

HOLOCAUST DENIAL AND
THE LAW
A COMPARATIVE STUDY

This page intentionally left blank

HOLOCAUST DENIAL AND
THE LAW
A COMPARATIVE STUDY

Robert A. Kahn

palgrave
macmillan



HOLOCAUST DENIAL AND THE LAW

© Robert A. Kahn, 2004

Softcover reprint of the hardcover 1st edition 2004 978-1-4039-6476-2

All rights reserved. No part of this book may be used or reproduced in any manner whatsoever without written permission except in the case of brief quotations embodied in critical articles or reviews.

First published 2004 by

PALGRAVE MACMILLAN™

175 Fifth Avenue, New York, N.Y. 10010 and

Houndmills, Basingstoke, Hampshire, England RG21 6XS

Companies and representatives throughout the world

PALGRAVE MACMILLAN is the global academic imprint of the Palgrave Macmillan division of St. Martin's Press, LLC and of Palgrave Macmillan Ltd. Macmillan® is a registered trademark in the United States, United Kingdom and other countries. Palgrave is a registered trademark in the European Union and other countries.

ISBN 978-1-349-52830-1

ISBN 978-1-4039-8050-2 (eBook)

DOI 10.1057/9781403980502

Library of Congress Cataloging-in-Publication Data

Kahn, Robert A. (Robert Andrew), 1963–

Holocaust denial and the law : a comparative study / Robert A. Kahn.
p. cm.

Includes bibliographical references and index.

1. Nuremberg Trial of Major German War Criminals, Nuremberg, Germany, 1945–1946. 2. War crime trials. 3. Holocaust denial. 4. Comparative law. I. Title.

KZ1176.5.K34 2004

341.6'9'0268—dc22

2003063202

A catalogue record for this book is available from the British Library.

Design by Newgen Imaging Systems (P) Ltd., Chennai, India.

First edition: June 2004

10 9 8 7 6 5 4 3 2 1

C O N T E N T S

<i>Preface</i>	vii
Introduction	1
PART I	
THE DILEMMA OF PROOF	11
1 Adversarialism, Inquisitorialism, and Judicial Notice	13
2 The Holocaust as Hearsay?	45
PART II	
THE DILEMMA OF TRIAL UNCERTAINTY	61
3 Holocaust Denial, German Judges, and Political Scandal	65
4 Taking the Blame for <i>R. v. Zundel</i>	85
5 The Limits of Symbolic Legislation—The Gayssot Law	101
PART III	
THE DILEMMA OF TOLERATION	119
6 A Panacea of Toleration?	121
7 The Hidden Benefit of Criminal Sanctions	137
Conclusion The Dilemmas of Holocaust-Denial Litigation	153
<i>Notes</i>	161
<i>Bibliography</i>	191
<i>Index</i>	199

This page intentionally left blank

P R E F A C E

The idea for this book came almost ten years ago when I was a graduate student studying comparative politics at Johns Hopkins University. The early 1990s saw an outpouring of books applying American principles of constitutional democracy to the new democracies of Eastern Europe. In this flurry of books on constitutionalism, I noticed a major gap. Few authors described how constitutional rights played out in the concrete context of a single, high-profile trial. Then I had the good fortune to stumble across John Langbein's 1978 textbook *Comparative Criminal Procedure: Germany*,¹ which describes the manslaughter trial of Dr. Brach. Reading Langbein's account (borrowed from Sybille Bedford's remarkable legal travel book *The Faces of Justice*),² I was amazed how differently the German trial unfolded. The judge asked the witnesses questions, retired with the jury, and defended the jury's verdict in a written opinion that described the accused and the crime in great narrative detail. I decided to write a book on how differences in criminal procedure affected the course and outcome of high-profile criminal trials and was soon looking for cases.

The choice of Holocaust-denial cases was in part fortuitous. I was attending a panel at the 1994 American Political Science Association meetings on Hannah Arendt and Anti-Semitism, at which I was surprised (like most Americans) to hear that France and Germany prosecuted Holocaust deniers. I soon began reading books on the Holocaust, Holocaust denial, and the legal action taken against deniers. The large number of cases prosecuted in France and Germany interested me, as did the fact that most prosecutions took place in Continental Europe, where civil law (inquisitorial) norms prevail. At the same time, as I read through these works, I was disappointed by their failure to address the comparative aspect of Holocaust-denial litigation. Suing Holocaust deniers was either good or bad, for all places and times. There was no middle ground, a tendency that weakens Lawrence Douglas's otherwise very good book on the legal trials of the Holocaust and Holocaust deniers, *The Memory of Judgment*.³ While Douglas concluded that the law's "evidentiary agnosticism" made it a flawed tool for expressing the truth about the Holocaust,⁴ my response is to ask: Which law? In what place?

This book, then, attempts to capture the diversity of the law as it responds to a series of difficult challenges. That itself was a challenge. It is one thing to agree with Clifford Geertz⁵ (and Tip O'Neil) that "all law is local." It is another to trace connections between distinct legal norms and outcomes of given trials. While the expanded role of the judge in inquisitorial legal

systems is one reason why German Holocaust-denial prosecutions unfolded differently than *R. v. Zundel*, a Canadian case and the only denial prosecution in the common law world, political factors also came into play. Germany, as the land of the perpetrators, has a special relationship with the Holocaust—and special expectations about how a Holocaust-denial trial should unfold—that are simply absent in Canada.

A second problem, one related to all comparative projects, is distinguishing differences from similarities. The first part of the book, which takes up the problems prosecutors and judges faced in using the tools of the law to disprove Holocaust denial, focuses on how the different legal norms in Canada, France, Germany, and the United States made this task easier or harder. At the same time, one must not lose sight of the larger similarity—in all four countries judges and lawyers were bound to these national norms and did not make special exceptions for the Holocaust. The commitment to Weberian norms of legal fairness is universal but the content of those norms varies. The second part of the book, which examines legal scandals, presents the same duality. On the one hand, all legal systems occasionally rule in favor of the accused and, given the proper external circumstances, sooner or later all justice systems experience scandal when this happens. The pattern of legal victory and scandal reflects a truism of law noted by Emile Durkheim more than a century ago—the criminal law plays an important symbolic role in marking out what a society will and will not accept.⁶ When the legal system fails in this role, society must act to restore faith in the law. This is true, but it does not mean that all legal systems react in the same way to scandals, or that the same types of cases cause scandals in all countries.

A final interest in the book concerns the relationship between freedom of speech as a cultural norm and legal institutions. If the difference between common law and civil law countries is one major divide in the liberal democratic legal world, the difference between the United States, which protects almost all political speech, and the rest of the world, which is far quicker to ban group libel, hate speech, and Holocaust denial, is another. It seemed unfair to focus on the scandals that prosecution caused in France, Germany, and Canada without also looking at whether toleration of Holocaust deniers in the United States also promoted scandal.

This was the origin of the third part of the book, which looks at the scandals that developed on American college campuses when a small group of student newspapers ran ads denying the Holocaust. There has been considerable debate as to why the students ran the ads. Were they bound by the First Amendment to do so? Did they think they were? Or were the students simply careless and/or poorly educated about the Holocaust? However one answers these questions, one point is clear—the powerful role of anticensorship norms in American society. This is especially notable when one compares the American editors with similarly situated actors in France, Germany, and Canada, where Holocaust denial is illegal.

In addition to a comparative work, this book is also a history of the principal Holocaust-denial trials and scandals of the 1970s, 1980s, and early

1990s. As such, it is a study of how Western legal systems came to terms with Holocaust denial during the period when it had the greatest power to shock. It was also the period when Holocaust-denial litigation carried the greatest risk of scandal. By the late 1990s, this had begun to change. The sheer volume of Holocaust-denial litigation (and controversy) during the previous decades lessened the power of denial to shock, even if denial is still seen as dangerous and offensive. Therefore, the book only mentions the *Irving v. Lipstadt* libel case in passing, and does not look at other recent cases. Likewise, the book does not examine cases from other countries with Holocaust-denial laws such as Austria, Switzerland, and Belgium. Nor does the book describe the difficult law enforcement problems the Internet poses for Holocaust denial.

On the other hand, the key cases of the 1970s, 1980s, and early 1990s are described in detailed narratives that provide both the legal and political context. These include the *Mermelstein* case, in which an American Holocaust survivor sued a Holocaust-denial group in civil court; the Canadian prosecution of Ernst Zundel for spreading false news; the multiple prosecutions of Robert Faurisson, the leading Holocaust denier in France; and the *Deckert* case, in which two German judges were removed from the bench after issuing a verdict that offended public sensibilities about the Holocaust. In addition, the book also describes German denial cases from the early 1970s and 1980s and French cases brought under the Gayssot Law. Likewise, the chapter on the United States provides four detailed case studies on campuses that ran ads denying the Holocaust. Therefore, the book should interest not only students of comparative politics, Holocaust studies, and the sociology of law, but also lawyers, journalists, and the general reader interested in an in-depth look at the pros and cons of speech prosecutions.

*

This book is a revision of my doctoral dissertation in political science from Johns Hopkins University. I want to thank my dissertation chair Richard Katz, who got me interested in comparative politics, and my second reader, Joel Grossman, who helped me a great deal in framing the project. In addition, J. Woodford Howard, also of Johns Hopkins University, gave me a great deal of inspiration and advice particularly with the early versions of the draft. Finally, the finished book owes a great deal to Douglas Dow, who over the years has read and commented on multiple versions of the project, and David Patton, who read the entire draft in 2002. Both Doug and David have given me excellent advice, even if I have not always followed it.

I also want to thank Professors Suzette Hemberger, Richard Flathman, and Thomas Berger, also of the Johns Hopkins Political Science department. Colleagues also supplied me with important advice. Mark Cushman read extensive portions of the work providing many useful suggestions and encouragement. At the Berlin Program for Advanced European and German Studies, I must thank Patricia Stokes, whose work and perseverance were a model to emulate. I also want to thank Frank Ravitch. His enthusiasm has

been a constant source of inspiration. The book also benefitted from feedback following presentations at the Berlin Program seminar meetings, the Law and Society Association, and the Northeastern Political Science Association. Finally, I want to thank my two anonymous readers at Palgrave Press. Their comments made this a much better book.

A second kind of debt involves institutions that supported my research. A grant from the Social Science Research Council's Berlin Program for Advanced German and European Studies enabled me to spend a year in Berlin gathering materials on French and German Holocaust-denial litigation. My year in Berlin also improved my language abilities, and gave me a sense of German society and how the Holocaust influences it. I also received a grant from the Canadian Government, which I used to travel to Toronto, meet with members of the Canadian Jewish Congress, and photocopy large portions of the *Zundel* transcript.

Other debts involve individuals and institutions that opened up their archives to me. In New York, I want to thank the student members of the *Queens College Quad*. In Los Angeles, I want to thank members of the Simon Wiesenthal Center and the Records Office of the Los Angeles Superior Court. My research in the United States also included work at the New York Public Library, the American Jewish Committee's Blaustein Library, and the library at the Holocaust Museum, where I was able to interview Christopher Browning, who testified in Ernst Zundel's 1988 trial.

In Canada, I want to thank Steve Schulman and Manuel Prutschi of the Canadian Jewish Congress, Sol Littman of the Simon Wiesenthal Center Toronto Office, and Mendel Green. I also want to thank Alan Borovoy of the Canadian Civil Liberties Association, Peter Griffiths, and John Pearson—the two attorneys who prosecuted Zundel—for agreeing to interviews. Although these interviews do not figure prominently in the final version, they were invaluable as background. My Canadian work also included research at the libraries of the University of Toronto and Osgoode Hall Law Schools.

In France I owe a great debt to Matire Jean Serge Lorrach, an attorney for two deportee organizations, who provided me with a great amount of materials on the Gaysot-law litigation. Without these materials the fifth chapter could not have been written in anything like its present form. In addition, Stephanie Courable, a French scholar of Holocaust-denial litigation, has provided me with samples of her work as well as valuable citations to secondary research. My work in France also involved research at the *Bibliothèque nationale de Paris*, and the University of Paris law school library.

In Germany there are many people to thank. First and foremost is Ingeborg Mehser, coordinator of the Berlin program, who took me under her wing and provided me with contacts to experts in the field. While most of my research was undertaken at the Free University, especially in its law library, I also worked extensively at the Anti-Semitism Research Center of the Berlin Technical University. There I must thank Juilane Wetzel and especially Peter Widman, the archivist, who presented me with copies of the full

written verdicts in the *Deckert* and *Althans* cases, set up a screening of *Beruf Neonazi*, and gave me access to the research center's extensive newspaper clipping files. I also availed myself of the newspaper clippings maintained by the Otto Sühr Archiv of the Free University of Berlin, as well as the Institut für Sozialforschung (Hamburg) and the Dokumentationsarchiv des österreichischen Widerstandes (Vienna).

Let me address a few technical matters. The book uses a wide variety of legal and nonlegal source materials. When citing legal sources I have tried to follow the legal citation norms of the country in question. When citing nonlegal sources I rely on the *Chicago Manual of Style*. In Germany, where periodicals such as *Kritische Justiz* and *Neue Juristische Wochenzeitung* publish both articles and legal cases, citation form varies with the type of material. Finally, unless otherwise noted, all translations are my own. Chapters 3 and 4 are an expanded and revised version of my 1998 article "Who Takes the Blame? Scapegoating, Legal Responsibility and the Prosecution of Holocaust Revisionists in the Federal Republic of Germany and Canada" published in volume 16, number 2 of *The Glendale Law Review*. Parts of chapters 6 and 7 were previously published at 9 *Geo.MasonU.Civ.Rts.L.J* 125 (1998), George Mason University Civil Rights Law Journal Association, copyright 1998.

This book has taken many years to write. At times it seemed less than certain that I would ever finish. During these times I fell back on support of my family. Unfortunately, my dad did not live to see this book, but the memory of his warmth and humor inspired me. I also want to thank my mother and brother. Over the years we had many interesting discussions about the book, the writing process, and life in general. My in-laws also took an active interest in the book, sending me a steady flow of newspaper clippings on genocide denial. Finally, I owe a great deal to my wife, Jacqueline. In addition to making excellent substantive and editorial suggestions about the book, her ability to look at the long term lifted my spirits. Therefore, I dedicate this work to Jacqueline Baronian.