2012

Introduction: Special Issue on Law

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Guest Editor

Just as ensuring civil liberties for all requires eternal vigilance, so combating antisemitism is a never-ending quest. But the continuous monitoring of antisemitic incidents—a critical exercise that this journal painstakingly reflects in its "Antisemitica" feature—is merely the beginning of the everlasting effort to limit them. Bigotry comes in many guises and is a constantly evolving target, exposing the limitations of law and the frustrations of justice.

Thus, even in civilized societies where equality under the law is a guiding principle, legal remedies for discrimination are insufficient in and of themselves. They must be accompanied by purposeful good-will and a firm and rational determination to triumph over humanity's basest instincts. This issue of the *JSA* is devoted to how that resolve may best be nurtured.

The American experience has seen many attempts to combat discrimination through law. Principal among them was the passage of the Civil Rights Act of 1964, the landmark legislation that resulted from a growing demand during the early 1960s for the federal government to launch a nationwide offensive against racial discrimination. Title VI of the Act prohibits discrimination on the basis of race, color, or national origin in programs and activities receiving federal financial assistance. President John F. Kennedy identified simple justice as the justification for Title VI: "Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation." The protections of Title VI were extended to include barring against discrimination on the basis of pregnancy, sex stereotyping, and sexual harassment of employees. Title VII prohibits most workplace harassment and discrimination, covers all private

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employers, state and local governments, and educational institutions with fifteen or more employees.

In 1964, President George W. Bush signed into law a bill requiring the State Department to monitor global antisemitism and rate countries annually on their treatment of Jews. "This nation will keep watch; we will make sure that the ancient impulse of antisemitism never finds a home in the modern world," Bush said. (The State Department had opposed the legislation, saying it was unnecessary as the department already compiles such information in its annual reports on human rights and religious freedom.)

The United States is not alone in passing legislation against antisemitism. A few nations have enacted laws dealing with antisemitism directly, and some have gone further, specifically prohibiting symbolic speech like Holocaust denial and the display of Nazi insignia. In most countries, the subject of antisemitism is dealt with in the broader general legislation against racism and xenophobia.

Legislation to prohibit Holocaust denial has particular obstacles. Indeed, as the Coordination Forum for Countering Antisemitism points out, alongside the clear advantages to legislating against denial of the Holocaust, there are several arguments against such legislation:

- *The confrontation with freedom of expression*. Legislation whose object is to limit expression on the subject of denying the Holocaust could be construed as an illegitimate limitation on freedom of expression.
- *Problems with the effectiveness of such legislation*. Despite a number of successes in the implementation of this kind of law, mainly in France and Germany, its use as a basis for obtaining an indictment is still very low. In addition, there is no clear evidence indicating a connection between this kind of legislation and the drop in the number of incidents of Holocaust denial.
- *Defining the concept is problematic*. Too broad a definition of the concept of Holocaust denial is liable to meet up with claims of substantial limitations on freedom of speech, while too narrow a definition of the concept is liable to leave too many incidents outside its purview. At the same time, an ambiguous definition could create difficulties in framing the indictments.
- *Apprehension about discussing the subject*. Legislation against discrimination arouses public discussion in connection with the uniqueness of the Holocaust vis-à-vis other horrors throughout human history. In this connection, it has been claimed that legislation of that kind might, paradoxically, result in a public debate

whose result would be diminishing the status of the Holocaust in comparison with other events.

- *The fear of creating a platform and a resonance for the claims of the Holocaust denier*. Putting Holocaust deniers on trial will provide them with a convenient arena where they can present their case while enjoying broad media coverage. Moreover, they might be viewed by the public as "martyrs" fighting for the principle of free speech.
- *The fear of losing*. The deniers' acquittal at trial is liable to be construed as the historical vindication of their claims and not as merely a legal-technical acquittal. Recall the trial several years ago in Britain of David Irving, which attracted a great deal of attention because it required a legal decision on the historical subject of the Holocaust. In addition, legislation against racism often requires a burden of proof and legal procedures that make getting a conviction in the courts very difficult; the legal systems in the European states have no clear category for racist crimes; and many cases of antisemitism are ignored under the burdensome weight of dockets filled with more pressing criminal prosecutions.

Nevertheless, it is notable that many European states have become actively engaged in the collection of data and a systematic recording of antisemitic incidents. Among the more prominent among them are Germany, France, the Netherlands, Sweden, and Britain. On the other hand, in Austria, Belgium, Greece, Spain, Ireland, Luxembourg, Italy, Portugal and Finland, there is no orderly monitoring and registration of such incidents.

Included in this issue of the *JSA* are a number of articles and essays that touch upon the relationship between law and antisemitism. Frederick Schweitzer ("International Law and Antisemitism") addresses the core problem from a global and historical perspective, concluding that combating antisemitism will remain a "Sisyphean task." Karen Eltis ("Hate Speech, Genocide, and Revisiting the Marketplace of Ideas in the Digital Age") underscores the fact that the collective condemnation of racist incitement cannot be discounted, particularly in terms of a communal statement helping to distinguish lies, such as genocide denial, from historical truths—a distinction even more important, as she notes, in an age when the discourse on human rights "is being cynically inverted." Benjamin Arem ("Never Again, and Not at Work") points out that courts have become increasingly prone to uniting themselves against applying the legislative-policy goal of the Civil Rights Act, overlooking any general sense of morality in favor of providing a shield to grossly intolerant actors. For example, in *Peterson* v. *Wilmur Communications*, the court found in favor of a white-supremacist plaintiff solely on the basis that his antisemitic beliefs were

sincerely held. Stephen Norwood ("The Expulsion of Robert Burke") provides a historical overview of how the notorious case of administrative bias at Columbia University in the Second World War era was displayed. Winnipeg-based lawyer David Matas ("Palestinian Rights and Israeli Wrongs") points up the current bias in the cultural air that allows all things Palestinian to be tinged with goodness while all things Israeli are painted black.

The *Journal for the Study of Antisemitism* is still a fledgling publication and seeks always to be a work in progress—both responsive and responsible, thoughtful and thought-provoking. I am proud to guest edit this first legal issue. As usual, we welcome readers' comments and suggestions for improvement.

—Kenneth Lasson