



## WIDER VISION: HATE SPEECH LAW, PUBLIC OPINION AND HOMOSEXUAL RIGHTS IN GERMANY AND THE UNITED STATES

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### *Abstract*

*Advocates for homosexual rights have won many recent court battles and have helped repeal Don't Ask Don't Tell. These successes have been accompanied by a dramatic shift in public opinion over a short period of time. Germany, too, has experienced a steady trend of more legally-recognized homosexual rights. This trend might also reflect public opinion, as polling in Germany indicates broad support for homosexual rights. This increase in support for homosexual rights, however, has apparently not coincided with a general increase in tolerance in each country. Though the American public is roughly divided on the issue of hate speech, hate speech is unregulated in the United States. Furthermore, hate speech in Germany is regulated even though Germans seem to favor less stringent hate speech laws in some circumstances.*

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## INTRODUCTION

In recent years, homosexual rights have surged to the forefront of American politics.<sup>1</sup> However, even though it seems reasonable to assume that public support for homosexual rights might coincide with more stringent hate speech regulation, hate speech is virtually unregulated at the federal level in the United States.<sup>2</sup> Support for both homosexual rights and hate speech regulation might fall within a broad conceptualization of “tolerance,” as support for both topics would necessarily entail greater protection of groups which have historically been the target of discrimination.<sup>3</sup>

In response to increasing public support for homosexual rights in the United States, both the legislative and judicial branches have needed to address the interplay between hate speech and homosexual rights.<sup>4</sup> Germany, too, has widespread support for homosexual rights, and has adopted laws that reflect the stance of its electorate.<sup>5</sup> A comparison of hate speech laws in the United States and Germany, however, reveals that there is no similar relationship between support for homosexual rights and hate speech regulation.<sup>6</sup> The United States has generally refused to regulate hate speech at the federal level.<sup>7</sup> Germany, by contrast, has extensive hate speech regulation.<sup>8</sup> It is apparent, then, that the recent groundswell of support for homosexual rights in the United States has not translated into support for greater hate speech regulation.

For the purposes of this article, support for homosexual rights in the United States will be conceptualized through support for the Defense of Marriage Act (“DOMA”) and Don’t Ask Don’t Tell (“DADT”).<sup>9</sup> Because this article deals with hate speech and homosexual rights, two topics which are only loosely related conceptually, it is easier for organizational purposes to think of this article as broken into two “halves.” The first half of this article discusses hate speech in the

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1. Debbie Siegelbaum, *Gay Rights: Republicans' Last Hot Button Issue?*, BBC NEWS (Mar. 25, 2014), <http://www.bbc.com/news/blogs-echochambers-26361290>.

2. Michael W. McConnell, *You Can't Say That*, N.Y. TIMES (June 20, 2012), available at <http://www.nytimes.com/2012/06/24/books/review/the-harm-in-hate-speech-by-jeremy-waldron.html?pagewanted=all> (“The United States is almost alone among Western liberal democracies in not punishing what is called hate speech. . .”).

3. Merriam-Webster defines “tolerance” as the “willingness to accept feelings, habits, or beliefs that are different from your own.” Both hate speech regulation and advocacy for homosexual rights seem to fit generally within this definition. *Definition of Tolerance*, MERRIAM-WEBSTER (2014) available at <http://www.merriam-webster.com/dictionary/tolerance>.

4. See *infra* Section V-VI.

5. See *infra* Section VII- VIII.

6. See *infra* Section IX.

7. See *infra* Section III.

8. See *infra* Section IV.

9. Obviously, operationalizing support for homosexual rights through only two issues is somewhat imperfect. These issues were chosen for two reasons. First, there is a great deal of polling available on both subjects. Second, both subjects illustrate the fact that public opinion towards homosexual rights has changed dramatically within a very short period of time. This article also examines public opinion towards homosexual rights in Germany by examining attitudes towards same-sex marriage specifically and attitudes towards homosexuality generally. Scant polling exists on public opinion towards hate speech legislation in both the United States and Germany.

United States and Germany. First, this article will provide a general discussion of hate speech law in order to illustrate the degree to which the regulation of hate speech had adequately coincided with “tolerance” as a concept generally. Next, this paper will give a summary of case law dealing with hate speech in the United States. This discussion is deliberately short, because the audience of this article is presumed to have a general familiarity with this concept. This article then explores the laws surrounding hate speech in Germany, including international agreements, the German Constitution, case law and legislation. The first section of this paper concludes with an exploration of recent changes in public opinion towards homosexuals, by examining several tracking polls on the subject.

The second half of this article discusses public opinion over homosexual rights in the United States and Germany. This section begins by detailing recent trends in polling in the United States on DOMA and DADT. Then, this article discusses how public opinion in the United States has generally affected changes in social policy for homosexual rights, but not for hate speech regulation. This article will then briefly summarize major advances in homosexual rights in Germany, and provide a discussion of homosexual rights and hate speech legislation in the context of public opinion. This article concludes that shifts in public opinion towards homosexual rights do not necessarily result in a greater level of tolerance, as indicated by a comparison of hate speech regulation in Germany and the United States.

#### I. HATE SPEECH AND TOLERANCE

Hate speech has been defined as “utterances which tend to insult, intimidate or harass a person or groups or utterances capable of instigating violence, hatred or discrimination.”<sup>10</sup> On its most simplistic level, the question “should hate speech be legalized?” could be thought of as “do you believe that an act can be so offensive that it should lose its quality as speech?”

The answer to this question to some extent depends on the answer to a variety of other questions, each of which involves modern societal norms.<sup>11</sup> First, should remarks by members of a minority group against members of the majority be treated differently than remarks by members of the majority group against members of a minority?<sup>12</sup> Second, even if this is so, what about remarks by members of one minority group against another?<sup>13</sup> In other words, can anti-Semitic remarks made by an African-American ever be “racist?”<sup>14</sup> Third, what exactly *is* hate speech?<sup>15</sup> Obviously, certain words would practically always be included in our definition of racism. But when do veiled remarks become racist?<sup>16</sup>

Finally, where and under what circumstances should hate speech be

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10. Winfried Brugger, *The Treatment of Hate Speech in German Constitutional Law (Part I)*, 3 GERMAN L.J. 1, 11 (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=212>.

11. See generally Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1525-29 (2003).

12. *Id.* at 1528.

13. *Id.*

14. *Id.*

15. *Id.* at 1527.

16. *Id.*

banned?<sup>17</sup> Should hate speech *ever* be protected? Is it ever appropriate to ban artwork because of its underlying racial message?<sup>18</sup> Many modern racists point to statistics in order to spread their message and so, therefore, is it ever appropriate to ban academic literature because of its message?<sup>19</sup> And who decides what speech is acceptable and what speech is not acceptable? Political leaders? Society as a whole?

Absolute free speech advocates refer to book burning, witch trials and communist blacklists in order to illustrate the historical negative effects of curtailing free speech.<sup>20</sup> They also claim hate speech regulation will lead to a “slippery slope” resulting in greater general regulation of speech which would chill discussion in sensitive settings.<sup>21</sup> Supporters of hate speech regulation point to other events, such as slavery, Jim Crow Laws, and segregation.<sup>22</sup> Racist remarks also cause emotional scarring and feelings of fear and anxiety.<sup>23</sup> Both sides, of course, can be supported by historical and constitutional arguments.

Winfried Bugger, a noted scholar of German constitutional law at Heidelberg University, summarized the debate surrounding hate speech well when, in the form of a speech, he wrote four statements which would each qualify as protected in the United States and unprotected speech in Germany:

Wake up, you tired masses, I have four messages that you better listen to, understand and share! First, our President is a pig! I have painted two pictures to demonstrate my point. Here is one showing our clearly recognizable President as a pig engaged in sexual conduct with another pig in a judge’s robe, and here is another, showing our President having a sexual encounter with his mother in an outhouse. Second, all of our soldiers are murderers. Third, the Holocaust never happened. Fourth, African-Americans use the slavery lie to extort money from the American government in the same way Jews use the Holocaust lie to extort money from Germany. Something should be done about this!<sup>24</sup>

So, how did the United States and Germany come to these radically different conclusions about what is acceptable speech? With this question in mind, this paper turns to United States Supreme Court case law.

## II. UNITED STATES CASE LAW

*Beauharnais v. Illinois* raised a variety of questions about the relationship

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17. *Id.* at 1528

18. *Id.* at 1527-28.

19. *Id.* at 1526.

20. Bradley A. Appleman, Note, *Hate Speech: A Comparison of the Approaches Taken by the United States and Germany*, 14 WIS. INT’L L.J. 422, 426 (1996).

21. *Id.*

22. *Id.* at 427.

23. *Id.*

24. Winfried Bugger, *Ban On or Protection of Hate Speech? Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. L.F. 1, 1 (2002).

between political speech and restricted speech.<sup>25</sup> In that case, a member of a white supremacist organization distributed literature that included several derogatory remarks about African-Americans.<sup>26</sup> The defendant also called upon city officials to stop the “invasion” of white property, neighborhoods and persons by African-Americans.<sup>27</sup> He was convicted under a criminal libel statute.<sup>28</sup> The Court stated that:

In the face of our history, it would not be correct to say that the Illinois legislature was without reason in seeking ways to curb false or malicious defamation of racial and religious groups, made in public places and by means calculated to have a powerful emotional impact on those to whom it is presented.<sup>29</sup>

*Beauharnais* demonstrates the relationship between hate speech and political speech in the United States. Political speech has historically received the highest protection under the law, and so its treatment under *Beauharnais* is somewhat surprising. One group of scholars who have addressed this question stated as follows:

Q: Did *Beauharnais* involve protected political speech in the sense that the petitioner was focused on communicating with public officials?

A: Yes. *Beauharnais* illustrates the proposition that even if we have clearly defined legal principals, the Court does not always apply them. Few commentators would regard the decision as good law today.<sup>30</sup>

The Supreme Court ruled that *Beauharnais*'s speech fell outside of political speech because it amounted to group defamation.<sup>31</sup> This concept of anti-defamation protection was narrowed in *Milkovich v. Lorain Journal Co.*, in which the Court held that a reasonable fact-finder must be able to conclude that the defamatory statements imply an assertion of fact and not just rhetorical hyperbole.<sup>32</sup> Assuming *Beauharnais* is still good law, a racial stereotype today might be held to be a rhetorical hyperbole.

In *Brandenburg v. Ohio*, a KKK leader was convicted for criminal syndicalism after uttering derogatory remarks against African-Americans and Jews.<sup>33</sup> The court struck down the statute because it failed to distinguish between mere advocacy and incitement to imminent lawless action, stating as follows:

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25. See *Beauharnais v. Illinois*, 343 U.S. 250 (1952).  
26. *Id.* at 251-53.  
27. *Id.* at 252.  
28. *Id.* at 251.  
29. *Id.* at 261.  
30. RUSSELL L. WEAVER ET AL., *INSIDE CONSTITUTIONAL LAW: WHAT MATTERS AND WHY* 299 (2009).  
31. *Beauharnais*, 343 U.S. at 286-87.  
32. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21-22 (1990).  
33. See *Brandenburg v. Ohio*, 395 U.S. 444, 444-47 (1969).

The constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force . . . except where such advocacy is directed to incit[e] or produc[e] imminent lawless action and [the speech] is likely to incite or produce such action.<sup>34</sup>

Similarly, in *Boos v. Barry* the Court rejected a “human dignity” standard for the regulation of free speech similar to the approach that Germany takes.<sup>35</sup>

In drafting hate speech legislation, the United States has confronted the obstacle of narrowly tailoring the legislation in such a way so that it would only ban speech that is unprotected by the First Amendment. It is difficult to draft hate speech legislation which bans only unprotected speech. This problem is illustrated by *R.A.V. v. City of St. Paul, Minnesota*.<sup>36</sup> In *R.A.V.*, a teenage boy burned a cross in the yard of an African-American family.<sup>37</sup> He was convicted under the St. Paul Bias-Motivated Crime Ordinance, which provides as follows:

Whoever places on public or private property a symbol, object, appellation, characterization of graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arises anger, alarm, or resentment in others on the basis of race, creed, color, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>38</sup>

The Court struck down the statute as being content-based, as the statute only precluded speech on disfavored subjects.<sup>39</sup> The Supreme Court provided that “[n]onverbal express activity can be banned because of the action it entails, but not because of the idea it expresses. Burning a flag in violation of a law against outdoor fires is punishable, but it is not punishable as a law against dishonoring the flag.”<sup>40</sup> In other words, “[t]he government can’t regulate speech based on hostility or favoritism towards its underlying message.”<sup>41</sup> One paradox that is apparent from reading *R.A.V.* is that a law prohibiting hate speech will only be upheld if it doesn’t draw content-based distinctions among types of speech.<sup>42</sup> An example of an impermissible content-based distinction would be prohibiting speech concerning race, but not political affiliation.<sup>43</sup> However, it is very difficult for legislation to meet this test without being invalidated due to over-breadth.<sup>44</sup>

In *Virginia v. Black*, one respondent burned a cross during a KKK rally, and two others burned a cross in the yard of an African-American family who had

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34. *Id.* at 447.

35. *See Boos v. Barry*, 485 U.S. 312, 322, 324 (1988).

36. *R.A.V. v. St. Paul*, 505 U.S. 377, 379 (1992).

37. *Id.*

38. *Id.* at 380.

39. *Id.* at 391, 398.

40. *Id.* at 385.

41. *Id.* at 386.

42. *Id.* at 401.

43. *See id.* at 411.

44. *See id.* at 381 n.3.



complained that one respondent used the family's backyard as a firing range.<sup>45</sup> The Court upheld a statute which prohibited burning crosses with "intent to intimidate," because cross burning had historically been associated with intimidation.<sup>46</sup> A plurality of justices found that burning a cross was prima facie evidence of intimidation.<sup>47</sup> This decision affirmed a state's right to ban cross-burning, provided it does so in a content-neutral way.

### III. GERMAN HATE SPEECH LAW

Before 1945, Jews in Germany received little protection.<sup>48</sup> Though the 1950s generally saw an increase in the protection of German Jews, there were still many setbacks.<sup>49</sup> As an example, in one case a man distributed pamphlets alleging that Hitler was a Jewish agent and that no Jews should hold office.<sup>50</sup> The presiding judge said that the pamphlets spoke out against "international Jewry," a much smaller group than the Jews, and therefore the speech was protected.<sup>51</sup> Germany's recent past provides a stark contrast to its present legislation. Germany has now adopted several laws, both nationally and internationally, which prohibit hate speech.

#### A. *International Agreements*

Germany is a member state of the European Convention on Human Rights (ECHR).<sup>52</sup> Article 9 of the ECHR provides:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.<sup>53</sup>

The broad nature of this language is apparent. While member states have "freedom to manifest [their] religion or beliefs[.]" this freedom can be subject to restrictions if the speech in question is prohibited by law and is necessary "for the

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45. *Virginia v. Black*, 538 U.S. 343, 350 (2003).

46. *Id.* at 347, 354-55.

47. *Id.* at 366-67.

48. Robert A. Kahn, *Cross-Burning, Holocaust Denial, and the Development of Hate Speech Law in the United States and Germany*, 83 U. DET. MERCY L. REV. 163, 184 (2006).

49. *Id.* at 185.

50. *Id.*

51. *Id.* at 186.

52. *Germany*, COUNCIL OF EUROPE (2014), <http://www.coe.int/en/web/portal/germany>.

53. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 9, Nov. 4, 1950, 213 U.N.T.S. 221.

protection of the public order, health or morals, or the protection of the rights and freedoms of others.”<sup>54</sup> It seems likely that hate speech legislation would fall within the broad category of speech restricted in favor of the “rights and freedoms of others[.]”<sup>55</sup> and possibly within the purview of the “protection of public order, health or morals” of society.<sup>56</sup>

### B. German Constitution

Article 5 of the German Constitution (“Grundgesetz”) provides that “[e]veryone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcast and films is guaranteed. There shall be no censorship.”<sup>57</sup>

Furthermore, “[t]hese rights are limited by the provision of the general laws, the provisions of law for the protection of youth, and by the right to inviolability of personal honor.”<sup>58</sup> “Opinions” may be “well-founded or unfounded, emotional or rational, valuable or worthless, dangerous or harmful . . . . An expression of an opinion does not lose this protection by being sharply or hurtfully worded.”<sup>59</sup> Although freedom of speech is a fundamental right in Germany, it is not absolute. Free speech is limited to the extent it offends others or offends the “constitutional order or the moral code.”<sup>60</sup> What constitutes the “constitutional order or the moral code” is embodied by the “free democratic order.”<sup>61</sup>

The Federal Constitutional Court defined the “free democratic order” as

an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least; respect for the human right of a person to life and free development; popular sovereignty; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties.<sup>62</sup>

Article 18 of the German Constitution provides that a person who abuses freedom of expression “in order to combat the free democratic basic order, shall

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54. *Id.*

55. *See id.*

56. *See id.*

57. GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW] [CONSTITUTION] May 23, 1949, BGBl. S. I, art. 5 (Ger.) [hereinafter GERMAN CONSTITUTION].

58. *Id.*

59. Brugger, *supra* note 10, at 11 (quoting 90 BVerfGE 241, 247 (1994)).

60. GERMAN CONSTITUTION, *supra* note 57, at art. 2.

61. Appleman, *supra* note 20, at 429.

62. Appleman, *supra* note 20, at 429 (quoting judgment of Oct. 23, 1952, Federal Constitutional Court (First Sen.), 2 BVerfGE 1, 12-13) (F.R.G.), *translated in* W. MURPHY & J. TANENHAUS, COMPARATIVE CONSTITUTIONAL CASES 603 (1977).

forfeit these basic rights.”<sup>63</sup>

Article 21 states that political party shall help form the will of the people but if the parties aim to impair or abolish the free democratic basic order they will be deemed unconstitutional.<sup>64</sup>

### C. German Case Law

Donald Kommers, a scholar of German law, summarized the “hierarchy” of free speech in Germany as follows:

First, the value of personal honor always trumps the right to utter untrue statements of fact made with knowledge of their falsity. If, on the other hand, untrue statements are made about a person after an effort was made to check for accuracy, the court will balance the conflicting rights and decide accordingly. Second, if true statements of fact invade the intimate personal sphere of an individual, the right to personal honor trumps freedom of speech. But if such truths implicate the social sphere, the court once again resorts to balancing. Finally if the expression of an opinion—as opposed to fact—constitutes a serious affront to the dignity of a person, the value of personal honor triumphs over speech. But if the damage to reputation is slight, then again the outcome of the case will depend on careful judicial balancing.<sup>65</sup>

At its most basic level, freedom of speech yields to other rights in Germany. All rights are weighed against the concept of human dignity, the “trump card.” Courts must follow two rules: (1) Only “pressing public interests” can justify interference with free speech, and (2) If two reasonable interpretations of speech exist, a court may not choose the punishable interpretation.<sup>66</sup>

In *Luth*, 7 BverfGE 198 (1958), *Luth* boycotted the continued distribution of films by a filmmaker who was popular during World War II.<sup>67</sup> A Hamburg court enjoined this campaign,<sup>68</sup> but the Constitutional Court voided the injunction.<sup>69</sup> The Court stated that allowing the continued distribution of Nazi propaganda would “mean that nothing had changed in German cultural life since the National Socialist period . . . .”<sup>70</sup>

The Court balanced *Luth*’s free speech interests against the film director’s professional and economic interests, concluding that, “[w]here the formation of public opinion on a matter important to the general welfare is concerned, private and especially individual economic interests must, in principle, yield.”<sup>71</sup>

In another case, spreading pamphlets charging “the Jew” with crimes was

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63. Grundgesetz [GG] May 23, 1949, BGBl. S. I, art. 18 (Ger.).

64. *Id.* at art 21.

65. DONALD P. KOMMERS & RUSSELL A. MILLER, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 485 (Duke Univ. Press 2012).

66. Brugger, *supra* note 24, at 8.

67. Rosenfeld, *supra* note 11, at 1550.

68. Rosenfeld, *supra* note 11, at 1550.

69. Rosenfeld, *supra* note 11, at 1550.

70. Rosenfeld, *supra* note 11, at 1550.

71. Rosenfeld, *supra* note 11, at 1551.

deemed punishable by the courts, as well as placing stickers saying “Jew” on election posters.<sup>72</sup> Some courts require a threat to the public peace.<sup>73</sup>

Holocaust denial is illegal in Germany.<sup>74</sup> However, in the Historical Fabrication Case, 90 BVerfGE 1 (1994), a book stating that Germany was not the cause of WWII, because the war was thrust upon Germany by its enemies, was held to proffer an “opinion” and was thus protected speech.<sup>75</sup> The Court has held that, “no one has a protected interest in spreading untrue statements.”<sup>76</sup>

The statement “all soldiers are murderers,” however, was held to be an opinion.<sup>77</sup> The court ruled that the comment was not meant literally, and that the statement served as a criticism of the role of soldiers in society.<sup>78</sup> In *Mephisto*, 9 BVerfGE 173, the heir of a deceased actor sought to enjoin the publication of a book which alleged that the actor collaborated with the Nazis.<sup>79</sup> The Court found that Article 5(3) did have limits.<sup>80</sup> In this case, the actor’s post-mortem “human dignity” outweighed the free speech interest.<sup>81</sup>

Laws regulating speech must pass a two-step test under Article 5(2) of the German Constitution.<sup>82</sup> First, the law must be content-neutral or protect a community value that takes precedence over free speech.<sup>83</sup> Second, the value of the interest must be greater than the basic right being limited.<sup>84</sup>

The Federal Constitutional Court has explained the rationale behind this as follows: “All printed matter, films, or pictures which glorify crime or violence, provoke racial hatred, glorify war, or depict sexual acts in a crude, offensive and shameful manner constitute (moral) harm and thus may lead to serious or even irreversible injury.”<sup>85</sup> As such, the court engages in a balancing test and hate speech can be limited by legislation.

#### D. German Hate Speech Legislation

Section 130 of the German Criminal Code prohibits attacks on human dignity that incite hatred in a manner likely to cause a breach of the peace.<sup>86</sup> It prohibits acts against parts of the population that lead to: (1) incitement of hatred; (2) provocation of violence or lawlessness against personal freedom; and (3) insult, ridicule, and defamation (not including mere expression of disrespect or

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72. Rosenfeld, *supra* note 11, at 1551.

73. Rosenfeld, *supra* note 11, at 1551.

74. Rosenfeld, *supra* note 11, at 1552.

75. Rosenfeld, *supra* note 11, at 1553.

76. ROBERT KAHN, HOLOCAUST DENIAL AND THE LAW 18 (2004).

77. Rosenfeld, *supra* note 11, at 1553-54.

78. Rosenfeld, *supra* note 11, at 1553-54.

79. Claudia E. Haupt, *Regulating Hate Speech - Damned If You Do and Damned If You Don't: Lessons Learned from Comparing the German and U.S. Approaches*, 23 BU INT'L L.J. 299, 325 (2005).

80. *Id.* at 326.

81. *Id.*

82. Appleman, *supra* note 20, at 431.

83. Appleman, *supra* note 20, at 431.

84. Appleman, *supra* note 20, at 431.

85. Appleman, *supra* note 20, at 431.

86. Appleman, *supra* note 20, at 432.

disparaging assertions whose truth or untruth cannot be proven).<sup>87</sup>

Section 130(3) provides punishment in the form of “[i]mprisonment, not exceeding five years, or a fine will be the punishment for whoever, in public or in an assembly, approves, denies or minimizes an act described in §220a(1) [i.e., genocide] committed under National Socialism, in a manner which is liable to disturb the public peace.”<sup>88</sup> Section 131 of the Criminal Code prohibits inciting the public to race hatred or describing cruel acts of violence against humans “as to glorify or deny the wrongfulness of such acts of violence, or which represent the cruel or inhuman aspects of the subject matter in a manner which violates human dignity.”<sup>89</sup> Section 185 punishes offenses against personal honor or insult.<sup>90</sup> It provides that “[i]nsult will be punished by imprisonment not exceeding one year or by a fine.”<sup>91</sup>

The Youth Protection Act also limits German freedom of expression. It established the Office for the Examination of Materials Endangering Youths.<sup>92</sup> A board representing the office generates a master list of materials that endanger the well-being of youths, and sale of those materials to persons under 18 is prohibited.<sup>93</sup> However, an item cannot be placed on the list purely for political, social, religious or philosophical reasons.<sup>94</sup> The list is not published so as to avoid advertising those works.<sup>95</sup> A list of video games includes well-known American games such as *Wolfenstein 3D*, *Resident Evil*, *Medal of Honor*, *Mortal Kombat* and *Quake*.<sup>96</sup> It is also well known that the sale of neo-Nazi music has been banned for youths.<sup>97</sup> The constitutionality of the list has been upheld.<sup>98</sup>

#### IV. HOMOSEXUAL RIGHTS AND PUBLIC OPINION IN THE UNITED STATES

##### A. Recent Trends

A large body of literature exists detailing public opinion about homosexuality in the United States. While it is true that Americans have been less willing to restrict the rights of homosexuals since the 1970s, same-sex marriage was used as a wedge issue in a presidential election as recently as 2004.<sup>99</sup>

Paul Brewer, a Professor of Communication at the University of Delaware, conducted a study that suggested that the rapid change in public opinion in favor of

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87. Appleman, *supra* note 20, at 432.

88. Haupt, *supra* note 79, at 323.

89. Appleman, *supra* note 20, at 432.

90. Appleman, *supra* note 20, at 432.

91. Brugger, *supra* note 10.

92. Appleman, *supra* note 20, at 433.

93. Appleman, *supra* note 20, at 433.

94. Appleman, *supra* note 20, at 433.

95. Protection of Young Persons Act § 15(4) [Federal Law Gazette I, p. 2730, 2003 I, p. 476] (July 23, 2002) <http://www.bmfsfj.de/RedaktionBMFSFJ/Abteilung5/Pdf-Anlagen/jschg-englisch,property=pdf,bereich=bmfsfj,sprache=de,rwb=true.pdf>.

96. *Computer Games on the Index List*, INTERCAFE 2012 (Jan. 2007), <http://www.cybercafe-software.com/indexlist.html>.

97. DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST* 330 (2010).

98. Appleman, *supra* note 20, at 433.

99. Laura R. Olson, Wendy Cadge & James T. Harrison, *Religion and Public Opinion About Same-Sex Marriage*, 87 SOC. SCI. Q. 340, 341 (2006).

increased civil rights for homosexuals was defined by a significant shift in the public's attitudes towards homosexuals themselves.<sup>100</sup> Recent polls demonstrate that factors such as age, education, gender and religious observation have a significant impact on attitudes towards homosexuality.<sup>101</sup>

Support for homosexual rights has grown significantly in the last few years, as illustrated by the public's waning support for DOMA and DADT. Support for the legalization of gay marriage has steadily grown, as illustrated in the table below. Those favoring the legalization of gay marriage has grown from a meager thirty-seven percent of adults in the United States in 2004, to fifty-six percent in 2014.

ABC News Poll/ Washington Post Poll<sup>102</sup>

N=1,005 adults nationwide. Margin of error  $\pm$  3.5.

"Do you think it should be legal or illegal for gay and lesbian couples to get married?"

Year	Legal	Illegal
2003	37%	55%
2004	41%	55%
2005	39%	58%
2006	36%	58%
2007	N/A	N/A
2008	N/A	N/A
2009	49%	46%
2010	47%	50%
2011	53%	44%
2012	51%	47%
2013	58%	36%

100. PAUL RYAN BREWER, VALUE WAR: PUBLIC OPINION AND THE POLITICS OF GAY RIGHTS 118 (2008).

101. Olson, Cadge & Harrison, *supra* note 99, at 342.

102. *Same Sex Marriage, Gay Rights*, POLLING REPORT (2015), <http://www.pollingreport.com/civil.htm> (last visited May 9, 2015).

2014	56%	38%
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Support for DADT has also declined. Below are two tracking polls on the public's support for DADT, conducted somewhat sporadically across the same period of time:

CBS News/ New York Times Poll<sup>103</sup>

N=550 adults nationwide.

"Do you favor or oppose permitting homosexuals to serve in the military? ... Do you favor/oppose that strongly or not so strongly?"

Year	Favor Strongly/ Favor Not So Strongly	Oppose Strongly/ Oppose Not So Strongly
1993	42%	42%
2009	67%	17%
2010	59%	29%
2011	68%	22%

ABC News/ Washington Post Poll<sup>104</sup>

N=1,001 Adults nationwide. Margin of error  $\pm$  3.5.

"Do you think homosexuals / gays and lesbians who DO publicly disclose their sexual orientation should be allowed to serve in the military or not?"

Year	Should Be Allowed	Should Not Be Allowed
1993	44%	55%
2001	62%	35%
2008	75%	22%
2010	83%	14%

Both of these polls echo the significant shifts in public opinion towards homosexuality in the same approximate period of time.

103. *Id.*

104. *Id.*

## B. Major Homosexual Rights Legislation in the United States

### 1. Gay Marriage

In 1996, President Clinton signed the Defense of Marriage Act into law.<sup>105</sup> The bill defined the institution of marriage as follows:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.<sup>106</sup>

The bill passed through the Republican House and into the Republican Senate relatively unscathed, with no new directly-related amendments added.<sup>107</sup>

Backed by the Republicans, the House passed the Marriage Protection Act in 2004, which, had it passed the Republican dominated Senate,<sup>108</sup> would have prohibited the court system from making decisions dealing with same-sex marriage.<sup>109</sup> George W. Bush also advocated for an anti-gay marriage constitutional amendment.<sup>110</sup> In 2011 the Obama Administration announced it would no longer defend DOMA, although it would continue to enforce it.<sup>111</sup>

In 2013, the United States Supreme Court issued the landmark opinion *United States v. Windsor*, which invalidated the Defense of Marriage provision prohibiting gay marriage at the federal level.<sup>112</sup> The Supreme Court, however, was silent as to whether individual states could ban gay marriage.<sup>113</sup> Gay rights advocates enjoyed a great deal of success in federal courts after *Windsor*,<sup>114</sup> but a recent decision by the

105. *Bill Summary & Status - 104th Congress*, LIBRARY OF CONGRESS (1996) available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d104:HR03396:@@X> [hereinafter *Bill Summary & Status*].

106. 1 U.S.C. § 7; 28 U.S.C. § 1738C.

107. *Bill Summary & Status*, *supra* note 105.

108. Craig Broffman & Ed Henry, *Same-Sex Marriage Senate Battle Over, War is Not*, CNN (Jul. 14, 2004, 2:28 AM), <http://www.cnn.com/2004/ALLPOLITICS/07/14/samesex.marriage/index.html?s=PM:ALLPOLITICS>.

109. Joanna Grossman, *The Proposed Marriage Protection Act: Why It May Be Unconstitutional*, FINDLAW (Jul. 27, 2004), <http://writ.news.findlaw.com/grossman/20040727.html>.

110. *Bush Calls for Ban on Same-Sex Marriages*, CNN (Feb. 25, 2004, 5:05 AM), [http://articles.cnn.com/2004-02-24/politics/elec04.prez.bush.marriage\\_1\\_single-state-or-city-marriage-rights-marriage-licenses?s=PM:ALLPOLITICS](http://articles.cnn.com/2004-02-24/politics/elec04.prez.bush.marriage_1_single-state-or-city-marriage-rights-marriage-licenses?s=PM:ALLPOLITICS).

111. Brian Montopoli, *Obama Administration Will No Longer Defend DOMA*, CBS NEWS (Feb. 24, 2011, 12:58 PM), <http://www.cbsnews.com/news/obama-administration-will-no-longer-defend-doma/>.

112. *United States v. Windsor*, 133 S.Ct. 2675; 186 L.Ed.2d 808 (2014). *But see* Hollingsworth v. Perry, 133 S. Ct. 2652, 186 L. Ed. 2d 768 (2013) (dismissing petitioners' claim opposing gay marriage based on lack of standing).

113. Robert Barnes, *Appeals Court Upholds Ban on Same-Sex Marriage for First Time*, WASH. POST (Nov. 6, 2014), [http://www.washingtonpost.com/politics/appeals-court-upholds-bans-on-same-sex-marriage-in-four-states/2014/11/06/6390904c-65fc-11e4-9fdc-d43b053ecb4d\\_story.html](http://www.washingtonpost.com/politics/appeals-court-upholds-bans-on-same-sex-marriage-in-four-states/2014/11/06/6390904c-65fc-11e4-9fdc-d43b053ecb4d_story.html).

114. *Id.*



United States Sixth Circuit Court of Appeals upheld state-wide bans on same sex marriage, increasing the likelihood that the Supreme Court will grant certiorari as to whether the United States Constitution prohibits individual states from banning same-sex marriage.<sup>115</sup>

## 2. Don't Ask Don't Tell<sup>116</sup>

“Don't Ask Don't Tell” was introduced in 1993 by Bill Clinton as a compromise measure.<sup>117</sup> At the time, homosexuality was seen as incompatible with military service; in order to allow gay military service men to serve at all, Clinton believed such a measure would be preferable.<sup>118</sup> In 2010, Democrats pressed legislation through the House and Senate that ultimately repealed “Don't Ask Don't Tell,” and President Obama signed this legislation.<sup>119</sup>

## V. CORRELATION TO PUBLIC OPINION IN THE UNITED STATES<sup>120</sup>

### A. Homosexual Rights

Congressional action towards gay rights has closely correlated with public opinion. When the Defense of Marriage Act became law, support for the measure was at 55%.<sup>121</sup> As of 2014, the percentages of Americans supporting and opposing the Defense of Marriage of Act have essentially flipped. When “Don't Ask Don't Tell” was first proposed, support for homosexuals serving openly in the military was in the low forties. When it was repealed, support rose to the low eighties.<sup>122</sup>

The *Windsor* decision may be viewed as a recognition of the slow responsiveness of the legislative branch. In 2010, support for “Don't Ask Don't Tell” hovered at around twenty percent before the legislative branch repealed it. Similarly, opposition to gay marriage is shrinking. The Supreme Court's decision to strike down DOMA at the federal level, then, could merely be the court acknowledging the public's change of opinion on the matter prior to an outright repeal of DOMA.

### B. Hate Speech Legislation

The United States Supreme Court has virtually declined to prohibit hate speech.<sup>123</sup> The singular poll conducted on hate speech regulation in the United States reveals a stark contrast with the polls dealing with homosexual rights, in that a large section

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115. *Id.*

116. 10 U.S.C. § 654.

117. Meena Hartenstein, *Bill Clinton Regrets 'Don't Ask, Don't Tell' Policy, Says it was Meant to Protect Gay Soldiers*, DAILY NEWS (Sep. 21, 2010), [http://articles.nydailynews.com/2010-09-21/news/27075974\\_1\\_gay-soldiers-gay-bars-gay-advocates](http://articles.nydailynews.com/2010-09-21/news/27075974_1_gay-soldiers-gay-bars-gay-advocates).

118. *Id.*

119. Montopoli, *supra* note 111.

120. This section is based on the polls cited in the “Recent Trends” section.

121. *Same Sex Marriage*, *supra* note 102.

122. *Same Sex Marriage*, *supra* note 102.

123. *See infra* Section III.

of the public is virtually undecided on this issue.<sup>124</sup> This matters because this issue offers relatively little guidance for courts. However, it is possible that if hate speech legislation were to enter the public consciousness on a deeper level, public opinion would shift more towards one side of the spectrum.

## VI. HOMOSEXUAL RIGHTS IN GERMANY

### A. A German Law and Homosexual Rights

Germany recognized civil unions for homosexuals in 2001.<sup>125</sup> In 2004, the German government expanded the rights afforded to homosexual couples under the Life Partnership (Revision) Act.<sup>126</sup> Now, German same-sex couples are no longer compelled to testify against one another in court, same-sex partners may qualify for state pensions and a same-sex partner may adopt his or her partner's biological child.<sup>127</sup> In 2012, the Federal Constitutional Court held that homosexual couples who have entered into "registered partnerships" will receive the same tax treatment as heterosexual couples.<sup>128</sup> The Federal Constitutional Court ruled in 2013 that gays and lesbians could adopt children already adopted by their partners.<sup>129</sup>

### B. German Public Opinion on Same-sex Marriage

Polling questionnaires about same-sex marriage in Germany are much sparser than in the United States, possibly because Germany has already legalized same-sex marriage. In one Pew Global poll of Germans conducted in 2013, Germans were asked whether society should accept homosexuality.<sup>130</sup> Eighty seven percent of those interviewed responded that it should, while eleven percent said that it should not.<sup>131</sup> Another 2013 poll of Germans provided that sixty-seven percent supported same-sex marriage, twelve percent supported some other form of same-sex union short of marriage, and ten percent supported recognition of same-sex relationships.<sup>132</sup>

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124. Kathy Frankovic, *America Divided on Hate Speech*, YOUGOV (2014), <https://today.yougov.com/news/2014/10/02/america-divided-hate-speech-laws/>.

125. Chris Cottrell & Nicholas Kulish, *Gay Rights Emerge as Campaign Issue in Germany*, N.Y. TIMES (Feb. 27, 2013), available at [http://www.nytimes.com/2013/02/28/world/europe/gay-rights-emerge-as-campaign-issue-in-germany.html?\\_r=0](http://www.nytimes.com/2013/02/28/world/europe/gay-rights-emerge-as-campaign-issue-in-germany.html?_r=0).

126. *Same-Sex Marriage in Germany*, ANGLOINFO (2014), <http://berlin.angloinfo.com/information/family/marriage-partnerships/same-sex-marriage/>.

127. *Id.*

128. Fred Pleitgen & Janina Bembenek, *Germany's High Court Expands Gay Rights*, CNN (Aug. 9, 2012, 7:09 AM), <http://www.cnn.com/2012/08/09/world/europe/germany-gay-rights/>.

129. Cottrell and Kulish, *supra* note 125.

130. *The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent*, PEW RESEARCH CTR. (June 4, 2013), <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>.

131. *Id.*

132. *Same-Sex Marriage*, IPSOS (Apr. 4, 2015), <http://www.ipsos-na.com/download/pr.aspx?id=12794>.

## VII. GERMAN CORRELATION TO PUBLIC OPINION

### A. Homosexual Rights

Public opinion on homosexuality has coincided with the advancement of homosexual rights in Germany.<sup>133</sup> Polls indicate that Germans overwhelmingly accept homosexuality, and advocates for homosexual rights have had much recent success in Germany.<sup>134</sup>

### B. Hate Speech Legislation

One research survey dealing with German attitudes towards Islam provided that “[t]he majority of Germans are also firmly opposed to appeasing Muslims and Islam. Only 22% of Germans say there should be a ban on speech that could insult or provoke Muslims. A majority of Germans (52%) are explicitly opposed to such restrictions on free speech.”<sup>135</sup> This finding is consistent with the general reluctance by Germans to accept the growing population of Muslims in Germany. The survey also provided, for example, that “more than half of the German population believes that Islam is prone to violence (64%); has a tendency toward revenge and retaliation (60%); is obsessed with proselytizing others (56%); and strives for political influence (56%).”<sup>136</sup>

## VIII. FINDINGS

The United States has seen a groundswell in support of homosexual rights in recent years. This increase in support has been paralleled by more successes by homosexual rights advocates. Similarly, support for homosexual rights in Germany is high, and advocates for homosexual rights have also made significant advancements for their cause in recent years. None of this seems very surprising, because one generally expects for democracy to be responsive to the public opinion.

The same cannot be said about public opinion on hate speech in either country. Even though roughly half of Americans support some regulation on hate speech, there is virtually no regulation of hate speech at the federal level. Furthermore, even though there are many laws prohibiting hate speech in Germany, public support for hate speech regulation (at least in all circumstances) is rather low. Both of these findings are counter-intuitive.

Finally, when hate speech and homosexual rights in Germany and the United States are examined together, it is clear that these topics have no relationship to each other. In other words, even though tolerance for homosexuals has arguably been increasing in recent years, there has been no broad increase in tolerance for all groups generally.

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133. *See infra* Section V.B.

134. *Id.*

135. Soeren Kern, *Germany: Image of Islam 'Devastating'*, GATESTONE INST. (Dec. 10, 2012, 5:05 AM), <http://www.gatestoneinstitute.org/3487/germany-fear-east-west>.

136. *Id.*

## IX. CONCLUSION

Support for same-sex marriage in the United States has grown in recent years, and a similar phenomenon has happened in Germany. A monumental shift in public opinion towards homosexuality has occurred recently, and it is unlikely to reverse in the foreseeable future.

Despite an increase in support for homosexual rights in both countries, the hate speech laws in both countries have not been affected. The United States and Germany have a variety of factors that might have affected their views on hate speech legislation. For example, the United States is more ethnically diverse<sup>137</sup> and geographically much larger<sup>138</sup> than Germany. There is, however, a history of racial animosity in both countries; the United States had slavery and the Holocaust occurred in Germany. Though “individualism” and “libertarianism” have shaped policy in the United States, “human dignity” and “honor and personality” are most important in Germany.<sup>139</sup> In America, hate speech is viewed fully as a form of speech, even though the speech might be painful to others. German law assigns greater protection to dignity, honor and equality in the interests of targets of hate speech. Rights in the United States are seen as inalienable. Free speech in Germany is viewed as one right among many.

Though support is divided for hate speech legislation in the United States, there is practically no regulation of hate speech at the federal level. Germany, by contrast, has considerable regulation over hate speech but public opinion (at least towards certain groups) is against hate speech regulation. This new uptick of support for homosexual rights has apparently not been indicative of greater levels of tolerance in either country. Whether American courts will follow any shifts in public opinion over hate speech, of course, remains to be seen.

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137. See *The World Fact Book: Germany*, CENT. INTELLIGENCE AGENCY (June 22, 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html>. See also *The World Fact Book: United States*, CENT. INTELLIGENCE AGENCY (June 2014), <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html>.

138. *The World Fact Book: Germany*, *supra* note 137. See also *The World Fact Book: United States*, *supra* note 137.

139. Rosenfeld, *supra* note 11, at 1541, 1548.