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NEVER FORGET?
JEWISH IDENTITY, HISTORY, MEMORY, SLAVERY AND
THE CONSTITUTION

*Ariela J. Gross**

People often ask me how I became interested in the topics I work on: the history of law, slavery, race and racism, and the relationship between our Constitution and the achievement of racial justice and equality. Sometimes what the questioner really means is, “How did a nice white (Jewish) girl like you start writing about race?” This essay will be my attempt to answer that question on several levels. What is the relationship between my Jewish (white) identity and the way I write about race, racism, and the Constitution?

Like many of the participants in this symposium, I have a double-edged relationship to Jewish identity. My mother comes from an observant, deeply religious Italian-Israeli Jewish family for whom ritual and tradition shape every aspect of their daily lives. Her family members see themselves standing apart from the societies in which they have lived (except for Israel). My mother’s uncle, my great-uncle, Elio Toaff, was the Chief Rabbi of Rome for over fifty years. He was best known for embracing Pope John Paul II during a papal visit to his synagogue, and more recently, for his son Ariel’s notorious banned book, *Passovers of Blood*.¹ My father, on the other hand, comes from a secular, socialist, Ashkenazi American family, for whom Jewish identification was completely divorced from ritual or belief, but closely intertwined with cultural and political radicalism. My father’s father, Bertram Gross, worked in government for years. He drafted early versions of full employment legislation, served as Secretary of the Council of Economic Advisers under President Truman, research director for

* John B. & Alice R. Sharp Professor of Law & History, University of Southern California Gould School of Law. Many thanks to Roberta Kwall for organizing the symposium on People of the Book at DePaul Law School, and to the participants for a stimulating discussion.

¹ Bruce Weber, *Elio Toaff, Spiritual Leader of Italian Jews, Dies at 99*, N. Y. Times (Apr. 20, 2015), http://www.nytimes.com/2015/04/21/world/europe/elio-toaff-spiritual-leader-of-italian-jews-dies-at-99.html?_r=0. For discussion of the *Passovers of Blood* controversy, see, e.g., Kenneth Stow, *Blood Libel: Ariel Toaff's Perplexing Book*, HISTORY NEWS NETWORK (Feb. 19, 2007), <http://historynewsnetwork.org/article/35496>; Sabina Loriga, *Une vieille affaire? Les "Pâques de sang" d'Ariel Toaff*, 1 ANNALES, HISTOIRE, SCIENCES SOCIALES 143 (2008).

the Democratic National Committee in 1952 (before anti-Communist pressures forced him out), and later became an academic best known for his book, *Friendly Fascism*.² My parents, who moved to Berkeley in the 1960s for graduate school, were products of that era: getting arrested in Free Speech movement protests, and carrying their new baby (me) to marches and folk rock concerts. My earliest lullabies were freedom songs. For my parents, although they never articulated the connection, it was natural that Jews should participate in the Civil Rights Movement.

I grew up in Princeton, New Jersey—a preppy, waspy university town that replicated big-city racial segregation in miniature. The inner city, or “donut hole,” was the Princeton Borough, which contained the town’s small black population as well as an Italian community that dated back to stonemasons and carpenters who immigrated in the early twentieth century. The outer ring, “the donut,” was Princeton Township, which was prosperous and almost entirely white. There were plenty of Jews in Princeton, but it was an anemic, assimilated identity—one to wear lightly. My mother’s foreign accent embarrassed me. Hebrew school consisted mainly of Holocaust films and bat mitzvah preparation.

For me, being Jewish was at once an Old World throwback identity to be sloughed off at the earliest opportunity, as well as an in-group experience of wry comedy, left politics, and outsider sensibility. Furthermore, by the time I was a politically sentient being, at the dawn of the Reagan era, prominent civil rights-era American Jews had become neo-conservatives, leading the charge against affirmative action.³ So for me, Jewishness might mean standing with oppressed peoples for justice everywhere, but also navigating a complex history of black-Jewish relations in the U.S., and acknowledging my own privileged position in that racial

² See Kenneth N. Gilpin, *Bertram M. Gross, 84, Author of Full Employment Bills of 1944-45*, N.Y. TIMES (Mar. 15, 1997), <http://www.nytimes.com/1997/03/15/business/bertram-m-gross-84-author-of-full-employment-bills-of-1944-45.html>; *Politicians As Expected*, CHICAGO TRIBUNE (Jan. 15, 1952), <http://archives.chicagotribune.com/1952/01/15/page/16/article/politicians-as-expected>; BERTRAM M. GROSS, *FRIENDLY FASCISM: THE NEW FACE OF POWER IN AMERICA* (1980).

³ See, e.g., NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY* (1975); NATHAN ABRAMS, *NORMAN PODHORETZ AND COMMENTARY MAGAZINE: THE RISE AND FALL OF THE NEOCONS* (2010); *AFRICAN AMERICANS AND JEWS IN THE TWENTIETH CENTURY: STUDIES IN CONVERGENCE AND CONFLICT* (V. P. Franklin et al. eds., 1999).

hierarchy. I do not write explicitly about Jewish identity, but the double consciousness it entails informs all of my scholarship.

As a historian of law, race and slavery, now co-authoring a comparative project on Cuba, Louisiana, and Virginia,⁴ I have spent a great deal of time thinking about the origins of race and racism in the Iberian world of the late fifteenth century. There seems to be little doubt that ideas of racial purity developed during the Spanish Inquisition and were carried to the New World where they became entangled in the African slave trade.⁵ Even in the Mediterranean itself, as Debra Blumenthal shows in fifteenth and sixteenth century Valencia, slavery evolved to have a racialized basis as African appearance became associated with the status of a “captive,” hence enslaveable, person.⁶ Yet the social trajectories of anti-Semitism and anti-black racism diverged so radically that it is hard to know what to make of this confluence of ideological origins.

I have also been writing about the uses of the history of slavery in the contemporary law and politics of race in the United States and France, looking at the way political conservatives, liberals and radicals deploy historical narratives to argue for contemporary responsibility to remedy racial injustice. The study of historical memory has been deeply shaped by Jewish historiography (especially the work of Yosef Yerushalmi), and the admonition to remember (the Holocaust) has influenced the U.S. Civil Rights Movement and my own work as well. In his landmark work, *Zakhor*, Yerushalmi interrogates Jewish memory and its relation to historiography. He argues that in the modern era, “Jewish historiography [has been] divorced from Jewish collective memory and, in crucial respects, thoroughly at odds with it.”⁷ At a conference on “the uses of forgetting,” Yerushalmi reflected that perhaps “it [is] possible that the antonym of ‘forgetting’ is not

⁴ Alejandro de la Fuente & Ariela Gross, *Comparative Studies of Law, Race and Slavery in the Americas*, 6 ANN. REV. L. SOC. SCI. 469 (2010); Ariela Gross & Alejandro de la Fuente, *Slaves, Free Blacks, and Race in the Legal Regimes of Cuba, Louisiana, and Virginia: A Comparison*, 91 N.C. L. REV. 1699 (2013).

⁵ See generally María Elena Martínez, *The Black Blood of New Spain: Limpieza de Sangre, Racial Violence, and Gendered Power in Early Colonial Mexico*, 61 WM. & MARY Q. 479 (2004).

⁶ DEBRA BLUMENTHAL, ENEMIES AND FAMILIARS: SLAVERY AND MASTERY IN FIFTEENTH-CENTURY VALENCIA (2009).

⁷ YOSEF HAYIM YERUSHALMI, ZAKHOR, JEWISH HISTORY AND JEWISH MEMORY 93 (1996).

‘remembering,’ but *justice*.”⁸ In *Zakhor*, he tried to show the gulf between historiography and collective memory, yet argued for the “moral imperative” of historiography, not as a substitute for memory, but as a guard against the “agents of oblivion, the shredders of documents, the assassins of memory, the revisers of encyclopedias, the conspirators of silence.”⁹

As a historian of slavery, race and law in the United States, it has been a key aim of my work to show the centrality of slavery to the construction and maintenance of legal, political and economic institutions; the centrality of slavery to the Constitution, capitalism, and to the meaning of freedom and citizenship, both before and after the Civil War. The erasure of slavery from our chief narratives about law and the Constitution—or its portrayal as a blip, as a temporary deviation from a tradition of freedom and color-blind equality—is our version of oblivion our conspiracy of silence. And it is an example of where the historiography is in a very different place from the collective memory. The historians have rewritten slavery, the slave trade, Reconstruction. But collective memory stubbornly persists in many ways.

In the United States, the North and South united in the post-Civil War era by a joint commitment to white supremacy and to burying the memory of slavery.¹⁰ New Englanders and other Northerners “disowned” their own history of slavery.¹¹ This collective forgetting of slavery extended from popular culture in films like “Gone With The Wind,” to the historiography of the Dunning School that reimagined Reconstruction as a criminal exercise by venial “carpetbaggers” and incompetent ex-slaves. To a great extent, as Richard Primus and Norm Spaulding have shown us, constitutional jurisprudence continues in this retrograde understanding of the Reconstruction Era and the Amendments it produced.¹²

In both the United States and France, memorialization of the Holocaust and the success of “never forget” as a political strategy, triggered claims and demands by the descendants of

⁸ *Id.* at 117.

⁹ *Id.* at 116.

¹⁰ NINA SILBER, *THE ROMANCE OF REUNION: NORTHERNERS AND THE SOUTH 1865-1900* (1993).

¹¹ JOANNE POPE MELISH, *DISOWNING SLAVERY: GRADUAL EMANCIPATION AND “RACE” IN NEW ENGLAND 1780-1860* (1998).

¹² Richard A. Primus, *The Riddle of Hiram Revels*, 119 HARV. L. REV. 1680 (2006); Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 COLUM. L. REV. 1992 (2003).

slaves for the memorialization of slavery. Only after the success of Holocaust reparations claims against Swiss banks and other institutions was there a spate of lawsuits against institutions that benefited from slavery in the United States, and a rejuvenation of the reparations movement both here and internationally. After years of stop and start struggles, the Smithsonian National Museum of African American History and Culture has just opened on the National Mall, more than two decades after the Holocaust Museum was dedicated. In France, the 2001 Taubira Law, declaring slavery a crime against humanity, followed closely the model of the Gayssot Law, memorializing the Holocaust, and making Holocaust denial a crime.¹³

There have been some successes in the public memory work. The debate over the relationship between Thomas Jefferson and Sally Hemings and the overwhelming success of the New York Historical Society's exhibit on slavery demonstrate that "slavery has become a language, a way to talk about race in a society in which race is difficult to discuss."¹⁴ The success of *Twelve Years A Slave*, a film that faithfully rendered Solomon Northup's narrative of his years of enslavement in Georgia after being kidnapped by traders in the North, is only the most recent such moment. In France, the aftermath of the 2001 law declaring slavery a crime against humanity has been a series of both public commemorations and scholarly endeavours recovering the history of French slavery and the Haitian experience, culminating in the 2012 opening of the slave trade memorial in Nantes.

Of course, many of these efforts to shape collective memory so emphasize the victimization of Africans that they "play[] into stereotypes of dehumanized slaves, ineffectual subjects rendered passive, weak and silent through their enslavement."¹⁵ There is a tendency to portray white allies as saviors and blacks as passive victims. France has commemorated slavery by celebrating the

¹³ For a more in depth discussion of these issues, see Ariela J. Gross, *All Born to Freedom? Comparing the Law and Politics of Race and the Memory of Slavery in the U.S. and France Today*, 21 S. CAL. INTERDISC. L.J. 523 (2012) [hereinafter Gross, *All Born to Freedom?*]; Ariela Gross, *When is the Time of Slavery? The History of Slavery in Contemporary Legal and Political Argument*, 96 CALIF. L. REV. 283 (2008); Ariela Gross, *The Constitution of History and Memory*, in LAW AND THE HUMANITIES: AN INTRODUCTION 416 (Austin Sarat et al. eds., 2010).

¹⁴ Ira Berlin, *American Slavery in History and Memory and the Search for Social Justice*, 90 J. AMER. HIST. 1251, 1259 (2004).

¹⁵ ELIZABETH KOWALESKI WALLACE, *THE BRITISH SLAVE TRADE AND PUBLIC MEMORY* 207-08 (2006).

Republican abolition, especially the white abolitionist leader Victor Schoelcher. Jacques Chirac, then President, gave a speech at the commemoration that referred to abolition as a “founding act” that “reinforced the unity of the Nation,” concluding “we were all born in 1848.” Critics contest that 1848 was in fact the right moment to celebrate—why not the Haitian Revolution, for example? Before *Twelve Years A Slave*, this theme was also illustrated in films that put white abolitionists at the center: *Amistad*, *Glory*, and *Amazing Grace*. Even in *Twelve Years A Slave*, Brad Pitt gave himself a heroic role, one far greater in the film than in the pages of Northup’s narrative.

In both the United States and France, movements to oppose race-conscious redress for the legacy of slavery have used the memory of slavery as part of a historical narrative that wipes clean the slate of debt. These conservative narratives portray slavery as part of a deep past, and a past that is detached from “race.” Furthermore, they invoke the originary revolutionary moment—in the United States, the 1787 Constitution, and in France, the Declaration of the Rights of Man. This creates a sense of the timeless continuity of color-blindness, with slavery a temporary deviation (and affirmative action or race-conscious data collection a parallel deviation on the other side of the ledger).¹⁶

Of course it is true that French and American racial politics diverge in important ways. American civil rights law developed in the 1950s, 60s and 70s through a jurisprudence that drew on a progressive history, linking the legacies of slavery and Jim Crow to remedial programs of affirmative action. France in the 1970s was focused instead on its Vichy past, and concentrated on combating hate speech and acts of violence against minorities. If in the United States, the paradigm act of racism was the exclusion of African American children from public schools and of adults from voting and jury service, in France, it was the torching of a synagogue. Yet in the last two decades, both countries have experienced a burgeoning of memorialization of slavery, and both countries’ public discourse about racial justice have been dominated by these conservative narratives of discontinuity between the slave past and the free present.¹⁷

In the U.S., liberal recovery of the memory of slavery and its aftermath as a history of struggle has given way to more celebratory versions of the slavery-to-freedom story, which can be

¹⁶ See Gross, *All Born to Freedom?*, *supra* note 13, at 536-51.

¹⁷ *Id.* at 552-53.

the basis for race-blind suppression of affirmative measures for racial justice. In France, the first efforts to recover the memory of slavery have gone hand-in-hand with a new Black consciousness (including the birth of *le CRAN*, the first black-identified civil rights group in France, in 2005), a growing awareness of race in public life, and demands by some for an end to total race-blindness (for example, through the collection of “ethnic data” as we routinely do in our Census). Yet in France as well, the slavery-to-freedom story has been a means to answer these initiatives with a reiterated commitment to race-blind republicanism.¹⁸

Where do Jewish intellectuals fit into this history of memory and forgetting with regard to race and slavery? I will make just two observations that encapsulate my ambivalence about my own Jewish identity. On the one hand, there is the narrative of colorblind meritocracy that has been articulated by no one more strongly than Jewish neo-conservatives in the United States. Former liberals Nathan Glazer and Norman Podhoretz went on record in opposition to affirmative action as early as 1964, when basic legislative victories for civil rights were hardly yet secure. In 1975, Podhoretz wrote candidly about the group interest inherent in his position (“Is it good for the Jews?”), concluding that an educational admissions system that bore any relation to reflecting the diversity of the population could only be bad for a group that made up only 3% of the national population.¹⁹ In the 1987 edition of *Affirmative Discrimination*, Glazer acknowledged that the “proportional representation” he had feared as a result of affirmative action had not come to pass.²⁰ Thus, Jews have participated, and at times led, in the collective forgetting of slavery and its legacies that makes color-blindness an attractive political strategy and constitutional theory.

Similarly, in France, the leading anti-racist organizations, including MRAP [*Mouvement contre le Racisme et pour l’Amitié entre les Peuples*], *SOS-Racisme*, and the Human Rights League, express an ideology of republican citizenship almost uniformly hostile to race-consciousness of any kind, but especially to “ethnic statistics” or “action positive.” These organizations, spearheaded in many cases by Jewish lawyers, activists and intellectuals, enjoin the fight against anti-Semitism and racism as a battle primarily against hate speech and violence, and have sought only race-blindness in the workplace and educational arena.

¹⁸ *Id.* at 551-59.

¹⁹ Norman Podhoretz, *Is It Good For The Jews?*, 53 COMMENTARY 7 (1972).

²⁰ NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION* x-xiv (1987).

On a personal level, it is upsetting to me to find Jewish intellectuals positioned so focused on certain forms of discrimination (“quotas,” for example) that one history blinds them to another. However, my second observation is that when it comes to the history of collective memory and forgetting of slavery, Jewish liberal historians, in the United States and in France, have been in the forefront of historiography, and this is a point of pride for me.

What has not surfaced with regard to slavery is the critique that accompanied the turn to memory studies of the Holocaust. With respect to the Holocaust, some Jewish historians in the U.S. have criticized the “surfeit of memory” that has become the norm in European history. They raise the concern that “never forget” will create a special “status of victimhood,” and warning, as Charles Maier did, that “the surfeit of memory is a sign not of historical confidence but of a retreat from transformative politics.”²¹ Yet in the context of slavery and race, it is primarily conservative politicians and activists who warn of identity politics as a “victims’ revolution.” Reparations talk in the context of slavery and Jim Crow has remained politically radical enough that there is little sense that it represents a retreat from transformative politics.

So, as a Jewish historian of the Constitution in all its dimensions, I remain committed to countering the “agents of oblivion:” those who tell us that slavery ended in 1865, and the debt for 350 years of slavery was paid with the bloodshed of the Civil War; the “shredders of documents,” who read the Constitution on the floor of the House of Representatives, excising the three-fifths clause and the slave trade clause as unpleasant memories best forgotten; the “revisers of encyclopedias,” who change the textbooks to emphasize the greatness of the Founders, rather than the men and women they owned; and “the conspirators of silence” who insist that we stop talking about the continuing legacies of slavery in the present day.²² I forswear a surfeit of memory of victimhood as the political guiding light of what it means to be a Jew in the world today—“never forget” as the rallying cry for all kinds of political retrenchment. But I also allow the double consciousness of an ambivalent identity to guide my own sensibility as a scholar who tries to write a tragic history with

²¹ Charles S. Maier, *A Surfeit of Memory? Reflections on History, Melancholy and Denial*, 5 HIST. & MEMORY 136, 150 (1993).

²² YERUSHALMI, *supra* note 7, at 116.

an acknowledgment of the possibilities of irony, self-criticism—and perhaps even some form of redemption.