciously exposing them to contempt or slandering them

shall be punished by a term of imprisonment of not less than three months and not exceeding five years.¹³⁶

Additionally, article 131 provides for a prison term of up to one year for the producing, disseminating, exhibiting, or making available to persons below the age of eighteen, writings that:

incite to [sic] race hatred or which describe cruel or otherwise inhuman acts of violence against human beings in a manner which glorifies such acts of violence, or makes them appear harmless, or represents the cruel and inhuman aspects of such acts in a manner offending human dignity.¹³⁷

This article generally affects written material such as hanging posters or publicly displaying items deemed to incite racial hatred or minimize violence.¹³⁸ Like articles 86 and 86a, this article contains an exception when the act serves to report on current events or history.¹³⁹ As such, like article 86 and 86a, this exception can often be used by right extremists to avoid criminal liability.¹⁴⁰

A juvenile court in Frankfurt utilized article 131 in an innovative manner. The Frankfurt Court found two youths guilty of hanging posters with National Socialist slogans, such as “Death and extermination to all foreigners and Jews.”¹⁴¹ As a penalty, the Court instructed the youths to read a report about Auschwitz and submit an essay on the topic.¹⁴²

136. STRAFGESETZBUCH [StGB] [Penal Code] art. 130, *reprinted in Wetzel, supra* note 109, at 105 n.12.

137. STRAFGESETZBUCH [StGB] [Penal Code] art. 131, *reprinted in Wetzel, supra* note 109, at 105 n.13.

138. Wetzel, *supra* note 109, at 87-88.

139. STRAFGESETZBUCH, [StGB] [Penal Code] art. 131(3), *reprinted in Wetzel, supra* note 109, at 105 n.13.

140. *See supra* notes 115-35 and accompanying text.

141. Wetzel, *supra* note 109, at 100 (citing *Frankfurter Rundschau*, 3 October 1979).

142. *Id.* at 100-01.

While innovative, this sentence was slight.¹⁴³ German judges often issue mild sentences for fear a long prison term will result in the permanent criminalization of a first offender.¹⁴⁴

A third provision is the "lie of Auschwitz" offense. The "lie of Auschwitz" offense is not a criminal offense, but rather an act of libel and slander under article 194.¹⁴⁵ Article 194 prohibits the trivializing or denial of Nazi crimes or the crimes of other violent arbitrary regimes.¹⁴⁶ However, an amendment allows for the criminal prosecution of the "lie of Auschwitz" offense by the state.¹⁴⁷ Previously, such a charge had to originate from a survivor or member of a murdered person's family.¹⁴⁸

Article 194 was used in the case of Karl-Franz Muller in the Federal Court in Karlsruhe. In that case, a Jewish student whose grandfather was murdered at Auschwitz filed a complaint alleging that his grandfather's honor had been offended by posters in Muller's garden that proclaimed the Holocaust was a lie and a "Zionist hoax."¹⁴⁹ In ruling for the student, the court established that "no one can plead for protection by claiming freedom of speech if that person makes statements denying the

143. *Id.*

144. Tyler Marshall, *German Scales of Justice Seem to Tilt to Right*, L.A. TIMES, Dec. 4, 1993, at A1.

145. Wetzel, *supra* note 109, at 99. The first two paragraphs of article 194 provide the following:

(1) Prosecution for insult shall be instituted only upon petition. When the act is committed by disseminating or making publicly accessible a writing (Section 11, para. 3), or in an assembly or by means of broadcasting, a petition is not required, if the insulted person was persecuted as a member of a group under the National Socialist or another violent and arbitrary dominance, if the group is a part of the population and if the insult is connected with such persecution. However, there shall be no prosecution ex officio if the injured person opposes it. The opposition passes to the next of kin as specified in Section 77, para. 2.

(2) If the memory of a deceased person is denigrated, the next of kin as specified in Section 77, para. 2 have the right to lodge a petition. If the act is committed by disseminating or by making publicly accessible a writing (Section 11, para. 3), or in an assembly or by means of broadcasting, a petition is not required, if the insulted person was persecuted as a member of a group under National Socialist or another violent and arbitrary dominance and the denigration is connected with it. However, there shall be no prosecution ex officio if the person entitled to launch a petition opposes it. The opposition may not be withdrawn.

GESETZGEBUNGSDIENST JURISTEN ZEITUNG [Legislation Service] Nr. 12, Aug. 9, 1985, *reprinted in* Wetzel, *supra* note 109, at 106 n.18.

146. *Id.*

147. Wetzel, *supra* note 109, at 99.

148. *Id.* The law does not protect Jews from anti-semitic statements in general, but rather protects all victims of Nazi persecution. *Id.* at 93.

149. *Id.* at 91 (citing Judgment of Sept. 18, 1979, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] (F.R.G.)).

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historical fact that Jews were murdered in the 'Third Reich.'"¹⁵⁰ As the Court stated: "Whoever attempts to deny these events, denies to each and every one of them [Jews] their value as human beings which they may rightfully claim as their own."¹⁵¹

E. The Case of Gunter Deckhart and the Future of German Hate Crimes

A recent decision by the Federal Court in Karlsruhe obfuscated the judicial application of hate crime laws in Germany. Guenter Deckert, leader of the rightist National Democratic Party, organized a rally where Fred Leuchter, an American neo-Nazi, explained to an audience that there had never been gas chambers at Auschwitz.¹⁵² Subsequently, Deckert translated Leuchter's speech and attempted to market it.¹⁵³ Deckert was convicted of inciting hatred and was given a one-year suspended sentence and fined approximately \$6,000.¹⁵⁴ Germany's highest court of appeals reversed this conviction and returned the case to the lower courts.¹⁵⁵ The Court ruled that it was "too much of a generalization" to hold that publicly repeating another person's denial of the holocaust constituted inciting racial hatred.¹⁵⁶ The Court remanded the case to the lower courts to examine and establish rules of evidence to determine whether

150. *Id.* The Court's decision was primarily based on the literature that proclaimed the Holocaust was a fabrication and not the literature's dispute of the actual numbers murdered. Wetzel, *supra* note 109, at 91.

151. *Id.* at 92. An additional possible source for criminal sanctions is § 220a of the Criminal Code relating to Genocide. Section 220a provides:

(1) Whosoever, with the intention of destroying wholly or partially a national, racial, religious or ethnic group, willfully

(i) Kills members of such group

(ii) Causes grave physical or mental damage, . . . to members of such group,

(iii) Causes such group to live in conditions likely to cause their total or partial physical destruction,

(iv) Take measures to prevent births within such group,

(v) Transfers children of such group by force to some other group,

shall be guilty of genocide and punished with lifelong imprisonment.

(2) If mitigating circumstances are present in the cases specified in subparagraph (1) (ii) to (v) above, punishment shall be imprisonment not less than five years.

STRAFGESETZBUCH [Penal Code] [StBG] 220a, *reprinted in* GENEVA CENTRE FOR HUMAN RIGHTS, SECOND DECADE TO COMBAT RACISM AND RACIAL DISCRIMINATION: GLOBAL COMPILATION OF NATIONAL LEGISLATION AGAINST RACIAL DISCRIMINATION 94-95 (United Nations ed., 1991).

152. Marjorie Miller, *Ruling On Holocaust Denial Is Denounced In Germany*, L.A. TIMES, Mar. 17, 1994, at 1.

153. *Id.*

154. *Id.*

155. *Id.*

156. Craig R. Whitney, *German's Race-Hatred Conviction Is Reversed*, N.Y. TIMES, Mar. 17, 1994, at 13A.

Deckert was guilty of inciting hatred against part of the population.¹⁵⁷ The Court rejected Mr. Deckert's contention and reaffirmed that the Holocaust was a historical fact that did not need to be established by evidence in Holocaust-denial cases.¹⁵⁸

The decision has been widely condemned throughout Germany as narrowing the definition of inciting racial hatred.¹⁵⁹ As such, authorities fear the ruling will make it more difficult to prosecute right extremists that advocate racial violence.¹⁶⁰

IV. The U.S. Legal System and Hate Crimes

A. *The Rising Trend of Hate Crimes in the United States*

Much like Germany, hate crimes in the United States hold a special significance, in part due to the historical background of the United States. A strange dichotomy exists in the United States. No country in the world has embraced more immigrants into its home.¹⁶¹ However, this ethnic diversity has often created an environment in which racism and discrimination have flourished, as evidenced by the enslavement and segregation of African-Americans.¹⁶²

In recent years, the number of hate-related crimes has dramatically increased. Although it is difficult to predict the number and extent of hate crimes with accuracy, dramatic incidents combined with subsequent governmental responses, such as the Hate Crime Statistics Act, indicate a clear and present crisis.¹⁶³ A recent report found that "most

157. *German Court Narrows Definition of "Inciting Racial Hatred,"* CHICAGO TRIB., Mar. 17, 1994, at 3 [hereinafter *German Court Narrows Definition*].

158. *Id.*

159. Miller, *supra* note 152, at 1.

160. Whitney, *supra* note 156, at 13A. As stated by Michael Friedmann, a German lawyer whose parents survived the Holocaust: "The decision is a wrong signal at a time when right-wing radicals are trying to relativize history." Miller, *supra* note 152, at 1. The German Federal Minister of Justice disagreed and noted that the German government had introduced a bill to strengthen and clarify German criminal law dealing with right extremism by making it easier to convict under the "inciting racial hatred" standard. *German Court Narrows Definition, supra* note 157, at 3.

161. Donald A. Downs, *Racial Incitement Law and Policy in the United States: Drawing the Line between Free Speech and Protection against Racism in UNDER THE SHADOW OF THE WEIMAR: DEMOCRACY, LAW, AND RACIAL INCITEMENT IN SIX COUNTRIES 107-08* (Louis Greenspan & Cyrill Levitt eds., 1993).

162. *Id.* at 107.

163. In 1990, President George Bush signed into law the Hate Crime Statistics Act, which requires collection of data on crimes committed by reason of race, religion, national origin, or sexual orientation. The Act states in part:

(b)(1) Under the authority of section 534 of title 28, United States Code, the Attorney General shall acquire data, for the calendar year 1990 and each of the succeeding 4 calendar years, about crimes that manifest evidence of prejudice based on age, religion,

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incidents . . . [involve] vandalism like the scrawling of 'K.K.K.' on doors and walls or harassing phone calls and letters. While most cases did not result in physical harm to the minority families . . . they had a serious emotional impact."¹⁶⁴

Still, hate crimes are not just limited to vandalism. Indeed, many involve violent acts. In 1990, for example, the Southern Poverty Law Center found twenty murders that were "linked to white supremacist or motivated by violence"¹⁶⁵ This number was triple the 1989 total and the most reported in the Center's ten-year history of recording such incidents.¹⁶⁶ Further, these numbers probably underestimate the problem, as many incidents are not reported.¹⁶⁷ In January 1993, much of what these reports suggested was confirmed with the release of the first FBI hate crimes report.¹⁶⁸ The compiled statistics for 1994 found that approximately 7684 bias-motivated offenses were committed, including 2776 incidents of intimidation, 15 rapes, 2800 assaults, and 20 murders.¹⁶⁹ In reaction to such a rapid escalation of hate crimes, state and federal authorities have taken action to curb and punish bias-related crimes. As a result, it becomes necessary to examine the various sanctions available under U.S. law.

sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, intimidation; arson; and destruction, damage or vandalism of property...

(5) The Attorney General shall publish an annual summary of the data acquired under this section.

Hate Crimes Statistics Act, Pub. L. 101-275, § 1(b)(1), 104 Stat. 140 (codified at 28 U.S.C. § 534 note (1993)).

164. Downs, *supra* note 161, at 108 (quoting N.Y. TIMES, Apr. 28, 1990).

165. *Id.* Private organizations, such as the Southern Poverty Law Center and the Anti-Defamation League have compiled data on hate crimes. *Id.* at 108-09. The Southern Poverty Law Center reported a "dramatic rise in hate crimes" in recent years, in particular housing-related incidents which constituted 75% of the federal prosecutions in 1988 and 1989. *Id.* Such figures increased 50% from previous years. *Id.* at 109 (citing 1991 SOUTHERN POVERTY LAW CENTER REPORT 2 (1991)). The Center also reported a 50% increase in cross burnings, a 33% increase in religious vandalism, and a 22% increase in violent assaults. Downs, *supra* note 161, at 109 (citing 1991 SOUTHERN POVERTY LAW CENTER REPORT 4 (1991)). The Anti-Defamation League, which tracks anti-Semitic violence, reported 324 incidents of crimes of assaults, threats, and harassments in 1987. *Id.* at 109.

166. *Id.*

167. *Id.*

168. Wisconsin v. Mitchell, ___ U.S. ___, 113 S. Ct. 2194, 2198 n.4 (1993).

169. *Hate Crimes: New Federal Report has Some Large Holes*, COLUMBUS DISPATCH, July 13, 1994, at 8A (quoting U.S. F.B.I. Director Louis Freeh and 1993 F.B.I. report issued pursuant to Hate Crimes Act).

B. Bias Crimes in the United States Legal System

Prior to 1980, only five states had any type of statute related to bias crime.¹⁷⁰ Today, approximately thirty states have enacted measures dealing with bias crime.¹⁷¹ Furthermore, in 1992, federal legislation concerning bias crimes passed the House of Representatives but failed to

170. Frederick M. Lawrence, *Resolving the Hate Crimes/Hate Speech Paradox: Punishing Bias Crimes and Protecting Racist Speech* 68 NOTRE DAME L. REV. 673, 680 (1993). Virginia, North Carolina, Connecticut, Georgia, and Florida enacted statutes mainly designed to combat the Klu Klux Klan and as such, these statutes primarily address cross burnings and wearing of hoods or masks in public. *Id.* at 680 n.32.

171. See, e.g., CAL. PENAL CODE § 422.6 (West 1991) ("Interference with exercise of civil rights"); CAL. PENAL CODE § 422.7 (West 1991) ("Aggravating factors for punishment"); COLO. REV. STAT. ANN. § 18-9-121 (West Supp. 1994) ("Ethnic intimidation"); CONN. GEN. STAT. ANN. § 53-37a (West 1994) ("Ridicule on account of race, creed, or color"); D.C. CODE ANN. § 22-3112.2 (1991) ("Defacing or burning cross or religious symbol; display of certain emblems"); FLA. STAT. ANN. § 775.085 (West 1990) ("Evidencing prejudice while committing offense"); IDAHO CODE § 18-7902 (1991) (making criminal harassment based on race, color, religion); IOWA CODE ANN. § 708.2c (West 1992) ("Assault in violation of individual rights"); IOWA CODE ANN. § 712.9 (West 1992) (establishing penalty enhancement statute); IOWA CODE ANN. § 729A.2 (West 1992) (defining hate crimes for use in this and other statutes); ME. REV. STAT. tit. 17, § 2931 (West Supp. 1994) (proscribing harassment of person exercising free rights); MD. CRIM. LAW CODE ANN. § 470A (1989) ("Crimes against religious property, institutions, or persons"); MASS. GEN. L. ch. 265, § 39 (Supp. 1994) ("Assault and battery for purposes of intimidation"); MICH. COMP. LAWS § 750.147b (1991) ("Ethnic intimidation — causes or threatens harm to person or property motivated by race, color, religion, gender, or national origin"); MO. REV. STAT. § 574.090 (1989) ("Ethnic intimidation in the first degree"); MO. REV. STAT. § 574.093 (1989) ("Ethnic intimidation in the second degree"); MONT. CODE ANN. § 45-5-221 (1992) (outlining malicious intimidation or harassment relating to civil or human rights); MONT. CODE ANN. § 45-5-222 (1992) (providing sentence enhancement for offenses committed because of victim's race); N.H. REV. STAT. ANN. § 651:6(I)(g) (providing for extended terms of imprisonment for crimes motivated by hostility toward race or religion); N.J. REV. STAT. § 2C:33-11 (1992) ("Defacement or damage of property by placement of symbol"); N.J. STAT. ANN. § 2C:44-3(e) (Supp. 1994) (designating criteria for sentencing defendants acting with ill will, hatred, or bias due to race, color, religion, sexual orientation, or ethnicity); N.Y. PENAL LAW § 240.31 (McKinney 1989) (providing that personal or property damage based on race is aggravated assault in the first degree); OHIO REV. CODE ANN. § 2927.12 (Anderson 1987) ("Ethnic intimidation"); OKLA. STAT. tit. 21, § 850 (1990) ("Malicious intimidation or harassment because of race, color, religion, ancestry, national origin, or disability"); OR. REV. STAT. § 166.155 (1990) ("Intimidation in the second degree"); PA CONS. STAT. § 2710 (1991) (defining ethnic intimidation as any crime with malicious intent due to race); R.I. GEN. LAWS § 11-42-3 (1991) ("Ethnic or religious intimidation"); R.I. GEN. LAWS § 11-53-2 (1991) (prohibiting burning crosses, displaying Nazi swastikas, with intent to threaten); R.I. GEN. LAWS § 11-53-3 (1991) ("Threats to immigrants"); TENN. CODE ANN. § 39-17-309 (1991) ("Civil rights intimidation"); UTAH CODE ANN. § 76-3-203.3 (Supp. 1994) ("Penalty for Hate Crimes — Civil Rights Violation"); VT. STAT. ANN. tit. 13, § 1455 (1991) (increasing penalties for violations of other crimes committed with a racist motivation); WASH. REV. CODE ANN. § 9A.36.080 (West 1991) (prohibiting intimidation because of race, including cross-burning or defacing with swastika etc.); W. VA. CODE § 61-6-21 (1991) (prohibiting violations of an individuals civil rights, injury or intimidation, based on race, religion, etc.); W. VA. CODE § 61-6-22 (1991) ("Wearing masks, hoods or face coverings"); WIS. STAT. ANN. § 939.645 (West 1991) ("Crimes committed against certain people or property").

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pass the Senate.¹⁷² Consequently, prosecution of hate crimes is solely based upon state law.¹⁷³ These hate crime laws may be classified into two categories: (1) pure bias crimes and (2) penalty enhancement laws. Pure bias criminal statutes prohibit certain racially-motivated behavior that is directed at a person or property.¹⁷⁴ Such statutes act as “free-standing criminal prohibitions of racially-targeted violence.”¹⁷⁵ In contrast, penalty enhancement statutes increase the severity of criminal punishment when a crime is committed with racial motivation.¹⁷⁶ The U.S. Supreme Court appears to have embraced this distinction in addressing the constitutionality of both types of statutes. In *R.A.V. v. City of St. Paul*,¹⁷⁷ the Supreme Court struck down an ordinance that was essentially a pure bias criminal statute. In *Wisconsin v. Mitchell*,¹⁷⁸ the Supreme Court reversed a lower court decision and upheld the validity of a penalty enhancement statute. As a result, each decision must be critically examined in order to determine the status of hate crime laws in the United States. In addition, it must be recognized that any type of hate crime statute necessarily implicates First Amendment rights because such statutes confront racist expression. Thus, a brief analysis of First Amendment law is necessary as the validity of each statute involves intricate free speech elements.

1. First Amendment and Hate Crimes.—Few countries in the world provide as great a protection to free speech, and consequently racist speech, as the United States. This protection is rooted in the First Amendment,¹⁷⁹ which places the right to free speech above societal interest in prohibiting offensive expression.¹⁸⁰ Such an approach is premised upon the view that “[t]he law deems it inappropriately paternalistic for the state to abridge politically relevant speech because of disapproval of its content or undifferentiated concern about its potential

172. See H.R. 4797, 102d Cong., 2d Sess. (1992); S. 2522, 102d Cong., 2d Sess. (1992). See also *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2197 n.4 (1993).

173. There are federal prohibitions against racially motivated interference with certain legal rights, however. See 18 U.S.C. § 245(b)(2) (1988) (proscribing force or intimidation against a victim because of the victim’s race and because the victim is engaged in voting, participating in or enjoying a government benefit, applying for or enjoying employment, or serving or attending a court proceeding); 18 U.S.C. § 242 (1988) (proscribing disparate punishment of persons based upon race or national origin).

174. Lawrence, *supra* note 170, at 682.

175. *Id.*

176. *Id.*

177. ___ U.S. ___, 112 S. Ct. 2538 (1992).

178. ___ U.S. ___, 113 S. Ct. 2194 (1993).

179. U.S. CONST. amend. I.

180. Downs, *supra* note 161, at 110.

to influence the acts of others."¹⁸¹ However, the right to free speech is not absolute and in certain contexts the regulation of speech has been deemed constitutional. Thus, these contexts must be examined in order to determine the degree of protection afforded verbal assaults in the context of bias crimes. Particularly relevant to such an analysis are the doctrines of "clear and present danger" and "fighting words."

The constitutional law regarding hate crimes originated in the U.S. Supreme Court decisions regarding the prosecutions of individuals whose speech threatened to disrupt the draft during the First World War.¹⁸² For a number of years, Courts allowed speech restrictions provided there was a "clear and present danger" to society.¹⁸³ Initially, this was interpreted by the Court to require that the speech have a "dangerous tendency" to lead to unlawful action.¹⁸⁴ This standard was restricted over time, culminating with the case of *Brandenburg v. Ohio*.¹⁸⁵ In that case, Brandenburg, a leader of a Klu Klux Klan group, filmed a rally at a farm in Ohio and later broadcasted it on the local and national networks.¹⁸⁶ He was convicted under an Ohio Criminal Syndicalism statute for "advocat[ing] . . . crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform" and for "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."¹⁸⁷ The Supreme Court reversed the conviction and held that guarantees of free speech do not allow "a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."¹⁸⁸ The Court developed this distinction by recalling an earlier case that stated that "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group

181. *Id.*

182. *Id.* at 112.

183. *Id.*

184. *Id.*

185. 395 U.S. 444 (1969).

186. *Id.* at 445.

187. *Id.* at 444-45 (citing OHIO REV. CODE ANN. § 2923.13). From 1917 to 1920, 20 states and two territories adopted similar or identical statutes. *Id.* In *Whitney v. California*, 274 U.S. 357 (1927), the Supreme Court upheld the constitutionality of California's Criminal Syndicalism Act. However, in *Brandenburg*, *Whitney* was overturned. *Id.* at 447. See also *Dennis v. United States*, 341 U.S. 494, 507 (1951), *reh'g denied*, 342 U.S. 842 (1951); *reh'g denied*, 355 U.S. 936 (1958) (criticizing *Whitney*). See also ELDRIDGE FOSTER DOWELL, A HISTORY OF CRIMINAL SYNDICALISM LEGISLATION IN THE UNITED STATES (1939).

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

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for violent action and steeling it to such action.”¹⁸⁹ Thus, it appears that the “clear and present danger” standard, as applied to hate crimes, requires speech that is likely to cause or incite immediate violence.

The U.S. Supreme Court established the doctrine of “fighting words” in *Chaplinsky v. New Hampshire*.¹⁹⁰ In that case, the Court upheld a conviction under a New Hampshire ordinance that made it illegal to “call . . . [anyone] by any offensive or derisive name, [or] make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him.”¹⁹¹ The Court stated that there are “certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words.”¹⁹² The Court limited its interpretation of “fighting words” to apply to any “words plainly likely to cause a breach of the peace.”¹⁹³

Over the course of several decades, the doctrine of “fighting words,” like the “clear and present danger” standard, was also restricted. In *Cohen v. California*,¹⁹⁴ the Court articulated a standard that required a person to direct “personally abusive epithets” at a specific individual.¹⁹⁵ This standard was further limited in *Lewis v. City of New Orleans*,¹⁹⁶ which implied that a physical confrontation may be necessary to invoke the doctrine of “fighting words.”¹⁹⁷ Thus, the possibility of invoking the “fighting words” doctrine as a statutory basis for curtailing racist or offensive words appears to be limited.

Despite the constriction of the doctrines of “clear and present danger” and “fighting words,” several states have maintained statutes that restrict offensive and racist expression. Such statutes have been the subject of two recent U.S. Supreme Court decisions regarding the constitutional validity of hate crime statutes.

189. *Id.* at 448 (citing *Noto v. United States*, 367 U.S. 290, 297-98 (1961)); *Herndon v. Lowry*, 301 U.S. 242, 259-61 (1937); *Bond v. Floyd*, 385 U.S. 116, 134 (1966)).

190. 315 U.S. 568 (1942).

191. *Id.* at 568.

192. *Id.* at 571-72.

193. *Id.* at 573.

194. 403 U.S. 15 (1971), *reh'g denied*, 404 U.S. 876 (1971). See generally Note, *The Demise of the Chaplinsky Fighting Words Doctrine: An Argument for its Internment*, 106 HARV. L. REV. 1129 (1993).

195. *Cohen*, 403 U.S. at 20.

196. 415 U.S. 130 (1974).

197. *Id.* at 134-35.

2. *R.A.V. v. City of St. Paul and Pure Bias Criminal Statutes.*—*R.A.V. v. City of St. Paul* was the first case in which the Supreme Court considered the constitutionality of prohibitions on racist expression. In *R.A.V.*, Robert Viktora, then a juvenile, burned a cross in the yard of an African-American family that had recently moved into the neighborhood.¹⁹⁸ Viktora was charged with violating the St. Paul Bias-Motivated Crime Ordinance, which stated:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.¹⁹⁹

Viktora claimed the ordinance was invalid under the First Amendment because it was overbroad and an impermissible content-based restriction on speech.²⁰⁰ The Minnesota Supreme Court rejected the overbreadth challenge, interpreting the language “arouses anger, alarm or resentment in others” to reach only “fighting words.” Thus, the court held that the ordinance reached only expression “that the First Amendment does not protect.”²⁰¹ The court also found that the ordinance was not impermissibly content-based as “the ordinance [was] a narrowly tailored means toward accomplishing the compelling governmental interest in protecting the community against bias-motivated threats to public safety and order.”²⁰²

On appeal, the U.S. Supreme Court unanimously ruled to abolish the ordinance. However, the Court split 5-4 upon the appropriate grounds for its decision.²⁰³ Justice Scalia, writing for the majority, established that

198. ___ U.S. ___, 112 S. Ct. 2538, 2541 (1992).

199. *Id.* at 2541 (citing St. Paul Bias-Motivated Crime Ordinance, MINN. LEGIS. CODE § 292.02 (1990)).

200. *Id.* at 2541.

201. In re Welfare R.A.V., 464 N.W.2d 507, 510 (Minn. 1991), *cert. granted*, 501 U.S. 1204 (1991); *rev'd*, ___ U.S. ___, 112 S. Ct. 2538 (1992)). The Minnesota Supreme Court relied upon an interpretation of the statute in a prior case, In re Welfare of S.L.J., 263 N.W.2d 412 (Minn. 1978). In each case, the court invoked the *Chaplinsky* doctrine of “fighting words,” which amounts to “conduct that itself inflicts injury or tends to incite immediate violence . . .” *Chaplinsky*, 315 U.S. at 572.

202. 464 N.W.2d at 511.

203. *R.A.V.*, 112 S. Ct. at 2541. Justice Scalia delivered the opinion of the Court, in which Chief Justice Rehnquist, Justice Kennedy, Justice Souter, and Justice Thomas joined. Justice White filed a concurring opinion in judgment joined by Justices Blackmun and O'Connor. Justice Stevens joined Justice White's opinion in part and filed a separate concurring opinion joined in part by Justices White and Blackmun. Justice Blackmun filed a separate concurring opinion. *Id.* See generally

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several categories of speech, such as obscenity, defamation, and fighting words may be regulated “because of their constitutionally proscribable content.”²⁰⁴ However, Scalia did stipulate that such expression is not “entirely indivisible to the Constitution” and does deserve some protection.²⁰⁵ Consequently, these types of expression may be proscribed in a categorical nature but not on the grounds of their content.²⁰⁶ As Justice Scalia explained, “[F]ighting words are . . . analogous to a noisy sound truck” in that each is a “mode of expression.”²⁰⁷ That is, each may convey an idea, but neither is in and of itself entitled to First Amendment protection.²⁰⁸ Yet, in each case “the government may not regulate use based upon hostility — or favoritism — to the underlying message expressed.”²⁰⁹

Applying this analysis to the St. Paul ordinance, Justice Scalia found the ordinance facially unconstitutional, as categorically, the ordinance affected “fighting words,” a mode of expression not protected by the First Amendment.²¹⁰ Upon closer look, however, the Court found that the ordinance applied only to “fighting words” affecting race, color, creed, religion, or gender.²¹¹ Indeed, the ordinance failed to include prohibitions on other hostile expressions, such as those directed toward political affiliation, union membership or homosexuality. As such, the Court found the ordinance imposed special prohibitions on certain disfavored subjects and in that regard, was unconstitutional as an impermissible content-based restriction on speech.²¹²

After *R.A.V. v. St. Paul*, it appears that “pure bias crime” laws will be unconstitutional if they regulate the expression that conveys racist

Thomas H. Moore, *R.A.V. v. City of St. Paul: A Curious Way to Protect Free Speech*, 71 N.C. L. REV. 1252 (1993); J. Lim, *R.A.V. v. City of St. Paul: Casting Aside of First Amendment Stare Decisis*, 24 U. WEST L.A. L. REV. 275 (1993); Bruce A. Grabow, *R.A.V. v. City of St. Paul: Dismantling Free Speech Jurisprudence to Make Room for Equal Treatment*, 3 WIDENER J. PUB. L. 577 (1993); Andrea L. Crowley, *R.A.V. v. City of St. Paul: How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. REV. 771 (1993); Tracy Lynne Hulsey, *R.A.V. v. City of St. Paul: The Right Decision, Flawed Reasoning*, 44 MERCER L. REV. 1015 (1993); Michael Sandberg, *Responding to Bias Crimes in America*, 18 WM. MITCHELL L. REV. 961 (1992).

204. *R.A.V.*, 112 S. Ct. at 2543.

205. *Id.*

206. Lawrence, *supra* note 170, at 687.

207. *R.A.V.*, 112 S. Ct. at 2545 (citing *Niemotko v. Maryland*, 340 U.S. 268, 283 (1951)).

208. *Id.*

209. *Id.*

210. *Id.* at 2547.

211. *Id.*

212. *R.A.V.*, 112 S. Ct. at 2547. The concurring opinions of the minority disagreed with Justice Scalia’s analysis and would have found the St. Paul ordinance unconstitutional because it was overbroad and “criminalizes not only unprotected expression but expression protected by the First Amendment.”

messages, as such prohibitions are *content-based* restrictions. However, in *R.A.V.*, the Court did suggest that such statutes may be constitutional provided they regulate the *mode* of expression, such as prohibiting racist expression because it is communicated in a threatening manner.

3. *Wisconsin v. Mitchell and Penalty Enhancement Statutes.*—The day after the *R.A.V. v. City of St. Paul* decision was announced, the Wisconsin Supreme Court held that the state's penalty enhancement hate crime law was unconstitutional in *Wisconsin v. Mitchell*.²¹³ In that case, Mitchell, a nineteen-year-old black man, and several other black youths gathered at an apartment complex and discussed a scene from the movie "Mississippi Burning," in which a white man beats a black boy who was praying.²¹⁴ Shortly thereafter, a young white man walked by the group on the opposite side of the street.²¹⁵ The group descended upon the white youth and beat him severely, rendering him unconscious and in a coma for four days.²¹⁶ Mitchell was convicted of aggravated assault and his sentence was increased because he had intentionally selected his victim on the basis of race, thereby violating the Wisconsin penalty enhancement statute.²¹⁷

213. 485 N.W.2d 807 (1992), *cert. granted*, ___ U.S. ___, 113 S. Ct. 810 (1992); *rev'd*, ___ U.S. ___, 113 S. Ct. 2194 (1993).

214. 113 S. Ct. 2194 (1993). After leaving the apartment complex, Mitchell asked his friends: "Do you all feel hyped up to move on some white people?" *Id.* at 2196.

215. *Id.*

216. *Id.* at 2197.

217. *Mitchell*, 113 S. Ct. at 2197. In Wisconsin, the offense of aggravated battery usually carries a maximum of a two year sentence of imprisonment. WIS. STAT. ANN. §§ 940.19(1m), 939.50(3)(e). Under the penalty enhancement statute, discussed in this case, the possible term of imprisonment was increased to seven years. The Wisconsin penalty enhancement statute provided:

(1) If a person does all of the following, the penalties for the underlying crimes are increased as provided in sub. (2):

(a) Commits a crime under chs. 939 to 948.

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.

(2) (a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is one year in the county jail.

(b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is \$10,000 and the revised maximum period of imprisonment is 2 years.

(c) If the crime committed under sub. (1) is a felony, the maximum fine prescribed by law for the crime may be increased by law for the crime may be increased by not more than \$5,000 and the maximum period of imprisonment prescribed by law for

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The Wisconsin Supreme Court reversed the conviction, holding that the statute “violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought.”²¹⁸ The Court cited the recent *R.A.V.* decision and added: “[T]he Wisconsin legislature cannot criminalize bigoted thought with which it disagrees.”²¹⁹ In addition, the Wisconsin Supreme Court held the statute was overbroad since it would require evidentiary use of protected speech in order to establish that the defendant intentionally selected his victim on the basis of race.²²⁰ This would have a “chilling effect” upon those who feared prosecution under the offenses covered by the penalty enhancement.²²¹

A unanimous U.S. Supreme Court reversed and held that Mitchell’s First Amendment rights had not been violated by the penalty enhancement statute.²²² The Court first rejected the contention that the statute was invalid because it punished a defendant’s discriminatory motive.²²³ Referring to an earlier decision, the Court established that “the Constitution does not erect a *per se* barrier to the admission of evidence concerning one’s beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment.”²²⁴ As a result, the Court held that the First Amendment does not prohibit the evidentiary use of defendant’s motive or intent,

the crime may be increased by not more than 5 years.

(3) This section provides for the enhancement of the penalties applicable for the underlying crime. The court shall direct that the trier of fact find a special verdict as to all of the issues specified in sub. (1).

(4) This section does not apply to any crime if proof of race, religion, color, disability, sexual orientation, national origin or ancestry is required for a conviction for that crime.

WIS. STAT. § 939.645 (1989-90). The statute was amended effective 1992, but such amendments were not at issue in this case. Amended Section (1)(b) provides:

(b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property that is damaged or otherwise accepted by the crime under par. (a) in whole or in part because of the actor’s belief or perception regarding the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property, whether or not the actors belief or perception was correct.

WIS. STAT. § 939.645 (1990). *Mitchell*, 113 S. Ct. at 2197 n.1. Mitchell was sentenced to four years imprisonment. *Id.* at 2197.

218. *Mitchell*, 485 N.W.2d at 811.

219. *Id.* at 815.

220. *Id.* at 816.

221. *Id.* Two dissenting justices argued that the statute punished discriminatory acts, not beliefs, and thus, was constitutional. *Id.* at 819, 821-25.

222. *Mitchell*, 113 S. Ct. at 2202.

223. *Id.* at 2199-2200.

224. *Id.* at 2200 (citing *Delaware v. Dawson*, 112 S. Ct. 1093, 1094, *on remand*, 637 A.2d 57 (Del. Super. Ct. 1992)).

provided such use is designed to prove more than the defendant's abstract beliefs.²²⁵

Next, the Court distinguished *Mitchell* from *R.A.V.* on the basis of the type of ordinance involved. The Court explained that the ordinance in St. Paul was invalid because it proscribed a class of "fighting words" found offensive by the city, which consequently violated the First Amendment rule against content-based discrimination.²²⁶ In contrast, the Wisconsin statute was aimed at conduct unprotected by the First Amendment.²²⁷ The Court elaborated on this distinction by explaining the purposes of the statute. The Court explained that "the Wisconsin statute singles out for enhancement bias-inspired conduct because this conduct is thought to inflict greater individual and societal harm."²²⁸ As such, the Court found that the state's desire to protect against the effects of bias-motivated crime, such as retaliatory crimes, distinct emotional harms, and community unrest, went beyond mere disagreement with offender's beliefs or biases and therefore, provided an adequate basis to uphold the statute.²²⁹ Finally, the Court summarily dismissed any "chilling effect" the statute may have had upon free speech on the grounds that such a claim was too attenuated and speculative.²³⁰

In assessing *R.A.V.* and *Mitchell*, it is clear that the Supreme Court distinguished between the two types of hate crime statutes on the basis of First Amendment interpretations. In *R.A.V.*, the Court declared unconstitutional a pure bias crime statute because it proscribed only a certain class of "fighting words" that violated the First Amendment rule of content-neutral regulation. In *Wisconsin*, the penalty enhancement statute was upheld, as it did not regulate speech but conduct. In considering this conduct, courts are free to consider evidence of motive, such as racist beliefs, in determining the criminal sentence. However, use of such evidence may not be aimed at establishing abstract beliefs. Thus, presumably, the Supreme Court has, at least temporarily, settled the much debated issue of hate crime statutes and the First Amendment.

225. *Id.* That is, "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge." *Id.*

226. *Mitchell*, 113 S. Ct. at 2200-01.

227. *Id.*

228. *Id.* at 2201.

229. *Id.*

230. *Id.*

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V. International Human Rights Laws and Hate Crimes

In addition to the domestic laws of the United States and Germany, international human rights law provides a possible basis for sanctioning hate crimes. Two treaties, the International Covenant on Civil and Political Rights²³¹ and the International Convention on the Elimination of All Forms of Racial Discrimination,²³² contain provisions that may be applicable to the problem of hate crime.

A. *International Covenant on Civil and Political Rights*

Both the United States and Germany are parties to the International Covenant on Civil and Political Rights.²³³ For the most part, the Covenant's text concerns traditional political rights, with considerable emphasis upon the themes of equality and non-discrimination.²³⁴ Consequently, many of the treaty's provisions are relevant to the issue of hate crimes. In fact, three articles are particularly relevant because they deal with both racial hatred and freedom of expression, two crucial issues in bias-related crimes.

The first, article 20(2) of the Covenant provides: "Any advocacy of national, racial, or religious hatred that constitutes incitement to

231. Covenant on Civil and Political Rights, *supra* note 21.

232. Convention on Elimination of Racial Discrimination, *supra* note 22.

233. The Federal Republic of Germany signed the Covenant on October 6, 1968 and ratified it on December 17, 1973. GENEVA CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS: STATUS OF INTERNATIONAL INSTRUMENTS 26 (United Nations eds., 1987) [hereinafter CENTRE FOR HUMAN RIGHTS]. The United States signed the Covenant on October 5, 1977 and ratified it on June 8, 1992. Carter, *US Finally Ratifies Human Rights Covenant*, CHRISTIAN SCIENCE MONITOR, June 29, 1992, at 19.

234. The International Covenant of Civil and Political Rights protects the right to life (article 6); prohibits torture or cruel, inhuman or degrading treatment or punishment (article 7); prohibits slavery, the slave trade, servitude and compulsory labor (article 8); prohibits arbitrary arrest or detention (article 9); provides that all persons deprived of their liberty shall be treated with humanity (article 10); prohibits imprisonment on grounds of inability to fulfill a contractual obligation (article 11); provides for liberty of movement (article 12); provides for equality before the courts and for guarantees in criminal procedures (article 14); prohibits retroactive criminal procedures (article 15); provides for the right of everyone to recognition everywhere as a person before the law (article 16); prohibits arbitrary or unlawful interference with privacy, family, home, or correspondence and unlawful attacks on honor and reputation (article 17); provides for freedom of thought, conscience and religion (article 18); provides for the right to join trade unions (article 22); protects the family (article 23); protects children (article 24); protects the right and the opportunity to take part in the conduct of public affairs, to vote and to be elected at genuine periodic elections by universal and equal suffrage held by secret ballot, and to have access on general terms of equality to public service in his country (article 25); provides equality before the law (article 26) and protects minorities (article 27). Covenant on Civil and Political Rights, *supra* note 21. See also B.G. RAMCHARAN, EQUALITY AND NONDISCRIMINATION IN THE INTERNATIONAL BILL OF HUMAN RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 250 (Louis Henkin ed., 1981).

discrimination, hostility or violence shall be prohibited by law."²³⁵ This article serves to prohibit the type of conduct that is often associated with a hate crime.

Article 20(2) is supplemented by article 5(1), which prohibits any State, group or person from undertaking "any activity or perform[ing] any act aimed at the destruction of any of the rights and freedoms recognized herein [the Covenant] or at their limitation to a greater extent than is provided for in the present Covenant."²³⁶ Thus, article 20(2) combined with article 5(1) appears to proscribe any State, group, or person from engaging in bias-related activity, as this would violate many of the rights contained in the Covenant.

Implicit in the consideration of hate crimes is the concept of speech and expression. The Covenant covers these issues in article 19, which states:

Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.²³⁷

This right, however, is accompanied with "special duties and responsibilities" that allows for certain restrictions to the right of speech, provided such restrictions are necessary to (1) respect the rights or reputations of others; or (2) protect national security, public order or public health or morality.²³⁸ The combination of articles 19, 20, and 5 effectively prohibits any conduct that may be associated with the commission of a bias-related crime. Moreover, these provisions prohibit racial hatred and limit the freedom of expression in such a manner as to allow countries to prevent racist speech.

The strength of these provisions is compounded by article 2, which establishes state parties' obligations under the Covenant. Article 2(1) specifically states:

Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinctions of any kind, such as race, colour, sex, language, religion,

235. Covenant on Civil and Political Rights, *supra* note 21, art. 20(2).

236. *Id.* art. 5(1).

237. *Id.* art. 19(2).

238. *Id.* art. 19(2).

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political or other opinion, national or social origin, property, birth or other status.²³⁹

This subsection is complemented by article 2(2), which requires each State party “to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.”²⁴⁰ The result of article 2 is that upon ratification, a State must immediately take necessary steps to implement the provisions of the Covenant. In essence, parties to the Convention have an affirmative obligation to institute legislative measures that operate to eliminate bias-related crimes.

Both the United States and Germany have voiced reservations about the effect of the relevant bias-related crime provisions. Germany has entered a reservation that states that “[a]rticles 19, 21 and 22 in conjunction with article 2(1) of the Covenant shall be applied within the scope of article 16 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.”²⁴¹ Interestingly enough, article 16 of the European Convention for the Protection of Human Rights and Fundamental Freedoms allows the High Contracting Parties to impose restrictions on the political activity of aliens.²⁴² It appears that perhaps Germany foresaw the possibility of a right extremism resurgence from outside sources and included a reservation that would allow it to prevent such a possibility in the political arena. Thus, Germany appears to have enacted this reservation with the prospect of preventing racist activity in the political arena by ensuring the right to check any such political activity.

The United States recognized that a conflict existed between the First Amendment and article 20.²⁴³ Consequently, the United States entered a reservation which states: “Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and

239. *Id.* art. 2(1).

240. Covenant on Civil and Political Rights, *supra* note 21, art. 2(2).

241. CENTRE FOR HUMAN RIGHTS, *supra* note 233, at 36. Articles 21 and 22 of the International Covenant of Civil and Political Rights confer the right to peacefully assemble, and article 19 concerns the right to freedom of expression. Covenant on Civil and Political Rights, *supra* note 21, arts. 19, 20, 21.

242. HUMAN RIGHTS IN INTERNATIONAL LAW: BASIC TEXTS 166 (Council of Europe Press ed., 1992).

243. Article 20 specifically provides:

1. Any propaganda for war shall be limited by law.
2. Any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Covenant on Civil and Political Rights, *supra* note 21, art. 20.

the laws of the United States."²⁴⁴ Such a reservation was necessary, as both *R.A.V.* and *Mitchell* established that the First Amendment protects speech that may be contrary to the terms of article 20. Arguably, this reservation may be interpreted as a violation of several provisions of the Covenant because it protects racist speech. However, the recent *Mitchell* decision upholding penalty enhancement statues allows the United States to enact legislation that complies with the Covenant by effectively dealing with hate crimes through the alternate method of penalty enhancement statues.

B. International Convention on the Elimination of All Forms of Racial Discrimination

Presently, only Germany is a party to the Convention, although it appears that the United States is close to ratifying it.²⁴⁵ The Convention proscribes racial discrimination, which it defines as "any distinction, exclusion, restriction or preference based upon race, colour, descent, or national or ethnic origin" which nullifies or impairs "the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."²⁴⁶ The Covenant establishes a series of broad political, civil, economic, social and cultural rights similar in nature to the International Covenant on Civil and Political rights.²⁴⁷ These

244. 102 CONG. REC. S4781-84 (daily ed., Apr. 2, 1992). See generally David Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L.J. 77 (1993).

245. Germany signed the Covenant on February 10, 1967 and ratified it on May 16, 1969. CENTRE FOR HUMAN RIGHTS, *supra* note 233, at 36. The United States signed the Covenant on September 28, 1966 and is preparing for ratification. *Id.* at 96.

246. Convention on Elimination of Racial Discrimination, *supra* note 22, art. 1(1).

247. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination provides:

In compliance with the fundamental obligations laid down in Article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government official or by any individual group or institution;
- (c) Political rights, in particular the rights to participate in elections -to vote and to stand for election- on the basis of universal and equal suffrage to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

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rights are supported by an affirmative obligation of the state to prohibit and eliminate racial discrimination with regards to governmental authorities as well as prohibiting “by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”²⁴⁸ This obligation is increasingly significant when viewed under the dictates of article 4, which provides:

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end . . .

(a) Shall declare an offence [sic] punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which

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- (d) Other civil rights, in particular:
- (i) the right to freedom of movement and residence within the border of the State;
 - (ii) the right to leave any country, including one's own, and to return to one's country;
 - (iii) the right of nationality;
 - (iv) the right to marriage and choice of spouse;
 - (v) the right to own property alone as well as in association with others;
 - (vi) the right to inherit;
 - (vii) the right to freedom of thought, conscience and religion;
 - (viii) the right to freedom of opinion and expression;
 - (ix) the right to freedom of peaceful assembly and association;
- (e) economic, social and cultural rights, in particular:
- (i) the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
 - (ii) the right to form and join trade unions;
 - (iii) the right to public housing;
 - (iv) the right to public health, medical care, social security and social services;
 - (v) the right to education and training;
 - (vi) the right to equal participation in cultural activities;
- (f) the right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theaters and parks.

Id. art. 5.

248. *Id.* art. 2.

promote and incite racial discrimination, and shall recognize participation in such organization or activities as an offence punishable by law . . .²⁴⁹

Article 4 is somewhat unique in the field of international human rights law, as it directs states to enact comprehensive laws explicitly designed to eliminate all activity that incites racial hatred. As a result, upon ratification, a state undertakes a significant obligation to eliminate racial discrimination and, with it, the vestige of hate crimes.

Germany appears to have implemented legislation sufficient to meet the obligations of the Convention. German laws dealing with racial hatred, such as article 130 of the Criminal Code, appear to satisfy the dictates of article 2 of the Convention.²⁵⁰ In addition, it appears that Germany has complied with article 4 of the Convention, as German courts may deem unconstitutional political parties and organizations that attempt to incite racial hatred and may impose sanctions for disseminating propaganda pursuant to articles 86 and 86a of the German Criminal Code.²⁵¹

The United States appears to have the necessary elements in its comprehensive civil rights laws to satisfy the requirements of article 2 of the Convention. However, article 4 of the Convention is in direct conflict with the First Amendment, as the First Amendment protects racist propaganda and organizations. Perhaps the United States will enact a reservation similar to the one used in the International Covenant on Civil and Political Rights. It may be argued that such reservations defeat the object and purpose of the treaty and hence, is a violation of international law. Still, the U.S. civil rights laws provide adequate remedies to address any concerns that may arise in regards to article 4. Nevertheless, U.S. ratification would be a significant step in the struggle against racial discrimination for a country long haunted by such a specter.

VI. Conclusion

The United States and Germany both share an unfortunate legacy of hatred manifested in racial discrimination and bias-related crimes. In response to such a past, the United States and Germany have undertaken significant measures to eradicate the evils associated with hatred that have increasingly manifested themselves in hate crimes.

249. *Id.* art. 4. See generally Michael A.J. Korengold, *Lessons in Confronting Racist Speech: Good Intentions, Bad Results, and Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination*, 77 MINN. L. REV. 719 (1993).

250. See *supra* part III.D.2.

251. See *supra* part III.D.1.

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A comparative analysis of the German and United States hate crime laws reveals that the one major difference between the two lies in the varying conceptions of freedom of speech. The First Amendment precludes the United States from undertaking measures to ban racist expression. This was confirmed by the United States Supreme Court in *R.A.V. v. City of St. Paul*, which declared unconstitutional an attempt to proscribe hate speech.²⁵²

Germany is not subject to such demanding requirements in its protection of free speech. Indeed, the German Criminal Code affords its protection beyond the limits of speech. For example, article 130 of the German Criminal Code prohibits incitement of racial hatred through speech.²⁵³ In addition, article 130 prohibits the dissemination of racist writings.²⁵⁴ Articles 86 and 86a provide mechanisms for the prohibition of political parties and their symbols that may be deemed capable of inciting racial hatred.²⁵⁵ Finally, article 194, “the lie of Auschwitz” offense, prohibits the denial of the Holocaust.²⁵⁶

Accordingly, while Germany has undertaken a wide array of provisions designed to prohibit any form of racial hatred, such measures would not be constitutional in the United States. As a result, the United States has implemented an alternative approach, penalty enhancement, which the Supreme Court has recently affirmed is consistent with the U.S. Constitution in *Wisconsin v. Mitchell*.²⁵⁷

It is difficult to argue which country’s approach is most effective. Admittedly, the German approach facially covers a much broader array of topics in its attempts to eradicate the German legacy of racial hatred. Yet, the United States, limited in its methods by the terms of its Constitution, had nevertheless enacted measures that at their core, effectively punish and deter hate crimes. As such, both German and the United States appear to have enacted comprehensive schemes for dealing with hate crimes, while staying within the bounds of their respective constitutional systems.

252. See *supra* part IV.B.2.

253. See *supra* part III.D.2.

254. *Id.*

255. See *supra* part III.D.1.

256. See *supra* part III.D.2.

257. See *supra* part IV.B.3.

