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## On the "Auschwitz Lie"

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## CORRESPONDENCE

### On the "Auschwitz Lie"

In the November 1986 issue of the *Michigan Law Review*, Professor Eric Stein addressed the then-recent German legislation prohibiting the "Auschwitz lie."<sup>1</sup> The "Auschwitz lie" refers to contemporary attempts to deny the historical truth of the Holocaust. In an extended analysis of the 1985 legislation criminalizing such attempts to deny historical fact, Professor Stein revealed the contradictory impulses motivating restrictions on free speech. He reported that the most controversial aspect of the legislation was the question whether the criminalization of the denial of the Holocaust should be extended to cover the denial of other actions, such as the violent expulsion of Germans from Soviet-occupied East Germany — in other words, whether or not the Holocaust was a unique phenomenon. His examination of the legislative history and of decisions applying the predecessors of the 1985 Act suggested that the goals of the Act, the rules of standing it establishes, the ways in which it defines harm, and the time limits for its enforcement presented problematic issues for German constitutional scholars, for lawyers and judges, and for the German people as well.

In the time since his article was published, Professor Stein has corresponded with several European scholars on the issues raised by the 1985 legislation. That correspondence, though brief, highlights the contentious aspects of Professor Stein's analysis; it suggests that the issues of restricting "historical speech," promoting national consciousness, attributing collective guilt, and identifying the role of courts in punishing historical lies remain troublesome to German intellectuals. Excerpts from Professor Stein's correspondence follow.

#### LETTER FROM PROFESSOR HERBERT A. STRAUSS<sup>2</sup>

Your comprehensive study of the recent "Twenty-first Law Modifying the Criminal Law" passed by the Bundestag of the German Federal Republic on June 13, 1985, places the daily detail of the legal processes surrounding the treatment of the "Auschwitz lie" in Ger-

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1. Stein, *History Against Free Speech: The New German Law Against the "Auschwitz" — and Other — "Lies,"* 85 MICH. L. REV. 277 (1986).

2. Professor, Department of History (emeritus), City College of New York; Director, Center for Research on Antisemitism, Technical University, Berlin, Germany.

man courts into a welcome perspective. Since I have been appointed director of the new "Center for Research on Antisemitism" at the Berlin Technical University in 1982, I have been following the debate surrounding this issue as closely as a layman would in my position. I am a historian of modern Germany, and of Jewish *Zeitgeschichte* [contemporary history].

Permit me some observations of a nonlegal nature on one or two of the issues reported by you on the general situation in Germany. At one point, you comment on the absurdity that lawyers and judges still apply law handed down from the Nazi period. Here, you point to a paradox that seems to me inherent in legal forms of thinking: German law commentaries still reproduce decisions seen as precedents that were handed down during the Third Reich, including some of the language then in use. Given this fact — I have hit on it when I had to look up a law book on associations — I seriously question whether a law, however well intentioned, is an effective vehicle in dealing with the political problems left behind by the criminal regime of the Third Reich, and by its survivals or revivals in contemporary political culture. Although I happen to have come to the conclusion, since working here, that the German constitution works and is accepted by the vast majority of Germans too young to have known the previous regime, I am equally convinced that the genocidal process that led to Auschwitz and the unique mass murder of the Jewish people has not been adequately integrated into a critical view of German history by intellectuals and public opinion alike. Since you completed your piece, the world had to witness a heated debate among German historians at whose core lay an attempt by the Berlin historian Ernst Nolte to relieve the burden of shame and responsibility felt by many liberal Germans about the Holocaust, and to point either to alleged Jewish actions — actions by Jews — and to the Soviet liquidation of the kulaks or the gulag concentration camps as "logical" or "historical" precedents of the Holocaust. It is unclear and precise information is lacking about how widely his views have been accepted: prominent historians had no difficulties proving his facts wrong, but establishment papers like the "Frankfurter Allgemeine Zeitung" have supported what they see as the underlying motive of his stance, to wit the perception that German youth can only reacquire a virile national consciousness if it sees the Nazi genocide as part of the "civil war" of the twentieth century, and thus as part of a universal historical process. This view is, of course, diametrically opposed to the positions taken by Bundespräsident Richard von Weizsäcker in the historic speech before the Bundestag delivered on May 8, 1985, and quoted by

you. It would seem to me that even the best of laws making the "Auschwitz lie" offense an *Offizialdelikt* (subject to compulsory prosecution by the state attorneys) must, by the very nature of legal procedure and thinking, fail to speak to this most important juncture in German political culture.

#### LETTER FROM PROFESSOR DR. ERNST NOLTE<sup>3</sup> (I)

Please accept my sincere thanks for your kind letter of June 4, 1987, and for sending me your article in the *Michigan Law Review*. You have chosen one of the most sensitive themes that exist in present-day Germany. The fullness of the examples and cases which you have found allows in any case a better-grounded judgment formation and makes the motives of the legislature more understandable. But I experience a great uneasiness about this law now, as I did before. It would be absurd to pass a law threatening punishment of whoever denies the existence of Napoleon; and it would be unbearable to decree by law that Napoleon won at Aspern (for one can have a different opinion about this, and generally it is assumed that there was a draw). The case of the German law reposes somewhere in the middle, but isn't it already quite questionable that only a German law is in question? The existence of gas chambers has been denied also by certain authors in England, France and the United States; does there exist a similar extraordinary law in those countries? Can a denial of a historical fact ever constitute an attack on human dignity of any person or any group? Is an Armenian really hurt in his human dignity when a Turk questions the existence of a genocide? Where should one draw the line between a simple expression of opinion and scientific research which obviously may err, and in fact must err, if new ways are to be explored? Could it consequently one day become punishable if somebody brings into connection Auschwitz and the Gulag Archipelago or cites the statement by Weizmann from the beginning of September, 1939? I therefore am inclined to think that the law was "bad," but your careful and balanced presentation makes it clear that those who consider it "good" are also able to offer weighty reasons.

My book will not be published in London but rather in Berlin and namely by Propyläen-Verlag under the title "The European Civil War, 1917-1945: National Socialism and Bolshevism." I had great difficulties with the publication that surely were connected with the "dispute of the historians." I am enclosing a copy (unfortunately a bad one) of

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3. Faculty of History, Free University, Berlin. This letter and all the letters that follow are translated from the German by Professor Stein.

an annotated biography which recently appeared in the periodical "Liberal."

#### LETTER FROM PROFESSOR DR. ERNST NOLTE (II)

When a scholar answers another scholar's question that lends itself to scholarly treatment, he is basically always speaking to the public. A difficulty may arise only from the fact that he may not formulate his answer in his correspondence with only one colleague as carefully as he would in a publication. Nevertheless, rereading my letter of June 25 I have the impression that I, therein, raised several questions that might promote discussion. . . .

I write without having answered your kind letter which I found waiting for me in the beginning of October upon my return from a rather long vacation. This letter gave me a new cause for reflection. In short, and using a term I also used in the "Historikerstreit" (dispute of historians), I today am inclined to express my view as follows:

Every type of attribution of collective guilt, *i.e.*, of accusation against a group which is not constituted solely by free agreement of individuals should be penalized. The penalty should be the most severe, if a group which experienced extreme suffering through genocidal intentions and measures (like "the Jews") is blamed for these very measures or rather for the alleged invention of such measures which, according to this thesis, in reality have not taken place ("group defamation").

No type of constraint of scientific inquiry and research is permissible, not even if the generally assumed numbers of victims of the "Holocaust" are drawn into question or even the fact of the intended and organized mass extinction by gassing is denied by arguments and findings. In that case, the majority of the "scientific community," insofar as it is competent, would have to refute the minority or the outsider conclusively through compelling arguments and incontestable factual proof. The fact cannot be denied that it would be hard to draw a sharp line between the "functionalists" and possible "scientific propagandists." This, however, may not be accepted as an argument for the prevention of free research. The "majority opinion" among scientific scholars must be formed in a scientific way, and every intervention of the judiciary power has to be rejected.

The "Historikerstreit" continues, and since my book has just been published, it might even gain new strength.

LETTER FROM HELGE GRABITZ<sup>4</sup>

I want to thank you most sincerely for your interesting article about the "Auschwitz-lie" and for your friendly letter of June 4.

I was very impressed by your objective, balanced way of presenting the problems of Art. 194 of the Criminal Code and the complex questions connected with it.

I am of the view that "Auschwitz is unique" and for that reason the additional clause "or any other violent and arbitrary dominance" should have been eliminated; this addition is ahistorical and makes the holocaust, which is "an unparalleled crime," unjustifiably relative. What is more, the memory of the killed victims and the witnesses who today still live among us are offended by this juxtaposition: A grotesque result in view of the fact that this global insult is placed in the Criminal Code provision concerning the insult [defamation] . . . .

LETTER FROM PROFESSOR DR. CHRISTIAN MEIER<sup>5</sup>

I found your article highly interesting; a lot of what you gathered in it was new to me. I also consider your piece very useful. To the extent that you take specific positions, I agree with you entirely: especially at the end where you speak of the "delicate balance" that must be found, since on the one hand the memory of the National Socialist crimes must be kept alive while on the other hand, the self-consciousness of those who come after must not be made unbearable so as to cause a backlash. I am also persuaded by your estimate of a "modest contribution" that the courts may offer in this area.

You would certainly want to know in some detail where I stand on the issues raised. I shall articulate my position briefly. I consider the transformation of the "insult" into a crime to be prosecuted *ex officio* as necessary, of course only with respect to the victims of the National Socialist regime. The extension to other groups, particularly to the Germans expelled [from the areas which were given to Poland] was obviously an act of juxtaposition, whatever some others may say. One should not try a cover-up; every one can see it with open eyes. I see no reason for it, certainly not on the merit (no one would think of denying that terrible event), nor was it necessary (contrary to Vogelsang) from the viewpoint of the legal system. In my view, these reasons do not apply where the question clearly is one of a practical, urgent assistance to certain groups of victims who should be spared as much as possible the burden of instituting a criminal proceeding (and of all that

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4. Senior Prosecuting Attorney.

5. Universitaet Munchen, Institut fuer Alte Geschichte.

is connected with it). Any juxtaposition strikes me as bad above all because — apart from the wretchedness of the attempts to set off the suffering of the German victims against the suffering of the Holocaust victims — in my judgment the criminal law measures against the “Auschwitz lie” can be justified only by the uniqueness of the German crimes during the National Socialist period. In principle I cannot approve of placing any historical fact under the protection of courts. And I must admit that I am particularly struck in my heart of hearts when the “right” holds it against me that one cannot tell “the truth” about Auschwitz without being hailed before a judge. I propose flatly to challenge any false allegations about the NS crimes, any attempts to deny, diminish or set them off against other crimes. But the reference to a judge causes me some embarrassment. I manage, however, to overcome that feeling as well, since there are sufficient grounds for the pertinent legislation and for the holdings of the Federal Supreme Court. All this — and I do not want to raise any doubt about it — is necessary. But it makes one feel uncomfortable.

I — and others — must put up with this uneasiness. It is not worth talking about in comparison with the suffering under the circumstances of those whom these provisions are designed to protect. But it also shows — and I want to offer my own personal experience as an example — that in principle it is not good for a democratic country to protect historical facts by criminal law. This therefore must remain an exception. It can find its justification only in the uniqueness of the NS crime.

It means, on the other hand: the safeguarding of the truth about the Holocaust must be left to historians, but also to politicians and even to the entire society. For the moment, this is not such a great problem since the liars, respectively the deniers, are in a minority. But it requires great vigilance and a lot of tact. The growing distance in time and the ever increasing progression of generations render difficult any recollection that should not be reduced to a ritual. What it means to be a German after 1945 is hardly clear — even to the majority of the Germans. There are evasions everywhere: they are understandable, one must admit. In my small volume, . . . I have enumerated several reasons why we Germans find ourselves in a “disproportionate” position in relation to all others as a result of the continuing worldwide remembrance of Auschwitz. It is unavoidable, but on the other hand, in the long run it could heavily burden the “delicate balance” described by you at the end of your piece. Why should children, and above all, the children’s children of the perpetrators in such a bad world, be still made to feel responsible for the evil deeds of their par-

ents and grandparents — why should they still be treated differently from those with whom they would rather like to feel equal? When one then hears reproaches from abroad — understandable as they may be from that viewpoint — that is not easy to bear.

Whatever errors were made at Bitburg, and there were many, the various conclusions drawn from them by American east coast newspapers were very unjust. (Parenthetically, Bitburg shows how even Federal Chancellor Kohl at that time entirely misjudged the dimensions of the event: After the act of conciliation in Verdun with President François Mitterand, he meant to do the same with Reagan: he obviously knew nothing about the difference between the First and Second World War. What then should the broad strata of the entire population think? By the way, Helmut Kohl has learned his lesson since then (see my “40 Jahre nach Auschwitz,” p. 69 n.26).)

In short, to conclude, here lie heavy burdens for the future which no court will be able to help alleviate. It will take a great deal of courage and tact and spiritual power, on the one hand not only to maintain alive the memory but also to take due account of the given reality of the worldwide remembrance of Auschwitz (which is also deeply anchored in Germany), and on the other hand to avoid injuring thereby the self-consciousness of the Germans living today.

Actually, one ought to be able to draw certain self-confidence from the forty years of a successful democracy and the almost thirty years of the appreciable public awareness of the full dimension of the crimes. For the one and the other are — despite the great deficiencies — without doubt significant positive items in the balance sheet of the Federal Republic. But then one sees again returning the signs of the old nationalism, the old bewilderment from the period immediately following 1945, the defense mechanisms arising from guilt feelings, innumerable repressions, and other factors designed to prevent many from facing the truth, the truth about the period from 1933 to 1945 and, on the positive side, the truth about the work of the Federal Republic in maintaining the memory.

Just now I am preparing a new, thoroughly revised edition of my book and the opening address for the session of historians in Bamberg in which I must deal with the “historians’ dispute” of the last two years. Thus these lines should be sufficient for today.