

ANTISEMITISM AND HATE SPEECH STUDIES

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I. INTRODUCTION

Many leading Jewish lawyers, such as Louis Brandeis and Ruth Bader Ginsburg, have internalized the Jewish experience with persecution and translated it into empathic professional lessons. At her Supreme Court confirmation hearing, Ginsburg explained how her background sensitized her to the evils of inequality:

Senator Kennedy, I am alert to discrimination. I grew up during World War II in a Jewish family. I have memories as a child, even before the war, of being in a car with my parents and passing a place in [Pennsylvania], a resort with a sign out in front that read: “No dogs or Jews allowed.” Signs of that kind existed in this country during my childhood. One couldn’t help but be sensitive to discrimination, living as a Jew in America at the time of World War II.¹

Even before the First World War, pogroms and Jew-hatred more generally were epidemic in Europe. American newspapers reported on overseas tragedies and those at home, such as the lynching of Leo Frank. Learning of the violence, professional disabilities, and personal hardships of Jews living in Russia, Romania, and Germany, Brandeis embraced Zionism. But he didn’t stop there. As befits a great Justice, he also championed the causes of very different disempowered groups, like those of female laborers.²

Similarly empathic responses to antisemitism spurred a disproportionate number of Jews—including, Joel Spingarn, Franz

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¹ *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 103d Cong. 139 (1994), available at <http://www.loc.gov/law/find/nominations/ginsburg/hearing.pdf>.*

² SIDNEY M. BOLKOSKY, HARMONY & DISSONANCE: VOICES OF JEWISH IDENTITY IN DETROIT, 1914–1967 86–87 (1991); LOUIS D. BRANDEIS, *The Jewish Problem, How to Solve it*, in BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS 12, 17 (1942).

Boas, Julius Rosenwald, and Elie Wiesel—to play leading roles in the American civil rights movements. Experiences as members of a historically reviled group informed their understandings about the needs of other persecuted groups. The collective experience with oppression has also led many ordinary Jews to work for the advancement of progressive causes. Despite the significant distinctions between Jews, stemming from differing sentiments about religion and politics, many of them share a passion for social justice.

My experiences as a refugee likewise shaped how I perceive, react to, and write about minority experiences in the United States. I was born in the Soviet Union. In 1974, my parents and I fled that country to escape persistent, endemic antisemitism. Although I was only seven and a half years of age when we boarded a train headed for the West, this background has deeply shaped my personality and perspective on constitutional law. Like so many other constitutional scholars, I recognize certain dysfunctions in the United States polity, but I tend to be more optimistic than many mainstream scholars about the possibility of social uplift through constitutional enforcement. Where writers like Rogers Smith regard America's many historical failures as an indication that racism and xenophobia are American values,³ I believe those evils to be deviations from the constitutional ideal. I emerged from the antisemitic confines of the Soviet Union, to join a nation whose Declaration of Independence and Preamble to the Constitution promise equal rights for the common good. This perspective goes some way to understanding the sharp contrast I see between Soviet totalitarianism, especially in its race-based treatment of ethnic and religious minorities—such as Jews, Koreans, Germans, Chechens, and Crimean Tatars⁴—and the vastly greater liberty enjoyed by minority groups living in the United States. While in the country of my birth repression was based on the autocratic nature of government, principled change and improvement is possible in this country through representative institutions and judicial processes.

³ ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* (1997).

⁴ Theodore H. Friedgut, *Nationalities Policy, the Soviet Regime, the Jews, and Emigration*, in *JEWISH LIFE AFTER THE USSR* 27, 30 (Zvi Y. Gitelman, Musya Glants & Marshall I. Goldman eds., 2003) (Jews); STEVEN A. BARNES, *DEATH AND REDEMPTION: THE GULAG AND THE SHAPING OF SOVIET SOCIETY* 97 (2011) (Koreans); DONALD J. RALEIGH, *PROVINCIAL LANDSCAPES: LOCAL DIMENSIONS OF SOVIET POWER, 1917–1953* (2001) (Germans and Chechens); EVAN MAWDSLEY, *THE STALIN YEARS: THE SOVIET UNION 1929-1953* 69 (2d ed. 2003) (Crimean Tatars).

The empathic aspects of Jewish tradition as translated into social activism, so evident in the Passover Haggadah mandate that we remain conscious of the enslavement in Egypt. Our all too oft experiences as victims of exclusionary injustices should inform our commitment to causes of groups like blacks, gypsies, and Armenians, who have also suffered and continue to experience inequalities. Constitutional interpretation is an excellent means of systematically identifying historical wrongs and seeking cutting-edge, principled solutions.

The need to remember our experiences and to incorporate them into our professional and personal actions is clearly emphasized by the post-Holocaust phrase "Never Again!" To me the emphatic phrase speaks primarily to the responsibility to prevent the dehumanization of fellow Jews, which has so often around the globe turned into gross violence. But it also sends a message about helping to safeguard others' welfare, even when it is not directly tied to Jewish identity. Other groups have concerns based on their unique history. For Jews, the Holocaust remains a real concern in an age when Hamas, a Palestinian terrorist organization, continues to advocate genocide in its core Charter.⁵ But the welfare of other groups is also directly tied to their own well-being. As Frantz Fanon, the great psychoanalyst of the racist mentality wrote:

At first glance it might seem strange that the attitude of the anti-Semite can be equated with that of the negrophobe. It was my philosophy teacher from the Antilles who reminded me one day: "When you hear someone insulting the Jews, pay attention; he is talking about you." And I believed at the time he was universally right, meaning that I was responsible in my body and soul for the fate reserved for my brother. Since then, I have understood that what he meant quite simply was that the anti-Semite is inevitably a negrophobe.⁶

⁵ COVENANT OF THE ISLAMIC RESISTANCE MOVEMENT (1988), *available at* http://avalon.law.yale.edu/20th_century/hamas.asp (quoting and advocating the achievement of one of Muhammad's official *Hadiths*: "The Prophet, Allah bless him and grant him salvation, has said: 'The Day of Judgement will not come about until Moslems fight the Jews (killing the Jews), when the Jew will hide behind stones and trees. The stones and trees will say O Moslems, O Abdulla, there is a Jew behind me, come and kill him.'").

⁶ FRANZ FANON, *BLACK SKIN, WHITE MASKS* 101 (Richard Philcox trans., Grove Press rev. ed. 2008) (1952).

Fanon understood that Jews, like various other groups who had suffered injustices, are the targets of a “collective unconscious” consisting of “the repository of prejudices, myths, and collective attitudes of a particular group.”⁷ Put another way, Jewish collective identity with the dispossessed of the earth has informed many of them to work for social justice. Often this drive, contrary to Fanon’s view, is indeed conscious, and aware that by helping others overcome injustice, Jews themselves will benefit from the formal state of social justice.

The immediate concern for the welfare of our ethno-religious group energizes my work. It compels me to write of the continued hatred for Jews in Europe, the Arab world, and elsewhere. Likewise, I have written on behalf of causes ranging from women’s rights, Rwandan genocide, Mauritanian slavery, and Sudanese persecution of Darfurians.⁸ I think it my obligation to use the public podium that I have been so fortunate to receive for my work. I am compelled to work on these issues as a Jew of Soviet descent.

But that is not all. Understanding that ethnic supremacy rarely stops with one object, I believe that we as a people must help others, even when we do not stand to benefit from our efforts. That might mean working on behalf of women subject to genital mutilation in countries like Somalia, Sudan, Yemen, Ethiopia, and Egypt. Our joint humanity should stir us to action against existing forms of domestic and international injustices.

While we act as Jews, it is the Constitution that empowers us to work through powerful institutions as collective citizens of the United States. We live in a religiously tolerant society that is a social melting pot. The constitutional source of concern comes from the statement of inalienable human rights in the Declaration of Independence and the Equal Protection Clause. For Jews, our own historic memory adds to the sense of constitutional empathy. Thus, like many other Jewish constitutional scholars, I have spent so many pages on civil rights related causes. In the idealistic

⁷ *Id.* at 165.

⁸ Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 510 (2009); Alexander Tsesis, *Providing Hope: Empowering Homeless, Battered Women Through Vocational Opportunities*, 2 FAMILY & INTIMATE PARTNER VIOLENCE Q. 73 (2009); Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1171 n.148 (2013); ALEXANDER TSEISIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS* (2002).

vision of my scholarship, I have sought to express a realistic picture of failures, gains, and positive directions.

An often-repeated theme of my written work is the suffering of groups who have experienced injustice in the United States, especially blacks and Native Americans. I nevertheless still hold to the aspiration of betterment through the use of legal institutions. But as a refugee from the Soviet Union I am also conscious of the United States' enormous achievements, especially since 1954, when the Supreme Court issued its decision in *Brown v. Board Education*. In numerous books and articles, I have tried to demonstrate that historical realism can inform a direction forward where general welfare and individual rights enjoy substantive and due process protections. In the following section, I discuss one aspect of my scholarship and how my effort to expose the dangers of hate speech is energized by my understandings of the dangers it poses.

II. HATE SPEECH SCHOLARSHIP

My work on hate speech delves into the Jewish experience with how dehumanizing portrayals often instigate acts of discrimination, pogroms, and attempted genocide. Antisemitic propaganda has seeped through the European continent.⁹ As diverse as Europeans are in their national histories, Jew-hatred has been a common denominator among peoples with otherwise divergent historical backgrounds.¹⁰ Russia was no exception to the rule. Even before the establishment of the U.S.S.R., anti-Semitism often appeared in Russian literature in the works of Ivan Turgenev, Fyodor Dostoyevsky, and many others.¹¹ In the early years of the Soviet Union, despite the brutal repression against anti-Bolshevik parties, antisemitism was officially condemned and even prosecuted. The Soviet government's approach changed when many Jews resisted "sovietization" in favor of Zionism; religiosity; or so-called Counter Revolutionary socialist parties, such as the Bund and Trotskyites. From the 1920s until the Soviet Union's

⁹ For a contemporary study of anti-Semitism see DANIEL JONAH GOLDHAGEN, *THE DEVIL THAT NEVER DIES* (2013).

¹⁰ RAPHAEL ISRAELI, *MUSLIM ANTI-SEMITISM IN CHRISTIAN EUROPE: ELEMENTAL AND RESIDUAL ANTI-SEMITISM* 160 (2009).

¹¹ GARY ROSENSHIELD, *THE RIDICULOUS JEW: THE EXPLOITATION AND TRANSFORMATION OF A STEREOTYPE IN GOGOL, TURGENEV, AND DOSTOEVSKY* 9, 15-16 (2008); JOSEPH FRANK, *DOSTOEVSKY: THE MANTLE OF THE PROPHET, 1871-1881* 310-16, 423 (2002).

downfall, hostility toward Jews and Zionism commonly appeared in literature and newspapers.¹² Jewish culture too, especially in its religious and linguistic forms, was virtually stamped out.¹³ The *Protocols of the Elders of Zion*, a Tsarist forgery defaming Jews as power hungry seekers of world domination, was widely circulated throughout the Soviet Union.¹⁴ Soviet Jews were persecuted for two reasons: They were members of a separate religion and nationality. This put them at odds with Soviet communist and class ideologies.

My experience with antisemitism as a child growing up in the Soviet Union deeply impressed my research agenda. A significant part of my scholarship concentrates on outgroups. From early youth, conversations with my parents' friends, many of whom had fled the nation of their nativity, raised troubling questions about the spread of ethnocentrism. I often heard refugees who had arrived to the United States as adults describe the antipathy toward Jews living in the Ukraine, Russia, Belarus, Azerbaijan, Kazakhstan, and Uzbekistan.¹⁵

As I began my academic career, I expanded my research about antisemitic patterns beyond the Soviet republics to other countries where Jews had experienced similar forms of exclusion. I found that the often stated stereotypes of Jews abusing power, greed, and exploiting the general population have long been present in places and cultures far removed from each other, such as Medieval England and Spain, Nazi Germany, and Nasser's Egypt. While the experiences of Jews differed, in all these countries Jews became principal scapegoats for social ills. They experienced violence at the hands of mobs and leaders who justified cruelties on the basis of age-old dehumanizing tropes found in Christian and Islamic religious scriptures. In the course of these aggressions, Jews have been blamed for such widely divergent, and often incompatible conduct and ideas, such as ritual murder, falsification of the Bible, cosmopolitanism, nationalism, capitalism, and Marxism.

My experiences with antisemitism in the Soviet Union and escape to the United States helped me empathize with oppressions experienced by so many Jews throughout the world and to delve

¹² STEVEN BOWMAN, *DICTIONARY OF LITERARY THEMES AND MOTIFS* 73, 80, 82 (1988).

¹³ NORA LEVIN, *THE JEWS IN THE SOVIET UNION SINCE 1917* (1990).

¹⁴ MARK EDELE, *STALINIST SOCIETY: 1928-1953* (2011).

¹⁵ ROBERT S. WISTRICH, *A LETHAL OBSESSION: ANTI-SEMITISM FROM ANTIQUITY TO THE GLOBAL JIHAD* 166 (2010).

into common and distinct experiences. As with anything, the explanation for the wide divergences in anti-Semitic stereotyping are wide-ranging, linked to everything from economic downturns to personal vendettas. Being a student on the First Amendment, I focused my efforts on understanding the effect of hate propaganda on individual psyches and on herd mentality.

From some of my earliest publications¹⁶ to some of my most recent articles,¹⁷ my publications have connected psychological research into group mentality with the sociological study of how negative attitudes spread to the general population. Analyzing those experiences has helped me expostulate how hate speech not only causes personal affront but is a form of group defamation and incitement that should not be protected by First Amendment limitations on content regulations. The Jewish experience with hate speech has informed a variety of international compacts, entered into by many members of the United Nations and the European Union, against the dissemination of destructive messages.

United States First Amendment scholars have tended not to embrace the international law and European approaches. While much of the world has recognized the power of antisemitism to stir the cauldron of hatred, many of the leading free speech luminaries in the United States have argued against the regulation of incitement unless it poses an immediate threat of harm. To the contrary, in my work on the subject I have taken the position that hate speech is not protected by the Free Speech Clause. My rather heterodox perspective is informed by the Jewish experience with antisemitism around the world, including Russia where pogroms were often fueled by Jew-hating incitement.

Unlike the United States, since World War II democratic countries around the world have recognized that hate directed against identifiable groups should be criminally sanctioned. Laws they have passed restricting ethnocentric incitement and Holocaust denial have not negatively impacted democracies' commitments to free speech. Countries like Canada, Germany, and France have justified such legislation as protections of human dignity and a shield against threats to pluralism. Their statutes

¹⁶ ALEXANDER TESIS, DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS (2002); Alexander Tesis, *The Empirical Shortcomings of First Amendment Jurisprudence: A Historical Perspective on the Power of Hate Speech*, 40 SANTA CLARA L. REV. 729 (2000).

¹⁷ Alexander Tesis, *Inflammatory Speech: Offense versus Incitement*, 97 MINN. L. REV. 1145 (2013).

and the policies behind them have helped me develop a model hate speech statute. My first book, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, examined the history behind those laws, the patterns of discrimination they seek to punish, and the normative reasons for criminalizing hate speech directed at identifiable groups.

My research into hate speech has gone far beyond antisemitic stereotypes. Just as Jews have suffered from ethnic hatred, so too other peoples (like the Tutsis in Rwanda and Native Americans in the United States) have been subject to dehumanizing and defaming writings and statements. In the United States, the advocacy of racism and Indian savagism helped plant the ideological rationale for the human rights violations of black slavery and Native American displacement.

My interest in hate speech scholarship stems from personal experiences with it in the Soviet Union and research into the experiences of other persecuted groups. My work has tried to explain the dangers of destructive messages, place them into historical context, and develop normative responses to the social evil. More generally, my work has been informed by background and membership in a group with a long history of discrimination.