A TALE OF TWO SYSTEMS: PROFESSOR LOEWY AND HATE SPEECH

*David Crump**

I. THE TWO SYSTEMS ARE MOSTLY THE SAME 5
II. BUT IS HATE SPEECH DIFFERENT? 7
III. WE IN AMERICA CENSOR ANALOGUES TO HATE SPEECH...................... 8
IV. SOME CATEGORIES OF UTTERANCES HAVE TO BE UNPROTECTED 9
V. COULD A DEMOCRACY GET BY, PERHAPS, WITH CONSTITUTIONAL PROTECTION ONLY FOR POLITICAL SPEECH?....................................... 11
VI. CONCLUSION 12

Arnold Loewy's take on offensive words is a debate between advocates from two systems: those of the United States and those of Germany. *A Dialogue on Hate Speech* (*Dialogue*) is really a play or drama in which a continental lawyer named Hans winds up in a seat on an airplane next to John, who is an American lawyer.[1] Professor Loewy has them debate one of the finer points in the United States Constitution.[2] He shows the values on which these interlocutors' two systems base their laws governing (or not governing) speech that denigrates groups of people.[3] It is a far-out hypothetical debate, but it is an excellent vehicle for putting together two disparate views and letting the reader decide—perhaps, naturally, with a slight tilt toward the American approach.

I. THE TWO SYSTEMS ARE MOSTLY THE SAME

One of the major points that emerges from the *Dialogue* is that the two systems are closely similar.[4] In both the United States and Germany, if you criticize the government, your speech is protected.[5] You can say it bitterly, sarcastically, or viciously, and the government cannot act against you in either country.[6]

---

* A.B. Harvard College; J.D., University of Texas School of Law; John B. Neibel Professor of Law, University of Houston.

1. Arnold H. Loewy, *A Dialogue on Hate Speech*, 36 FLA. ST. U. L. REV. 67, 67 (2008).
2. *Id.*
3. *See id.*
4. *Id.* at 75.
5. *See id.*
6. *See id.*; *see also* Arnold H. Loewy, *Free Trade in Ideas Is (or Ought to Be) for Adults*, 2007 BYU L. REV. 1585, 1585 (2007) (suggesting that a true democratic government would punish only speech that is very harmful).

Germany draws the line at the point where the expression becomes what we in America would call group libel.[7] Americans can freely express hatred against racial minorities, for example, but Germans cannot.[8] At the very least, we can understand that Germans come by this policy honestly. They have had enough of hatred against religious and ethnic groups. Throughout their public education, every German learns about the Holocaust in detail, and every German is inculcated with the national determination that it will never happen again.[9] Other than Germany's treatment of hate speech, *Dialogue* suggests that freedom of speech in Germany is similar to freedom of speech in America.[10] Germans could be characterized as American-style constitutionalists. In fact, Germans are probably more like Americans than are citizens of most other countries, down to the television shows they watch.[11] Let me prove it to you.

Professor Loewy's German lawyer is named Hans: but virtually no one is named Hans in Germany anymore.[12] It is an impossibly old-fashioned name. My wife is a German citizen and her name is Susanne.[13] Her daughter is Linda, named after Linda Evans, who starred on that TV drama, *Dynasty*.[14] Susanne's German son is Tim Christopher, named after Bobby's son on *Dallas*.[15] Both Tim and Linda do their work entirely in English.[16] Tim's best friend is Dennis, and Dennis's wife is Jenny.[17] Tim's girlfriends (in no particular order) have included Sandra, Eva, and Samantha (pronounced za-MAN-ta).[18] Practically everybody in Germany speaks English, is into American culture, and even has a name that's from the good old U.S.A.[19]

Of course, Professor Loewy is right to call his character Hans. It helps keep track of who is talking, and it is consistent with the purpose of the piece. But my point is that the two cultures are remarkably similar.

If you read Professor Loewy's *Dialogue*, you realize that, just like people's names, German freedom of speech is similar to freedom of speech in America.[20] Germany has a Constitutional Court, and because it deals only with constitutional questions, it can churn out more decisions on the subject

7. Loewy, *supra* note 1, at 72–73.
8. *Id.*
9. Interview with Susanne Crump, German Citizen educated in Germany, in Hous., Tex. (Oct. 17, 2018) (notes on file with author).
10. Loewy, *supra* note 1, at 75.
11. Interview with Susanne Crump, *supra* note 9.
12. Loewy, *supra* note 1, at 67; Interview with Susanne Crump, *supra* note 9.
13. Interview with Susanne Crump, *supra* note 9.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *See* Loewy, *supra* note 1.

than our Supreme Court can.[21] There is also the European Court of Human Rights,[22] which has made human rights seem so oppressive to the British that it has been an important motivator for Brexit.[23] In summary, there's no good reason for an American to look down on Hans, except possibly his name.

II. BUT IS HATE SPEECH DIFFERENT?

And so, Germany believes in the freedom of speech, just as America does.[24] But one of the biggest divides, apparently, is hate speech.[25] In Germany, they hate speech even more than we in America do because there are laws in Germany against what we in America would call group libel.[26] You can freely castigate a racial group in America with all kinds of outrageous obloquy, but not in Germany.[27]

Why in America do we tolerate hate speech? Professor Loewy has John, the American, quote Justice Powell: "[T]here is no such thing as a false idea."[28] Our First Amendment treats racial slurs as equivalent to the Declaration of Independence as far as protected speech is concerned.[29] It isn't especially that there is a lot of valuable expression in race baiting. Professor Loewy has John explain that an idea today, such as a suggestion that women might be different in intellectual capacity from men, or that racial minorities might have different analytical abilities from the majority, might be offensive now but might be valuable some day in the future, and the courts cannot reliably predict that outcome.[30]

In fact, you don't have to be a futurist. It happens now. The president of Harvard gave a speech in which he noted the undeniable fact that women are badly underrepresented in scientific fields as compared to men.[31] Then, he

---

21. *See Federal Constitutional Court*, WIKIPEDIA, https://en.wikipedia.org/wiki/Federal_Constitutional_Court (last updated Sept. 19, 2019); *Federal Constitutional Court*, ENCYCLOPAEDIA BRITTANICA, britannica.com/topic/Federal-Constitutional-Court (last visited Nov. 10, 2019) (stating that the German Constitutional Court delivers more decisions per year than the U.S. Supreme Court).

22. *See European Court of Human Rights*, WIKIPEDIA, https://en.wikipedia.org/wiki/European_Court_of_Human_Rights (last updated Nov. 1, 2019, 4:39 PM).

23. *See* Rob Merrick, *Theresa May to Consider Axeing Human Rights Act After Brexit, Minister Reveals*, INDEP. (Jan. 18 2019, 4:00 PM), https://www.independent.co.uk/news/uk/politics/theresa-may-human-rights-act-repeal-brexit-echr-commons-parliament-conservatives-a8734886.html (stating that Prime Minster Theresa May "will consider axeing the Human Rights Act after Brexit" because it "can bind the hands of [P]arliament," and "make[] us less secure").

24. Loewy, *supra* note 1, at 67.

25. *Id.* at 75–78.

26. *See id.* at 72–75.

27. *See id.* at 68, 71.

28. *Id.* at 74 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974)).

29. *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (protecting hate speech against racial and religious groups).

30. Loewy, *supra* note 1, at 74.

31. *See* Marcella Bombardieri, *Summer's Remarks on Women Draw Fire*, BOS. GLOBE (Jan. 17, 2005), http://archive.boston.com/news/education/higher/articles/2005/01/17/summers_remarks_on_women_draw_fire/.

stepped into the minefield. He dared to wonder why. As a matter of scientific speculation, he asked whether women might have different minds from men in such a way as to inhibit them in science.[32] This remark was not treated as a scientific search for an explanatory mechanism.[33] It was about as popular as a porcupine hiding in a pillow, and it was treated as hate speech.[34] Shortly afterwards, the president resigned.[35]

III. WE IN AMERICA CENSOR ANALOGUES TO HATE SPEECH

And that's not all. There are several reasons Americans should not become too smug. Shamefully, our Supreme Court says that some kinds of ideas are false.[36] For example, America absolutely prohibits coverage of creation science in the public schools.[37] You can't even debate the subject philosophically or examine intelligent design against criteria of science.[38] One school tried that, got sued, and faced legal costs so expensive that it had to throw in the towel.[39] In effect, creation science is a type of hate speech in America.[40] We should all be sympathetic to Hans and to the German system because of the mistakes America has made. I know that Professor Loewy and I are of one mind about creation science because we once "debated"—if you can call it that—whether creation science in the schools was protected speech; however, it wasn't much of a debate because we both agreed that it was, or should be.[41] I should quickly add that neither of us is at all an adherent to creationism. We both think it is not a very accurate hypothesis, but it's an allegedly false idea that the Supreme Court has seen fit to censor.[42]

Actually, creation science was followed by the irreducible complexity hypothesis: the idea that some biological organisms are so complex, complete, and internally interdependent that they could not have come about by step-by-step mutation.[43] This idea forced Darwinian scientists to explain why the theory was dubious.[44] Their ultimate answer involved a phenomenon

---

32. *Id.*
33. *See id.*
34. *See id.*
35. *See* Allan Finder, Patrick D. Healy & Kate Zernie, *President of Harvard Resigns, Ending Stormy 5-Year Tenure*, N.Y. TIMES, Feb. 22, 2006, at 1.
36. *See* Edwards v. Aguillard, 482 U.S. 578, 595–97 (1987).
37. *See id.*
38. *See* Kitzmiller v. Dover Area Sch. Dist., 400 F. Supp. 2d 707, 734 (M.D. Pa. 2005).
39. *Id.* at 707.
40. *See id.* (holding that it was unconstitutional for a public school to teach intelligent design in biology class).
41. *See Intelligent Design: What It Is, and Isn't*, UNIV. OF HOUS. L. CTR., http://www.law.uh.edu/news/fall2009/crump.asp (last visited Nov. 10, 2019).
42. *See Edwards*, 482 U.S. at 578.
43. *See* David Crump, *Natural Selection, Irreducible Complexity, and the Bacterial Flagellum: A Contrarian Approach to the Intelligent Design Debate*, 36 PEPP. L. REV. 1, 8–9, 37 (2008) (discussing philosophy of science and secular value of the subject).
44. *Id.*

called "exaptation,"[45] and thus the idea of irreducible complexity, although not particularly valuable in itself, produced value because it stimulated additional thought and discovery.[46]

IV. SOME CATEGORIES OF UTTERANCES HAVE TO BE UNPROTECTED

I found myself thinking that Hans had a lot of things right. Germany protects political speech but not hate speech.[47] In America, we recognize many categories of utterances that are not protected speech.[48] They include copyright infringement,[49] face-to-face "'fighting' words,"[50] defamation,[51] certain kinds of threats,[52] incitement to crime,[53] and on and on. In fact, the jurisprudence of the First Amendment is largely the jurisprudence of exceptions: unprotected utterances.[54]

In developing this jurisprudence of exceptions, the Supreme Court produced differing tests to determine what is not covered by the freedom of speech.[55] For example, the Court has said that utterances that are intrinsically harmful but ineffective in expressing ideas (such as "'fighting' words") are unprotected.[56] As the Court in *Chaplinsky v. New Hampshire* noted: "such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[57] Elsewhere, the Court has said that speech in some instances must be of "public concern" to be protected.[58] Do these unprotected categories mean that the freedom of speech is impaired in America? Surely not.

---

45. Wynne Parry, *Exaptation: How Evolution Uses What's Available*, LIVE SCI. (Sept. 16, 2013), https://www.livescience.com/39688-exaptation.html. "Exaptation" refers to the evolution of a change in function to an existing organ. *Id.*

46. *See id.*

47. Loewy, *supra* note 1, at 72–73, 75.

48. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 572 (1994); R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992); Gertz v. Robert Welch, Inc., 418 U.S. 323, 323 (1974); Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

49. *Acuff-Rose Music*, 510 U.S. at 579 (recognizing copyright infringement as unprotected, but viewing parody as protected speech).

50. *Chaplinsky*, 315 U.S. at 572 (quoting ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES, 149 (1941)) (balancing harm and speech value).

51. *Gertz*, 418 U.S. at 340 (recognizing defamation claims, and creating standards for the elements of defamation).

52. *R.A.V.*, 505 U.S. at 388 (explaining why a threat to the President can be criminalized).

53. *Brandenburg*, 395 U.S. at 448–49 (allowing incitement to crime to be criminalized, but protecting speech that stops short of incitement).

54. *See Acuff-Rose Music*, 510 U.S. at 579; *R.A.V.*, 505 U.S. at 388; *Gertz*, 418 U.S. at 340–48; *Brandenburg*, 395 U.S. at 448–49; *Chaplinsky*, 315 U.S. at 572.

55. Connick v. Meyers, 461 U.S. 138, 143 (1983); *Chaplinsky*, 315 U.S. at 572.

56. *Chaplinsky*, 315 U.S. at 572 (citing CHAFEE, *supra* note 50).

57. *Id.*

58. *Connick*, 461 U.S. at 143.

Against this picture of unprotected categories, John the American says that regulation of hate speech is wrong because it might censor valuable ideas.[59] "I'm not willing to find out," he says.[60] Of all John's overstatements, this one is the most disingenuous. In countless areas, the Supreme Court balances harm and communicative value,[61] and it recognizes that regulation of speech results in outlawing some valuable communications, but it has retained laws that facially had that effect.[62] In other words, the Supreme Court is willing to take greater risks than John when it comes to losing some ideas, but many people might conclude that the Court is right. Would John say that all of these exceptions to free speech are unacceptable risks? No, because it really could not be otherwise. If the mob boss were to say to his enforcer, "Go whack that guy who insulted me," it cannot be protected speech,[63] however much risk there is that the mob boss might have a good idea.

I found myself wondering whether Hans's system really involves the same kind of balancing as John's system in America. I suspect it does. Obviously, there must be categories of speech that are out of bounds in either system. Germany may censor certain categories of hate speech, and America may not, but the American system also suppresses some categories of expression that are harmful but offer "slight" contributions to the expression of ideas.[64] Imagine someone in Germany criticizes the government, but in the course of doing so, adds a gratuitous racial slur. Perhaps that kind of expression can be prohibited in Germany.[65] But the same speaker, in Germany, can utter the same message perfectly lawfully, by simply eliminating the part that adds nothing—the racial slur. It doesn't seem to me that Germany has lost anything valuable by that result. In fact, it strikes me that some people who value free speech could easily prefer such a system—for example, Germans.

---

59. Loewy, *supra* note 1, at 77.

60. *Id.* at 74–75.

61. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358–59 (2003) (balancing harm and value of speech according to the *Chaplinsky* test in a cross-burning case); R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992) (balancing harm and value of speech according to *Chaplinsky* to determine protection); *Chaplinsky*, 315 U.S. at 571–72 (balancing harm and value according to *Chaplinsky* to determine protection).

62. *E.g.*, Broadrick v. Oklahoma, 413 U.S. 601, 607–08 (1973). The Court here recognized that Oklahoma's "Hatch Act," limiting electioneering by public employees, might prohibit some protected speech. *Id.* at 615. But, it said, "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.*

63. *See Chaplinsky*, 315 U.S. at 572. And if it isn't, it's because it's incitement to crime.

64. *Id.*

65. *See* Loewy, *supra* note 1, at 67–69.

V. COULD A DEMOCRACY GET BY, PERHAPS, WITH CONSTITUTIONAL PROTECTION ONLY FOR POLITICAL SPEECH?

Professor Loewy also made me wonder, as I have wondered before, whether a system in which only political speech—or speech on matters of public interest—is protected could support a democracy? There is an argument that all a democracy really needs to protect is political speech, and that if this kind of speech is protected, the population will choose to protect most other kinds of utterances.[66] This hypothetical democracy will quickly realize that one must also protect philosophy, poetry, and literature if the population wants to be able to act meaningfully on political speech.[67] And this imagined democracy must realize, through political speech, that it needs to protect speech about sports, movies, leisure activities, and the like because otherwise its government cannot be told how to treat these subjects.[68]

The argument, then, is that political speech will protect every other kind of speech.[69] I suspect it is true, but I don't know and don't want to see us try it, and so a broader First Amendment seems better. Meanwhile, Professor Loewy has done a marvelous job of challenging the reader to think about these issues and consider whether Hans is right.

There are categories of speech that I wish we as a society could effectively suppress. Several times when my children were young, I was with them in the middle of crowds of people where individuals shouted out obscenities, scatology, and various four-letter words. I wish it were easier to stop this kind of behavior, although I hasten to add that it doesn't seem like the kind of thing for invoking heavy-handed government. On the other hand, violent video games,[70] obscenity,[71] and what I call camouflaged incitement to crime,[72] are some other categories I wish we could get rid of.

Frankly, if I may borrow John the American's phrase, we take a big risk when we tolerate these kinds of things.[73] I believe, although I cannot prove

---

66. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 208 (1993) (advocating a two-tier system with political speech most protected); Brian D. Einhorn, *The Dying of the Light*, 93 MICH. BAR J. 16 (2014) (stating that political speech is a unique interest, and "[t]he First Amendment protects political speech"); Harry Kalven, Jr., *The New York Times Case: A Note on the Central Meaning of the First Amendment*, 1964 SUP. CT. REV. 191, 210–11 (1964) (theorizing that political speech has special protection).

67. SUNSTEIN, *supra* note 66, at 232–42 (suggesting the approach would "give a good deal of protection to non-political speech").

68. *See id.* at 242 (concluding that a two-tier system approach where political speech is most protected will "give a good deal of protection to non-political speech").

69. *See id.*

70. *Cf.* Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) (holding California statute preventing the sale or rental of violent video games unconstitutional).

71. *Cf.* Roth v. United States, 354 U.S. 476, 486 (1957) (setting difficult-to-meet standards for proof of obscenity).

72. *See* David Crump, *Camouflaged Incitement: Freedom of Speech, Communicative Torts, and the Borderland of the Brandenburg Test*, 29 GA. L. REV. 1, 13 (1994) (arguing that the test for incitement to crime is inadequate to deal with suggestive statements).

73. Loewy, *supra* note 1, at 71.

it, that these protected categories of speech have led to a dangerous coarsening of our public interactions, including our political discourse. I think, although again I cannot prove it, that this general fraying of our social constraints has been a part of today's polarization of our Congress and executive departments, to the point that they are inhibited in acting at all.[74] If so, at least in this way it's John, not Hans, who's taking a big risk.

VI. CONCLUSION

I have no ready solution to this problem, but Professor Loewy makes us examine it and think whether there should be solutions.

I suspect he did not intend for the reader to adopt the take on his work that I have. In fact, I imagine he may think my view of Hans's ideas to be a little too sympathetic. But maybe not. He is a professor, as we all know, who is unusual, and he has the singular virtue of forming his opinions one by one. As it is, Professor Loewy's *Dialogue* resembles a Socratic lesson like those in law school classes, in which the American teaches the foreigner but still leaves the outcome open. But the Socratic dialogue is a game that only one person can play, and it took me a couple of readings before I could see that Hans the German, had a point or two to make. Still, these are points that are there to be read and for every reader to make up their mind about. Professor Loewy has put together a debate about the reasons for protecting or not protecting the category of utterances known as hate speech, all without being tendentious. And he has also made his readers think about alternatives to our approach—alternatives that another population might consider just as consistent with democratic ideals as the American regime.

---

74. *See generally* Erik Cleven, Robert A. Buruch Bush, & Judith A. Saul, *Living with No: Political Polarization and Transformative Dialogue*, 2018 J. DISP. RESOL. 53, 55 (discussing the issue of polarization and the erosion of civility in political discourse).