Facing History and Our First Amendment

Opinion, ***Massachusetts Lawyers Weekly****, October 31, 2005, pp. 55-56*
By Harvey A. Silverglate, Norman S. Zalkind, Philip G. Cormier and Malick W. Ghachem*

There are some matters that only the court of history can decide: What happened in the past, why and how?

Although lawyers and judges are frequently called upon to derive constitutional and other legal lessons from bygone ages, they are generally ill-equipped to sift through the nuances of the historical record.

But as any student of the past will testify, in order for the court of history to function properly, it is essential that all those who engage in historical learning have unmitigated and uncensored access to the full range of ideas, facts and materials that the past in all of its variety and messiness offers up to us.

A lawsuit we have recently filed involving rival interpretations of the fate of the Armenian communities of the Ottoman Empire during World War I seeks to reaffirm this basic principle, one that is central to historical scholarship and American public law alike.

Late in the evening on Sept. 22, only hours before the first academic conference on Turkish soil regarding the disappearance of the Armenian population of eastern Anatolia between 1915 and 1917 was set to commence, a Turkish administrative court enjoined Bogazici University in Istanbul from hosting the assembly of historians. (The conference had already been suspended once before, this past spring, after nationalist critics labeled the event "treason" and a "dagger in the back of the Turkish nation.")

Prime Minister Recep Tayyip Erdogan and Foreign Minister Abdullah Gul, attempting to assure European Union officials and the world that the last-minute judicial effort to halt the conference did not reflect Turkey's official position, sharply criticized the court's decision.

A day-and-a-half after the injunction, roughly 300 Turkish scholars met in a private university across town, not subject to the court's censorial jurisdiction, to discuss "Ottoman Armenians of an Empire in Decline." The marketplace of free thought — so long and deeply embedded in American law and culture but so often hard-won, case by case, elsewhere in the world — triumphed in a nation where dissident views on whether the events of 1915-1917 constitute a genocide exemplify the proverbial "fighting words."

After the first cancellation of the conference in May 2005, James Sheehan, the president of the American Historical Association, wrote a letter to Prime Minister Erdogan on behalf of the AHA.

Although the AHA "does not have a position on the fate of the Armenians," Sheehan wrote, "it is deeply committed to free and open inquiry about historical issues, and especially about those issues that have been charged with political and ideological animosities."

He concluded that "[i]n the long run, everyone's interests are best served by allowing uninhibited and open inquiry and debate."

The Turkish government, to its credit, agreed.

Few if any political and historical topics are more provocative and volatile in contemporary Turkey and Armenia than the debate over what happened (and why) to the Ottoman Armenian communities during the World War I.

Prime Minister Erdogan's open support for the conference and his call for a Turkey in which "liberties are practiced to the full" mark a watershed moment for a country determined to break through the nationalist taboos of its past.

It is all the more disconcerting, then, that right here in the Commonwealth of Massachusetts, the state Department of Education has censored one side of this contentious historical debate.

We have recently filed a lawsuit in U.S. District Court in Boston seeking to implement a longstanding but, in the current heated and bitter atmosphere of our nation's "culture wars," sometimes overlooked Supreme Court doctrine that seems ripe for reinvigoration. It is a doctrine mandating true tolerance and a real diversity of opinion on even the most emotional and fiercely contested issues separating our citizens (as well as many nations of the world) today.

This doctrine flows from the First Amendment's requirement that the government not establish ideological, cultural, religious, philosophical or historical orthodoxies and then punish, censor or otherwise disadvantage those who deviate from officially promulgated views.

In the area of public education, in particular, that doctrine prohibits the government from censoring politically disfavored points of view by limiting student and teacher access to materials otherwise deemed educationally suitable.

Genocide vs. contra-genocide theses

The crux of our lawsuit lies at the intersection of the First Amendment and the ongoing debate over whether the governing authorities of the Ottoman Empire committed genocide against the Armenian population of eastern Anatolia just before, during and after World War I.

The lawsuit is a response to the Massachusetts Department of Education's 1999 deletion from its state curricular guide, after political pressure from Armenian-American lobbyists and

politicians, of all resources supportive of the view that the atrocities at issue did not attain "genocide" status within the internationally accepted definition of the term: that is to say, the intentional destruction (whether attempted or actual) of a particular racial, ethnic or religious community.

Filed on behalf of public school teachers, a student and his father, and an umbrella organization of Turkish-American groups, our lawsuit seeks a court order declaring that state educational authorities violated state and federal constitutional guarantees of freedom of speech and belief when they ordered the elimination, from state-recommended curricular materials, of the competing point of view on events in the late-Ottoman Empire nearly a century ago.

Like the American Historical Association, our lawsuit does not take a position on the legal and historical characterization of the fate of the Ottoman Armenians during World War I.

There is no question that, through a combination of killings, relocations, disease and hunger, a very large proportion of the Armenian population of eastern Anatolia Ottoman Empire was collapsing during and immediately after the war.

While the historical accounts are not evenly split as to the "how" and "why" of this disappearance — or as to the numbers of deaths involved — they do reflect a range of positions between two poles.

On the one hand, some accounts posit that the deaths and deportations of Armenians were the result of a civil war between Turkish and Armenian forces, with suffering (including many Turkish civilian deaths) and violence on the part of both sides, rather than a deliberate genocidal campaign by the Ottoman authorities against the Armenian minority. This is the "wartime conflict" or "contra-genocide" thesis.

The other pole maintains that the actions of the Ottoman military forces reflected nothing less than an intentional and largely successful program to kill and/or remove the entire Armenian population of eastern Anatolia. This is the "genocide" thesis.

Although this historical dispute is complex, the facts that give rise to the lawsuit are fairly simple. Pursuant to legislative mandate (Chapter 276 of the Sessions Laws of 1998), the state commissioner of education created a guide to choosing curricular materials on genocide and human rights.

A preliminary draft of the guide, which contained resources supporting only the genocide thesis, prompted Turkish-American advocates to suggest that contra-genocide materials be added to the guide in order to acquaint students with both sides of the controversy.

After a public meeting, followed by the board's determination that they were educationally suitable, the contra-genocide materials were indeed added, and a version of the guide that included both genocide and contra-genocide resources was submitted to the state Legislature.

Yet, after proponents of the genocide thesis harshly protested the board's inclusion of contra-genocide materials in the guide and a state senator insisted on their deletion, the commissioner circulated a new draft of the guide that censored out all contra-genocide materials.

A series of letters, between and among the board and the advocates for the competing positions on the historical question, culminated in a statement by the commissioner that, because the original statute used the phrase "Armenian genocide," no contra-genocide materials would be included in the guide. The statute provides:

"The board of education shall formulate recommendations on curricular materials on genocide and human rights issues, and guidelines for the teaching of such material. Said material and guidelines may include, but shall not be limited to, the period of the transatlantic slave trade and the middle passage, the great hunger period in Ireland, the Armenian genocide, the holocaust and the Mussolini fascist regime and other recognized human rights violations and genocides." [emphasis added]

In the commissioner's view, the Legislature's mere use of the phrase "Armenian genocide" — as an example of the kinds of historical events to be included in the curricular guide — was to be taken as a command that the guide include only materials expressing the position that the events did indeed constitute, legally and historically, a genocide.

To this day, the guide does not contain any references to contra-genocide viewpoints or resources. The guide thus attempts to convey the impression that the genocide thesis is the only possible and intellectually respectable view, as if this characterization has been universally accepted by historians.

As AHA President Sheehan has noted in a recent column in the AHA newsletter Perspectives (September 2005), however, even among the majority of historians who accept the underlying facts of the genocide thesis, there is uncertainty as to whether the specific term genocide is appropriate.

Neither the plaintiffs nor the attorneys in this lawsuit are historians of the late Ottoman Empire . They have not spent years laboring to master difficult foreign languages or dig tirelessly in remote, politically sensitive archives. But they do believe it is imperative that the state not silence meaningful discussion on this complicated and contentious topic, or on any other topic with respect to which reasonable people in a free society can and do differ, often quite heatedly.

Assessing whether the intention of the Ottoman authorities was to destroy the Armenian people and culture or instead to put down a political uprising during a period when the administration of the Ottoman Empire was dissolving, historians, partisans and partisan-historians have taken up their own arms, ranging from vituperative denunciations to pleas for public discussion and debate.

A genocide resource book published by Brookline-based Facing History and Ourselves refers to dissidents from the genocide thesis as "deniers and revisionists," approvingly citing one scholar who "believes that denial of the Genocide is tantamount to hate speech." ("Crimes Against Humanity and Civilization: The Genocide of the Armenians," Readings 8 and 9 (2004)).

But the plaintiffs in this case do not seek to obtain the state's imprimatur for any particular thesis. Nor do they seek to halt the debate by insisting that one side's point of view is the only legitimate one. They ask only that the state allow teachers and students to think for themselves after all intellectually and academically appropriate points of view have been placed on the table in the tradition of America's free marketplace of ideas — and inclusion in the curricular guide surely is essential to accomplish this.

Other examples

The dispute over the fate of the Ottoman Armenians is only one of many hotly contested political, religious and cultural contexts in which censorship and ad hominem invective seek to squeeze out free inquiry and mutual understanding in contemporary America.

Consider, for example, the raging controversy between Darwinian evolutionists and adherents of Intelligent Design theory (ID), which sometimes sounds like a struggle between the forces of godless materialism and those of narrow-minded fundamentalism.

Or the battle between advocates on both sides of the abortion debate, where nuances get lost in the struggle between those who claim to revere life versus those who respect a woman's autonomy.

In an enormous assortment of issues in American political and cultural life today, lines have been drawn in the sand on issues where, in fact, mutual respect and toleration might be achieved if the goal were not the power of each side to push the other out of the intellectual marketplace altogether.

It is human nature for each of us to believe he or she is correct on any number of deeply held views. Even something as important as the need to live together in a diverse society does not, and should not, require any of us to give up our beliefs.

But our system of constitutional democracy also contemplates a certain civic tolerance that has lately been in increasingly short supply at both ends of the various spectra governing American life: conservative versus liberal, religious versus secular, etc.

The Supreme Court's opinions regarding one of the foundational rights in the Constitution — the right to an unencumbered conscience and an unrestrained mind, free of official censorship, coercion and state-mandated orthodoxies — have repeatedly defined and demonstrated the

significance of a liberated mind and of its essential twin, tolerance for those with whom we vehemently disagree.

The notion that government should facilitate discourse and not force citizens to accept a singular point of view is not new. One recalls the famous 1929 dissenting opinion by Justice Oliver Wendell Holmes in United States v. Schwimmer, 299 US 644 (1929): "The principle of free thought — not free thought for those who agree with us, but freedom for the thought that we hate," Holmes wrote, is arguably the most imperative principle in the Constitution.

Much more recently, the constitutional scholar Laurence Tribe observed in the 1988 edition of his acclaimed treatise American Constitutional Law (p. 838, n. 17) that "[i]f the Constitution forces government to allow people to march, speak and write in favor of peace, brotherhood, and justice, then it must also require government to allow them to advocate hatred, racism, and even genocide."

Censorship of materials deemed offensive, provocative or otherwise politically unacceptable from an academic collection calls to mind a famous 1982 legal tussle involving the Island Trees Union Free School District in New York . There, the Board of Education, under pressure from what the Supreme Court dubbed "a politically conservative organization of parents," removed nine books from the school library, characterizing them as "anti-American, anti-Christian, anti-Semitic, and just plain filthy."

As Justice William Brennan wrote, the court saw fit to order the books reinstated "because we are concerned in this case with the suppression of ideas." Board of Education v. Pico, 457 U.S. 853, 871-2.

Perhaps the most forceful example of the Supreme Court's defense of the importance of a free mind dates back to World War II.

In 1943, the court took the highly unusual step of reversing an opinion it had crafted only a few years earlier. In a 1940 case, Minersville School District v. Gobitis (310 U.S.US 624), shared a similar cast of characters and central plot device. 586), the high court upheld a state's mandatory flag-salute requirement, concluding that government had the power to compel such a civic ritual in the name of maintaining national cohesion. The court's 1943 reversal of this decision, in West Virginia Board of Education v. Barnette, (319).

In both, Jehovah Witnesses challenged, on freedom of religion grounds, the requirement that their children be forced to salute the flag each day in what was to them an act of idolatry, given the book of Exodus' prohibition against making obeisance to "graven images."

Justice Jackson was able to attain a clear majority for his magisterial opinion in Barnette. While Jackson and his fellow justices had no problem with West Virginia's requirement that certain courses be taught, nor with attempts to inspire patriotism by exposing students to national

history and traditions, they did have a problem with the West Virginia Board's mandatory flag-salute.

That requirement, Jackson wrote, compelled a student "to declare a belief [and] ... to utter what is not in his mind." The strength of America consisted in "individual freedom of mind" rather than in "officially disciplined uniformity for which history indicates a disappointing and disastrous end." Enforced conformity, far from teaching the value of liberty, would "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Paragraph by paragraph, Jackson's powerful prose explained why even men and women of good intentions should not possess the awesome power to compel belief. Jackson appealed to practicality and to history. Throughout time, he noted, both the good and the evil had attempted "to coerce uniformity of sentiment in support of some end thought essential." Such goals had been variously racial, territorial, and religious. Yet each such effort raised the bitter and profoundly divisive question of "whose unity it shall be."

In short, Jackson wrote for the majority, "compulsory unification of opinion achieves only the unanimity of the graveyard." The "freedom to differ is not limited to things that do not matter much," the court discerned. "That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

Jackson concluded his Barnette opinion with one of the most eloquent passages in American constitutional history and, indeed, in all of American literature.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith" in it.

"The purpose of the First Amendment to our Constitution," he emphasized, was precisely to protect "from all official control" the domain that was "the sphere of intellect and spirit."

So it was that Barnette, not Gobitis, became the landmark opinion, defining the constitutional and moral norms of our free society, challenging us never to be so sure of our own rectitude that we force others to agree with us.

Running afoul of 'Barnette' warnings

Today's attempts to establish official orthodoxies, whether by mandating declarations of belief or censoring politically disfavored viewpoints by limiting student and teacher access to educationally suitable materials, run seriously afoul of Justice Jackson's warnings in Barnette.

It is one thing for private citizens to be so certain they are right that they vilify or even seek to silence disagreement. It is quite another thing for government to act as a proxy for private

certainties by writing them into the law of the land, whether through statute or administrative action.

This brings us back to the lawsuit at hand. If the highest principles of our Constitution require protection even for those who advocate genocide, then surely it protects those engaged in a legitimate debate over whether a particular historical event did or did not constitute genocide within the accepted international legal definition.

As recent events in Turkey have demonstrated, facing history sometimes requires societies to confront viewpoints and truths that clash with strongly held nationalist sentiments.

Facing the First Amendment is not all that dissimilar: It can sometimes create deep discomfort and anxiety, even great pain, on the part of those who disagree to the core of their being with a particular form of protected expression. That is part of the price of living in a free society. But it is consistent with greater historical understanding of the underlying events that give rise in the United States to the endless and enervating culture wars and, in some places in the world, to actual armed conflict.

The First Amendment, in its wisdom, gives us a way to avoid such outcomes, if only we choose to follow and honor it.

**Harvey A. Silverglate, a criminal defense and civil liberties lawyer, is of counsel to the Boston firm of Good & Cormier, co-author (with Alan Charles Kors) of "The Shadow University: The Betrayal of Liberty on America's Campuses" (HarperPerennial, 1999), and vice chairman of The Foundation for Individual Rights in Education. Norman S. Zalkind is a partner in the Boston firm of Zalkind, Rodriguez, Lunt & Duncan. Philip G. Cormier is a partner in the Boston firm of Good & Cormier. Malick W. Ghachem is an associate in the Boston firm of Zalkind, Rodriguez, Lunt & Duncan. The authors acknowledge with gratitude the research assistance of Dustin A. Lewis.*