

THE LESSONS OF HISTORY: HOLOCAUST EDUCATION IN THE UNITED STATES PUBLIC SCHOOLS

Geri J. Yonover*

*"[M]emory is moral; what we consciously remember is what our
conscience remembers."*

Anne Michaels¹

As we enter the next millennium, knowledge of the Holocaust is widespread: a Holocaust film made in Hollywood wins an Academy Award for Best Picture;² the United States Holocaust Memorial Museum draws record numbers of visitors,³ including tens of thousands of school groups;⁴ and, frequently, the media broadcasts new revelations of the brutality of the Nazi regime and stories about the return of Nazi-looted art⁵ and other property—"The greatest mass theft . . . [and] the greatest mass murder in history."⁶

At the same time, scholars note that Holocaust revisionism and denial appear to be growing,⁷ as does the number of hate crimes directed against

* Professor of Law, Valparaiso University School of Law; B.A. University of Chicago, 1964; J.D. Chicago Kent College of Law, 1983. I thank Makedonka Papukoski, Class of 2000, for her expert research assistance and Debbie Bercik for her fine secretarial support. I presented an earlier version of this article at the 30th Annual Scholars' Conference on The Holocaust and the Churches at St. Joseph's University in Philadelphia in March, 2000.

1. W. S. Di Piero, *Fossil Remains*, N.Y. TIMES BOOK REV., Apr. 20, 1997, at 10 (quoting ANNE MICHAELS, *FUGITIVE PIECES* (1997)).

2. SCHINDLER'S LIST (Steven Spielberg 1993).

3. George F. Will, *Ordinary Germans?*, WASH. POST, Apr. 14, 1996, at C7, available at 1996 WL 3074192.

4. Elaine Kahn, *Museum Educates Within, Without*, N.J. JEWISH NEWS, Apr. 23, 1998, at 16, 1998 WL 11395871.

5. See generally Geri J. Yonover, *The Return of Nazi-Looted Art: Choice of Law Issues*, in 2 REMEMBERING FOR THE FUTURE: HOLOCAUST IN AN AGE OF GENOCIDE 5 (John K. Roth & Elisabeth Maxwell eds., 2001).

6. Irwin Cotler, *The Holocaust, Thefticide, and Restitution: A Legal Perspective*, 20 CARDOZO L. REV. 601, 602 (1998).

7. DEBORAH E. LIPSTADT, DENYING THE HOLOCAUST: THE GROWING ASSAULT ON TRUTH AND MEMORY 17 (1993). Prof. Lipstadt was the target of a British libel suit brought by David Irving who claimed Lipstadt defamed him by accusing him of being a "Hitler partisan" and "Holocaust denier." Ray Mosely, *Holocaust Based Libel Suit Opens in British Court*, CHI. TRIB., Jan. 12, 2000, at 6. On April 11, 2000, the judge ruled in favor of Lipstadt. Irving v. Penguin Books (Q.B. 2000), available at <http://www.focal.org/judg.html>. See *infra* notes 86-88 and accompanying text. See also RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL (2001); Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 VAL. U. L. REV. 499, 500 (2001) ("[W]hile few may be actively promoting the gospel of denial, modern forms of communication make it possible for the words of a few to make an impression on multitudes."); Kenneth Lasson, *Holocaust Denial and the First Amendment: The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV. 35, 35 (1997) ("Holocaust denial" abounds worldwide in its full foul flourish."); Geri J. Yonover, *Anti-Semitism and Holocaust Denial in the Academy: A Tort Remedy*, 101 DICK. L. REV. 71, 72 (1996) (noting increased incidents of anti-semitism).

ethnic and religious minorities both in the United States and abroad.⁸ Will we never learn?

This Article examines the irony of increased Holocaust awareness in the face of increased Holocaust denial which has sadly spread its mendacious message even more widely via the Internet.⁹ Perhaps to right the balance, several states have in recent years adopted legislation that provides that schools include the study of the Holocaust in their educational programs. Some states have also enacted hate crime legislation that may reinforce the goals of curricular studies to inculcate tolerance and compassion. Parts I and II describe these statutes (both educational and criminal) and attempt to ascertain (or predict) how such laws affect the minds and hearts of United States school children by examining recent studies in educational theory. Part III discusses the twin goals of Holocaust education: truth dissemination and inculcation of values such as tolerance, compassion and respect for diversity. Finally, Part IV offers some suggestions to enrich the Holocaust curriculum.

I. HOLOCAUST EDUCATION STATUTES

More than a dozen states have enacted laws that require the teaching of Holocaust history or have established Holocaust Commissions to help implement ongoing Holocaust education. These states include Alabama (establishing a Holocaust Commission¹⁰); California (providing for "regional social tolerance resource centers" which will develop exhibits on "social tolerance, the Holocaust, and human rights"¹¹ and social science instruction in "human rights issues, with particular attention to the study of the inhumanity of genocide, slavery, and the Holocaust"¹²); Connecticut (Holocaust education and awareness¹³); Florida (Holocaust education to encourage responsibility, respect, tolerance of diversity and protection of democratic values¹⁴); Georgia (establishing a Holocaust Commission¹⁵); Illinois (Holocaust study to "reaffirm . . . the commitment of free peoples from all

8. See, e.g., *Statement of the Anti-Defamation League on Bias-Motivated Crime and H.R. 1082—The Hate Crimes Prevention Act*, August 4, 1999, 21 CHICANO-LATINO L. REV. 53 (2000); *Asians Feeling Pain of Hatred*, N.Y. DAILY NEWS, Dec. 3, 2000, at 44, available at 2000 WL 29594700.

9. Several authors have analyzed this disturbing development. See Credence Fogo-Schensul, Comment, *More than a River in Egypt: Holocaust Denial, the Internet, and International Freedom of Expression Norms*, 33 GONZ. L. REV. 241, 242 (1998); The Jewish Student Online Research Center, *Holocaust Denial*, at <http://www.us-israel.org/jsource/Holocaust/denial.html> (last visited Sept. 11, 2001).

10. ALA. CODE § 41-9-980 (Michie 2000).

11. CAL. EDUC. CODE §§ 44776.1-.2 (West Supp. 2001).

12. *Id.* § 51220(b) (West Supp. 2001).

13. CONN. GEN. STAT. ANN. § 10-16b(d)(1) (West Supp. 2001).

14. FLA. STAT. ANN. § 233.061(2)(f) (West 1998).

15. GA. CODE ANN. § 50-12-130 (1998).

nations to never again permit the occurrence of another Holocaust"¹⁶); Nevada (establishing a Holocaust Council¹⁷); New Jersey (providing that the Holocaust Commission created in 1991 should recommend material "on a wide range of genocides,"¹⁸ designating a Kristallnacht Memorial Night¹⁹ and providing instruction on the Holocaust²⁰); New York (Holocaust education²¹ to teach "ethical and moral behavior"²²); North Carolina (establishing a Holocaust Council²³); South Carolina (creating a Holocaust Council "to develop an educational program to prevent future atrocities similar to the systematic program of [Nazi] genocide"²⁴); Tennessee (establishing a Holocaust education commission²⁵); and Washington (instituting Holocaust instruction as a "reaffirmation of the commitment of free peoples never again to permit such occurrences"²⁶).

Thus, seven states, California, Connecticut, Florida, Illinois, New Jersey, New York, and Washington, have specifically mandated Holocaust education. The legislative action of these states reflects a belief that such instruction can inform and inculcate democratic values while fostering compassion and tolerance. Florida's statute typifies the objectives of states that have mandated Holocaust education as well as those states that have created commissions to facilitate Holocaust study:

The history of the Holocaust (1933-1945), the systemic, planned annihilation of European Jews and other groups by Nazi Germany, a watershed event in the history of humanity, [is] to be taught in a manner that leads to an investigation of human behavior, an understanding of the ramifications of prejudice, racism, and stereotyping, and an examination of what it means to be a responsible and respectful person, for the purposes of encouraging tolerance of diversity in a pluralistic society and for nurturing and protecting democratic values and institutions.²⁷

16. 105 ILL. COMP. STAT. ANN. 5/27-20.3 (West 1998).

17. NEV. REV. STAT. ANN. § 233G.020 (Michie 2000).

18. N.J. STAT. ANN. § 18A:35-27(c) (West 1999).

19. N.J. STAT. ANN. § 36:1-13 (West Supp. 2001).

20. N.J. STAT. ANN. § 18A:35-28 (West 1999).

21. N.Y. EDUC. LAW § 801(1), (3) (McKinney 2001).

22. 1996 N.Y. Laws 697, § 1 (current version at N.Y. EDUC. LAW § 801(1), (3) (McKinney 2001).

23. N.C. GEN. STAT. § 143B-216.20 (1999).

24. S.C. CODE ANN. § 1-29-10 (West Supp. 2000).

25. TENN. CODE ANN. § 4-48-101 (1998).

26. WASH. REV. CODE ANN. § 28A.300-115(1) (West 1997).

27. FLA. STAT. ANN. § 233.061(2)(f) (West Supp. 2000). The academic press has responded to the need for educational materials on the Holocaust and has published Holocaust education guides. See, e.g., WILLIAM R. FERNEKES, LISA CLYDE NIELSEN AND WILLIAM L. SCHULMAN, *TEACHER'S GUIDE* (1998); *THE SOCIOLOGY OF THE HOLOCAUST AND GENOCIDE: A TEACHING AND LEARNING GUIDE* (Jack Nusan

Similarly, New Jersey's legislature expressly noted that "[n]ational studies indicate that fewer than 25% of students have an understanding of organized attempts throughout history to eliminate various ethnic groups through a systematic program of mass killing or genocide."²⁸ New Jersey further recognized "an inescapable link between violence and vandalism and ethnic and racial intolerance."²⁹

Yet Holocaust education has not gone unchallenged. Most notably, some have attacked Holocaust education as a perversion of history, citing reasoning put forth by Holocaust deniers such as Arthur Butz.³⁰ In Illinois, one student's parents, apparently persuaded by the Holocaust denial propaganda of Arthur Butz, tenured professor of electrical engineering at Northwestern University since 1974, in Evanston, Illinois,³¹ objected to the Holocaust studies required by Illinois law. In protest, they withdrew their daughter from junior high school in Winnetka, a suburb near Evanston.³² The parents claimed the required curriculum was the product of "Jewish propagandists who wanted the world to learn 'gross distortions and myths'" and cited Butz's book in support of their position.³³ Similarly, others have challenged Holocaust education as "propaganda" and have refused to allow their children to be exposed to Holocaust instruction or to participate in field trips to commemorate the Holocaust.³⁴ Still other parents have challenged the inclusion of a Holocaust and Italian Heritage curriculum, claiming that the New York City Board of Education violated the civil rights³⁵ of African-Americans by not changing the curriculum to reflect the contributions of African-Americans.³⁶ The federal district court rejected the argument, finding insufficient evidence to show the requisite discriminatory intent.³⁷

Porter & Steve Hoffman eds., 1999); BUILDING HOLOCAUST EDUCATION: TEACHING TRUNK CURRICULUM FOR GRADES K-12 (CD-ROM, Florida Holocaust Museum, St. Petersburg, FL 1999).

28. N.J. STAT. ANN. § 18A: 35-27(d) (West 1999).

29. *Id.* § 18A: 35-27(b).

30. KENNETH S. STERN, HOLOCAUST DENIAL 10, 157-58 n.4 (1993).

31. In 1976, Butz published *The Hoax of the Twentieth Century* and continues to spread his Holocaust denial message on his web page devoted to Holocaust revisionism. See Yonover, *supra* note 7 at 75 & nn.18-24.

32. STERN, *supra* note 30.

33. *Id.* Other parents have called Holocaust education "propaganda." See Warner v. St. Bernard Parish School Bd., No. CIV.A.96-1839, 1998 WL 50016 at *1 (E.D. La. Feb. 5, 1998). Similarly, in Ontario, some have challenged Holocaust education as racist. Michele Landsberg, *Holocaust Curriculum Attack Threatens Progress*, TORONTO STAR, July, 15, 2001, at A02, available at 2001 WL 23662237.

34. See Warner v. St. Bernard Parish School Bd., No. CIV.A.96-1839, 1998 WL 50016, at *1 (E.D. La. Feb. 5, 1998). Two years later, the court considered whether the school defendants violated Warner's rights when they released to the media her 1992 letters to her son's teacher. 99 F. Supp. 2d 748 (E.D. La. 2000).

35. The claims were based on 42 U.S.C. § 1983 (1994).

36. Grimes v. Sobol, 832 F. Supp. 704 (S.D. N.Y. 1993).

37. *Id.*

There are, however, even more insidious attacks on Holocaust education, some from within the academy itself. For example, a Colorado public high school teacher called the Holocaust a "holohoax" and distributed copies of an article entitled "Swindlers of the Crematoria."³⁸ A teacher of an introductory Western Civilization course at Indiana University-Purdue, in Indianapolis, called the Holocaust a "myth" and noted that the worst thing about Hitler is that "without him, there would not be an Israel."³⁹ A South Carolina teacher reported that his students were "captivated by Holocaust denial."⁴⁰ Academics in other countries, taking positions similar to those of Arthur Butz, have also engaged in Holocaust denial.⁴¹

Can we rely on Holocaust education to combat revisionist and inaccurate propaganda? Can Holocaust education accomplish the goals set forth by the various state legislatures that have adopted a Holocaust unit as part of the curriculum? Can such values-based education truly foster the acceptance of diversity and lessen hate? These are very big questions indeed. Some tentative answers (or, at the least, optimistic predictions) will be addressed in Part III.

II. HATE CRIME LEGISLATION

Perhaps hedging their legislative bets, several states have not relied solely on Holocaust education to accomplish the desired results, but have fashioned criminal laws that provide for penalty enhancement for a hate crime. The Supreme Court has upheld the constitutionality of such statutes,⁴² while nonetheless striking down a "hate speech" statute as violative of the First Amendment.⁴³ Although there is some dispute whether hate crimes have increased or decreased,⁴⁴ there is still a sufficient number of them to be of great concern. As previously mentioned, New Jersey recognizes this concern

38. STERN, *supra* note 30, at 10, 157 nn. 1-3.

39. *Id.* at 11.

40. *Id.*

41. These professors have taught in France, Germany, Canada, Yonover, *supra* note 7, at 76-77, and England. See Irving v. Penguin Books, *supra* note 7.

42. Wisconsin v. Mitchell, 508 U.S. 476 (1993).

43. R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). See also Reno v. ACLU, 521 U.S. 844 (1997) (upholding a First Amendment challenge to the Communications Decency Act, 47 U.S.C. § 223(a), (d) (Supp. 1999)).

44. See David E. Rovella, *Hate Crime Drop Disputed*, NAT'L L. J., Dec. 4, 1995, at A6 (reporting that the FBI's announcement of a decrease in hate crimes does not comport with observations of discrimination watch dog groups); *ADL Concerned About Incomplete 1994 FBI Hate Crime Figures*, U.S. NEWswire, Nov. 14, 1995, 1995 WL 11282808. The Anti-Defamation League (ADL) National Chairman and its National Director believe that "[t]here's a disconnect in the FBI's 1994 hate crime statistics." ADL's own statistics and its examination of the states' hate crime data do not "square" with the FBI report. *Id.*

in adopting Holocaust education, stating that there is "an inescapable link between violence and vandalism and ethnic and racial intolerance."⁴⁵ On the criminal side, New Jersey has a penalty-enhancing provision applicable to a defendant who commits a defined crime with a bias motive: an intent to intimidate the victim because of his or her race, color, gender, handicap, religion, sexual orientation or ethnicity.⁴⁶ Washington, a state that mandates Holocaust education, also provides for a criminal and civil action for malicious harassment, noting that certain words and symbols, such as swastikas, "may create a reasonable fear of harm in the mind of [a] person"⁴⁷

Arguably, laws such as these are intended not only to serve the same educative function as Holocaust instruction in the schools, but are also intended to carry out the typical deterrence and punishment goals shared by most, if not all, criminal laws. It is interesting to observe that criminal laws have evolved (using the term *very* loosely) from a focus that (1) it is permissible to maim or kill the "other," e.g., witness the Crusades and the Spanish Inquisition; to (2) it is not permissible to maim or kill anyone, e.g. Model Penal Code on Homicide;⁴⁸ to (3) enhanced penalties for maiming or killing the "other,"⁴⁹ e.g., a Wisconsin statute provides for enhanced sentencing for intentionally selecting a person as a criminal target based on race, religion, ancestry or other characteristics.⁵⁰

To complete this brief description of the status of hate crime laws in the United States, it should be noted that several other countries have criminalized hate speech expressed in the form of Holocaust denial.⁵¹ However, First Amendment jurisprudence suggests that such measures are not constitutional in this country.⁵²

45. N.J. STAT. ANN. § 18A:35-27(b) (West 1999).

46. N.J. STAT. ANN. §§ 2C:43-7(a)(1), 2C:44-3e (West 1999). In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court invalidated the statutory scheme that allowed a court, rather than a jury, to determine whether a criminal was motivated by a statutorily-defined bias. The Court held that a jury must determine whether a crime was motivated by bias, and bias must be proved beyond a reasonable doubt. *Id.* at 490.

47. WASH. REV. CODE ANN. §§ 9A.36.078-9A.36.083 (West 2000).

48. Model Penal Code § 210.1-210.2 (1962). The Code provides: "[a] person is guilty of criminal homicide if he purposely, knowingly, recklessly or negligently causes the death of another human being." *Id.* at 210.1(1) (Proposed Official Draft 1962).

49. I am grateful to my colleague, Prof. Bruce Berner, for this "long view" of the continuum of criminal law.

50. The Supreme Court rejected a constitutional challenge to the Wisconsin law, WIS. STAT. ANN. 939.645(1)(b) (West 1996), in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

51. More than a dozen nations have enacted prohibitions against hate propaganda, and France, Austria and Germany have criminalized Holocaust denial. See Yonover, *supra* note 7, at 78. Belgium, Switzerland and Spain have also banned Holocaust denial and at one time a British member of Parliament proposed such a law. *Commentators*, THE INDEPENDENT (LONDON), Jan. 29, 1997, at 17.

52. See *supra* note 43. However, some have argued that because hate speech can have serious anti-democratic effects, it should be regulated. See, e.g., Richard Delgado, *Are Hate-Speech Rules*

If a value-based education, including Holocaust instruction, is effective by increasing racial tolerance and respect for diversity, fostering individual responsibility and understanding of justice, then, hopefully, incidents of hate crimes should decrease and Holocaust denial propaganda will be rejected, felled by knowledge.

III. THE EFFICACY OF HOLOCAUST EDUCATION

The analysis proffered here is confined to assessing the impact of Holocaust instruction in secondary education during the seventh to twelfth grade years, reaching children and young adults who range in age from twelve to eighteen, in those states offering such study, either by a statutory mandate⁵³ or by local initiative.⁵⁴ In addition to a significant body of teaching materials,⁵⁵ the U.S. Holocaust Memorial Museum assists some 37,000 teachers with curricula and programs devoted to such Holocaust study.⁵⁶ It should be noted, additionally, that several public and private colleges and universities offer post-secondary instruction in Holocaust studies.⁵⁷ Cumulatively, these facts suggest that Holocaust education reaches an appreciable number of young adults.

A. Education as Truth Dissemination

"Of all the hate pages on the Internet dealing with anti-Semitism, half deal with Holocaust denial You click on, use any search engine, and up pops thousands of articles. A young child can't distinguish between true scholarship and trash."⁵⁸

Constitutional Heresy? A Reply to Steven Gey, 146 U. PA. L. REV. 865 (1998); Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817 (2001).

53. See *supra* notes 10-26 and accompanying text.

54. For instance, some schools in Ohio incorporate Elie Wiesel's *Night* into their eighth-grade literature study, have students write a term paper on some aspect of the Holocaust, or devote a week to Holocaust study culminating with a visit to the U.S. Holocaust Memorial Museum. See Gayle Horowitz, *Holocaust Comes Alive in Classroom: Students Break Through Their Own Prejudices by Confronting Lessons from the Past*, CLEVELAND JEWISH NEWS, Apr. 17, 1998, at 38, 1998 WL 11350831.

55. See *supra* note 27.

56. Elaine Kahn, *Museum Educates Within, Without*, N.J. JEWISH NEWS, Apr. 23, 1998, available at 1998 WL 11395871.

57. See, e.g., Marion Faber, *The Holocaust: Remembering for the Future: Teaching a Multidisciplinary Course on the Holocaust and German Culture*, 548 ANNALS AM. ACAD. POL. & SOC. SCI. 105 (1996). In 1998, the Richard Stockton College of New Jersey became the first U.S. public or private institution to offer a Master's degree specifically in Holocaust and genocide studies. See Dorie Edelstein, *Stockton College First to Offer Master's in Holocaust Studies*, N.J. JEWISH NEWS, Sept. 10, 1998, 1998 WL 11396256.

58. Kellie Patrick, *Schools Warned About Internet Hate Messages*, SUN-SENTINEL, Mar. 7, 1998, at 1A, 1998 WL 3250283 (quoting William Rothchild, Director, Palm Beach County Anti-Defamation League).

The first goal of education must be truth dissemination. Even if we as educators can never entirely erase the prejudice caused by bigotry or racial and religious hatred, Holocaust education continues to be important because it fosters the ability of adolescents to make the distinction between "true scholarship and trash."⁵⁹ While recognizing that Holocaust denial can be a form of hate speech with a significant anti-Semitic bent, some commentators suggest more education and more speech to respond to the "defamers of the dead."⁶⁰ This response is necessary because such vicious and irresponsible "speech" will "get out" despite government efforts to regulate it.⁶¹ If, indeed, the cure for hate speech is constructive discourse among our youth, then the most effective and credible source to lead that discussion is our public and private school teachers. Even if we concede that education cannot eliminate all prejudice, educators can make an important contribution by teaching tolerance and understanding. Thus, a former director of the U.S. Holocaust Memorial Museum notes that programs that teach tolerance and understanding "change the general culture . . . [because] racial and ethnic hatreds are regarded as less acceptable and more deviant . . . haters will be shunned . . . their members will be limited . . . and . . . we'll continue to be shocked and angered each time the hate, and the killing, break through."⁶² Knowledge and understanding of historical truth can enable our students to separate truth from fiction, accurate observations from anti-Semitic propaganda, and responsible scholarship from hate mongering.

B. Can We Teach Values?

The second goal of Holocaust studies, expressed by various state legislatures in providing for such instruction, is to instill in our youth the values of tolerance and respect. Several authorities suggest that this is not only wise, but feasible.⁶³ For example, the Facing History and Ourselves project (FHAO) has developed a curriculum focusing on human rights.⁶⁴ FHAO offered the program to eighth grade students in their first semester,

59. *Id.*

60. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2381 n.233 (1989) (citing Elie Wiesel, Address at the Hofstra University Conference on Group Defamation and Freedom of Speech (Apr. 20, 1988)).

61. See Alan Dershowitz, *Debate: Freedom of Speech and Holocaust Denial*, 8 CARDOZO L. REV. 559, 569-70 (1987).

62. Walter Reich, *Progress Against Prejudice*, JERUSALEM POST, July 26, 1999, at O8, 1999 WL 9006247.

63. See, e.g., PETER L. BENSON, ALL KIDS ARE OUR KIDS (1997); KEVIN RYAN & KAREN E. BOHLIN, BUILDING CHARACTER IN SCHOOLS (1999).

64. See Mary Brabeck & Maureen Kenny, *Human Rights Education Through the 'Facing History and Ourselves' Program*, 23 J. MORAL EDUC. 333 (1994).

testing students in both semesters. The case study of the Holocaust includes films, guest speakers, discussion of anti-Semitism as a form of prejudice and discrimination, and teachings that view history not as inevitable, but as the effect of individual actors. Evaluations and research studies of the program have reached conclusions consistent with prior assessments: "human rights education positively affects students' moral development."⁶⁵ The authors report that the FHAO program "significantly increased eighth grade students' moral reasoning . . . without adversely impacting on their psychological well-being."⁶⁶

Still another study suggests that the apathy of a bystander can be made to be understood and ultimately rejected by a student.⁶⁷ Study of those who rescued victims of oppression and attempted extermination can facilitate development of empathy, foster a sense of responsibility to others and enable students to resist conforming to peer group pressure when that pressure involves antisocial, racist ends. These studies indicate that it is just as important that students learn tolerance as well as resistance and that such basic values can be taught and absorbed. Dr. Short notes that "students who have acquired knowledge of the bystander phenomenon are less likely to fall prey to it."⁶⁸

In addition to school curricula, laws too can facilitate character education and affect how people believe they should act. For example, one comparative study shows that eighty-six percent of Germans believe they have a legal duty to render assistance to another in peril, while only nineteen percent of Americans believe they have a duty to rescue.⁶⁹ Arguably, these responses reflect the presence in Germany, and the general absence in America, of a legal duty to rescue. In the United States, only four states have statutes that require bystanders to assist endangered persons,⁷⁰ while Germany provides for up to one year imprisonment for failing to assist a stranger in danger if "help is clearly necessary, could be reasonably expected under the circumstances, and could be rendered without increased personal danger to the rescuer."⁷¹ Just as states have enacted both hate crime and Holocaust education legislation in an effort to increase tolerance and criminalize bias-driven

65. *Id.*

66. *Id.*

67. See Geoffrey Short, *Antiracist Education and Moral Behaviour: Lessons from the Holocaust*, 28 J. MORAL EDUC. 49 (1999).

68. *Id.* at 57 (citation omitted).

69. Thomas C. Galligan, Jr., *Aiding and Altruism: A Mythopsycholegal Analysis*, 27 U. MICH. J.L. REFORM. 439, 477 & nn. 232, 241 (1994).

70. See *infra* notes 89-91 and accompanying text.

71. See Margalynne Armstrong, *Can Good Samaritan Laws Fit into the United States Legal/Political Framework?: A Brief Response to Elspeth Farmer, Joshua Dressler and Marc Franklin*, 40 SANTA CLARA L. REV. 1027, 1027-28 nn.2, 3 (2000).

conduct, so too can Good Samaritan statutes create an atmosphere of care and concern for one another. Taken together, these can function as separate, but interconnected roads leading to the same destination—social responsibility.⁷²

IV. PROPOSED ADDITIONS TO THE HOLOCAUST CURRICULUM

A focus on three areas of inquiry may enrich Holocaust education. First, Holocaust denial must be confronted. By examining the “cases” of Arthur Butz and Mel Mermelstein and the recently decided *Irving v. Lipstadt* British defamation case, students can explore and shed much-needed light on the persistent problem of Holocaust denial propaganda. Such study can assist students in distinguishing Holocaust revisionist myth from reality, demagoguery from critical analysis and irresponsible anti-Semitic propaganda from responsible historiography. Second, an analysis should be offered, geared to junior and high school age adolescents, of the relationship in tort law between legal duty and moral duty, focusing on the bystander versus rescuer issue. If the study of the duty of care to others is geared to the appropriate target student audience, it can demonstrate how the common law should and does develop to reflect societal norms. Third, students should learn about those extraordinary women and men who aided others in the most altruistic and courageous manner during the Holocaust years. These individuals felt a sense of duty to aid Jews and others in peril and, despite tremendous personal risk, they helped save a precious few from the extermination camps. Incorporation of these three interrelated subjects in our public and private school curricula should serve to increase the ability of students to engage in value-based moral reasoning—a goal sought by those state legislatures that have encouraged or mandated Holocaust education.

A. Combating Holocaust Denial

1. Arthur Butz

In 1976, Arthur Butz, a tenured professor of electrical engineering at Northwestern University in Evanston, Illinois, published a book that built upon the Holocaust revisionism typified in earlier works by others.⁷³ The

72. This is akin to the communitarian focus away from the emphasis upon the individual qua individual (libertarian) to an approach which emphasizes our duties to the community, of which we are merely one small part. See, e.g., Robert M. Ackerman, *Tort Law & Communitarianism: Where Rights Meet Responsibilities*, 30 WAKE FOREST L. REV. 649, 653 (1995); Hanoch Dagan, *In Defense of the Good Samaritan*, 97 MICH. L. REV. 1152, 1167, 1172 (1999).

73. For example, professor Lipstadt describes the dissertation and subsequent book by David Leslie Hoggan in which he claimed, in part, that no Jewish people were killed during or in the immediate aftermath of *Kristallnacht*. LIPSTADT, *supra* note 7, at 71.

central thesis of Butz's book, *The Hoax of the Twentieth Century*, is that the claim of Nazi extermination of millions of Jews was propaganda to further Zionist ends.⁷⁴

The University's response to Butz makes for interesting discussion. Butz was tenured, and careful not to insert his Holocaust denial views into his engineering classes. He remains to this day on the faculty, a beneficiary of notions about academic freedom and First Amendment concerns. Nevertheless, on Holocaust Remembrance Day in 1991, Northwestern University volunteers read the names of some 9,000 Holocaust victims, perhaps as an attempt to counteract the pernicious falsity of Butz's writings, which came wrapped in the mantle of scholarly discourse. Although the president of Northwestern called Butz's views "monstrous," he was "reluctant to appoint himself a censor."⁷⁵ Additional responses to Butz's ongoing Holocaust revisionist diatribes, which Butz posts on the University's web page, include a public lecture given in 1998 by Pierre Vidal-Nacquet, author of the *Assassins of Memory*. In his lecture, the author described the revisionists' disservice to historical truth, though he did not name Butz.⁷⁶

2. Mel Mermelstein and the Institute for Historical Review

Almost twenty years ago the Institute, an organization that believes the Holocaust to be a "distortion" of history,⁷⁷ offered to pay \$50,000 to anyone who could prove that Jews were gassed at Auschwitz.⁷⁸ Mel Mermelstein, who had survived the Death Camp, found out about the offer and was outraged. He had lost several family members in Auschwitz-Birkenau. He filed an affidavit with the Institute. When the Institute refused to pay, Mermelstein sued for breach of contract and filed tort claims as well. The

74. ARTHUR BUTZ, *THE HOAX OF THE TWENTIETH CENTURY* 87 (Institute for Historical Review 1976). An equally pernicious example of Holocaust denial is portrayed in Errol Morris' documentary film, *MR. DEATH: THE RISE AND FALL OF FRED A. LEUCHTER, JR.* (Lions Gate Entertainment 2001). The film depicts an engineer with a background in designing machines used to effect capital punishment in certain states. Leuchter goes to Auschwitz, takes samples illegally from the ruins of the gas chamber, and claims to have found no evidence of the Nazi killing machines. After the film's distribution in theaters, Cinemax showed the movie in prime time on January 30, 2001.

75. Mike Harden, *The Censorship of Stupidity is Still Censorship*, COLUMBUS DISPATCH, Apr. 5, 2000, at 01G, available at 2000 WL 18888170.

76. Garry Wills, *A Dervice to What the Holocaust Meant*, TIMES UNION (Albany, N.Y.), May 28, 1998, at A11, available at 1998 WL 726051. Recall that the Institute published Butz's book. See *supra* note 74.

77. ENCYCLOPEDIA OF ASSOCIATIONS § 9 (15240) (Sandra Jozszczak ed., 37th ed. 1996).

78. Lawrence Douglas, *Wartime Lies: Securing the Holocaust in Law and Literature*, 7 YALE J.L. & HUMAN. 367, 371 (1995); Lasson, *supra* note 7, at 76; Yonover, *supra* note 7, at 84. The Mermelstein-Institute dispute was described in a TV docudrama, "Never Forget." Mary Frances Prechtel, Comment, *Classic Malice: A New Fault Standard for Defamation in Fiction*, 55 OHIO ST. L.J. 187, 212 n.128 (1994).

case settled before trial for \$150,000.⁷⁹ However, the court indicated it would take judicial notice both of the Holocaust in general and the gassing of Jews at Auschwitz stating that the “‘fact[s] . . . [were] not reasonably subject to dispute’ because of any number of reliable sources other than Mermelstein.”⁸⁰

Recently, Mermelstein reiterated the purpose of his decade-long dispute with the Institute: “Unless we learn from this barbaric event [Holocaust], and unless we do whatever we can do to remember what man can do to his fellow man, I will not rest.”⁸¹ To this end, Mermelstein has published a book, *By Bread Alone, The Story of A-4685*, which describes his concentration camp experience and his dispute with revisionist historians.⁸² Such long and continuing efforts⁸³ to combat Holocaust denial show that one individual who speaks the truth can prevail over the deniers of historical fact. Similar to the outcome in the *Irving v. Lipstadt* British libel suit, the resolution of the Mermelstein case some twenty years prior indicates that attempts to cloak Holocaust denial with historical and academic legitimacy fail utterly when challenged.⁸⁴

3. *Irving v. Lipstadt*: Truth Prevails

The Holocaust denial fringe received a powerful setback on April 11, 2000, when a British judge ruled in favor of the author Deborah Lipstadt and her publisher, Penguin Books.⁸⁵ Calling David Irving anti-Semitic and racist, Justice Gray held that Lipstadt did not libel Irving⁸⁶ and ordered him to pay 150,000 pounds toward the defense costs of his failed libel action.⁸⁷ The

79. Douglas, *supra* note 78, at 371. But see Ron Csillag, *He Took on Neo-Nazis and Won*, TORONTO STAR, Apr. 30, 1989, at D6, 1989 WL 7477936 (recounting that the court ordered the Institute to pay \$150,000 for “breach of contract, libel, and intentional infliction of emotional distress” but that the amount was later reduced to \$90,000).

80. *Holocaust Not A Myth: Judge*, CHI. TRIB. Oct. 11, 1981, § 3, at 11 (quoting Superior Court Judge Thomas T. Johnson).

81. Olivia Hawkinson, *Pieces of Horror from the Past*, ORANGE COUNTY REGISTER, Apr. 11, 1989, at B01, 1999 WL 4294162.

82. Regina Hong, *Survivor of Holocaust Will Discuss New Book*, L.A. TIMES, Jan. 16, 1999, at B2, available at 1999 WL 2120955. The book is privately printed and is available from BN.com in the out-of-print section. “A-4685” is Mermelstein’s Nazi-issued concentration camp number which is tattooed on his arm. See Lisa Petrillo, *Holocaust Survivor Battles to Keep Grim Message Alive, He Takes His Cause to College Campus*, SAN DIEGO UNION-TRIB., May 10, 2001, at NC1, N11, 2001 WL 6459408.

83. He has assembled a private Holocaust collection and often speaks about his experiences for school classes and other groups. Petrillo, *supra* note 82.

84. See *supra* note 7 and accompanying text; *infra* notes 87-88 and accompanying text.

85. See *supra* note 7; 2000 WL 362478, appeal denied (Dec. 18, 2000).

86. *Irving v. Penguin Books* (Q.B. 2000), available at <http://www.focal.org/judg.html>.

87. BIRMINGHAM POST, *Irving to Pay Pounds 150,000 or Face Bankruptcy*, May 6, 2000, at 8, available at 2000 WL 20181282. See generally, EVANS, *supra* note 7; D.D. GUTTENPLAN, *THE HOLOCAUST ON TRIAL* (2001).

charges against Irving which Justice Gray found to be substantially true were that he "portrayed Hitler in an unwarrantedly favourable light . . . ; that he is an active Holocaust denier; that he is anti-semitic and racist and that he associates with right wing extremists who promote neo-Nazism."⁸⁸

Taken together, the Mermelstein resolution in the early 1980's and the recent *Lipstadt* opinion can show students that the Holocaust deniers of this world cannot prevail over historical truth.

B. The Bystander/Rescuer Doctrine in Tort Law

With few exceptions, there has been no liability for nonfeasance in the United States.⁸⁹ Courts impose no civil or criminal liability on one who fails to rescue another in peril. In contrast, several European courts have imposed on individuals a duty to rescue⁹⁰ and many scholars have advocated a change

88. *Irving v. Penguin Books* (Q.B. 2000), ¶ 13.167. Part of the testimony included a nursery rhyme Irving wrote for his daughter: "I'm a Baby Aryan/ Not Jewish or Sectarian/ I have no plans to marry- an/ Ape or Rastafarian." Wendie Ellen Schneider, Note, *Past Imperfect*, 110 Yale L.J. 1531, 1532 (2001); see generally Dennise Mulvihill, Comment, *Irving v. Penguin: Historians on Trial and the Determination of Truth under English Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 217 (2000).

89. Exceptions include, for example, a special relationship between plaintiff and non-rescuing defendant and an undertaking of or reliance on rescue. See generally JOHN W. WADE ET AL., PROSSER, WADE AND SCHWARTZ'S TORTS 403-21 (9th ed. 1994). Professor Greenawalt believes that this lack of duty, "criminal or civil, to rescue strangers even when one can rescue at no risk to oneself . . . is misguided and in need of reform." Kent Greenawalt, *Secret Knowledge of Genocide: British Failure to Disclose the Killing of Jews in 1941*, 20 CARDOZO L. REV. 549, 549 n.1 (1998). The Greenawalt article is included in a symposium, *The Holocaust: Moral and Legal Issues Unresolved 50 Years Later*, 20 CARDOZO L. REV. 415 (1998). A very few states reacted to incidents such as the Kitty Genovese attack in 1964 in Queens, New York, by enacting Good Samaritan Laws. See, e.g., MINN. STAT. ANN. § 604A.01 (West 2000); R.I. GEN. LAWS § 11-56-1 (2000); VT STAT. ANN. TIT. 12, § 519 (2000). WIS. STAT. ANN. § 940.34(2)(a) (West 1996). The laws impose a duty to assist and violation of the statute results in a small fine. For example, in *State v. LaPlante*, 521 N.W. 2d 448 (Wis. App. 1994), the Wisconsin appeals court upheld the conviction of a hostess who did not aid or summon help for a guest who was severely beaten, in the hostess' presence, by a fellow guest.

90. Wade, et al., *supra* note 89, at 405 n.5 (describing the Dutch Penal Code which requires one to give assistance to another in severe danger provided one can do so without reasonable fear of danger). See also Minnesota's similar Good Samaritan statute which provides in part:

Duty to assist. A person at the scene of an emergency who knows that another person is exposed to or has suffered grave physical harm shall, to the extent that the person can do so without danger or peril to self or others, give reasonable assistance to the exposed person.

MINN. STAT. ANN. § 604A.01 (West 2000).

Other countries that now impose a qualified duty to rescue include France, Germany, Poland, Portugal, Italy, Denmark, Russia, Norway, Romania, Turkey and Hungary. See Jennifer L. Groninger, Comment, *No Duty To Rescue; Can Americans Really Leave a Victim Lying in the Street: What is Left of the American Rule and Will it Survive Unabated*, 26 PEPP. L. REV. 353, 353 & n.2 (1999).

The Northern Territory of Australia also has a Good Samaritan provision, Criminal Code Act § 155 (N. Terr. Austl. Laws 2000). See generally John Pardin, Note, *Good Samaritan Laws: A Global Perspective*, 20 LOY. L.A. INT'L & COMP. L. REV. 591 (1998). According to one Australian judge, the

in tort law so that failing to act (i.e., not rescuing) would constitute a tortious breach of duty.⁹¹ Other scholars propose expanding the legal obligation to care for and to be involved in the well-being of others.⁹²

Exploration of the complex issues surrounding the imposition of a legal (in addition to a moral) duty to rescue in conjunction with Holocaust study would enrich the Holocaust curriculum. In 1897 a court could confidently assert: "with purely moral obligations the law does not deal . . . [T]he priest and Levite who passed by on the other side were not, it is supposed, liable at law for the continued suffering of the man who fell among thieves, which they might and morally ought to have prevented or relieved."⁹³ But today, considering the public outcry in the murder of Kitty Genovese and the New Bedford rape case, amidst onlookers who arguably could have assisted the victims without physical risk to themselves, after Shoah, the common law's view of the rescue doctrine surely must change. Our legal system should not be "devoid of care and responsiveness to the safety of others."⁹⁴

*C. The Intersection of Holocaust Education and the Rescuer Doctrine:
"Righteous Gentiles"*⁹⁵

"I don't feel like a hero. I did what I had to do."⁹⁶ When Annie Schipper, a Dutch woman who hid a Jewish family in her Amsterdam apartment during the Holocaust,⁹⁷ said this, her self-deprecating remark typified the rescuers' state of mind. Ms. Schipper's attitude reflects that of the more than 15,000 "righteous gentiles," or "righteous among the nations," recognized for their heroic rescue efforts by the American Society for Yad Vashem, an Israeli Holocaust memorial organization established in 1953 in

"basis lies in a concept of social responsibility." *Salmon v. Chute*, 4 N.T.L.R. 149, 160 (N. Terr. Austl. Laws 1994).

91. See, e.g., Viola Brady, *The Duty to Rescue in Tort Law: Implications of Research on Altruism*, 55 IND. L.J. 551 (1980); Steven Heyman, *Foundations of the Duty to Rescue*, 47 VAND. L. REV. 673 (1994).

92. See, e.g., Leslie Bender, *Changing the Values in Tort Law*, 25 TULSA L.J. 759 (1990). Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848; Carrie Menkel-Meadow, *What's Gender Got to do with it? The Politics and Morality of an Ethic of Care*, 22 N.Y.U. REV. L. & SOC. CHANGE 265, 291 & n. 99 (1996) (reviewing JOAN C. TRONTO, *MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE* (1993)).

93. *Buch v. Amory Mfg. Co.*, 44 A. 809, 810 (N.H. 1897).

94. Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 36 (1988).

95. Yad Vashem, the Israel Holocaust Institute, has given this name (alternatively, "Righteous Among the Nations") to rescuers of Jews during the Holocaust years.

96. Tom Tugend, *Dutch 'Righteous Gentiles' Honored in LA*, JERUSALEM POST, Dec. 17, 2000, at 4 (quoting Annie Schipper, a Dutch woman who hid a Jewish couple and their infant son in her Amsterdam apartment).

97. *Id.*

honor of the memory of the six million Jews who died during World War II. Yad Vashem honors those non-Jews who, based on survivors' reports, aided or rescued those in danger from the Nazi onslaught.

Overwhelmingly these rescuers did not then, nor do they now, think of themselves as heroic or special. Rather, they saw an opportunity to do good and acted as they believed any human would. Their humanity triumphed over dangers both perceived and very real. These rescuers described themselves as ordinary even though they acted in extraordinary ways, most often in the face of extreme peril to themselves and their own families.⁹⁸ The qualities that these rescuers shared—"empathy, self-confidence, a strong sense of justice and involvement in religious or political activities"⁹⁹—propelled them to act, rather than to take the safer course of passivity in the face of danger.¹⁰⁰

The study of and discussion about these extraordinary people, the "Righteous Gentiles," should be included in a Holocaust study unit. That a few ordinary individuals responded to the Nazi attempt to exterminate European Jews by saving lives should serve as a focal point. Their stories show what it means to be a compassionate human and how one individual can, with great effect, march to a different and more empathetic drummer in times of extreme danger.

CONCLUSION

*"To educate . . . in mind and not morals is to educate a menace to society."*¹⁰¹

By requiring Holocaust education, several states seem to recognize the value and efficacy of exposing young minds and hearts to the lessons of history. Although a single, small unit in Holocaust education in one secondary school semester out of eight does not alone foster the development

98. See, e.g., *Fund Grants \$2M to Christians who Saved Jews from Holocaust*, NEWS DAY, May 31, 2000, at A31, available at 2000 WL 10017085 (This article describes the rescue of a six year-old child by a Polish woman. The child's father died in Treblinka, but her mother survived and reclaimed her after a two-year stay with the Polish family.).

99. See Krista Latham, *Lecture Begins Two Week Holocaust Memorial at Michigan State U.*, U-WIRE Mar. 31, 2000, at 2 available at 2000 WL 17590653 (quoting Lawrence Baron, Director, Lipinsky Center for Judaic Studies at San Diego University). Baron's findings about the motivations of the rescuers are based on interviews with 450 persons who rescued Jews during the Holocaust years. *Id.*

100. See generally DAVID GUSHEE, *THE RIGHTEOUS GENTILES OF THE HOLOCAUST: A CHRISTIAN INTERPRETATION* (1994); ELLEN LANE-WEBER, *TO SAVE A LIFE: STORIES OF HOLOCAUST RESCUE* (2000); MORDECAI PALDIEL, *SAVING THE JEWS: AMAZING STORIES OF MEN AND WOMEN WHO DEFIED THE FINAL SOLUTION* (2000).

101. See Ryan & Bohlin, *supra* note 63, at 189 (quoting Theodore Roosevelt).

of a moral sense, it is a good start and one that more states would be wise to adopt.

That such education is necessary is evidenced by the increase in the volume and insidiousness of Holocaust denial both outside the academy and within it. Sadly, Holocaust revisionism proceeds apace despite the positive results achieved in 1980 in the Mel Mermelstein case in California and in 2000 in the British libel case that David Irving brought against Deborah Lipstadt and her publisher, Penguin Books. Apparently, and ironically, intolerance and untruths about the Holocaust can exist at the same time as the press, movies, and the establishment of the United States Memorial Holocaust Museum increase public awareness of the Nazi atrocities. Thus, young adults are in greater need than ever to possess the tools that competent historical analyses and values-teaching can give them so that they can distinguish messages of hate and intolerance from historical truth. States' adoption of Holocaust education in their school programs, in conjunction with hate-crime legislative efforts, can help foster tolerance, respect for diversity and knowledge of past truths so that never again will we have to experience another Holocaust.