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Where's the Harm?: Free Speech and the Regulation of Lies

Lyrissa Barnett Lidsky*

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I. Introduction

False factual information has no First Amendment value,[1] and yet the United States Supreme Court has accorded lies a measure of First Amendment protection.[2] The First Amendment imposes something in the nature of a

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1. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here is no constitutional value in false statements of fact."); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.").

2. The State may only punish deliberate falsehoods when they cause significant harms to individuals. Thus, the State is allowed to punish *defamatory* falsehoods about private individuals regarding matters of public concern if they are negligently made and cause actual injury to reputation or if they are made with "knowledge of [their] falsity or reckless disregard for the truth." *Gertz*, 418 U.S. at 348–49. The State may also punish falsehoods that place a plaintiff in a false light in the public eye and are made with "actual malice." *See* Cantrell v. Forest City Publ'g Co., 419 U.S. 245, 253 (1974) (concluding that the defendant was liable for "portray[ing] the Cantrells in a false light through knowing or reckless untruth"). Even so, the First Amendment clearly forbids any general procedure for judicial certification of truth. In

presumption against government interference in public discourse. This presumption is rooted in suspicion of the State's ability to distinguish facts from falsehoods as well as its motives for doing so.[3] However, the presumption against regulation of false speech is not absolute. It can be overcome when verifiably false speech poses a direct threat of harm to individual interests.[4] Unlike other countries, the United States has never justified the regulation of verifiably false speech on the grounds that it poses a generalized threat of dignitary harm.[5] Using Holocaust denial as an example of verifiably false speech, this essay poses the question of whether such speech poses a more serious danger than First Amendment jurisprudence typically has acknowledged. In other words, this essay asks: Where's the harm in Holocaust denial? It then turns to the related question: Where's the harm in government suppression of verifiably false speech?[6]

II. The Harm of Denial

Holocaust denial, at its simplest, is the claim that the Holocaust—the German genocide of millions of Jews and others before and during World War II—never

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State ex rel. *Public Disclosure Commission v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998), the Washington Supreme Court struck down, 5–4, a statute setting criminal penalties for knowing or reckless falsehoods in political advertising, on the ground that the First Amendment requires the State to leave the determination of truth or falsity to voters. *See id.* at 695–96. One of the concurring opinions called the decision the first "in the history of the Republic to declare First Amendment protection for calculated lies." *Id.* at 701 (Talmadge, J., concurring). In a subsequent decision, the Washington Supreme Court struck down a statute forbidding knowing or recklessly false personal attacks against a candidate for office, asserting that "any statute permitting censorship by a group of unelected government officials is inherently unconstitutional." Rickert v. State Pub. Disclosure Comm'n, 168 P.3d 826, 828, 831–32 (Wash. 2007).

3. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 85–86 (1982) ("Freedom of speech is based in large part on a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders . . . .").

4. For example, calculated falsehoods that are defamatory lack constitutional protection. *See, e.g.*, Herbert v. Lando, 441 U.S. 153, 160 (1979) (noting that "damages liability for [intentional or reckless] defamation abridges neither freedom of speech nor freedom of the press"); *Gertz*, 418 U.S. at 349 (concluding that defamatory false statements made with "knowledge of falsity or reckless disregard for the truth" are actionable).

5. *See* Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 72 (1997) ("[E]very Western democracy with the exception of the United States has laws which punish various forms of hate speech, and a number of them specifically prohibit Holocaust denial.").

6. Obviously, the arguments here would also apply to any other denials of historically documented genocide.

actually occurred.[7] Holocaust deniers accuse Jews of "invent[ing]" the Holocaust in order to profit from a spurious victimhood; Jews supposedly have exploited the Holocaust "for money, to victimize the Germans and to create the State of Israel."[8] As proof, deniers offer trumped up and distorted historical "evidence" regarding matters such as the number of Jews exterminated by the Germans during the Holocaust and the justifications for the extermination.[9]

Both individuals and societies suffer harm as a result of Holocaust denial. Holocaust denial is a profound affront to human dignity. The obvious effect when a speaker denies or discounts the deaths and suffering inflicted by the Nazis is to strip from Holocaust victims the fundamental respect to which they are entitled.[10] This affront arguably demands a collective repudiation by society as a whole, specifically in the form of a response by the State. Absent that response, State silence may be seen as acquiescence in the oppression and persecution of vulnerable groups within the society. Some would even contend that State silence in the face of Holocaust denial fosters anti-Semitism and ultimately increases discrimination and hate crimes against Jews.[11] The pernicious effects of Holocaust denial stem from its capacity to pollute and corrupt public discourse.[12] Denial threatens to distort our collective

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7. *See* MICHAEL SHERMER & ALEX GROBMAN, DENYING HISTORY: WHO SAYS THE HOLOCAUST NEVER HAPPENED AND WHY DO THEY SAY IT? 1 (2000) (defining the concept of Holocaust denial).

8. Vera Ranki, *Holocaust History and the Law: Recent Trials Emerging Theories*, 9 CARDOZO STUD. L. & LITERATURE 15, 22 (1997).

9. *See* DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 21–23 (1993) (summarizing the claims made by Holocaust deniers that have "distorted and deconstructed" the Holocaust). For specific examples of the methods Holocaust deniers use to refute evidence that the Holocaust occurred, see *id.* at 9–15.

10. Harry Frankfurt succinctly identifies what is at stake:

> Failing to respect someone is a matter of ignoring the relevance of some aspect of his nature or his situation. The lack of respect consists in the circumstance that some important fact about the person is not properly attended to or is not taken appropriately into account. In other words, the person is dealt with as though he is not what he actually is. The implications of significant features of his life are overlooked or denied. Pertinent aspects of how things are with him are treated as though they had no reality. It is as though, in denying him suitable respect, his very existence is reduced.

Harry Frankfurt, *Equality and Respect*, 64 SOC. RES. 3, 12 (1997).

11. *See* Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71, 77–78 (1996) ("The connection between anti-Semitism and Holocaust denial and the creation of a climate which fosters animosity, racial hatred, and repression is not tenuous.").

12. *See* Michelle L. Picheny, Note, *A Fertile Ground: The Expansion of Holocaust Denial into the Arab World*, 23 B.C. THIRD WORLD L.J. 331, 339 (2003) (citing a 1993 Roper poll, which found that twenty-two percent of American adults thought "it was possible that the Holocaust did not happen").

memory of the past, to "cover up the truth with lies."[13] If successful in gaining "converts," those who deny the Holocaust turn "history" into an excuse for anti-Semitism and persecution.

In spite of the very real threats posed by Holocaust denial, First Amendment jurisprudence in the United States would likely treat these harms, standing alone, as an insufficient basis for punishing Holocaust deniers. The Supreme Court previously has struck down legislation designed to demonstrate community solidarity with historically persecuted groups.[14] Preserving the dignity of a group, as opposed to an individual, has not been deemed a sufficient harm to overcome constitutional objections to speech regulation.[15] Furthermore, the Supreme Court has repeatedly said that the State may not punish individuals simply for holding disfavored views.[16] It may punish incitements to violence,[17] discrimination,[18] threats,[19] crimes,[20] and

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13. BOB DYLAN, *Idiot Wind*, *on* BLOOD ON THE TRACKS (Columbia Records 1975).

14. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992) (striking down "a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred" and stating that "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content").

15. *But see* Beauharnais v. Illinois, 343 U.S. 250, 262–67 (1952) (upholding defendant's criminal conviction for group libel). It is not clear that *Beauharnais* is still good law, especially in light of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). In *R.A.V.*, the Court recognized a "compelling" interest in "ensur[ing] the basic human rights of members of groups that have historically been subjected to discrimination." *R.A.V.*, 505 U.S. at 395. However, the Court held that a content-based prohibition against "bias-motivated" fighting words was not "reasonably necessary to achieve" that interest. *Id.* at 395–96.

16. *See, e.g.*, Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 118–23 (1991) (invalidating a statute that imposed a financial burden on any publication that chronicles a criminal's narrative of the crime); Texas v. Johnson, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

17. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curium) (stating that a State can prohibit speech that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action").

18. *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 109 (1953) ("[S]o far as the Federal Constitution is concerned there is no doubt that legislation which prohibits discrimination on the basis of race in the use of facilities serving a public function is within the police power of the states.").

19. *See* Virginia v. Black, 538 U.S. 343, 360 (2003) (upholding a statute punishing cross burning and stating that intimidation is "constitutionally proscribable" when it "is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death").

20. *See* United States v. Alvarado, 440 F.3d 191, 197 (4th Cir. 2006) (noting that as sovereign entities, the states have "the power to create and enforce a criminal code," which

defamation,[21] but the State may not punish citizens for holding anti-Semitic beliefs nor prevent them from receiving information likely to foster such beliefs.[22] Finally, and perhaps most significantly, First Amendment jurisprudence relies on rational and committed citizens, rather than the State, to protect public discourse from being polluted by the lies of Holocaust deniers.

That Holocaust denial is not only harmful but harmful and *false* ought to create more leeway for punishing Holocaust denial. The Holocaust is a historical fact, about as well documented as any historical fact could ever hope to be.[23] Those who deny the Holocaust do so with deceptive and malevolent intent. In spite of this, there are both constitutional and pragmatic grounds for objecting even when the State seeks to suppress indisputably false information published with bad motives.

III. A Breathing Space for Lies?

If "there is no constitutional value in false statements of fact,"[24] why not punish lies? Consider the constitutional objections first. First Amendment theory requires government neutrality in the "marketplace of ideas."[25] The government must allow citizens to engage in the "free trade in ideas," based on the notion "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[26] The marketplace of ideas metaphor reflects the libertarian orientation of First Amendment jurisprudence,

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necessarily includes the right to "punish wrongdoers").

21. *See* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (acknowledging that in defamation cases, "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection").

22. *See* Emanuela Fronza, *The Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609, 622 (2006) (noting that in a democratic state committed to rationalism, "people should not be criminally prosecuted for what they are or want, but only for what they do").

23. *See* SHERMER & GROBMAN, *supra* note 7, at 33–35 (asserting that the documents, stories from eyewitnesses, photographs, and physical existence of the camps are evidence of the Holocaust); Lasson, *supra* note 5, at 77 (noting that in a Holocaust denial case brought under contract law, the court declared that "'the fact that Jews were gassed at Auschwitz is indisputable'") (quoting Mermelstein v. Inst. for Historical Review, No. C356-542 (Cal. Super. Ct. July 22, 1985)).

24. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

25. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("[A] central tenet of the First Amendment [is] that the government must remain neutral in the marketplace of ideas.") (quoting FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978)).

26. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

which presumes that government regulation of public discourse should be a last, rather than first, resort.

The presumption against regulation rests on several foundations. First, it rests on respect for speaker autonomy,[27] though that interest should have very little weight when it comes to speech that is both harmful and false. More crucially in this context, it rests on faith in democratic self-governance and collective self-determination, and a preference for rational discussion over state coercion.[28] In most situations, the First Amendment assigns citizens the role of arbiters of truth and falsity in public discourse.[29] As the Supreme Court stated in *Dennis v. United States*,[30] "the basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, [and] free debate of ideas will result in the wisest governmental polices."[31] From this perspective, even a false statement is valuable because it gives citizens the opportunity for rebuttal and correction,[32] the power to replace "evil

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27. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–9 (1970) (discussing the values of "the system of freedom of expression in a democratic society," which emphasize the individual over society as a collective).

28. *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); *see also* Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 SUP. CT. REV. 245, 262–63 ("[T]he authority of citizens to decide what they shall write and, more fundamental, what they shall read and see, has not been delegated to any of the subordinate branches of government. It is 'reserved to the people.'"); Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1118 (1993) ("The state ought not to be empowered to control the agenda of public discourse, or the presentation and characterization of issues within public discourse, because such control would necessarily circumscribe the potential for collective self-determination.").

29. *See* Branzburg v. Hayes, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised.").

30. Dennis v. United States, 341 U.S. 494, 515 (1951) (establishing that "a conviction relying upon speech or press as evidence of violation may be sustained only when the speech or publication created a 'clear and present danger' of attempting or accomplishing the prohibited crime").

31. *Id.* at 503; *see also* Whitney v. California, 274 U.S. 357, 375 (Brandeis, J., concurring) (asserting that "reason as applied through public discussion" can avert most dangers of speech and that "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine"), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444 (1969). *But see* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 71 (1975) (asserting that "we have lived through too much to believe [Justice Brandeis's optimistic prediction]").

32. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (citing John Stuart Mill for the proposition that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error'"). Compare the following statement by Mill: "It is a piece of idle sentimentality that truth, merely as truth, has any inherent power

counsels" with good ones.[33] This high-minded rhetoric has persuasive force. And yet, if truth is to emerge from public discourse, citizens cannot remain passive; they must charge into the fray and battle the lies spread by Holocaust deniers.[34] Moreover, the emergence of truth depends on a rational audience that will listen critically to the evidence and decide where the truth lies (so to speak).[35]

Some evidence suggests that faith in a rational and engaged citizenry may be misplaced. Behavioral economics reveals the extent to which even educated citizens are subject to cognitive biases that affect their ability to make rational decisions.[36] Moreover, the persistence of popular delusions and the success of propaganda as a tool for manipulating public discourse are evidence that truth does not always emerge, or at least that it is not universally acknowledged.[37] This may be especially true of historical discourse. Many citizens may lack the knowledge or interest necessary to engage in a discourse about the validity of historical events, particularly to the extent that such discourse has become dominated by professional historians.

Yet even if First Amendment theory's faith in the fundamental rationality of public discourse is misplaced, distrust of government still may be a strong enough basis, standing alone, to warrant declaring any attempt to punish Holocaust denial unconstitutional. Past governmental attempts to "prescribe what shall be orthodox"[38] have resulted in suppression of truth and enshrinement of error.[39] In recognition of this fact, First Amendment

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denied to error of prevailing against the dungeon and the stake." JOHN STUART MILL, ON LIBERTY 31 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859); *see also* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected.").

33. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring), *overruled on other grounds by* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969).

34. *See* Lyrissa Barnett Lidsky, Brandenburg *and the United States' War on Incitement Abroad: Defending a Double Standard*, 37 WAKE FOREST L. REV. 1009, 1024 (2002) ("[T]he marketplace of ideas metaphor implicitly envisions a thriving civil society, a realm where public debate can occur free from governmental coercion.").

35. For more on the "rational audience" assumption, see Lyrissa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1582–83 (2007).

36. *See generally* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

37. *See* MARC A. FRANKLIN, DAVID A. ANDERSON & LYRISSA BARNETT LIDSKY, MASS MEDIA LAW: CASES AND MATERIALS 11 (7th ed. 2005) (setting forth criticisms of the marketplace metaphor).

38. W.Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

39. *See* SCHAUER, *supra* note 3, at 81–86 (providing examples of governmental

jurisprudence has committed to "uninhibited, robust and wide-open" debate even at the expense of allowing a certain amount of false speech to pollute public discourse.[40] In *New York Times v. Sullivan*, for example, the Supreme Court opted for underregulation of potentially harmful speech, based on the notion that errors are "inevitable in free debate."[41] Yet the Court did not say that deliberate falsehood is inevitable; rather, the Court was concerned with protecting negligent falsehoods lest the publication of truthful information be chilled.[42] Even if one accepts this logic, however, it does not mean that First Amendment jurisprudence is required to carve out sufficient "breathing space"[43] for lies.

The breathing space argument is essentially a slippery slope argument: The government must tolerate a certain amount of false speech in order to protect true speech, especially where the line between truth and falsity is difficult to discern.[44] But this argument is weak in the context of Holocaust denial. If the State were only to punish the most obvious and egregious forms of Holocaust denial, very little valuable speech would be chilled. Yet it still seems doubtful that American citizens really want the government to get into the business of sanctioning an official version of history. Oliver Stone's account of the John F. Kennedy assassination[45] has little basis in historical fact.[46] Why not punish that? And, since it is not just Holocaust denial per se that distorts our collective memory, why not punish any historian who contends that the number of Jews killed in the Holocaust is less than is commonly

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suppression and noting that "acts of suppression that have been proved erroneous seem to represent a disproportionate percentage of the governmental mistakes of the past").

40. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

41. *Id.* at 271.

42. *See id.* at 279 ("Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court . . . .").

43. *Id.* at 272 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

44. *See* McDonald v. Smith, 472 U.S. 479, 486–87 (1985) (Brennan, J., concurring) ("The First Amendment requires that we extend substantial 'breathing space' to such expression, because a rule imposing liability whenever a statement was accidently or negligently incorrect would intolerably chill 'would-be critics of official conduct . . . from voicing their criticism.'") (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 272, 279 (1964)); Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) ("The First Amendment requires that we protect some falsehood in order to protect speech that matters."); SCHAUER, *supra* note 3, at 171 ("[W]e grant the greatest freedom for the spread of truth only by adopting rules that will permit the circulation of an increased amount of defamatory falsehood.").

45. JFK (Warner Brothers 1991).

46. Alan M. Dershowitz, Letter to the Editor, *Suppression of the Facts Grants Stone a Broad Brush*, L.A. TIMES, Dec. 25, 1991, at B7 (noting that Stone's film is based on a conspiracy theory of government cover-up rather than "the facts as we know them").

believed? Once Holocaust denial is regulated, it seems that regulation of any sort of historical revisionism is but a short step away. Indeed, several European countries that punish Holocaust denial could already be sliding down that particular slope by enforcing laws that forbid not merely Holocaust denial, but "minimiz[ation]" and "justif[ication]" of the Holocaust as well.[47] That said, the European experience provides little evidence that punishment of Holocaust denial is the first step on the slippery slope to tyranny, though perhaps it is simply too early to tell where the path of punishing denial will lead.

IV. Unintended Consequences of Regulation in the Internet Age

Even if the constitutional objections to punishment of Holocaust denial could be surmounted, it might very well be that the State should avoid this path on pragmatic grounds. By punishing Holocaust denial, a State attempts to establish an official Truth. But an official pronouncement of Truth is highly unlikely to convert the unbelievers. The deniers have proved willing to ignore historical evidence; why should they pay more attention to evidence that emerges from a judicial or administrative proceeding? One might counter that the purpose of punishing Holocaust denial is not to convince deniers but to send a message of symbolic solidarity to Holocaust victims. But at what price? The dangers of allowing courts or other government bodies to determine historical truth arguably outweighs the potential harm that Holocaust victims will suffer from official silence.[48]

More specifically, punishment of Holocaust denial may have the unintended and paradoxical consequence of strengthening the beliefs of Holocaust deniers, rather than weakening them.[49] And it may make more people, rather than fewer, prone to believe in the truth of Holocaust denials.[50]

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47. Fronza, *supra* note 22, at 619.

48. Actually, the State need not be silent. The State as speaker may take a position on the historical evidence regarding the Holocaust; it simply may not punish those who do not accept the official position.

49. Deborah Lipstadt, *Foreword* to FROM THE PROTOCOLS OF THE ELDERS OF ZION TO HOLOCAUST DENIAL TRIALS: CHALLENGING THE MEDIA, THE LAW, AND THE ACADEMY vii (Debra Kaufman et al. eds., 2007) (asserting that laws criminalizing Holocaust denial "render denial 'forbidden fruit,' making it more–not less–alluring").

50. For a similar argument, see Peter R. Teachout, *Making "Holocaust Denial" A Crime: Reflections on European Anti-Negationist Laws from the Perspective of U.S. Constitutional Experience*, 30 VT. L. REV. 655, 675 (2006) ("If there is a core conviction underlying U.S. free speech jurisprudence, it is this. You can respond to poisonous ideas by censoring them and throwing those who disseminate them in prison, but that will only serve to drive the ideas underground where the poison will fester and spread.").

Holocaust denial is essentially a conspiracy theory: It reflects a belief that "they" want you to believe in the Holocaust to achieve selfish political ends. As Professor Mark Fenster has explained, those who feel politically powerless are more likely than others to be attracted to conspiracy theories.[51] Conspiracy theories provide an explanation for the hidden and seemingly mysterious workings of political power, and they represent a populist response to government secrecy.[52] Thus, denial of a conspiracy theory can often become proof that it exists, at least for its adherents. The perverse result is that punishment of Holocaust denial is likely to lend it legitimacy, at least for those who are susceptible to its lure in the first place.

So what is likely to happen if Holocaust denial is criminalized or otherwise officially proscribed? Those who are attracted to Holocaust denial as a theory are unlikely to simply abandon it just because the State prohibits it. Instead, they are likely to turn away from public discourse within the State to find a community of like-minded individuals who will reinforce their beliefs. The Internet makes that community easy to find. An array of worldwide websites readily supplies "evidence" "confirming" that the Holocaust never happened.[53] Not only do private individuals host such websites, but several Middle Eastern countries, including Iran and Syria, officially promote Holocaust denial in all of their state-controlled media, including media accessible via the Internet.[54] Given the ready availability of these sources, it is unlikely that a State's attempt to take Holocaust denial off of the agenda of public conversation will be successful; instead, it will merely free believers from the necessity of having to defend their views. Thus, punishing Holocaust denial may strengthen rather than weaken the convictions of believers. On this basis alone, a State should resist the temptation to punish Holocaust denial.

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51. *See* MARK FENSTER, CONSPIRACY THEORIES: SECRECY AND POWER IN AMERICAN CULTURE 68–74 (1999) (discussing a theory that focuses on oppressed and powerless groups' distrust of the state and large organizations as a catalyst for subscribing to conspiracy theories).

52. *See id.* at xiv ("Above all, conspiracy theory is a theory of power."); *id* at 67 ("Conspiracy theory as a theory of power, then, is an ideological misrecognition of power relations, . . . interpellating believers as 'the people' opposed to a relatively secret, elite 'power bloc.'").

53. I refuse to give these websites the dignity of citing them.

54. *See* Picheny, *supra* note 12, at 346–52 (discussing various instances of Arab countries using the media to promote Holocaust denial); *see also* Richard Cohen, Editorial, *The Ugly Arab Press*, WASH. POST, Mar. 13, 2001, at A21 ("Throughout the Arab world, the most ugly and ridiculous anti-American, anti-Israeli and antisemitic diatribes are routinely published in the press or aired on radio and television—and always with either the acquiescence or the prompting of the government.").

V. Conclusion

Many First Amendment scholars in the United States, including this one, are tempted to reflexively oppose criminal punishment of Holocaust denial. Yet Holocaust denial poses a real threat of dignitary harm, pollution of public discourse, and even incitement of discrimination and violence against Jews. First Amendment theory supplies abstract reasons to oppose all State interventions in public discourse, but, upon analysis, there seems little more to fear from State regulation of Holocaust denial than there is to fear from State regulation of obscenity or even defamation. Instead, the best reason to oppose punishment of Holocaust denial may be the pragmatic one. Since Holocaust denial is essentially a conspiracy theory, punishment of believers will only tend to strengthen their convictions. Moreover, it will drive them out of public discourse and into the echo chamber of like-minded believers on the Internet. Punishment of Holocaust denial may therefore do little good, and unintentionally, much harm.