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## Holocaust Denial and the Concept of Dignity in the European Union

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## HOLOCAUST DENIAL AND THE CONCEPT OF DIGNITY IN THE EUROPEAN UNION

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# HOLOCAUST DENIAL AND THE CONCEPT OF DIGNITY IN THE EUROPEAN UNION

JOHN C. KNECHTLE\*

## ABSTRACT

*On April 19, 2007, the Justice and Home Affairs Council of the European Union adopted the Framework Decision on Racism and Xenophobia (the "Framework Decision"),<sup>1</sup> which seeks to initiate substantial hate speech regulation throughout the European Union, including public speech which condones, denies, or grossly trivializes the crimes defined by the Nuremberg Tribunal, namely the Holocaust.<sup>2</sup> Although the Framework Decision does not have direct effect in member states and the European Commission does not have powers to initiate enforcement actions, the Framework Decision asks European Union member states to enact legislation that criminalizes various forms of pure speech based on their content alone.<sup>3</sup>*

*In my recent writing on this subject, I formulated a set of factored principles which address the issues of when and how governmental entities should regulate hate speech.<sup>4</sup> The primary purpose of this Article is to examine the Framework Decision under the factored principles and (hopefully) shed some light on the question of whether the Framework Decision is an appropriate exercise of power for the European Union. After a careful analysis of the Framework Decision and the surrounding facts, I conclude that the Framework Decision is not a sound and appropriate measure for regulating hate speech for the following reasons: (1) the Framework Decision is an overly broad, one size fits all statute that fails to account for the historical realities of the various European Union member nations; and (2) the Framework Decision, although consistent with much European jurisprudence, is not likely to forward its putative purpose of protecting the dignity of the European populace.*

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\* Professor of Law, Florida Coastal School of Law. The author thanks Adam Rowe for his research assistance, comments, and support.

1. Press Release, Council of the European Union, Framework Decision on Racism & Xenophobia (Apr. 19, 2007), *available at* [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/misc/93739.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/misc/93739.pdf) [hereinafter Framework Decision].

2. *Id.*

3. *Id.*

4. John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539, 552 (2006) (taking a comprehensive look at the issue of hate speech regulation through the lenses of U.S. constitutional jurisprudence and comparative constitutional law and, after a review of U.S. and international precedent, setting forth and briefly developing the elements of a factored approach to the regulation of hate speech).

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## I. INTRODUCTION

The debate on the issue of when and how to regulate hate speech is framed by two major philosophical camps: (1) those who favor the protection of the individual's right to speak over the protection of group and/or individual dignity; and (2) those who feel that the fundamental right to free speech must be curtailed with respect to hate speech in order to protect the group and the individual dignity of traditionally disadvantaged minority groups.<sup>5</sup>

There are certain enigmatic issues that bubble up to the surface time and again throughout this debate. How is a nation to arrive at a definition of "hate speech" that protects the dignity of the marginalized group while still ensuring that legitimate political, philosophical, academic, and scientific debate is not suppressed? Is human dignity capable of state regulation so that the state can increase or decrease human dignity? Or does human dignity emanate from a source beyond the reach of the law and what hate speech regulation really seeks is a more respectful and civilized discourse? What criteria does the government use in deciding which groups shall receive the protection of the hate speech regulation? For example, if race, ethnicity, or religion are criteria, does the hate speech regulation protect all races, ethnicities, and religions, or only those which can prove a certain type, amount, breadth, and duration of recent discrimination? Is there a principled and objective basis for the regulation of speech that expresses and incites hatred, or is the basis pragmatic and relative to the cultural and social history of the nation

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5. See *id.* at 539-43. The United States is the foremost proponent of the prospeech camp, and the nations of Europe hold a corresponding position in the prodignity camp. See *id.*

which is attempting such regulation? Is there any evidence that the various attempts at hate speech regulation have actually achieved the putative goal of reducing the prevalence of racial, religious, ethnic, or gender-based hatred in society?

These questions are fundamental, and their answers determine the appropriate remedy in the current hate speech debate. This Article takes the position that content-based hate speech regulation may be justified only when both of the following factors are met: (1) it is enacted by a society that has a recent history of racial, religious, or ethnic strife that is sufficiently severe to justify the curtailment of its citizens' fundamental right to free speech in order to address the historical wrong; and (2) the jurisprudential history of the state, or states if it is an international treaty, is amenable to content-based speech restrictions within its understanding of freedom of expression.<sup>6</sup> An increasingly popular jurisprudential justification for hate speech regulation is the protection of human dignity. Human dignity in this context is often understood as a quality which the state can regulate. I will argue that human dignity comes from within—well beyond the reach of the law—and, although we can be offended and wounded by words, other than the legal remedies for defamation, the state best recognizes human dignity in the context of speech by respecting the individual's right to speak and by supporting nonlegal avenues to encourage respect and tolerance in society.

## II. THE HOLOCAUST

The Framework Decision directly references the crimes of genocide committed against the Jews during World War II and mandates that speech acts that deny, minimize, or trivialize the Holocaust be criminalized and punished.<sup>7</sup> Because the criminality of Holocaust denial is addressed by the Framework Decision, this Article focuses on the Holocaust and the Holocaust denial movement in its analyses of the propriety of the speech regulation mandated therein.

The Nazi regime in Germany carried out the genocidal murder of more than six million Jews.<sup>8</sup> This is one of the most infamous crimes of the twentieth century, and it has had a profound influence on the development of human dignity and international human rights law.<sup>9</sup>

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6. *See id.* at 552.

7. Framework Decision, *supra* note 1, at 1-2. Specifically, the Framework Decision mandates that European Union Member Nations criminalize speech that publicly condones, denies, or grossly trivializes the crimes defined by the Nuremberg Tribunal. *Id.* at 1-2.

8. Holocaust Memorial Museum, Holocaust Encyclopedia, <http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005143> (last visited Nov. 12, 2008).

9. The Preamble of the United Nations Charter expresses belief in "the dignity and worth of the human person." U.N. Charter pmbli.; *see, e.g.*, American Declaration of the Rights and Duties of Man, O.A.S. Official Rec., OAS/Ser.L/V/II.4 rev.12 (1992) (adopted by

It can be reasonably argued that the development of the concept of human rights law in the modern sense is a direct response to the atrocities of Nazi Germany.<sup>10</sup> The magnitude of this carnage is so great that the human imagination struggles to even comprehend it, much less make sense of it. Many of the major perpetrators of the Holocaust were tried and punished by the Nuremberg Tribunal.<sup>11</sup> However, the conviction of many of the Nazi perpetrators at Nuremberg is merely the end of the first part, and the beginning of the second part, of the history of the Holocaust.

The seeds of the Holocaust denial movement were planted by the Nazis even before the fall of Berlin and the destruction of the concentration camps at the end of World War II. As Professor Lasson points out:

Inmates at concentration camps testified that they were frequently taunted by their captors: "And even if some proof should remain and some of you survive, people will say that the events you describe are too monstrous to be believed; they will say that they are the exaggerations of Allied propaganda and will believe us, who will deny everything, and not you."<sup>12</sup>

This quote rings prophetically true, as the Holocaust denial movement has consistently exploited the incomprehensible scope and magnitude of the crime to argue that the generally accepted account of the Holocaust is a lie.<sup>13</sup>

There are two general rhetorical trends in the Holocaust denial movement: (1) the Negationists who claim that the Holocaust never

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the Ninth International Conference of American States (1948) (beginning with: "The American peoples have acknowledged the dignity of the individual"; followed by Preamble, beginning with: "All men are born free and equal, in dignity and in rights"), available at <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm> (last visited Nov. 12, 2008); African Charter on Human and Peoples' Rights, art. 5, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) ("Every individual shall have the right to the respect of the dignity inherent in a human being . . ."); see also Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 853 (1983).

10. See Christopher D. Van Blarcum, *Internet Hate Speech: The European Framework and the Emerging American Haven*, 62 WASH. & LEE L. REV. 781, 785 (2005) (indicating that "[a]fter the Holocaust, European countries moved to take steps to prevent similar atrocities from ever happening again, and hate speech was targeted for elimination").

11. Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 229 (1997).

12. Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 37 (1997) (quoting PRIMO LEVI, *THE DROWNED AND THE SAVED* 11-12 (Raymond Rosenthal trans., Vintage Int'l 1989)).

13. See, e.g., ARTHUR R. BUTZ, *THE HOAX OF THE TWENTIETH CENTURY: THE CASE AGAINST THE PRESUMED EXTERMINATION OF EUROPEAN JEWRY* (3d ed. 2003), available at <http://vho.org/dl/ENG/Hoax.pdf>; PAUL RASSINIER, *DEBUNKING THE GENOCIDE MYTH* (Noontide Press 1978), available at <http://www.vho.org/aaargh/fran/livres/debunk.pdf>.

occurred;<sup>14</sup> and (2) the Revisionists who admit that something like the historical Holocaust occurred but make revisionist arguments about the scope of the crime, challenging things such as the official number of Jews murdered and whether gas chambers were used to carry out mass murder.<sup>15</sup> Many of the Revisionists claim that their goal is different from the Negationists and the anti-Semites, in that the Revisionists claim that they are simply searching for historical truth rather than seeking to intimidate the Jewish people.<sup>16</sup> The text of the Framework Decision seems clear in its mandate to criminalize and punish either of these trends within the Holocaust denial movement.<sup>17</sup>

The development of the Internet as a forum for speech and debate has had a profound effect on the Holocaust denial movement, just as the Internet provided the Holocaust denial movement with an international platform from which to espouse their message of hate.<sup>18</sup> Where an individual Holocaust denier was once limited to printing and distributing racist tracts in a single geographic location, now that same individual could broadcast a message of hatred across oceans and continents with the click of a mouse. The explosion of online anti-Semitic organizations has influenced many nations in Europe and elsewhere to enact strict legislation that criminalizes both hate speech in general and Holocaust denial in particular.<sup>19</sup>

### III. THE HATE SPEECH DEBATE IN AMERICA

The early history of the First Amendment to the U.S. Constitution is unique in that the preference and protections that it espoused regarding free speech were largely either ignored or construed in a manner that robbed the amendment of any de facto significance.<sup>20</sup> Like so many other provisions of the Bill of Rights in the U.S. Constitution, the First Amendment existed as a piece of elegant rhetoric that had little backing from the power structures within the U.S. government throughout most of the eighteenth and nineteenth cen-

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14. Emanuela Fronza, *The Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609, 613-14 (2006).

15. Yulia A. Timofeeva, *Hate Speech Online: Restricted or Protected? Comparison of Regulations in the United States and Germany*, 12 FLA. ST. J. TRANSNAT'L L. & POL'Y 253, 258-59 (2003).

16. *Id.* at 259.

17. The Framework Decision seemingly makes specific reference to the Holocaust when it mandates the criminalization of "[p]ublicly condoning, denying or grossly trivialising . . . crimes defined by the Tribunal of Nuremberg." See Framework Decision, *supra* note 1, at 1-2.

18. Timofeeva, *supra* note 15, at 256-58.

19. *Id.* at 260; Knechtel, *supra* note 4, at 540-54.

20. SAMUEL WALKER, HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY 12 (1994).

turies.<sup>21</sup> Indeed, within two years of the enactment of the First Amendment, Congress (with many of the constitutional drafters participating) passed the Alien and Sedition Acts of 1798, which criminalized speech that criticized any branch of the U.S. government.<sup>22</sup>

The early decades of the twentieth century brought new challenges and a new generation of jurists who began the gradual and sometime tenuous process of elevating the First Amendment from its status as a beautiful but vapid relic from the eighteenth century to the position it currently holds as the emblem of one of the most revered and cherished values of American society.<sup>23</sup> The twentieth century resurrection of the First Amendment in the United States carried with it a new set of issues that had to be addressed. The most fundamental issue was the question of what categories of speech are protected by the First Amendment and what categories of speech fall outside of its protections.<sup>24</sup> Despite the presence of powerful dissenters to the contrary, the federal judiciary never adopted an absolutist approach to First Amendment jurisprudence.<sup>25</sup> The U.S. courts have recognized almost from the beginning that some forms of speech are harmful to society and the government has a legitimate right to regulate speech of this nature even though it involves a content-based restriction.<sup>26</sup> The Supreme Court of the United States has consistently held that obscenity,<sup>27</sup> defamation,<sup>28</sup> fighting words,<sup>29</sup> incitement or conspiracy to imminent violence,<sup>30</sup> and true threats<sup>31</sup> are all forms of speech that are not protected by the First Amendment.

Hate speech is a category of speech that brushes up against several of the speech categories that U.S. jurisprudence does not traditionally protect.<sup>32</sup> Hate speech can take the form of fighting words, defamation and incitement, or actual imminent violence.<sup>33</sup> However, hate speech also transcends those traditional categories of nonpro-

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21. *See id.*

22. An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798).

23. WALKER, *supra* note 20, at 18-37.

24. *See infra* notes 27-31.

25. Knechtle, *supra* note 4, at 564.

26. *Id.*

27. *Miller v. California*, 413 U.S. 15, 23 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973); *Roth v. United States*, 354 U.S. 476, 485 (1957).

28. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

29. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942).

30. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982); *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969).

31. *Virginia v. Black*, 538 U.S. 343, 359-60 (2003); *Watts v. United States*, 394 U.S. 705, 708 (1969).

32. *See Knechtle, supra* note 4, at 564-71, 569-73.

33. *Id.* at 564-65.



tected speech in a manner that justifies a serious debate about whether it could, or should, be identified as its own separate category of nonprotected speech here in the United States. The debate in the United States is ongoing, but thus far those who argue that the traditional categories are sufficient to protect the government interest in regulating hate speech seem to be winning.<sup>34</sup> The U.S. approach to the hate speech issue can be generally characterized as prospeech, as opposed to the prodignity approach preferred in many European states.<sup>35</sup>

#### IV. THE EUROPEAN APPROACH TO HATE SPEECH REGULATION

The nations of Europe and the European Union generally have never viewed the concept of freedom of speech in the same manner as the United States. While practically every European nation recognizes a fundamental right to freedom of speech, the member nations of the European Union have generally been more open to allowing content-based speech regulation in circumstances where the regulated content is hate.<sup>36</sup> Legislation that seeks to regulate and criminalize hate speech and Holocaust denial is abundant on both the national and international level throughout Europe.<sup>37</sup>

##### A. *European Hate Speech Regulation on the International Level*

The earliest and arguably most important international treaty that expressly addresses the issue of content-based hate speech regulation is the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>38</sup> The ICERD was adopted by the General Assembly for signature in 1965, actually entered into force in 1969, and has as its goal the total elimination of racism and discrimination.<sup>39</sup> Article 4 of the ICERD specifically addresses hate speech and reaffirms that all signatories shall (1) criminalize the “dissemination of ideas based on racial superiority or hatred”; (2) “declare illegal and prohibit organizations . . . which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offense punishable by law”; and (3) prohibit “public authorities . . . [from] promot[ing] or incit[ing] racial discrimination.”<sup>40</sup>

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34. See WALKER, *supra* note 20, at 159-67.

35. Knechtle, *supra* note 4, at 559-65.

36. Van Blarcum, *supra* note 10, at 786.

37. *See id.*

38. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 352, available at [http://www.unhchr.ch/html/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/html/menu3/b/d_icerd.htm).

39. *Id.*

40. *Id.* art. 4.

More than 150 nations have signed and ratified the ICERD.<sup>41</sup> The United States has ratified the ICERD but has filed a reservation indicating that it will not take any measures that violate the First Amendment to the U.S. Constitution.<sup>42</sup> Within the context of the debate between the prospeech and the prodignity camps on the hate speech regulation issue, the ICERD represents a substantial victory for those who argue that the dignity of the individual or group must take precedence over the speaking rights of racists.<sup>43</sup> The influence of the ICERD on the development of antihate speech legislation in Europe is profound, and since the inception of the ICERD, every European nation has adopted legislation that prohibits and criminalizes racist and hateful speech.<sup>44</sup>

Another major player in the area of European hate speech regulation is the Council of Europe. The Council of Europe is a treaty-making body that was first established in 1949 to promote intergovernmental cooperation throughout Europe and develop international standards aimed at preventing the reoccurrence of gross human rights violations such as those which occurred in Europe during World War II.<sup>45</sup> With forty-seven member nations throughout Europe, the Council of Europe is highly influential in the area of human rights.<sup>46</sup>

In 2002, the Committee Members of the Council of Europe adopted the Additional Protocol to the Convention on Cybercrime, Concerning the Criminalization of Acts of a Racist and Xenophobic Nature Committed Through Computer Systems (the “Additional Protocol”).<sup>47</sup> The Additional Protocol delineates five types of speech conduct that signatories are required to criminalize: (1) each party must criminalize “distributing, or otherwise making available, racist and xenophobic materials to the public through a computer system”; (2) each party must “criminalize the act of directing a threat to a person through the Internet purely because of race, national origin, or religion”; (3) each party must “criminalize the act of publicly insulting a person through a computer system because of the person’s race, national origin, or religion”; (4) each party must criminalize distributing over the internet “material which denies, grossly minimi[z]es, approves, or justifies acts constituting genocide or crimes against

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41. Van Blarcum, *supra* note 10, at 786.

42. *Id.*

43. *See id.*

44. *Id.*

45. *Id.* at 787-88.

46. *See* Council of Europe, <http://www.coe.int> (last visited Nov. 12, 2008).

47. Van Blarcum, *supra* note 10, at 791.

humanity”]; and (5) each party must criminalize “aiding or abetting the commission of any of the offenses established by the Protocol.”<sup>48</sup>

The Additional Protocol was opened for signatories on January 28, 2003, and as of January 10, 2004, has been signed by twenty-three members of the Council of Europe.<sup>49</sup> The overwhelming European acceptance of the Additional Protocol again demonstrates that Europeans generally favor content-based speech regulation in the area of racist and hateful speech. It also demonstrates the Internet’s powerful role as a forum for international dissemination of racist and xenophobic ideas.

The ICERD and the Additional Protocol are very much aligned with the Framework Decision in both spirit and philosophy. They employ the same means, prohibit the same acts, and are generally applicable to the same situations. On the international level, the approach to hate speech regulation throughout Europe is quite consistent.<sup>50</sup> Article 4 of the ICERD provides that signatory states shall (1) criminalize the dissemination of ideas based on racial superiority or hatred, (2) prohibit organizations that promote and incite racial discrimination and criminalize participation in such organizations, and (3) prohibit public authorities and public institutions from promoting or inciting racial discrimination.<sup>51</sup> This approach to the problem of hate speech has led to several recent high-profile prosecutions in the area of Holocaust denial at the state level.<sup>52</sup>

### B. *European Hate Speech Regulation on the State Level*

Following the mandate of the ICERD and numerous other international treaties on the subject of racial discrimination, the nations of Europe have almost uniformly adopted measures that criminalize hate speech on the national level. Germany, with its unique history of horrific racial violence, has adopted some of the most restrictive speech regulations on the continent.<sup>53</sup> The reconstruction process that was carried out in Germany after World War II included the enactment of many German statutes aimed at eliminating Nazism and its ideology of racial hatred altogether.<sup>54</sup> The current German law is

48. *Id.* at 792-94 (internal quotations and citations omitted).

49. *Id.* at 791.

50. See DAVID A. J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY 161-80 (1999).

51. See Van Blarcum, *supra* note 10, at 786.

52. In addition to the *Faurisson* and *Toben* prosecutions that are cited and discussed, see *infra* notes 61-67 and accompanying text, the reader may wish to explore the Holocaust denial cases of Ernest Zundel, David Irving, and Roger Garady. Lasson, *supra* note 12, at 41-45; see also Pascale Bloch, *Response to Professor Fronza’s The Punishment of Negationism*, 30 VT. L. REV. 627, 635-36 (2006).

53. Timofeeva, *supra* note 15, at 260.

54. *Id.*

clear that certain forms of racist political discourse will not be tolerated in the least, and the German State has demonstrated a willingness to prosecute those who would cross the line.

Article 5 of the Basic Law of Germany provides that every individual member of society has the right to freedom of expression,<sup>55</sup> but then announces that “[t]hese rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.”<sup>56</sup> The practical effect of this language in the German law is that the State has plenary power to regulate speech that it determines tends to stir up racial strife. Other passages in the Basic Law lend further support to the German State’s power to regulate hate speech based on content. Article 1 declares human dignity to be of the utmost value,<sup>57</sup> and article 18 provides for the forfeiture of basic rights when such rights are abused.<sup>58</sup>

The German penal code contains several provisions that criminalize hate speech in general and Holocaust denial in particular,<sup>59</sup> and the German State has carried out several recent high-profile prosecutions of prominent Holocaust deniers.<sup>60</sup> The far-reaching extent to which the German State is willing to prosecute and punish Holocaust deniers for speech crimes is exemplified by the recent *Toben* decision.<sup>61</sup> Fredrick Toben is an Australian Holocaust revisionist who published his revisionist material on Web pages that originated in computers outside the geographical borders of Germany.<sup>62</sup> In upholding Mr. Toben’s ten-month prison sentence, the German Federal Court set the precedent that all material published on the Internet, no matter its country of origin, is subject to German legislation prohibiting hate speech.<sup>63</sup>

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55. Article 5 provides that

[e]very 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.

Grundgesetz für die Bundesrepublik Deutschland [GG] [Basic Law] May 23, 1949, BGBl. I, as amended through Dec. 20, 1993, art. 5, § 2, *translated in* Basic Law for the Federal Republic of Germany (Grundgesetz, GG), <http://www.iuscomp.org/gla/statutes/GG.htm> (last visited Nov. 12, 2008).

56. *Id.* art. 5, § 2.

57. *See id.* art. 1.

58. *Id.* art. 18.

59. Timofeeva, *supra* note 15, at 261-62.

60. *See id.* at 262-64.

61. *See* Van Blarcum, *supra* note 10, at 803-04.

62. *Id.*

63. *Id.*

The *Faurisson* case is an example of the European approach to hate speech regulation on both the state and international level.<sup>64</sup> In *Faurisson*, the United Nations Human Rights Committee upheld the French conviction of Robert Faurisson who was convicted of violating French law that prohibits any questioning of the findings of the Nuremberg Tribunal.<sup>65</sup> Mr. Faurisson, a member of the revisionist strain of the Holocaust denial movement, was convicted for repeatedly denying that the Jews killed at Auschwitz were killed through the use of gas chambers.<sup>66</sup> The Human Rights Committee, acting under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, found that Faurisson's content-based speech conviction under French law did not violate article 19, paragraph 3 of the Covenant, which guarantees free speech and expression.<sup>67</sup>

Although in theory a right to human dignity need not restrict the right to freedom of expression, in practice this has been the result in European and international law.<sup>68</sup> The speech-restrictive effect of a constitutional or international human right to human dignity can be explained by a few factors. First, the First Amendment to the U.S. Constitution was written and understood as a negative right, whereas many other Western democracies understand freedom of expression as a positive right bestowed by the government and therefore regulated by the state when private actors cause harm.<sup>69</sup> Second, the American emphasis is on the rights of the speaker and any harm to the listener is viewed in terms of interests, not rights, whereas other Western Democracies view harm to the listener as violating a right—the right to human dignity—which results in a balancing of these competing rights by courts.<sup>70</sup> Third, the American philosophy is more libertarian and individualistic, creating tests like the content-neutrality doctrine, while other Western Democracies hold a more communitarian philosophy which includes fraternity, solidarity, and paternalism.<sup>71</sup>

The foregoing analysis of the European approach to the problem of hate speech is illustrative of two points that will be important to the next Section of this discussion: (1) European jurisprudence from the

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64. *Faurisson v. France*, U.N. Human Rights Comm., U.N. Doc. CCPR/C/58/D/550/1993 (Dec. 16, 1996).

65. *Id.* ¶ 10.

66. *Id.* ¶ 2.6.

67. *Id.* ¶ 9.6.

68. See Knechtle, *supra* note 4, at 541-43.

69. Guy E. Carmi, *Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification*, 9 U. PA. J. CONST. L. 957, 995-96 (2007).

70. *Id.* at 993.

71. *Id.* at 990.

end of World War II to the present favors the concept of protection of individual and group dignity over the concept of protection of free speech; and (2) the leading nations of Europe are willing to use the police power of the state and international authorities to prevent speech that might encourage the reoccurrence of the kind of atrocities that were committed on the continent during World War II. The Framework Decision is the latest in a long line of similarly intentioned statutes and treaties that seek to punish speech acts that the current European power structure regards as harmful and/or dangerous.<sup>72</sup> The unique aspect of the Framework Decision is that, in attempting to regulate hate speech in the international law context, it makes express reference to the Nuremberg Decision and thus seems to directly reference the Holocaust.<sup>73</sup>

#### V. TOWARDS A FACTORED APPROACH

As mentioned in the introduction, I have advocated for two factors in approaching the questions of whether, when, and how a state or international body should address the problem of hate speech with legislation.<sup>74</sup> First, a legislative body should look to the “historical accounts of ethnic, racial and religious violence, genocide, and discriminatory practices” that have occurred within the jurisdiction of the state or region in which the body operates, and determine whether the historical record demonstrates a need for regulation of this kind.<sup>75</sup> Pursuant to this first factor, any law that punishes speech based on its content alone must at a minimum address a historical wrong within the subject society that is pervasive and severe to the extent that speech regulation is arguably justified.<sup>76</sup> The “historical wrong” aspect of this first factor means that, for example, while a law specifically criminalizing Holocaust denial may be appropriate for Germany because it addresses a significant historical wrong committed by the German State, the same law would be inappropriate in Indonesia because the historical wrong that the law addresses (i.e., the Holocaust) was not committed by Indonesia or a faction within Indonesian society.<sup>77</sup> Conversely, a law criminalizing the denial of the atrocities committed by Indonesia in its occupation of East Timor<sup>78</sup> may be appropriate for Indonesia and/or East Timor,

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72. See Timofeeva, *supra* note 15, at 260-68.

73. Framework Decision, *supra* note 1, at 2.

74. Knechtle, *supra* note 4, at 552.

75. *Id.*

76. See *id.* at 552-53.

77. *Id.* at 553-58.

78. Julie M. Sforza, Note, *The Timor Gap Dispute: The Validity of the Timor Gap Treaty, Self-Determination, and Decolonization*, 22 SUFFOLK TRANSNAT'L L. REV. 481, 481-82 (1999).

but not Germany. The reasoning here is that the power to regulate speech based on its content carries within it a malignancy too dangerous to allow a legislative body to look beyond the walls of its own society when determining which crimes are so monstrous that speech content regulation is warranted.

The “pervasive and severe” aspect of the analysis under the first factor simply means that individual crimes (monstrous though they may be) that have no substantive impact on society as a whole or a significant group within the society are not an appropriate basis for content-based speech regulation. Content-based speech regulation is only appropriate when it responds to crimes against humanity, mass murder, and/or genocide. Thus, a law criminalizing the denial of the Holocaust may be appropriate under this analysis because the Holocaust was an act of mass murder that had a wide impact in Germany and much of Europe.

The second factor that must be addressed by any legislative body seeking to promulgate content-based speech regulation is the jurisprudential history of the society within which speech is to be regulated.<sup>79</sup> Prohibitions of Holocaust denial can be grounded in such jurisprudential concerns as equality, group libel, peace and security, and human dignity. Protection of Holocaust denial can be grounded in such jurisprudential concerns as disapproval of content-based speech restrictions absent a compelling governmental interest, which is an interest absent here. Where the historical jurisprudence of a society falls on this continuum of opinion is absolutely relevant to the questions of speech regulation and must be taken into account by any body legislating in this area.

The United States is easily identified as the vocal leader of the prospeech camp in the international hate speech debate, a role that has garnered the label “American Exceptionalism.”<sup>80</sup> Any legislative body considering the problem of hate speech regulation within the United States would have to deal in particular with the past fifty years of jurisprudential preference for individual speaking rights in

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For the last twenty-five years a quiet battle has raged in East Timor which has killed thousands and produced enough political “disappearances” to rival even the worst period of political disappearances in El Salvador in the late 1980s. Indonesian police forces have regularly detained and tortured innocent civilians and suppressed peaceful protests by systematically gunning down hundreds of young people, leading to one of the worst genocides in post-World War II history.

*Id.* (citations omitted); *see also* NOAM CHOMSKY, *ROGUE STATES: THE RULE OF FORCE IN WORLD AFFAIRS* 51-61 (2000) (discussing the horrific realities of Indonesian occupation of East Timor).

79. Knechtle, *supra* note 4, at 552.

80. *See* Frederick Schauer, *The Exceptional First Amendment, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 29, 30 (Michael Ignatieff ed., 2005).

this country and the Supreme Court's expanding case law which prohibits content-based speech regulation in the area of hate speech.<sup>81</sup> Thus, pursuant to the second factor ("jurisprudential history"), other than hate speech that incites imminent violence or threatens unlawful acts, hate speech regulation based on its offensive content is inappropriate (not to mention unconstitutional) in the United States.

The same cannot be said for Germany. The German Basic Law expressly recognizes the importance of individual and group dignity and further acknowledges the State's right to use its police power to protect human dignity.<sup>82</sup> German law since the end of World War II has consistently sought to eliminate Nazi ideology and the racial/religious prejudice which spawned the Holocaust.<sup>83</sup> Thus, under the second "jurisprudential history" factor, it would appear that content-based speech regulation would be appropriate within Germany.

The factored approach to the question of hate speech regulation leads to the observation that the fundamental right to free speech is not absolute. At a minimum, every state has a legitimate interest in preventing hate speech that constitutes a true threat of violence to an individual or group.<sup>84</sup> This kind of speech regulation should be constitutionally permissible even in the United States.<sup>85</sup> There may be certain societies within which it is appropriate for the sovereign to move beyond the criminalization of true threats of racial violence toward more pervasive content-based speech regulation, and in those societies the factored approach discussed herein may be of help to the legislators.

## VI. THE FRAMEWORK DECISION

The following Section of this Article examines the Framework Decision under the factored approach, giving special attention to the question of human dignity and the role that dignity plays in the jurisprudence of both the prospeech approach to the question of hate speech regulation and the prodignity approach to the question.

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81. See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding that the City of St. Paul's Bias Motivated Crime Ordinance is unconstitutional under the First Amendment). The Court noted that content-based and viewpoint-based restrictions on speech are generally invalid and have only been upheld "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.'" *Id.* at 382-83 (quoting *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942)).

82. Timofeeva, *supra* note 15, at 260-64.

83. See *id.* at 260-61.

84. Knechtle, *supra* note 4, at 543.

85. See *Watts v. United States*, 394 U.S. 705, 707 (1969); *Bridges v. California*, 314 U.S. 252, 260-63 (1941).



A. *The Framework Decision and the Historical Accounts of Ethnic, Racial, and Religious Violence Within the European Union*

The Framework Decision makes specific reference to the Holocaust when it mandates the criminalization of “[p]ublicly condoning, denying or grossly trivialising . . . crimes defined by the Tribunal of Nuremberg.”<sup>86</sup> The Framework Decision also broadly criminalizes speech acts of any kind that publicly incite violence or hatred on the basis of “race, colour, religion, descent or national or ethnic origin.”<sup>87</sup>

The Framework Decision is problematic with regard to the issue of the historical accounts of ethnic, racial, and religious violence within the various member nations of the European Union. With its reference to the Holocaust and the Holocaust denial movement, the Framework Decision asks all European Union member nations to criminalize speech that addresses a historical wrong committed by only one of its members, Germany. Indeed, most European Union member nations can be generally classified as either being victims of Nazi Germany (e.g., Poland),<sup>88</sup> having actively fought against the Nazis (e.g., United Kingdom),<sup>89</sup> or simply not existing during the time of the Holocaust (e.g., Czech and Slovak Republics).<sup>90</sup>

The Framework Decision paints with a brush too broad and fails to take a proper account of the history of racial strife within the European Union. There are societies within which content-based speech regulation may be necessary to address a legitimate historical wrong. However, one must question the propriety of the Framework Decision because it takes an atrocious act of genocide committed by one of its member nations as a mandate that the entire European Union

86. Framework Decision, *supra* note 1, at 1-2.

87. *Id.* at 1.

88. Germany attacked Poland on September 1, 1939. Matthew Lippman, *The History, Development, and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 995-96 (2004) (“The Nuremberg Tribunal concluded that the Reich’s attack on Poland was ‘most plainly an aggressive war, which was to develop in due course into a war which embraced almost the whole world, and resulted in the commission of countless crimes, both against the laws and customs of war, and against humanity.’” (quoting *United States v. Hermann Göring*, in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 411, 445-46 (1948))).

89. Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT'L L.J. 1, 16 (2002) (“Germany launched the Battle of Britain [in June of 1940], an air offensive against England. The combination of night bombing and the targeting of military facilities within London resulted in severe damage to the central city. England retaliated with an attack on industrial sites in Berlin. Hitler launched a nine-month air campaign against civilian targets within London; by mid-May 1941, the death toll stood at forty-five thousand with more than 3.5 million homes destroyed or seriously damaged.” (citations omitted)).

90. At midnight on December 31, 1992, the Czech-Slovak State expired and split into two wholly new and independent successor states, the Czech Republic and the Slovak Republic. Eric Stein, *Peaceful Separation: “A New Virus”?*, 36 COLUM. J. TRANSNAT'L L. 25, 25 (1997).

criminalize speech acts that even so much as “trivialize” that act of genocide.

Laws like the Framework Decision are properly suited and more effective when enacted on the national (rather than international or regional) level. The State of Germany is in a better position to construe a law like the Framework Decision in a manner that truly promotes justice and dignity because it is more closely connected to the historical wrong that the law addresses. Thus, the State of Germany is more likely to make a better decision about when and how to apply such a law.

To argue that the Holocaust occurred within the European society as a whole and therefore that all of Europe must criminalize the denial or trivialization of the Holocaust still does not address why members of the European Union and the Council of Europe, which are arguably well beyond the confines of European society, are subject to this prohibition. Questions are also raised: Why limit speech prohibitions of genocide to the one that occurred in Nazi Germany? Why isn't the much more recent genocide in the former Yugoslavia included in the European Union directive? Why isn't the Armenian genocide included? If Europe is part of the world community, why isn't each genocide of the modern era included in the prohibition?

Criminalizing the act of “grossly trivializing” the Holocaust raises the question of what speech constitutes “grossly trivializing.” If historical research reveals that the previously established number of victims killed in a particular concentration camp is inaccurate, can the historian who reveals this new information be prosecuted under a statute adopted pursuant to the Framework Decision? The Framework Decision, like most hate speech statutes, does not allow truth to be a defense. If such a prosecution is a possibility, wouldn't this end or at least chill such research and thereby undermine a primary justification for freedom of expression—the discovery of truth?<sup>91</sup>

Neither the dignity of the individual nor the dignity of the group is protected when laws like the Framework Decision are written and enforced without reference to a country's historical accounts of ethnic, racial, and religious violence. Without a firm historical basis for content-based speech regulation, these kinds of laws serve only to (1) canonize certain generally accepted accounts of historical events like the Holocaust; (2) stifle legitimate discussion; and (3) spotlight and thereby aggrandize the purveyors of hate speech.

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91. JOHN STUART MILL, ON LIBERTY 1-52, 73-91 (Elizabeth Rapaport ed., Hackett Pub. Co. 1982) (1859). *See generally* K.C. O'ROURKE, JOHN STUART MILL AND FREEDOM OF EXPRESSION: THE GENESIS OF A THEORY (2001).

*B. The Framework Decision and the Jurisprudential History of the European Union*

The jurisprudential history of the European Union since the Holocaust has consistently favored the protection of individual and group dignity over the protection of individual speaking rights in situations where it is perceived that these two rights come into conflict.<sup>92</sup> The Framework Decision takes this classically European position and mandates that speech be curtailed and even criminalized when it “grossly trivializes” the Holocaust or other international crimes against humanity.<sup>93</sup> While the Framework Decision is certainly in line philosophically with the jurisprudential history of European society, the means by which it seeks to forward the European prodignity jurisprudence are flawed and should be changed or discarded.

*1. The Concept of Dignity*

The concept of dignity is not mentioned in the U.S. Constitution.<sup>94</sup> The Declaration of Independence seems to hint toward recognition of the concept of dignity with the phrase “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness.”<sup>95</sup> While this famous passage from the Declaration of Independence has no statutory force and does not specifically mention the word “dignity,” it comes close to circumscribing dignity as a concept. Specifically, the Declaration of Independence recognizes that there is a metaphysical aspect of human existence that is inherent in humanity itself. This inherent value appears changeless and timeless, shining forth from the individual regardless of circumstance. Dignity is the existential value of every individual. Dignity is in each and every case “mine,” because nothing and no one other than the individual himself may forsake and thereby diminish his own dignity. Dignity can be acknowledged or ignored but it cannot be bought or sold, given or taken. Dignity is an innate human quality that seems to spring either from God or from the fabric of being human itself.

These existential and metaphysical aspects of the concept of dignity lead to several significant questions when viewed through the lens of jurisprudence: (1) is it possible for a statute to forward the legislative purpose of enhancing or preserving human dignity?; (2) is dignity strictly an attribute of the individual, or can the state or

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92. Van Blarcum, *supra* note 10, at 785-87.

93. Framework Decision, *supra* note 1, at 1.

94. *See* U.S. CONST.

95. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

group possess dignity as well?; and (3) what role does the state play with regard to the question of dignity? The way that a society answers these questions in large part determines which side of the hate speech dichotomy that society will inhabit.

### 2. *Dignity and European Jurisprudence*

Following the foregoing analysis, it is evident that the concept of human dignity plays a primary role in European jurisprudence on both a national and an international level. Based on this Article's earlier observations of the way that laws regarding human dignity are enforced in Europe, it is reasonable to infer that European jurisprudence generally takes the position that the power of the state may be legitimately used in an effort to promote or enhance the dignity of individuals and groups within society. Human dignity is of paramount importance, and state and international legislative bodies have a compelling interest in creating an environment in which dignity may flourish. However, pursuant to the factored analysis, one must take issue with the *means* by which European jurisprudence, exemplified here by the Framework Decision, seeks to achieve the noble goal of preserving and enhancing human dignity within European society.

The reasoning behind the Framework Decision is that one way to preserve the dignity of the individual, minority, or minority group is to limit the speaking rights of other individuals or groups within society. This flawed reasoning leads to a situation in which a society limits one fundamental right in the hope of enhancing another. However, freedom of speech, even highly unpopular and offensive speech, is not an obstacle to the state's preservation of human dignity. In fact, the opposite is true. Freedom of speech for even the racist and/or morally bankrupt factions within a society enhances the dignity of all, and to sacrifice freedom of speech in an effort to preserve dignity can only serve to diminish the dignity of the masses.

### 3. *Dignity and the Horizon of the Law*

The reason that enhancing, rather than limiting, the speaking rights of the populace is the most conducive strategy that a sovereign may employ, when that sovereign's purpose is to protect and enhance dignity, is that dignity is an innate quality of the individual that arises from within. Dignity occupies an internal realm deep within human consciousness and is largely unaffected by circumstances external to the ego.

A hypothetical example to illustrate this concept begins with an individual sitting on a park bench. An interloper approaches that same individual and begins shouting highly offensive insults at him.

Has the individual's dignity been diminished by the insult? Of course not; the dignity of the individual arises from within. The hypothetical individual may be angry or offended, but his dignity is in no way diminished by the actions of the interloper. The interloper's personal dignity may have been diminished by his offensive actions, and the individual may choose to return the insults of the interloper and thereby risk compromising his own dignity, but in each of these examples the dignity of the persons (both the individual and the interloper) is threatened not by external causes, but by the ego's internal choices.

Similarly, how can we expect a mere statute, like the Framework Decision, to penetrate to such depths of the human psyche as to be able to allocate something like dignity? We cannot, neither by limiting speaking rights nor any other legislative strategy. The Framework Decision is a legislative example of cutting off one's nose to spite one's face. By discarding speaking rights in an attempt to enhance individual dignity, the Framework Decision will succeed only in diminishing legitimate speech and thereby threaten the dignity of the governed.

Society can develop mechanisms other than the law to address offensive and hurtful speech, mechanisms which can be more effective than criminalizing speech. African Americans have endured the worst racial discrimination in the United States, first through more than two hundred years of enslavement and then another hundred years of institutionalized oppression. All racist speech is offensive and hurtful, but particularly to a racial group like the African Americans, which has endured so much discrimination in the United States. However, today, racist speech in the United States is often punished in the workplace not because it is illegal but because the society at large has developed a norm which does not tolerate such speech in many, if not most, places of employment. Although there are few statistics in this area, many individuals in the private sector have lost their jobs due to their racist comments, especially when those comments were made in public.<sup>96</sup> Arguably, such nonlegal methods freely chosen by an employer are more powerful than decisions coerced by the law because they respect the individual's right and ability to decide.

An example of this societal norm against racist expression that has developed in American society in absence of legislation occurred when Trent Lott was forced to resign his position as Senate Majority Leader because he expressed support for Senator Strom Thurmond's

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96. *E.g., Don Imus Fired by CBS Radio for Racist Comments, One Day After MSNBC Drops Show*, FOXNEWS.COM, Apr. 13, 2007, <http://www.foxnews.com/story/0,2933,265701,00.html>.

1948 “Dixecrat” segregationist campaign for President.<sup>97</sup> Speaking at Senator Thurmond’s 100th birthday party, Senator Lott said, “I want to say this about my state. When Strom Thurmond ran for president, we voted for him. We’re proud of it. And if the rest of the country had followed our lead, we wouldn’t have had all these problems over all these years either.”<sup>98</sup> Senator Lott was immediately met with harsh criticism from both sides of the political aisle after making this public statement.<sup>99</sup> Senator Lott made multiple public apologies for these words, but the damage was already done.<sup>100</sup> Fifteen days after making this statement, Senator Lott resigned from his leadership position in the Senate.<sup>101</sup> Senator Lott was forced to resign, not by power of law, but by operation of a societal norm that developed organically within American society in the absence of legislation.

The societal norm against racist expression in the United States is not limited to the sphere of politics. In April 2007, CBS radio fired long-time talk-radio personality Don Imus for referring to African-American members of the Rutgers University women’s basketball team as “nappy-headed hos [sic].”<sup>102</sup> The MSNBC cable news network also dropped a TV simulcast of the Imus show that it had televised for more than ten years.<sup>103</sup> Thus, even in the private sphere, the societal norm against racist speech in the United States shows its power. This nonlegislative deterrent to hateful and racist speech exemplifies the possibility of society enhancing the dignity of the individual by operation of the moral choices of individuals within society without legislative assistance.

To the extent that the reasoning underlying the Framework Decision is to protect persons from the threat of violence or to address a recent historical wrong in the country, the reasoning is well-grounded. However, to the extent that the reasoning is based on government allocation of human dignity, it is flawed. Positive law cannot protect or enhance the dignity of the individual or group by identifying and then proactively legislating against expression of undesirable trains of thought within the collective consciousness of a society. Only when the law recedes and allows the greatest possible freedom to speak and be spoken to, can a positive impact on the dignity of a people be perceived.

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97. Adam Clymer, *Divisive Words: The Downfall; 30-Year Dream of Leadership Is Undone by a Lack of Allies*, N.Y. TIMES, Dec. 21, 2002, at A19.

98. *Id.*

99. See, e.g., Carl Hulse, *Lott’s Praise for Thurmond Echoed His Words of 1980*, N.Y. TIMES, Dec. 11, 2002, at A24.

100. See, e.g., Sheryl Gay Stolberg, *Under Fire, Lott Apologizes for His Comments at Thurmond’s Party*, N.Y. TIMES, Dec. 10, 2002, at A28.

101. *Id.*

102. Richard Sandomir, *Post-Imus, WFAN Opts for More Sports, for Now*, N.Y. TIMES, Apr. 14, 2007, at B7.

103. *Id.*

It is important to note here that I am not arguing that the government should not treat people with dignity. Nothing could be further from the case. All persons, including governments, should strive at all times to treat citizens and noncitizens with dignity. The point is simply that positive law can not enhance the dignity of the governed. This is especially true where the means employed toward the goal of the improvement of dignity is the limitation of the fundamental right to speak.

#### 4. *Dignity and Free Speech*

Half of the thesis to this Section of the Article is proven once we have established that dignity can be neither allocated by statute nor enhanced by the limitation of speaking rights. This point (if it has been established) leads to the question that frames the second half of this analysis: Does broadly protecting the speaking rights of even the most offensive, hateful, and racist factions of society actually enhance the dignity of the individual or group within society? This Article takes the position that the dignity of individuals and groups within society may be enhanced when the law draws back and allows greater freedom of speech.

It is appropriate from the outset of this portion of the analysis to address the inevitable dissenters who will criticize this analysis for arguing out of both sides of the mouth. Those dissenters will surely protest that the preceding Section of this analysis posited that dignity is beyond the reach of the law, and now the analysis has proceeded to turn around and argue that dignity can be enhanced by the operation of law. Nothing could be further from the case. Rather, this Article takes the following position: most positive law approaches to the protection or enhancement of dignity are inherently flawed for the reasons discussed above; however, when the law *recedes* and *declines to legislate* in certain areas like speech restriction, what is left is an organic open space within which individuals and factions within society can make moral choices which may enhance their own personal and/or group dignity.

The firmament upon which this portion of the argument is based is again the uniquely internal nature of dignity itself. The preceding argument attempted to establish that external conditions have little or no effect on the dignity of the individual or group. The corollary to this position is that individuals or groups may forsake or enhance their own dignity through their individual choices and actions.

When a society regulates speech based on content, it limits the space in which the individual may make the moral choices necessary to enhance his or her personal dignity. When a society declines to regulate speech, it leaves the individual free to think and choose in a

manner which may enhance his or her personal dignity. The better way for a state or an international body to forward the legislative purpose of enhancing and/or promoting the dignity of the individual and the group within society is to leave that space open and allow the individual or group to find its own way to dignity through decisions that arise from an environment of unbounded speech and expression.

This is not an argument against dignity as a jurisprudential concept. The author holds the utmost respect for the concept of dignity and feels that nation states and international bodies are justified in taking actions that promote dignity's cause. This is not an argument against dignity as a legitimate legislative end. This argument reserves its criticism for the means by which the Framework Decision attempts to achieve the legitimate legislative goal of protecting the dignity of the individual.

When a society resorts to the coercion of law to hear only the viewpoints it finds acceptable, it employs tools of repression and intolerance to supposedly enhance human dignity.<sup>104</sup> Words sometimes offend and wound a listener and usually the state can do little to prevent these psychic injuries. However, the best way to promote a civil discourse and minimize such injuries is not to shut one side down, but to invite the sides to a deeper discussion. The challenge of legislators is to find nonrepressive ways to promote human dignity.

The curtailment of free speech in the manner mandated by the framework is anathema to dignity, both as an abstract concept and as a definite legislative goal. More freedom of speech, more debate, more dialectic—this is the path to enhance the dignity of the governed because it values each individual, including the outliers with opinions that the majority finds deeply offensive.

Are the proponents of the Framework Decision afraid that the ideas that they condemn will prevail in an open and honest societal debate? Do the proponents of the Framework Decision distrust the intelligence of the governed to the extent that they feel that certain historical opinions must be mandated by fiat? Those questions, which can only be reasonably answered in the affirmative, underline the point of this argument. The means that the Framework Decision employs in its quest for dignity are offensive to the dignity of the individual.

Banning hateful speech is a superficial attempt to address the deeper problem of respecting one's own and another's human dignity.

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104. See R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1399 (1995) (examining "the relationship between consent and human dignity and inquir[ing] into noncoercive devices, both governmental and social, for encouraging and safeguarding the dignity of individuals without undermining their autonomy").



If a goal is to address the deeper problems of racism and ethnic and religious prejudice, more speech rather than less speech is needed. Such conversation is less likely to begin, let alone reach the deeper concerns, if one side's expression is proscribed by criminal law. Using the coercive power of the state to ban the speech of a purveyor of hate not only eliminates the conversation, but reduces the space and opportunity for that person to be transformed.

And so it seems that the foregoing analysis has turned the European jurisprudential history of human dignity and the approach to preservation of dignity through content-based regulation of speech on its head. The Framework Decision certainly arises and follows a prevalent avenue of thought that runs throughout the recent history of European jurisprudence—the idea that human dignity is inviolate and is best preserved by government control of speech. However, based on the foregoing analyses, it is clear that the means by which the Framework Decision seeks to forward its prodignity agenda are flawed and the statute is bound to fail. The Framework Decision's positivistic approach to the issues of the preservation of dignity through speech regulation can only lead to bureaucracy, inconsistent application, oppression, and the creation of an environment where dignity can not thrive.

## VII. CONCLUSION

The main purpose of this Article has been to examine the Framework Decision under the two categories of the factored approach to hate speech regulation: (1) whether the law is enacted by a society that has a recent history of racial, religious, or ethnic strife that is sufficiently severe to justify the curtailment of its citizens' fundamental right to free speech in order to address the historical wrong; and (2) whether the jurisprudential history of the state, or states if it is an international treaty, is amenable to content-based speech restrictions within its understanding of freedom of expression. That analysis has led to the following general conclusions: (1) the Framework Decision certainly addresses a horrific historical wrong (i.e., the Holocaust), but it is overly broad in scope because it mandates that many nations who bear no responsibility (some of which were not even in existence at the time) for the Holocaust criminalize speech acts that do not follow the generally accepted historical account of that crime; and (2) the Framework Decision certainly falls in line with the European jurisprudential express recognition of the primacy and necessity of the preservation of human dignity, but the means it uses to advance dignity's cause are flawed and likely to fail.

In conclusion, this Article offers a few final observations regarding the controversies surrounding the Holocaust and the Holocaust de-

nial/revision movements. There seems to be a certain fundamental futility underlying the attempts of the various institutions cited in this Article to establish a historical record by fiat. In criminalizing certain trends of critical analysis of an event like the Holocaust, the state and international institutions discussed herein undermine the strength of the overwhelming evidence for the historical Holocaust.

When a state criminalizes a certain account of a historical event, it takes history out of the realm of science and elevates it to the status of scripture. This act of criminalization undermines the strength of the historical record because it suggests that the power structures that are implementing the legislation are afraid that the undesirable positions and arguments that they are seeking to suppress may develop a legitimacy they cannot control. Supporters of this legislation either do not trust the people or do not trust the truth.

Ironically, laws prohibiting the denial of the Holocaust empower the Holocaust denial movement. Holocaust deniers gain political strength when they point to these laws and say to their followers, "You see . . . our ideas are so powerful, they are afraid to even allow us to discuss them, let alone debate us!" The better approach is to confront the absurd and racist claims of the Holocaust deniers with facts drawn from the overwhelming historical record. This approach allows the ideas of the Holocaust denial movement to be discredited, and that is achieved without resort to laws and trials that merely grant the movement a public forum from which to espouse their views and message of persecution and hatred. To protect the cause of dignity, this confrontation must take place in a free and open environment where the debaters are free to express their true ideas without fear of governmental retribution.

How will the governed ever be able to trust a historical record that is established and enforced by the police power of the state? Once a precedent for enforcing a historical record with police power is established, how can it be controlled and who will have the power to control it? Even when altruistically motivated, legislators should not bestow on government the power of establishing and enforcing the expression of orthodox views, whether it involves historical, scientific, or religious "truth."

There is no need for the legislators of the European Union to fear the truth. If the evidence of the facticity of the generally accepted accounts of the Holocaust is sufficient to form the historical record (as I believe it is), then the legislative bodies discussed herein have no need to fear the speech and pseudoscience of the Holocaust deniers/revisionists. If the evidence of the facticity of the generally accepted accounts of the Holocaust is not sufficient to form a complete historical record or if research is needed to further develop the record, then a robust debate about what really happened is warranted.

Either way, legislation like the Framework Decision impedes the process by which history is recorded by a society and undermines the strength of the evidence in the historical record. Truth needs no law to mandate its acceptance, and the truth of the horrific crimes of the Holocaust is clear to anyone who takes the time to examine the historical record.

