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## Undeniably Difficult: Extradition and Genocide Denial Laws

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# UNDENIABLY DIFFICULT: EXTRADITION AND GENOCIDE DENIAL LAWS

## INTRODUCTION

Denial is often considered the final stage of genocide.<sup>1</sup> This is due to the alarming frequency of denial and skepticism that appears to immediately follow the physical killings.<sup>2</sup> No act of genocide in the past one-hundred years has been without its subsequent doubters, detractors, or outright deniers.<sup>3</sup> The quintessential example of this phenomenon is the denial of the Holocaust — the murder of millions of people, approximately six million of them Jews, in Europe during the Second

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<sup>1</sup> Gregory Stanton, *The Eight Stages of Genocide*, GENOCIDE WATCH (1998), <http://www.genocidewatch.org/aboutgenocide/8stagesofgenocide.html>. A briefing paper by Gregory Stanton was presented to the United States Department of State in 1996 outlining the “Eight Stages of Genocide” which expressly includes denial as the eighth stage. In Stanton’s view, the proper response to genocide denial should be outright prosecution. *Id.* The eight stages of genocide are said to be (1) Classification, (2) Symbolization, (3) Dehumanization, (4) Organization, (5) Polarization, (6) Preparation, (7) Extermination, and (8) Denial. *Id.* This has now been updated to include ten stages of genocide, which further includes Discrimination and Persecution as stages. Gregory Stanton, *The Ten Stages of Genocide*, GENOCIDE WATCH 2 (2013), [http://www.genocidewatch.org/images/Ten\\_Stages\\_of\\_Genocide\\_by\\_Gregory\\_Stanton.pdf](http://www.genocidewatch.org/images/Ten_Stages_of_Genocide_by_Gregory_Stanton.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> See generally *Past Genocides and Mass Atrocities*, UNITED TO END GENOCIDE (2016), <http://endgenocide.org/learn/past-genocides/> (last visited Feb. 7, 2017) (surveying several events in recent history generally considered genocides); see also *Genocide Denied*, FACING HISTORY & OURSELVES (2016), <https://www.facinghistory.org/holocaust-and-human-behavior/chapter-11/genocide-denied> (last visited Feb. 7, 2017) (surveying genocide denial). For detailed analyses of instances of denial of several genocides in the last one hundred years, see generally Tim Arango, *A Century After Armenian Genocide, Turkey’s Denial Only Deepens*, N.Y. TIMES (Apr. 16, 2015), [https://www.nytimes.com/2015/04/17/world/europe/turkeys-century-of-denial-about-an-armenian-genocide.html?\\_r=0](https://www.nytimes.com/2015/04/17/world/europe/turkeys-century-of-denial-about-an-armenian-genocide.html?_r=0) (detailing denial of the Armenian Genocide); James Oliver, *On Holodomor Denial, and Fisking a Denialist Russian Professor of History*, EUROMAIDAN PRESS (Dec. 17, 2014), <http://euromaidanpress.com/2014/12/17/on-holodomor-denial-and-fisking-a-denialist-russian-professor-of-history/#arvlbdata> (detailing modern denial of the Holodomor); *Holocaust Denial*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/resources/glossary-terms/holocaust-denial> (last visited Feb. 7, 2017) (detailing Holocaust denial); Faine Greenwood, *Cambodia Passes Law Banning Genocide Denial*, PUBLIC RADIO INT’L (June 7, 2013, 6:35 PM), <https://www.pri.org/stories/2013-06-07/cambodia-passes-law-banning-genocide-denial> (detailing political issues in Cambodia around Cambodian Genocide denial); Gerald Caplan, *Rwanda’s Genocide: First the Deed, then the Denial*, GLOBE & MAIL, (Mar. 13, 2007), <https://www.theglobeandmail.com/opinion/rwandas-genocide-first-the-deed-then-the-denial/article722068/>. (detailing Rwandan Genocide denial); David Rohde, *Denying Genocide in the Face of Science*, ATLANTIC (Jul. 17, 2015), <https://www.theatlantic.com/international/archive/2015/07/srebrenica-massacre-bosnia-anniversary-denial/398846/> (detailing Bosnian Genocide denial).

World War by Nazi Germany and its collaborators.<sup>4</sup>

The phenomenon of post-genocide denialism has gained worldwide scholarly attention.<sup>5</sup> Gregory Stanton, professor of Genocide Studies and Prevention at George Mason University, produced a renowned report in 1996 laying out the “eight stages of genocide”<sup>6</sup> for the U.S. Department of State. In that report, Stanton assigned *denial* as the eighth stage of genocide, and recommended the proper punishment for genocide denial to be criminal prosecution.<sup>7</sup> Indeed, most nations of the European Union (as well as Israel and Russia) criminalize Holocaust denial.<sup>8</sup> Despite the threat of criminal prosecution, however, Holocaust and genocide denial have taken on a cult-like following of their own on the internet.<sup>9</sup>

Denialism of atrocities including the Rwandan Genocide,<sup>10</sup> the Armenian Genocide,<sup>11</sup> the Cambodian Genocide,<sup>12</sup> and others<sup>13</sup> is also

<sup>4</sup> *Introduction to the Holocaust*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/learn/introduction-to-the-holocaust>; see also Michael Berenbaum, *The Uniqueness and Universality of the Holocaust*, in *A MOSAIC OF VICTIMS: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS* 20, 20 (Michael Berenbaum ed., 1990).

<sup>5</sup> See, e.g., Paul Behrens, *Genocide Denial and the Law: A Critical Appraisal*, 21 BUFF. HUM. RTS. L. REV. 27; see also Alexander Galitsky, *The Crime of Genocide Denial?*, INT’L POLICY DIGEST (Jul. 3, 2016), <https://intpolicydigest.org/2016/07/03/the-crime-of-genocide-denial/>.

<sup>6</sup> See Stanton, *supra* note 1.

<sup>7</sup> See *id.* “The response to denial is punishment by an international tribunal or national courts.” Gregory Stanton, *Genocide: The Cost of Denial*, GENOCIDE WATCH, <http://www.genocidewatch.org/aboutus/thecostofdenial.html> (last visited Feb. 17, 2018). “Denial harms the victims and their survivors . . . Denial harms the perpetrators and their successors . . . [and] Denial harms the bystanders.” *Id.* Stanton continues to comment on denial of the Armenian Genocide: “[Genocide denial] is what the Turkish government today is doing to Armenians around the world . . . [W]ithout such healing, scars harden into hatred that cripples the victim and cries out for revenge.” *Id.* This sentiment is an important reason that genocide denial is considered so offensive. See *id.*; see generally *Denial of Genocide, Psychology of*, in *ENCYCLOPEDIA OF GENOCIDE* 159 (1999).

<sup>8</sup> See *infra* Part I: Background and Issues.

<sup>9</sup> See Michael Curtis, *Holocaust Denial and the Internet*, COMMENTATOR (Feb. 21, 2014, 8:03 AM), [http://www.thecommentator.com/article/4745/holocaust\\_denial\\_and\\_the\\_internet](http://www.thecommentator.com/article/4745/holocaust_denial_and_the_internet) (detailing the rise of Holocaust denial on the internet); see also John T. Soma et al., *Transnational Extradition for Computer Crimes: Are New Treaties and Laws Needed?*, 34 HARV. J. ON LEGIS. (SPECIAL ISSUE) 317, 344 (1997) (“The United States’ liberal regulation of speech has resulted in extremist groups funneling information through the United States to other countries where tighter controls on speech exist.”).

<sup>10</sup> The events that are known today as the Rwandan Genocide occurred in 1994 during a conflict between two major ethnic groups in Rwanda, the Hutus and the Tutsis. *The Rwandan Genocide*, HISTORY.COM (2009), <http://www.history.com/topics/rwandan-genocide>. Ultimately, “[a]pproximately 800,000 Tutsis and Hutu moderates were slaughtered in a carefully organized program of genocide over 100 days . . .” *The Rwandan Genocide*, END GENOCIDE.ORG, <http://endgenocide.org/learn/past-genocides/the-rwandan-genocide/> (last visited Apr. 20, 2018).

<sup>11</sup> The Armenian Genocide was the systematic murder of approximately 1.5 million ethnic Armenians in the final days of the Ottoman Empire in 1915 at the hands of Turkish authorities. *The Armenian Genocide*, END GENOCIDE.ORG, <http://endgenocide.org/learn/past-genocides/the-armenian-genocide/> (last visited Feb. 17, 2018). This genocide is considered to be a precursor to the Holocaust, as Adolf Hitler later wrote, “[W]ho today still speaks of the massacre of the Armenians?” *Id.* This is an interesting reminder of the ravages of denialism, ignorance, and skepticism about genocide.

It remains the official national policy of the modern state of Turkey to deny that there was a systematic genocide of ethnic Armenians, *id.*, which continues to chill relations between Turkey and Armenia. *Id.* Merely discussing the Armenian genocide is outlawed in Turkey. *Id.* This also stymies the legislatures of other nations that have or are considering recognizing the Armenian genocide, lest they anger Turkey. See Alison Smale & Melissa Eddy, *German Parliament Recognizes Armenian Genocide, Angering Turkey*, N.Y. TIMES (June 2, 2016), [https://www.nytimes.com/2016/06/03/world/europe/armenian-genocide-germany-turkey.html?\\_r=0](https://www.nytimes.com/2016/06/03/world/europe/armenian-genocide-germany-turkey.html?_r=0).

12 The Cambodian Genocide occurred between 1975 and 1979 at the hands of the Communist Khmer Rouge regime against the Cambodian people. *The Cambodian Genocide*, END GENOCIDE.ORG, <http://endgenocide.org/learn/past-genocides/the-cambodian-genocide/> (last visited Feb. 17, 2018). According to End Genocide.org, “[i]t is estimated that between 1.7 and 2 million Cambodians died during the 4-year reign of the Khmer Rouge, with little to no outcry from the international community.” *Id.* In 2013, the government of Cambodia passed a law criminalizing denial of the Khmer Rouge’s genocide in Cambodia. Andrew Buncombe, *Cambodia Passes Law Making Denial of Khmer Rouge Genocide Illegal*, INDEPENDENT (June 7, 2013, 2:53PM), <http://www.independent.co.uk/news/world/asia/cambodia-passes-law-making-denial-of-khmer-rouge-genocide-illegal-8649701.html> (“Recently, Kem Sokha, deputy president of the opposition Cambodia National Rescue Party, claimed that exhibits at Tuol Sleng genocide museum, a former torture and interrogation centre from where 17,000 people were dispatched to their deaths, had been faked.”).

In the United States, certain academics and commentators have also questioned the reported facts surrounding the genocide in Cambodia. See Christopher Hitchens, *The Chorus and Cassandra: What Everyone Knows about Noam Chomsky*, 5 GRAND ST. 106, 118 (1985). Noam Chomsky, an American linguist and celebrated figurehead for left-wing and socialist causes, also cast some doubt on the Cambodian Genocide. *Id.* According to Journalist Fred Barnes, Chomsky thought that “tales of holocaust in Cambodia were so much propaganda.” *Id.* See generally *Intro to Chomsky*, SOCIALISTWORKER.ORG (May 15, 2008), <https://socialistworker.org/2008/05/15/essential-noam-chomsky>, for background information about Noam Chomsky.

13 See, e.g., David Rohde, *Denying Genocide in the Face of Science*, ATLANTIC (Jul. 17, 2015.), <http://www.theatlantic.com/international/archive/2015/07/srebrenica-massacre-bosnia-anniversary-denial/398846/> (information relating to the genocide of Bosnian Muslims and its subsequent denialism during the Yugoslav Wars of the 1990s). In his article, Rohde writes that “[The Bosnian Serbs] dismissed the annual commemoration [of the massacre at Srebrenica] as a ‘provocation’ also organized by meddling outsiders. They said the crowds were so large because ‘Western NGOs’ paid people to attend.” *Id.*

The conspiracy theories espoused in these charges are common in the world of genocide-denialism. See generally, *Kristallnacht: No Jewish Conspiracy*, HOLOCAUST DENIAL ON TRIAL, <https://www.hdot.org/debunking-denial/kn4-jewish-conspiracy/> (last visited Feb. 17, 2018). This is most pronounced with Holocaust denial, with very frequent invocations of anti-Semitic canards and conspiracy theories that bolster the denialism. *Holocaust Denial*, ENCYCLOPEDIA.COM (2007), <https://www.encyclopedia.com/religion/encyclopedias-almanacs-transcripts-and-maps/holocaust-denial>; also available at *Holocaust Denial*, AMERICAN-ISRAELI COOPERATIVE ENTERPRISE (2012), [https://web.archive.org/web/20160303204153/https://www.jewishvirtuallibrary.org/jsource/judaica/eju\\_d\\_0002\\_0009\\_0\\_09147.html](https://web.archive.org/web/20160303204153/https://www.jewishvirtuallibrary.org/jsource/judaica/eju_d_0002_0009_0_09147.html). In that article, it is written:

In most societies Holocaust denial is a fringe phenomenon, and is less about historical events and more about classical anti-Semitic conspiracy theories . . . . Most deniers allege that Jews made up [the Holocaust] to exact reparations or to justify the creation of Israel, and have fooled the world through alleged control of governments and the media.

*Id.* This is also indicative of the unique nature of *Holocaust* denial in particular in the world of bigotry and racism; Holocaust denial is a cornerstone of anti-Semitic vitriol in a way that is not always present in other types of atrocity denial such as the Cambodian genocide (wherein perpetrator and victim mainly belonged to the same Khmer ethnic group). See, e.g., *The Cambodian Genocide*, END GENOCIDE.ORG, <http://endgenocide.org/learn/past-genocides/the-cambodian-genocide/>; see Walter Reich, *Erasing the Holocaust*, N.Y. TIMES (Jul. 11, 1993),

quite common. Recognizing denial of the Rwandan genocide as a social ill, for example, the Rwandan government constitutionally forbids it.<sup>14</sup>

Similarly, the Holodomor, or “Great Famine” of Ukraine, an ethnic cleansing of the Ukrainian people by the Soviet Union beginning in 1933,<sup>15</sup> has fallen victim to widespread denialism.<sup>16</sup> Although several countries do not recognize Holodomor as a fully-fledged genocide, the Ukrainian parliament passed legislation in 2006 prohibiting the denial of the Holodomor as well as the Holocaust.<sup>17</sup>

Accordingly, several countries have enacted laws criminalizing genocide denial.<sup>18</sup> Crucially, the United States, Canada, and Great Britain do not have laws expressly or impliedly prohibiting genocide denial,<sup>19</sup> largely due to the strength of free speech principles within the legal

<http://www.nytimes.com/1993/07/11/books/erasing-the-holocaust.html?pagewanted=all> (declaring anti-Semitism the main cause of Holocaust denial).

14 Yakaré-Oulé (Nani) Jansen, *Denying Genocide or Denying Free Speech? A Case Study of the Application of Rwanda's Genocide Denial Laws*, 12 NW. J. INT'L HUM. RTS. 191, 192 (2014) (citing The Constitution [of Rwanda]; Law No. 33bis/2003, Repressing the Crime of Genocide, Crimes Against Humanity and War Crimes, art. 9, Official Gazette of Rwanda, Nov. 1, 2003; Law No. 18/2008, Relating to the Punishment of the Crime of Genocide Ideology, Official Gazette of Rwanda, Oct. 15, 2008).

15 The name “Holodomor” refers to the starvation of an estimated four to fourteen million Ukrainians through a man-made famine in Ukraine at the hands of the Soviet authorities in the late 1920s and early 1930s. See Alec Torres, *Ukraine's Genocide by Famine*, NATIONAL REVIEW, (Nov. 9, 2013, 9:00 AM), <http://www.nationalreview.com/article/363533/ukraines-genocide-famine-alec-torres>.

16 HOLODOMOR DENIAL, LIBRARY OF CONGRESS SUBJECT HEADINGS 8 (2012), (the “Holodomor denial” literature includes works that “diminish the scale and significance of the Ukrainian famine of 1932-1933 or assert that it did not occur”). Denial of the Holodomor is particularly common in Russia. See generally Paula Chertok, *History, Identity, and Holodomor Denial: Russia's Continued Assault on Ukraine*, EUROMAIDAN PRESS (Nov. 7, 2015, 6:18 AM), <http://euromaidanpress.com/2015/11/07/history-identity-and-holodomor-denial-russia-s-continued-assault-on-ukraine/#arv1bdata>.

Additionally, the BBC reported in 2013 that “Kiev and Moscow have clashed over the issue in the past,” and that “Russia in particular objects to the genocide label, calling it a ‘nationalistic interpretation’ of the famine.” *Holodomor: Memories of Ukraine's Silent Massacre*, BBC NEWS (Nov. 23, 2013.), <http://www.bbc.com/news/world-europe-25058256>. Plainly, then, genocide denial is very consequential in the world of foreign relations. Given the evidence that genocide denial underlays foreign relations between various nations, see *id.*; see Smale & Eddy, *supra* note 11, in the wake of refusing to extradite a genocide denier, it is reasonable to hypothesize that foreign relations between certain nations (e.g., Turkey and Armenia, see *infra* note 35) could be further chilled.

17 Peter Roudik, *Ukraine: Legislation Introduced on Criminalization of Holocaust Denial*, LIBRARY OF CONGRESS, GLOBAL LEGAL MONITOR (Sept. 27, 2013.), <https://www.loc.gov/law/foreign-news/article/ukraine-legislation-introduced-on-criminalization-of-holocaust-denial/>.

18 See generally Michael J. Bazylar, *Holocaust Denial Laws and Other Legislation Criminalizing Promotion of Nazism*, YAD VASHEM (2016), <http://www.yadvashem.org/holocaust/holocaust-antisemitism/articles/holocaust-denial-laws>; see also Jansen, *supra* note 14, at 192 (2014).

19 See Bazylar, *supra* note 18 (“These countries [without laws against denying the Holocaust] include the United Kingdom, Ireland, and the Scandinavian nations.”); see also *id.* (“[First Amendment protections] prohibit suppression of the Nazi message.”); see *id.* (“[A]ttempting to criminalize such denial [is] incompatible with Canadian guarantees of free speech.”).

traditions of those countries.<sup>20</sup>

A unique legal issue therefore arises with respect to extradition of defendants to face prosecution under genocide denial laws. In extraditing a defendant from one nation to another with incongruent laws, there will always be a balance of moral and legal imperatives: on the one hand, denying an extradition petition for a Holocaust or genocide-denying defendant to a nation forbidding genocide denial risks appearing to sanction or excuse denialism.<sup>21</sup> On the other hand, a grant of the petition to extradite that defendant to face prosecution under such laws would certainly pose its own legal, moral, and public policy concerns as an assault on freedom of speech.<sup>22</sup>

With respect to the United States, genocide denial laws could most likely never exist anywhere in America, as they would be a direct violation of Constitutional protections of free speech.<sup>23</sup> Although European nations like France do have strong traditions protecting free speech and press in their legal systems,<sup>24</sup> their perspectives on balancing the imperatives between free speech and curbing hateful speech are different than those in America; they are decidedly less libertarian.<sup>25</sup> The motivation behind

20 See U.S. CONST. amend. I (protecting freedom of speech); see Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.) § 2 “Fundamental Freedoms.”

21 In communities like Canada and the United States, for example, with significant communities of people fleeing or surviving atrocities, this option appears highly unacceptable. See generally *Holocaust Survivors: Rescue and Resettlement in the United States*, ENCYCLOPEDIA: JEWISH WOMEN’S ARCHIVE (Mar. 20, 2009), <https://jwa.org/encyclopedia/article/holocaust-survivors-rescue-and-resettlement-in-united-states>; see also Zi-Ann Lum, ‘Pay It Forward’: Canada Resettles Nearly 39,000 Syrian Refugees, HUFFINGTON POST (Dec. 24, 2016), [http://www.huffingtonpost.ca/2016/12/24/syrian-refugees-in-canada\\_n\\_13822554.html](http://www.huffingtonpost.ca/2016/12/24/syrian-refugees-in-canada_n_13822554.html).

22 U.S. CONST. amend. I (the prohibition of governmental curtailing of free speech; the federal government, and later expanded to include state governments, may not curtail free expression except for carve-outs specifically for such matters as slander, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), libel, *id.*, fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973), copyright violations, *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560 (1985), gag orders, etc.; but see *Gertz*, 418 U.S. at 340 (“There is no constitutional value in false statements of fact.” (emphasis added)); see also Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 69 (1997) (discussing the First Amendment implications of holocaust denial publications) (“Yet all Western democracies but the United States have laws prohibiting the dissemination of hate speech.”).

23 See U.S. CONST. amend. I (prohibiting governmental interference in free speech); see generally Lasson, *supra* note 22.

24 See, e.g., *Loi sur la liberté de la presse* du 29 juillet 1881, J.O. July 30, 1881, p. 4201 (outlining freedom of the press in France); see also Grundgesetz [GG][Basic Law][Civil Code] May 23, 1949, Bundesgesetzblatt [BGBI] 1-2, art. 5 § 1 (F.R.G.), translation at <https://www.btg-bestellservice.de/pdf/80201000.pdf> (German Basic Laws upholding freedom of speech).

25 See, e.g., Russell L. Weaver, Nicolas Delpierre and Laurence Boissier, *Holocaust Denial and*

genocide denial laws is not merely concern about distortions of historical fact. Holocaust denial, for example, has been frequently considered hate speech,<sup>26</sup> and is widely thought to be driven mainly by anti-Semitism.<sup>27</sup>

These legal conflicts are compounded by modern developments in communication technology and social media.<sup>28</sup> Unfortunately, the rise of the internet has exposed a grim picture of the popularity of genocide denial.<sup>29</sup> Despite the internet's utility and advantages, anonymity on the internet allows virtually complete impunity in spreading messages of hate and denialism.<sup>30</sup> This is especially problematic when the individual is computer and internet savvy.<sup>31</sup>

In Part I, this paper will examine the history and development of genocide denial, will examine genocide denial laws globally, and will introduce a brief survey of extradition laws and customs in the United States. In Part II, the paper will explore in greater detail the legal conflicts that arise from extradition petitions to common law nations for genocide deniers by prosecuting nations.<sup>32</sup> It will also explore current and past commentary on the matter, analogous situations that have occurred in Europe and elsewhere, legally related situations (denials of asylum requests, deportations), and the legal conflicts that arise therefrom. In Part III, this paper will then suggest means of mitigating some of the legal challenges arising from these conflicts with a focus on the United States.

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*Governmentally Declared "Truth": French and American Perspectives*, 41 TEX. TECH. L. REV. 495 (2009) (this paper explores the differences between the American and French jurisprudence on the matter of denial of the Holocaust and genocides); International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969) (requires signatory nations, of which the United States and Canada do not belong, to outlaw hate speech).

<sup>26</sup> Raphael Cohen-Almagor, *Holocaust Denial is Hate Speech*, AMSTERDAM L. F., Fall 2009, at 33, 35 ("Holocaust denial is a form of hate speech because it willfully promotes enmity against an identifiable group based on ethnicity and religion."); *see also* Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71 (1996); Walter Reich, *supra* note 13 ("The primary motivation for most deniers is anti-Semitism, and for them the Holocaust is an infuriatingly inconvenient fact of history.").

<sup>27</sup> Walter Reich, *supra* note 13.

<sup>28</sup> *See infra* note 38.

<sup>29</sup> *See infra* note 38.

<sup>30</sup> *See infra* note 38; *see* Bruce Schneier, *The Internet: Anonymous Forever*, FORBES (May 12, 2010, 6:00 PM), <http://www.forbes.com/2010/05/12/privacy-hackers-internet-technology-security-anonymity.html> ("Attempts to banish anonymity from the Internet won't affect those savvy enough to bypass it.").

<sup>31</sup> *See infra* note 38; *see* Schneier, *supra* note 30.

<sup>32</sup> These include, namely, the United States, Canada, and the United Kingdom. *See generally* Michael J. Bazzyler, *supra* note 18.

## PART I: BACKGROUND AND ISSUES

Instances of genocide denial are unfortunately as frequent as genocide itself.<sup>33</sup> Although genocide can be denied by a wide range of people,<sup>34</sup> genocide denial is often related to bigotry or ethnic tensions<sup>35</sup> or age-old canards.<sup>36</sup> Genocide denial is a personal insult to the memory of the deceased victims of genocide, to the survivors of genocide, and to the family members and descendants of either. It is a generalized insult to the various ethnic groups victimized by genocide. Moreover, it is an indignity to the truth and pursuit of understanding of history.

A recent increase in skepticism of denialism about the Holocaust<sup>37</sup> could be aided by the internet and the ease at which individuals wishing to remain anonymous can access certain web forums,<sup>38</sup> blogs, or “news” websites<sup>39</sup> devoted to denying the Holocaust.<sup>40</sup>

Obviously, there is a vast array of legal issues associated with policing free speech on the internet, especially if the websites are not officially or

33 See *supra* note 3.

34 See Israel W. Charny, *The Psychological Satisfaction of Denials of the Holocaust or Other Genocides by Non-Extremists or Bigots, and Even by Known Scholars*, IDEA: A JOURNAL OF SOCIAL ISSUES (July 17, 2001), <http://www.ideajournal.com/articles.php?id=27> (outlining “five categories of defense mechanisms” that “allow” scholars to participate in genocide denial).

35 See Sean Gorton, Note, *The Uncertain Future of Genocide Denial Laws in the European Union*, 47 GEO. WASH. INT’L L. REV. 421, 445 (2015) (“[T]hose who engage in genocide denial in the face of overwhelming historical evidence are, almost always, motivated by hatred in spreading such an ignorant message.”); see generally Ari Rusila, *The Armenian Genocide Still Denied by Turkey (and Azerbaijan)*, CAFEABEL (Apr. 27, 2013), <http://www.cafebabel.co.uk/arirusila/article/the-armenian-genocide-still-denied-by-turkey-and-azerbaijan.html> (“[Ninety-eight] years after the Genocide the present Turkish nation not only deny that its predecessors plotted and committed the Genocide, but also continues its anti-Armenian policy . . .”).

36 See *Holocaust Denial*, *supra* note 13 and accompanying text.

37 See *US Study Shows Global Increase in Anti-Semitism, Shoah Denial*, TIMES OF ISRAEL (May 20, 2013), <http://www.timesofisrael.com/us-study-shows-global-increase-in-anti-semitism-shoah-denial/>; see also Arutz Sheva, *Holocaust Denial up 77 Percent in Canada, Audit Reveals*, ARUTZ SHEVA (Apr. 28, 2013), <http://www.israelnationalnews.com/News/News.aspx/167532>.

38 See generally Jamie Doward, *New Online Generation Takes up Holocaust Denial*, GUARDIAN (Jan. 21, 2017), <https://www.theguardian.com/world/2017/jan/22/online-conspiracy-theories-feed-holocaust-denial>.

39 See, e.g., DAILY STORMER, <http://www.dailystormer.com/> (last visited Jan. 26, 2018) (a popular anti-Semitic and racist neo-Nazi website).

40 See generally *Holocaust Denial: An Online Guide to Exposing and Combating Anti-Semitic Propaganda*, ANTI-DEFAMATION LEAGUE (2001), <https://web.archive.org/web/20160421002819/WtadD4jwbIWhhttp://archive.adl.org/holocaust/introduction.html#.Wtp-U4jwbZk>. This phenomenon is also intimately linked with corrosive anti-Semitism and other forms of bigotry and or racism. See Reich, *supra* note 13; see also *Holocaust Deniers and Public Misinformation*, *Holocaust Encyclopedia*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007272> (last visited Feb. 18, 2018).

discernably sourced within a particular nation or region. This phenomenon is of greater consequence in recent decades with the expansion of, and greater access to the internet, which potentially presents legal issues relating to genocide-denial prosecution based on particular comments.

Holocaust denial on the internet is further complicated by laws criminalizing genocide denial. Despite the deep-seated diplomatic and social consequences of enacting such legislation, several countries during the twentieth and twenty-first centuries were motivated to enact them.<sup>41</sup> The motivation for these laws is multifold: some scholars claim that anti-genocide-denial laws are intended (“ostensibly”<sup>42</sup>) to prevent a reoccurrence of genocide,<sup>43</sup> while in most respects it appears that genocide denial laws in particular were enacted to combat hate speech;<sup>44</sup> for symbolic reasons; and or, in the case of Holocaust denial, to discourage the circulation of neo-Nazi or anti-Semitic conspiracy theories that serve to harm and re-traumatize the victims of the Holocaust or their families.<sup>45</sup>

Pertinently, author Marissa Goldfaden of New York University writes that “[t]o refute genocide is an attack on the psyche and morale of the society in which it occurred. It is an affront to the victims, both living and dead.”<sup>46</sup> Although this is an excellent summary of public motivation for outlawing genocide denial, a more nuanced analysis of the actual laws intended to prevent these consequences is needed.

There appear to be different overlapping categories of genocide denial

41 See *infra* notes 51 (Germany’s law), 47 (France’s law), 50 (Poland’s law), 63 (Israel’s law), 135 (Spain’s law), and 48 (Portugal’s law). See generally Bazzyler, *supra* note 18.

42 See *infra* note 43, at 192.

43 Jensen, *supra* note 14. Commenting on Rwandan genocide-denial laws in Rwanda, Jensen writes that “[t]hese laws are ostensibly intended to prevent a repetition of the events of 1994.” *Id.* at 192.

44 See Jenia Iontcheva Turner, *The Expressive Dimension of EU Criminal Law*, 60 AM. J. COMP. L. 555, 565 (2012) (outlining that a rise in right wing sentiments in Europe may have been the impetus to enact these genocide denial laws).

45 See Bazzyler, *supra* note 18 (“The aim of these laws is to prevent the resurrection of Nazism in Europe . . . .”); see also Cohen-Almagor, *supra* note 26, at 36 (“It is demeaning to deny the Holocaust for it is to deny history, reality, and suffering.”); see *infra* note 46.

46 Marissa B. Goldfaden, *An Argument for Outlawing Genocide Denial*, INQUIRIES JOURNAL (2009), <https://www.inquiriesjournal.com/articles/102/an-argument-for-outlawing-genocide-denial>. Further commentary on the motivations for genocide denial laws is provided from Paul Behrens of the University of Edinburgh. In the Buffalo Human Rights Law Review, he writes:

The significance of the harm principle as a rationale for the criminalization of denialism is manifested in several ways. For one, denialism has a direct impact on the surviving victims. [That may] include both psychological and physical damage. In all cases, however, denying or minimising the suffering of the victims targets the dignity of the survivors, and it appears appropriate in this context to consider such conduct akin to criminal insult.

Paul Behrens, *Genocide Denial and the Law: A Critical Appraisal*, 21 BUFF. HUM. RTS. L. REV. 27, 32 (2015).

laws. Some nations, such as France and Portugal, enacted Holocaust-denial laws in an attempt to combat racism, extremism, bigotry or expressions sympathizing with the perpetrators of genocide.<sup>47</sup> This is made clear in the statutes' use of words tending to speak to the state of mind of the offender.<sup>48</sup> By contrast, atrocity-denial laws in Poland<sup>49</sup> appear to be intended for broader dignitary reasons,<sup>50</sup> although the distinction is minor.

Genocide denial laws<sup>51</sup> are remarkably common. These laws are popular either in regions in which genocide took place (e.g., Poland and Ukraine),<sup>52</sup> regions considered the successors of the perpetrator nations (e.g., Germany),<sup>53</sup> or regions with a significant population of victims or

47 For example, the relevant French statute, the Gayssot Act of 1990, expressly prohibits acts and expressions that are "racist, anti-Semitic, or xenophobic." Law No. 90-615 of July 13, 1990, J.O., July 14, 1990, p. 8333.

48 The Portuguese legislation around denial of atrocities requires that the publication be made "with intent to incite racial, religious, or sexual discrimination or to encourage it" *Codigo Penal Português*, Art. 240 sec. 2.

49 Dz.U. 1998 nr 155 poz. 1016 (Pol.). In his law review article, *The Uncertain Future of Genocide Denial Laws in the European Union*, Sean Gorton exemplifies the strictness of Holocaust-denial laws in Europe by introducing a case of a violation of the Hungarian Holocaust denial law. Gorton, *supra* note 35, at 421. "Gyorgy Nagy was arrested at a rally in Hungary for holding a banner that read, 'The Shoah [Holocaust] did not happen.' . . . Nagy was sentenced to eighteen months in prison . . ." *Id.* The harshness of this penalty would almost certainly shock the conscience of the American public with its strong reliance upon the principles of free speech, despite general public disagreement with Holocaust denial. See Michael R. Kagay, *Poll on Doubt of Holocaust is Corrected*, N.Y. TIMES (Jul. 8, 1994), <http://www.nytimes.com/1994/07/08/us/poll-on-doubt-of-holocaust-is-corrected.html> (outlining that in 1994, a corrected poll indicated that only 1% of those Americans polled believed that the Holocaust did not happen).

50 The Polish equivalent of the law prohibits denial of "Crimes against the Polish Nation" Dz.U. 1998 nr 155 poz. 1016 (Pol.) (referring impliedly to the Holocaust and or Soviet atrocities committed in Poland or against Christian or Jewish Poles). Furthermore, in his law review article *Holocaust Denial and the Concept of Dignity in the European Union*, John Knechtle expounds upon the dignitary motivation of the European Union's Framework Decision that criminalizes Holocaust denial. John C. Knechtle, *Holocaust Denial and the Concept of Dignity in the European Union*, 36 FLA. ST. U. L. REV. 41, 57 (2008) ("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.").

51 For the purposes of this paper, a "genocide denial law" also includes the tangential prohibitions on glorifying oppressive regimes or minimizing certain tragedies. For example, Article 261 of the Swiss Penal Code prohibits "grossly minimizing" crimes against humanity. SCHWEIZERISCHES STRAFGESETZBUCH [StGB] [Criminal Code] Dec. 21, 1937, 54 AS at 757 (1938), *as amended* by Gesetz, June 18, 1993 AS 2887 (1994), art. 261 (Switz.). See also STRAFGESETZBUCH [STGB] [PENAL CODE], §130(3) (F.R.G.) ("Whoever publicly or in a meeting approves of, denies, or downplays an act committed under the rule of National Socialism [Nazism] . . . shall be liable for imprisonment of not more than five years or a fine.").

52 See *supra* note 50 (referring to the Polish law).

53 See *supra* note 51 (referring to the German law).

victims' families (e.g., Israel and Rwanda).<sup>54</sup> The efficacy of these laws has long been disputed,<sup>55</sup> but they largely still remain in effect.<sup>56</sup> Notable examples of Holocaust denial laws include those of Israel, Poland, Portugal, Russia, and Germany.<sup>57</sup> Other examples of similar non-Holocaust-related genocide denial laws include those of Rwanda<sup>58</sup> and Cambodia.<sup>59</sup>

A primary example of a law criminalizing Holocaust denial is that of Israel. Israel's genocide denial law is deeply rooted in the nation's Jewish heritage, presumably as a strong nod to its European Jewish past.<sup>60</sup> The Israeli Knesset (parliament) passed its Holocaust denial law in 1986,<sup>61</sup> perhaps in response to a rise in denialism or questioning of the Holocaust worldwide.<sup>62</sup> The law reads, in part, that "[a] person who . . . publishes any statement denying or diminishing the . . . acts . . . committed in the period of the Nazi regime . . . shall be liable to imprisonment for a term of

<sup>54</sup> See Denial of Holocaust (Prohibition) Law *infra* note 63.

<sup>55</sup> See *Is there a New Anti-Semitism? A Conversation with Raul Hilberg*, LOGOS J. (2007) [http://www.logosjournal.com/issue\\_6.1-2/hilberg.htm](http://www.logosjournal.com/issue_6.1-2/hilberg.htm); see also Adam Lebor, *A Bad Law Against Holocaust Denial*, JEWISH CHRONICAL (Mar. 25, 2010), <https://www.thejc.com/comment/comment/a-bad-law-against-holocaust-denial-1.14690>.

Additionally, Deborah Lipstadt, a renown anti-Holocaust denial opponent, verbally defended David Irving after he was convicted and jailed in Austria for Holocaust denial. *Holocaust Denier Irving is Jailed*, BBC NEWS (Feb. 20, 2006), <http://news.bbc.co.uk/2/hi/europe/4733820.stm> ("I am not happy when censorship wins, and I don't believe in winning battles via censorship . . . [t]he way of fighting Holocaust deniers is with history and with truth," *quoting* Deborah Lipstadt).

<sup>56</sup> For example, in 2007 Spain's Constitutional Court held that Holocaust denial alone was protected speech and was therefore not to be criminalized. *Spanish Jewish Community Leader Calls for New Law Punishing Holocaust Denial*, WORLD JEWISH CONGRESS (Feb. 5, 2008), <http://www.worldjewishcongress.org/en/news/spanish-jewish-community-leader-calls-for-new-law-punishing-holocaust-denial?printable=true>. Despite this reversal, other European genocide denial laws remain in effect. See *supra* note 51 and accompanying text (referring to the Swiss and German laws).

<sup>57</sup> See Denial of Holocaust (Prohibition) Law, 5746-1986, § 2 (Isr.); see Dz.U. 1998 nr 155 poz. 1016 (Pol.) (referring impliedly to the Holocaust and or Soviet atrocities committed in Poland or against Christian or Jewish Poles); see *supra* note 48 (Portugal's law); see also Reuters, *Holocaust Deniers in Russia Now Face Five Years in Prison*, FORWARD (May 5, 2014), <http://forward.com/news/breaking-news/197664/holocaust-deniers-in-russia-now-face-five-years-in/>; see *supra* note 51 and accompanying text (referring to the German law).

<sup>58</sup> See *supra* note 14 (Law No. 18/2008, Relating to the Punishment of the Crime of Genocide Ideology, Official Gazette of Rwanda, Oct. 15, 2008).

<sup>59</sup> See Buncombe, *supra* note 12.

<sup>60</sup> As of 1960, 25% of the population of Israel was made up of Holocaust survivors. Avi Ben-Hur, *Israeli Society and the Holocaust*, HUFFINGTON POST (Apr. 11, 2013, 3:26 PM), [http://www.huffingtonpost.com/avi-benhur/israeli-society-and-the-h\\_b\\_3058971.html](http://www.huffingtonpost.com/avi-benhur/israeli-society-and-the-h_b_3058971.html).

<sup>61</sup> See Denial of Holocaust (Prohibition) Law, *infra* note 63.

<sup>62</sup> See generally Emma Green, *The World is Full of Holocaust Deniers*, ATLANTIC (May 14, 2014), <https://www.theatlantic.com/international/archive/2014/05/the-world-is-full-of-holocaust-deniers/370870/>. This article examines how prevalent the Holocaust denial is worldwide, particularly in the Middle East (excluding Israel). *Id.*

five years.”<sup>63</sup>

Relatedly, Germany has enacted a law outlawing Holocaust denial.<sup>64</sup> They are rooted in part in the country’s collective shame and affirmative willingness to confront dark aspects of its history during the Nazi era.<sup>65</sup> Though it does not specifically refer to the Holocaust as perpetrated against the Jews, the laws of “Incitement to Hatred”<sup>66</sup> and “Dissemination of Propaganda Material of Unconstitutional Organisations”<sup>67</sup> are invoked very frequently to prosecute deniers of the Holocaust in Germany.<sup>68</sup> In its most important segments, the law of “Incitement to Hatred” provides:

- (1) Whosoever, in a manner capable of disturbing the public peace:
1. incites hatred against a national, racial, religious group or a group defined by their ethnic origins . . .
  2. assaults the human dignity of others by insulting, maliciously maligning an aforementioned group . . .
- shall be liable to imprisonment from three months to five years.<sup>69</sup>

This statute has been used numerous times to prosecute Holocaust denial in Germany.<sup>70</sup> This particular law is highly controversial worldwide, even

63 Denial of Holocaust (Prohibition) Law, 5746-1986, § 2 (Isr.). There is thought to be “a danger that [holocaust deniers] will be turned into [] martyr[s] for the cause in the wake of [their] prosecution.” Efraim Zuroff, *The Value of Laws Against Holocaust Denial*, HAARETZ (Dec. 1, 2005), <http://www.haaretz.com/the-value-of-laws-against-holocaust-denial-1.175556>.

64 See generally Klaus Dahmann, *No Room for Holocaust Denial in Germany*, DEUTSCHE WELLE, (Dec. 23, 2005), <http://www.dw.com/en/no-room-for-holocaust-denial-in-germany/a-1833619>; see *supra* note 51 (referring to the German law).

65 Bazylar, *supra* note 18 (“As part of efforts to overcome its Nazi past, Germany has criminalized denial of the Holocaust and also banned the use of insignia related to Hitler’s regime...”).

66 STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BGBl. I at 3322, *as amended by* Gesetz, Oct. 10, 2013, BGBl. I at 3799 art. 6(18), §130 (F.R.G.)

67 STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BGBl. I at 3322, *as amended by* Gesetz, Oct. 10, 2013, BGBl. I at 3799 art. 6(18), § 86 (F.R.G.) (“4. [P]ropaganda materials the contents of which are intended to further the aims of a former National Socialist organisation, shall be liable to imprisonment not exceeding three years or a fine.”).

68 These laws have traditionally been supplemented with laws that prohibit the glorification of Nazi Germany or fascism. STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BGBl. I at 3322, *as amended by* Gesetz, Oct. 10, 2013, BGBl. I at 3799 art. 6(18), §130 (F.R.G.) “Incitement to Hatred” provides in relevant part: “(4) Whosoever publicly or in a meeting disturbs the public peace in a manner that violates the dignity of the victims by approving of, glorifying, or justifying National Socialist rule of arbitrary force shall be liable to imprisonment not exceeding three years or a fine.”

69 STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BGBl. I at 3322, last amended by Gesetz, Oct. 10, 2013, BGBl. I at 3799 art. 6(18), §130 (F.R.G.).

70 See Bazylar, *supra* note 18; see generally *Holocaust Denier Extradited to Germany for Prison Term*, TIMES OF ISRAEL (Sept. 19, 2012), <http://www.timesofisrael.com/holocaust-denier-extradited-to-germany-for-prison-term/>; see generally John Knechtle, *When to Regulate Hate Speech*, 110 PENN ST. L. REV. 539 (2006) (exploring Germany’s hate speech codes).

beyond just right-wing communities, who are some of the most vocal opponents of Holocaust denial laws.<sup>71</sup>

Similarly, a law passed by the legislature in Rwanda prohibits the denial of the Rwandan genocide, presumably for similar reasons as the European laws.<sup>72</sup> Additionally, the French parliament voted in July 2016 to enact a criminal statute that bans denial of the Armenian genocide, much to the chagrin of the Turkish government.<sup>73</sup> In other European nations, such as Switzerland, denial of atrocities like the Armenian genocide are prosecutable under general anti-racial discrimination statutes, which are enacted either by the nation state or by the European Union.<sup>74</sup>

These laws have been criticized on several fronts,<sup>75</sup> even by some of

71 See Adam Taylor, *Why Romania had to Ban Holocaust Denial Twice*, WASH. POST, (July 27, 2015), [https://www.washingtonpost.com/news/worldviews/wp/2015/07/27/why-romania-had-to-ban-holocaust-denial-twice/?utm\\_term=.e7659bc75593](https://www.washingtonpost.com/news/worldviews/wp/2015/07/27/why-romania-had-to-ban-holocaust-denial-twice/?utm_term=.e7659bc75593). The most common claim is that the laws are “incompatible with the concept of freedom of speech,” a controversy with any law prohibiting intolerant or hate speech. *Id.*

72 Relating to the Punishment of the Crime of Genocide Ideology, *Gazeti ya leta ya Republika Rwandaise*, October 15, 2008. The operative section of this law as it relates to genocide denial is codified at Article: 3, 2°, which defines “genocide ideology” as “marginalising, laughing at one’s misfortune, defaming, mocking, boasting, despising, degrading creating confusion aiming at negating the genocide which occurred, stirring up ill feelings, taking revenge, altering testimony or evidence for the genocide which occurred.” *Id.* at Article: 3, 2°.

73 Rachael Pells, *French MPs vote to Criminalise Denial of Armenian Genocide*, INDEPENDENT (July 3, 2016), <http://www.independent.co.uk/news/world/armenian-genocide-french-mps-vote-denial-crime-criminalise-a7117091.html>. The author writes that “[t]he new amendment covers all events which French law deems to be genocide, crimes against humanity, war crimes or slavery, including ‘denial or trivialisation.’” *Id.* The penalty would be “up to one year in prison” as well as a “45,000 Euro fine.” *Id.* This law is unique, due to its criminalization of mere “trivialization” of any recognized genocide. This implies that this law includes denial of the Armenian genocide. See Fiona Guitar, *15 Years after France Recognized the Armenian Genocide . . .*, ARMENIAN WKLY. (Jan. 20, 2016), <http://armenianweekly.com/2016/01/20/15-years/> (explaining that France already formally recognized the Armenian genocide in 2001).

74 See, e.g. Sean Gorton, *supra* note 35, at 432-33; *Perincek v. Switzerland*, App. No. 27510/08, EUR. CT. H. R. (2015), <http://hudoc.echr.coe.int/eng/?i=001-158235>. In this case at the European Human Court of Human Rights (ECHR), a Turkish national was found guilty of “racial discrimination” by a Swiss court and jailed because he referred to the Armenian genocide as an “international lie.” *Id.*; see, e.g., Gorton, *supra*, at 35. The *Perincek* case had its basis upon Article 261 of the Swiss Penal Code which, among other provisions, prohibits an “individual from denying, grossly minimizing, or justifying genocide or other crimes against humanity” *Id.* Although *Perincek* later successfully challenged the Swiss law at the ECHR, the court was highly deferential to the Swiss courts and “found that the conviction served the legitimate purpose of protecting the reputation and rights of families and relatives of victims of the Armenian genocide.” *Id.* at 433-34. The Swiss government has tendered its intent to appeal the judgment, which is pending as of the date of this paper. *Id.* at 432.

75 See Lasson, *supra* note 22, at 67. The wisdom of these laws has been questioned:

In addition, the experience with [legislation prohibiting Holocaust denial] shows that hate-speech defendants . . . remain convinced if not strengthened in the truth of their contentions. Not only is deterrence unlikely, there is a real danger of backlash . . . The judicial process cannot carry the burden of education that should fall to family, school, and political discourse. To the contrary, the German courts have become forums for neo-Nazi propaganda.

the victims of genocide themselves.<sup>76</sup> For example, in the United States, no such laws prohibiting denial of the Holocaust have been enacted either by statute or judicially, as they would almost certainly be rejected on First Amendment grounds.<sup>77</sup> The First Amendment of the United States Constitution, a pinnacle of American democracy, disallows governmental interference or criminalization of free speech (among other matters).<sup>78</sup> Genocide deniers frequently claim that their expressions of denial and criticisms of Holocaust denial laws are merely examples of free speech.<sup>79</sup>

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*Id.* See generally Gorton, *supra* note 35.

<sup>76</sup> Raul Hilberg, a noted Holocaust scholar and a victim of the tragedy during its earliest days, himself criticized the laws on the grounds that “[i]t is a sign of weakness, not of strength, when you try to shut somebody up.” LOGOS J., *supra* note 55.

<sup>77</sup> The First Amendment of the United States Constitution prohibits governmental infringement of the right to free speech. U.S. CONST. amend. I. It provides, in part: “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 . . . .” *Id.*

The legality of Holocaust-denial laws has been discussed or at least alluded to at various points in American case law, including in *United States v. Strandloff*, 667 F.3d 1146, 1176 (10th Cir. 2012), *vacated on other grounds*, 684 F.3d 962. In this case, the Tenth Circuit appraised the comportment of the Stolen Valor Act of 2013 based on the First Amendment, which criminalizes the knowledge of false statements related to receipt of military decorations. *See id.* at 1176; *see also* 18 U.S.C. § 704. A challenge to the Act alleged a violation of the First Amendment. *See Strandloff*, 684 F.3d at 1155. The Court rejected this claim because it only prohibited the knowledge of misstatements of fact. *See id.*

We thus disagree with the suggestion that upholding the Stolen Valor Act would lead America down a slippery slope where Congress could criminalize an appallingly wide swath of ironic, dramatic, diplomatic, and otherwise polite speech . . . just because Congress can criminalize some lies does not imply that it can attack opinions . . . [or] ideologically inflected statements (e.g., Holocaust denial or climate change criticism) or anything that is not a knowingly false factual statement made with an intention to deceive.

*Id.* *But see* *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisémitisme*, 433 F.3d 1199 (9th Cir. 2015). In this case, *Yahoo! Inc.* brought a declaratory judgment suit against French organizations, which had obtained a French judicial injunction to block pro-Nazi content on *Yahoo!*. *Id.* at 1201-02. Although the District Court determined that the French injunction was not legal in the United States, *id.*, the Ninth Circuit reversed and ordered the suit to be dismissed on ripeness grounds, but commented in *obiter dictum* that

*Yahoo!* contends that it has a legally protected interest, based on the First Amendment, in continuing its current policy with respect to Nazi memorabilia and Holocaust-related anti-Semitic materials. Until that contention is endorsed by the judgment of an American court, it is only a contention . . . the very existence of [the French injunction to block certain *Yahoo!* material] may be thought to cast a shadow on the legality of *Yahoo!*’s current policy.

*Id.* at 1211.

<sup>78</sup> U.S. CONST. amend. I; *see also supra* note 77.

<sup>79</sup> *See* Felicity Capon, *Former German Lawyer Imprisoned for Holocaust Denial for Second Time*, NEWSWEEK (Feb. 26, 2015), <http://www.newsweek.com/former-german-lawyer-imprisoned-holocaust-denial-second-time-309725>. (“A Swiss lawyer filed a criminal complaint three months after the event, accusing [the defendant Stolz] of transgressing race law. Yet [Stolz] argued during her trial that she was exercising her right to free speech.”). This claim is common among genocide deniers, regardless of how counter-factual and offensive their opinions are generally held to be. *See* Gord McFee, *Why “Revisionism” Isn’t*, HOLOCAUST HIST. PROJECT (May 15, 1999),

There are notable instances of American hesitation to restrict even neo-fascist expression, whether related to Holocaust denial or not.<sup>80</sup> *National Socialist Party of America v. Village of Skokie* is one notable case in American constitutional law on this point.<sup>81</sup> In this case, the United States Supreme Court granted the National Socialist Party of America (a neo-Nazi organization)<sup>82</sup> the right to march and display the swastika in a neo-fascist parade in Skokie, Illinois.<sup>83</sup> The Court based its holding on the First Amendment's judicially-derived requirement that if a state wishes to restrict individual's right to assemble, "it must provide strict procedural safeguards" or else allow a stay.<sup>84</sup> Although this case was not related to Holocaust denial, it offers a glimpse into the talismanic dedication of American federal courts in protecting broadly-construed First Amendment assembly rights, even if they are objectively offensive and traumatizing.<sup>85</sup> Given the intense similarities and sentiments between Holocaust deniers and neo-fascist groups, this case provides an indication of how American federal courts might treat genocide denial in adjudicating an extradition petition.

In addition to this case, the Canadian case *R. v. Zundel* specifically addresses the prosecution of a foreign defendant for Holocaust denial.<sup>86</sup> In this case, the Supreme Court of Canada was faced with a challenge to a provision in the Canadian Criminal Code<sup>87</sup> that prohibited spreading of false information or news.<sup>88</sup> Although the defendant Ernst Zundel, a

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<http://www.phdn.org/archives/holocaust-history.org/revisionism-isnt/index.html>.

<sup>80</sup> See *infra* note 81.

<sup>81</sup> *Nat'l Socialist Party v. Skokie*, 432 U.S. 43 (1977).

<sup>82</sup> See *Nazis Thwarted in Rally Bid*, JEWISH TELEGRAPHIC AGENCY (May 4, 1977), <https://www.jta.org/1977/05/04/archive/nazis-thwarted-in-rally-bid>.

<sup>83</sup> See *Nat'l Socialist Party*, 432 U.S. at 44. The Village of Skokie, a suburb of Chicago, is a region wherein approximately one sixth of all Jewish inhabitants was a Holocaust survivor or related to a Holocaust survivor at the time of this incident. DEBORAH LONG, *FIRST HITLER, THEN YOUR FATHER, AND NOW YOU* 71 (Deborah Long ed., 2010) ("By the 1970s, one out of every six Jewish Skokie residents was a Holocaust survivor or was directly related to a survivor.").

<sup>84</sup> *Nat'l Socialist Party*, 432 U.S. at 44.

<sup>85</sup> See *supra* note 45.

<sup>86</sup> *R. v. Zundel* [1992], 2 S.C.R. 731 (Can.).

<sup>87</sup> Criminal Code, R.S.C. 1985, c C-34. This anti- "false news" statute, now formally stricken from the Criminal Code, provided in part "[e]very one who willfully publishes a statement, tale or news that he knows is false and causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment..." *Id.*

<sup>88</sup> *R. v. Zundel* [1992] 2 S.C.R. 731 (Can.).

The charge arose out of the accused's publication of a pamphlet entitled *Did Six Million Really Die?* . . . . The pamphlet . . . [suggests] that it has not been established that six million Jews were killed before and during World War II and that the Holocaust was a myth perpetrated by a worldwide Jewish conspiracy.

*Id.* See *supra* note 87.

notorious German-Canadian Holocaust denier,<sup>89</sup> was accused of violating §181 of the Criminal Code prohibiting the spread of “false information,”<sup>90</sup> the Court determined that §181 itself violated §2(b) of the Canadian Charter of Rights and Freedoms and subsequently struck it down.<sup>91</sup> Therefore, Zundel was not to be held criminally liable for his Holocaust-denying publications.<sup>92</sup> However, Zundel would later be deported from Canada to Germany to face prosecution for racial hatred and Holocaust denial.<sup>93</sup>

A unique legal conflict is raised when a nation is faced with an extradition request to remove a defendant from its borders to face prosecution for genocide denial. A comparison can be drawn to any circumstance of extradition of a defendant to a nation for a violation of a law deemed burdensome or harsh in the United States.<sup>94</sup>

89 Ernst Zundel had no Canadian or American citizenship. *Ernst Zundel*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/individual/ernst-zundel> (last visited Feb. 24, 2018). According to the Southern Poverty Law Center, Zundel’s attempts to obtain Canadian citizenship were consistently rebuffed due to his incitement of hatred. *Id.* And according to a report prepared by Margaret Young of the Canadian Parliament’s “Law and Government Division” about issues surrounding the Citizenship act, “The Minister reported to SIRC [Security and Intelligence Review Committee] that in his opinion Mr. Zundel was a threat to the security of Canada. SIRC, had issued a report the previous year in which Mr. Zundel was described as a prolific publisher of hate literature . . . .” Margaret Young, *Canadian Citizenship Act and Current Issues*, PARLIAMENT OF CANADA (Oct. 1997), <http://www.lop.parl.gc.ca/Content/LOP/ResearchPublicationsArchive/bp1000/bp445-e.asp>.

90 Criminal Code, R.S.C. 1985, c. C-46. This provision prohibited knowingly publishing false information that would injure the public good. *Id.*

91 Zundel [1992] 2 S.C.R. 731 (*citing* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, §2(b), 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.)). The Canadian Charter of Rights and Freedoms, entrenched in the Canadian Constitution, mirrors the American Bill of Rights in its protections of, *inter alia*, “(a) freedom of conscience and religion . . . (b) freedom of thought, belief, opinion and expression, including freedom of the press . . . .”

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, 1982, c11 (U.K.).

92 *See* Zundel [1992] 2 S.C.R. 731 (Can.).

93 *See* Zundel, Re, 2005 CanLII 295 (F.C.). (denying defendant Zundel’s asylum request). Crucially, the decision by the Canadian courts to deny Zundel’s “refugee” asylum request was intimately related to his Holocaust-denying and racist views. *Id.*

Involving the same defendant, *Zundel v. Gonzales* was a U.S. case that affirmed Zundel’s removal from the United States for a violation of immigration law. *Zundel v. Gonzales*, 230 Fed. App’x. 468, 476 (6th Cir. 2007). In this case, the Sixth Circuit, while noting that Zundel was a proponent of Holocaust denial, refused to review Zundel’s claim that his First Amendment rights were violated by the Attorney General’s allegedly biased removal proceedings against him. *Id.*

94 For example, federal courts in the United States generally refuse to extradite individuals to face prosecution for political crimes. 18 U.S.C. §3181 (2017) (“Attorney General [must] certifi[y] . . . the offenses charged are not of a political nature.”). In 1984 the United States refused to extradite a defendant who had belonged to the Irish Republican Army to the United Kingdom for prosecution, because the British authorities presented “the assertion of the political offense exception in its most classic form.” William G. Blair, *U.S. Judge Rejects Bid for Extradition of I.R.A. Murderer*, N.Y.

Extradition laws in the United States are within the purview of the federal government,<sup>95</sup> and are marked by specific treaties between the United States and foreign nations as enacted by the executive branch.<sup>96</sup> An extradition treaty is the vehicle by which two nations agree to a mutual policy of transferring defendants for specific offenses.<sup>97</sup> These treaties often mention offenses by name,<sup>98</sup> as well as include specific exceptions.<sup>99</sup>

Specifically, §3184 of the United States Code grants federal judges in the United States discretion to pursue legal action against a foreign fugitive with respect to the terms of the extradition treaty.<sup>100</sup> As set forth in the United States District Court for the Southern District of New York in the case *In Re Extradition of Orellana*, in order to certify an extradition, the Government must sufficiently demonstrate to the federal court that the defendant was charged with an extraditable crime as outlined in the extradition treaty. This is often restricted according to the *dual criminality requirement*.<sup>101</sup>

The dual criminality requirement must be taken into consideration when deciding to grant or deny an extradition petition.<sup>102</sup> Dual criminality is the general prerequisite that there be equivalent prosecutable crimes in both the requesting and requested nations in order to grant an extradition

TIMES (Dec. 14, 1984), <http://www.nytimes.com/1984/12/14/nyregion/us-judge-rejects-bid-for-extradition-of-ira-murderer.html>; *see also In Re Requested Extradition of Doherty*, 599 F. Supp. 270 (S.D.N.Y. 1984).

95 U.S. CONST. art. II, § 2, cl. 2 (the “Treaty Clause”). This clause confers the power to make treaties upon the president. *Id.*

96 18 U.S.C. § 3184 (2017). Section 3184 governs how the petition for extradition of a fugitive is addressed in American criminal procedure. It says, in relevant part:

Whenever there is a treaty or convention for extradition between the United States and any foreign government . . . any justice or judge of the United States . . . may . . . issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the *evidence of criminality may be heard and considered*.

*Id.* (emphasis added). This suggests that Congress intended to allow judicial discretion to determine whether the extradition would violate a right of the defendant guaranteed in the United States. *See id.*; *see also* U.S. CONST. art. II, § 2, cl. 2 (“Treaty Making Power”).

97 *Extradition Treaty*, BALLENTINE’S LAW DICTIONARY (3rd ed. 2010).

98 *See, e.g.*, Extradition Treaty with the Federal Republic of Germany, Ger.-U.S., Jun. 20, 1978, 32 U.S.T. 1485 (including “murder,” “manslaughter,” and “libel” as extraditable offenses.).

99 This most prominently includes the *political offense exception*, *see infra* note 110; *see, e.g.*, Extradition Treaty with the Federal Republic of Germany, Ger.-U.S., Jun. 20, 1978, 32 U.S.T. 1485 (“Extradition shall not be granted if the offense . . . is regarded by the Requested State as a political offense”) *Id.*

100 18 U.S.C. § 3184 (2012) “Fugitives from foreign country to United States.”

101 *See In Re Extradition of Orellana*, 2001 WL 266073 (S.D.N.Y. 2000). To certify an extradition, the court must determine “whether the evidence presented to the judicial officer is sufficient to sustain the charge under the provisions of the treaty.” *Id.* at \*4.

102 *See infra* note 106.

petition.<sup>103</sup> This is the crux of the difficulties in extraditing a genocide-denier from the United States, as the United States lacks a punitive measure for genocide denial.<sup>104</sup> However, current case law, legislation, and regulations of the United States federal government do not strictly require that the laws of the requesting nation be perfectly congruous with American laws;<sup>105</sup> the dual criminality requirement does not demand “‘identical counterpart[s] under laws of United States, rather, dual criminality requires only that acts alleged constitute *crime* in both jurisdictions.” (emphasis added.)<sup>106</sup>

Another roadblock to granting such an extradition petition would be the *political offense exception*.<sup>107</sup> Generally, crimes that fall within the category of a political offense exception include crimes victimizing the

103 “[U]nder the principle of ‘dual criminality,’ no offense is extraditable unless it is criminal in both jurisdictions.” Caplan v. Vokes, 649 F.2d 1336, 1343 (9th Cir. 1981); see also *United States Ct. App. For the Ninth Cir. Choe v. Torres*, 47 I.L.M. 581 (citing *Choe v. Torres*, 525 F. 3d 733, 737 (9th Cir. 2009) (explaining “[a]rticle 2 of the [extradition] Treaty [between South Korea and the United States] provides that an ‘offense shall be an extraditable offense if . . . it is punishable under the laws’ of both nations . . . . This is known as the ‘dual criminality requirement.’”). Although this requirement may seem on its face to be strict, federal courts typically apply a relaxed version of this requirement, as explicated in *Collins v. Losel*, 259 U.S. 309, 312 (1922):

The law does not require that the name by which the crime is described in the two countries shall be the same; nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries. It is enough if the particular act charged is criminal in both jurisdictions.

Furthermore *Heilbronn v. Kendall*, 775 F. Supp. 1020, 1025 (W.D. Mich. 1991) explained that “[t]he fact that a particular act is classified differently or that different requirements of proof are applicable in the two countries does not defeat extradition.” *Id.* In cases of extradition as a result of genocide denial, however, it is far more likely that an American federal court would find that First Amendment considerations would cast a shadow over any potential analysis of dual criminality, even under the relaxed standards of dual criminality as presented in *Heilbronn*, 775 F. Supp. 1020, and *Loisel*, 259 U.S. 309 (as extrapolated from the ruling in *In re the Petition of France for the Extradition of Philippe Sauvage*, 819 F. Supp. 896, 904 (S.D. Cal. 1993)).

104 See Bazyler, *supra* note 18; see discussion *supra* Introduction.

105 See, e.g., *Bozilov v. Seifert*, 983 F.2d 140, 142 (9th Cir. 1992) (citing *Theron v. U.S. Marshal*, 832 F.2d 492, 495 (9th Cir. 1987)) (“Dual criminality does not require that an offense in a foreign country have an identical counterpart under the laws of the United States.”).

106 See *Bozilov*, 983 F.2d at 142; 5 Offenses ground for extradition (201) on Westlaw (Key Number). See also Theresa L. Kruk & Russell J. Donaldson, *Test of “Dual Criminality” where extradition to or from foreign nation is sought*, 132 A.L.R. Fed. 525, Art. 1(a) (originally published in 1996) (“‘dual criminality’ - that the acts claimed to have been performed by the person sought to be extradited constitute a crime under the laws of both countries.”).

107 The *political offense exception* is the principle that United States will generally not extradite individuals from American territory to be prosecuted in a foreign nation solely for a crime of “political opposition.” *Political Offense*, BOUVIER LAW DICTIONARY (Desk ed. 2012). See also Credence Fogo-Schensul, Comment, *More Than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 GONZ. L. REV. 241, 259 (1997) (“[O]ffenders being sought for crimes of a ‘political character’ will not be extradited from one state to another.”).

government *itself*, (e.g., treason<sup>108</sup>), or crimes prosecuted “solely for the government’s political benefit.”<sup>109</sup> It is likely that an extradition petition for a genocide denier would run afoul of the political offense exception,<sup>110</sup> for example, considering the political nature of Germany’s Holocaust-denial laws.<sup>111</sup> This, combined with the lack of dual criminality, makes the likelihood of such an extradition from the United States or Canada very slim.

Interestingly, no evidence exists that United States courts have yet been faced with the task of adjudicating an extradition petition on grounds of genocide denial. For the most part, any legal proceedings in the United States and Canada involving Holocaust-denying defendants relate to deportations for violations of visa terms (as in *Zundel v. Gonzales*<sup>112</sup>), or the denial of asylum (as in *Scheerer v. United States*<sup>113</sup>), rather than an outright grant or denial of an extradition petition. However, with the ever-growing permanent record of individuals’ political and social expressions online,<sup>114</sup> the possibility of an extradition petition to the United States on genocide denial grounds is far from negligible.

## PART II: A CONFLICT BETWEEN FREE SPEECH AND RESPECTING EXTRADITION PETITIONS

As explored above, conflicts can arise between the imperatives of good diplomacy and maintaining the constitutionality of an extradition.<sup>115</sup> In the case of extradition for genocide denial, a stark conflict would arise in American federal courts because of a lack genocide denial laws, primarily due to the First Amendment prohibition on governmental curtailment of free speech, as well as the Eighth Amendment prohibition on cruel and

<sup>108</sup> *Political Offense*, *supra* note 107.

<sup>109</sup> *Id.*; see also *In Re Requested Extradition of Doherty*, 599 F. Supp. 270, 277 (S.D.N.Y. 1984) (refusing to grant an extradition petition for an Irish Republican Army member to the United Kingdom as a violation of the political offense exception).

<sup>110</sup> See Fogo-Schensul, *supra* note 107, at 258-59 (“Furthermore, extradition of Holocaust deniers from the United States would likely offend . . . the political exception doctrine”).

<sup>111</sup> See Bazyler, *supra* note 18.

<sup>112</sup> See *Zundel*, 230 Fed. App’x. at 471 (holding that the Immigration and Naturalization Services’ decision to reject defendant’s First Amendment defense to deportation was not judicially reviewable, thereby permitting defendant’s deportation to Canada).

<sup>113</sup> See *Scheerer v. U.S. Atty. Gen.*, 445 F.3d 1311, 1316 (11th Cir. 2006) (holding that Holocaust-denying defendant did not sufficiently prove grounds to claim asylum status in the United States for pending prosecution for Holocaust denial in Germany).

<sup>114</sup> See Doward, *supra* note 38; see generally *Yahoo! Inc.*, 433 F.3d at 1199.

<sup>115</sup> See generally Darin A. Bifani, Comment, *The Tension between Policy Objectives and Individual Rights: Rethinking Extradition and Extraterritorial Abduction Jurisprudence*, 41 BUFF. L. REV. 627 (1993).

unusual punishment.<sup>116</sup> Because of the dual criminality requirement<sup>117</sup> present in any review of an extradition petition, there would also be difficulties in fulfilling even a reasonable extradition request for genocide denial based on these legal concerns.<sup>118</sup>

To this day, extradition petitions on genocide denial grounds remain only a hypothetical in North American courts. However, this North American hypothetical was a reality for Great Britain in 2008.<sup>119</sup> Gerald Fredrick Toben, a well-known Australian anti-Semite and Holocaust-denier, was sought in 2008 by Germany to face Holocaust denial prosecution for comments made on his website.<sup>120</sup> The German authorities made many attempts to extradite Toben from Great Britain, where he was staying temporarily.<sup>121</sup> After his arrest by British authorities, however, the petition was denied,<sup>122</sup> and the German government abandoned its

<sup>116</sup> See generally Lasson, *supra* note 22; see also U.S. CONST. amend. I; U.S. CONST. amend. VIII (barring cruel and unusual punishments; an argument could be made that the penalty of extraditing a defendant to face an unconscionable sentence in a foreign land is independently cooperation in a cruel and unusual punishment, see *In Re Extradition of Chen*, 161 F.3d 11, 11 (9th Cir. 1998) (“[W]e have recognized the possibility of a ‘humanitarian exception’ to the rule of non-inquiry into the judicial process and penalties an extraditee will face upon his return.”)); but see *Harmelin v. Mich.*, 501 U.S. 957, 965 (1991) (“[T]he Eighth Amendment contains no proportionality guarantee.”).

<sup>117</sup> See *supra* note 105.

<sup>118</sup> *Collins v. Loisel*, 259 U.S. 309, 311 (1922) (“It is true that an offense is extraditable only if the acts charged are criminal by the laws of both countries.”). See also Fogo-Schensul, *supra* note 107, at 258-59.

<sup>119</sup> See generally, Joshua Rozenberg, *Toben’s Arrest ‘Fatally Flawed’, says Lawyer*, TELEGRAPH (Oct. 10, 2008, 10:56 PM), <http://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/3175523/Tobens-arrest-fatally-flawed-says-lawyer.html> (detailing the legal dispute over the European Arrest Warrant for Gerald Toben in the U.K.).

<sup>120</sup> See, e.g., Editorial, *Dr. Fredrick Toben’s Arrest Should Alarm Us All*, TELEGRAPH (Oct. 5, 2008), <http://www.telegraph.co.uk/comment/telegraph-view/3562585/Dr-Fredrick-Tobens-arrest-should-alarm-us-all.html>; Aislinn Simpson, *‘Holocaust Denier’ Gerald Toben Arrested at Heathrow*, TELEGRAPH (Oct. 1, 2008, 12:01 AM), <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/3116061/Holocaust-denier-Gerald-Toben-arrested-at-Heathrow.html> (“The founder of the Adelaide Institute, a web and print publication that questions the Holocaust, he is accused of publishing material on the internet ‘of an anti-Semitic and/or revisionist nature’ that ‘denies, approves of or plays down the mass murder of Jews by the Nazis.’”); see also David Barrett, *Holocaust Denier Dr. Fredrick Toben Should Not Be Extradited, Says Liberal Democrat MP*, TELEGRAPH (Oct. 4, 2008, 3:58 PM), <http://www.telegraph.co.uk/news/politics/liberaldemocrats/3135276/Holocaust-denier-Dr-Fredrick-Toben-should-not-be-extradited-says-Liberal-Democrat-MP.html> (“When the legislation went through Parliament, the then-Home Office minister Lord Filkin pledged that no-one would be extradited for conduct *that was legal in Britain*, if it took place in this country.” (emphasis added)).

<sup>121</sup> See Joshua Rozenberg, *supra* note 119.

<sup>122</sup> *Id.* Interestingly, the denial of Germany’s extradition request for Toben was not as a result of the United Kingdom’s dual criminality requirement as Toben’s lawyer represented, see *supra* note 120, but, according to British legal commentator Joshua Rozenberg, as a result of a technicality in

attempts to persuade British authorities to extradite him.<sup>123</sup> Toben's British defense attorney commented that "[t]he offense is not made out in the UK."<sup>124</sup> This invoked the strong dual criminality requirement present in British extradition law.<sup>125</sup>

Conversely, in 2012 Gerhard Ittner, a German neo-Nazi and Holocaust denier, was unable to escape the long arm of Germany's anti-Nazi and Holocaust denial statutes.<sup>126</sup> After his German conviction<sup>127</sup> in 2005, Ittner fled to Portugal to attempt to escape prosecution.<sup>128</sup> In April 2012, Ittner was apprehended by Portuguese authorities who arranged his deportation to Germany.<sup>129</sup> Portugal, unlike the United Kingdom, finds anti-denialism within the scope of its anti-racial discrimination statute.<sup>130</sup>

In another case, Austrian academic Gerd Honsik was prosecuted by Austrian authorities in 2007 for his denial of the Holocaust after his

Britain's extradition act which requires that the offense *not have taken place at all* in Britain. Joshua Rozenberg, *Man Accused of Denying the Holocaust May Escape Extradition From Britain*, TELEGRAPH (Oct. 3, 2008, 11:50 PM), <http://www.telegraph.co.uk/news/newstoppers/lawreports/joshuarozenberg/3132331/Man-accused-of-denying-the-Holocaust-may-escape-extradition-from-Britain.html>. Since Toben's expressions of Holocaust denial were written online, which the British court determined was therefore "published" in Britain, section 64 of the Extradition Act would not allow Toben's extradition to Germany. *Id.* (citing Extradition Act, 2003 s. 64(2)(a) (U.K.)).

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* This is quoting Dr. Toben's lawyer, Kevin Lowry-Mullins, who went on to allude to Britain's dual criminality principle that

If Dr. Toben had been extradited back to, Germany for Holocaust denial, which does not exist as an offence in this country, then we would have found ourselves in a situation where hypothetically the Iranian Government could have asked for all the gay Iranian asylum-seekers to be extradited back to Iran.

*Id.* These comments, although vexing to many proponents of strict genocide-denial laws, outline an irrefutable difficulty with reconciling the dual criminality requirement with punishing hate speech.

<sup>125</sup> Freedom of Expression is enshrined in the United Kingdom's Human Rights Act of 1998. Human Rights Act 1998, 1998, c. 42, sch. 10. The Act provides that "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers." *Id.* Despite the exceptions to this right under the Public Order Act of 1986 for racial hatred, threats, etc., Public Order Act 1986, 1986 c. 64, § 17-20 (U.K.), Holocaust denial is not outlawed in the United Kingdom. See Bazylar, *supra* note 18.

<sup>126</sup> *Holocaust Denier Extradited to Germany for Prison Term*, TIMES OF ISRAEL (Sept. 19, 2012), <http://www.timesofisrael.com/holocaust-denier-extradited-to-germany-for-prison-term/>.

<sup>127</sup> See *supra* Part I: Background and Issues. These were couched as charges for "slander, racial hatred and other crimes." TIMES OF ISRAEL, *supra* note 126.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Código Penal Português, Art. 240 sec. 2 (criminal statute prohibiting racial or sexual discrimination, which is interpreted as prohibiting atrocity denial). This law has been interpreted as outlawing denial of atrocities as well. Michael Whine, *Expanding Holocaust Denial and Legislation Against It*, 20 JEWISH POL. STUD. REV. 57, 84 (2008).

fleeing to Spain.<sup>131</sup> At the time, Spain had a similar anti-Holocaust denial law to Austria.<sup>132</sup>

Although the case of a direct extradition to face genocide denial prosecution has not appeared to have occurred in the United States, the legal treatment of analogous cases of extradition for laws that do not exist in the United States, as well as treatment of foreigners with certain connections to neo-Nazism or fascism, guides the hypothetical legal treatment of potential cases of extradition petitions for genocide denial in the future.

There have been several notable cases of extradition petitions explicitly barred by federal courts in the United States due to either Constitutional concerns, or a failure of the test of dual criminality. The first of such cases in American jurisprudence is *In Re the Petition of France for the Extradition of Philippe Sauvage*.<sup>133</sup> In this case, the Southern District of California refused an application by the federal government to comply with a French extradition petition on the grounds that the defendant, then residing in America, had violated French law while in France. The accusation was a violation of law by “swindling persons in violation of § 405 of the French Penal Code.”<sup>134</sup> The defendant Philippe Sauvage, a self-ascribed “faith healer,” had allegedly spread mistruths on television in France that led to allegations of fraud.<sup>135</sup> The court held that the First Amendment prevented the court from even examining the truth of the claims made by Sauvage in France to determine if they reached the threshold standard for fraud.<sup>136</sup> Fraud may have been the only extraditable

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131 *El Apologista Nazi Gerd Honsik es Detenido en Málaga*, EL PAÍS (Aug. 23, 2007, 12:35 PM), [http://elpais.com/elpais/2007/08/23/actualidad/1187857021\\_850215.html](http://elpais.com/elpais/2007/08/23/actualidad/1187857021_850215.html).

132 *Holocaust Denier to do Prison Time in Austria*, NBC NEWS (Dec. 3, 2007, 2:29 PM), [http://www.nbcnews.com/id/22084028/ns/world\\_news/t/holocaust-denier-do-prison-time-austria/#.WH6NC\\_krLIU](http://www.nbcnews.com/id/22084028/ns/world_news/t/holocaust-denier-do-prison-time-austria/#.WH6NC_krLIU) (“Austria’s law making it a crime to deny the Holocaust applies to ‘whoever denies, grossly plays down, approves or tries to excuse the National Socialist genocide or other National Socialist crimes against humanity in a print publication, in broadcast or other media.’); C.P. art. 6071 (Sp.) (Spain’s former statute outlawing denial of genocide).

133 *In Re France for the Extradition of Philippe Sauvage*, 819 F. Supp. 896 (S.D. Cal. 1993).

134 *Id.* at 896.

135 *Id.* at 897. The alleged offense that the defendant committed was appearing on French television to discuss his capacity to heal the sick through prayer, and then subsequently receiving payments in exchange for his “services.” *Id.*

136 In *Sauvage* the court opined:

Thus, the First Amendment would preclude conviction of Sauvage in the United States for fraud unless it were established that he did not honestly and in good faith hold a belief that he had been given the power by God to heal through prayer and that he could actually heal the people solicited.

*Id.* at 902.

offense.<sup>137</sup> This demonstrates an unwillingness by U.S. courts to make even certain preliminary investigations that would ordinarily be required by other nations' courts if they conflict in any way with Constitutional requirements.

The next case, *In the Matter of the Extradition of John Demjanjuk*,<sup>138</sup> was decided differently than *Sauvage* with respect to the outcome of the defendant.<sup>139</sup> In this case, the Northern District of Ohio handled an extradition petition from the State of Israel of a former Treblinka Death Camp guard, John Demjanjuk, for crimes committed in the early 1940s during the Holocaust.<sup>140</sup> The case did not relate genocide denial, but was related to an extradition petition by a nation that wished to prosecute a defendant for offenses that were not explicitly made crimes in the United States, or expressly written in the extradition treaty (i.e. mass murder committed during the Holocaust).<sup>141</sup> In this case, the court held that any case of murder, regardless of how the criminal statute is constructed, is an extraditable offense between the United States and nations with whom it has an extradition treaty.<sup>142</sup> Although unlikely dispositive on the matter, this holding carries the impression that federal courts adjudicating an extradition request may have the authority to entertain apparent exceptions to Constitutional principles (such as the prohibition of ex-post facto laws, a major concern with regard to the prosecution of Nazi war criminals), which might permit a federal court to uphold a grant of an extradition petition for genocide denial.<sup>143</sup>

With the preceding two cases in mind, it would be reasonable to infer that a U.S. court would only willing to stretch the authority to extradite a

<sup>137</sup> Under the United States' extradition treaty with France, crimes are extraditable if they are recognized as crimes carrying penalties of at least one-year maximum sentences in both France and United States' jurisdictions. Extradition Treaty with France, Fr.-U.S., Apr. 23, 1996, 2179 U.N.T.S. 341. This presumably includes criminal fraud; for example, in New York, a "scheme to defraud in the second degree" is classified as a Class A Misdemeanor and as such carries with it a maximum one-year prison sentence. N.Y. PENAL LAW § 190.60 (McKinney 1996); N.Y. PENAL LAW § 70.15, 1 (1993).

<sup>138</sup> 612 F. Supp. 544 (N. D. Oh. 1985).

<sup>139</sup> *Id.* at 571.

<sup>140</sup> *Id.* at 546.

<sup>141</sup> *Id.* at 560 ("Demjanjuk is charged with murdering thousands of Jews and non-Jews while operating the gas chambers to exterminate prisoners at Treblinka.").

<sup>142</sup> *Id.* at 561. ("There is no reason to presume that the Treaty drafters intended to extradite for 'murder' and not for 'mass murders.'). It also held that the fact that the State of Israel had not existed at the time of the offense was not grounds to refuse the petition for extradition. *See id.* at 568.

<sup>143</sup> *See* Susan Tiefenbrun, *The Failure of the International Laws of War and the Role of Art and Story-Telling as a Self-Help Remedy for Restorative Justice*, 12 TEX. WESLEYAN L. REV. 91, 122 (2005) ("The German defense lawyers at the Nuremberg Trials made a strong case [against] . . . retroactivity or ex post facto laws; however, the defense lost its case in Nuremberg.").

defendant beyond the letter of the law insofar as the law in the petitioning country is at least similar in spirit with a law enacted in the U.S. (as in *Demjanjuk*<sup>144</sup>). However, it would not be willing to extend its authority in cases requiring an impermissible investigation or action by the federal or a state government (as in *Sauvage*<sup>145</sup>).

Another issue raised, however, is the lengthy punishments that certain nations<sup>146</sup> impose for violations of laws against genocide denial. This is of particular importance in extradition cases relating to genocide denial; U.S. courts (as well as the American public) may find genocide denial inflammatory enough to rise to indictable hate speech,<sup>147</sup> but nevertheless find that the petitioning country's penalty for genocide denial shocks the conscience or is in violation of the Eighth Amendment.<sup>148</sup>

On this matter, Restatement Third of the Foreign Relations Law of the U.S., § 746<sup>149</sup> provides some guidance for federal courts as persuasive authority on the issue of extradition treaty interpretation. The operative section of this provision is: "A person sought for prosecution or for enforcement of a sentence will not be extradited . . . (c) if the offense with which he is charged . . . is not punishable as a serious crime in both the requesting and the requested state . . ." <sup>150</sup>

It is obvious that the legal matter has not been settled in the United States. An outcome is not clear from published U.S. case law on point. However, inferences on how to deal appropriately with this potential legal dispute can be drawn from the experience of American courts on the topic of the First Amendment with respect to fascist and neo-Nazi groups, as well as the jurisprudence from other nations on the matter of extradition requests.

144 See *Demjanjuk*, 612 F. Supp. at 561.

145 See *Sauvage*, 819 F. Supp. 896, at 900-04.

146 This is especially true with respect to Germany, Israel, and Poland's genocide denial laws. See, e.g., Strafgesetzbuch [StGB] [Penal Code], Nov. 13, 1998, BGBO. I at 3322, as amended by Gesetz, Oct. 10, 2013, BGBI. I at 3799 art. 6(18), §130(3) (F.R.G.) (German law, providing that distributing neo-Nazi materials carries a prison sentence of up to three years or a fine); Denial of Holocaust (Prohibition) Law, 5746-1986, SH No. 1187 p. 196 § 2 (Isr.) (Israeli law, providing that Holocaust denial carries a prison sentence of five years); Dz.U. 1998 nr 155 poz. 1016 (Pol.) (Polish law, providing that denial of Nazi or communist crimes can carry a prison sentence of up to three years); see *supra* notes 51 (Germany's law), note 47 (France's law), note 50 (Poland's law), note 63 (Israel's law), note 132 (Spain's former statute), and note 48 (Portugal's law).

147 See generally Cohen-Almagor, *supra* note 26.

148 *Id.*

149 RESTATEMENT (THIRD) OF THE FOREIGN REL. L. OF THE U.S., § 776 (AM. LAW. INST. 1986).

150 *Id.* Note, the term "state" in this material refers to extradition petitions between foreign nations, not states within the United States.

## PART III: POTENTIAL SOLUTIONS TO THE PROBLEM

There are potential methods for balancing the imperatives of protecting the defendant's constitutional rights with respecting the requesting nation's autonomy and diplomacy.

Because genocide denial is often inextricably linked with racial or ethnic hatred (Armenian genocide denial being highly correlated with anti-Armenian sentiment,<sup>151</sup> to name one example), it may be possible to consider offensive examples of genocide denial as "carve-outs"<sup>152</sup> to the First Amendment with respect to extradition petitions.<sup>153</sup> This would protect legitimate expressions of doubt over truly doubtful historical events that are not linked to bias against an identifiable group,<sup>154</sup> without protecting those wishing to spread misinformation motivated by ethnic animus.<sup>155</sup> Hate crime laws in the United States are very complex;<sup>156</sup> generally, exceptions to the prohibition against prosecution of free speech are crimes in which some harm against an individual or group would result.<sup>157</sup>

A seminal case illustrating this notion is *R.A.V. v. City of St. Paul, Minn.*<sup>158</sup> In that case, the Supreme Court opined:

A few limited categories of speech, such as obscenity, defamation, and fighting words, may be regulated *because of their constitutionally proscribable content*. However, these categories are not entirely invisible to the Constitution, and government may not regulate them based on hostility, or favoritism, towards a

151 See generally Edita Gzoyan, *Genocide Denial as a Form of Racism: Turkish Responsibility under International Law* (2012) (unpublished master's thesis, American University of Armenia).

152 *Carve-out*, BOUVIER LAW DICTIONARY (Desk ed. 2012) ("An omission from a rule, property, or plan").

153 See *supra* note 22; see also *Gertz*, 418 U.S. at 340. If genocide denial can be sufficiently demonstrated to be "false" under the *Gertz* analysis, American courts may be more likely to relax strict dual criminality requirements for extradition petitions for genocide denial if they did not find "constitutional value" in the "false statements of fact." *Id.*

154 Hate speech is considered speech that is "reasonably likely to offend, insult, humiliate, or intimidate another person or group." LIABILITY FOR RACIAL OR HATE SPEECH, INT'L ENCY. CYBER LAW (2016), 2015 WL 9331414.

155 Certain authors are proponents of categorizing Holocaust denial as hate speech, making it either criminally or civilly actionable. See generally Geri J. Yonover, *supra* note 26, at 93 ("Anti-Semitic language and Holocaust denial are a form of hate speech. Holocaust denial fits squarely within the crux of the [intentional infliction of emotional distress] tort . . ."); see also Cohen-Almagor, *supra* note 26, at 40.

156 See generally, Edward M. Kennedy, *Hate Crimes: The Unfinished Business of America*, BOS. B.J., Jan.-Feb. 2000, at 6 (outlining unsatisfactory attempts to curb hate crimes in America).

157 See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

158 See *id.* at 377.

nonproscribable message they contain.<sup>159</sup>

To be certain, Holocaust denial is a shibboleth of hatred and anti-Semitism.<sup>160</sup>

Webpages and forums devoted to denial of the Holocaust are typically littered with strong anti-Semitic and anti-Israel sentiment.<sup>161</sup> Notably, former Iranian President Mahmoud Ahmadinejad's career was marked by Holocaust denial, as the Iranian government's anti-Israeli state policy<sup>162</sup> continued the bigoted tradition of conflation of the State of Israel with the Jewish people in general.<sup>163</sup>

Therefore, if it could be determined that a genocide denier's actions are criminally proscribed in the United States or Canada as hate speech, then the outcome of an extradition petition for a genocide-denier may be different than in *Sauvage*.<sup>164</sup> In *Sauvage*, the speech, although proscribable under French law, did not rise to the level of proscribable fraud or hate speech.<sup>165</sup>

Another possible solution is preventative rather than surgical. Since the majority of extradition petitions are against non-American defendants, the most likely initial cases of contact between such a defendant and the American legal system would be by way of applications for asylum, temporary visa issuances, and other checkpoints along the immigration process.<sup>166</sup> Unlike cases of extradition requests for genocide denial, of which there have been none in the United States, this legal scenario has

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<sup>159</sup> *Id.*

<sup>160</sup> See Cohen-Almagor, *supra* note 26, at 35 ("Their beliefs include accusations that Jews have falsified and exaggerated the tragic events of the Holocaust in order to exploit non-Jewish guilt."); see generally DEBORAH LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY (The Free Press ed. 1993); see also *Holocaust Denial Timeline*, U. S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10008003> (last visited Mar. 10, 2018).

<sup>161</sup> See generally INST. FOR HISTORICAL REVIEW, <http://www.ihr.org/> (a so-called "revisionist" website espousing Holocaust denial, including anti-Semitic and anti-Israeli articles).

<sup>162</sup> See Bozorgmehr Sharafedin, *Why Iran Takes Issue With the Holocaust*, BBC NEWS (Oct. 9, 2013), <http://www.bbc.com/news/world-middle-east-24442723> ("[Ahmadinejad] thought denying the Holocaust would be an existential blow to Israel. But he didn't realise denying the Holocaust would be perceived as anti-Semitic rather than anti-Israeli.").

<sup>163</sup> See "Something is Rotten in the State of Europe": *Anti-Semitism as a Civilizational Pathology*, JERUSALEM CTR. FOR PUB. AFF. (Oct. 1, 2004), <http://www.jcpa.org/phas/phas-25.htm> ("In some specific cases, [British] politicians have used outright anti-Semitic expressions under the cover of being anti-Israeli.").

<sup>164</sup> See *Sauvage*, 819 F. Supp. at 904.

<sup>165</sup> See *id.*

<sup>166</sup> See generally *Zundel*, 230 Fed. App'x. at 471; *Scheerer*, 445 F.3d 1311.

actually already occurred in federal courts in America.<sup>167</sup>

One important case along these lines is *Zundel v. Gonzales*.<sup>168</sup> In *Zundel*, notorious Holocaust denier Ernst Zundel,<sup>169</sup> who was wanted in Germany for genocide denial, filed a writ of habeas corpus pending his removal proceedings for violation of the visa that he was granted in the United States.<sup>170</sup> Zundel was eventually deported to Canada, and in turn deported to Germany to face prosecution.<sup>171</sup> The Sixth Circuit, in reviewing Zundel's writ, refused to hear Zundel's claim that his First Amendment rights were being violated by the deportation order to Canada,<sup>172</sup> and held that the INS' "decision to institute removal proceedings against [Zundel] was a discretionary decision to 'commence proceedings against an alien that was *shielded from judicial review* under 8 U.S.C. § 1252(g).'"<sup>173</sup> (emphasis added.)

Another case of interest is *Scheerer v. United States AG*.<sup>174</sup> In *Scheerer*, the Eleventh Circuit held that an immigration judge's order to remove defendant Scheerer from the United States to face prosecution in Germany under its genocide denial laws was proper<sup>175</sup> despite the fact that no such laws exist in the United States. This obviously does not amount to a grant of an extradition petition for Holocaust denial; the resulting deportation to Germany to face prosecution, however, nevertheless resulted in the defendant's prosecution for genocide denial.<sup>176</sup>

<sup>167</sup> See generally *Scheerer*, 445 F.3d 1311; see generally *Zundel*, 230 Fed. App'x. at 468.

<sup>168</sup> *Zundel*, 230 Fed. App'x at 468.

<sup>169</sup> Ernst Zundel is the author of the publication *Did Six Million Really Die? The Truth at Last*, which was the subject of the Canadian criminal case *R. v. Zundel*. See S. POVERTY L. CTR., *supra* note 89. In it, Zundel questions accepted historical facts surrounding the Holocaust and the gas chambers. See generally ERNST ZUNDEL, *DID SIX MILLION REALLY DIE? THE TRUTH AT LAST*, (1974). Ernst Zundel, in addition to Holocaust denial, is a known anti-Semite and has been documented spreading white supremacist ideologies. *Ernst Zundel*, ANTI-DEFAMATION LEAGUE (2005), [https://web.archive.org/web/20160527074044/http://archive.adl.org/learn/ext\\_us/zundel.html?LEARN\\_Cat=Extremism&LEARN\\_SubCat=Extremism\\_in\\_America&xpicked=2&item=zundel](https://web.archive.org/web/20160527074044/http://archive.adl.org/learn/ext_us/zundel.html?LEARN_Cat=Extremism&LEARN_SubCat=Extremism_in_America&xpicked=2&item=zundel). He and his wife produced the *Zundel* site, a Holocaust-denying database and news website known for its controversial material and misstatements of fact. *Id.* Zundel is often revered by neo-Nazis in both America and in his native Germany. *Id.*

<sup>170</sup> *Zundel*, 230 Fed. App'x. at 470.

<sup>171</sup> See *id.*

<sup>172</sup> *Id.* at 474.

<sup>173</sup> *Id.* at 472 (emphasis added); 8 U.S.C. § 1252(g) (2012) ("[barring statutory exceptions] no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.").

<sup>174</sup> 445 F. 3d 1311 (11th Cir. 2006).

<sup>175</sup> *Id.* at 1316-17.

<sup>176</sup> See generally *Ernst Zundel Sentenced to 5 Years for Holocaust Denial*, CBC NEWS (Feb. 15, 2007, 8:58 AM), <http://www.cbc.ca/news/world/ernst-zundel-sentenced-to-5-years-for-holocaust-denial-1.659372>. Zundel would eventually return to Germany where he was prosecuted for "incitement

Ultimately, U.S. courts' only recourse to discourage safe harbor for foreign genocide deniers is to enact stricter policies against issuance of temporary visas for those fleeing prosecuting nations on the grounds of genocide denial.

The Canadian case *In the Matter of Ernst Zundel*<sup>177</sup> similarly deals with this matter.<sup>178</sup> In this case, involving the same defendant as the U.S. case *Zundel v. Gonzales*, the Canadian federal court held that Mr. Zundel's request to be considered a refugee in Canada was not meritorious.<sup>179</sup> Canada, like the United States, does not have either statutes or common law that outlaw genocide or Holocaust denial.<sup>180</sup> The Canadian high court did, however, consider Mr. Zundel's connection with neo-Nazi groups and his general neo-Nazi sentiment to be a threat to the safety of Canada,<sup>181</sup> and he was not permitted to return to Canada after his deportation from the United States.<sup>182</sup>

Another benefit to using immigration law as a preventative tool against harboring genocide deniers in America is the principle that the First Amendment does not protect nonimmigrant aliens prior to entry.<sup>183</sup> The Supreme Court applied this principle against a communist foreign national in *Kleindienst v. Mandel*.<sup>184</sup> In *Kleindienst*, a Belgian professor espousing Marxist ideologies was refused entry into the United States by the Department of State.<sup>185</sup> The Court held that the refusal of defendant's

of racial hatred." *Id.*

177 *In the Matter of Ernst Zundel*, [2005] F.C.J. No. 314 (Can. Ont. Fed. Ct.). (QL).

178 *Id.*

179 *See id.*

180 *See generally Zundel* [1992] 2 S.C.R. 731; *see also Bazylar, supra* note 18.

181 *In the Matter of Ernst Zundel*, [2005] F.C.J. No. 314 (Can. Ont. Fed. Ct.). (QL) ("Mr. Zundel's activities are not only a threat to Canada's national security but also a threat to the international community of nations.").

182 *See id.*

82. (1) The Minister and the Solicitor General of Canada may issue a warrant for the arrest and detention of a permanent resident who is named in a certificate described in subsection 77(1) if they have reasonable grounds to believe that the permanent resident is a danger to national security or to the safety of any person or is unlikely to appear at a proceeding or for removal.

Immigration and Refugee Protection Act S.C. 2001, c. 27 (Can.). *See also Zundel*, 230 Fed. App'x. at 468.

183 *See Kleindienst v. Mandel*, 408 U.S. 753, 769-70 (1972) (holding that an executive department's decision to exclude a communist foreign national from entry into the United States is not judicially reviewable under First Amendment principles, when executive action is for a bona fide reason). The Court determined that Congressional delegation of the power to exclude foreign nationals was firmly grounded in American jurisprudence. *Id.* at 770.

184 *Id.*

185 *Id.* at 756-59.

visa was not judicially reviewable under First Amendment principles.<sup>186</sup> Although this by no means grants the executive the authority to broadly violate the constitutional rights of nonimmigrant aliens,<sup>187</sup> the principle certainly grants the executive authority to exclude genocide-deniers for reprehensible views.<sup>188</sup>

There is obvious tension here between North American courts' authority to deport fugitives to face genocide denial prosecution in Europe, and their unwillingness to consider genocide denial an extraditable offense. Therefore, in light of this apparent contention, courts may either have to admit that foreign relations law and immigration law are incompatible with respect to foreign fugitives, or should eventually find a "carve-out" exception<sup>189</sup> for genocide denial with respect to extradition treaties.

These proposals do not completely erase the difficulties of both respecting defendants' constitutional rights while maintaining good diplomacy. The double-edged sword of American-style libertarian principles of free speech, however, shields bigoted individuals in the "marketplace of ideas."<sup>190</sup> Regardless, these proposals to either classify genocide denial as hate speech or to employ a stronger vetting process for asylum seekers are currently the closest strategies at the United States' disposal with regards to taking a legally-permissible stance against genocide denial.<sup>191</sup>

## CONCLUSION

Despite extant case law on matters of hate speech,<sup>192</sup> it is unlikely that the Constitution of the United States would allow extradition to face prosecution under genocide denial laws in other nations.<sup>193</sup> This is due to current constitutional jurisprudence and procedures constraining judicial

<sup>186</sup> *Id.* at 769-70.

<sup>187</sup> *See id.* at 770 (limiting the non-reviewability of executive action on exclusion of aliens "on the basis of a *legitimate and bona fide reason* . . .") (emphasis added).

<sup>188</sup> *See id.* It could be argued that genocide denial is broadly more reprehensible and unsafe a view than the espousal of Marxist views, as with the defendant in *Kleindienst*.

<sup>189</sup> *See, e.g., Gertz*, 418 U.S. at 340 (declaring an express carve-out that "there is no constitutional value in false statements of fact."); *see also supra* note 152.

<sup>190</sup> "One serious problem with the marketplace-of-ideas rationale is that the premise that a completely unregulated market of ideas will lead to discovery of truth is highly contestable." *See* Remarks of Karen Eltis, *Hate Speech, Genocide, and Revisiting the "Marketplace of Ideas" in the Digital Age*, 43 *LOY. U. CHI. L. J.* 267 (2012).

<sup>191</sup> *See supra* Part III: Potential Solutions to the Problem.

<sup>192</sup> *See generally* *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992).

<sup>193</sup> *See supra* Part II: A Conflict between Free Speech and Respecting Extradition Petitions.

review of extradition petitions.<sup>194</sup> The same is true in most other Western common law nations that do not have genocide-denial laws (e.g., Great Britain and Canada).<sup>195</sup> The current state of the law around genocide denial in common law countries risks running afoul of public policy by granting bigoted individuals safe harbor. In order to avoid this outcome, which is likely to be more common in the future given the fluidity of ideas and recorded statements with the expansion of the internet,<sup>196</sup> nations without genocide denial laws could enact a stricter standard for adjudicating asylum claims by genocide deniers on the grounds of persecution for “political beliefs,” (a common mantra among those trying to escape genocide-denial prosecution).<sup>197</sup> Otherwise, those nations, including the United States, should consider placing genocide denial on higher level of scrutiny when adjudicating extradition petitions, since the effects of genocide denial can mirror those already recognized with hate speech.<sup>198</sup> Because of recent trends in genocide and Holocaust denial online,<sup>199</sup> understanding the legal intricacies around extradition for speech-related offenses will likely become more salient in the foreseeable future.

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194 *See supra* Part II: A Conflict between Free Speech and Respecting Extradition Petitions; Part I, Background and Issues.

195 *See* Bazzyler, *supra* note 18; *see also* R v. Zundel [1992] 2 S.C.R. 731 (Can.).

196 *See* Doward, *supra* note 38.

197 *See supra* note 79 and accompanying text.

198 *See generally* Cohen-Almagor, *supra* note 26. Views such as Cohen-Almagor’s are common, because Holocaust-denial is intimately linked with some form of anti-Semitism. *See generally* Reich, *supra* note 13.

199 *See supra* Bazzyler, note 18.

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