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Sticks and Stones May Break my Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws

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NOTE

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BUT WORDS MAY ALSO HURT ME:

A COMPARISON OF UNITED STATES AND
GERMAN HATE SPEECH LAWS

*Deborah Levine**

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I. INTRODUCTION

The intersection of 116th Street and Broadway is an iconic spot in New York City. An exquisite black gate, with two towering pylons, one for the Arts and one for the Sciences, marks the entrance to one of the most beautiful places in Manhattan: Columbia University. There is one more iconic piece of that entrance, which everyone at Barnard and Columbia knows very well: the man who stands by the gate with a sign that says “Google it! Jews control” Some of his signs have said “Google it! Jews control the internet,” “Google it! Jews control Congress,” “Google it! Jews control Wall Street,” “Google it! Jews control Hollywood,” “Google it! Jews control Obama,” and “Google it! Jews financed black slavery.”

Approximately one-third of the students at Columbia are Jewish.¹ The man strategically stands outside of the Columbia gate where he is

1. *Admissions 104 & 105: The Top 60 Schools Jews Choose*, REFORM JUDAISM (2015), http://www.reformjudaism.org/sites/default/files/Col_TopCharts_f14_F_spreads.pdf [https://

most likely to interact with Jewish students and tourists. While people do get upset by him, for the most part the students find a way to turn him into a joke. Sometimes the students create signs that say “this man is an idiot” or “this is what anti-Semitism looks like” and follow him around. However, this man’s signs have the ability to put ideas in people’s consciousness and promote anti-Semitism.

This raises the question as to where the line between hate speech and free speech, if any, should be drawn. Should society value dignity, or should society value liberty? Should we allow any type of hate speech, even if it may cause psychological harm or an increase in violence and racist thought, or should we counteract hate speech with more speech?²

This Note analyzes the regulation of hate speech by comparing and contrasting German hate speech laws, which are based in dignity,³ with those of the United States, which are based in liberty,⁴ and analyzes which regime is better.⁵ Part II of this Note defines hate speech and dignity, presents the prevailing arguments for and against hate speech regulation, and discusses the psychological research of the effects of hate speech. Part III discusses the relevant history, as it applies to hate speech, of the United States and Germany, including relevant statutes, Constitutions, and cases. Part IV argues that Germany’s regulation of hate speech is superior and that the United States should adopt a similar approach, and illustrates how this can be implemented.

II. THE INTERPLAY OF HATE SPEECH, DIGNITY, AND PSYCHOLOGY

The basis for hate speech laws in Germany and the United States are vastly different. Germany bases its hate speech laws in dignity, whereas the United States bases its laws in liberty and does not

perma.cc/452N-NKJB]. Barnard, one of the undergraduate institutions at Columbia University, is 33% Jewish.

2. In this Note, the phrase “more speech” refers to speech being minimally restricted, therefore allowing more speech to flow in the marketplace of ideas. See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 42-43 (2000); Charlotte H. Taylor, *Hate Speech and the Government*, 12 U. PA. J. CONST. L. 1115, 1163 (2010).

3. See *infra* Part III.B.

4. See *infra* Part III.A.

5. See *infra* Part IV.

recognize dignity. Part II.A. of this Note defines hate speech, dignity, and liberty. Part II.B. discusses the positive and negative aspects of hate speech regulation and discusses the psychological implications of hate speech.

A. *Defining Hate Speech, Dignity, and Liberty*

The meaning of hate speech and dignity are critical for this Note.⁶ Hate speech is generally defined as speech that expresses hate for a specific group.⁷ Merriam-Webster defines hate speech as “speech expressing hatred of a particular group of people.”⁸ Black’s Law⁹ takes a narrower focus on hate speech and defines it as “speech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence.”¹⁰ The Black’s Law definition is endorsed by US case law on this topic.¹¹ Scholars do not agree on one set definition of hate speech. Some scholars define hate speech as speech that includes epithets, historical revisionism, or discrimination or violence against religious, racial, ethnic, and other

6. The importance of establishing what dignity is lies in the German reliance on the concept of dignity when drafting its hate speech laws. *See, e.g.* Strafgesetzbuch [StGB] [Penal Code], § 130, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/U9XX-KJ5K>] (Ger.). The United States, however, values liberty over dignity. *See, e.g.*, Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 *CARDOZO L. REV.* 1523, 1529 (2003); John C. Knechtle, *When to Regulate Hate Speech*, 110 *PENN. ST. L. REV.* 539, 563 (2006). Because dignity and hate speech are pivotal in the discussion of this Note, they must be defined.

7. *See Hate Speech*, BLACK’S LAW DICTIONARY (10th ed. 2014). *See also Hate Speech*, MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/Hate%20speech>. Knechtle defines hate speech as “including racial, ethnic and religious epithets, historical revisionism about racial or religious groups (i.e. denying the Holocaust), or incitement to ethnic, racial or religious hatred, discrimination or violence.” Knechtle, *supra* note 6, at 539 (citing Rosenfeld, *supra* note 6, at 1553).

8. *See* MERRIAM WEBSTER’S DICTIONARY, *supra* note 7.

9. Black’s Law Dictionary is one of the most prominent and trusted legal dictionaries in the United States. *See, e.g.*, *U.S. Legal Dictionaries*, YALE L. SCH. (2018), <https://library.law.yale.edu/us-legal-dictionaries> [<https://perma.cc/JX5P-UA53>].

10. *See* BLACK’S LAW DICTIONARY, *supra* note 7.

11. *See infra* Part III.A.3.

minority groups,¹² while another scholar includes pornography in the definition of hate speech.¹³

Dignity is defined by Merriam-Webster as “the quality or state of being worthy, honored, or esteemed.”¹⁴ Germany has a very similar meaning of dignity, which is supported by Germany’s Constitution.¹⁵ Black’s Law Dictionary does not have a definition of dignity in this regard, but provides a definition about dignity in relation to nobility.¹⁶

Liberty, which is the foundation for hate speech laws in the United States, is generally defined as freedom.¹⁷ This freedom may be, for

12. See Knechtle, *supra* note 6, at 539 (describing ethnic, religious, and racial epithets in the definition of hate speech). See also ERIC BARENDT, FREEDOM OF SPEECH 6-7 (1985) (further describing the ethnic, religious, and racial epithets in the definition of hate speech); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY (1982) (same); Richard Delgado, *Fight Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 133-34 (1982) (including historical revisionism pertaining to religious or racial groups in the definition of hate speech); R. KENT GREENWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES SPEECH 57-58 (1995) (including ethnic, religious, and racial epithets in the definition of hate speech); Mari Matsuda, *Public Response to Racist Speech: Consider the Victim’s Story*, 87 MICH. L. REV. 2320, 2341 (1989) (including “incitement to ethnic, racial or religious hatred, discrimination or violence” in the definition of hate speech).

13. See Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425, 1430 (1994).

14. *Dignity*, MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/dignity>.

15. The provision of human dignity is as follows:

(1) Human dignity 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 applicable law.

GRUNDGESETZ [GG] [BASIC LAW], Article 1, *translation at* <https://www.btg-bestell-service.de/pdf/80201000.pdf>.

16. *Dignity*, BLACK’S LAW DICTIONARY (10th ed. 2014).

17. See, e.g., *Liberty*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“Freedom from arbitrary or undue external restraint, especially by a government”); *Liberty*, Dictionary.com, <http://www.dictionary.com/browse/liberty>

(“freedom from arbitrary or despotic government or control”); *Liberty*, ENGLISH OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/liberty> (“The state of being free within society from oppressive restrictions imposed by authority on one’s way of life, behaviour, or political views”); *Liberty*, MERRIAM-WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/liberty> (“the quality or state of being free: (a) the power to do as one pleases; (b) freedom from physical restraint; (c) freedom from arbitrary or despotic control; (d) the positive enjoyment of various social, political, or economic rights and privileges; (e) the power of choice”).

example, freedom of government,¹⁸ freedom to do as one desires,¹⁹ or freedom from physical restraint.²⁰ One of the best physical representations of liberty, which also symbolizes its importance to the United States, is seen by the broken shackles on the Statue of Liberty's feet.²¹

B. *The Pros and Cons of Hate Speech Regulation*

Part I.B.1 discusses the prevailing arguments in favor of hate speech regulation. This Part also highlights the psychological implications of hate speech on the intended recipient. The main arguments against the regulation of hate speech are discussed in Part I.B.2.

1. Arguments in Favor of Regulation of Hate Speech

Some scholars argue that the foundation of the United States is rooted in equality, which makes it peculiar that such a system values liberty over equality of its citizens.²² There are instances where the United States has restricted partly, if not entirely, certain types of speech. For example, obscenity, defamation, fraud, perjury, copyright, and some forms of indecent speech are all regulated in some capacity.²³ These types of speech are conceptualized as being based in morality or reputation by both case law and scholars.²⁴ However, the same

18. See BLACK'S LAW DICTIONARY, *supra* note 17; DICTIONARY.COM, *supra* note 17.

19. See MERRIAM-WEBSTER'S DICTIONARY, *supra* note 17.

20. See *id.*

21. See *generally Abolition*, NAT'L PARK SERV. (Feb. 26, 2015), <https://www.nps.gov/stli/learn/historyculture/abolition.htm> [<https://perma.cc/H9WL-LCLN>] (discussing the meaning of the Statue of Liberty's broken shackles).

22. See, e.g., STEVEN H. SCHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? 41-42 (2016) (“[The commitment to free speech] has already been compromised in many ways including defamation, obscenity, copyright, fraud, perjury, and some forms of indecent speech. If free speech can be compromised in a clash with reputation or morality, it is not clear why it should be privileged when it clashes with racial equality, order, and the avoidance of deliberately induced trauma.”).

23. See *id.* at 41. See also John C. Knechtle, *Papers from the First Amendment Discussion Group: Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. 41, 46 (2008).

24. See *Virginia v. Black*, 538 U.S. 343, 358-59 (2003) (“The *First Amendment* permits restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality”) (internal quotations omitted); Schiffrin, *supra* note 22, at 41.

protection is not given to speech that clashes with “racial equality, order, and the avoidance of deliberately induced trauma.”²⁵

There are three prominent justifications for the protection of free speech: (1) acknowledgment of human autonomy and dignity, (2) promotion of the marketplace of ideas, and (3) as an effective tool of democracy.²⁶ However, hate speech, in its most extreme form, does lead to widespread murder and genocide,²⁷ is used as a weapon to continue to oppress and subordinate groups that are commonly labeled as inferior,²⁸ affects a person’s emotional and psychological state,²⁹ and promotes inequality throughout populations.³⁰ Because of these reasons, scholars advocate that hate speech should be regulated.³¹

In addition to promoting inequality and leading to violent outcomes, hate speech attacks the dignity of another person, which in turn can result in psychological harm.³² If someone encounters hate speech frequently enough, there may be a lasting effect on their

25. Schiffrin, *supra* note 22, at 41-42.

26. See Thomas J. Webb, Note, *Verbal Poison – Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J. 445, 448-49 (2011). See generally JONATHAN RAUCH, *KINDLY INQUISITORS* (1993) (discussing the negatives of restricting free speech and the benefits of allowing freedom of speech, even hurtful speech).

27. See Webb, *supra* note 26, at 467. See also Mariana Mello, *Hagan v. Australia: A Sign of the Emerging Notion of Hate Speech in Customary International Law*, 28 LOY. L.A. INT’L & COMP. L. REV. 365, (2006) (citing William A. Schabas, *Hate Speech in Rwanda: The Road to Genocide*, 46 MCGILL L.J. 141, 144 (2000)).

28. See Webb, *supra* note 26, at 468 (quoting Gloria Cowan et. al., *Hate Speech and Constitutional Protection: Priming Values of Equality and Freedom*, 58 J. SOC. ISSUES 247, 248 (2002)).

29. See *id.* See also Claudia E. Haupt, *Regulate Hate Speech – Damned If You Do and Damned If You Don’t: Lessons Learned Comparing the German and U.S. Approaches*, 23 B.U. INT’L L.J. 299, 309 (2005).

30. See Webb, *supra* note 26, at 468. See also Onder Bakircioglu, *Freedom of Expression and Hate Speech*, 16 TULSA J. INT’L & COMP. L 1, 6-7 (2008).

31. See generally Webb, *supra* note 26, at 468. See also Knechtle, *supra* note 6, at 548-50.

32. See Steven J. Heyman, *Free Speech and Human Dignity*, IIT CHICAGO-KENT ST. C. OF L. 2 (Apr. 2008), http://scholarship.kentlaw.iit.edu/fac_schol/302 (discussing the effect that free speech, particularly hate speech, may have on human dignity). See also Jeremy Waldron, *The Harm in Hate Speech* 5 (2012) (discussing the negative effects free speech, especially hate speech, may have on a person).

perception of their own dignity.³³ This, in turn, may affect their mental state, and thus their psychological health.³⁴

Furthermore, hate speech affects the public good, primarily because it poisons the marketplace of ideas.³⁵ It intimates discrimination and violence and reawakens living nightmares of what society was like in the past.³⁶ This creates an environmental threat to social peace, which accumulates slowly and makes it a greater challenge for the civic-minded members of society to perform their civic duty in maintaining the public good of inclusiveness.³⁷

Directed hate speech also often violates an individual's right of personal security, personality, and equality.³⁸ Personal security rights may be violated because a person's speech was so extreme that it leaves another individual in fear of physical harm.³⁹ When hate speech is directed towards particular individuals, it can cause severe psychological injury and can infringe on the right to privacy, therefore violating personality rights.⁴⁰ Lastly, there may be a violation of the right to equality when hate speech is directed towards a particular individual because hate speech can injure others on invidious

33. See, e.g., KENNETH B. CLARK, *DARK GHETTO DILEMMAS OF SOCIAL POWER* 64, 67 (2d ed. 1989); Andrea L. Crowley, *R.A.V. v. the City of St. Paul: How the Supreme Court Missed the Writing on the Wall*, 34 B.C. L. Rev. 771, 775-76 (1993) (citing KENNETH B. CLARK, *PREJUDICE AND YOUR CHILD* 23-24 (2d ed. 1955)) (hereinafter "Prejudice").

34. See Waldron, *supra* note 32, at 4; Heyman, *supra* note 32, at 165-66.

35. See Waldron, *supra* note 32, at 4, 165; Crowley, *supra* note 33, at 776-77 (citing Jeff Meer, *Slurred Speech*, *PSYCH. TODAY*, July 1985, at 8-9). See also Matsuda, *supra* note 12, at 2336 (citing Jeff Greenberg & Tom Pyszczynski, *The Effect of an Overhear Ethnic Slur on Evaluations of the Target: How to Spread a Social Disease*, 21 J. EXPERIMENTAL SOC. PSYCH. 61, 70, (1985)).

36. See Waldron, *supra* note 32, at 4. See also Moran, *supra* note 13, at 1464.

37. See Waldron, *supra* note 32, at 4. See generally Heyman, *supra* note 32, at 2.

38. See Heyman, *supra* note 32, at 165. See also IVAN HARE & JAMES WEINSTEIN, *EXTREME SPEECH AND DEMOCRACY* 164 (2009).

39. See Heyman, *supra* note 32, at 165; Hare & Weinstein, *supra* note 38, at 164.

40. See Heyman, *supra* note 32, at 165-66. See also Hare & Weinstein, *supra* note 38, at 164. Personality rights refers to the right of an individual to control the use of his/her likeness, name, or other aspects of one's identity. *Id.* An example of this is receiving anonymous threatening or offensive messages. See Heyman, *supra* note 32, at 165-66. Violating the right to privacy may lead to the victim not being able to control the use of his/her identity, therefore violating personality rights. *Id.*

grounds.⁴¹ Race is included in invidious grounds, as people unfairly discriminate based on race.⁴²

Numerous studies have been conducted to understand the effect hate speech may have on an individual.⁴³ For example, psychologists have found that victims of vicious hate propaganda have experienced both physiological symptoms and emotional distress, such as fear in the gut, rapid pulse rates and difficulty in breathing, post-traumatic stress disorder, psychosis, and suicide.⁴⁴ Psychologists have also found that the effects of racial prejudice include displaced aggression, retreat, withdrawal, alcoholism, avoidance, and suicide.⁴⁵ Furthermore, studies have shown that psychological responses to racist victimization include withdrawal, clowning, self-hate, and self-fulfilling prophecies.⁴⁶ Additionally, it has been shown that racist speech, attitudes, and harassment often cause “deep emotional scarring and bring feelings of intimidation and fear that pervade every aspect of a victim’s life.”⁴⁷

In addition to conducting studies as to how hate speech effects individuals, psychologists have also conducted studies as to how

41. See Heyman, *supra* note 32, at 166; see generally Waldron, *supra* note 32 (discussing the negative effects free speech, especially hate speech, may have on a person).

42. See Heyman, *supra* note 32, at 166; see generally Waldron, *supra* note 32 (discussing the negative effects free speech, especially hate speech, may have on a person).

43. Kenneth Clark’s studies seem to be the most notable earliest studies on this topic. Clark’s work was pivotal in the famous case *Brown v. Board of Education*, 347 U.S. 483, 494-95, n.11 (1955). Clark found that children perceived race as a hindrance and also noted that children notice that society values white people over black people. See Crowley, *supra* note 33, at 775 (citing Clark, *Prejudice*, *supra* note 33, at 24). This, in turn, lead children to suffer from a distorted or damaged individual personality. *Id.* (citing Clark, *Prejudice*, *supra* note 33, at 23-24). In a separate study, Clark found that black people experience a sense of worthlessness as a result of their perception that society values white children over black children, and that “this sense of inferiority is never truly lost and manifests itself in a lack of motivation to succeed in the workplace, a fear of competing with Caucasians, and a sense of hopelessness in changing or contributing to the community. See *id.* at 776 (citing Clark, *DARK GHETTO DILEMMAS OF SOCIAL POWER*, *supra* note 33, at 64, 67).

44. See Matsuda, *supra* note 12, at 2336 (citing HARRY H.L. KITANO, *RACE RELATIONS* 113 (1st ed. 1974)).

45. See Matsuda, *supra* note 12, at 2336 (citing Kitano, *supra* note 44, at 113). See also Crowley, *supra* note 33, at 777.

46. See Matsuda, *supra* note 44 (citing GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 141-61 (1954)).

47. Matsuda, *supra* note 12, at 2336 (quoting Asian and Pacific Islander Advisory Comm., Office of Attorney Gen., Cal. Dept. of Justice, Final Report 45 (1988)). See also Delgado, *supra* note 12; Crowley, *supra* note 33, at 778 (“Racist speech and attitudes have been shown to cause . . . lowered self-esteem, lack of self-worth, and lack of motivation.”).

stigmatization effects an individual.⁴⁸ Psychologists have found that the stigmatization of a group may lead to underperformance in nearly anything (e.g. tests, job performance, etc.).⁴⁹ The experiments have been conducted with black, Asian, women, and other minority groups.⁵⁰ These studies found that a consistent reminder to the minority group of their minority status led them to underperform on the exam given in the study.⁵¹ Psychologists have termed this phenomenon “stereotype threat.”⁵²

48. See CLAUDE STEELE, *WHISTLING VIVALDI: HOW STEREOTYPES AFFECT US AND WHAT WE CAN DO* 20-60 (2010). For an explanation as to how stereotyping is a version of hate speech, see *infra* note 52 and accompanying text.

49. See Steele, *supra* note 48, at 20-60.

50. See *id.*

51. For example, there is a stereotype that black people are not as intelligent as Caucasians. *Id.* at 20-30. The experiment conducted to test this stereotype threat consisted of two groups, a group of black people that were reminded of this stereotype, and a group of black people who were not reminded of this stereotype. *Id.* These two groups then took an exam. *Id.* The results of the experiment showed that the black people who were not reminded of the stereotype that black people are not as intelligent as Caucasians performed just as well as the Caucasians on this exam. *Id.* However, the black people who were reminded of the stereotype that black people are not as intelligent as Caucasians performed significantly worse than their black counterparts and the Caucasians. *Id.* These experiments emphasize that when something hateful is said to someone, especially repeatedly, it can have negative psychological consequences. *Id.* For similar studies with similar findings, see Martin J. Wasserberg, *Stereotype Threat Effects on African American Children in an Urban Elementary School*, 82 *J. OF EXPERIMENTAL EDUC.* 502 (2014); Douglas S. Massey & Tayanti Owens, *Mediators of Stereotype Threat Among Black College Students*, 37 *ETHNIC AND RACIAL STUD.*, 557 (2014); Martin J. Wasserberg, *Stereotype Threat Effects on African American and Latino/a Elementary Students Tested Together*, 11 *J. MULTICULTURAL EDUC.*, 51 (2017).

52. See Steele, *supra* note 48. See also Michael Inzlicht et al., *Stereotype Threat: Theory, Process, and Application* (2012); Fangfang Wen et al., *Reducing the Effect of Stereotype Threat: The Role of Coaction Contexts and Regulatory Fit*, 19 *SOC. PSYCHOL. EDUC.*, 2016. According to Steele, stereotype threat is something that stigmatizes a group, and thus leads that group to underperform. Steele, *supra* note 48, at 31.

It may be argued that stereotype threat is not hate speech, or, if it is, it is a weaker type of hate speech. The argument against stereotype threat constituting hate speech is that stereotypes are not hate speech, and therefore stereotype threat is not hate speech. The argument that stereotype threat is a form of hate speech is as follows: Telling a group of people that they are not as intelligent as another group of people is hateful and malicious, especially when not based on fact. However, even if stereotype threat is not hate speech, it still causes significant negative psychological effects on the people who experience it. Hate speech, being that it is hateful, is arguably more severe than stereotype threat. If stereotype threat is less severe than hate speech and causes psychological harm, then it must be that hate speech, being more severe, also causes psychological harm. Furthermore, hate speech can cause people to internalize and believe in various stereotypes, regarding themselves or others, and can lead to various types of psychological harm.

In addition to studying how racist speech effects the individual, studies have been conducted determining the effect that targeted racist hate speech has on the perception of listeners.⁵³ These studies have found that racial and ethnic slurs cause the listener to view the group through that racist lens, whether they mean do to it consciously or not.⁵⁴ This in turn inflames racial prejudice.⁵⁵

2. Arguments in Favor of Free Speech

Pro-free speech scholars argue that American society would be better served if it did not interfere with free speech at all than it would be if it were to regulate hate speech.⁵⁶ If hate speech were to be regulated, it is unclear who would be tasked with regulating and determining what qualifies as hate speech.⁵⁷ This conjures up the idea of an individual possessing a god-like power, which no one individual is qualified to do.⁵⁸ Rather, it is better to counter hate speech with more speech.⁵⁹ These issues are routinely addressed by defenders of freedom of speech.⁶⁰

53. See Crowley, *supra* note 33 at 776 (citing Meer, *supra* note 35, at 8-9; Matsuda, *supra* note 12, at 2336 (citing Greenberg & Pyszczynski, *supra* note 35, at 70). The quintessential study on this topic is having a black person and a white person give the exact same presentation on a neutral topic, such as space, to a group of people. See Crowley, *supra* note 33, at 776 (citing Meer, *supra* note 35, at 8-9). Sometimes, a person in the audience makes a racist remark while the black person is giving the presentation. *Id.* When the audience member makes a racist remark, the black person's performance is viewed more negatively than his white peers and black peers when no racist remark was made. *Id.*

54. See Crowley, *supra* note 33, at 776 (citing Meer, *supra* note 35, at 8-9); Matsuda, *supra* note 12, at 2336 (citing Greenberg & Pyszczynski, *supra* note 35, at 70).

55. See Crowley, *supra* note 33, at 777 (citing Meer, *supra* note 35, at 9); Matsuda, *supra* note 12, at 2336 (citing Greenberg & Pyszczynski, *supra* note 35, at 70).

56. See, e.g., ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007); Rauch, *supra* note 26.

57. See Lewis, *supra* note 56; Rauch, *supra* note 26. The notion that it is unclear as to who would be tasked with determining whether certain speech is appropriate is exemplified by Rauch's dislike of the fundamentalist social rule. The fundamentalist social rule is that "those who know the truth should decide whose opinion is right." Rauch, *supra* note 26, at 93.

58. See Lewis, *supra* note 56; Rauch, *supra* note 56, at 93.

59. See Lewis, *supra* note 56; Rauch, *supra* note 26, at 161.

60. See, e.g., Lewis, *supra* note 56. As noted earlier, the phrase "more speech" refers to the notion of speech that is minimally restricted. This allows more speech to flow in the marketplace of ideas.

Because the state holds the policing power, the state would be the one to regulate hate speech.⁶¹ Therefore, the state would possess a monopoly on legitimate coercive power, which includes the police, courts, and prisons, to decide what sorts of offensive speech rises to the level of being hateful or harmful enough to be worthy of criminal (or civil) regulation.⁶² Two major concerns accompany this legislative power.⁶³ One concern with the state having the power to determine what qualifies as hate speech is that any given governmental entity may decide which speech is worthy of regulation based on the cultural norms, which constantly shift.⁶⁴ A second concern is that it may result in any given governmental entity using this type of regulatory power to favor groups that possess the same ideology as the state power.⁶⁵

Another problem arises when a case goes to court and the juries would have to decide if the speech was within the realm of hate speech, which may shift on a case by case basis.⁶⁶ As a result, the outcome would depend on the makeup of the jury.⁶⁷ For example, if the jury is a sympathetic jury, then they will likely find the person guilty.⁶⁸ However, if the jury is made up of very conservative individuals or members of the ACLU,⁶⁹ then the person who committed the act would

61. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that the power to police belongs to the states); *Chicago, B. & Q. R. Co. v. Illinois*, 200 U.S. 561 (1906) (finding the same); *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (stating that the states hold the police power).

62. See Rebecca L. Brown, *The Harm Principle and Free Speech*, 89 S. CALIF. L. REV. 953, 994 (2016); Moran, *supra* note 13, at 1504-05.

63. See Brown, *supra* note 62, at 994; Moran, *supra* note 13, at 1504-05.

64. See Brown, *supra* note 62, at 994; Moran, *supra* note 13, at 1504-05.

65. See Brown, *supra* note 62, at 994; Moran, *supra* note 13, at 1504-05.

66. See *Snyder v. Phelps*, 562 U.S. 443, 445, 458 (2011) (discussing that juries would have to determine on a case by case basis if the speech was within the realm of hate speech and the outcome may vary depending on the jury); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510 (1984) (citing *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971) (holding that, as a matter of Constitutional law, the jury could not determine the relevance of a defamatory statement made to a public figure because the jury would be unlikely to remain neutral)). This, in theory, is a problem with all juries. However, it is of particular concern when it comes to hate speech cases, as evidenced by its discussion in *Snyder*.

67. See *Snyder*, 562 U.S. at 445.

68. See Shannon Henson, *5 Tips for Seating a Sympathetic Jury*, L. 360 (Feb. 22, 2010), <https://www.law360.com/articles/148377/5-tips-for-seating-a-sympathetic-jury> [<https://perma.cc/97U6-52ZW>]; John Wilinski, *When Will Jurors Find the Plaintiff Sympathetic?*, LITIGATION INSIGHTS (Jan. 6, 2015), <http://litigationinsights.com/case-strategies/jurors-find-plaintiff-sympathetic/> [<https://perma.cc/BK43-YMLY>].

69. ACLU stands for American Civil Liberties Union.

most likely be found not guilty.⁷⁰ To put it simply, some people do not trust juries, just as they do not trust the government, or anyone else for that matter, to regulate hate speech.

There are strong arguments for and against hate speech regulation, and each side has their merits.⁷¹ The primary argument in favor of hate speech regulation is that it allows everyone, especially the people on the receiving end of hate speech, to feel equal.⁷² Additionally, it will help curb many of the negative psychological effects hate speech may cause.⁷³ The main arguments against hate speech regulation is that it will constrict the marketplace of ideas and someone will have to play the role of god.⁷⁴

III. HISTORY AND LAW OF THE UNITED STATES AND GERMANY REGARDING HATE SPEECH

The United States and Germany have had two different histories. For example, one started a war to gain independence, whereas the other started World War II. These two different histories have influenced the values of the respective countries, which in turn has influenced their respective laws, especially for hate speech regulation.⁷⁵

Part III.A. outlines the relevant history, statutes, and case law of the United States as it pertains to hate speech. This Part also discusses the relevant doctrines applicable to hate speech in the United States. Part III.B. reviews the relevant history, statutes, and case law of hate speech for Germany.

A. History and Law Pertaining to Hate Speech in the United States

The relevant history of hate speech in the United States is explained in Part III.A.1. Part III.A.2 addresses US statutes that are relevant to hate speech and hate speech law. The United States' relevant case law on hate speech is discussed in Part III.A.3.

70. In theory, this is a problem with all juries. However, it seems to be of particular concern when it comes to hate speech. See *Snyder*, 562 U.S. at 445, 458 (2011) (discussing the issue of juries for hate speech cases).

71. See *supra* Part II.

72. See *supra* Part II.B.1.

73. See *supra* Part II.B.1.a.

74. See *supra* Part II.B.2.

75. See *infra* Part III.A., Part III.B.

1. History and its Effect on Freedom of Speech

There have been four historical stages of free speech in the United States.⁷⁶ The first stage dates back to the American Revolution and established that the principal purpose of free speech is protection of the people against the government.⁷⁷ This is exemplified by the Bill of Rights, personal freedoms that the federal government protects, which was added to the Constitution in order to help ratify it.⁷⁸ In 1787, the US Constitution was written by the Founding Fathers⁷⁹ in hopes that it would become the new governing document of the United States.⁸⁰ The Constitution required ratification by three-fourths of the newly formed United States.⁸¹ There were arguments both in favor and in opposition to ratification,⁸² and the ability to vocalize one's opinion was instrumental to the ratification of the US Constitution.⁸³ Citizens were worried that the ratification and implementation of the Constitution would impinge upon certain rights⁸⁴ which had led to the American Revolution. As a protection against potential infringement on a white

76. See Rosenfeld, *supra* note 6, at 1531 (citing LEE C. BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 144 (1986)).

77. See *id.* (citing Bollinger, *supra* note 76, at 144).

78. See *Bill of Rights of the United States of America (1791)*, BILL OF RTS. INST. (2017) <https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/> [<https://perma.cc/P6LQ-F633>].

79. See generally U.S. CONST.

80. See *Constitution FAQs*, NAT'L CONST. CTR. (2017), <https://constitutioncenter.org/learn/educational-resources/constitution-faqs> [<https://perma.cc/P7R3-4A6B>].

81. U.S. CONST. art. VII.

82. See, e.g., *The Federalist Papers*, Congress.gov <https://www.congress.gov/resources/display/content/The+Federalist+Papers> [<https://perma.cc/H3B9-E8UV>]; *Anti-Federalist ELesson: Brutus No. 1*, BILL OF RTS. INST. (2018), <http://billofrightsinstitute.org/educate/educator-resources/lessons-plans/federalist-anti-federalist-papers/anti-federalist-lesson-brutus-no-1-3/> [<https://perma.cc/DT9A-U9K7>].

83. It took ten months for the Constitution to be ratified. *Observing Constitution Day*, NAT'L ARCHIVES (Aug. 21, 2016), <https://www.archives.gov/education/lessons/constitution-day/ratification.html> [<https://perma.cc/M5W5-ZZDG>]. It should also be noted that only property-owning white men could vote. See *infra*, note 85.

84. See U.S. CONST. amends. I-X; *Bill of Rights of the United States of America (1791)*, BILL OF RTS. INST. (2017), <https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/> [<https://perma.cc/4X9A-ZNH8>].

male citizen's rights,⁸⁵ the Bill of Rights was created.⁸⁶ The First Amendment in the Bill of Rights protects freedom of speech.⁸⁷ Without the Bill of Rights as the means to address citizen concerns, the Constitution may not have been ratified.⁸⁸

The ideology in the second historical stage was that free speech was meant to protect proponents of unpopular views against the majority, whoever that majority may be.⁸⁹ This second stage started once democracy became firmly entrenched as the form of government and the threat to free speech came from the "tyranny of the majority"⁹⁰ instead of the government.⁹¹ The ideology in the third stage, which dated from the mid-1950s to the 1980s, was that listeners should remain open-minded.⁹² This era is the era of conformity, as there had been a widespread consensus on the essential values of that time.⁹³ Therefore, the main threat to speech at this stage was conforming and not having an open mind generally.⁹⁴ The principal role of hate speech in the fourth stage, the current stage, is to protect the oppressed and marginalized discourses and their proponents against the discourses of

85. White, property-owning, male citizens were the only people guaranteed rights at the time of the drafting of the Constitution, as they were the only ones who could vote. See *History of Voting Rights*, MASSVOTE (2017), <http://massvote.org/voterinfo/history-of-voting-rights/>. See also *Who Got the Right to Vote When? A History of Voting Rights in America*, AL JAZEERA (2016), <https://interactive.aljazeera.com/aje/2016/us-elections-2016-who-can-vote/index.html>.

86. See U.S. CONST. Amends. I-X; *Bill of Rights of the United States of America (1791)*, BILL OF RIGHTS INSTITUTE (2017), <https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/> [https://perma.cc/P6LQ-F633].

87. U.S. CONST. Amend. I.

88. See U.S. CONST. Amends. I-X; *Bill of Rights of the United States of America (1791)*, BILL OF RIGHTS INSTITUTE (2017), <https://www.billofrightsinstitute.org/founding-documents/bill-of-rights/> [https://perma.cc/P6LQ-F633].

Citizens wanted to be protected against the government and were worried that if they did not have free speech, they could get in trouble with the government. See Rosenfeld, *supra* note 6, at 1531 (citing Bollinger, *supra* note 76, at 144).

89. See Rosenfeld, *supra* note 6, at 1531 (citing Bollinger, *supra* note 76, at 143).

90. Tyranny of the majority refers to the phenomenon where, in a direct democracy, the majority places its own interests above that of the minority, often at the expense of the minority. See *The Tyranny of the Majority*, THE ECONOMIST (Dec. 17, 2009), <https://www.economist.com/node/15127600> [https://perma.cc/P6LQ-F633]; *Tyranny of the Majority*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/social-sciences/applied-and-social-sciences-magazines/tyranny-majority>.

91. See Rosenfeld, *supra* note 6, at 1531 (citing Bollinger, *supra* note 76, at 143).

92. See *id.* (citing Bollinger, *supra* note 76, at 143-44).

93. See *id.* (citing Bollinger, *supra* note 76, at 143-44).

94. See *id.* (citing Bollinger, *supra* note 76, at 143-44).

the powerful, which tend to be white males.⁹⁵ This is seen by the “rapid expansion of feminist theory, critical race theory and other alternative discourses,” all of which are still being discussed today, indicating that these voices are starting to be heard.⁹⁶

The importance of free speech has been seen throughout the history of the United States, especially when it comes to political speech. It is a right that US citizens hold dearly.⁹⁷ However, even amongst democracies, the United States and its Constitution protects freedom of speech and press to a degree not comparable to other democracies.⁹⁸

2. The Constitution, the First Amendment, and Statutes and Their Effect on Free Speech

The First Amendment is the foundation in the United States for freedom of speech.⁹⁹ The First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”¹⁰⁰ If the issue in a case

95. See *id.* (citing Mary J. Matsuda et. Al., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); Catherine A. Mackinnon, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)). White males overwhelming hold positions of power. See, e.g., Grace Donnelly, *Only 3% of Fortune 500 Companies Share Full Diversity Data*, *FORTUNE* (June 7, 2017), <http://fortune.com/2017/06/07/fortune-500-diversity/> [https://perma.cc/7J6T-JWK4]; Stacy Jones, *White Men Account for 72% of Corporate Leadership at 16 of the Fortune 500 Companies*, *FORTUNE* (June 9, 2017), <http://fortune.com/2017/06/09/white-men-senior-executives-fortune-500-companies-diversity-data/> [https://perma.cc/QNS8-FLYE].

96. See Rosenfeld, *supra* note 6, at 1531 (citing Matsuda et al., *supra* note 95); Mackinnon, *supra* note 95.

97. See Alex Cook, *Americans Say Freedom of Speech is the Most Important Constitutional Right, According to FindLaw.com Survey for Law Day, May 1*, *PRNEWswire* (Apr. 30, 2015), <https://www.prnewswire.com/news-releases/americans-say-freedom-of-speech-is-the-most-important-constitutional-right-according-to-findlawcom-survey-for-law-day-may-1-300074847.html> [https://perma.cc/3NYW-XJJW]; Steven Pinker, *Why Free Speech is Fundamental*, *THE BOSTON GLOBE* (Jan. 27, 2015), <https://www.bostonglobe.com/opinion/2015/01/26/why-free-speech-fundamental/aaAWVYFscrhFCC4ye9FVjN/story.html> [https://perma.cc/3MAG-BFWB]

98. The United States stands alone in the “extraordinary degree to which its constitution protects freedom of speech and of the press.” Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 *B.U. INT’L L.J.* 277, 339 n.431 (2008).

99. U.S. CONST. amend I.

100. *Id.*

concerns freedom of speech, the courts must determine if the state action in question violated the First Amendment, and therefore the Constitution.¹⁰¹ The First Amendment's freedom of speech, press, and religion are protected by the Fourteenth Amendment's due process clause,¹⁰² and thus when the case involves a state, the Fourteenth Amendment will also be analyzed.¹⁰³

As will be discussed in Part IV.B. of this Note, hate speech may be considered an equal protection issue.¹⁰⁴ The Fourteenth Amendment guarantees equal protection for all citizens of the United States.¹⁰⁵ All Equal Protection issues can be broken down into three questions: (1) what is the classification of the law;¹⁰⁶ (2) which level of scrutiny should be applied; and (3) does the particular government action meet the level of scrutiny?¹⁰⁷ Each question has multiple parts. For the first question, classification can either (i) exist on the face of the law or (ii) the law is facially neutral, but there is a discriminatory impact to the law or discriminatory effects from its administration.¹⁰⁸ A disparate impact is an adverse effect on a protected group, even though the

101. This is known as common law. See *Common Law and Civil Law Traditions*, U. AT CAL., BERKELEY, SCH. OF L. (2017), <https://www.law.berkeley.edu/library/robbins/CommonLawCivilLawTraditions.html> [<https://perma.cc/6DUE-4LYT>]; Richard A. Epstein, *The Common Law in the Supreme Court*, HOOVER INST. (Nov. 10, 2015), <https://www.hoover.org/research/common-law-supreme-court> [<https://perma.cc/M5AU-AUA5>].

102. The Due Process Clause is a Constitutional doctrine in the United States that prohibits the government from unfairly depriving a person of property, liberty, or life. *Due Process Clause*, BLACK'S L. DICTIONARY (10th ed. 2014). There are two Due Process Clauses in the United States' Constitution: one in the Fifth Amendment, which applies to the federal government, and one in the Fourteenth Amendment, which applies to the states. *Id.*

103. See *Chaplinsky*, 315 U.S. at 571-72 (citing *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938)).

104. See *infra* Part IV.B.

105. U.S. CONST. amend. XIV § 1. Equal protection means that the government must treat individuals the same as it would treat others in similar conditions and circumstances. See Eugene Temchenko *Equal Protection*, LEGAL INFORMATION INSTITUTE (June 2016), https://www.law.cornell.edu/wex/equal_protection; U.S. CONST. amend. XIV § 1. Equal protection is required to be followed by the states via the Fourteenth Amendment, and by the federal government via the Fifth Amendment.

106. See *infra* for explanation on classification.

107. See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996); ERWIN CHERMERINSKY CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 698-701 (Wolters Kluwer, 5th ed. 2015). See generally *Equal Protection of the Laws*, JUSTIA (2018), <https://law.justia.com/constitution/us/amendment-14/06-equal-protection-of-the-laws.html> [<https://perma.cc/VU99-LLKV>].

108. See Chemerinsky, *supra* note 107, at 698. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

practice is facially neutral.¹⁰⁹ To determine if there is a disparate impact, the disparate impact test is used.¹¹⁰ The disparate impact test requires proof of a discriminatory purpose in order for a law to be classified as having racial or national origin.¹¹¹ It is often the case that both discriminatory impact and discriminatory purpose are necessary.¹¹² Factors that help to show a discriminatory purpose of a law include a statistical pattern that can only be explained by a discriminatory purpose, history surrounding the government's action, and the legislative or administrative history of the law.¹¹³ Showing a purpose requires proof that the government aimed to discriminate (known as invidious intent); it is not sufficient to prove that the government took an action with knowledge that it would have discriminatory consequences.¹¹⁴

For the second question, there are three types of scrutiny¹¹⁵ that may apply: strict scrutiny, intermediate scrutiny, and rational basis.¹¹⁶ The different levels of scrutiny determine how the courts will review the law.¹¹⁷ For strict scrutiny, the discrimination must be based on race or national origin.¹¹⁸ Intermediate scrutiny applies when there is discrimination based on gender.¹¹⁹ Rational basis is the minimum level of scrutiny that all laws challenged under the Equal Protection Clause

109. See Chemerinsky, *supra* note 107, at 698. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

110. See Chemerinsky, *supra* note 107, at 698. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

111. See Chemerinsky, *supra* note 107, at 698. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

112. See Chemerinsky, *supra* note 107, at 698. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

113. See Chemerinsky, *supra* note 107, at 698. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

114. See *Virginia*, 518 U.S. 515 (1996) (discussing the levels of scrutiny); Chemerinsky, *supra* note 107, at 698. See generally *Equal Protection of the Laws*, *supra* note 107.

115. Scrutiny refers to the level of analysis the text of the law will receive. See *Virginia*, 518 U.S. 515; Chemerinsky, *supra* note 107, at 699.

116. See Chemerinsky, *supra* note 107, at 699. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

117. See Chemerinsky, *supra* note 107, at 698-701. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

118. See Chemerinsky, *supra* note 107, at 699. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

119. See Chemerinsky, *supra* note 107, at 699. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

must meet.¹²⁰ The third question, does the particular government action meet the level of scrutiny, is determined by the court by analyzing the first and second questions.¹²¹

3. Cases and Their Effect, or Lack Thereof, on Hate Speech Regulation

The Supreme Court of the United States has never ruled on hate speech directly. Rather, they have a tendency to skirt around the issue.¹²² It seems that the Supreme Court is particularly worried about setting hate speech precedent, despite the fact that the Supreme Court has restricted other types of speech without hesitation in the past.¹²³ However, the Supreme Court has ruled on insults addressed to an individual that would prompt a violent reaction¹²⁴ and speech that advocates for unlawful conduct and is likely to incite such conduct.¹²⁵

In *Chaplinsky v. New Hampshire*, the Supreme Court established the fighting words doctrine.¹²⁶ *Chaplinsky* was distributing literature about Jehovah's Witnesses, his religion, on a public sidewalk.¹²⁷ The city marshal warned *Chaplinsky* that the crowd was getting restless,

120. See *Chemerinsky*, *supra* note 107, at 699. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

121. See *Chemerinsky*, *supra* note 107, at 698-701. See generally *Virginia*, 518 U.S. 515; *Equal Protection of the Laws*, *supra* note 107.

122. See *infra* for a discussion of hate speech related cases that have come before the Supreme Court.

123. See, e.g., *Schneck v. United States*, 249 U.S. 47 (1919) (finding that circulars mailed to draftees telling them to peacefully resist the draft does not fall under the realm of constitutionally protected free speech). See also *Roth v. United States*, 354 U.S. 476 (1957) (holding that obscenity is not within the realm of constitutionally protected free speech). The Supreme Court has never stated that they are worried about setting precedent for hate speech, but as they have created precedent for other types of speech and not hate speech, it can be inferred that they are worried about doing so.

124. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). See generally Columbia University, *Chaplinsky v. New Hampshire*, GLOBAL FREEDOM OF EXPRESSION (2015), <https://globalfreedomofexpression.columbia.edu/cases/chaplinsky-v-new-hampshire/> [<https://perma.cc/SGR3-UZHJ>].

125. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). See generally Columbia University, *Brandenburg v. Ohio*, GLOBAL FREEDOM OF EXPRESSION (2015), <https://globalfreedomofexpression.columbia.edu/cases/brandenburg-v-ohio/> [<https://perma.cc/L86R-596P>].

126. See *Chaplinsky*, 315 U.S. at 572. See generally Columbia University, *supra* note 124.

127. See *Chaplinsky*, 315 U.S. at 569. See generally Columbia University, *supra* note 124.

and Chaplinsky responded by saying “[y]ou are a God damned racketeer” and “a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists.”¹²⁸ The Supreme Court held that insults addressed to an individual that were so offensive as to prompt a violent reaction are not constitutionally protected speech.¹²⁹ This doctrine requires that the insult be said directly to the person in person.¹³⁰ This action by the Supreme Court limited individual liberty when it comes to insulting speech.¹³¹

In *Brandenburg v. Ohio*, the Court implemented a clear and present danger rule for hate speech.¹³² Brandenburg, a leader in the Ku Klux Klan, made a speech at a Klan rally in Ohio and was later arrested for violating the Ohio Criminal Syndicalism statute in place at the time.¹³³ The Supreme Court ruled “that the government may only prohibit the advocacy of unlawful conduct if such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹³⁴ The Court used a two-pronged test, known as the clear and present danger test, to evaluate speech acts: (1) the State can prohibit speech if it is “directed at inciting or producing imminent lawless action”¹³⁵ and (2) it is “likely to incite or produce such action.”¹³⁶ If the speech does not fall under both of these prongs, then the speech is protected by the Constitution.¹³⁷ This case limited specific speech, and therefore liberty, by implementing the clear and present danger test.¹³⁸

128. *Chaplinsky*, 315 U.S. at 569-70. *See generally* Columbia University, *supra* note 124.

129. *See Chaplinsky*, 315 U.S. at 572. *See also* Rosenfeld, *supra* note 6, at 1535 n. 46;

130. *See Chaplinsky*, 315 U.S. at 572. *See generally* Alexander Tsesis, *The Categorical Free Speech Doctrine and Categorization*, 65 EMORY L.J. 495, 516-17 (2015).

131. *See generally Chaplinsky*, 315 U.S.; Columbia University *supra* note 124.

132. *See Brandenburg*, 395 U.S. at 447. *See generally* Columbia University, *supra* note 125.

133. *See Brandenburg*, 395 U.S. at 444. *See generally* Columbia University, *supra* note 125.

134. *See Knechtle*, *supra* note 6, at 548 (quoting *Brandenburg*, 395 U.S. at 444-45) (internal quotations omitted).

135. *Brandenburg*, 395 U.S. at 447. *See generally* Columbia University, *supra* note 125.

136. *Id.*

137. *See id.*

138. *See generally Brandenburg*, 395 U.S. 444; *Brandenburg v. Ohio*, OYEZ (2018), <https://www.oyez.org/cases/1968/492> [<https://perma.cc/Z2ZS-9ERG>].

a. Supreme Court Cases in Line with *Chaplinsky* and *Brandenburg*

The Supreme Court heard two seminal cases pertaining to cross burnings: *R.A.V. v. City of St. Paul* and *Virginia v. Black*.¹³⁹ In *R.A.V.*, several teenagers crudely assembled a cross and burned it inside the fenced yard of the black family who lived across the street from where *R.A.V.*, a minor, was staying.¹⁴⁰ *R.A.V.* was arrested under St Paul's Bias-Motivated Crime Ordinance.¹⁴¹ In *R.A.V.*, the Supreme Court held that even within a regulable category of speech, in this case fighting words, the state may not pick and choose by subject matter what speech to protect, because it would lead to impermissible content discrimination.¹⁴² However, the Supreme Court notes two exceptions to this rule: (1) if the subject matter singled out was the very reason for the category itself (e.g. threats against the President) or (2) if the content under-inclusion is truly about regulating an underlying discriminatory purpose, with speech providing evidence of such purpose.¹⁴³ Bias-motivated crime ordinances, such as the Minnesota city ordinance in question in this case, therefore, do not fit under these exceptions, and thus are not protected.¹⁴⁴

R.A.V. does not address if *Chaplinsky* is still good law.¹⁴⁵ Justice Scalia, the author of the majority opinion in *R.A.V.*, makes no mention of it, so it is assumed that *Chaplinsky*, and therefore the fighting words doctrine, is still good law.¹⁴⁶ Therefore, there is still the question of how to treat hate speech that falls outside of the fighting words doctrine. *Virginia v. Black* does not assist in answering this question.¹⁴⁷

139. See generally *Virginia v. Black*, 538 U.S. (2003); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

140. See *R.A.V.*, 505 U.S. at 379. See generally Columbia University, *R.A.V. v. City of St. Paul*, GLOBAL FREEDOM OF EXPRESSION (2015), <https://globalfreedomofexpression.columbia.edu/cases/r-v-v-city-st-paul/> [<https://perma.cc/26EJ-VLQF>].

141. See *R.A.V.*, 505 U.S. at 379-80. See generally Columbia University, *supra* note 140.

142. See *R.A.V.*, 505 U.S. at 421-22; 436. See generally Columbia University, *supra* note 140. The Minnesota Supreme Court had found that the statute only applied to fighting words for specified groups. *R.A.V.*, 505 U.S. at 391. See generally Columbia University, *supra* note 140.

143. See *R.A.V.*, 505 U.S. at 421. See generally Columbia University, *supra* note 140.

144. See *R.A.V.*, 505 U.S. at 436. See generally Columbia University, *supra* note 140.

145. See generally *R.A.V.* 505 U.S. 377; Columbia University, *supra* note 140.

146. See generally *R.A.V.* 505 U.S. 377; Columbia University, *supra* note 140.

147. See generally *Virginia v. Black* 538 U.S. 343; Columbia University, *Virginia v. Black*, GLOBAL FREEDOM OF EXPRESSION (2015), <https://globalfreedomofexpression.columbia.edu/cases/virginia-v-black/> [<https://perma.cc/6B7H-MGXX>].

In *Virginia v. Black*, another cross-burning case, there were three respondents, each of whom burned a cross.¹⁴⁸ The first respondent burned a cross during a Ku Klux Klan rally,¹⁴⁹ whereas the second and third respondents burned a cross in the yard of their black neighbor.¹⁵⁰ Virginia had a cross-burning statute that prohibited the burning of a cross with the intent of intimidating any person or group and treated cross burning as prima facie evidence of intent to intimidate.¹⁵¹ The Supreme Court, in a plurality decision, found that this statute violated the First Amendment.¹⁵²

However, there was no majority opinion as to why it violated the First Amendment.¹⁵³ Four justices, Justice O'Connor, Chief Justice Rehnquist, and Justices Stevens and Breyer, concluded that treating cross-burnings as prima facie evidence of intent to intimidate rendered the statute unconstitutional;¹⁵⁴ because while the act of burning a cross may mean that the person is engaging in a constitutional proscribable action, that same act may also mean that the person is engaging in core political speech, which is protected.¹⁵⁵ Justices Souter, Kennedy, and Ginsburg concluded that the statute was unconstitutional, regardless of the prima facie provision,¹⁵⁶ and Justice Thomas dissented.¹⁵⁷ The Court upheld the part of the statute where Virginia singled out cross-burning as a particularly virulent form of threat or intimidation using the *R.A.V.* "very reason" exception as the explanation.¹⁵⁸

148. *See Black*, 538 U.S. at 348. *See generally* Columbia University, *supra* note 147.

149. *See Black*, 538 U.S. at 349. *See generally* Columbia University, *supra* note 147.

150. *See Black*, 538 U.S. at 350. *See generally* Columbia University, *supra* note 147.

151. *See Black*, 538 U.S. at 348. *See generally* Columbia University, *supra* note 147.

152. *See Black*, 538 U.S. at 367. *See generally* Columbia University, *supra* note 147.

153. *See generally Black*, 538 U.S. 343; Columbia University, *supra* note 147.

154. *See Black*, 538 U.S. at 367. *See generally* Columbia University, *supra* note 147.

155. *See Black*, 538 U.S. at 365. *See generally* Columbia University, *supra* note 147.

156. *See Black*, 538 U.S. at 368. *See generally* Columbia University, *supra* note 147.

157. *See Black*, 538 U.S. at 388. *See generally* Columbia University, *supra* note 147.

Justice Scalia agreed that the portion of the case with respect to Elliott and O'Mara (the second and third respondents) should be vacated and remanded to the state, which is why he signed on to the opinion, but that is not relevant to this Note.

158. *See Black*, 538 U.S. at 361. *See generally* Columbia University, *supra* note 147. As mentioned above, the "very reason" exception means if the subject matter singled out the very reason for the category itself. *See R.A.V.*, 505 U.S. at 421.

b. *Collin v. Smith*—The Paramount Federal Court Case on Hate Speech

In *Collin v. Smith*,¹⁵⁹ Collin, a neo-Nazi, wanted to organize a Nazi march and chose to march in Skokie, Illinois.¹⁶⁰ Skokie was home to the largest group of Holocaust survivors outside of New York City and when the Holocaust survivors heard about Collin's plan, they threatened violence.¹⁶¹ The Skokie government leaders said they would allow the march, but only if the Nazis put up a \$350,000 insurance bond, which they knew would never be issued.¹⁶² Regardless, Collin decided to march in Skokie under the pretense of protesting the violation of his First Amendment rights.¹⁶³ Skokie sued for an injunction, the ACLU came to Collin's defense, and litigation ensued.¹⁶⁴ The Seventh Circuit held that Collin could march and his First Amendment rights were violated.¹⁶⁵ This case is an important hate speech case because it exemplifies how instrumental free speech is in the United States.¹⁶⁶ It did not matter to the court the pain and terror that went through the Holocaust survivor's heads; rather, the court found that liberty should prevail.¹⁶⁷

c. *Beauharnais*—A Loner in Hate Speech Jurisprudence

The closest the Supreme Court ever came to regulating hate speech was in the 1952 case *Beauharnais v. Illinois*.¹⁶⁸ Joseph Beauharnais, president of the White Circle League of America, Inc., was distributing pamphlets to promote membership of the White Circle League, a white supremacist group.¹⁶⁹ He was arrested for violating

159. 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978). *Collin* is an appellate court case. An appellate court case, while important, does not bind the entirety of the United States, unlike a Supreme Court case.

160. *See Collin*, 578 F.2d at 1199; Schiffrin, *supra* note 22, at 37.

161. *See Collin*, 578 F.2d at 1199; Schiffrin, *supra* note 22, at 37.

162. *See Collin*, 578 F.2d at 1199; Schiffrin, *supra* note 22, at 37-38.

163. *See Collin*, 578 F.2d at 1199; Schiffrin, *supra* note 22, at 38.

164. *See Collin*, 578 F.2d at 1199; Schiffrin, *supra* note 22, at 37.

165. *Collin*, 578 F.2d at 1210.

166. *See generally id.*; Schiffrin, *supra* note 22, at 37-38.

167. *See generally Collin*, 578 F.2d at 1210; Schiffrin, *supra* note 22, at 37-38.

168. 343 U.S. 250 (1952).

169. *See Beauharnais v. Illinois*, 343 U.S. 250, 252 (1952). *See generally* Columbia University, *Beauharnais v. Illinois*, GLOBAL FREEDOM OF EXPRESSION (2015), <https://globalfreedomofexpression.columbia.edu/cases/beauharnais-v-illinois/> [<https://perma.cc/TW3H-987J>]. The pamphlets called for a petition for the Mayor and the City Council of

Part 224(a) of the Illinois Criminal Code.¹⁷⁰ *Beauharnais* challenged this conviction by arguing that the statute violated his constitutional right to free speech under the First and Fourteenth Amendments.¹⁷¹ The Supreme Court held that *Beauharnais*' speech constituted libel, and was therefore not protected by the Constitution.¹⁷²

In response to the argument that the Illinois statute may be abused, the Supreme Court stated that “[e]very power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law.”¹⁷³ However, while this decision has not been explicitly overturned, if a similar case came to the Supreme Court today, it is unclear if the decision would be the same.¹⁷⁴ Additionally, this case concerns regulating libel, which distinguishes it from regulating hate speech.¹⁷⁵

Chicago “to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro. . . .” *Beauharnais*, 343 U.S. at 252. It also called for “[o]ne million [self-respecting] white people in Chicago to unite” and also stated that “[i]f persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.” *Id.*

170. *See Beauharnais*, 343 U.S. at 251. *See generally* Columbia University, *supra* note 169. “It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .” *Beauharnais*, 343 U.S. at 251 (quoting Illinois Criminal Code §224a, Ill. Rev. Stat., 1948, c. 38, Div. 1, §471).

171. *See Beauharnais*, 343 U.S. at 251. *See generally* Columbia University, *supra* note 169.

172. *See Beauharnais*, 343 U.S. at 265. *See generally* Columbia University, *supra* note 169.

173. *Beauharnais*, 343 U.S. at 263.

174. This in part has to do with more recent case law on freedom of speech. *See, e.g., R.A.V. v. City of St. Paul* and *Virginia v. Black*.

175. *Compare Libel*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/libel> (a written or oral defamatory statement or representation that conveys an unjustly unfavorable impression)” *with Hate Speech*, *supra* note 7 (“speech expressing hatred of a particular group of people.” *See also Beauharnais*, 343 U.S. 250 (1952).

d. The Content Neutrality Doctrine

The content neutrality doctrine, while not from a hate speech case,¹⁷⁶ is instrumental when it comes to laws regulating speech.¹⁷⁷ There are two prongs to the content neutrality doctrine: (1) “the government may not restrict speech due to its content,”¹⁷⁸ and (2) “it may not use content as a basis for differential treatment of speech.”¹⁷⁹ Any governmental action that breaches these two principles is “presumptively invalid” under the First Amendment.¹⁸⁰

All laws regulating hate speech in the United States are analyzed by turning to the First Amendment and subsequent case law, as well as to the Fourteenth Amendment.¹⁸¹ If the hate speech act violates the fighting words doctrine or the clear and present danger test, then that hate speech act will be deemed unconstitutional.¹⁸² As exemplified by the case law, the United States primarily bases hate speech regulation, or lack thereof, on the grounds of liberty.¹⁸³

B. History and Law Pertaining to Hate Speech Regulation in Germany

The relevant history of Germany as it pertains to hate speech is discussed in Part III.B.1. Part III.B.2 reviews Germany’s statutes that are relevant to hate speech and hate speech law. Part III.B.3 addresses Germany’s relevant case law on hate speech.

1. History and its Effect on Hate Speech Regulation

Germany’s hate speech laws are widely a result of World War II and the Holocaust.¹⁸⁴ During World War II, speech generally was

176. See *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

177. See *Mosley*, 408 U.S. at 95-96.

178. Carmi, *supra* note 98, at 346; Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in the First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650 (2002).

179. Carmi, *supra* note 98, at 346; *R.A.V.*, 505 U.S. at 377.

180. See Carmi, *supra* note 98; *United States v. Playboy Entm’t. Group, Inc.*, 529 U.S. 803, 817 (2000) (quoting *R.A.V.* 505 U.S. at 382).

181. See *supra*, Part III.A.1.

182. See *supra*, Part III.A.2.

183. See Part III.A.

184. See Rosenfeld, *supra* note 6, at 1525; Frederick Kubler, *How Much Freedom for Racist Speech? Transnational Aspects of a Conflict of Human Rights*, 27 HOFSTRA L. REV. 335, 336 (1998).

restricted, and thus freedom of speech essentially did not exist.¹⁸⁵ Most scholars attribute Germany's current hate speech laws to World War II and the Holocaust.¹⁸⁶ However, the argument has been made that the origins of hate speech laws date back to the Middle Ages.¹⁸⁷

German laws enforce civility and respect,¹⁸⁸ and honor is a protectable legal interest.¹⁸⁹ German law prohibits, via civil law, and criminalizes inciting hatred and attacks on human dignity because of race, religion, ethnic origin, or nationality.¹⁹⁰ Unlike the United States, German statutes do not require that racist speech lead to a clear and present danger of imminent lawless action before becoming

185. This can be seen by the book burnings Hitler held. *See The Holocaust: A Learning Site for Students*, U.S. HOLOCAUST MEMORIAL MUSEUM (2018), <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007677> [<https://perma.cc/5CYU-CLSS>]; Michael S. Roth, *How Nazis Destroyed Books in a Quest to Destroy European Culture*, THE WASHINGTON POST (Feb. 24, 2017), https://www.washingtonpost.com/opinions/how-nazis-destroyed-books-in-a-quest-to-destroy-european-culture/2017/02/24/244aee94-cdf3-11e6-a87f-b917067331bb_story.html?noredirect=on&utm_term=.2bb1cd82f16b [<https://perma.cc/68S5-2QAF>].

186. *See* Rosenfeld, *supra* note 6, at 1525; Kubler, *supra* note 184, at 336.

187. *See* Carmi, *supra* note 98, at 327; James Q. Whitman, *The Two Western Cultures of Privacy: Dignity versus Liberty*, 113 YALE L.J. 1151, 1165 (2004). Whitman argues that the origins of the German law of insult are largely descended from the law of dueling. *See* Carmi, *supra* note 98, at 327; Whitman, *supra*, at 1165. He also argues that the "historical development of 'dignity' in European law should be principally seen as a continuous history, one that includes developments during the Nazi period." Carmi, *supra* note 98, at 327. *See also* Whitman, *supra*, at 1162-63. While Whitman's scholarship is viewed as both provocative and controversial, (*see* Carmi, *supra* note 98, at 328, scholars do agree that human dignity, a pre-World War II phenomenon, plays a big role in Germany's current hate speech laws. *See* Carmi, *supra* note 98, at 326. "Michel Rosenfeld traces the contemporary German approach to free speech as a product of two principal influences: the German Constitution's conception of freedom of expression as properly circumscribed by fundamental values such as human dignity and by constitutional interests such as honor and personality; and by the Third Reich's historical record against the Jews, especially is virulent hate propaganda and discrimination which culminated in the Holocaust." *Id.* at 325 (internal quotations omitted). Additionally, "[t]he German tradition of honor plays a significant role in the manner in which human dignity is currently perceived since some of the concepts that characterize traditional honor and modern dignity are overlapping." *Id.* The right to human dignity is so important to Germany that the German government has an independent duty to protect against abuse, even when the abused do not want protection from the government. *See* Knechtle, *supra* note 6, at 551.

188. *See* Strafgesetzbuch [StGB] [Penal Code], translation at https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/XSZ5-CQYM>]; Carmi, *supra* note 98, at 328.

189. *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 Yale L.J. 1279, 1282-83 (2000) (citing Ralf Stark, EHRENSCHUTZ IN DEUTSCHLAND 26 (1996)).

190. *See* Knechtle, *supra* note 6, at 541 (citing Kubler, *supra* note 184, at 344-45).

punishable.¹⁹¹ Rather, a “distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself.”¹⁹²

2. The Constitution and Statutes Governing Hate Speech Regulation

The German Criminal Code includes statutes that specify different acts of hate speech that are illegal. Part 130 of the German Criminal Code covers inciting hatred:

(1) Whosoever, in a manner capable of disturbing the public peace

1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins, against segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population or calls for violent or arbitrary measures against them; or

2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population, or defaming segments of the population,

shall be liable to imprisonment for three months to five years.¹⁹³

191. See Carmi, *supra* note 98, at 329 (citing Winifred Brugger, *Ban on or Protection of Hate Speech? Some Observations Base on German an American Law*, 17 TUL. EUR. & CIV. L.F. 1, 39 (2002)).

192. *Id.*

193. Strafgesetzbuch [StGB] [Penal Code], § 130, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/7D42-GVZ8>]. The statute continues:

(2) Whosoever

1. with respect to written materials (section 11(3)) which incite hatred against an aforementioned group, segments of the population or individuals because of their belonging to one of the aforementioned groups or segments of the population which call for violent or arbitrary measures against them, or which assault their human dignity by insulting, maliciously maligning or defaming them,

(a) disseminates such written materials;

(b) publicly displays, posts, presents, or otherwise makes them accessible;

(c) offers, supplies or makes them accessible to a person under eighteen years; or

(d) produces, obtains, supplies, stocks, offers, announces, commends, undertakes to import or export them, in order to use them or copies obtained from them within the meaning of Nos (a) to (c) facilitate such use by another; or

In Germany, “human dignity” is “broadly defined as an attack on the core area of [the victim’s] personality, a denial of the victim’s right to life as an equal in the community, or treatment of a victim as an inferior being excluded from the protection of the constitution.”¹⁹⁴ Other important provisions of the German Criminal Code that relate to hate speech include Sections 26, 30, 86a, 111, and 185-200.¹⁹⁵ Section 26 covers instigation,¹⁹⁶ section 30 covers attempted instigation,¹⁹⁷ section 86a covers using symbols of unconstitutional organizations,¹⁹⁸

2. disseminates a presentation of the content indicated in No 1 above by radio, media services, or telecommunication services

Shall be liable to imprisonment not exceeding three years or a fine.

(3) Whosoever publicly or in a meeting approves of, denies or downplays an act committed under the rule of National Socialism of the kind indicated in section 6(1) of the Code of the International Criminal Law, in a manner capable of disturbing the public peace shall be liable to imprisonment not exceeding five years or a fine.

(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.

(5) Subsection (2) above shall also apply to written materials (section 11(3)) of a content such as is indicated in subsections (3) and (4) above.

(6) In cases under subsection (2) above, also in conjunction with subsection (5) above, and in cases of subsections (3) and (4) above, section 86(3) shall apply *mutatis mutandis*.

Id.

194. Knechtle, *supra* note 6, at 553 (quoting Sionaidh Douglas-Scott *The Hatefulness of Protected Speech: A Comparison of the American and European Approaches*, 7 WM. & MARY BILL RTS. J. 305, 322-23 (1999)) (internal quotations omitted).

195. See Strafgesetzbuch [StGB] [Penal Code], §§ 26, 30, 86a, 111, 185-200, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/Y3UM-3BK2>].

196. See *id.* at § 26.

197. See *id.* at § 30.

198. §86a provides that:

(1) Whosoever

a. domestically distributes or publicly uses, in a meeting or in written materials (section 11(3)) disseminated by him, symbols of one of the parties or organizations indicated in section 86(1) Nos 1, 2, and 4; or

b. produces, stocks, imports or exports objects which depict or contain such symbols for distribution or use in German or abroad in a manner indicated in No 1, . . .

shall be liable to imprisonment not exceeding three years or a fine.

Id. at § 86a. “Symbols within the meaning of subsection (1) above shall be in particular flags, insignia, uniforms and their parts, slogans and forms of greeting. Symbols which are so similar as to be mistaken for those named in the first sentence shall be equivalent to them.” *Id.*

section 111 covers public encouragement to commit criminal acts,¹⁹⁹ and sections 185-200 contain provisions punishing individual and collective defamation or insult.²⁰⁰

Section 185 provides that “an insult shall be punished with imprisonment not exceeding one year or a fine and, if the insult is committed by means of an assault, with imprisonment not exceeding two years or a fine.”²⁰¹ Some examples of criminal insults include saying “du” (an informal way to address someone) instead of “Sie” (the respectful way to address someone),²⁰² “asshole,” “jerk,” and “idiot.”²⁰³ Mere rudeness and tactlessness are not sufficient for the purpose of Section 185 as long as they do not take the form of a “particularly coarse expression of disrespect. Petty harassment, inappropriate jokes, gags, and the like are insults only if they are

199. See Strafgesetzbuch [StGB] [Penal Code], § 111, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/BU5Q-BWHS>]; Brugger, *supra* note 191, at 13 n. 32.

200. See Haupt, *supra* note 29, at 322. Section 185 pertains to criminal insults. Strafgesetzbuch [StGB] [Penal Code], § 185, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/2EQZ-8WGE>]; Whitman, *supra* note 190, at 1294 n. 40. Section 186 regards defamation. Strafgesetzbuch [StGB] [Penal Code], § 186, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/2BKY-RF9D>]; Whitman, *supra* note 189, at 1294 n.40. Section 187 discusses slander. Strafgesetzbuch [StGB] [Penal Code], § 187, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/DCK5-YVK2>]; Whitman, *supra* note 190, at 1294 n.40 (2000). Section 188 pertains to political defamation. Strafgesetzbuch [StGB] [Penal Code], § 188, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/9LEE-Y8JT>]. Section 189 regards the abuse of the memory of deceased persons. Strafgesetzbuch [StGB] [Penal Code], § 189, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/V43M-ETZA>]; Whitman, *supra* note 190, at 1294 n.40. Section 190 discusses proof of truth by criminal judgment.; Strafgesetzbuch [StGB] [Penal Code], § 190, *translation at* https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0877 [<https://perma.cc/V43M-ETZA>]. Section 192 pertains to insult despite proof of truth (*Id.* at § 192), section 193 pertains to fair comment and defense (*Id.* at § 193), section 194 regards the request to prosecute (*Id.* at § 194), section 199 pertains to mutual insults (*Id.* at § 199), and section 200 regards publication of conviction (*Id.* at § 200). Sections 191 and 195-198 have been repealed. *Id.* at §§ 191, 195-98.

201. *Id.* at § 185.

202. While cases regarding “du” and “Sie” have made it to court, they only occasionally succeed. See Carmi, *supra* note 98, at 330; Whitman, *supra* note 189, at 1299.

203. See Carmi, *supra* note 98, at 330; Whitman, *supra* note 189, at 1279, 1304 & nn. 68-69.

accompanied by particular circumstances that express a view of the lesser value and worth of the affected party.”²⁰⁴

The Basic Law for the Federal Republic of Germany, which is Germany’s constitution, also covers hate speech. Article 2(1) provides that “every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”²⁰⁵ Section 5 of German Basic Law²⁰⁶ covers freedom of expression. It states:

(1) Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. (2) These rights find their limits in the provisions of the general laws, in provisions for the protection of young persons, and in the right to personal honor. (3) Art and scholarship, research, and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.²⁰⁷

3. Cases and their Effect on Hate Speech Regulation

There are six cases that largely impacted German hate speech laws, which will be discussed in chronological order.²⁰⁸ The first major

204. Whitman, *supra* note 189, at 1304 (quoting VON ADOLF SCHÖNKE & HORST SCHRODER, STRAFGESETZBUCH § 185, at 1385-86 (Theodor Lenckner et al. eds., 25th ed. 1999) (Ger.)).

205. Brugger, *supra* note 192, at 7 n.16 (quoting GRUNDGESETZ [GG] [BASIC LAW] art. 5)).

206. German Basic Law is an interchangeable term with the German Constitution.

207. Brugger, *supra* note 191, at 4, n.7 (quoting GRUNDGESETZ [GG] [BASIC LAW] art. 5)).

208. *See infra* Part III.B.3. Germany follows a civil law system. *See The German System*, ENCYCLOPAEDIA BRITANNICA (2018), <https://www.britannica.com/topic/civil-law-Romano-Germanic/The-German-system> [<https://perma.cc/6MFQ-WNKE>]; *What is the Civil Law*, LSU LAW: CIVIL LAW ONLINE (2018), <https://www.law.lsu.edu/clo/civil-law-online/what-is-the-civil-law/> [<https://perma.cc/DXR8-NWVJ>]. The German court system has two classifications of courts: ordinary courts and specialized courts. *See* Eric Solsten *The Judiciary*, in *GERMANY: A COUNTRY STUDY* (1995), <http://countrystudies.us/germany/155.htm> [<https://perma.cc/5FFT-ULQJ>]; *German Law and the German Legal System*, HOW TO GER. (2018), <https://www.howtogermany.com/pages/legal.html> [<https://perma.cc/C5HE-ZT4S>]. Cases that concern a constitutional issue are heard in a constitutional court. [*See id.* They are first heard by the state’s Constitutional Court, and each of the sixteen states, or Länder, has their own Constitutional Court. *See Id.* If the case is appealed, it is heard by the Federal Constitutional Court (known in German as *Bundesverfassungsgericht*). *See id.*

case involving Article 5 communicative freedoms was the *Luth*²⁰⁹ case of 1958.²¹⁰ Eric Luth publicly called for a boycott of the movie *Unstervliche Geliebete* directed by Veit Harlan, a notorious anti-Semite and former Nazi propagandist.²¹¹ The Constitutional Court held that the right to free speech is fundamental.²¹²

In 1961, the Constitutional Court heard the *Schmid-Spiegel* case,²¹³ which was a libel case that involved a high-ranking state judge.²¹⁴ Schmid compared the political reporting of the newsmagazine “Der Spiegel” to pornography after the newsmagazine accused Judge Schmid of being sympathetic of communism, indicated by his judgments.²¹⁵ The Constitutional Court held that the related freedoms of Basic Law Article 5 are to be treated with heightened protection, given the value of communication.²¹⁶ This case initiated the doctrine that “false statements of fact, as opposed to value judgments, are ‘a verifiable limit on public discourse.’”²¹⁷

The *Mephisto*²¹⁸ case marked a shift in free speech jurisprudence in Germany.²¹⁹ In this case, the heir of a deceased German actor tried to prevent the publication of a novel that was allegedly based on the actor’s life and accused the actor of collaborating with the Nazi

209. 1 BVerfGE 198 (1958).

210. See Haupt, *supra* note 29, at 323 (citing 1 BVerfGE 198 (1958)); Tony Weir, *German Case: Foreign Law Translations*, TEX. L. (Dec. 1, 2005), <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369>.

211. See Haupt, *supra* note 29, at 323 (citing 1 BVerfGE 198 (1958)); Weir, *supra* note 210.

212. See Haupt, *supra* note 29, at 324 (citing 1 BVerfGE 198 (1958)); Weir, *supra* note 210.

213. 12 BVerfGE 113 (1961)

214. See Haupt, *supra* note 29, at 324 (citing 12 BVerfGE 113 (1961)); Donald P. Kommers, THE CONST JURIS. OF THE FED. REPUBLIC OF GERMANY 368, 377 (1989).

215. See Haupt, *supra* note 29, at 324 (citing 12 BVerfGE 113 (1961)); Kommers, *supra* note 214, at 377.

216. See Haupt, *supra* note 29, at 325 (citing 12 BVerfGE 113, 1961); Kommers, *supra* note 214, at 377.

217. Haupt, *supra* note 29, at 325 (citing Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 828-29 (1997)). See also 12 BVerfGE 113, 1961.

218. 30 BVerfGE 173 (1971).

219. See Haupt, *supra* note 29, at 325 (citing 30 BVerfGE 173 (1971)). See generally Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 290-337 (1989).

regime.²²⁰ The Constitutional Court found that, despite the wording of Article 5(3) of the Basic Law, the Article 5 rights do have limits.²²¹ The court held that Article 5 may be limited, under certain circumstances, by interests such as protection of personality and human dignity.²²²

The German Constitutional Court noticeably applied a heightened scrutiny in the *Straubeta* case.²²³ Franz Josef Strauss, the late, former Prime Minister of Bavaria, was caricatured as a rutting pig.²²⁴ The Constitutional Court found that while caricatures meet the requirements for constitutional protection under Article 5, the protections satire and parody enjoy must give way to personal dignity.²²⁵ Before this point in time, caricatures, satires, and parodies were constitutionally protected forms of speech.²²⁶ *Straubeta* made it clear that personal dignity is first and foremost in the eyes of German law, therefore creating a heightened scrutiny.²²⁷

In the early 1990s, the German Constitutional Court heard a series of cases known as the *Tucholsky Cases*,²²⁸ which consist of *Tucholsky I* and *Tucholsky II*.²²⁹ The *Tucholsky Cases* involved a pacifist bumper sticker that read “soldier are murderers” during the Gulf War, as a way to criticize German involvement.²³⁰ A three-judge panel of the Constitutional Court held that speech is protected, and thus allowed the

220. See 30 BVerfGE 173 (1971); Haupt, *supra* note 29, at 325 (citing Eberle, *supra* note 217, at 831-41). See generally Quint, *supra* note 219, at 290-337.

221. See Haupt, *supra* note 29, at 325-26 (citing 30 BVerfGE 173, 193 (1971)). See generally; Quint, *supra* note 219, at 247, 290-337.

222. See 30 BVerfGE 173 (1971); Haupt, *supra* note 29, at 326 (citing Eberle, *supra* note 217, at 836-37). See generally Quint, *supra* note 220, at 290-337.

223. 75 BVerfGE 369 (1987). See Haupt, *supra* note 29, at 326 (citing Eberle, *supra* note 217, at 853-63). See generally *Foreign Law Translations: German Case*, TEX. L. (Dec. 1, 2005), <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=634> [<https://perma.cc/83LJ-NG6Z>] [hereinafter “*Straubeta, Foreign Law Translations*”].

224. See Haupt, *supra* note 29, at 327 (citing 75 BVerfGE 369 (1987)). See generally *Straubeta, Foreign Law Translations*, *supra* note 223.

225. See Haupt, *supra* note 29, at 327 (citing 75 BVerfGE 369, 379 (1987)). See generally *Straubeta, Foreign Law Translations*, *supra* note 223.

226. See Haupt, *supra* note 29, at 327 (citing 75 BVerfGE 369, 379 (1987)). See generally *Straubeta, Foreign Law Translations*, *supra* note 223.

227. See Haupt, *supra* note 29, at 327 (citing 75 BVerfGE 369, 379 (1987)). See generally *StraubetaStrauss, Foreign Law Translations*, *supra* note 223.

228. 93 BVerfGE 266 (1995).

229. See Carmi, *supra* note 98, at 336 (citing 93 BVerfGE 266 (1995)).

230. See Carmi, *supra* note 98, at 336 (citing Kommers, *supra* note 214, at 388); 21 EuGRZ 463 (1994).

use of the sticker.²³¹ This overruled the lower courts' determination that the stickers offended the German soldier's human dignity.²³²

Tucholsky II narrowed the scope of the *Tucholsky I* decision.²³³ In *Tucholsky II*, the Constitutional Court held that the right to express political opinions that are critical or even insulting to political institutions, which are distinguished from any segment of the population, outweighed the affected institutions' need for protection.²³⁴ This case also stated the requirements that must be met in order for group defamation to be punishable under section 185 of the German Criminal Code:

- (1) There must be a small, rather than a large, group that is attacked;
- (2) the group's characteristics must differ from those of the general public;
- (3) the defamatory statement must assault all members of the group rather than single or typical members; and
- (4) the derogatory criticism must be based on unalterable criteria or on criteria that are attributed to the group by the larger society around them instead of by the group itself, especially ethnic, racial, physical, or mental characteristics.²³⁵

Another case which restricted hate speech, the *Historical Fabrication Case*,²³⁶ known in German as *Auschwitzulge*, found it illegal to deny that the Holocaust occurred.²³⁷ David Irving, a British historian who has argued that the Third Reich did not conduct a mass extermination of the Jewish people, was invited to speak at a public meeting issued by a far right party.²³⁸ The government conditioned permission for David Irving and the meeting on the assurance that Holocaust denial would not occur.²³⁹ The government stated that Holocaust denial would amount to "denigration of the memory of the dead, criminal agitation, and, most importantly, criminal insult, all of

231. See 21 EuGRZ 463 (1994); Carmi, *supra* note 98, at 336 (citing Kommers, *supra* note 214, at 388-89).

232. See 21 EuGRZ 463 (1994); Carmi, *supra* note 98, at 336 (citing Kommers, *supra* note 214, 388-89).

233. See Carmi, *supra* note 98, at 336 (citing 93 BVerfGE 266 (1995)).

234. See Rosenfeld, *supra* note 6, at 1554 (citing 93 BVerfGE 266 (1995)).

235. Brugger, *supra* note 191, at 12 (citing 93 BVerfGE 266, 300 ff. (1995)).

236. 90 BVerfGE 241 (1994).

237. See Rosenfeld, *supra* note 6, at 1552 (citing Kommers, *supra* note 214, at 386); 90 BVerfGE 241 (1994).

238. See Rosenfeld, *supra* note 6, at 1552; 90 BVerfGE 241 (1994).

239. See Rosenfeld, *supra* note 6, at 1552 (citing Kommers, *supra* note 214, at 386); 90 BVerfGE 241 (1994).

which are prohibited by the Criminal Code.”²⁴⁰ The Constitutional Court found it illegal to deny the Holocaust in order to protect the dignity of the Jewish people in Germany.²⁴¹

Germany evidently bases its laws in human dignity.²⁴² This is seen via their statutes, Constitution, and case law.²⁴³ The United States, however, does not base its laws on dignity, but rather on liberty.²⁴⁴ These different foundations have created two opposing mentalities as to the extent hate speech should be regulated.²⁴⁵

IV. GERMANY VERSUS UNITED STATES: WHICH HATE SPEECH REGIME IS BETTER?

Two different hate speech regimes have been discussed: that of the United States and Germany. The United States essentially always permits hate speech²⁴⁶ and while Germany has freedom of speech, hate speech is restricted.²⁴⁷ While it is true that these two regimes can exist simultaneously (if the internet and television are put aside), Germany’s approach is better.

A. Germany and the United States: A Comparative

Hate speech is, essentially, unregulated in the United States.²⁴⁸ The two essential reasons are that: (1) the ability to speak freely without consequence is a basic tenet of US democracy and (2) freedom of speech keeps the marketplace of ideas flowing.²⁴⁹ The first argument is weakened by the fact that many western democracies, such as the United Kingdom, Denmark, Canada, the Netherlands, Germany, and Ireland all restrict hate speech and the restrictions do not limit their

240. Rosenfeld, *supra* note 6, at 1552 (quoting Kommers, *supra* note 214, at 383).

241. *See id.*; 90 BVerfGE 241 (1994)).

242. *See supra* Part III.B.

243. *See supra* Part III.B.

244. *See supra* Part III.A.

245. *See supra* Part III.

246. There are some exceptions. *See Brandenburg*, 395 U.S. at 447. Additionally, hate speech is not allowed if falls under the fighting words doctrine. *See Chaplinsky*, 315 U.S. at 572.

247. *See, e.g.*, German Penal Code §130. Germany, while perhaps slightly stricter than other European countries, represents the European model in this Note.

248. *See supra* Part III.A.

249. *See Webb, supra* note 26, at 448-49; *see also supra*, Part II.B.2 and III.A.

respective democracies.²⁵⁰ However, there is an issue with having absolute free speech, which is exemplified by Germany's hate speech laws.²⁵¹ While, on its face, keeping hate speech unregulated may seem best for a free and open democracy, it is not, as it inherently limits speech and equality.

The United States does not consider how hate speech will affect the people who are on the receiving end of the hate speech. It is not a small group of people who are affected by hate speech, but rather numerous minority groups such as Hispanic, Muslim, Jewish, Asian, Black, and LGBT²⁵² people. The United States prides itself on treating everyone equally, but the people who are rarely victims of hate speech may fail to grasp the full extent of its indignity.

Germany's Constitution and early²⁵³ case law are similar to those of the United States as severe protectors of speech.²⁵⁴ The Constitutional Court of Germany narrowed the scope of Article 5 over time, primarily using human dignity as the reason.²⁵⁵ In other words, Germany believes that people should be treated with respect, merely because they are human. Conversely, the United States does not give enough weight to these values. This is clear by looking at the case law of the United States. In *R.A.V. v. City of St. Paul*²⁵⁶ and *Virginia v.*

250. See United Kingdom's Public Order Act of 1986 §18(1) ("A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby."); Danish Criminal Code Article 266, Criminal Code of Canada §318 (making it illegal to advocate for genocide); Dutch Criminal Code Article 137 ("Any person who in public, either verbally or in writing or through images, intentionally makes an insulting statement about a group of persons [or incites hatred of or discrimination against person or violence against their person or property] because of their race, religion or beliefs, their hetero or homosexual orientation or their physical, mental or intellectual disability, shall be liable to a term of imprisonment not exceeding one year or a fine . . ."); German Penal Code §130 (see *supra*, Part III.B.2); and Ireland's Incitement to Hatred Act of 1989 (restricting actions and broadcasts likely to stir up hatred).

251. See *supra* Part III.B.

252. LGBT stands for Lesbian, Gay, Bisexual, Transgender.

253. I am using early references to the time period immediately after WWII.

254. See, e.g., GRUNDGESETZ [GG] [BASIC LAW] art. 5; *The Luth Case* (1 BVerfGE 198 (1958)); see also *Schmid-Spiegel* (12 BVerfGE 113 (1961)).

255. See *Mephisto* (30 BVerfGE 173 (1971)); *Straubeta* (75 BVerfGE 369 (1987)); *Tucholsky/Tucholsky II* (93 BVerfGE 266 (1995)); and *Auschwitzlüge*; *Auschwitzlüge* (90 BVerfGE 241 (1994).); *Strauss* (75 BVerfGE 369 (1987)); *Mephisto* (30 BVerfGE 173 (1971)).

256. See generally 505 U.S. 377.

Black,²⁵⁷ the Supreme Court did not find it important that not only did the cross burnings cause people to fear for their lives, it also disregarded the human dignity of black people, regardless of if the cross burning is on private or public property. This is because cross burnings are emblematic of racism, hatred, lynchings, and murders.²⁵⁸ In *Auschiwitzulge*, the German Constitutional Court held that denying the Holocaust is illegal because it disrespected the history and disregarded the human dignity of the Jewish people.²⁵⁹ If *R.A.V.* and *Virginia* occurred in Germany, the outcome would be different. Applying the logic of *Auschiwitzulge*, the cross burnings alone would have made the actions legally regulable.

Today is the era known as Trump's America.²⁶⁰ The United States has always struggled with issues of racism, prejudice, and hatred generally. However, once Donald Trump was elected as President, racism, prejudice, hatred, and hate speech appeared to escalate.²⁶¹ Anti-

257. See generally 538 U.S. 343.

258. Cross burnings are a symbol of the Ku Klux Klan (KKK), a group notorious for perpetuating hatred and racism. See *Top 5 Questions About the KKK*, PUB. BROADCASTING SYSTEM (2018), <http://www.pbs.org/wgbh/americanexperience/features/klansville-faq/> [<https://perma.cc/R5L4-44QN>]; Rian Dundon, *Why Does the Ku Klux Klan Burn Crosses? They Got the Idea from a Movie*, TIMELINE (Mar. 15, 2017), <https://timeline.com/why-does-the-ku-klux-klan-burn-crosses-they-got-the-idea-from-a-movie-75a70f7ab135> [<https://perma.cc/G8VQ-6KXS>]. Historically, the KKK would torture and murder groups that they felt were inferior, namely black people and Jewish people. *Id.*

259. See Rosenfeld, *supra* note 6, at 1552; 90 BVerfGE 241 (1994).

260. Trump's America refers to how Trump is running the United States. However, it tends to be used as a colloquial term to describe a recent rise in white supremacy, xenophobia, and hatred of those that are "different." See *Hate in Trump's America*, AL JAZEERA (Nov. 1, 2017), <http://www.aljazeera.com/programmes/faultlines/2017/10/hate-trump-america-171031080947571.html> [<https://perma.cc/S7MN-ZUL9>]; James Fallows, *Despair and Hope in Trump's America*, THE ATLANTIC (Jan. 2017), <https://www.theatlantic.com/magazine/archive/2017/01/despair-and-hope-in-the-age-of-trump/508799/> [<https://perma.cc/2DBC-HE6B>].

261. See *Hate in Trump's America*, *supra* note 261; Scott Malone, *Data Dive: U.S. Hate Incidents Rise Sharply After Trump Win: Civil Rights Group*, REUTERS (Nov. 29, 2016) <http://www.reuters.com/article/us-usa-trump-hatecrime/data-dive-u-s-hate-incidents-rise-sharply-after-trump-win-civil-rights-group-idUSKBN13O2ED> [<https://perma.cc/3SN7-7L8J>]; *U.S. Hate Crimes Rises 20 Percent in 2016, Fueled by Election Campaign: Report*, NATIONAL BROADCASTING COMPANY NEWS (Mar. 14, 2017), <https://www.nbcnews.com/news/us-news/u-s-hate-crimes-20-percent-2016-fueled-election-campaign-n733306> [<https://perma.cc/SH5E-BJGX>]; Alexis Okeowo, *Hate on the Rise After Trump's Election*, NEW YORKER (Nov. 17, 2017) <https://www.newyorker.com/news/news-desk/hate-on-the-rise-after-trumps-election> [<https://perma.cc/NQ64-23WF>]; Clark Mindock, *Anti-Semitic Incidents Almost Double Under Donald Trump Administration, New Figures Reveal*, INDEPENDENT (Apr. 25, 2017) <http://www.independent.co.uk/news/world/americas/us-politics/trump-antisemitism-rise-reports-statistics-almost-double-far-right-a7700366.html> [<https://perma.cc/8M6A-DUR7>].

Muslim, anti-Hispanic, and anti-black epithets and actions appeared more prevalent, as well as instances of anti-Semitism.²⁶² This is exemplified by what occurred in Charlottesville in August 2017.²⁶³ The United States seemed to have been making some progress towards equality for all, but it now seems as if the country is backtracking.²⁶⁴ By adopting an approach similar to that of Germany and other Western countries, the United States can protect the dignity and psychology of the people who live there and instill decorum and respect into society.

B. Proposal on How to Regulate Hate Speech in the United States

While the United States bases its hate speech regulation (or lack thereof) on liberty, it is possible to regulate hate speech and include dignity in that analysis because doing so would promote equality, which would in turn promote liberty. People would feel more equal and valued, which would allow them to participate more in the marketplace of ideas, make uncoerced decisions, and feel less oppressed.

The best way for hate speech regulation laws to pass would be in tandem with the Equal Protection Clause. The Constitution only regulates (and limits) state action, not private action.²⁶⁵ However, the state should be permitted to regulate hate speech in order to advance equality values, and the Equal Protection Clause is the best example of how the Constitution protects equality values.²⁶⁶ Thus, even when private actors engage in hate speech that is not directly violating the

262. See *Hate in Trump's America*, *supra* note 261; Malone, *supra* note 261; *U.S. Hate Crimes Rises 20 Percent in 2016, Fueled by Election Campaign*, *supra* note 262; Okeowo, *supra* note 261; Mindock, *supra* note 261. This is not to say that Trump caused these actions. Rather, an environment has been created as a result of Trump being elected. The total number of bias-motivated crimes in 2015 was 5,850, while in 2016 the total was 6,121. *2015 Hate Crime Statistics*, FBI: UCR (2015), <https://ucr.fbi.gov/hate-crime/2015/tables-and-data-declarations/1tabledatadecpdf> [<https://perma.cc/HX5F-Q8NV>]; *2016 Hate Crime Statistics*, FBI: UCR (2016), <https://ucr.fbi.gov/hate-crime/2016/topic-pages/incidentsandoffenses>.

263. See *infra* Part V for a discussion on Charlottesville.

264. See *infra* Part V; Malone, *supra* note 262; *U.S. Hate Crimes Rises 20 Percent in 2016, Fueled by Election Campaign: Report*, *supra* note 261; Okeowo, *supra* note 261; Mindock, *supra* note 261.

265. See *Within Its Jurisdiction*, JUSTIA (2017), <https://law.justia.com/constitution/us/amendment-14/68-equal-protection-of-the-laws.html> [<https://perma.cc/S8MU-CE22>]; Civil Rights Cases, 109 U.S. 3, 11 (1883); *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973).

266. See U.S. CONST. amend. XIV, § 1.

Constitution, the state has the power to limit such hate speech in the name of equality.²⁶⁷

Dignity is not valued in the United States in the same way as it is in Germany.²⁶⁸ Therefore, the equal protection claim cannot be that everyone needs to be treated with the same amount of respect and dignity. Besides the fact the United States values liberty over dignity, such a law would most likely not pass the equal protection test. If it is based on the psychological effects that hate speech has, such as Post-Traumatic Stress Disorder, Generalized Anxiety Disorder, and Depression, then such a law is more likely to succeed. This still may be difficult because people generally are reluctant to use psychology as a basis for regulation, particularly because it is considered a soft science.²⁶⁹

The best way in which regulation of hate speech can be implemented into law is by creating a statute.²⁷⁰ If a law were passed that restricts hate speech, the law could not be classified on its face, the content of the law must be neutral,²⁷¹ and the law cannot be vague.²⁷² An example of such a statute is:

It shall be a crime, payable up to \$10,000 or two years in prison, except in private conversation with friends and family, to make statements or act in a way that: (1) intentionally causes fear to the point of psychological and/or physical damage or (2) purposefully creates or attempts to create an action of violence by the recipient. Either of the two prongs must be proven beyond a reasonable doubt. Ways to prove psychological harm include, but are not limited to, expert psychological reports, psychological tests, and testimony from forensic psychologists.²⁷³

267. See *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Flagg Bros. v. Brooks*, 436 U.S. 149 (1978); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Blum v. Yaretsky*, 457 U.S. 991 (1982).

268. See Knechtle, *supra* note 6, at 563; *supra* Parts II.A and III. This is evidenced by the fact that dignity is not mentioned anywhere in the United States Constitution.

269. See *Soft Science*, DICTIONARY.COM, <http://www.dictionary.com/browse/soft-science> [<https://perma.cc/S2X7-3DFY>]; Pamela Frost, *Soft Science and Hard News*, 21st C. METANEWS (2018), <http://www.columbia.edu/cu/21stC/issue-1.1/soft.htm> [<https://perma.cc/YVS9-P6UJ>].

270. It would be better to create a statute than to challenge hate speech regulation by bringing a case to court pertaining to hate speech, and thus analyzing it on First Amendment or Fourteenth Amendment grounds.

271. See *Mosley*, 408 U.S. at 95-96.

272. Including a specific list of words would be tricky because it would either be over-inclusive or under-inclusive. Canons of construction would be helpful, but listing words would probably cause more issues than the one proposed.

273. This is a draft of a proposal by the author of this Note.

The potential argument that the law has a disparate impact would not succeed because it is not discriminating against anyone: no one in the United States, no matter which race, ethnicity, sexuality, gender, nationality, etc., would be able to engage in hate speech (as specified by the law). Because the law is not discriminating against anyone based on race or national origin, it would not be analyzed under strict scrutiny. Therefore, the law would have to pass the rational basis test. As there is no invidious intent to discriminate, the law would likely pass the rational basis test. As long as the government proffers a legitimate purpose, then the law would be upheld. A potential legitimate purpose is hate speech has disadvantaged minorities, and in order to level the playing field, hate speech must be regulated.

A law regulating hate speech would be difficult to pass, especially on the federal level. If this route is taken, a liberal state, such as California, would need to either pass a hate speech regulation law or vote for it by referendum. Then, the state would need to show that regulating hate speech is more beneficial than completely free speech in order to encourage other states to adopt this law. Once enough states pass the law, a law could be passed at the federal level, or a case may come to the Supreme Court and they could rule in favor of regulating hate speech. This idea is supported primarily by gay marriage laws.²⁷⁴ States were slowly passing laws that allowed gay marriage, and once more than half of them allowed it and the public was in favor of gay marriage, the Supreme Court granted certiorari to a case concerning gay marriage.²⁷⁵ This case found that marriage is a right that everyone is entitled to, even if both people in the marriage are of the same sex.²⁷⁶

Passing a law like this is harder in the United States than in Germany because the United States does not value dignity to the same

274. See Richard Wolf, *Timeline: Same Sex Marriage Through the Years*, USA TODAY (June 24, 2016), <https://www.usatoday.com/story/news/politics/2015/06/24/same-sex-marriage-timeline/29173703/> [<https://perma.cc/P3KS-FX7T>]; *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEORGETOWN LAW LIBRARY, (Feb 20, 2018), <http://guides.ll.georgetown.edu/c.php?g=592919&p=4182201> [<https://perma.cc/385V-XKJQ>] [hereinafter *Timeline of the Legalization of Same-Sex Marriage*. While a law being passed at the federal level once a majority of states pass hate speech regulation laws is possible, it is distinguished from gay marriage, as gay marriage was dealt with by the Court and not Congress. See Wolf, *supra* note 274; *Timeline of the Legislation of Same-Sex Marriage*, *supra* note 274.

275. See Wolf, *supra* note 274; *Timeline of the Legislation of Same-Sex Marriage*, *supra* note 274.

276. See *Obergefell v. Hodges*, 576 U.S. ___, 2015, 135 S. Ct. 2584, 2608 (2015); *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, *supra* note 274.

extent as Germany does.²⁷⁷ Additionally, while there are two major political parties in both the United States and Germany, Germany has more prominent minority parties than the United States. Furthermore, while there are two houses in the German legislature, whichever house proposes the legislation is the one that writes the bill.²⁷⁸ The other house must approve of it, but, unlike the United States' Congress, they do not rewrite parts of the bill.²⁷⁹ Thus, the German legislature is more efficient and can more easily pass laws, especially to regulate more controversial areas.

V. CONCLUSION

Hate speech is especially relevant today. In Europe, there has been a rise in popularity of very conservative politicians who are against everything except white people, as seen by Angela Merkel in Germany and Marine Le Pen in France.²⁸⁰ Hate speech has been more prevalent since the start of Trump's election as president.²⁸¹ There have been

277. See *supra* Part III.

278. See *Passage of Legislation*, DEUTSCHER BUNDESTAG (2017), <https://www.bundestag.de/en/parliament/function/legislation/passage/245704> [<https://perma.cc/8X77-VAMD>] (last visited July 3, 2018); *The Legislative Process: Overview*, CONGRESS.GOV (2017), <https://www.congress.gov/legislative-process> [<https://perma.cc/WBG6-L9K9>] (last visited July 3, 2018).

279. See *The Legislative Process*, *supra* note 278; *Schoolhouse Rock!: I'm Just a Bill* (AMERICAN BROADCASTING COMPANY, Sept. 18, 1975), <https://www.youtube.com/watch?v=tYeJ55o3EI0> [<https://perma.cc/E8EG-SA64>].

280. See Kim Sengupta, *Anti-Semitism Rising Across West as Result of 'Populism and Isolationism'*, *Jewish Leader to Warn Pope Francis*, THE INDEPENDENT (Jan. 25, 2017), <http://www.independent.co.uk/news/world/europe/pope-francis-anti-semitism-european-jewish-congress-moshe-kantor-populism-donald-trump-hitler-a7544886.html> [<https://perma.cc/Z3CH-PGUT>]; *German Elections 2017: Angela Merkel Wins Fourth Term but AfD Makes Gains—As It Happened*, THE GUARDIAN (Sept. 24, 2017), <https://www.theguardian.com/world/live/2017/sep/24/german-elections-2017-angela-merkel-cdu-spd-afd-live-updates> [<https://perma.cc/TUA5-8GML>]; Eric Reguly, *Rise of Marine Le Pen: How the Far-Right Leader Became a Contender in France*, THE GLOBE AND MAIL (Nov. 12, 2017), <https://www.theglobeandmail.com/news/world/rise-of-marine-le-pen-how-the-far-right-leader-became-a-contender-in-france/article34752498/> [<https://perma.cc/VJ9P-VVD3>].

281. See Malone, *supra* note 261; Reuters, *U.S. Hate Crimes Rises 20 Percent in 2016, Fueled by Election Campaign: Report*, *supra* note 261; Okeowo, *supra* note 261; Mindock, *supra* note 261. Prevalent refers to being more widely known about, not necessarily that there have been more actions.

bomb threats for synagogues,²⁸² destruction of Jewish cemeteries,²⁸³ and white supremacist marches.²⁸⁴ The most prominent of the white supremacist marches was the Charlottesville march in August 2017. Anti-Jewish and anti-black remarks were made, the protestors carried guns and TIKI Torches²⁸⁵ with them, and three people were murdered.²⁸⁶

Some of the statements made at Charlottesville included: “You will not replace us,” “Jews will not replace us,” “Our blood, our soil,” and “White lives matter.”²⁸⁷ These sentiments are not fighting words, but they are hateful. They express a “holier than thou” attitude, reinforcing that they believe these minority groups are inferior, while also say something more. These phrases, in the minds of the white

282. See Eric Levenson & AnneClaire Stapleton, *Jewish Center Bomb Threats Top 100; Kids Pulled from Schools*, CABLE NEWS NETWORK (Mar. 13, 2017), <http://www.cnn.com/2017/02/28/us/bomb-threats-jewish-centers-jcc/index.html> [<https://perma.cc/7J4R-8ABC>]; Ray Sanchez & David Shortell, *Calls for More Security as New Threats Made Against Jewish Centers*, CABLE NEWS NETWORK (Mar. 7, 2017), <https://www.cnn.com/2017/03/07/us/adl-jcc-bomb-threats/index.html> [<https://perma.cc/S66V-UAK8>]. A synagogue is the Jewish house of worship.

283. See Emma Green, *Why Attacks on Jewish Cemeteries Provoke Particular Fear*, THE ATLANTIC (Feb. 27, 2017), <https://www.theatlantic.com/politics/archive/2017/02/jewish-cemeteries-destruction/518040/> [<https://perma.cc/PFS2-YBP8>]; Azadeh Ansari & Joe Sutton, *Tombstones Damaged at New York Cemetery Not Vandalism, Say Police*, CABLE NEWS NETWORK (Mar. 6, 2017), <http://www.cnn.com/2017/03/05/us/brooklyn-jewish-cemetery-tombstones-overturned/index.html> [<https://perma.cc/9J8B-NCNN>]; Niraj Chokshi, *100 Headstones Toppled at a Jewish Cemetery in Philadelphia*, THE N.Y. TIMES (Feb. 26, 2017), https://www.nytimes.com/2017/02/26/us/headstones-toppled-jewish-cemetery-philadelphia.html?_r=0.

284. See Maggie Astor, Christina Caron, & Daniel Victor, *A Guide to the Charlottesville Aftermath*, THE N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html>; Joe Heim, *Recounting a Day of Rage, Hate, Violence, and Death*, WASH. POST (Aug. 14, 2017), https://www.washingtonpost.com/graphics/2017/local/charlottesville-timeline/?utm_term=.af77e2a41574 [<https://perma.cc/R3AV-TLCY>].

285. Please note that TIKI Torch did not sponsor this protest nor support it. See Emily Saul, *Tiki Torch Makers: ‘We Do Not Support’ White Supremacists*, THE NEW YORK POST (Aug. 13, 2017), <https://nypost.com/2017/08/13/tiki-torch-makers-we-do-not-support-white-supremacists/> [<https://perma.cc/Z66Z-2G5B>]; Aaron Smith, *Tiki Torch Company: We Have Nothing to Do With White Nationalism*, CABLE NEWS NETWORK MONEY (Aug. 14, 2017), <http://money.cnn.com/2017/08/14/news/companies/tiki-torches-charlottesville/index.html> [<https://perma.cc/VNT3-GGVG>].

286. See Heim, *supra* note 284; Hawes Spencer & Sheryl Gay Stolberg, *White Nationalists March on University of Virginia*, THE N.Y. TIMES (Aug. 11, 2017), <https://www.nytimes.com/2017/08/11/us/white-nationalists-rally-charlottesville-virginia.html>.

287. See Heim, *supra* note 284; Spencer & Stolberg, *supra* note 286.

supremacists, mean that white people²⁸⁸ are superior and that no other group will ever be their equal. In essence, the non-white people will be treated as second-class citizens forever, so long as the white supremacists have anything to say about it. This deeper level is what causes pain in and possible psychological damage to the victims.

While these phrases are not fighting words, for they were not epithets made face-to-face,²⁸⁹ it still resulted in violence; counter-protestors were present and fought back through words and other peaceful means.²⁹⁰ At one point, the counter-protestors formed a line across the street that the white nationalists were walking down in order to block their path.²⁹¹ The white nationalists, who were carrying shields and wooden clubs, “charged through the line, swinging sticks, punching, and spraying chemicals.”²⁹² The counter-protestors then fought back, also punching, swinging sticks, spraying chemicals, and even throwing balloons filled with paint or ink.²⁹³ Not only does Charlottesville exemplify the relevance of hate speech and the need to implement regulation, but it also exemplifies that even though words might not be fighting words on their face, they may still lead to violence.²⁹⁴

The United States should follow Germany’s lead when it comes to regulation of hate speech. Regulating hate speech has a number of advantages. Hate speech promotes racist thoughts and actions, so by regulating hate speech the government can diminish racism from perpetuating to future generations. Furthermore, regulating hate speech has the possibility of diminishing violence, or the threat of violence, as even though some hate speech may not be fighting words on their face, the words may still lead to violence. Finally, it helps to foster an environment in which everyone can feel valued, maintain their dignity, and freely participate in the marketplace of ideas.

288. Some people consider Jewish people to be white because most Jewish people look white (especially those who are of Ashkenazic descent). However, “white people” in this Note and in Charlottesville do not include Jewish people, as the white protestors made it explicitly clear that they do not think Jewish people are white. *See id.*

289. *See* the Fighting Words Doctrine from *Chaplinsky v. New Hampshire*, 315 U.S. at 568, 572.

290. *See* Heim, *supra* note 284; Spencer & Stolberg, *supra* note 286.

291. *See* Heim, *supra* note 284; German Lopez, *Charlottesville Protests: A Quick Guide to the Violent Clashes this Weekend*, VOX (Aug. 14, 2017), <https://www.vox.com/identities/2017/8/14/16143168/charlottesville-va-protests> [<https://perma.cc/WXM8-GNUM>].

292. Heim, *supra* note 284. *See also* Lopez, *supra* note 291.

293. Heim, *supra* note 284. *See also* Lopez, *supra* note 291.

294. If incitement is shown, then the *Brandenburg* test may be used. 395 U.S. at 447.