When Academic Freedom and Freedom of Speech Confront Holocaust Denial and Group Libel: Comparative Perspectives

Gerald Tishler
WHEN ACADEMIC FREEDOM AND FREEDOM OF SPEECH CONFRONT HOLOCAUST DENIAL AND GROUP LIBEL: COMPARATIVE PERSPECTIVES*

Mr. Gerald Tishler: What we're going to discuss in this panel is, to a Holocaust survivor, the most important issue of all. In my own subjective experience, I've known hundreds of survivors and they all respond differently to the Holocaust. But the one common theme, the one common response they have, is their anxiety about historical inaccuracy concerning the Holocaust. In their wildest imagination, the survivors who were liberated in 1945 could not have conceived of an outright denial of the Holocaust ever happening. Of course, in 1945, and indeed for almost twenty years thereafter until the Eichmann trial, very few people knew what had actually occurred. But today we find not only the actual former Nazis and the neo-Nazi groups in Europe, but what would appear on the surface to be historical groups, such as the Institute for Historical Review. These groups actually misconstrue and misrepresent history, by either denying that the Holocaust ever occurred or by relegating it to a footnote in World War II history. They don't even extrapolate from it the important components, the fact that it was politically motivated and that the trains and ovens kept rolling long after the Germans knew that they were going to lose the war. This phenomenon comes into conflict with the first amendment, which you know in terms of the ostensible right to say whatever you want, particularly in the academic context.

* This panel discussion was originally published in 8 CARDOZO L. REV. 559 (1987). The BOSTON COLLEGE THIRD WORLD LAW JOURNAL gratefully acknowledges their permission to reprint this portion of the conference. The panelists have made some slight changes in their remarks from the version that appeared in the CARDOZO LAW REVIEW.

1 Mr. Tishler is a partner at the Boston law firm of Brown, Rudnick, Freed & Gesmer. He is Vice-Chairman of the Facing History and Ourselves National Foundation, Inc., and is a member of the Anti-Defamation League's New England Regional Board and Civil Rights Committee. Mr. Tishler also serves on the Board of Overseers, the Tauber Institute for the Study of European Jewry, Brandeis University. He is a graduate of Boston College Law School and is a former Captain in the U.S. Army Judge Advocate General's Corps.


The Institute for Historical Review purports to be a historical revisionist society whose objective is to bring history into accord with the facts by publishing and conducting educational programs on twentieth century historical events, particularly the Holocaust, which the institute believes is a distortion that should be clarified in order to prevent future wars and eliminate the "undue influence" that Israel exerts on American foreign policy.

1 ENCYCLOPEDIA OF ASSOCIATIONS § 14099 (21st ed. 1987).

We will first hear from Professor Irwin Cotler who will tell us what the law is in Canada, and what the experience has been in Canada particularly with respect to criminal prosecution for group libel. Then we will hear from Professor Alan Dershowitz who will explain to us his perceptions of the conflict and of the tension that I've described between, and I use the term advisedly, free speech and Holocaust Denial. Finally, Professor Arthur Berney will address the same subject.

Professor Irwin Cotler: I think it's an example of the Orwellian character of our times that, forty years after the end of the Holocaust, Canada has emerged as the world center for Holocaust Denial litigation; that the prosecution of Ernst Zundel, one of the two prosecutions in Canada for Holocaust Denial dissemination, ended up, as MacLean's, our national magazine, called it, a situation where the Holocaust and not just Ernst Zundel was put on trial. Why? How did all of this happen? Could it have been prevented? How do we deal with Holocaust Denial dissemination? Is the criminal sanction an appropriate method for dealing with this dissemination? Let me just discuss a number of questions; at this point, I'll take them seriatim.

First question: How did it all begin? For some time, Ernst Zundel, a commercial publisher in Toronto, had not only been the chief disseminator of Holocaust Denial and hate propaganda in Canada, but also had been the chief exporter internationally of this material to centers in Europe and elsewhere.

After suffering under a constant barrage of this material, one Holocaust survivor, Sabina Citron, sought to lay a sanction or complaint under the criminal code. We have

---

4 Professor Cotler is an associate professor of law at McGill University Law School and has taught international law at Harvard Law School. He had helped defend Antoly Scharansky and is active in anti-apartheid work. Professor Cotler has testified before the Deschenes Commission, the Canadian governmental body responsible for shaping Canada's policy regarding World War Two persecutors. From 1977–1980, Professor Cotler was President of the Canadian Jewish Congress. He is one of the original advisory board members of the Holocaust/Human Rights Research Project.

5 Professor Dershowitz teaches criminal, constitutional, and international human rights law at Harvard Law School.

6 Professor Berney teaches constitutional, arms control, and mass communications law at Boston College Law School. He is on the Steering Committee of the Lawyers Committee for Civil Rights Under the Law, and is a member of the Lawyers Alliance for Nuclear Arms Control Executive Board. Professor Berney was one of the original Advisory Board members of the HHRRP.

7 See Martin, Anti-Semite is on Trial, But Did Ontario Blunder?, N.Y. Times, Feb. 15, 1985, at A2, col. 3, where the case of Ernst Zundel, one of the world's leading distributors of anti-semitic literature, is described. He was tried for publishing false news detrimental to the public interest as he asserted that the killing of six million Jews during World War II was a fabrication. For news of his conviction, see id., Mar. 1, 1985, at A7, col. 5. On January 23, 1987, the Ontario Court of Appeals reversed the Zundel conviction. Her Majesty the Queen v. Zundel, slip op. (Ont. App. Jan. 23, 1986). In its 125 page decision, the court maintained that the statute under which Zundel was prosecuted was constitutional, but held that the conviction must be reversed because (1) the judge did not allow defense counsel the proper scope in questioning during voir dire regarding pretrial publicity, (2) the judge gave an erroneous jury instruction regarding the required mental state of the defendant, and (3) the judge admitted a graphic film on the concentration camps into evidence even though it contained prejudicial hearsay. The Canadian government has not decided whether to appeal the decision, retry the case, or let the matter drop.

8 Quinn, The Holocaust Trial, MacLEAN'S, Mar. 11, 1985, at 42.
a criminal sanction which prohibits the dissemination of hate propaganda or that kind of communication other than private conversation which promotes hatred or contempt of an identifiable group.\(^9\) She sought to have Mr. Zundel prosecuted under the hate propaganda provisions of the criminal code. However, for purposes of that prosecution, you need the consent of the attorney general.\(^{10}\) The attorney general was not prepared to give his consent; not because he was not otherwise sympathetic with the concerns and, indeed, the anguish of Holocaust survivors, he very much was, but because he felt that that section of the criminal code was unenforceable and that a prosecution would lose.

Undaunted, Citron found another section of the Canadian criminal code, used only once in the history of Canada, which made it an offense for someone to willfully spread false news causing or likely to cause racial or religious intolerance.\(^{11}\) And so, the prosecution of Mr. Zundel for Holocaust Denial dissemination proceeded under section 177 of the criminal code, while at the same time, in Alberta, Mr. Keegstra was prosecuted by the Alberta attorney general, under the criminal code provisions prohibiting the dissemination of hate propaganda.\(^{12}\)

I should explain the criminal-law framework regarding the dissemination of hate propaganda. We have the Canadian Human Rights Act,\(^{13}\) which in effect prohibits the dissemination of hate propaganda. We've got similar provisions under the Customs Tariff Act,\(^{14}\) and under the Canada Post Act,\(^{15}\) and more recently, group defamation legislation was developed in the provinces of British Columbia and Manitoba\(^{16}\) which permit civil suits by groups that have been the victims of hate propaganda.

Second question: What differences were there in the two cases? The differences resided very much in the different parts of the criminal code under which each was prosecuted. As I indicated, under section 177 of the criminal code, a prosecution for willfully spreading false news does not require the consent of the attorney general; the hate propaganda provision does. Section 177 has no defenses. The hate propaganda provision has four express defenses, which is one of the reasons why the attorney general in Ontario felt that the section was unenforceable. In the Zundel case, the main issue was

---

\(^9\) Canada's Hate Propaganda Act, R.S.C. ch. C-34, § 281.1–3 (1st Supp. 1970) provides in relevant part:

(1) Every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace, is guilty of

(a) an indictable offense and is liable to imprisonment for two years . . . .

(2) Every one who, by communicating statements, other than in private conversation, willfully promotes hatred against any identifiable group is guilty of

(a) an indictable offense and is liable to imprisonment for two years . . . .

\(^{10}\) Id. § 281.2(1), (2).

\(^{11}\) Id. § 281.1(3).

\(^{12}\) Id. § 177 (1970). This statute provides: “Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offense and is liable to imprisonment for two years.”


Holocaust Denial dissemination, and only subsidiarily the International Jewish Conspiracy. In _Keegstra_, the main issue was the International Jewish Conspiracy, and only subsidiarily Holocaust Denial.

Since Zundel was a commercial publisher who was involved not only in the dissemination of such material in Canada itself, but was also the primary exporter internationally, the issue of Canada's obligations under international law to prohibit this kind of exportation became relevant. In the United States, which is not a signatory to the international covenant on civil and political rights, this would not be an issue.

Finally, I think there's a difference in the context of the two cases. Zundel was a commercial publisher. But Mr. Keegstra was a high school teacher. He had been teaching his hate propaganda for some twelve years in an Alberta high school to a captive audience of high school students.

Third question: Could the courts have taken judicial notice of the existence of the Holocaust as a historical fact? As many of you know, judicial notice is a principle of evidence; courts are authorized to take judicial notice of matters which are common knowledge and about which reasonable people would agree. One would have hoped, indeed argued, therefore, that the Holocaust is at the very least such a matter. One might draw a disturbing inference if judicial notice of the Holocaust was not taken: Maybe the Holocaust isn't a matter of common knowledge and it is not a matter about which reasonable people would agree. Two constitutional courts of West Germany have held that the Holocaust was _Offenkündig_, that is, a matter that was obvious. And the courts did not permit the matter of the existence of the Holocaust to be debated. I would add that in every case in the United States or elsewhere, which involved suspected Nazi war criminals, there have been findings of fact about the Holocaust. Courts could use those very cases with respect to taking judicial notice of the existence of the Holocaust as an historical fact.

Query: Why then didn't the court in either the Zundel or the _Keegstra_ case take judicial notice of the Holocaust? I suspect that it had to do with, or was not unrelated to, the manner and timing of the motion for taking judicial notice as presented by the Crown prosecutor. In other words, the Crown prosecutor in the _Zundel_ case asked the court to take judicial notice of the existence of the Holocaust as an historical fact, after he had let in prosecution evidence and just before the defense was to enter its case. I think that at this point the court, perhaps properly, felt that it would deprive the defense of the right to a fair trial and hearing if the motion were granted. However, if at the onset of the trial the Crown prosecutor had asked the court to take judicial notice, the court might have done so.


18 _The Canadian Law Dictionary_ states:

The existence and truth of matters of which a court of law requires no proof are said to be taken judicial note of. These are such matters as Acts of Parliament and Provincial Legislatures, the constitution and course of nature, main geographical features, official documents duly authenticated. In general it covers matters so "notorious" that a production of evidence would be unnecessary, since the law presupposes a judge and jury to be acquainted with them. 

Second, it was a jury trial. And because the jury had a responsibility for finding a fact, it is arguable that the judge taking judicial notice would have preempted the role and responsibility of the jury. Finally, it was the manner in which the motion was made. It neither introduced nor relied upon any comparative jurisprudential authority.

It is possible, ironically enough, that if the court had taken judicial notice of the Holocaust, it may well have resulted in Zundel's acquittal because the only thing that the jury would have had to resolve was whether Zundel had a reasonable belief that the Holocaust had never occurred instead of whether in fact the Holocaust did or did not occur. And I don't think that a jury in Toronto, Ontario, or in Alberta was prepared to find itself in a situation where it rendered a verdict of acquittal whose inference, in effect, would be that the Holocaust never occurred. It would be different if the court had taken judicial notice. Then the only inference that could be drawn was that he had a reasonable belief, rather than that the Holocaust did not occur. Because the trial was unprecedented, one could say that the Crown was not only unprepared for, but in a certain way outmaneuvered by, the defense. The government of Ontario authorized only one Crown attorney to handle the case. At the same time, the case became, in effect, an international convention for the Holocaust Denial movement. Every Holocaust Denial person, whether from Sweden, France, England, or the United States was there, and indeed, many of them were admitted as expert witnesses in the trial. The defense lawyer for Zundel developed an expertise in terms of Holocaust Denial litigation, having represented all of these people, whereas the Crown attorney's only experience was with breaking-and-entering cases and this was the first case he had ever handled involving Holocaust Denial litigation.

Finally, I'll close with the issue of free speech. The Canadian Charter of Rights and Freedoms, in section 2, provides a comprehensive guarantee for free speech, whose express language is even broader than the language of the first amendment. It states that free speech is protected in the following way: Freedom of conscience and religion; freedom of thought, opinion, belief, and expression; freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association.

So you can see a rather comprehensive protection of what are called fundamental freedoms in section 2 of the charter. At the same time, Canada, unlike the United States, has built up a rather comprehensive regime that limits the dissemination of hate propaganda, criminal, administrative, civil, and the like. So you have here the makings for what in fact was a collision between the prohibition of the dissemination of hate propaganda and the free speech protection of the charter. In a preliminary inquiry prior to the actual trial itself, the constitutional objection raised by defense counsel was that the hate propaganda provisions under which both Zundel and Keegstra were prosecuted were an infringement of the free speech provisions. The court held that it was the other way around: the genre of hate propaganda did not belong to constitutionally protected speech, and therefore was not classifiable as protected speech to begin with.

---

20 The first amendment provides: "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." U.S. Const. amend. 1.
Interestingly, the Court of Queens Bench and Alberta relied upon that principle in the *Chaplinsky* and *Beauharnais* cases here in the United States, to state that there are certain classes of speech whose prevention and punishment have never been a cause of constitutional concern — e.g., libel, and by analogy, hate propaganda.

Finally, as Professor Herbert Packer has said, the criminal sanction is uniquely coercive and uniquely hazardous and thus should be reserved for things that really matter. I therefore agree that it should be a final resort for dealing with the dissemination of hate propaganda. I would also agree that other approaches should first be addressed — e.g., education. We should try to ensure that the Holocaust is taught in the schools so we don’t get into an issue of Holocaust Denial or we should require in the licensing of teachers a specific prohibition with respect to Holocaust Denial teaching. I think we should proceed in Canada under our federal and provincial anti-discrimination legislation rather than criminal sanctions.

The advantages to legislation are: The anti-discrimination legislation is civil rather than criminal, it is administrative rather than adversarial, it does not give the accused the kind of platform he gets in a criminal trial, and the complaint is carried by a Human Rights Commission rather than the political trial that can be developed by the accused. In my view, the whole question of bringing suspected Nazi war criminals to justice is inextricably bound up with the whole question of Holocaust Denial in this sense: Every time we bring a suspected Nazi war criminal to justice, we repudiate by the legal process the Holocaust Denial movement. Conversely, every time we abstain, for whatever reason, and do not bring suspected Nazi war criminals to justice, it allows the inference to be drawn that if there were no criminals, it’s because there were no crimes. And, indeed, this is what Zundel did in his trial. At one point in the trial, he said: “Well, since there are no crimes, it must be as well that there are no criminals.” And I think the way to repudiate Zundel is to say: “Yes there are criminals and it’s because there were crimes.”

---

21 *Chaplinsky* v. New Hampshire, 315 U.S. 568 (1942). Chaplinsky, a Jehovah’s Witness, denounced organized religion while proselytizing on the streets of Rochester, New Hampshire. Despite a city marshal’s warning that the crowd was getting unruly, he continued his activities. When a disturbance occurred, he was taken to the police station. As he was being led away, Chaplinsky called the city marshal “a God-damned racketeer” and “a damned Fascist.” He was convicted by the state court under a statute that banned “address[ing] any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place.” The United States Supreme Court held that these words did not warrant first amendment protection. The Court stated that such utterances are no essential part of any exposition of ideas, and 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 572.

22 *Beauharnais* v. Illinois, 343 U.S. 250 (1952). Beauharnais was convicted under a state statute prohibiting the manufacture, publication, or exhibition in a public place of any publication portraying “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 . . . to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . . .” *Id.* at 251. The Court affirmed his conviction, holding that defamation of groups may be unprotected by the first amendment in the same way as is libel of individuals; see Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 916 (1978) (questioning the vitality of *Beauharnais*).

23 As Professor Packer stated:

> The criminal sanction is the best available device we have for dealing with gross and immediate harms and threats of harm. It becomes less useful as the harms become less gross and immediate. It becomes largely inefficacious when it is used to enforce morality rather than to deal with conduct that is generally seen as harmful.

Mr. Tishler: For those of you who don't know, Irwin, when he was president of the Canadian Jewish Congress, was active in the development of some of the legislation to which he is referring. We're grateful to him for his contributions and for his continuing contributions in this field. Also, obvious to all of you, very active and hardly remaining within academic walls is Alan Dershowitz who will follow.

Professor Alan Dershowitz: I am not going to talk about the first amendment, because I'm not a positivist and because I get bored by thinking about how five mediocrities in robes may ultimately resolve a given issue. I want to talk instead about freedom of expression in the broadest sense of that term. I want to make a strong pitch for why courts and governments should never be allowed to be arbitors of truth; should never be allowed to be arbitors of whether a particular historical event occurred or didn't occur. I am categorically opposed to any court, any school board, any governmental agent taking judicial notice about any historical event, even one that I know to the absolute core of my being occurred, like the Holocaust. I don't want the government to tell me that it occurred because I don't want any government ever to tell me that it didn't occur.

I want to tell a little story. A few years ago, I was in Madrid debating a Soviet lawyer about anti-semitism. I took out some anti-semitic material published in the Soviet Union and I said to him: "Isn't this a disgrace to the name of Lenin who was against anti-semitism that your government should allow this material to be published?" He was very well prepared and he took out some anti-semitic material from his briefcase published in the United States and he said to me: "My comrade, tell me isn't this worse?" And I looked at it, and I said: "Yes, it's worse in one respect, but I want you to look at it and tell me if yours isn't worse in another." And he looked at it and he smiled and the audience looked at it and they smiled and they understood what was happening. In the bottom right hand corner of the Soviet material was a stamp that said approved by Glovlet, the Soviet censorship agency. There was no similar stamp on the American anti-semitic Nazi propaganda; it just said distributed by the Nazi Party, Hoboken, New Jersey. The United States Government took no position. It simply said: We will allow ourselves to be the printing press of the world; we will allow anything to be published. And I am here to oppose censorship of anti-Holocaust material even though I know it hurts, I know it causes pain, and I know that somebody who suffered the Holocaust can have no worse feeling than having been looked in the eye by somebody who says it didn't happen.

I remember sitting in a meeting with Elie Wiesel and others when we were discussing the Mermelstein case and whether the ADL or the AJC should get involved. Elie looked at me with a tear in his eye, and said: "I don't want any court to make decisions

24 Mel Mermelstein, an Auschwitz survivor, sued the Institute of Historical Review when they reneged on their offer to pay $50,000 to anyone who could prove that Jews were gassed at Auschwitz. The case was settled when the Institute agreed to pay the $50,000 plus $100,000 for Mermelstein's pain and suffering caused by the revoked offer. See, e.g., N.Y. Times, July 25, 1985, at A12, col. 4.

25 Anti-Defamation League of B'nai B'rith. Its purpose is "[t]o stop the defamation of Jewish people and to secure justice and fair treatment to all citizens alike." 1 Encyclopedia of Associations 1289 (21st ed. 1987).

26 American Jewish Congress; composed of "American Jews opposed to all forms of racism and committed to the unity, security, dignity, and creative survival of Jews in Israel, the USSR and wherever they may be threatened." Id. at 1551.
about my existential being. I have to make that decision for myself. It's not for the
government to do.” Historical events evolve and unfold in very complicated manners.
The Holocaust may not have happened exactly the way we think it happened. The
detention of Japanese-Americans in concentration camps may not have happened ex­
actly the way we or the Japanese communities think it happened. Slavery may not have
happened exactly the way we think it happened. Apartheid may not operate exactly the
way we think it operates. The Marcos regime may not have operated exactly the way we
think it operated. Every one of those events is far more complex than the romanticized
version makes it seem in later history. The Holocaust was full of complexity. It was full
of cynicism. It was full of heroes. It was full of devils. It was full of heroes on the
German side. And devils on the Jewish side. It was full of extraordinary complexities.
The Holocaust itself was a metaphor. What does it mean? It's a word for inOamed and
gulfed. It's not even a word that one can give precise meaning to. In
fact, if one looks
at what the revisionists are saying, the smart ones aren't saying the entire Holocaust
didn't occur; they're looking at very specific aspects of it. And invoking research and
invoking typical lawyers' cross-examination tools to say it didn't happen exactly the way
you say it happened. It didn't happen like in the movie Judgment at Nuremburg. It didn't
 happen like in the movie Shoah. It didn't happen in that way because a complex
historical event which took place over a long period of time can never be encapsulated.
So what are we to do? What are we to take judicial notice of? If Irwin is right that we
should take notice only of things about which reasonable people can't disagree, then we
would only be able to take judicial notice of some parts of the Holocaust. Certainly not
the number six million; that was an approximation. Certainly not the fact that all Jews
were gassed in the way that movies suggest that they were because it was far more
complicated than that. There were phases, there were stages. There were times when
Jews were killed in less systematic ways and times when Jews were killed in more
systematic ways. The very issue of whether or not we should litigate the Holocaust creates
for me a very uncomfortable situation. Here I am, sitting in front of you and acting, in
effect, as a defender of those with whom I most fundamentally disagree and whom I
despise. And yet, it is important to explain that no matter how obvious a historical event
is to us, no government should sit in final historical judgment over its parameters, its
boundaries, and its truth.

Just for one second, consider an analogy we all know about: the Japanese detention. We all
know how simple it was: The bad guy Americans came and they rounded up
these terribly innocent people of whom there was no suspicion of espionage and we kept
them in concentration camps where they suffered, fighting and struggling to get out the
entire period of time. It's a wonderful historical saga. It just doesn’t happen to be entirely
true. The truth is so much more complicated. Some Japanese-American leaders coop­
erated with the detention. Kiyoshi Hirabayashi30 and Toyosaburo Korematsu31 were

28 Paramount (1985). “[This] 9 1/2 hour documentary on the destruction of European Jewry
during World War II opened [in May 1985] to the acclaim of critics who have called it ‘a masterpiece’
and ‘a monument against forgetting.’” N.Y. Times, May 2, 1985, at C91, col. 1. For reviews, see
29 See supra note 7.
30 Kiyoshi Hirabayashi was an American of Japanese descent who challenged a curfew imposed
31 Toyosaburo Korematsu challenged the detention of Americans of Japanese descent. Kore­
dissidents within the Japanese community who were ostracized for fighting. The various choices available to the Japanese–American were very complex.

J. Edgar Hoover, the ironic hero of the Japanese detention, was against it. It was a liberal proposal. J. Edgar Hoover said: “No, I don’t have to detain all Japanese–Americans. Just give me the choice and the discretion to pick out the few dangerous ones and I’ll figure out what to do with them.” And some traditional community leaders responded by saying: “No, no, no, don’t take our male leaders who can protect us in the event of anti–Japanese sentiment in this part of the country. If we have to go, let us go as families together.” In fact, the birth rate went up, the death rate went down. Truck farming broke up. Some of the Japanese–American success in this country can even be attributed to this very evil scheme.

I am a categorical, unequivocal opponent of what happened during the Japanese detention. But I would not, under any circumstances, make it a crime to tell the story I just told. Nor would I make it a crime to go to the West German cemetery at Bitburg where SS soldiers are buried. N.Y. Times, May 4, 1985, at A6, col. 4.

And so, what’s the result of this? The result of this is that we have to tolerate a great deal of very annoying, very uncomfortable, very erroneous, very wrong–headed lies. Many of them are, in fact, lies.

I just want to end with two questions. The interesting epistemological question, the one that becomes converted into a legal question both for Irwin and me is: How does a group turn a crackpot, damnable lie, which the broadest of anti-Holocaust view is, into a reasonable revisionist argument capable of being called the dissenting view? That’s the epistemological question we have to confront and answer. We have failed in this issue insofar as the people who have made these claims can call themselves revisionists. We have failed because we refuse to confront them in the marketplace of ideas. We have spent too much time trying to close their stalls down without spending enough time realizing that their point of view is going to get out. Let’s answer and let’s prepare for it. Instead of putting the Holocaust on trial in Canada, we should have engaged in the kind of educational endeavors that Irwin was talking about.

Let me just quickly list five or six brief areas where I think the discussion should eventually focus. There are differences between defending the rights of anti-Holocaust material to be published, and joining with the publishers. We all know that Noam Chomsky, to his eternal disgrace, wrote an introduction to a book by a so-called intellectual named Faurisson who denied the existence of the Holocaust.32

Incidentally, I finally discovered what an intellectual was a few years ago, when I got in the mail an invitation to be included in the International Who's Who of Intellectuals for $25. That was for paperback; it was $75 for hardcover. It said, if you can't use it, pass it on to a friend. I'm sure Faurisson had it passed on by a friend.

The second level might be the politics of Holocaust Denial. Pat Buchanan33 has finally, in his long lifetime, found one minority that he can support — Nazi war crimi-

32 R. FAURISSON, MEMOIRE EN DEFENSE (1980).
33 President Reagan's White House Director of Communications, appointed in February 1984, who has been highly criticized for repeatedly writing the phrase, "sucumbing to the pressure of the Jews," on a piece of paper at a meeting at which Jewish leaders were advising the President not to go to the West German cemetery at Bitburg where SS soldiers are buried. N.Y. Times, May 4, 1985, at A6, col. 4.
nals. He has made a career of it. He is their man in the White House. Two LaRouche people getting nominated on a platform which includes anti-Holocaust preaching.

The next level is that of teaching academic respectability: Whether or not a teacher should be allowed to teach that the Holocaust didn’t exist. And I tell you Irwin, with all due respect, that if you start licensing teachers and making them take a loyalty oath as to whether they believe the Holocaust existed, the next step is going to be people being given equal academic time for the other position. A government must be agnostic. Even a teaching government must be agnostic in these situations. The marketplace of ideas simply has to be allowed to operate even at the school level.

At the next level is television and radio, regulated by the FCC. As you know, a radio station is owned in Kansas by a group of Nazis who preach hate propaganda and have gone too far. They actually gave the names and addresses of various Jewish organizations and explained how you can point a gun and shoot into their windows. Now their licenses are up for revocation.

The next step is marches, like the marches in Skokie. Obviously we’ve heard much about that. After that comes neo-Nazi training camps, and caches of arms. All protected within our ridiculous law involving possession of guns in this country — but nonetheless protected.

And finally, even when the Nazis actually kill, as they have a radio talk show host and others, there are civil rights problems. Those Nazis weren’t charged with murder. They were charged instead with violations of the Racketeering Influenced and Corrupt Organizations Act, a statute that makes conspiracy laws seem like a paradigm of civil liberty and narrowly drawn statutes. So, everywhere we come into confrontation with political groups, we run into difficulties with civil liberties.

I want to end by simply saying I know my view is not a pleasant, happy one, but I want you to imagine sitting in a room like this in a country, not ours, at a time, not now, and hearing a group of people, not us, but perhaps Croatians, nationalistic or others, sitting here and talking about whether we should ban discussion of the Holocaust as libel. Because, inevitably, if the government can say the Holocaust occurred, then another government somewhere, sometime, can say it didn’t occur. And I want that to be left to truth. From my experience, government is one of the worst judges of truth.

Buchanan has been criticized for a meeting that he had on June 26, 1985, dealing with the restoration of United States citizenship to Arthur Rudolph, a rocket scientist, who is accused of Nazi war crimes. See N.Y. Times, Oct. 17, 1985, at D27, col. 1.

Lyndon LaRouche is the founder of the U.S. Labor Party which includes Zionist groups and Jews in its analysis of conspiracies. For a summary of LaRouche’s background and of his pro-Nazi sentiments, see Montgomery, U.S. Labor Party: Cult Surrounded by Controversy, N.Y. Times, Oct. 7, 1978, at A1, col. 3, A16, col. 1; Montgomery, One Man Leads U.S. Labor Party on Its Erratic Path, N.Y. Times, Oct. 8, 1979, at B1, col. 1, B5, col. 1 (describing LaRouche’s swing to anti-Semitism). See also N.Y. Times, May 2, 1983, at A18, col. 1 (“His literature . . . devotes far more space to . . . support for anti-Zionism in a form that is hard to distinguish from anti-Semitism.”).


Gary Lee Yarbrough, a member of the neo-Nazi group, the White American Bastion, murdered Denver radio host Alan Berg. See N.Y. Times, Dec. 15, 1984, at A8, col. 1.


Mr. Tishler: Alan, you've articulated a difficult and unpopular position very well, and you've generated a lot of questions.

I think Arthur Berney is going to suggest there's another perspective to this. Arthur, like Alan and Irwin, has been active well beyond these walls and is active in a number of civil rights organizations including the Lawyers Committee for Civil Rights.

Professor Arthur Berney: There were two things that Alan said that were very disturbing to me. One is that the U.S. government should take no position on this question. That's very much, to my mind, like saying that the U.S. should take no position on the segregation of races in this country. The U.S. government is not just a negative force. The other thing that bothered me was Alan's statement that you have to be able to tolerate these rather annoying and uncomfortable matters. I think these things are more than annoying and uncomfortable.

To deny a people their history is to deny them the most essential element of their group existence. It is always a precursor to the subordination, diminishment, and ultimately the destruction of a people. When the slaves were brought to this country, part of the enslavement process was to destroy their history. Once that history was destroyed, it took a couple of centuries for the blacks, as a people, to revive themselves. This is very, very serious stuff. Not annoying, not uncomfortable. It's more than that. When Elie Wiesel speaks out for the survivors, as a survivor, he has a perfect right to say: "I will not bring a suit; I will not be involved in it." But he has no right to speak out for other survivors who may very well say: "I would like to be able to bear witness and to confront the people who are lying about our existence." And sure, lawyers can do the sort of thing that Alan just did about truth. Truth is a very complex, detailed matter that can be seen in many different ways. But then, there are "big lies" and grand truths, too. And when the grand truth is being denied and undermined, you've got to confront that in the only way that you can, and that is in a political fashion. That is where the government does have some kind of an obligation.

Speaking of his enemy, Sam Goldwyn was reputed to have said: "Don't pay any attention to him. Don't even ignore him." The Jews and other groups in this world have learned that this is not an acceptable way of dealing with this kind of distortion of history. It is just unavailing.

I don't agree with what the Canadians have done, at least with respect to imposing criminal sanctions. On this much I agree with Professor Dershowitz. But that's because you are putting the prosecution into the wrong hands. It ought to be left up to the people who have suffered or who are the survivors of the survivors, relatives of the survivors, the people whose existence is in jeopardy and has been challenged, so to speak. It is their right to bring suit, should they see fit.

Now, I don't think you need a dissertation on American law. The bottom line is that the Beauharnais case, which was relied on by the Canadian court, was a group libel case and has generally been characterized as no longer the law of the United States, and maybe that's right. It was a criminal prosecution, and I think Judge Skelly Wright is probably right in saying that it has spawned no progeny and it has been more and more barren of subsequent opinions.

It's not my position that the Beauharnais case, with respect to group defamation, was not a violation of the first amendment. I think there is a very serious first amendment consideration. But I want to talk to you about another case of which you may not see
the immediate relevance, *Runyon v. McCrory.* In that case, the question was whether section I of the Civil Rights Act of 1866, which prohibits racial discrimination in the making and enforcement of private contracts, applied to a private school which discriminated on the basis of race. The Court, resting on the thirteenth amendment — which doesn't involve a state action requirement — essentially said that Congress could prohibit race discrimination by private schools that held themselves open generally to the public. But in the same opinion, it felt compelled to say that the case did not involve a challenge to the subject matter which is taught at any private school. Thus, the school remains free to inculcate whatever values it deems desirable. Parents have a first amendment right to send their children to schools, Alan, that promote the belief that racial segregation is desirable. I call that judicial schizophrenia. And why I call it that is because it seems to me that it is incongruous to take the position that governmental institutions and educational institutions fulfilling a public function may not practice racial discrimination but may inculcate the children or allow the inculcation of the children with racially discriminatory doctrines. The first amendment should not protect the promulgation by educators of the doctrines of racial hatred. Now where does that leave my professed first amendment concerns? Why do I say that I am also interested in protecting first amendment values? My answer comes from what the government has done in other contexts. And I'm just going to cite two other cases.

One of them is the *United States v. O'Brien.* In *O'Brien,* we had a situation, demonstrations against the Vietnam War with this fellow getting up on the steps — I don't know where it was, was it in Boston? — and burning his draft card as a symbolic act to try to tell people: "This war is terrible and you should not allow yourself to be drafted." Congress, in response to this kind of activity, had previously passed a new law that made such symbolic speech subject to five years imprisonment. The Supreme Court of the United States said that the government in this instance had a legitimate interest to protect: the running of the war. Therefore, the "incidental limitations" on the first amendment were justified according to the Supreme Court. For what purposes? For running a war that was not going to be overthrown even if this person convinced many people? And even if it could be overthrown; isn't that the democratic process? Here was a person talking about the government and saying that the government is doing something wrong. That's where first amendment interests count most and should be especially protected. But the Court preferred the governmental interests to the first amendment exercise of a dissident.

Let us compare what happened in Skokie. The proposed Nazi march was not a speech alone but actions, demonstrations, the wearing of symbolic uniforms, yet the courts, up to the Court of Appeals said: "First amendment; symbolic speech; no imminent harm." Yet the harm was much more imminent than the harm to the war machinery involved in *O'Brien.* By imminent harm, I do not mean the sort of thing that some of the people in Skokie were talking about, that is, breaches of the peace. I don't

---

41 Civil Rights Act of 1866, ch. 31, 14 Stat. 27.
consider that to be comparable to the serious imminent harm of psychic trauma that was imposed on a group of identifiable people. This is the harm that courts have traditionally and appropriately been concerned with. So when you compare a case like Collin** (Skokie) with a case like O'Brien, you understand that the United States government's interest in each case is very different, and that what government does is protect that about which it cares the most.

Let's just quickly run through a couple of things that the first amendment doesn't seem to get in the way of. Seven dirty words, broadcast on a radio station. That's out!

Professor Dershowitz: Why? The mediocrities in robes!

Professor Berney: What's the harm? Who is hurt? Obscenity as a general category, out. It is not protected under the first amendment. Personal reputations, Gertz,45 etc., out. Not protected or protected only in a qualified way. And then there are other things like marketplace supports or trade secrets. You can't expose trade secrets. That's going to hurt somebody's pocketbook. You can't engage in false labeling — after all, someone may misspend a dollar twenty-nine or whatever.

I'm not saying that those things are not reasonable regulations. What I'm saying is that we protect a whole lot of less serious harms than what we're talking about today without concerning ourselves with first amendment interests. Is there any first amendment absolutist who is going to say: "Well, the hell with all of that too? The first amendment should apply so that all of those other interests — trade secrets or consumer protection, etc. — are thrown out." I think the answer to that is — no.

My final and most important point is: What is at stake here? I think this is political speech, and therefore, it does deserve a kind of core protection. But, as O'Brien teaches, not all political speech is protected. Maybe we need to get into a little more refinement about what political speech deserves full protection and what doesn't. Where does this speech catch on? To whom is it directed? I think we have to ask questions like that.

What happened in Illinois, recently, with the election of the LaRouche candidates, is instructive. Usually, groups and individuals who are frightened, insecure, and resentful

---

**The facts are well known. Frank Collin, leader of the National Socialist Party of America, a self-proclaimed Nazi organization, planned a march for May 1, 1977 to be held in front of the Village Hall in Skokie, Illinois, a predominantly Jewish neighborhood. The Seventh Circuit affirmed a district court decision holding unconstitutional three local village ordinances designed to stop the march. The ordinances that were struck down had (1) prohibited the dissemination of literature designed to promote racial tension, 578 F.2d at 1207, (2) enabled the village government to deny march permits based on the village's belief that the participant's would disseminate controversial literature and (3) prohibited the assembly of members of a political party clothed in military garb. Id.

45 In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court, in a 5-to-4 decision, held that the protective sweep of the rule of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), did not insulate a magazine publisher from liability for defamation of a private citizen. 418 U.S. at 352. The plaintiff, a lawyer, had represented a claimant in his suit against a Chicago policeman. Id. at 325. The magazine falsely accused the attorney of framing the officer and of being a "communist fronter." Id. at 325-26. In refusing to extend the New York Times rule, which shields publishers from liability for defamation of a public official absent actual malice, the Court rejected the magazine's claim that the original suit against the officer constituted sufficient public interest. Id. at 352.
are the groups in which this kind of hate campaign takes hold. It is no fluke that LaRouche candidates won in the farm counties of Illinois.46

It is also no surprise that the Klan is on the rise in Indiana. Those people are in economic trouble and they are scared and resentful. Scapegoating, divisiveness, and hate-mongering is a time-honored way of diverting reaction away from political reform.

Consider the paradigm case of Hitler’s rise during the Great Depression. Consider the stirring of racism in the South in the post-reconstruction period, the heading-off of the populist coalition, a political movement which included both blacks and whites. This was dangerous to the establishment. The establishment, therefore, is interested in having a first amendment doctrine that says: No lawsuits, no rights against hate-mongering and racial vilification. Maybe the establishment or government has a stake in a certain amount of racist divisiveness.

If you don’t think these tendencies are encouraged by those in power through the kinds of cases that I’ve made reference to, then ask why so many politicians display racist signals. Everyone knew what certain politicians meant when they began talking about law and order. Or how it is that busing becomes a special word that loses all of its real meaning and becomes a slogan? Or consider the ethnic jokes that Secretary Butts made and the sexist remarks that Vice President Bush made after the debate with Geraldine Ferraro about “kicking ass.”47 What is that, other than a manifestation of insecurity with respect to a challenge by a woman; a demonstration in a few words to so many people across the country that the male order will be maintained.

When the law says such hate-mongering is protected speech, we may be reinforcing the wrong messages. Most of this sort of thing we must tolerate in a free society. But when the harms are really egregious, my conclusion is that you have to let the real free marketplace operate, and if people feel that they have been aggrieved to their very core, then they ought to have a cause of action; a civil remedy. Free speech should not mean speech without cost.

Mr. Tishler: I think all of you share with me the belief that we’ve heard three absolutely first-rate and provocative presentations. There’s certainly substantial truth in each one of them. Actually, Arthur’s close gives me an opportunity to explain to you about the Mermelstein case.

Very, very briefly, Mr. Mermelstein is a survivor of Auschwitz, living in California. The Institute for Historical Review promised in its magazine, which was disseminated across the United States, to pay $50,000 to anyone who could prove that Jews were gassed at Auschwitz. Now, I stood at Auschwitz last summer next to survivors and I know Auschwitz existed. And you probably know, perhaps not on such personal knowledge, but you know that Auschwitz existed. You can imagine what Mermelstein’s reaction was, how outraged he felt. Mermelstein accepted the offer. There was preliminary skirmishing that went on with respect to whether or not the Institute for Historical Review really wanted to carry this out. But ultimately, the issue was joined. Mermelstein submitted an affidavit, and the Institute for Historical Review refused to pay. Mermelstein brought suit, not only for breach of contract, but for intentional infliction of emotional distress, among other torts. Representing him was an attorney who spoke

---

46 See supra note 36.
within the last six months at a regional Anti-Defamation League conference here in Boston, Michael Maroko, who did an absolutely first-rate job. In addition to obtaining a judgment against the Institute for Historical Review and against the Liberty Lobby, the discovery process in the case unearthed the basis, the financial, and the academic credentials of the people who had founded the Institute for Historical Review; it was responsible for its nonexistence now, and for discrediting the Liberty Lobby, an actively anti-minority, anti-semitic Holocaust Denial organization.

The two important points about the Mermelstein case to remember are first, the court in California, pursuant to a provision of the California Civil Code, which is replicated in every state of the United States including Massachusetts, took judicial notice of the Holocaust, and second, took judicial notice specifically that the Jews were gassed at Auschwitz, without any further proof. Parenthetically, I disagree with Alan. It seems to me that this is a different issue than the free speech issue and involves different considerations.

But apart from my differences with Alan on the point, as a matter of trial strategy, is Eli Rosenbaum still here? Eli was describing to me when he was with the Office of Special Investigations, a deportation and denaturalization hearing at which he and the other prosecutor decided, in spite of the judge's willingness to take judicial notice of the Holocaust, to prove it. In other words, it might have strategic value in a particular case. The problem is, what level of proof do you go to after the last survivor has died?

Well, in any event, we have the first precedent in the United States directly on point. The other aspect of the case is that in lieu of going to trial, the defendants agreed not to pay $50,000, but $150,000 in damages, including punitive damages. And substantially all of the money has been paid to Mermelstein, who promptly donated it to a Holocaust-education foundation. So here we have, to my knowledge, the only precedent of its kind in the United States — very important, very concrete, very practical — providing a remedy, a civil remedy, for an injured party who had specific privity, if you'll excuse that word — a direct connection with a Holocaust Denial organization.

The more difficult question is the one our panelists will address now: What happens when you get away from that one-on-one relationship? What happens to the survivor not as articulate as Elie Wiesel reading a newspaper article that says that his parents and his children and his brothers and sisters never perished in the gas chambers. That it was all a hoax.

Well, Irwin, this is probably a good setting for your rebuttal.

Professor Cotler: I think that many of us, as we grew up, may remember the refrain: "Sticks and stones may break my bones but words will never harm me." I think we have learned that this may not be the case; that speech can hurt, that words do maim, that many of us have felt the pain in being targets of group vilification either as blacks, Jews, Asians, and the like. And I think, in this sense, the notion of freedom of expression must also connote what I would call freedom from certain kinds of expression. Now, this might be said to beg the question; what are these certain kinds of questions? This gets me back to what Alan said in an interview this afternoon, as well as to part of his

---

48 The Liberty Lobby is a right-wing group which opposes federal aid to education, foreign aid, "unfair" foreign competition, E.R.A., and civil rights, and supports a free gold market, an end to forced busing, and repeal of the seventh and twenty-fifth amendments. The group styles itself "pro-individual liberty and pro-patriotic." 1 Encyclopedia of Associations 1303 (21st ed. 1987).
remarks. That law, as you put it, is flexible; it should be a flexible, evolving kind of concept.

Professor Dershowitz: You left out the last part. On the subject of the cumulative capital of civil liberties.

Professor Cotler: Exactly. Responsive, as you put it, to the felt necessities of the time à la Justice Holmes. That if the U.S., therefore, were to capture a Libyan terrorist and bring him here, a U.S. court today would exercise jurisdiction. That we should not, to use your terms, be encapsulated in rigid formulae. And I assert that we should not be encapsulated in the rigid formulae of absolutist first amendment doctrine. But, to use your language, we should engage in reasonable balancing.

The question then becomes: What is the reasonable balance at that point with the intellectual spirit of civil liberties and the felt necessities of the time? I suggest to you that what the Canadian courts and Parliaments and their reports refer to as a critical mass of hate propaganda, of which the Holocaust Denial may be the most pernicious of examples, is an example of some of those felt needs.

The question then is: How does one make some kind of determination in accordance with the intellectual capital of civil liberties? Now, I would agree with you that freedom of speech is the most fundamental of our rights. It’s at the core of our democratic process and at the core of our self-determination and human dignity. But I would also think that it is not an absolute right. The question then becomes, what kind of criteria can one suggest? I suggest that the Canadian Charter of Rights and Freedoms has a section which applies to all of the rights and freedoms in the Charter, which is a kind of framework of inquiry for this purpose. It guarantees the rights and freedoms set out in it, subject only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society. And the government or authority, in order to invoke the benefit of this section, must satisfy this four-pronged test that a limitation must be reasonably prescribed by law, demonstrably justified in a free and democratic society. Now, I suggest to you some questions to allow the kind of determination of a reasonable balancing approach to be done.

I would say all of these things have to be taken together in order to arrive at that judgment. One, does this speech constitute an assault on the inherent dignity and worth of the human person whose very utterance results in substantial harm or injury to the target group? Two, does it threaten not only the inherent dignity of the human person, but the equal worth of all human beings? I suggest to you that freedom of speech must be read together with an equality of rights and not abstracted from it. Three, does it undermine the principle of multiculturalism? In our Canadian Charter of Rights and Freedoms, it says that the charter shall be interpreted in a manner which not only preserves but enhances the multicultural heritage of Canada. Hate propaganda may be said to be a derogation of that multicultural heritage. Four, is it in accordance with our domestic obligations under international law? Canada has it. The U.S. does not have it, in my view, to its discredit. Five, is it an essential part of any exposition of ideas or search for truth, taking this out of Beauharnais and Chaplinsky, or is it of such slight social value that any benefit that is derived from it is otherwise outweighed by the social interest in

---

*See supra note 19.*
order and morality? Six, is it in accordance with principles and policies in other free and
democratic societies?

We conducted a study in Canada which showed that sixteen other free and demo­
cratic societies have prohibitions against hate propaganda. The United States is the only
one of those free and democratic societies that does not have it. To conclude, the Charter
instructs the courts to look at what international law prescribes, and not simply at
American absolutist first amendment dogma. And finally, how does it accord with what
might be called *jus gentium* in Canada as to what is involved in protected speech?

My second proposition was that freedom of expression must include freedom from
certain kinds of expression; it cannot be an absolute notion. There has to be a balancing
test, as Alan suggested. But when you use that balancing test, and when you use this
criteria, you cannot come to a conclusion with respect to the felt needs of the time now
that there are certain genres of hate propaganda that may be excludable in terms of
protected speech, to resolve the judicial notice issue. What Alan was concerned about
was the government laying down principles regarding judicial notice.

First of all, the principles of judicial notice are evidentiary notions. And in the law
of evidence, within the category of judicial notice, is a category called Historical Facts.
If the courts are able to take judicial notice of other historical facts, then why can't they
take judicial notice of the Holocaust as historical fact?

Second, it would be a particularly disturbing inference to suggest that the courts
cannot take judicial notice of the Holocaust as historical fact. Because, as I said earlier,
this would allow the inference that the Holocaust never occurred.

And finally, it's not government telling us what to do, it's courts engaged in findings
of fact. And this is not a denial of history. This is a denial of a crime.

**Question:** I have two questions. One is for Irwin Cotler. Canada's false news law, section
177 of the Canadian Criminal Code, is rooted in ancient statutes dealing with *scandulum
magnatum* — libels on peers and officials enacted during the reigns of Edward I and
Richard II. The law was enacted to avoid discord between the King and people of the
realm. Many have criticized the use of this law in the Zundel case and question whether
it should ever be used again because of its broad terms. I want to know whether you
think that law has any future or whether it should be used again in future prosecutions.

**Professor Cotler:** I must admit that I have advocated the repeal of that law. I think that
that particular law is not an appropriate mechanism for prosecutions of hate propaganda
disseminations. I think that the provision we should have used for such prosecution
couldn't be used because the consent of the attorney general is needed. Therefore,
section 177 had to be used. The fact that it may be a relic from Henry VIII, however,
does not necessarily mean it cannot be used to respond to the felt necessity of the times.

**Question:** Do you think Zundel will be upheld on appeal?

**Professor Cotler:** Well, the appeal is going to be argued in October, 1986, and the issue is
going to be free speech. I think that both the Zundel and Keegstra decisions will be upheld
on appeal because, unlike in the United States, there has been a growing body of
precedent which says that hate propaganda legislation is a reasonable limitation prescribed by all the mouths of justice in a free and democratic society.50

Professor Dershowitz: Hold it. We have had three speeches taking a view for suppressing speech. We've then had one rebuttal of my view. And two questions directed at my view. It's not only unfair . . . This free speech is being denied.

It really makes a point because the next step to denying people the right to claim the Holocaust didn't exist is denying advocates of their position the right to defend them and to defend their position and I really think that it's very important that a minority view, both on this panel and this audience, be given an adequate opportunity to respond.

Irwin ended his point by saying denial of the Holocaust is not only denial of history, but denial of a crime.

Professor Cotler: I knew that was going to get a rebuttal.

Professor Dershowitz: If I couldn't deny crimes, I'd be out of business as a criminal-defense lawyer. Irwin and I spent years and years denying the existence of a crime, a crime committed by Anatoly Scharansky according to the Soviet grand truth. Anatoly got additional punishment in prison for denying the grand truth, that he committed a crime. Irwin, with his usual brilliance, came up with six criteria for balancing. And I submit to you that every one of those criteria for balancing would justify, in many parts of this country, a speech that advocated abortion. If you conceive of the fetus as a human being, everybody who advocates abortion would be denying every one of those principles of law. Because, in the end, the worst truths are grand truths. Let's think about what some of the grand truths, to use Professor Berney's phrase, have been over time. Women belong in the home. Boy, that was a grand truth! That was a truth that was recognized for years and years. Jesus is God. Jehovah is God. The earth is the center of the universe. The grander the truth, the bigger the lie most often. Segregation is bad. That's a grand truth today. Segregation is good. That was a grand truth a few years ago. I don't want the schools teaching segregation is bad or segregation is good. I want the schools to teach as much as possible so that students can make up their own mind about that. And it's no analogy to say, as Professor Berney did, that because we can prohibit segregation, we can prohibit somebody who said that slavery didn't exist. There is an enormous difference between prohibiting actions and prohibiting advocacy prohibiting speech. Denying a people their history — there's a difference between bringing the slaves over here, which surely denies them their history, and somebody getting up and making an absurd speech saying, "hey, the slaves were happy on the plantation. It was a recreational facility. People enjoyed being slaves. I don't know what all this fuss about affirmative action is in this country. What do we have to be ashamed of? We rescued those barbarians from the trees and we brought them here." Despicable, disgusting speech. I do not want that speech banned by any government; I want to be able to answer that speech.

We recently brought a law suit on behalf of a guy named Terzi, the head of the PLO, because the State Department would not allow me to debate him. I want to debate

50 Professor Cotler was wrong with regard to the Zundel case. See supra note 7. If the government retries the case, however, he may ultimately be proved right.
that guy because I want to kick his ass in a debate. I don't want the State to deny me the right to beat him in a debate and I don't want the State to deny me the anti-Holocausters in a debate.

It was stated when I came up here today that I would state an extreme view, and that the moderate view would be presented by Professor Berney. I thought that Professor Berney's view was the most extreme advocacy of a system of censorship that I've heard in a long time because, in the end, if you take his views seriously, what he says is that you should be able somehow to prohibit the wrong message. You should have the real marketplace of ideas subject to it being expensive to speak. If you take the implications of his speech to their logical conclusion, he would ban dirty jokes, he would ban sexist statements, he would ban racist statements, and of course, anti-semitic statements.

Remember, deep down everybody wants to ban something. A couple of years ago, women at Harvard suggested that Playboy be taken out of the Harvard Law School library because it was offensive to many women. I circulated a memo saying it's a wonderful idea, but it should be generalized. Everybody in the Harvard community should be able to remove from the library one genre of material that is offensive to them. I would probably go with U.N. documents and then the remaining few books could be put in a file cabinet somewhere and Widener could be turned into squash courts. The squash courts would benefit us all. In the end, there is no way of creating these kinds of principles. The principle stated both by Professors Berney and Cotler are wonderful principles if Berney and Cotler administer them. But the principles go wild when Jerry Falwell, who really speaks for the majority of this country, starts administering them. When Andrea Dworkin starts administering them. When President Reagan starts administering them. When Warren Burger starts administering them. When Edwin Meese starts administering them. Or when William Kunstler starts administering them.

I don't care whether it's the right or the left or the center which starts administering these kinds of principles or rules. There is nobody in this room who isn't smart enough to use those principles to ban the particular genre of speech that most offends them.

I want to end with the worst first amendment principle, to show why I have no respect for the way the courts administer the first amendment. And that's the principle that was talked about earlier in the O'Brien case, the incidental impact on the first amendment. There is no piece of speech that can't be banned today without taking that to its illogical, absurd conclusion.

The most recent decision was the zoning law on pornography. Justice Rehnquist, another champion of speech and fundamental freedoms of expression, writes an opinion saying that the town folks of Renton could zone movie theaters into the swamps if they showed x-rated films. They said they weren't trying to regulate content. You'd think maybe they'd care that there was pornography and x-rated movies being shown. How foolish of you. They were concerned only with the environmental impact on the residential area. Sure it had an incidental impact on speech. But that was only incidental! We're all clever enough to manipulate these doctrines to ban whatever it is we want to ban. Today it's anti-Holocaust material, tomorrow it's something else. And in the end, the choice is between a system of censorship, whether it's civil, criminal, administrative, or judicial, and a basic trust in the ability of the citizens to choose what they want to believe and what they want to reject. I'm for trust.

---

Mr. Tishler: I just wish you'd take a firm position on something, Alan.

Professor Berney: All of the grand truths that Alan mentioned were truths that had to do with passing judgments, about expressing opinion. I think there has to be a way out of the philosopher's closet — the ability to be able to say that we can draw lines between fact and opinion, and that when you do start talking about fact, there is a general and public interest in holding people to the truth. There is a difference, for instance, between saying Jews poison wells and charging certain Jews with poisoning the Love Canal.

In every litigation, in any context, the truth is the measure. We don't always achieve it; we don't always discover it. As Alan can probably demonstrate in any number of recent trials, the truth may have been distorted and the wrong judgment may have been reached. And that is possible in these cases, too. That's the risk that you would be taking. But the answer is that truth is a value, too.

Statements about whether women belong in the home are not facts. That is a "grand opinion," and it is a controlling kind of opinion over society. And the best way that society can make determinations about its opinions is by subjecting them to open challenge. Government should have absolutely nothing to do with all of those other kinds of "truths." Facts and opinions do merge, but they remain distinguishable concepts.

Alan talks about governmental prohibition. Where is the prohibition in what I am suggesting? I am not saying: "Put these people in jail." I am not saying: "Shut their mouths." I am not saying: "Ban their speech," partly because I think that would be futile, but also because I think it would be wrong. I am saying if they want to take these positions, then let them be challenged like anyone else, in any number of different contexts, in a lawsuit.

With respect to the question of the slippery slide, all I can say is that I believe that the entire history of law could be described in terms of reasonable line drawing. And reasonable lines can be drawn here as in any other area.

I think that we do give the wrong message; the wrong official message. And here's where the real governmental influence comes in. There are remedies for false advertising and sanctions against offensive pornography. But none for Holocaust Denial. I think it's too easy for the government to put this kind of question aside and say: "This is where we will demonstrate that we are purists on first amendment grounds." I am concerned that the government's real message is: "We don't really care that much about these kinds of wrongs."

Mr. Tishler: This really has been a first-class debate. Arguments and analyses of this depth with responsiveness back and forth have not been published anywhere. Those of you who'd like to stay, let me take this question and then we'll do it as democratically as possible.

Question: I understood you to say that the Mermelstein case provided a new precedent. I am confused because the Mermelstein case was brought under basic contract and traditional tort causes of action, and I didn't see any new precedent there at all.

Mr. Tishler: What was the injury to Mermelstein? Did he have to go the hospital for it?
Question: Emotional distress.

Mr. Tishler: Of what kind?

Question: Severe emotional distress.

Mr. Tishler: But how did it manifest itself?

Professor Berney: Let me just interject one thing in terms of the kinds of things you're talking about. Roman law had a cause of action for outrage. Maybe this is the sort of thing you're talking about.

Professor Dershowitz: Well, if it established a precedent, it's a terrible precedent, and I hope that cartoonists and editorial writers will continue to outrage politicians and public figures. It is my stock and trade to be outrageous, and I want to continue to outrage and I don't want anybody to be able to sue me because I outrage people — because I'm going to continue. I can afford to continue to outrage people, but a lot of people who stand on the corner with truth, outrageous truth, will be deterred from the marketplace of ideas if you allow the deep pocket to sue the small pocket for outraging them.

Question: But what was the cause of action?

Mr. Tishler: The damage to Mermelstein was never tried. The case was settled. But he alleged no physical harm, and in many states, including California, psychic injury is enough. But here, there were no allegations of even psychic injury — psychic in the sense of manifesting itself in connection with seeing a psychiatrist. Ultimately, that was brought into the case. Here, his initial cause of action was that he was offended — and I think "outraged" actually was used as a descriptive word — that his piece of history could be so maligned. Would you like to continue?

Question: I just think that it was brought under traditional tort and contract law. I don't think there was any precedent established.

Question: I agree that there was no precedent established, but if there was one it would be that the tort of intentional infliction of emotional distress does not have to be directed towards a specific person. Traditionally, it's always directed towards a specific person.

Actually, the case is much narrower. It was essentially the Carbolic Smoke Ball case.52 The offer basically was I would give you a reward if you can prove what I'm offering.

52 Carlill v. Carbolic Smoke Ball Co., 2 Q.B. 256 (1893). The Carbolic Smoke Ball Company offered a reward to any person who contracted influenza, colds, or any disease caused by cold after using their product, the Carbolic Smoke Ball, three times daily for two weeks. Mrs. Carlill used the product as directed and contracted influenza and applied for the reward. When the company refused to pay, she filed suit. The court held that there was a contract, which by its nature did not require notice of acceptance, and that consideration had been given. The company was ordered to pay the reward.
Mr. Tishler: That was the contract count. And I think, Ruti, you were going to point out that that was the connection between the parties, the plaintiff and the defendant here, in terms of the tortious conduct. Unfortunately, there wasn't an opportunity to fully adjudicate the case and to have some nice dictum with respect to whether or not other persons offended by the ad itself, who didn't respond to it necessarily, would have a cause of action.

Professor Dershowitz: Well, I'm glad the case wasn't litigated because he probably would've come and asked me to do the appeal for him and I would've done it. I would've won.

Let me tell a brief story that some people may be too young to remember, but, in a town right near Skokie, called Cicero, Illinois, Martin Luther King took a deliberate walk through Cicero with his arms around a white woman. He did it for one reason and one reason alone. He wanted to provoke outrage in the segregationist northern Cicero, Illinois community to show the rest of the world, to provoke in the rest of the world outrage, so that what would be seen was that there is deep pervasive racism in the North as well as in the South. It sent a powerful message. It outraged the people of Cicero. Martin Luther King was right. The Nazis who marched in Skokie were wrong. The government can't make judgments of right or wrong, it cannot distinguish between Martin Luther King walking through Cicero and a Nazi group walking through Skokie. I submit that those judgments are impossible for governments to make. But governments can make distinctions between very broad judgments of whether a Holocaust existed and an attempt to prove in court that a particular person committed a particular act of murder against a particular individual or group of individuals on a given day. Or broader judgments that he participated in the movement of trains between such and such a city at such and such a place at a particular time. Of course, that can be proved by due process of law standards applicable to a particular proceeding. But we're talking about making it a crime or a tort to make a statement about a broad historical event. When it comes to teaching, of course that's the toughest issue, we do teach values in our schools. We do teach about sexual values. We do teach about religious values. We do teach about historical fact. We teach that Columbus discovered America on a particular day. We teach that the Renaissance began on a particular morning. We teach absurdly to our students because we oversimplify. And my point is not that we should demand that teachers teach that the Holocaust occurred or that we should demand that they teach it didn't occur. The process of education is very complicated. If you want to ask a direct question: Would I take a book out of a public school library, which for good reasons the public school committee wanted to put in, which raised questions about the existence of the Holocaust? No, I would not. I would not as a parent, I would not as an educator, and I would not as a constitutionalist. I think that for every reason of policy, it is a good thing to have in a school.

Ms. Ruti Teitel: Yes, but with the book we don't have a captive audience. It's not the same thing as Martin Luther King.

Professor Dershowitz: Yes, but with Martin Luther King you had a captive audience, too.

Professor Cotler: I think this discussion has been an interesting exercise in what I call comparative jurisprudence. In other words, you can't really abstract law or legal process from the legal culture in which it reposes. When I was listening to Alan's litany of villains
and mediocrities on the bench, I was saying to myself, I'm not sure I'd advocate the same position, if I was an American living within the American legal culture. Each culture sets up its own organizing idioms and I can identify very briefly six that make Canada's a distinguishable legal culture. One, the emphasis on the equality of rights in relation to fundamental freedom. Two, what we call in Canada, a domestic *jus gentium* that's been built up over time concerning the prohibition of hate propaganda. Three, the ethic of multiculturalism as distinct from the ethos of the melting pot. Four, the injunctions; we're looking at other free and democratic societies in our jurisprudence. Five, our obligations under international law. And six, the Canadian precedents built up over time which now include, at least at the first trial level, *Chaplinsky*, *Roth*,55 *Beauharnais*. So you have here, collectively speaking, features that are distinguishable in the Canadian legal culture.

Finally, we are a parliamentary system. You say we should trust the citizens, and in a parliamentary system where the Parliament is, in effect, the representative of the citizenry and not representative of process. Then, in effect, you trust the Parliament. If you can't trust them, you throw them out. But really what we are talking about in this prohibition against the dissemination of hate propaganda are not arbitrary and capricious hand-downs from above, but really the enactment of legislation from below, by way of minorities petitioning governments for redress of grievances and saying over a time we want that legislation because these words are maiming and because they're even worse than "sticks and stones."

*Professor Dershowitz:* And they only win when they get a majority to support them.

*Question:* I would like to raise a question that is somewhat separate. In my study of the Nazi period, we realized that some of the main perpetrators or culprits of the Holocaust itself were people with law degrees. If they had not had lawyers in Nazi Germany, even though Hitler didn't like them, much of this would not have happened.

*Mr. Tishler:* I knew it would come to this.

*Question:* The point is something called professional self-discipline. In other words, on what level would this panel advocate disciplining lawyers who disseminate such obvious lies knowingly in courtrooms. Everyone has the right to a defense. I understand that. But that propaganda was a key element in the Canadian case. If speech by persons on street corners or by "intellectuals" in journals published in Southern California or on Long Island cannot be prohibited, fine, but cannot this fine profession that you represent, I am a member of it . . .

*Professor Dershowitz:* I don't represent it.

*Professor Henry Friedlander:* Can they not discipline their own members?

*Mr. Tishler:* Let me refine your question. I think we would all come up with the same answer if you asked it at that level of generality.

Professor Dershowitz: What would that answer be?

Mr. Tishler: We would not. Are you saying, for example, that an attorney who represented the Institute for Historical Review in the Mermelstein case ought to have been disciplined?

Professor Friedlander: Mr. Butz at Northwestern\(^4\) was not disciplined, erroneously in my opinion, by his university even though people are fired for all kinds of absurd reasons. But because he's an electrical engineer, his business is really something else. But there is a general opinion that if a historian would espouse these ideas, it would be reason for a tenure hearing, not because of freedom of speech, but because of professionalism.

Mr. Tishler: Are you speaking about lawyers as substantive exponents of denial of Holocaust Denial and whether they should lose membership in the bar — something of that nature rather than representing clients?

Professor Friedlander: You correctly represent my question.

Mr. Tishler: Well, I can only cite to you the Massachusetts precedent of lawyers who are about to be disciplined if they cannot certify that they've paid their Massachusetts income tax. A very bad precedent. I don't think that I can concur with that. Arthur, why don't you respond.

Professor Berney: I happen to think that those kinds of internal disciplines are inappropriate for all of the first amendment reasons that Alan Dershowitz talks about. I'm not interested in curtailing anybody's first amendment rights. And no matter how often I say that, Alan wants to ignore it and turn it into a matter of banning and prohibiting. That is not what anybody is saying. The closest that he has come to addressing my position is that if speechmaking is made expensive, then you're going to be cutting off some speech. You're going to have a chilling effect on some speech. That is true. But that's not a ban. And if the speech is very important, it will find in the marketplace the kinds of support that it needs.

To repeat, I'm not saying anything about banning or prohibiting, and I would not therefore agree with the kind of things that have been suggested with respect to throwing people out of the academy or disbarring lawyers who take such positions. All I'm saying is that if you have deliberately, intentionally attempted to cause grievous harm, then our system should allow for some kind of compensation if the victim can prove harm. The first amendment, as the libel cases suggest, is not an absolute bar to that. There are other interests that have to be weighed very carefully. The speech that really matters the most in a democracy is the speech that is directed at the government; speech that challenges the authority. That sort of speech I would be interested in protecting absolutely. That's not what we're talking about here. Here, we're talking about two sets of individual or group interests. These private interests must be balanced.

Now I want to put one question to you, Alan.

\(^4\) A. Butz, supra note 3 (claiming that the Holocaust never occurred).
Professor Dershowitz: And then I want to put one to you.

Professor Berney: All right. Would you outlaw false advertising? Would you outlaw divulgence of trade secrets?

Professor Dershowitz: Well, you say "would I?" Certainly you're right in what the first amendment does today, and I think some of these are very hard questions. There is a problem that a truth has been established — cigarette smoking causes cancer — and, in effect, the cigarette industry has been denied their right to deny that truth through television advertising, to deny it on the carton of cigarettes. There are problems with that. I do think, in general, commercial advertising which is designed largely to sell a product is very different. We're talking about governmentally supported speech and I can give you an analogy to that. In the Soviet Union, if we adopted your laws, a Jew who advocates Zionism would be open to a civil suit because Palestinians and Arabs would say that this is the most fundamental denial of their history, of their people, or of their nationhood. Zionism in the Soviet Union is as evil a private wrong as one could have. And imagine a situation where every time someone advocated Zionism he could be sued civilly and made to pay substantial damages by an extremely unsympathetic court with a sympathetic plaintiff who is invoking a grand truth. And there is no grander truth in the Soviet Union than that Zionism is racism. Since racism is, after all, hateful propaganda, we would get to exactly the same result.

And so, I urge you when you think about these things, don't think about them in the context of what our belief system is today. Think about them when Jerry Falwell or Pat Robertson is President.

Mr. Tishler: Let me conclude by amending my answer to an earlier audience question. I've reflected further on it and I was wrong. I was wrong in my answer but not in the statement or the overstated I made about the Mermelstein case being a historic precedent. I think that's right. I think it's a historic precedent, at least to my knowledge as limited as that might be, because it establishes the principle that the tort for intentional infliction of emotional distress can be brought for an intentional misrepresentation of a specific historic fact. We tend, I think, in listening to Alan's very persuasive remarks, to extrapolate from the comparison with the Soviet Union and Zionism as racism is a useful one. But remember that what we're talking about here, from a concrete, practical standpoint, is very specific misrepresentation of very specific, irrefutable facts.

Professor Dershowitz: Well, it is an irrefutable fact in the Soviet Union that the Jews forced the Palestinians out of their homeland. They have pictures to prove it and, if you put down twenty-five Soviet social scientists and fifty jurors and judges, the fact that the Jews expropriated Palestinian land is as much a fact as the fact that there was a Holocaust. Facts are not something that you can show on a video tape. It is a fact in the Soviet Union, I have heard it, I have been there, I've debated and discussed it. They think my view about what happened in the Middle East is preposterous, absurd. The most outrageous statement. And I have to tell you something, a lot of students in the United States of America believe them! And fifty years from now, we may live in a time when the Zionist perspective on history is going to be regarded as factually wrong, outrageous,
and insulting. It happened in England, it has happened in universities in Sweden, it's happened in the Soviet Union, and it could happen here.

Mr. Tishler: Well, at the risk of prolonging the debate, I'll end it by simply pointing out that there are facts which are objectively, extrinsically, demonstrably, and empirically unassailable. And the Holocaust is one of them. Thank you, everyone.

Professor Dershowitz: I wish you were right.