

# “Using Law to Fight Antisemitism” Seminar

**by Alon Stein**

On November 4, 2021, the Decalogue Society of Lawyers, together with the Decalogue Foundation, presented as part of the 2021 Jewish Legal Lecture Series a webinar moderated by Decalogue Foundation president Robert W. Matanky entitled “Using Law to Fight Antisemitism.”

The event was co-sponsored by the American Association of Jewish Lawyers and Jurists and the DePaul University College of Law Center for Jewish Law & Judaic Studies.

The speakers at the event were: Steven H. Resnicoff, Professor of Law and Director of DePaul University College of Law Center for Jewish Law & Judaic Studies; Diane Klein, Visiting Professor, Southern University Law Center and Lecturer, Chapman University School of Law; and Robert A. Katz, Professor of Law and John H. Grimes Fellow, Indiana University McKinney School of Law.

Professor Resnicoff’s presentation was entitled “Free Speech, At What Cost?” and focused on the regulation of speech. Professor Resnicoff discussed the view espoused by some of a need for “absolutist” or “near absolutist free speech,” a view which does not consider any occasions and/or justifications that courts have applied over time to regulate speech. Professor Resnicoff argues that the absolutist approach also does not evaluate the significance of the harms that arise out of certain types of speech.

Professor Resnicoff contends that the absolutist approach to free speech has always been flawed. Technological changes to the way information is distributed and consumed today discredits the absolutist approach. He states that the absolutist approach to free speech has room for change but, because of the religious zeal for which the absolutist position has garnered, any suggestions for restrictions on speech are usually prevented due to claimed “slippery slope” concerns.

Professor Resnicoff then discussed the “marketplace of ideas” approach to free speech originally proposed by Supreme Court Justice Brandeis in a dissenting opinion. The marketplace of ideas approach provides that the best and only cure against the harm of negative speech is more speech. He noted that this approach is based on the assumption that there is an absolute commercial free market. However, there is no absolute commercial free market because the commercial market is regulated by consumer fraud laws, anti-trust laws, child labor, and other laws. He also noted that the marketplace of ideas approach has not gotten rid of antisemitism.

Professor Resnicoff gave examples of antisemitic speech that could be subject to regulation, such as threats made on college campuses, including intimidation and bullying, irrespective of the truth or falseness of the statements. Professor Resnicoff also stated that, nowadays, it has become extremely easy to spread false information and hate to specific groups. Because people filter out opposing viewpoints, the effect of harmful speech can become magnified. He also stated that any inciting to violence should be prohibited.

Professor Diane Klein next addressed the topic “Is Critical Race Theory Antisemitic?” Professor Klein concluded that, while the occasional person who might be associated with Critical Race Theory (CRT) and/or the Movement for Black Lives (sometimes known as “Black Lives Matter”) might say something that is susceptible to an antisemitic interpretation (or that person might be antisemitic), both CRT and/or the Movement for Black Lives are not themselves antisemitic.

Professor Klein talked about how the Movement for Black Lives currently has a policy platform of ending the war on African American communities, an end of all jails and prisons, an end to the war on drugs, an end to the death penalty, an end to money bail, an end to the use of past criminal history, restructuring the tax code, and demilitarization of police and other policies, but it does not mention Jews or Israel. As late as 2016, the Movement for Black Lives’ platform called for an end of the United States’ aid to Israel and it described Israel as an apartheid state, but that part of the platform is now gone. From the perspective of the Movement for Black Lives, the process in which Europeans became Americans involved the destruction of existing indigenous peoples and their culture, which involved removal and resettlement, and African Americans were forced into labor for this project. Professor Klein notes that Jews did not play a role in this, but that Jews may have benefitted from the creation of the United States on these terms.

Professor Klein also discussed that CRT, which was developed in the 1980s, is a way of understanding race and racism in America. It asks “why?” It focuses on larger systems and structures in American life and it requires that we assess the continuing legacy of anti-Black racism in America today. It asks why things are not better. Professor Klein then discussed the concept of white privilege, which is the idea that all people who are white or appear to be white enjoy certain unearned advantages in American life that are not enjoyed by people who are not white, especially African Americans. There is a debate as to whether American Jews are or are not beneficiaries of white privilege in American life.

Professor Klein concluded by stating that CRT can help us understand the persistence of inequality in America and the types of interventions that might be able to change it. It can help us understand antisemitism better with the aim of combatting it more effectively. Not only is it not inherently antisemitic, it helps combat all forms of prejudice, including antisemitism.

Next, Robert A. Katz addressed the topic entitled “When is Diversity, Equity and Inclusion Training Discriminatory Under the Law?” He asked the question of what does it feel like, as a Jew, to be asked by your employer to participate in a diversity training program that could be perceived as hostile to Jews? He also asked to what extent could Title VII of the Civil Rights Act (which protects people from discrimination due to religion) be used to combat more subtle forms of antisemitism, beyond the most obvious cases of slurs in the workplace?

Professor Katz’s talk discussed a recent EEOC complaint filed by two Jewish mental health clinicians at Stanford who alleged that their employers fostered a hostile work environment by placing them into a program to learn about white privilege, specifically for white employees. The program used a loaded term, “white supremacy,” to describe the system that maintains and perpetuates white privilege, and it asserted that those who benefited from white privilege are complicit in white supremacy. The Plaintiffs, who were Ashkenazi Jews, objected to being placed into the white group, called the “White Accountability Group,” on the grounds that as Jews they did not feel an affinity to the white identity, that placing them in this group erased their Jewish identity, and that by placing them in this group, the program endorsed the narrative that Jews were connected to white supremacy.

Professor Katz stated that the most troublesome part of this complaint was connecting the Jews to white supremacy, which most Jews identify with neo-Nazis, especially if it persists after the problem with which such a connection has been pointed out. Professor Katz also stated that, regardless of whether this complaint will prevail, it was worth filing the complaint with the EEOC because it could lead to positive change.

Finally, it was announced that Professors Klein and Katz are co-authoring a casebook about Jews, antisemitism, and the law, and there was a conference called “Law Versus Antisemitism” held at Indiana University School of Law on March 13-14, 2022. They are also designing a course to go with their casebook as to how to use the law to combat antisemitism.

Overall, it was an interesting evening with these very engaging speakers and it got a lot of the participants thinking about some very important questions and issues that are relevant today.

*Alon Stein is Founder of Stein Law Offices of Illinois and Wisconsin, and President of the Israeli-American Bar Association.*