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Evan P. Schultz

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# GROUP RIGHTS, AMERICAN JEWS, AND THE FAILURE OF GROUP LIBEL LAWS, 1913-1952\*

Evan P. Schultz†

## INTRODUCTION

At the close of World War II, one writer, having spent a lifetime fleeing the ravages of persecution in Europe, commented bitterly that even in America,

[I]n the eyes of the law the Jews do not exist as a group. They may be murdered as a group, but they may not complain about it *as a group*. They can be defamed as a sinister gathering of the Elders of Zion, or as ritual murderers, but there is no effective remedy against their defamation as a group.<sup>1</sup>

The writer was technically wrong. Various laws condemning and punishing defamation of groups did in fact exist on the books of several states and municipalities as early as the 1910s, and such laws experienced a return to favor in the years surrounding World War II. But the small number of claims brought under such laws, and the generally harsh treatment they received in the courts, lend the statement a ring of truth.<sup>2</sup> For some time, disrepute led to obscurity, prompting one commentator to write over thirty years ago, "It is probable

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† B.A., Columbia College. J.D., M.A., University of Virginia. For all their help, I would like to thank Charles McCurdy, Michael Klarman, G. Edward White, Mary Anne Case, Robert O'Neil, and Brendan Cummins. I also thank the American Jewish Committee, the American Jewish Congress, and the United States Library of Congress for generously affording me access to the materials in their archives.

<sup>1</sup> LAW AND SOCIAL ACTION: SELECTED ESSAYS OF ALEXANDER H. PEKELIS 188 (Milton R. Konvitz ed., 1950).

<sup>2</sup> See, e.g., David Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727, 732 & n.26, 750, 778 (1942) [hereinafter Riesman, *Group Libel*]; Joseph Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261, 276 (1950). Specific instances will be considered in more detail throughout this Article.

that among today's law students, few have been called upon to think about group libel and that a fair number have never heard the term."<sup>3</sup>

Recently, of course, the subject has attracted renewed attention.<sup>4</sup> Given this resurgent interest in hate speech and its regulation, it is important to remember that America has traveled this road before, and it seems likely that the current debate regarding hate speech and its regulation will benefit from a fuller understanding of America's earlier attempts at confronting the issue. Yet the existing works that address these earlier laws are limited in scope: they tend only to document specific situations which led to the enactment of group libel statutes,<sup>5</sup> to discuss the legal reasoning used in cases ruling on the legitimacy of various group libel statutes,<sup>6</sup> or to consider the value of free speech to society generally.<sup>7</sup> As such, these

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<sup>3</sup> HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* 7-8 (1965). In this article, "group libel" and "hate speech" are used interchangeably. For the legal definition of group libel, see *infra* Part III.

<sup>4</sup> This recent renewal of interest in hate speech is shown perhaps most vividly by the controversy sparked when American Nazis marched in Skokie, Illinois in the 1970s, and, more recently, by the spate of universities that have passed rules prohibiting hate speech. See, e.g., SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF A CONTROVERSY* 101-59 (1994) [hereinafter WALKER, *HATE SPEECH*]. See generally Donald A. Downs, *Skokie Revisited: Hate Group Speech and the First Amendment*, 60 NOTRE DAME L. REV. 629 (1985). Another example illustrating the increased importance of the issue was *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377 (1992), where the Supreme Court struck down on constitutional grounds a city ordinance prohibiting bias-motivated disorderly conduct.

Also, there has been a resurgence of academic writing on the topic of hate speech. See generally, HENRY LOUIS GATES JR. ET AL., *SPEAKING OF RACE, SPEAKING OF SEX* (1994); Mari J. Matsuda, *Public Responses to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

<sup>5</sup> See generally WALKER, *HATE SPEECH*, *supra* note 4.

<sup>6</sup> See KALVEN, *supra* note 3, at 26-48 (analyzing the reasoning used in the majority and dissenting decisions of *Beauharnais v. Illinois*, 343 U.S. 250 (1952)); WALKER, *HATE SPEECH*, *supra* note 4, at 61-100 (analyzing various First Amendment decisions); Riesman, *Group Libel*, *supra* note 2, at 734-75 (surveying the history and contemporary forms of group libel claims); Tanenhaus, *supra* note 2, at 261 (summarizing history and contemporary forms of group libel claims). See generally, Note, *Liability for Defamation of a Group*, 34 COLUM. L. REV. 1322 (1934) [hereinafter *Liability for Defamation*]; Note, *Statutory Prohibition of Group Defamation*, 47 COLUM. L. REV. 595 (1947) [hereinafter *Statutory Prohibition*]; Note, *Group Libel Laws: Abortive Efforts to Combat Hate Propaganda*, 61 YALE L.J. 252 (1952) [hereinafter *Abortive Efforts*].

<sup>7</sup> See, e.g., WALKER, *HATE SPEECH*, *supra* note 4, at 167 ("It is in the protection of all ideas that the history of the hate speech issue demonstrates the true meaning of the First Amendment."); Tanenhaus, *supra* note 2, at 262 ("Legislation

articles offer relatively traditional legal analyses; that is, they concentrate on the specific laws that were enacted and on the laws' constitutionality. These approaches offer valuable insights, which are discussed throughout this Article. However, these traditional legal approaches can tell only part of the story of this country's early group libel laws. A full understanding of these laws requires an appreciation of the internal dynamics of the groups that were the most frequent targets of the offensive speech. Specifically, to understand the fate of these early laws, it is necessary to recognize the changing views that the target groups held towards group rights in America.<sup>8</sup>

This Article attempts such an approach. This Article examines the history of group libel statutes in terms of the evolving conception of group rights in America as experienced by American Jews. This focus is particularly appropriate because Jews often found themselves the targets of written and verbal assaults in America during the 1900s. Not surprisingly, then, American Jewish defense organizations initially played a leading role advocating the enactment and enforcement of group libel statutes. However, it is vital to note that American Jewish defense organizations later abandoned their support for these statutes.<sup>9</sup> This change was no doubt due to several factors. One that cannot be discounted, and that is treated in detail throughout this Article, is the emergence last century of new conceptions of the First Amendment favoring greater protection of speech. Nonetheless, this Article's purpose is to

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of [group libel] is by definition a restriction on the freedom of discussion. To curtail criticism, however virulent and ill-tempered, is a step so serious as to be taken only if investigation discloses that substantially more good than evil would result by so proceeding.”)

<sup>8</sup> Some works, old and new, have noted connections between group rights and group libel. See, e.g., WALKER, *HATE SPEECH*, *supra* note 4, at 35-36; Riesman, *Group Libel*, *supra* note 2, at 730-34; Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988); Leo Pheffer, *Defenses Against Group Libel*, JEWISH FRONTIER Feb., 1946, at 6, 7.

<sup>9</sup> WALKER, *HATE SPEECH*, *supra* note 4, at 14, makes the sensible claim that “[r]egardless of the merits of a particular idea, it has little practical effect without a person or organization to persuade others to support it, to bring and argue cases before courts of law, to propose legislation, and eventually to transform the idea into public policy.” Thus, this Article might be seen as aiming to explain why American Jewish defense organizations decided to stop supporting group libel statutes.

propose that American Jews stopped supporting group libel statutes for the separate reason that they, in large part, stopped seeing themselves as a group requiring official recognition or protection in American society. As American Jews generally assimilated into American society, they valued individual rights more, and group rights less. Based on an examination of the historical relationship between American Jews and group libel statutes, this Article proposes that support for group libel laws is a manifestation of support for group rights. Thus, by the time the Supreme Court approved of group libel laws in *Beauharnais v. Illinois*,<sup>10</sup> American Jews had abandoned their commitment to a society based in group rights, and they no longer supported group libel laws.

At the outset, it is important to note the link between group libel statutes and group rights, since the connection is not a logically necessary one. One might argue that group libel statutes actually protect individual rights, since they make illegal any statements which defame a person by virtue of his or her membership in a group, thereby violating the American creed that every person should be judged as an individual. Indeed, as is discussed later, some advocates of group libel statutes used just such logic.<sup>11</sup> Yet there are two reasons that nevertheless support a link between group libel statutes and group rights, which are explored in detail in the body of this Article. First, there is a correlation. American Jews supported group libel statutes at the same time that they most strongly identified themselves as a cohesive, even separate, group within American society. Conversely, American Jews generally refused to support group libel statutes after they began to see themselves in more individualistic terms. This is not to say that American Jews ever fully supported one conception over the other. Indeed, as this Article shows, the historical record indicates that there was a constant give-and-take between the prevalence of one idea and the other—assimilation versus group rights—within the community. The important point is that support for group libel statutes seemed strongest at the same time that support for the group rights conception was strongest.

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<sup>10</sup> 343 U.S. 250 (1952); see *infra* Part VII (discussing *Beauharnais v. Illinois*).

<sup>11</sup> See *infra* Part III.

Second, there is the reasoning used by advocates of group libel statutes to support their cause. They claimed that group defamation unfairly stigmatized the ethnic group itself and that the government had a responsibility to step in to protect the group, rather than the individuals who constituted the group. Indeed, it is striking to note how several advocates of group libel laws explicitly justified their theories and actions in terms of group rights.

Finally, this Article's scope makes it necessary to consider the constitutional, statutory, and common law history of group libel laws, the history of Jews in America, and some broader themes in American history. All of these considerations are marshaled in order to illustrate the link between support for group rights and support for group libel statutes. This link, I propose, is of fundamental importance in understanding some undercurrents in the debates surrounding the regulation of hate speech, whether they are the debates that revolved around the older group libel laws, which are the focus of this Article, or the contemporary debates. Regardless, the historical sources examined in this Article may seem somewhat nontraditional for the purposes of analyzing an issue that is normally thought of in more traditional legal terms. Yet the use of this broad range of historical resources is precisely what helps to shed a new light on the subject of group libel and hate speech.<sup>12</sup>

Part I of this Article offers a definition of group libel, and it also surveys the legal regime governing the topic at the beginning of the 1900s, when American Jews first began to address the issue. Part II describes American Jewry as it existed in the opening decades of the 1900s, when a huge influx of Jewish immigrants came to America. Moreover, Part II focuses on the debates concerning how the new arrivals should acculturate to life in America—either as assimilated individuals who would undertake purely voluntary group associations, or as members of officially recognized and protected ethnic and religious groups. Part III describes what is apparently the first

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<sup>12</sup> Thus, this Article may be seen as an attempt to "situat[e] constitutional disputes within their complex historical contexts" by making use of the "social, political, and ideological accounts of . . . civil rights and civil liberties" that Professor Michael Klarman called for in *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7, 31 (1996).

step that American Jews took towards advocating a type of group libel law, combating discriminatory advertisements for hotels. Part IV describes the articles printed in Henry Ford's *Dearborn Independent* throughout the 1920s, probably the single biggest episode of group libel in American Jewish history. Part IV also notes how budding concerns regarding freedom of expression influenced the manner in which American Jews responded to the episode. Part V discusses how the success that Jews achieved in America led them to resolve the acculturation debate by pursuing an essentially individualistic conception of American life. Part VI shows that by the time World War II and increased anti-Semitism came to America, American Jews generally responded by further stressing their individuality and respect for civil liberties and freedom of expression. Those who did advocate group libel laws during the World War II years depended on advocating group rights.<sup>13</sup> To advocate vigorous group libel laws, American Jews would have had to abandon their support for individualism and First Amendment rights. Most refused, instead taking the position that American Jews needed no special legal protection. This is shown most vividly in an analysis of a symposium amongst major Jewish defense organizations called to discuss the wisdom of group libel laws.<sup>14</sup> Part VII discusses the significance of *Beauharnais v. Illinois*,<sup>15</sup> the 1952 Supreme Court decision that upheld a group libel statute. What is most striking about this case is that Justice Frankfurter's majority opinion refers to a group rights justification. Ironically, the Supreme Court handed down this holding, along with its vindication of a group rights-based jurisprudence, only after America and American Jews in particular had embraced the opposing individualistic conception of American society. This conception of America, with its increased deference to individual rights generally and First Amendment concerns specifically, could not countenance group libel laws.

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<sup>13</sup> See generally Riesman, *Group Libel*, *supra* note 2. See also *infra* Part I (discussing Riesman, *Group Libel*).

<sup>14</sup> See *infra* notes 333-355 and accompanying text (discussing *Symposium*).

<sup>15</sup> 343 U.S. 250 (1952).

## I. EARLY LEGAL LANDSCAPE

For the purposes of this Article, group libel can be defined as any enactment or law "whereby the publishers and disseminators of statements that tend to disparage racial and religious groups are rendered legally responsible for their actions."<sup>16</sup> However, within this fairly common-sensical definition lie multiple causes of action, leading one commentator to call group libel a "rag-bag phrase."<sup>17</sup> Therefore, this Part briefly sketches the legal regime of group libel as it existed up until the beginning of the 1900s, when American Jews first started to engage the issue. It describes the development of the non-statutory causes of action used in America to prosecute or sue those who defamed groups of individuals: criminal libel and civil libel.<sup>18</sup>

The American law of libel<sup>19</sup> derives from the English common law,<sup>20</sup> and specifically, from the prohibition on seditious libel.<sup>21</sup> Just as the law of seditious libel developed to suppress criticism that might endanger the government, the law of criminal libel developed to suppress discord that might endanger the government, since libel could lead to social unrest.<sup>22</sup> The expansion of criminal libel law to encompass group libel comes from *King v. Osbourne*,<sup>23</sup> an English case decided in 1732. That case involved a riot prompted by a published paper

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<sup>16</sup> Tanenhaus, *supra* note 2, at 262.

<sup>17</sup> Tanenhaus, *supra* note 2, at 262.

<sup>18</sup> Statutes prohibiting group libel constitute a third device available to combat the defamation of groups. See *infra* Part III (considering such statutes).

<sup>19</sup> Libel refers to written defamations. Slander, or verbal defamation, has always enjoyed broader protection than libel.

<sup>20</sup> See Tanenhaus, *supra* note 2, at 268-69, 270; Riesman, *Group Libel*, *supra* note 2, at 730. While this Part makes use of Riesman's factual research, Part VI, *infra*, contains an in depth discussion of his normative arguments.

<sup>21</sup> See KALVEN, *supra* note 3, at 15-19; Riesman, *Group Libel*, *supra* note 2, at 734-36, 742. Seditious libel has its modern origins in the Star Chamber of Tudor England. Unhindered by procedural niceties or protests that the criticism was true, the chamber efficiently dispatched with those who criticized the government. One of its credos was, "Let all men take heede how they complayne in wordes against any magistrate, for they are gods." Riesman, *Group Libel*, *supra* note 2, at 735 & n.35. The criminal jurisdiction of the Star Chamber was merged into the common law courts during the seventeenth century. See Riesman, *Group Libel*, *supra* note 2, at 735.

<sup>22</sup> See Riesman, *Group Libel*, *supra* note 2, at 742.

<sup>23</sup> 2 Barn. K.B. 166 (1732).



claiming that Portuguese Jews living in London had burned and killed a woman and her baby.<sup>24</sup> Although it is unclear whether the English courts viewed the case as involving breach of the peace or group libel, the case came to America as a precedent for group libel.<sup>25</sup> The first American criminal prosecution for group libel came in the wake of the Civil War, against a publisher who had accused the Union army of cowardice.<sup>26</sup> Despite the large size of the aggrieved group, the New Hampshire Supreme Court sustained the judgement.<sup>27</sup>

In spite of these precedents, the law of criminal libel had intrinsic limits as a means to counteract the defamation of groups, and even of individuals. Because of its origins in the law of seditious libel, American courts analogized criminal libel to breach of the peace.<sup>28</sup> For instance, in the Civil War case referred to above, the court stated, "Indictments for libel are sustained principally because the publication of a libel tends to a breach of the peace . . . ."<sup>29</sup> Moreover, even with this limitation, American courts nevertheless prosecuted a narrow range of behavior, especially when compared to civil law countries in Europe that acted under similar constraints.<sup>30</sup> This limited vision of criminal libel in America, which crystallized in the 1800s, can be traced to several factors: popular reaction against abuses of pre-Revolutionary War libel laws,<sup>31</sup> reaction against the Sedition Act of 1798,<sup>32</sup> a firm sense of national security,<sup>33</sup> an apparent absence of class conflict,<sup>34</sup> and, most importantly for the purposes of this Article, the strengthening

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<sup>24</sup> See Tanenhaus, *supra* note 2, at 268-69; Riesman, *Group Libel*, *supra* note 2, at 742.

<sup>25</sup> See Tanenhaus, *supra* note 2, at 269.

<sup>26</sup> See Tanenhaus, *supra* note 2, at 270 (describing *Palmer v. City of Concord*, 48 N.H. 211 (1868)).

<sup>27</sup> See Tanenhaus, *supra* note 2, at 270.

<sup>28</sup> See Tanenhaus, *supra* note 2, at 273; *Abortive Efforts*, *supra* note 6, at 253 n.6.

<sup>29</sup> Tanenhaus, *supra* note 2, at 270 (quoting *Palmer*, 48 N.H. at 215).

<sup>30</sup> See Riesman, *Group Libel*, *supra* note 2, at 743.

<sup>31</sup> See Riesman, *Group Libel*, *supra* note 2, at 746.

<sup>32</sup> See Riesman, *Group Libel*, *supra* note 2, at 746.

<sup>33</sup> See Riesman, *Group Libel*, *supra* note 2, at 746.

<sup>34</sup> See Riesman, *Group Libel*, *supra* note 2, at 746.

of the American tradition of individualism.<sup>35</sup> These factors made prosecutions for criminal libel, of either individuals or groups, extremely rare.<sup>36</sup>

The second means employed to counter the defamation of groups was the law of civil libel. Two forms of civil actions existed; a suit could be brought by a member of the defamed group, or a suit could be brought in the name of the defamed group itself.<sup>37</sup>

Precedent for an individual member of a group bringing suit dates back to an English case in the 1600s in which the defendant referred to a group of seventeen men as murderers.<sup>38</sup> Over time, rules developed limiting the instances in which a member of a defamed group could bring suit. Members of large groups could not bring suit unless they showed that the defamation applied to them specifically and in their individual capacities. Members of small groups could sue only if the libel actually applied to each member individually or if the group was so small that the language must necessarily apply to each group member.<sup>39</sup> In America, by the end of the first decade of the 1900s, courts had ruled that individuals could not sue defamers of "wine-joint" owners,<sup>40</sup> correspondence schools<sup>41</sup> or trading stamp concerns,<sup>42</sup> since those groups were too large.<sup>43</sup> However, individuals could sue for defamation against a family,<sup>44</sup> a partnership,<sup>45</sup> a staff of young doctors at a hospital,<sup>46</sup> the occupants of a house,<sup>47</sup> and a jury.<sup>48</sup>

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<sup>35</sup> See Riesman, *Group Libel*, *supra* note 2, at 730.

<sup>36</sup> See Tanenhaus, *supra* note 2, at 266 & n.43; Riesman, *Group Libel*, *supra* note 2, at 747-50; *Abortive Efforts*, *supra* note 6, at 254 n.7.

<sup>37</sup> See Tanenhaus, *supra* note 2, at 263, 265.

<sup>38</sup> See Tanenhaus, *supra* note 2, at 263 (citing *Foxcraft v. Lacy*, Hobart 89a, 80 Eng. Rep. 239 (1613)).

<sup>39</sup> See Tanenhaus, *supra* note 2, at 262.

<sup>40</sup> See Tanenhaus, *supra* note 2, at 263 (citing *Comes v. Cruce*, 107 S.W. 185 (Ark. 1908)).

<sup>41</sup> See Tanenhaus, *supra* note 2, at 263-64 (citing *Int'l Textbook Co. v. Leader Publ'g Co.*, 189 F. 86 (6th Cir. 1910)).

<sup>42</sup> See Tanenhaus, *supra* note 2, at 263-64 (citing *Watson v. Detroit Journal Co.*, 107 N.W. 81 (Mich. 1906)).

<sup>43</sup> See Tanenhaus, *supra* note 2, at 263-64.

<sup>44</sup> See *Constitution Publ'g Co. v. Leathers*, 172 S.E. 923 (Ga. Ct. App. 1934); Riesman, *Group Libel*, *supra* note 2, at 760; Tanenhaus, *supra* note 2, at 264 (both citing *Fenstermakers v. Tribune Publ'g Co.*, 45 P. 1097 (Utah 1896)).

<sup>45</sup> See Tanenhaus, *supra* note 2, at 260 (citing *Tobin v. Alfred M. Best Co.*, 120 A.D. 387, 105 N.Y.S. 294 (1st Dep't 1907)).

<sup>46</sup> See Riesman, *Group Libel*, *supra* note 2, at 760; Tanenhaus, *supra* note 2, at

Suits brought in the name of the defamed group itself were also allowed. The typical example would be a corporation or a partnership that sued a defendant for libel.<sup>49</sup> However, those two forms of groups, officially recognized by the laws of the states where they were incorporated or resided, essentially exhausted the types of associations that could sue in their own names.<sup>50</sup> More informal groups had no standing.<sup>51</sup>

Thus, like the law of criminal libel, the law of civil libel had severe limits. First was the bar on members of large defamed groups suing as individuals. Second was the strict limit on the types of groups that could sue in their own names. For example, ethnic and religious groups had no standing to sue.<sup>52</sup> At the root of both of these limitations was the policy underlying the law of civil libel: defamers could be sued only for causing pecuniary harm to individuals.<sup>53</sup> This policy provided a ready remedy for corporations, which not only existed solely for commercial purposes, but, in the eyes of the law, stood as fictional individuals. However, groups that existed for purposes besides making money had no such remedy against libelers, though they might nonetheless suffer non-pecuniary harm to their honor or reputations.<sup>54</sup>

Therefore, criminal and civil libel laws afforded scant protection to ethnic groups such as Jews. Criminal libel laws, rooted in seditious libel, could only apply to defamation that disrupted the workings of the state. Similarly, civil libel laws could only apply to large groups that had been officially sanctioned by the government, such as corporations. As Part II

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260 (both citing *Bornman v. Star Co.*, 174 N.Y. 212, 66 N.E. 723 (1903)).

<sup>47</sup> See Tanenhaus, *supra* note 2, at 260 (citing *McClean v. New York Press Co.*, 19 N.Y.S. 262, 64 Hun 639 (N.Y. 1892)).

<sup>48</sup> See Riesman, *Group Libel*, *supra* note 2, at 760; Tanenhaus, *supra* note 2, at 260 (both citing *Byers v. Martin*, 2 Colo. 605 (1875); *Smallwood v. York*, 173 S.W. 380 (Ky. 1915); *Welch v. Tribune Publ'g Co.*, 64 N.W. 562 (Minn. 1890)).

<sup>49</sup> See Riesman, *Group Libel*, *supra* note 2, at 756-57; Tanenhaus, *supra* note 2, at 265.

<sup>50</sup> By the 1930s, New York State expanded the category very slightly, allowing a president of a trade union to sue on its behalf and allowing the New York Society for the Suppression of Vice to similarly sue. See Tanenhaus, *supra* note 2, at 265-66; Riesman, *Group Libel*, *supra* note 2, at 757, 763.

<sup>51</sup> See Riesman, *Group Libel*, *supra* note 2, at 761-62.

<sup>52</sup> See Riesman, *Group Libel*, *supra* note 2, at 730-32, 763, 767.

<sup>53</sup> See Riesman, *Group Libel*, *supra* note 2, at 730, 731, 756.

<sup>54</sup> See Riesman, *Group Libel*, *supra* note 2, at 730-32, 756.

tries to demonstrate, it was a matter of some debate in the opening years of the 1900s whether American Jews wanted to have their ethnicity sanctioned and recognized by the government in such a way. Of equal importance was whether the government, and particularly the courts, would want to do so.

## II. EARLY SOCIAL LANDSCAPE

Between 1880 and 1920, the Jewish population in America exploded, increasing in raw numbers from 250,000 to almost 3,400,000, and climbing from .5% of the total American population to over 3%. The increase was largely caused by a massive influx of Jews from Eastern Europe. These newer immigrants, who soon became the centerpiece of American Jewry, tended to concentrate in the urban Northeast, especially in New York.<sup>55</sup> This inundation of Jews, itself part of a larger pattern that brought tens of millions of new immigrants to America in those same decades,<sup>56</sup> sparked a fundamental reappraisal of what it meant to be an American.

One reaction to this onslaught of newcomers was a marked increase of American nativism and phobia towards foreigners.<sup>57</sup> The ebbs and flows of this phenomenon in the decades that followed form the backdrop to this entire Article. Such nativism surged again in the 1890s,<sup>58</sup> coinciding with the economic depression of the times.<sup>59</sup> It targeted mainly Catholics, and Italians in particular.<sup>60</sup> But it also precipitated a wave of

<sup>55</sup> See ARTHUR A. GOREN, *THE AMERICAN JEWS* 2, 21-36, 43 (1982).

<sup>56</sup> See LEONARD DINNERSTEIN ET AL., *NATIVES AND STRANGERS: ETHNIC GROUPS AND THE BUILDING OF AMERICA* 122 (1979).

<sup>57</sup> See JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 1860-1925* 52-54 (2d ed. 1963) [hereinafter HIGHAM, *STRANGERS*]. Higham notes that "nativism" is a broad phenomenon. However, for the purposes of this Article it suffices to define it as "unfavorable opinions of outsiders," which becomes manifested so as to prompt fear "that some influence originating abroad threatened the very life of the [American] nation from within." *Id.* at 2, 4. Such sentiments, it is important to note, were not only the exclusive preserve of extremists but also embodied "more steadily sustained contentions embedded in the fabric of our social organization." JOHN HIGHAM, *SEND THESE TO ME* 107 (1975) [hereinafter HIGHAM, *SEND THESE*].

<sup>58</sup> See John Higham, *Integrating America: The Problem of Assimilation in the Nineteenth Century*, 1 J. AM. ETHNIC HIST. 7, 13-14, 19 (1981) [hereinafter Higham, *Integrating America*].

<sup>59</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 68-70.

<sup>60</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 79-80, 90-91.

concerted anti-Semitism. The anti-Semitism occasionally manifested itself physically in the form of mobs, but it more commonly revealed itself in ideological terms, prompting the appearance in force of the myth of Jews as avaricious Shylocks.<sup>61</sup> In the words of one patrician of the era, the Jews would "completely control the finances and Government of this country in ten years."<sup>62</sup>

The emergence of an increasingly unitary and regionally interdependent America<sup>63</sup> spurred feelings of nativism again in the years before World War I, and hit a peak in the years that followed the war.<sup>64</sup> This nativism manifested itself in two forms. One manifestation was a call for immigration restriction and deportation of aliens. Cries for such restrictive measures dated back to the 1880s.<sup>65</sup> The movement for immigration restriction gathered increasing strength as the numbers of immigrants swelled, until finally the Immigration Restriction Act of 1921 codified the sentiment into law.<sup>66</sup>

A second manifestation of nativism was a call for assimilation. This movement was fueled by the same nativist concerns that drove the immigration restriction and deportation movements. As one state official said, "We are going to love every foreigner who really becomes an American, and all others we are going to ship back home."<sup>67</sup> The movement towards assimilation began during the closing years of the nineteenth century,<sup>68</sup> and by the time World War I loomed, this "American-

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<sup>61</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 92-93. But see Oscar Handlin, *American Views of the Jew at the Opening of the Twentieth Century*, 40 PUBLICATIONS OF THE AM. JEWISH HIST. SOC. 323, 325 (1951) (claiming that America exhibited philo-Semitic proclivities in the 1890s, which only turned more sinister with the new century).

<sup>62</sup> HIGHAM, *STRANGERS*, *supra* note 57, at 93.

<sup>63</sup> See Higham, *Integrating America*, *supra* note 58, at 19-20.

<sup>64</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 183-86, 227-33; HIGHAM, *SEND THESE*, *supra* note 57, at 128.

<sup>65</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 98-105.

<sup>66</sup> See *Immigration Act Now Law*, N.Y. TIMES, May 20, 1921, at A17. An even more restrictive act subsequently became law in 1924. See E.P. HUTCHINSON, *LEGISLATIVE HISTORY OF AMERICAN IMMIGRATION POLICY* 183 (1981).

<sup>67</sup> HIGHAM, *STRANGERS*, *supra* note 57, at 221.

<sup>68</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 236-37.

ization" campaign had won important adherents. For example, President Woodrow Wilson in 1915 addressed an audience of newly-naturalized Americans in Philadelphia:

You cannot dedicate yourself to America unless you become in every respect and with every purpose of your will thorough Americans. You cannot become thorough Americans if you think of yourselves in groups. America does not consist of groups. A man who thinks of himself as belonging to a particular national group in America has not yet become an American, and the man who goes among you to trade upon your nationality is no worthy son to live under the Stars and Stripes.<sup>69</sup>

The doctrine also found adherents amongst the new Americans and their defenders. Playwright Israel Zangwill, an English Jew,<sup>70</sup> penned the following words in his famous work, *THE MELTING POT*:

America is God's Crucible, the great Melting Pot where all the races of Europe are melting and reforming! . . . [T]he real American has not yet arrived. He is only in the Crucible, I tell you—he will be the fusion of all races, perhaps the coming superman . . . Celt and Latin, Slav, Teuton, Greek and Syrian,—black and yellow—Jew and Gentile—Yes, East and West, and North and South, the palm and the pine, the pole and the equator, the crescent and the cross—how the great Alchemist melts and fuses them with his purging flame!<sup>71</sup>

It is important to note the subtle differences between Wilson's and Zangwill's approaches to assimilation. Wilson's view, characteristic of an earlier form of assimilationist theories,<sup>72</sup> expected the new immigrants to conform to a pre-existing American culture. On the other hand, Zangwill's passage, characteristic of a different view of assimilation,<sup>73</sup> hoped that

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<sup>69</sup> See JULIAS W. MULLER, *PRESIDENTIAL MESSAGES AND STATE PAPERS* 115-116 (vol. X, 1917).

<sup>70</sup> While Zangwill never settled in America, his sentiments were shared by several immigrant spokesmen. Anthropologist Franz Boas, who held sympathies for the immigrants, even published a federally funded study stating that the immigrants assimilated their physical characteristics to American norms. See HIGHAM, *STRANGERS*, *supra* note 57, at 124-25. See also Solo Baron, *Is America Ready for Ethnic Minority Rights?*, 46 *JEWISH SOC. STUD.* 189, 194-95 (1984).

<sup>71</sup> ISRAEL ZANGWILL, *THE MELTING POT* 37-38, 198-99 (1909). It is from this play that the image of America as a "melting pot" developed.

<sup>72</sup> See PHILIP GLEASON, *SPEAKING OF DIVERSITY: LANGUAGE AND ETHNICITY IN TWENTIETH CENTURY AMERICA* 53 (1982).

<sup>73</sup> See *id.*

a new American hybrid would appear, sporting the beneficial attributes of each contributing group. But both approaches were united in advocating a distinctly American culture. Adherents to these two assimilationist approaches hoped assimilation could be used to address the problem of divided loyalties, which it was assumed America's new citizens harbored.<sup>74</sup> The sentiment, though it had new vitality in the 1910s, also had an established heritage amongst both Americans and Jews.

As early as the Revolutionary Era, one Frenchman stated, "Here [in America] individuals of all nations are melted into a new race of men."<sup>75</sup> The idea derived from European Enlightenment theories stating that society should be based on individuals rather than on groups. Also derived from the Enlightenment was a movement among Jews to stand before the law with rights equal to those enjoyed by all other individuals.<sup>76</sup> The trend started with the "Jewish Emancipation," which accompanied Napoleon's conquering armies in Europe.<sup>77</sup> The movement gained such a strong following that some European Jews protested attempts to grant rights to Jews as a group, arguing that Jews would be more secure if they were treated as full citizens of their homeland nations, instead of members of a minority group.<sup>78</sup>

Assimilation in America, then, had an appeal to both the old-stock Americans and to the Jewish immigrants themselves. Significantly, the call for assimilation intensified when America entered World War I, in which America's avowed enemies were the homelands from which many of these recent immigrants had come.<sup>79</sup>

In spite of these assimilationist forces, a counter-movement developed that aimed to accommodate ethnic groups

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<sup>74</sup> See, e.g., HIGHAM, *STRANGERS*, *supra* note 57, at 39, 40-41, 89.

<sup>75</sup> Higham, *Integrating America*, *supra* note 58, at 10 (citing *IMMIGRATION AND THE AMERICAN TRADITION* 29 (Moses Rischin ed., 1976)). It is important to note that despite the ardor of those holding assimilationist sentiments, "white Americans had no intention of translating a national myth into a literal command" until the end of the nineteenth century. *Id.* at 10, 19.

<sup>76</sup> See NAOMI COHEN, *ENCOUNTER WITH EMANCIPATION: THE GERMAN JEWS IN THE UNITED STATES 1830-1914* 4-5 (1984).

<sup>77</sup> See Baron, *supra* note 70, at 198; COHEN, *supra* note 76, at 6.

<sup>78</sup> See Baron, *supra* note 70, at 200.

<sup>79</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 195-204, 245, 248.

within the American framework. This movement started before World War I, with the encouragement of some old-stock Americans who hoped to enrich the country with the character and ideas of the world at large.<sup>80</sup> Yet the movement served a far more important cause than merely adding flavor to American life—it served to cushion the adjustment to life in America for the immigrants.

This theory won its own important adherents. For example, in 1915, Louis Brandeis sounded a call for American Jews to support Zionist causes and the creation of a Jewish nation in Palestine. His reasoning summarized how the immigrants could identify with their new home while still prizing their roots:

But Jews collectively should likewise enjoy the same right and opportunity to live and develop as do other groups of people . . . . For the individual is dependent for his development (and his happiness) in large part upon development of the groups of which he forms a part . . . . Nationality like democracy has been one of the potent forces making for man's advance during the past 200 years . . . . Let no American imagine that Zionism is inconsistent with Patriotism. Multiple loyalties are objectionable only if they are inconsistent . . . . Indeed, loyalty to America demands rather that each American Jew becomes a Zionist.<sup>81</sup>

Brandeis emphasized the benefits that would come by identifying with groups that he thought embodied American values of democracy, social justice, and responsibility.<sup>82</sup> However, he stopped there. His works do not evidence a desire for anything more than the personal gratification and strength he hoped would come to those who took his ideas to heart, and the resulting good that would accrue to America as a whole. The idea gained some appeal, and, indeed, it was developed further by others.

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<sup>80</sup> See HIGHAM, *STRANGERS*, *supra* note 57, at 251-53; Baron, *supra* note 70, at 196.

<sup>81</sup> LOUIS BRANDEIS, *THE JEWISH PROBLEM, HOW TO SOLVE IT*, reprinted in *BRANDEIS ON ZIONISM: A COLLECTION OF ADDRESSES AND STATEMENTS BY LOUIS D. BRANDEIS* 13, 18, 28-29 (1942). Interestingly, Brandeis made his comments in 1915, the same year that President Wilson in Philadelphia railed against the evils of hyphenated-Americans. See *supra* note 69 and accompanying text. Wilson appointed Brandeis to the Supreme Court the next year.

<sup>82</sup> See MELVIN I. UROFSKY, *LOUIS BRANDEIS AND THE PROGRESSIVE TRADITION* 92 (1981).



The most thorough contemporary treatment of the idea came from Horace Kallen,<sup>83</sup> a German-born Jewish academic and journalist,<sup>84</sup> whose ideas came to be known by the term "cultural pluralism." Like Brandeis, Kallen believed that ethnic groups should be given more recognition in American society. He wrote, "Because no individual is merely an individual, the political autonomy of the individual has presaged and is beginning to realize in these United States the spiritual autonomy of his group."<sup>85</sup>

However, his ideas went further. His most extreme proposal called for formal recognition of ethnic groups in America:

Its form would be that of a federal republic; its substance a democracy of nationalities, cooperating voluntarily and autonomously through common institutions in the enterprise of self-realization . . . . The common language of the commonwealth . . . would be English, but each nationality would have for its emotional and involuntary life its own peculiar dialect or speech, its own individual and inevitable esthetic and intellectual forms.<sup>86</sup>

Such pluralistic ideas, and especially Kallen's proposal for a federation of ethnicities, had roots in older European conceptions of group rights. The concept was most familiar to those immigrants who hailed from the multi-ethnic societies of the Austro-Hungarian and Russian empires, and it dated back to older European precedents. The first formal recognition of national minority rights occurred in 1815, when a treaty concluding the Napoleonic Wars contained a provision that Poles "should obtain their own national representation and institutions" under Russian, Austrian, and Prussian governments. The Austrian Empire first considered granting similar recognition to Jews following the Revolution of 1848, and it continued debating the issue up through the end of World War I. Similar ideas enjoyed wide support amongst Jews in pre-Revolutionary Russia, where Jews lived in communities separated from the

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<sup>83</sup> Horace M. Kallen, *Democracy Versus the Melting Pot*, 100 THE NATION 10 (1915) [hereinafter Kallen, *Democracy*]. Indeed, it is significant to note that Brandeis and Kallen were frequent correspondents. See HOWARD M. SACHAR, A HISTORY OF THE JEWS IN AMERICA 252, 254, 501 (1992).

<sup>84</sup> See Milton R. Konvitz, *In Praise of Hyphenation and Orchestration*, in THE LEGEND OF HORACE M. KALLEN 16-23 (Milton R. Konvitz ed., 1987).

<sup>85</sup> Kallen, *Democracy*, *supra* note 83, at 117; Gleason *supra* note 72, at 51.

<sup>86</sup> Kallen, *Democracy*, *supra* note 83, at 124.

rest of society. Advocates finally gained official sanction for various ethnic confederations in several European countries following World War I, though most of the arrangements ultimately failed.<sup>87</sup>

So, in America, theories of how the new immigrants should adjust could be clearly mapped out on a continuum. On one side were the assimilationists, who advocated an individualistic American culture, either a pre-existing one or one that would emerge from the fusion of the new immigrants with their predecessors. On the other side were the pluralists, who envisioned a continuing role for ethnic groups within America, either voluntarily or as part of a community with formal recognition by the government.

But the preferences of the immigrants themselves for one theory or another is not nearly as clear. On the other hand, as Kallen wrote, the new Jewish immigrants found it expedient to shed their distinctive ways. They "exhibit economic eagerness, the greedy hunger of the unfed. Since external differences are a handicap in the economic struggle, they 'assimilate,' seeking thus to facilitate the attainment of economic independence."<sup>88</sup>

Thus, they had a significant urge to assimilate. But, at the same time, these people undoubtedly felt most comfortable amongst their own. They lived in enclaves that were overwhelmingly Jewish.<sup>89</sup> The first generation immigrants formed communal societies, or *landsmanshaftn*, based not only on their religion but also on their specific nations of origin.<sup>90</sup> The trades they pursued, especially tailoring and sewing piece goods, were chosen at least partially because they allowed the immigrants to work with and for other Jews.<sup>91</sup> Indeed, one of the most popular causes amongst Jews in the opening decades of the 1900s was the creation of an American Jewish Congress that could speak with one voice for the entire group of American Jews.<sup>92</sup> Even second generation Jews of the time, general-

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<sup>87</sup> See IRVING HOWE, *WORLD OF OUR FATHERS; THE JOURNEY OF THE EASTERN EUROPEAN JEWS TO AMERICA AND THE LIFE THEY FOUND THERE* 7-15 (1976); Baron, *supra* note 70, at 197-20.

<sup>88</sup> Kallen, *Democracy*, *supra* note 83, at 114.

<sup>89</sup> See HOWE, *supra* note 87, at 67-90; SACHAR, *supra* note 83, at 140-41.

<sup>90</sup> See GOREN, *supra* note 55, at 46; HOWE, *supra* note 87, at 183-90.

<sup>91</sup> See HOWE, *supra* note 87, at 77-84; SACHAR, *supra* note 83, at 145; Goren, *supra* note 55, at 46-47.

<sup>92</sup> See MARC LEE RAPHAEL, *JEWS AND JUDAISM IN THE UNITED STATES: A DOC-*

ly more Americanized than their parents, tended to stay together when they left the ghettos.<sup>93</sup>

Other data is equally ambiguous in helping to determine whether Jews wanted to assimilate or to pursue life in America as part of a group. For instance, the success of the Yiddish press and Jewish labor unions might evidence insular tendencies amongst Jews. But such Jewish institutions might also be seen as transformative institutions that helped the immigrants adjust to, and ultimately assimilate into, American society.<sup>94</sup> Zangwill once proclaimed, "There is nothing more American than a Yiddish newspaper."<sup>95</sup> The meaning of even this simple statement is unclear: Did Zangwill mean to celebrate the diversity in America symbolized by the Yiddish press, or did he mean to lament that Jews were allowing issues from American mainstream culture to co-opt this cornerstone of Jewish ethnic identity?

Similarly, the significance of the success of American Zionism under the leadership of Brandeis is equally inconclusive regarding whether Jews in America preferred group or individualistic life in America. The membership roles swelled from 12,000 in 1914 to 140,000 in 1919.<sup>96</sup> That increase seems to show a desire by the Jews to act as a cohesive ethnic group on some level. But does it follow that the American Zionists advocated a formal reconstruction of America along ethnic lines, as did Kallen? Or did the success of Zionism indicate that American Jews merely wanted to express their ethnic identity voluntarily, as one part of their lives, but they were happy to assimilate other parts of their personalities and lives?

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UMENTARY HISTORY 114-16 (1983).

<sup>93</sup> See Deborah Dash Moore, *Defining American Jewish Ethnicity*, 7 PROSPECTS 387, 390-91 (1981).

<sup>94</sup> See GLEASON, *supra* note 72, at 54; HOWE, *supra* note 87, at 518-51, 287-324; SACHAR, *supra* note 83, at 200-05. The lengths to which the Yiddish press went in order to Americanize its readers cannot be underestimated. The JEWISH DAILY FORWARD, for instance, ran an article under the title, *The Fundamentals of Baseball Explained to Non-Sports*. See SACHAR, *supra* note 83, at 204. One contemporary reader criticized the *Forward's* editor, stating, "He prepares gradually for that which in his opinion is inevitable—assimilation." HOWE, *supra* note 87, at 529 n.8.

<sup>95</sup> ISRAEL ZANGWILL, WATCHMAN, WHAT OF THE NIGHT 17 (1923) [hereinafter ZANGWILL, WATCHMAN].

<sup>96</sup> See SACHAR, *supra* note 83, at 253, 501.

Jewish-funded philanthropic efforts aimed at the Jewish immigrants also have indeterminate significance. Such efforts aimed to provide the immigrants with the skills needed to survive and succeed in America, to clean them up, and so to assimilate them. The stated goal of the Educational Alliance, one of the institutions established by old-stock Jews for the new immigrants, was to be of an "Americanizing, educational, social and humanizing character."<sup>97</sup> But the programs also served as community centers of sorts, around which the immigrants could cluster and gain strength from each other, giving the charities something of a group-based characteristic.<sup>98</sup>

And what of an attempt to institute a formal Jewish community, the Kehillah, in New York? It was definitely a group activity. But like Brandeis' Zionism, it was voluntary. Moreover, its formation was sparked by concern in New York that young Jews tended to be criminals,<sup>99</sup> that is, they had not yet internalized or assimilated enough of America's values. And, perhaps most significantly, the Kehillah program ended in failure.<sup>100</sup>

So, while there may have been little support for Kallen's ethnic confederation in its pure form,<sup>101</sup> the new Jewish immigrants also failed to shed wholly their ethnic group identity

<sup>97</sup> GOREN, *supra* note 55, at 64.

<sup>98</sup> See HOWE, *supra* note 87, at 229-235; SACHAR, *supra* note 83, at 150-58. The memories of two students at the Educational Alliance are illustrative. One man recalled:

We were "Americanized" about as gently as horses are broken in. In the whole process, we sensed a disrespect for the alien traditions in our homes and came unconsciously to resent and despise those traditions, good and bad alike, because they seemed insuperable barriers between ourselves and our adopted land.

HOWE, *supra* note 87, at 233-34. But another remembered that "[i]t was [at the Alliance] that my father and mother went regularly to hear the Rev. Masliansky preach . . . in Yiddish." HOWE, *supra* note 87, at 234-35.

<sup>99</sup> In 1908, New York Police Commissioner Theodore Bingham remarked that "[a]mong the most expert of all the street thieves are the Hebrew boys under sixteen . . . . Forty percent of the boys at the House of Refuge and twenty-seven percent of those arraigned in the Children's Court are of that race." SACHAR, *supra* note 83, at 170.

<sup>100</sup> See SACHAR, *supra* note 83, at 194-96. See also generally ARTHUR A. GOREN, *NEW YORK JEWS AND THE QUEST FOR COMMUNITY* (1970).

<sup>101</sup> As one commentator wrote, "The publication of Kallen's article in 1915 attracted the attention of a few intellectuals, but its republication and the introduction of the term *cultural pluralism* in 1924 passed almost completely without notice." GLEASON, *supra* note 72, at 52.

and ties. If their group associations tended to be voluntary and unsanctioned by the government,<sup>102</sup> the immigrants saw themselves as members of a group nonetheless.

It was in this milieu that the first efforts to confront group libel were attempted. As Part III shows, the dual forces of assimilation and group identity, so apparent during the opening decades of the 1900s, are equally apparent in these first efforts to combat group libel.

### III. THE FIRST GROUP LIBEL STATUTES

In 1907, a prominent American Jewish woman was denied accommodations at the Hotel Marlborough in Atlantic City, New Jersey.<sup>103</sup> Such exclusions of Jews from resorts, hotels, and the like dated back to the 1870s;<sup>104</sup> by 1900, such exclusions were almost absolute.<sup>105</sup> But in this case, the woman was an associate of Louis Marshall, distinguished New York attorney and president of the American Jewish Committee (the "AJC"). In response to this incident, Marshall lobbied to have New York adopt a stricter anti-discrimination statute.<sup>106</sup> The original statute passed by the New York State Legislature in 1895 was modeled on the failed Federal Civil Rights Act of 1875.<sup>107</sup> The 1895 New York law gave protection to "all persons" from being discriminated against at "inns, restaurants, hotels, eating houses, public conveyances, bath houses, barber shops, theaters, or music halls."<sup>108</sup>

Marshall's amendments to the pre-existing law, in addition to other changes, would prohibit hotels from printing adver-

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<sup>102</sup> See Timothy L. Smith, *Religion and Ethnicity in America*, 83 AMERICAN HIST. REV. 1168 (1978) ("That this nation's ethnic groups, viewed structurally, were made in America by voluntary associations of newcomers has long been evident.").

<sup>103</sup> See NATHAN C. BELTH, A PROMISE TO KEEP: A NARRATIVE OF THE AMERICAN ENCOUNTER WITH ANTI-SEMITISM 23-26; HIGHAM, SEND THESE, *supra* note 57, at 148-51.

<sup>104</sup> See BELTH, *supra* note 103, at 23-26; HIGHAM, SEND THESE, *supra* note 57, at 148-51.

<sup>105</sup> See HIGHAM, SEND THESE, *supra* note 57, at 151.

<sup>106</sup> See THE JEW IN THE MODERN WORLD: A DOCUMENTARY HISTORY 386-87 (Paul R. Mendes-Flohr & Jehuda Reinharz eds., 1980); Jeffrey Gurock, *The 1913 New York State Civil Rights Act*, 1 AJS REV. 93-94 (1976).

<sup>107</sup> *Woollcott v. Shubert*, 217 N.Y. 212, 218, 111 N.E. 829, 830 (1916).

<sup>108</sup> 1895 N.Y. Laws 1042; Gurock, *supra* note 106, at 95.

tisements stating that the hotels would refuse accommodations on the basis of the patron's race, color or creed; in effect, "Christians only" advertisements would be prohibited.<sup>109</sup> This proposal constituted America's first step towards a group libel statute. The bill was finally enacted on April 11, 1913, when New York Governor William Sulzer signed it into law.<sup>110</sup> The only reported opposition focused on whether the law would keep hotels from excluding people infected with tuberculosis.<sup>111</sup>

In order to understand how this bill embodied the tension between group and individual rights that existed in the American Jewish community at large, it is first necessary to briefly describe the two Jewish defense organizations that addressed group libel in these early years—the AJC and the Anti-Defamation League of the B'nai B'rith (the "ADL"). The histories of these two groups, as well as the approaches they took to group libel statutes, illustrate the tension well.

The AJC was the oldest of the Jewish defense organizations. It was founded by wealthy American Jews of German

<sup>109</sup> See Gurock, *supra* note 106, at 93, 96.

<sup>110</sup> See 16 AM. JEWISH Y.B. 398 (1914-1915); Gurock, *supra* note 106, at 107; *Civil Rights Bill Passes Assembly*, N.Y. TIMES, Mar. 11, 1913, at 12; *New State Laws in Effect Today*, N.Y. TIMES, Sept. 1, 1913, at 1; *No Discrimination Under this New Law*, N.Y. TIMES, June 13, 1913, at 4.

The delay between proposal and enactment of the law seems to have less to do with a shift in public opinion during those six years so much as with a changing of the guard in Albany. One theory seems to make sense, that Marshall and other advocates of the bill had support from down-state politicians who won control of both houses of the state legislature and of the governor's office only in 1913. See Gurock, *supra* note 106, at 102-05.

Indeed, Marshall was good friends with the new governor, William Sulzer. Sulzer had assisted Marshall with earlier projects for the AJC, and Marshall represented Sulzer at his impeachment trial in 1913. See Gurock, *supra* note 106, at 105; *Lawyers Fight Sulzer Case on Money Charge*, N.Y. TIMES, Oct. 10, 1913, at 1.

<sup>111</sup> See *Bars Insult by Hotels*, N.Y. TIMES, Mar. 12, 1913, at 6.

The final version of the statute read in relevant part:

No person . . . shall . . . withhold from or deny to any person any of the accommodations, advantages or privileges thereof, or directly or indirectly publish, circulate, issue, display, post or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations, advantages and privileges of any such place shall be refused, withheld from or denied to any person on account of race, creed or color, or that the patronage or custom thereat, of any person belonging to or purporting to be of any particular race, creed or color is unwelcome, objectionable or not acceptable, desired or solicited.

1913 N.Y. Laws 265 § 40.

descent in 1906 primarily to combat anti-Semitism abroad, though it also undertook tasks in America.<sup>112</sup> The AJC mainly concerned itself with eliminating social, legal and political obstacles that still confronted individual Jews.<sup>113</sup> It is significant to note that Marshall, describing his thoughts on the creation of the AJC, specifically disavowed any intention to establish a formal Jewish political organization:

What I am trying to avoid more than anything else is, the creation of a political organization, one which will be looked upon as indicative of a purpose on the part of the Jews to recognize that they have interests different from those of other American citizens . . . . We can, however, all unite for the purpose of aiding all Jews who are persecuted, or who are suffering from discrimination in any part of the world on account of their religious beliefs; and we can at the same time, unite for the purpose of ameliorating the condition of our brethren in faith, who are suffering from the effects of such persecution and discrimination directly or indirectly.<sup>114</sup>

That is, Marshall was primarily concerned with having Jews treated as individuals, unencumbered by characteristics and stereotypes which might be attributed to Jews generally. He was apparently less interested in attaining any special protections or recognition for Jews as a group. The first action that the AJC undertook illustrates this point well.

In 1907, the United States State Department issued a circular stating that it would formally start to honor a Russian practice, previously acceded to informally, that denied entrance visas to American Jews.<sup>115</sup> The Russian actions violated an 1832 trade treaty between the two nations.<sup>116</sup> In response to the State Department circular, the AJC launched a campaign to have America abrogate the treaty if Russia refused to change its practice regarding American Jews.<sup>117</sup> Ultimately,

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<sup>112</sup> See SACHAR, *supra* note 83, at 228-29, 308; Mendes-Flohr & Reinharz, *supra* note 106, at 386 n.1.

<sup>113</sup> See SACHAR, *supra* note 83, at 308.

<sup>114</sup> Letter from Louis Marshall to Rabbi Joseph Stolz (Jan. 12, 1906), in LOUIS MARSHALL: CHAMPION OF LIBERTY 21-22 (Charles Reznikoff ed., 1957).

<sup>115</sup> See COHEN, *supra* note 76, at 236-38; SACHAR, *supra* note 83, at 229-33.

<sup>116</sup> See COHEN, *supra* note 76, at 236-38; SACHAR, *supra* note 83, at 229-33; *Russia and the American Passport* (1911), in Reznikoff, *supra* note 114, at 60.

<sup>117</sup> See COHEN, *supra* note 76, at 236-38; SACHAR, *supra* note 83, at 229-33; *Russia and the American Passport*, in Reznikoff, *supra* note 114, at 60.

Russia refused to concede the point, and America repudiated the treaty.<sup>118</sup> The AJC's rationales for its actions are telling.

According to Marshall, the State Department practice, if kept in force, might have led Jews to become second-class citizens within the United States, since it showed bias for the government to treat American Jews differently from other Americans.<sup>119</sup> And, no less important to the AJC, the abolition of the Russian practice might have lead the Russian government to accord full travel rights to its own Jewish citizens, who until then had been kept in the Jewish "Pale" of settlement.<sup>120</sup>

Thus, the AJC saw its primary mission as attaining full rights for individual Jews, be they American or Russian, and repudiating any special treatment that might be accorded to Jews as a group. This approach was similar to that of Wilson or Zangwill, since it aimed for a society where each citizen would be an individual, unencumbered by ethnic identity, prejudices or stereotypes.

The second organization, the ADL, was founded in 1913 to combat anti-Semitism in America. It initially consisted mainly of middle-class Jews of German descent.<sup>121</sup> The ADL began in the wake of the trial of Leo Frank,<sup>122</sup> which had been the centerpiece of a frenzy of anti-Semitism. In contrast to the AJC's focus on individualism, the ADL sought to "preserve the good repute of Jews and Judaism,"<sup>123</sup> and it thought that the

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<sup>118</sup> See COHEN, *supra* note 76, at 236-38; SACHAR, *supra* note 83, at 229-33; *Russia and the American Passport*, in Reznikoff, *supra* note 114, at 60.

<sup>119</sup> See Letter from Louis Marshall to Rabbi Joseph Stolz, in Reznikoff, *supra* note 114.

<sup>120</sup> See COHEN, *supra* note 76, at 236-38; SACHAR, *supra* note 83, at 229-33; *Russia and the American Passport*, in Reznikoff, *supra* note 114, at 60.

<sup>121</sup> See SACHAR, *supra* note 83, at 307-08.

<sup>122</sup> See DEBORAH DASH MOORE, B'NAI B'RITH AND THE CHALLENGE OF ETHNIC LEADERSHIP 107-09 (1981); SACHAR, *supra* note 83, at 307-08. Frank was a Jewish businessman who was arrested for murdering a girl in Georgia. After being convicted by a state court, he was lynched by a mob soon after having his death sentence commuted to life in prison. Interestingly, Louis Marshall represented Frank at the trial. See SACHAR, *supra* note 83, at 301-06. For a thorough account of the Frank trial and its impact on the American Jewish community, see LEONARD DINNERSTEIN, THE LEO FRANK CASE (1968) and Leonard Dinnerstein, *Leo M. Frank and the American Jewish Community*, 20 AM. JEWISH ARCHIVES 107 (Nov. 1968).

<sup>123</sup> MOORE, *supra* note 122, at 106 (quoting ADL founder Samuel Livingston); *Report of the Anti-Defamation League* (May, 1915), in Mendes-Flohr & Reinhartz,



best way to combat anti-Semitism was "an assertion of Jewish identity and an acceptance of collective responsibility."<sup>124</sup> The ADL's 1915 Statement of Policy used similar language, stating that the organization's goal was to protect against "the constant and ever increasing efforts to traduce the good name of the Jew."<sup>125</sup> That is, the ADL pursued a policy that very closely resembled the group rights approaches advocated by Kallen and Brandeis.<sup>126</sup>

The focus of the actions which the AJC and ADL undertook also differed. While the AJC acted on a wide array of issues, the ADL focused mainly on group defamation. Its very name indicated as much, and its charter stated, "The immediate object of the League is to stop, by appeals to reason and conscience, and if necessary, by appeals to law, the defamation of the Jewish people."<sup>127</sup>

Specifically, the ADL undertook a campaign against negative stereotypes of Jews in popular culture. It opposed the misuse of the word "Jew" in newspaper articles,<sup>128</sup> theater and movie shows where Jews were depicted as sly and avaricious, and the use in public schools of classics such as OLIVER

*supra* note 106, at 403.

<sup>124</sup> MOORE, *supra* note 122, at 106 (quoting ADL founder Samuel Livingston); *Report of the Anti-Defamation League* (May, 1915), in Mendes-Flohr & Reinharz, *supra* note 106, at 403.

<sup>125</sup> MOORE, *supra* note 122, at 106.

<sup>126</sup> The respective actions which the AJC and the ADL took in response to the Frank trial are telling. While Marshall said that "it would be most unfortunate if anything were done . . . from the standpoint of the Jews," the ADL thought that concerted Jewish action was the only effective way to combat the anti-Semitism surrounding the case. MOORE, *supra* note 122, at 107-08.

<sup>127</sup> *Anti-Defamation League*, B'NAI B'RITH NEWS (Oct., 1913), in BELTH, *supra* note 103, at 42. The charter went on to say, "Its ultimate purpose is to secure justice and fair treatment to all citizens alike and to put an end forever to unjust and unfair discrimination against and ridicule of any sect [or] body of citizens." BELTH, *supra* note 103, at 42. Thus, the organization arguably aimed to attain equal treatment for all in the long-term. Even so, the ADL's short-term tactics and goals tended towards collective action and group rights.

<sup>128</sup> A memo from *New York Times* editor Adolph Ochs hinted at the practices then in vogue:

The word "Jew" is a noun and should never be used as an adjective or verb. To speak of "Jew girls" or "Jew stores" is both objectionable and vulgar . . . . The use of the word "Jew" as a verb—"to Jew down"—is a slang survival of the medieval term of opprobrium . . . and should be avoided altogether.

BELTH, *supra* note 103, at 46.

TWIST and THE MERCHANT OF VENICE, which contain arguably derogatory depictions of Jews.<sup>129</sup>

However, it is important to note that both the AJC and the ADL called for legal regulation as one of the methods to be used in accomplishing their respective tasks. For the AJC, both the Russian treaty and the New York law involved the use of government intervention. For the ADL, the charter mentioned above<sup>130</sup> called for legal action as a last resort. Also, two of the ten stated programs included in the ADL's 1915 Statement of Policy called for legislation.<sup>131</sup> Specifically, both organizations agreed that "Christians only" advertisements should be banned.<sup>132</sup> Thus, group libel legislation in its earliest manifestation garnered support from two organizations that apparently held opposing views about the validity of group rights in America. With this background, it is possible to examine the 1913 New York law, and similar laws that were modeled after it, for evidence of how they could be supported by groups with such different motives.

There are several reasons to think that Marshall intended the 1913 New York law to protect the rights of Jews to be treated as individuals unburdened by their group affiliation. First, as discussed above, is the AJC's wish to avoid having Jews seen as a group meriting special legal protection.<sup>133</sup> Second is a 1907 letter Marshall wrote when lobbying for the statute. It stated, "[Jews] ask for no special privileges, but they have a right to demand the same protection which is afforded

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<sup>129</sup> See, e.g. BELTH, *supra* note 103, at 43-57; SACHAR, *supra* note 83, at 308; B'NAI B'RITH MANUAL 360-72 (Samuel S. Cohen ed., 1926) (hereinafter B'NAI B'RITH MANUAL); *Fourteenth Convention*, B'NAI B'RITH PROC. 211-13, 306, 311, 313, 318 (1935); Ellen Schiff, *Shylock's Mishpocheh: Anti-Semitism on the American Stage*, in ANTI-SEMITISM IN AMERICAN HISTORY 79-99 (David A. Gerber ed., 1986); *The Anti-Defamation League: A Statement of Policy* (1915), reprinted in Mendes-Flohr & Reinharz, *supra* note 106, at 403-404.

<sup>130</sup> See *supra* note 125 and accompanying text.

<sup>131</sup> See Mendes-Flohr & Reinharz, *supra* note 106, at 403-04. The other projects concerned educational campaigns such as providing books, pamphlets, and speakers on Jewish subjects, dialogue in the press, and private appeals to editors of periodicals and producers of plays and movies to change their characterization of Jews. See Mendes-Flohr & Reinharz, *supra* note 106, at 403-04.

<sup>132</sup> One of the two legal planks of the ADL's 1915 STATEMENT OF POLICY supported such laws. See Mendes-Flohr & Reinharz, *supra* note 106, at 404.

<sup>133</sup> See *supra* notes 114-120 and accompanying text.

to men of every other race, faith, and creed."<sup>134</sup> That is, they have the right to be treated as individuals. Third is the important fact that the ban on "Christians only" advertisements was an amendment to a law that already prohibited hotels from banning Jews from their premises. As such, since the original law aimed to allow individuals of all creeds to stay at hotels, the statute, even as amended, evidences a concern for individual rights.

Yet the 1913 legislation might also be seen as protecting group rights. Under the law, anyone who wrote "Christians only" in their advertisements, and thus offended the reputation of American Jews as a group, would be punished by the government. The ADL's position illustrates this point well. When the ADL supported legislation based on the 1913 New York law, the organization pointedly omitted the insistence that hotels actually admit Jewish guests.<sup>135</sup> The ADL stated, "While the League had no interest in forcing such establishments to admit Jews, it strenuously opposed the publicity thus given because of the effect in fostering anti-Semitic feeling."<sup>136</sup> The rationale, as one ADL official explained, was that "de facto social discrimination could not be fought through law; but the public advertisement that Jews were outcasts had to be prevented."<sup>137</sup> These comments indicate that the ADL was not spurred to action because "Christians only" advertisements violated any individual rights. Rather, it seems that the ADL supported legislation modeled on the 1913 New York law because "Christians only" advertisements portrayed Jews, as a group, in a negative light. And, if that is the case, the ADL's actions indicate a tendency towards protecting group rights.

Even the AJC's Marshall made some arguments indicating a concern with group reputation rather than with individual

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<sup>134</sup> Gurock, *supra* note 106, at 118.

<sup>135</sup> The ADL's 1915 STATEMENT OF POLICY stated:

[T]he League will endeavor to secure the passage of laws, where the same is practicable, making it unlawful for any hostelry, directly or indirectly, to publish, circulate, issue, display, post, or mail any written or printed communication, notice or advertisement, to the effect that any of the accommodations of such places shall be refused, withheld, or denied to any person on account of his creed.

Mendes-Flohr & Reinharz, *supra* note 106, at 404.

<sup>136</sup> B'NAI B'RITH MANUAL, *supra* note 129, at 366.

<sup>137</sup> MOORE, *supra* note 122, at 109.

rights of access. In a letter he wrote in 1907 in support of the bill, Marshall stated, "Even though Jews may be excluded on one pretext or another from hotels and public places, it must not be on the specific ground which ranks Jews with consumptives, mosquitos or in terms otherwise insulting."<sup>138</sup> Similarly, in a 1929 letter, Marshall wrote, "This legislation has at all events prevented the infliction of a public insult."<sup>139</sup> His concern with the "public insult" that "Christians only" advertisements inflicted onto Jews shows that Marshall did not see the 1913 law solely as an individual rights issue. It is also characteristic of a deeper ambiguity in his thought regarding the debate about whether Jews would do best to pursue a strategy of group or individual rights.

For instance, when lobbying for the 1913 New York bill in 1907, Marshall alluded to the 850,000 Jewish New Yorkers who would watch the actions of the legislature.<sup>140</sup> Apparently contradicting himself, in another situation he stated, "The idea of getting political recognition because one is a Jew is, to me, unspeakably shameful,"<sup>141</sup> and that Jewish citizens have "no distinctly Jewish interests with respect to matters of government."<sup>142</sup> Also, while he once said that "there are no people on earth who more readily assimilate than the Jews,"<sup>143</sup> he also commented that "[i]f [Zangwill's doctrine of the melting pot] is intended to convey the idea of being totally absorbed and of losing one's identity completely, then I am frank to say that I hope the Jews will never be assimilated."<sup>144</sup> And, in contrast to his stated opposition to group rights for American

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<sup>138</sup> Letter from Louis Marshall to Martin Saxe (May 22, 1907), in Reznikoff, *supra* note 114, at 249.

<sup>139</sup> Letter from Louis Marshall to Hugo S. Mack (Mar. 23, 1923), in Reznikoff, *supra* note 114, at 253.

<sup>140</sup> See Gurock, *supra* note 106, at 103, 118.

<sup>141</sup> HEYWOOD BROWN & GEORGE BRITT, CHRISTIANS ONLY: A STUDY IN PREJUDICE 270 (1931).

<sup>142</sup> MORTON ROSENSTOCK, LOUIS MARSHALL: DEFENDER OF JEWISH RIGHTS 36-37, 56 (1965).

<sup>143</sup> *Id.* at 35.

<sup>144</sup> *Id.* However, it seems that Marshall interpreted Zangwill to be proposing intermarriage. Thus, his objections should be taken in that context. See *id.*

Jews mentioned above,<sup>145</sup> after World War I Marshall supported the creation of legally recognized national minority rights for Jews and other minorities in Europe.<sup>146</sup>

Similarly, Marshall's involvement in another prominent legal case also shows ambiguities in his thought. In 1924, the Supreme Court unanimously decided *Pierce v. Society of Sisters*,<sup>147</sup> holding that a 1922 Oregon law that outlawed private education violated the Fourteenth Amendment's due process clause. Specifically, the Court ruled that the Oregon statute would both deprive the schools of their property without due process and interfere with parents' substantive due process rights to raise their children.<sup>148</sup> Marshall submitted an amicus brief on behalf of the AJC opposing the law. Like his views on the 1913 New York law, Marshall's position on the case seemed to support assimilation and individualism. The Oregon statute was unconstitutional, he wrote, because "[t]he right to choose the medium whereby an education is to be received is taken away, not only from the parent or guardian of the pupil or student, but also from the pupil or student himself."<sup>149</sup> Furthermore, Marshall viewed the statute as undesirable because "[t]he assimilation, so-called, of our foreign born citizens is advanced rather than retarded by the private, parochial and religious schools."<sup>150</sup>

But Marshall's stance in the case might also indicate sympathy for group rights. The Ku Klux Klan sponsored the bill,<sup>151</sup> and the bill aimed to implement a policy of strict assimilation and Americanization. As such, any opposition to the bill might be seen as opposing full assimilation, and therefore, intentionally or not, advocating group rights. Also, Marshall's brief contains references to the ills inherent in compelling "those of various races and creeds" to abandon their distinctive cultures.<sup>152</sup> Thus, it was not only in the context of the 1913

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<sup>145</sup> See *supra* note 114 and accompanying text.

<sup>146</sup> See SACHAR, *supra* note 83, at 269.

<sup>147</sup> 268 U.S. 510 (1924).

<sup>148</sup> See *id.* at 534-36. For a comprehensive analysis of both the circumstances surrounding the passage of the law, and of the decision itself, see DAVID TYACK ET AL., *LAW AND THE SHAPING OF PUBLIC EDUCATION 1785-1954* 177-92 (1987).

<sup>149</sup> Brief for the American Jewish Committee (*amicus curiae* for appellees) at 5, *Pierce v. Society of Sisters*, 268 U.S. 510 (1924) (No. 209221 and 209222).

<sup>150</sup> *Id.* at 12.

<sup>151</sup> See TYACK, *supra* note 148, at 177-79.

<sup>152</sup> Brief for the American Jewish Committee (*amicus curiae* for appellees) at 10,

New York law that Marshall's views seem ambiguous. While he generally advocated an individualistic vision of American life, some of his actions and statements seem to support group rights.

By 1926, seven states, at the urging of both the AJC and the ADL, had adopted statutes similar to the 1913 New York Law.<sup>153</sup> Significantly, those statutes followed the ADL's version of the law, abandoning the prohibition on actual discrimination in access to hotels and such, and instead banning only the dissemination of advertisements stating that Jews were not welcome. Despite the modest popularity of these statutes, they proved relatively ineffective. Hotels still generally refused to allow Jews to register as guests.<sup>154</sup> And if hotel proprietors were ever charged with discrimination, they had the advantage of sympathetic juries.<sup>155</sup> Moreover, the ban on discriminatory advertising, which was the main focus of the 1913 bill, proved easy enough to evade. Proprietors simply used codewords or expressions that technically fell outside the grasp of the statute, such as noting that churches were nearby, to indicate who was welcome.<sup>156</sup> So, it was unclear if, as Marshall claimed, the laws at least "prevented the infliction of a public insult."<sup>157</sup>

This, then, was the fruit of the first campaign for group libel statutes. Such laws could be justified by one of two theories. They might stand for the proposition that assimilation should be accelerated in America by prohibiting hotels from treating Jews as members of a group. Alternately, the laws might indicate support for the right of Jews as a group to have the government protect their good name in the public realm. It

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Pierce v. Society of Sisters, 268 U.S. 510 (1924) (No. 583).

<sup>153</sup> The states were Illinois, Colorado, New Hampshire, Connecticut, Pennsylvania, Maine, and Minnesota. See B'NAI B'RITH MANUAL, *supra* note 129, at 366-67; *Pennsylvania Civil Rights Law*, 20 AM. JEWISH Y.B. 381-82 (1918-1919). Massachusetts, Michigan, Washington, Wisconsin, Florida, and Virginia passed similar laws at later dates. See MILTON R. KONVITZ & THEODORE LESKES, A CENTURY OF CIVIL RIGHTS 169 (1961).

<sup>154</sup> See, e.g., BROUN & BRITT, *supra* note 141, at 246-67; Letter from Louis Marshall to Hugo S. Mack (Mar. 23, 1929), in Reznikoff, *supra* note 114, at 253.

<sup>155</sup> See Gurock, *supra* note 106, at 112.

<sup>156</sup> See Gurock, *supra* note 106, at 111 & n.60.

<sup>157</sup> Letter from Louis Marshall to Hugo S. Mack (Mar. 23, 1929), in Reznikoff, *supra* note 114, at 253.

may seem surprising that the law was thus justified by these two apparently contradictory theories. But such ambiguity was typical of the views that Jews at the time generally held towards acculturation in America. Indeed, the discussion of Marshall's views demonstrates that the contradictions in views could manifest themselves even within a single person. But aside from the question of the theoretical reasons supporting these statutes was the more immediate question of whether they would have the effect of, at least, stopping the "public insult" that so concerned both the AJC and the ADL. The first significant group libel trial, discussed in Part IV, demonstrates that they would not.

#### IV. THE DEARBORN INDEPENDENT

On May 22, 1920, Henry Ford's newspaper, the *Dearborn Independent*, initiated an anti-Semitic tirade that would persist for seven years.<sup>158</sup> The series essentially consisted of commentary on a publication, *The Protocols of the Elders of Zion* (the "Protocols"), which had recently appeared in Europe and in America. The *Protocols* purportedly was the minutes from a meeting of Jews who were conspiring to entrap the world in a web of financial and political deception.<sup>159</sup> The AJC and the ADL learned of the *Protocols* almost immediately, and in 1920 unsuccessfully attempted to dissuade American publishers from printing it as a book.<sup>160</sup> At first, Marshall thought that the preposterous nature of the material would lead the public to ignore it.<sup>161</sup> However, he soon began to take the situation

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<sup>158</sup> See, e.g., LEONARD DINNERSTEIN, *ANTI-SEMITISM IN AMERICA* 80-84 (1994) [hereinafter DINNERSTEIN, *ANTI-SEMITISM*]; ALBERT LEE, *HENRY FORD AND THE JEWS* 29 (1980); ROSENSTOCK, *supra* note 142, at 128; Mendes-Flohr & Reinhartz, *supra* note 106, at 407, 409.

<sup>159</sup> See ROSENSTOCK, *supra* note 142, at 118-19.

<sup>160</sup> See, e.g., THE AMERICAN JEWISH COMMITTEE, *FOURTEENTH ANN. REPORT*, 21-32 (1921); Letter from Louis Marshall to A.C. Ratshesky (Sept. 10, 1920), in Reznikoff, *supra* note 114, at 333-34.

<sup>161</sup> "[The PROTOCOLS] is so exceedingly silly that, were it not for the fact that it has made an impression on quite a number of people to whom it has been shown . . . one might well treat it with derision." Letter from Louis Marshall to Cyrus Adler (Dec. 18, 1919), in Reznikoff, *supra* note 114, at 328.

more seriously, once calling it "[t]he most serious episode in the history of American Jewry."<sup>162</sup>

The first installment of Ford's *International Jew* series in the *Dearborn Independent* claimed to explain the "instinctive" anti-Semitism, which Jews have confronted throughout the ages, as flowing from the fact, now revealed, that Jews had exploited the realms of commerce and finance to gain an upper hand.<sup>163</sup> In later issues, the paper claimed that specific Jews, including AJC head Marshall, were plotting to wreck the nation.<sup>164</sup> Explaining his motives for the series, Ford commented that he was "only trying to awake the Gentile world to an understanding of what is going on. The Jew is a mere huckster, a trader who doesn't want to produce, but to make something out of what somebody else produces."<sup>165</sup>

American Jewry, prompted by the AJC and the ADL, mobilized and undertook a series of actions to combat Ford and his publication.<sup>166</sup> Marshall wrote to Ford to complain about the *Dearborn Independent* on June 3, 1920, days after the publication of the first installment of Ford's series.<sup>167</sup> He stat-

<sup>162</sup> See SACHAR, *supra* note 83, at 315.

<sup>163</sup> See *The International Jew: The World's Problem*, DEARBORN INDEPENDENT, May 22, 1920, at 1-5, in Mendes-Flohr & Reinhartz, *supra* note 106, at 407-09.

<sup>164</sup> See ROSENSTOCK, *supra* note 142, at 131; Edwin Black, *The Anti-Ford Boycott*, 32 MIDSTREAM 39, 39 (1986).

<sup>165</sup> DINNERSTEIN, ANTI-SEMITISM, *supra* note 158, at 81.

<sup>166</sup> Interestingly, the AJC opposed any public response to Ford after the first article was printed. Members of the AJC Executive Committee thought that Ford's series was "not getting any wide publicity except in the Jewish press" and that "a public defense at the present time might be undesirable and only lend further publicity to an unpleasant situation." American Jewish Committee, *Meeting of the Executive Committee Minutes*, June 23, 1920 (on file with the American Jewish Committee archives). Marshall seemed to agree with this policy, even though he had written on June 5, 1920 that "[i]t is better that this whole matter be brought out in the open than to allow this poison to circulate under the surface as it now does." Letter from Louis Marshall to Julius Rosenwald, June 5, 1920, in Reznikoff, *supra* note 114, at 330. By October 1920, the circulation of the *Dearborn Independent* had risen from about 70,000 to 250,000. See American Jewish Committee, *Meeting of the Executive Committee Minutes*, June 23, 1920 and Oct. 10, 1920 (on file with the American Jewish Committee archives). Only then did the AJC decide to respond publicly. See *id.* Even so, on October 11, 1920 Marshall wrote, "After all Ford, however, is a very small element in the problem which confronts us. Infinitely more harm is being done by the distribution of the so-called Protocols." Letter from Louis Marshall to Harris Weinstock (Oct. 11, 1920), in Reznikoff, *supra* note 114, at 337-38.

<sup>167</sup> Letter from Louis Marshall to Henry Ford (June 2, 1920), in THE AMERICAN JEWISH COMMITTEE, FOURTEENTH ANN. REPORT, *supra* note 160, at 19-20.



ed that Ford's comments "constitute a libel upon an entire people who had hoped that at least in America they might be spared the insult, the humiliation and the obloquy which these articles are scattering throughout the land."<sup>168</sup>

At the same time, the AJC called for a meeting of major American Jewish organizations so that they could take joint action to combat "the assault that has been made upon their honor."<sup>169</sup> As a result of the meeting, a leaflet entitled, "*The Protocols*" *Bolshevism and the Jews: Address to the American Public* was published on December 1, 1920, which refuted the charges made in the *Dearborn Independent*.<sup>170</sup> Also, the AJC and other organizations arranged to have 119 prominent Americans, including President Wilson and ex-President Taft, sign a petition condemning Ford's publication.<sup>171</sup> In addition, American Jews began a boycott of all of Ford's products.<sup>172</sup> Finally, the AJC and the ADL tried to enlist three forms of official government intervention.<sup>173</sup>

First, the two organizations contemplated a Congressional investigation of Ford. The AJC first considered the idea when discussing the *Dearborn Independent* situation in October

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<sup>168</sup> THE AMERICAN JEWISH COMMITTEE, FOURTEENTH ANN. REPORT, *supra* note 160, at 19-20. In response, the Dearborn Publishing Company wrote, "Your rhetoric is that of a Bolshevik orator." Letter from the Dearborn Publishing Company to Louis Marshall, in THE AMERICAN JEWISH COMMITTEE, FOURTEENTH ANN. REPORT, *supra* note 160, at 20.

<sup>169</sup> Letter from the Dearborn Publishing Company to Louis Marshall, in THE AMERICAN JEWISH COMMITTEE, FOURTEENTH ANN. REPORT, *supra* note 160, at 32-33.

<sup>170</sup> See BELTH, *supra* note 103, at 78; "THE PROTOCOLS" BOLSHEVISM AND THE JEWS: ADDRESS TO THE AMERICAN PUBLIC (1921) (on file with the American Jewish Committee archives); THE AMERICAN JEWISH COMMITTEE, MEETING OF THE EXECUTIVE COMMITTEE MINUTES (Nov. 13, 1920) (on file with the American Jewish Committee archives).

<sup>171</sup> See ROSENSTOCK, *supra* note 142, at 149-57.

<sup>172</sup> See Black, *supra* note 164, at 40. Initially, Marshall and the AJC opposed such a boycott, claiming that "any proposed boycott might act as a boomerang and produce a counter boycott in which the Jews would greatly suffer." THE AMERICAN JEWISH COMMITTEE, MEETING OF THE EXECUTIVE COMMITTEE MINUTES (June 23, 1920) (on file with the American Jewish Committee archives). Marshall never officially sanctioned an official boycott. However, he approved of a "silent" boycott, stating that American Jews would know to follow it "without being told." *Id.*

<sup>173</sup> Marshall also made use of "unofficial" government intervention, such as asking President Harding to talk to Ford, who was a friend of the President. See Letter from Louis Marshall to Warren G. Harding (July 25, 1921), in Reznikoff, *supra* note 114, at 361.

1920,<sup>174</sup> but ultimately rejected an investigation. Marshall again rejected the idea in March 1921, stating that American Jews had already done enough on their own to "demonstrate the underlying falsehood of Ford's campaign."<sup>175</sup> He elaborated his reasons in another letter, stating that a Congressional investigation "would enable our enemies to shovel into the record all kinds of stupid and inane charges."<sup>176</sup>

The second form of government action that was contemplated and later abandoned was instituting civil or criminal libel suits against Ford or the Dearborn Publishing Company. Marshall was acutely aware of the state of group libel law at the time.<sup>177</sup> He wrote that "[t]he technical difficulties of such a proceeding are enormous. The expense would be prohibitive."<sup>178</sup> Also, the forum of a trial would give further publicity to Ford's charges, and, in light of the successful actions that American Jewry and many newspapers had taken to discredit Ford, Marshall felt that litigation was unnecessary.<sup>179</sup>

It is significant, however, that Marshall did not oppose such actions in theory. He wrote in April 1921 to the *Christian Science Monitor*:

Although the vast majority of the Jews of this country . . . are opposed to all retaliatory measures either looking to the prevention of the sale of the *Dearborn Independent* on the streets or otherwise . . . or to the exclusion from public libraries, or to legislation, however justifiable in principle, creating a remedy where none now exist, nevertheless it is but natural for men persistently insulted, as the Jews have been by Ford, to resent the insult and to seek immediate relief.<sup>180</sup>

<sup>174</sup> See Letter from Louis Marshall to Rabbi Isaac Landsman, (Dec. 24, 1920), in Reznikoff, *supra* note 114, at 350 n.\*.

<sup>175</sup> Letter from Louis Marshall to Joseph Henkin (Mar. 24, 1921), in Reznikoff, *supra* note 114, at 350.

<sup>176</sup> Letter from Louis Marshall to Adolf Kraus (Apr. 26 1921), in Reznikoff, *supra* note 114, at 350 n.\*.

<sup>177</sup> See Part I, *supra*, for the status of group libel law at the time.

<sup>178</sup> Letter from Louis Marshall to Adolf Kraus (Apr. 26, 1921), in Reznikoff, *supra* note 114, at 351 n.\*.

<sup>179</sup> See Letter from Louis Marshall to Felix Vorenberg (Apr. 26, 1921), in Reznikoff, *supra* note 114, at 357; Letter from Louis Marshall to the Editor, *CHRISTIAN SCIENCE MONITOR* (Apr. 28, 1921), in Reznikoff, *supra* note 114, at 358-60.

<sup>180</sup> Letter from Louis Marshall to the Editor, *CHRISTIAN SCIENCE MONITOR*, (Apr. 28, 1921), in Reznikoff, *supra* note 114, at 358-60. In a similar vein, Marshall wrote to another correspondent:

Therefore, it is not surprising that Marshall decided to lobby for group libel legislation, the third form of government intervention that the AJC and the ADL pursued. In a letter he wrote to Governor Nathan Miller of New York in February 1921, Marshall stated that such statutes were necessary because tirades such as Ford's would "stir up animosity and hatred against certain classes" and would lead to "breaches of the peace."<sup>181</sup> He further stated that "[w]hether or not any prosecution should ever take place under the New York Libel Law were it to be amended as proposed, the effect of such a law would in itself be salutary."<sup>182</sup> Two years later, in 1923, Marshall also contacted the Postmaster General of the United States to request a ban on certain materials containing advertisements for the *Dearborn Independent*.<sup>183</sup>

While the proposal to enact a criminal group libel law in New York failed,<sup>184</sup> the ADL pursued campaigns for similar laws elsewhere.<sup>185</sup> Boston, Chicago, Cincinnati, Cleveland, Columbus, Detroit, Pittsburgh, Toledo, and St. Louis tried to ban the distribution of the newspaper.<sup>186</sup> Furthermore, legis-

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While we recognize that, from one point of view, there is merit in the suggestion [of instituting some sort of libel proceeding], taking everything into consideration we have come to the conclusion that it would not be advisable to institute any libel suits against Ford . . . . We could not sue for any injury done to the Jewish people of America . . . even though they may be greatly wronged.

Letter from Louis Marshall to Felix Vorenberg (Apr. 26, 1921), in Reznikoff, *supra* note 114, at 357.

<sup>181</sup> The proposed law would have banned the libel of "those belonging to any race, religious denomination, sect or order against whom in whole or in part as a class a malicious publication is directed." Letter from Louis Marshall to Governor Nathan L. Miller, (Feb. 21, 1921), in Reznikoff, *supra* note 114, at 356.

<sup>182</sup> Letter from Louis Marshall to Governor Nathan L. Miller, (Feb. 21, 1921), in Reznikoff, *supra* note 114, at 356.

<sup>183</sup> See THE AMERICAN JEWISH COMMITTEE, MEETING OF THE EXECUTIVE COMMITTEE MINUTES (Mar. 11, 1923) (on file with the American Jewish Committee archives).

<sup>184</sup> See ROSENSTOCK, *supra* note 142, at 167-68.

<sup>185</sup> See ROSENSTOCK, *supra* note 142, at 167; SACHAR, *supra* note 83, at 315.

<sup>186</sup> See ROSENSTOCK, *supra* note 142, at 149-50; SAMUEL WALKER, IN DEFENSE OF CIVIL LIBERTIES: A HISTORY OF THE ACLU 62 (1990) [hereinafter WALKER, IN DEFENSE]. Most of the municipalities that attempted to prohibit the *Dearborn Independent* were in the Midwest. This may have been because the ADL based its operations in Chicago, and it hired an employee to help lobby against Ford. Interview with Alexander F. Miller, in 5 NOT THE WORK OF A DAY, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH ORAL MEMOIRS 13 (Anti-Defamation League of B'nai

lation to prohibit "general libel" that would encompass the *Dearborn Independent's* anti-Semitism was introduced in the Michigan state legislature.<sup>187</sup> Significantly, these attempts failed.

The reason is that free speech concerns were for the first time being raised explicitly as a reason to oppose such statutes. The bill in Michigan failed to pass the state senate because newspaper editors protested that the law would chill legitimate criticism.<sup>188</sup> The American Civil Liberties Union (the "ACLU") protested against the ordinance in Cincinnati.<sup>189</sup> And federal judges in Pittsburgh, Detroit, and Cleveland invalidated the group libel ordinances in those cities.<sup>190</sup> The situation in Cleveland is worth discussing briefly to show that resistance to group libel statutes based on freedom of speech concerns had begun to take root not only amongst the people but also in the federal judiciary.

Cleveland's ordinance was framed to ban publications "calculated to excite scandal and having a tendency to create breaches of the peace . . . ."<sup>191</sup> When city officials attempted to ban distribution of the newspaper by vendors on city streets,<sup>192</sup> the *Dearborn Independent* sued in federal court for an injunction against the city's actions. In support of the ban, the mayor testified that distribution of the *Dearborn Independent* "would tend to create religious and racial dissensions, and have a tendency to create breaches of the peace."<sup>193</sup> However, the court ruled in favor of the *Dearborn Independent* and granted the injunction, without issuing a holding on the validity of the ordinance. Rather, the judge stated that the proper action to take against the newspaper would be criminal prose-

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B'rith ed., 1987). But the concentration of such laws in one region may be more than a geographical coincidence. Of all the regions in the country, the Midwest was the most supportive of Ford and the *Dearborn Independent*. See ROSENSTOCK, *supra* note 142, at 151.

<sup>187</sup> See ROSENSTOCK, *supra* note 142, at 150.

<sup>188</sup> See *id.*

<sup>189</sup> See *id.*

<sup>190</sup> See *id.*

<sup>191</sup> *Dearborn Publ'g Co. v. Fitzgerald*, 271 F. 479, 480 (N.D. Ohio 1921) (summarizing CLEVELAND OH., REV. ORDINANCES § 1770 (1919)).

<sup>192</sup> But city officials did not attempt to ban the newspaper in news stands or shops. See *id.* at 481.

<sup>193</sup> *Id.*

cution of its distributors, not prior restraint of its distribution. The court further ruled that the publication had no tendency to create breaches of the peace, since no disorder had broken out because of the newspaper's distribution. The court also stated that the *Dearborn Independent* could not "by any stretch of the imagination be classified as indecent, obscene, or scandalous," which was the basis for action under the ordinance.<sup>194</sup> But, in *dicta*, the court questioned the ordinance's constitutionality:

If defendants' action were sustained, the constitutional liberty of every citizen freely to speak, write, and publish his sentiments on all subjects . . . would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace, and the right to a free press would likewise be destroyed.<sup>195</sup>

At the time of the decision in *Dearborn*, the Ohio court was not alone in its concern with freedom of the press. In 1919, only two years before the *Deaborn* decision, the United States Supreme Court started to contemplate granting greater First Amendment protections. It did so in three cases decided that year.<sup>196</sup> All three gave the federal government substantial power to limit speech and concerned the Espionage Act of 1917, which Congress had passed to control anti-war dissent during World War I.<sup>197</sup> In *Schenck v. United States*,<sup>198</sup> the Supreme Court upheld the Espionage Act against a First Amendment challenge.<sup>199</sup> Justice Holmes, ruling for the government, wrote a majority opinion that enunciated a test that allowed the government wide latitude to suppress speech.<sup>200</sup>

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<sup>194</sup> *Id.* at 482-83. The judge seemed to have a unique idea of group libel. Responding to the city's contention that publication of the *Dearborn Independent* would tend to lead to a breach of the peace, the judge stated, "It would be a libel, it seems to me, on people of the Jewish race to assume that they are imbued with such a spirit of lawlessness." *Dearborn*, 271 F. at 483.

<sup>195</sup> *Id.* at 485.

<sup>196</sup> See *Debs v. United States*, 249 U.S. 211 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>197</sup> Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917). See also G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF 414-15, 573 n.14 (1993).

<sup>198</sup> 249 U.S. 47 (1919).

<sup>199</sup> David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514, 582-84 (1981).

<sup>200</sup> Holmes stated that the relevant inquiry was "whether the words used are used in such circumstances and are of such a nature as to create a clear and

Yet that decision, and two others decided soon after,<sup>201</sup> sparked a barrage of criticism amongst the mainstream press and legal academics.<sup>202</sup> Indeed, after a summer of thought and consultations,<sup>203</sup> Holmes became more sympathetic to First Amendment claims. Therefore, he decided to dissent with Justice Brandeis in another Espionage Act case,<sup>204</sup> *Abrams v. United States*,<sup>205</sup> where he stated, "Congress certainly cannot forbid all effort to change the mind of the country."<sup>206</sup>

While the government prevailed in the three cases discussed above, adherence to the principle of freedom of expression was nevertheless becoming more widespread. Although Holmes' change of heart is a conspicuous example of this trend, he was far from alone in supporting it. In 1917, Judge Learned Hand issued his decision in *Masses Publishing Co. v. Patten*,<sup>207</sup> enunciating a permissive stance towards freedom of speech. In *Masses*, he stated that speech should be allowed unless it was in "direct advocacy of resistance" to the law.<sup>208</sup> Similarly, a number of scholars had started to consider the importance of the First Amendment in the years preceding World War I.<sup>209</sup> An organization called the Free Speech League had been formed in 1902, and its successor, the ACLU, was founded in 1920.<sup>210</sup> With the end of World War I, the popularity of such ideas would only grow.<sup>211</sup>

It was not clear whether this judicial activism would affect efforts to enact group libel statutes. None of the 1919 Supreme

present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck*, 249 U.S. at 52. See Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chaffee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919* 58 J. AM. HIST. 24 (1971) (arguing that Holmes originally meant the test to be restrictive of free speech, and he only later recast it to be protective of free speech).

<sup>201</sup> See *Debs*, 249 U.S. 211; *Frohwerk*, 249 U.S. 204.

<sup>202</sup> See Ragan, *supra* note 200, at 39-43; White, *supra* note 197, at 420-21.

<sup>203</sup> See White, *supra* note 197, at 422-30.

<sup>204</sup> Technically, the case involved the Sedition Act of 1918, which was an amendment to the 1917 Espionage Act. See Ragan, *supra* note 200, at 43 & n.80.

<sup>205</sup> 250 U.S. 621 (1919).

<sup>206</sup> *Id.* at 628 (Holmes, J., dissenting).

<sup>207</sup> *Masses Publ'g Co. v. Patten*, 244 F. 535, 541 (S.D.N.Y. 1917).

<sup>208</sup> *Id.* at 541.

<sup>209</sup> See Rabban, *supra* note 199, at 559-82.

<sup>210</sup> See WALKER, HATE SPEECH, *supra* note 4, at 18, 174 n.5.

<sup>211</sup> See PAUL L. MURPHY, THE MEANING OF FREEDOM OF SPEECH: FIRST AMENDMENT FREEDOMS FROM WILSON TO FDR 25-37 (1972).

Court cases implicated libel or group libel directly. This is not surprising, however, since libel was not seen as a First Amendment issue throughout the nineteenth century.<sup>212</sup> In fact, the Supreme Court would not define the exact relationship between libel and the First Amendment for several years to come.<sup>213</sup> Also, since the First Amendment on its face only applies to Congress, it was unclear until 1921 what impact, if any, an invigorated First Amendment would have on state laws that regulated speech and on state group libel laws in particular.<sup>214</sup> Nevertheless, the tension between group libel laws and the First Amendment was becoming evident. State courts started to analyze the general law of libel in terms of the First Amendment in the early 1900s.<sup>215</sup> The ACLU protested against the municipal group libel ordinances listed above, proclaiming that "the way to combat such [anti-Semitic] views is by argument, not by prosecution."<sup>216</sup> And, of course, there is the *Dearborn* decision. As that decision indicates, supporters of group libel statutes would have to consider both constitutional and social issues. That is, group libel legislation would not only have to gain support amongst American Jews and various legislatures, but would also have to gain support in federal courts that broadened First Amendment rights.

Perhaps as a result of all the actions taken against Ford, he dropped the intensity of his campaign in 1922.<sup>217</sup> While the AJC stated in 1924 that "[t]he *Dearborn Independent* occasionally reverts to its pet obsession,"<sup>218</sup> the ADL stated that, as of 1923, "[t]he *Dearborn Independent* is now being ignored."<sup>219</sup> But the Ford episode was not yet over.

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<sup>212</sup> See Rabban, *supra* note 199, at 550-51.

<sup>213</sup> Indeed, the Supreme Court did not consider the intersection of libel and the First Amendment until well into the twentieth century. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

<sup>214</sup> The Supreme Court decided to incorporate the First Amendment to the states in *Gitlow v. New York*, 268 U.S. 652 (1921).

<sup>215</sup> See Rabban, *supra* note 199, at 550-51.

<sup>216</sup> WALKER, IN DEFENSE, *supra* note 186, at 62.

<sup>217</sup> See SACHAR, *supra* note 83, at 316. Ford may have also been influenced by the fact that the *Protocols*, which formed the foundation for his attacks, had been discredited as a forgery in the *London Times* in 1921. See Mendes-Flohr & Reinhartz, *supra* note 106, at 409.

<sup>218</sup> 26 AM. JEWISH Y.B. 636 (1924).

<sup>219</sup> B'NAI B'RITH MANUAL, *supra* note 129, at 370.

In 1924, the *Dearborn Independent* claimed that San Francisco attorney Aaron Sapiro and other Jews were using farm cooperatives to seize control of the nation's agricultural resources.<sup>220</sup> Sapiro, on behalf of "myself and my race," then filed a \$1 million libel suit against Ford.<sup>221</sup> This was exactly the type of lawsuit that Marshall had discouraged, claiming that it would be too difficult to win and too damaging to the public image of American Jews.<sup>222</sup> Indeed, Marshall disapproved of Sapiro's actions.<sup>223</sup> The case came to trial on March 15, 1927,<sup>224</sup> but, a mistrial was declared, and before a new court date could be set, Ford decided to back off. He settled the case with Sapiro and issued a public apology, which he wrote with the assistance of Marshall,<sup>225</sup> for the content of the *Dearborn Independent* over the previous several years.<sup>226</sup> Soon after, Ford disbanded the Dearborn Publishing Company.

Sapiro's lawsuit obviously contributed to Ford's decision to issue his public apology. However, it is not clear that the power of a single group libel suit prompted Ford to repent. Two earlier libel suits had been filed, with no apparent effect on Ford. Rather, it seems that external concerns, such as his concerns about the release of a new model car, his possible presidential ambitions, or maybe his fear of testifying in court led to his change of heart.<sup>227</sup>

Even so, it is interesting to note how the case was perceived amongst American Jews and what it signified as a group libel case. The trial became something of a tabloid sensation, and it was followed very closely by the Jewish press.<sup>228</sup> The interest that the American Jewish public showed in the case demonstrates that they saw it as an oppor-

<sup>220</sup> See LEE, *supra* note 158, at 70-72; ROSENSTOCK, *supra* note 142, at 183-85; SACHAR, *supra* note 83, at 316.

<sup>221</sup> SACHAR, *supra* note 83, at 317.

<sup>222</sup> See *supra* notes 178-180 and accompanying text.

<sup>223</sup> See Letter from Louis Marshall to G. Lowenstein (Mar. 29, 1927), in Reznikoff, *supra* note 114, at 371.

<sup>224</sup> See HARRY BENNETT, WE NEVER CALLED HIM HENRY 49 (1951).

<sup>225</sup> See SACHAR, *supra* note 83, at 317-19. For details about the Sapiro-Ford settlement, see also Aaron L. Sapiro, *A Retrospective View of the Aaron Sapiro-Henry Ford Case*, W. ST. JEWISH HIST. Q. 79 (Oct. 1982).

<sup>226</sup> See ROSENSTOCK, *supra* note 142, at 182-200.

<sup>227</sup> See LEE, *supra* note 158, at 84-85; ROSENSTOCK, *supra* note 142, at 147, 187, 189, 190-96.

<sup>228</sup> See LEE, *supra* note 158, at 71.



tunity for the whole community to disprove the charges that Ford made against Jews collectively. One Jewish magazine called the "alleged Jewish conspiracy" the "principle issue" of the case.<sup>229</sup> At one point in the lawsuit, Ford's attorneys tried to limit the scope of the suit to an individual libel action by Sapiro. While they claimed that "[i]t is not a trial of Jews, not a trial of Judaism," Sapiro's lawyer replied, "Well, I do not know how the court can say it is not here. That is the very gravamen of the complaint."<sup>230</sup> The Jewish public was apparently disappointed when the trial judge ruled that the only issue to be litigated would be whether the farm cooperatives were as powerful and corrupt as Ford claimed, and the entire issue of a Jewish conspiracy would not be pursued.<sup>231</sup> Indeed, Marshall lost interest in the case after the judge refused to consider the allegations of a Jewish conspiracy. He wrote that "[t]he court has eliminated from consideration the infamous charges made by the Jews, as such, and Sapiro could not represent the Jews in fighting for their honor."<sup>232</sup>

This wide interest in the case indicates that, as late as 1927, Jews widely supported the regulation of group libel. But, perhaps more importantly, it shows that the support for such regulation was motivated by a theory that aimed to protect the group itself, rather than by a theory that sought to protect individuals from being tarred with group characteristics. Jews were not insulted because Sapiro had been falsely charged with participating in a Jewish conspiracy; they were insulted because Jews had been falsely charged with conspiracy in the first place.

The entire Ford incident left a bitter aftertaste. The failure of the group libel ordinances, along with the unsatisfactory legal outcome of Sapiro's lawsuit, left the Jews doubtful about the potential for group libel statutes in America, especially in

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<sup>229</sup> See Robert S. Marx, *Background of Ford Charges; Dearborn Independent Articles Basis of Sapiro Suit for Libel*, 120 AM. HEBREW 636, 636 (Mar. 18, 1927).

<sup>230</sup> *Id.* at 674.

<sup>231</sup> See LEE, *supra* note 158, at 72; *Legal Clash of Sapiro and Ford*, 120 AM. HEBREW 691 (Mar. 25, 1927).

<sup>232</sup> Letter from Louis Marshall to G. Lowenstein (Mar. 29, 1927), in Reznikoff, *supra* note 114, at 371.

light of the growing importance of the First Amendment. Indeed, the head of the ADL lamented years later in 1935:

The constitutional guarantee of free speech and free press, which we in common with all true Americans regard as a fundamental necessity to the maintenance of liberty and other constitutional guarantees, was never intended as a protection against group libel any more than against individual libel. Nevertheless, it forms an insurmountable obstacle in bringing before the bar of justice one of the lowest type of malefactors.<sup>233</sup>

Part V explores whether, as time progressed, Jews would continue to want such group-based protections at all.

## V. UPWARD JEWISH MOBILITY BETWEEN THE WORLD WARS

Regardless of whether or not the vitriol of Ford's *Dearborn Independent* had much effect on the daily lives of American Jews,<sup>234</sup> Jews faced other formidable obstacles of discrimination. One of the most celebrated instances occurred in 1922, when Harvard University announced its intention to impose quotas on the number of Jews it would accept. An internal committee advised against such a policy, but, in 1925, Harvard went ahead and reduced the proportion of Jews admitted from 25% to 10% of the student body.<sup>235</sup> The Harvard episode was significant mainly because it gave some legitimacy to a trend that had been growing for some time. By the 1940s, Jews faced barriers not only in colleges but also in secondary schools, graduate schools, professional schools, law firms, commercial banks, business firms, college fraternities and athletics, country-clubs, and in restrictive covenants placed on residential property.<sup>236</sup>

<sup>233</sup> B'NAI B'RITH PROC., *supra* note 129, at 201.

<sup>234</sup> However, Ford's diatribes may well have had a disastrous impact on the lives of European Jews. Adolph Hitler once said, "I regard Henry Ford as my inspiration." DINNENSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 83.

<sup>235</sup> See, e.g., HIGHAM, SEND THESE, *supra* note 57, at 160; RAPHAEL, *supra* note 92, at 272-77; Marcia Graham Synnott, *Anti-Semitism and American Universities: Did Quotas Follow the Jews?*, in *ANTI-SEMITISM IN AMERICAN HISTORY* 233-34 (David A. Gerber ed., 1986).

<sup>236</sup> See BROUN & BRITT, *supra* note 141, at 80, 118-24; HENRY L. FEINGOLD, A TIME FOR SEARCHING: ENTERING THE MAINSTREAM 1920-1945 1-34 (1992); GOREN, *supra* note 55, at 77; HIGHAM, SEND THESE, *supra* note 57, at 158-59; Synnott, *supra* note 235, at 233-66. It is interesting to note that the practice of excluding Jews from hotels, which had prompted Marshall to campaign for the 1913 New

But, even though Jews could not get into Harvard so easily, they still pursued higher education. In 1931 in New York, the city with the highest number of Jews in terms of both percentage and raw numbers, Jews made up 22.5% of the student population at Columbia (even after it instituted quotas), 36.5% at New York University, and 80-90% at both the City College of New York and Hunter College.<sup>237</sup> Aside from those four year schools, throngs more studied at two-year colleges.<sup>238</sup> While firmer quotas existed at medical schools, by the end of the 1920s, 18% of medical students in America and 35% of medical students in New York were Jews.<sup>239</sup> Law schools offered even wider opportunities; by 1930 over half of the members of the bar in New York City were Jewish.<sup>240</sup> And, if Jewish law students were generally excluded from the most prominent firms, they found work as practicing lawyers nevertheless, either in their own smaller firms, in social services, or in government.<sup>241</sup> Jews also made headway in trade, with about 60% of Jews holding jobs in that area, compared to half that percentage in the general population.<sup>242</sup> American Jews also attained prominence in the entertainment field. Essentially, by the 1930s, Jews had established themselves firmly in the American middle class.<sup>243</sup>

Also, despite increased social discrimination, virulent anti-Semitism declined in the mid-1920s.<sup>244</sup> This was due partially

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York law, fell out of favor. This development was probably due to the popularity of the automobile, which increased pressure to net a larger catch of shorter-staying guests. See HIGHAM, *SEND THESE*, *supra* note 57, at 161-62.

<sup>237</sup> See BRITT & BROWN, *supra* note 141, at 72.

<sup>238</sup> See *id.* at 72, 102-04.

<sup>239</sup> See *id.* at 102-03.

<sup>240</sup> See *id.* at 104.

<sup>241</sup> See *id.* at 125, 150, 152, 162-63, 166-73; FEINGOLD, *supra* note 236, at 141, 212; SACHAR, *supra* note 83, at 333, 430. Even so, the path to employment was difficult. A saying at the time called a career in the law for young Jews a "dignified road to starvation." FEINGOLD, *supra* note 236, at 141.

<sup>242</sup> See GOREN, *supra* note 55, at 73-77.

<sup>243</sup> See *id.* The white collar jobs that Jews generally took also helped them to weather the Great Depression, though they still suffered considerable hardship during those years. See Nathan Glazer, *Social Characteristics of American Jews, 1654-1954*, 56 AM. JEWISH Y.B. 3, 20 (1955); FEINGOLD, *supra* note 236, at 150-52.

<sup>244</sup> See, e.g., GOREN, *supra* note 55, at 82; DINNERSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 100. This decline in virulent anti-Semitism occurred despite the rise of the Ku Klux Klan during the same years. While the Klan posed a constant challenge to American Jews during the 1920s and 1930s, it did not begin a con-

to the economic boom of the times and partially to the persuasive and non-legal efforts of the Jewish defense groups. Indeed, in 1926, even before Ford issued his apology, the ADL noted that the reduction of anti-Semitism allowed it to expand its efforts towards educational, rather than defensive, projects.<sup>245</sup>

Jews were also becoming more acculturated to American society. With immigration cut off, the second-generation Jews started to define the face of American Judaism, and they wanted to look American. Therefore, they abandoned Yiddish and Yiddish newspapers in favor of English, and they often changed their last names to avoid sounding so "Jewish."<sup>246</sup> The communal and fraternal organizations that played such an important role in their parents' lives slowly disappeared. Those organizations that survived provided less kinship and nurture and more loans and insurance policies.<sup>247</sup> As American Jews absorbed the lessons of college, religion played an ever diminishing role in their lives, and they took on a more secularist and universalist outlook.<sup>248</sup>

Perhaps nothing demonstrates the growing assimilation of American Jews better than politics. Jews became essential partners in the coalition that elected Franklin Roosevelt in 1932, the year that marked the first time that Jews voted en masse for the Democratic ticket.<sup>249</sup> They not only helped to elect Roosevelt, they also worked for him.<sup>250</sup> Felix Frankfurter and the young Harvard Law School graduates whom he directed to Washington<sup>251</sup> stood as a vivid example of how American Jews, when judged by their individual merits, could enter the mainstream, and the establishment, of American life.

certed campaign to inflict egregious physical harm onto Jews. See FEINGOLD, *supra* note 236, at 3, 34; see generally NANCY MACLEAN, *BEHIND THE MASK OF CHIVALRY* (1994). Even so, the potential was always there; the twentieth century manifestation of the Klan, after all, began in the aftermath of the Leo Frank lynching. See MACLEAN, *supra*, at 145.

<sup>245</sup> See B'NAI B'RITH MANUAL, *supra* note 129, at 367.

<sup>246</sup> See DINNERSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 124; FEINGOLD, *supra* note 236, at 70, 75, 88.

<sup>247</sup> See FEINGOLD, *supra* note 236, at 59.

<sup>248</sup> See FEINGOLD, *supra* note 236, at 58; DINNERSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 124.

<sup>249</sup> See FEINGOLD, *supra* note 236, at 204.

<sup>250</sup> See SACHAR, *supra* note 83, at 446-50.

<sup>251</sup> See FEINGOLD, *supra* note 236, at 217-18; G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 326 (1988).

Given this success, it is not surprising that respect for individual merit ranked high amongst Jews. The response that Marshall offered to protest the Harvard quotas is telling. He stated that "[t]he only tests that we can recognize [for admission] are those of character and scholarship."<sup>252</sup>

Despite this increased trend to assimilate and rely on individual ability, Jewish social and cultural affiliation did not disappear. Unprecedented numbers of Jews joined the Reform branch of Judaism in the 1920s, while at the same time, Conservative Judaism was formed and began to thrive.<sup>253</sup> In addition to strictly religious associations, American Jews joined any number of secular Jewish organizations, from community centers, to charity associations, to Jewish defense leagues, to womens' leagues, to Zionist support groups.<sup>254</sup> But, while the movement to join such organizations gained momentum, it is important to recognize its significance—that it was up to the individual Jews to join on a voluntary basis.<sup>255</sup>

While the American Jewish community tended to develop along such assimilationist and voluntaristic lines, there were still counter movements that tried to institute formal recognition of the Jewish community and of Jewish group rights. Perhaps the most vivid example was a suggestion by Zangwill, the author of *THE MELTING POT*, to organize a formalized Jewish voting block. He stated, in a speech in 1923, that he found it "beyond question" that American Jews should organize their numbers into a single and unified voting party. He argued that "it is the positive duty of the religious body to seek political ends" and that "[i]f there is no Jewish vote today—and by a Jewish vote I do not mean a vote for Jews—it is a disgrace, not a policy to be commended."<sup>256</sup> Therefore, unless American Jews organized, their close physical proximity and cultural

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<sup>252</sup> GOREN, *supra* note 55, at 83.

<sup>253</sup> See FEINGOLD, *supra* note 236, at 99-100, 103-06.

<sup>254</sup> See FEINGOLD, *supra* note 236, at 100, 155, 186-87; SACHAR, *supra* note 83, at 408-12.

<sup>255</sup> See FEINGOLD, *supra* note 236, at 89-90. It is interesting to note that labor unions in America, which also confronted issues pertaining to group rights during this century, ultimately took a similarly "voluntaristic" stance towards the Federal Government. See generally WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1989).

<sup>256</sup> ZANGWILL, WATCHMAN, *supra* note 95, at 10-11, 13.

institutions would only serve as a partial bulwark to ward off assimilation, and would become "more food for 'The Melting Pot.'"<sup>257</sup>

Despite his pleas, Zangwill knew that his thinking was not in line with the views held by the majority of American Jews. He stated in the speech that he had received warnings that his idea was "dangerous and un-American."<sup>258</sup> For example, Marshall stated that he disagreed "totally with Mr. Zangwill" and that Jews "in foreign lands suffered from the consequences of an enforced segregation of this character, and they would not be so fatuous as to create voluntarily a condition which in effect would establish an American ghetto."<sup>259</sup>

Other episodes of attempts to formalize group rights also occurred. Some Jews waged a campaign, ultimately successful, to have New York City's public schools teach Hebrew as a foreign language.<sup>260</sup> Yet the campaign was a flimsy foundation on which to build a movement for government sanctioned group rights, since Yiddish, not Hebrew, was the language of Jewish culture in America.<sup>261</sup> Later attempts to have the school system recognize Jewish holidays and allow release-time programs for religious instruction were even less successful.<sup>262</sup> However, support for Zionism reached a new high in the mid-1930s, following a prior decline in its popularity.<sup>263</sup> But, as was the case with religion, association with Zionist causes was strictly voluntary. Moreover, an attempt to create a new form of religious Judaism called Reconstructionism advocated an emphasis on community. But while the movement reaped significant praise, it was met with little popular backing.<sup>264</sup> And of course, as discussed previously in this article, there were the failed attempts to institute group libel statutes and law suits in response to Ford's *Dearborn Independent*.

<sup>257</sup> *Id.* at 13. It is interesting to note that Zangwill's comments here seem to completely contradict the sentiments he expressed in his play, *THE MELTING POT*.

<sup>258</sup> *Id.* at 11.

<sup>259</sup> 26 AM. JEWISH Y.B. 72-73 (1924).

<sup>260</sup> See FEINGOLD, *supra* note 236, at 55.

<sup>261</sup> See FEINGOLD, *supra* note 236, at 55.

<sup>262</sup> See FEINGOLD, *supra* note 236, at 120-21.

<sup>263</sup> See FEINGOLD, *supra* note 236, at 176-85.

<sup>264</sup> See FEINGOLD, *supra* note 236, at 111-15.

Thus, while there was some support amongst American Jews for formal recognition of the group and its rights, such episodes were mainly noteworthy for their lack of success. Similarly, it is interesting to note that, at the same time, attempts to install regimes of national minority rights in Europe, dating from the Versailles treaty following World War I, also became acknowledged as failures.<sup>265</sup>

To be clear, the failure of American Jews to institute group rights did not indicate a lack of Jewish religious and cultural identity in America. Rather, American Jews resolved the tension between the importance of assimilation and the importance of heritage by identifying with their Judaism on a voluntary basis. For instance, they may have refused to support a formalized Jewish vote, but they still supported President Roosevelt with virtual unanimity. Moreover, they failed to institute time-release programs for Jewish study, but they still joined synagogues and provided for their children's religious instruction. As Zangwill said in his 1923 speech, American Jewry had "answered . . . in the affirmative" its intent to "stand out against 'The Melting Pot.'"<sup>266</sup> But if American Jews refused to disappear, they also refused to have their ethnic identity and affiliation defined or protected by the government.

This apparent resolution to the conflict between assimilating and maintaining ethnic heritage was tracked in the academic literature about pluralism in America. Academics softened the sharp boundaries between the melting pot and pluralistic conceptions of what it meant to be American. Furthermore, the assimilationists recognized that it would be impossible for citizens to completely shed their ethnic pasts. But, at the same time, it also became clear that a group's "retention of cultural diversity could not preclude substantial conformity with general American norms."<sup>267</sup> Social scientists helped accelerate this trend, since new work in their field exposed racism and bigotry as cultural constructs, rather than social or eugenic facts.<sup>268</sup>

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<sup>265</sup> See FEINGOLD, *supra* note 236, at 206.

<sup>266</sup> ZANGWILL, WATCHMAN, *supra* note 95, at 10.

<sup>267</sup> *Id.* at 578.

<sup>268</sup> See Richard Weiss, *Ethnicity and Reform*, 66 J. AM. HIST. 566, 567, 570-74 (1979).

Thus, the years between World War I and World War II were transformative for American Jews in many ways. First, social discrimination became commonplace to a degree never seen before. Even so, American Jews managed to attain high levels of education, which in turn helped them get jobs that placed them solidly in the American middle class. Second, assimilation increased with education and (relative) prosperity. While this assimilation to some extent diminished ethnic and religious affiliation, the assimilationist impulse also manifested itself in the guise of a reconstituted American Judaism. However, Jews were unwilling to totally abandon their heritage, but instead saw assimilation as a voluntary enterprise. Attempts to formalize Jewish affiliation under government auspices generally failed. Thus, the group rights versus individual rights debates from the earlier part of the 1900s became resolved, at least temporarily. Third, American Jews saw themselves primarily as individuals, without the inclination or the need to have an official Jewish community intervene between them and the state. In theory, it would still be possible for American Jews to support group libel laws while staying faithful to the creed of individualism. For example, Jews who wanted to be judged as individuals might support laws that punished people who advocated attributing individual Jews with traits supposedly characteristic of the group in general. Yet, whether American Jews would actually support such an individualistic defense of group libel laws in the years that followed remained to be seen and is discussed in Part VI.

## VI. WORLD WAR II AND BEYOND

With Hitler's ascendance to power in 1933, anti-Semitism increased in America.<sup>269</sup> Between 1933 and 1941, 100 new anti-Semitic organizations appeared, while only a handful had existed in America before that time.<sup>270</sup> For instance, the Silver Shirts and the German-American Bund appeared as Nazi franchises in America.<sup>271</sup> Moreover, Father Charles Coughlin

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<sup>269</sup> See, e.g., DINNERSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 107; SACHAR, *supra* note 83, at 450-58.

<sup>270</sup> See DINNERSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 112.

<sup>271</sup> See, e.g., DINNERSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 112; SACHAR, *supra* note 83, at 481.



started broadcasting anti-Semitic tirades from the radio waves in 1938.<sup>272</sup> America's entry into World War II boosted intolerance even more,<sup>273</sup> and by 1945, 58% of Americans believed that Jews had too much power.<sup>274</sup>

In response, American Jews emphasized the same individualistic and assimilative characteristics that had served them so well in the preceding decade. They stressed their Americanism, their patriotism, "their bravery, their athletic ability, [and] their 'all-rightness.'"<sup>275</sup> They also publicized their respect for American legal values and for civil liberties in particular. An AJC letter explains the efforts that the organization took to combat "anti-Jewish hostility" in the United States. It stated, "The fundamental appeal is to the basic principles of America, the ideals which the people of this country regard as precious, (Bill of Rights—freedom of speech, press and assembly, equity before the law)."<sup>276</sup>

The notion that civil liberties constituted the core of American ideals was an idea that was gaining wide support outside the Jewish community as well. Some Americans, especially intellectuals, tried to distinguish themselves from European Fascists by emphasizing tolerance and individual rights in the United States.<sup>277</sup> Moreover, the ACLU began to win First Amendment battles in the courts in the early 1930s, with apparent public approval.<sup>278</sup> And the labor movement in America, always a strong advocate of freedom of speech and assem-

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<sup>272</sup> See DINNERSSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 115.

<sup>273</sup> See DINNERSSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 131.

<sup>274</sup> See DINNERSSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 146.

<sup>275</sup> DINNERSSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 147-48.

<sup>276</sup> Letter from unknown AJC staffer to Jesse Steinhart 1 (Mar. 28, 1936) (on file with the American Jewish Committee archives, Chronological File, Jan.-June, 1936). As early as the mid-1920s, the Central Conference of American Rabbis, the umbrella organization of Reform rabbis, had advocated increased freedom of expression, condemning, "all interference, whether by private citizens or by officials with the exercise of freedom of speech, oral or written." MURPHY, *supra* note 211, at 32.

<sup>277</sup> See MURPHY, *supra* note 211, at 279-80; Geoffrey D. Berman, *A New Deal for Free Speech: Free Speech and the Labor Movement in the 1930s*, 80 VA. L. REV. 291, 292 n.8 (1994); Richard W. Steele, *The War on Intolerance: The Reformulation of American Nationalism, 1939-1941*, 9 J. OF AM. ETHNIC HIST. 9 (1989).

<sup>278</sup> WALKER, IN DEFENSE, *supra* note 186, at 90-92.

bly, gained increased power and respectability with the ascendance of Franklin Roosevelt and the New Deal.<sup>279</sup>

This growing popularity of freedom of expression in America, and the decision of American Jews to prove their patriotism by stressing their support for civil liberties, heavily influenced the way that Jews responded to the anti-Semitism and group libel of the age. Just as the decision of American Jews to pursue an individualistic conception of life during the 1920s made it impossible to rely on a defense of hate-speech based on group rights, the increasing popularity of civil liberties in general and of freedom of expression in particular during the 1930s made it difficult to rely on a defense of group libel laws based on individual rights.

Thus, when the AJC began to formulate a coherent group libel policy in 1935, as is discussed below, it considered three issues: whether group libel prosecutions would be prudential, whether they would be possible without statutory reform, and whether the Constitution would sanction such prosecutions, whatever the statutory authority.

First, the AJC questioned the advisability of group libel prosecutions. The organization noted that there was a "rising flood" of anti-Semitic literature in America.<sup>280</sup> But the AJC doubted that trials for group libel would remedy the problem because of difficulties such as the publicity that the defendants would be granted during their trials, the unpredictability and potential biases of juries, and the danger that defendants might be acquitted.<sup>281</sup> Indeed, by advocating group libel prosecutions or statutes, Jews opened themselves up to the charge that they held exactly the form of power that hatemongers accused them of holding.<sup>282</sup> The AJC was also leery because of the dubious legacy of group libel prosecutions in Germany preceding the Nazi takeover. A memo on this topic stated, "[I]n most Jewish circles gradually the feeling arose that by suing the defamers almost more harm than good would be accom-

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<sup>279</sup> See Klarman, *supra* note 12, at 40-43. See generally Berman, *supra* note 277.

<sup>280</sup> Letter from Morris D. Waldman to friends (June, 1935) (on file with the American Jewish Committee archives, Chronological File, May-July, 1935).

<sup>281</sup> See *id.*

<sup>282</sup> See LEGAL RECOURSE AGAINST ANTI-JEWISH PROPAGANDA 4 (May 5, 1935) (on file with the American Jewish Committee archives, Chronological File, May-July, 1935).

plished for the Jewish cause; if, after all, the Jewish party eventually succeeded, such success, it was generally felt, was in the nature of a Pyrric victory."<sup>283</sup>

Second, it was not clear that existing statutes or laws would support group libel prosecutions. Another AJC memo suggested that existing criminal libel statutes might suffice to prosecute group libelers.<sup>284</sup> Even so, the memo noted that "there is no reported case in New York directly passing upon the liability for defamation of a class under these sections of the Penal law,"<sup>285</sup> a fact which should not be minimized in any discussion of the wisdom of proceeding under these statutes. It also noted that the number of group libel prosecutions based on the law of criminal libel would be limited because of the requirement of linking such prosecutions to a breach of the peace.<sup>286</sup> And, in all defamation prosecutions in New York at the time, the defendant would be acquitted if the defamatory statement were true or if there were reasonable grounds for such a belief.<sup>287</sup>

Third, the AJC was acutely aware of constitutional concerns. The organization insisted that "no action should be taken which could in any way jeopardize, or be interpreted as jeopardizing, the fundamental guarantees of freedom of speech and of the press."<sup>288</sup> This consideration made it especially difficult to advocate new legislation that would prohibit group libel for several reasons. First, the Supreme Court had ruled in 1931 in *Near v. Minnesota*<sup>289</sup> that the Constitution would not allow local authorities to shut down a publication that charged them with corruption. Therefore, the AJC was concerned that any new legislation that banned group libel would constitute a

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<sup>283</sup> Memo from Dr. Derenberg to Mr. Waldman, in ANALYSIS OF GROUP LIBEL IN GERMANY 4 (May 3, 1935) (on file with the American Jewish Committee archives, Chronological Files, May-July, 1935).

<sup>284</sup> See MEMORANDUM RE CRIMINAL RESPONSIBILITY FOR DEFAMATION OF THE JEWS (June 1, 1935), at 6 (on file with the American Jewish Committee Archives, Chronological File, May-July, 1935).

<sup>285</sup> *Id.*

<sup>286</sup> See *id.* at 2.

<sup>287</sup> See *id.* at 6; see also *People v. Sherlock*, 56 A.D. 422 (1st Dep't 1900), *aff'd* 166 N.Y. 180, 68 N.Y.S. 74 (1901).

<sup>288</sup> Letter from Morris D. Waldman to friends (June, 1935) (on file with the American Jewish Committee archives, Chronological File, May-July, 1935).

<sup>289</sup> 283 U.S. 697 (1931).

prior restraint, and therefore would violate the rule articulated in *Near*.<sup>290</sup> Even laws that merely fined group libelers, and thus, avoided the prior restraint issue, ran into other First Amendment concerns. Furthermore, if the AJC advocated such laws, it risked handicapping the fight against anti-Semitism. As one AJC memo stated, "By alienating the support of liberals and the press, an attempt to secure such [group libel] legislation may incur the opposition of just those elements whose assistance is most needed in combating anti-Jewish propaganda."<sup>291</sup>

Thus, by 1935, the AJC decided to oppose group libel legislation and prosecutions. Instead, the organization suggested that "it may be the part of wisdom to adopt other means of defending the civil rights of Jews," such as through educational programs.<sup>292</sup>

Despite the AJC's stance, there were still attempts to prosecute group libelers and to pass group libel laws. New Jersey passed a group libel law in 1935 that prohibited any written or spoken statement, "which in any way in any part thereof, incites, counsels, promotes, or advocates hatred, violence, or hostility against any group or groups of persons residing or being in this state, by reason of race, religion or manner of worship."<sup>293</sup> Similarly, Massachusetts passed a law in 1943, providing that "whoever publishes any false written or printed material with intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion shall be guilty of libel" and pay \$1,000 or spend a year in jail or both.<sup>294</sup> Indiana passed a similar law, and New York, Ohio, and Rhode Island all considered, but ultimately rejected, such legislation.<sup>295</sup> There were also at-

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<sup>290</sup> See LEGAL RECOURSE AGAINST ANTI-JEWISH PROPAGANDA, *supra* note 282, at 4.

<sup>291</sup> Letter from Morris D. Waldman to friends, *supra* note 288.

<sup>292</sup> Letter from Harry Schneiderman to Members of the Executive Committee 2 (Apr. 3, 1936) (on file with the American Jewish Committee archives, Chronological Files, Jan.-June 1936).

<sup>293</sup> See Martha Glaser, *The German American Bund in New Jersey*, 92 NEW JERSEY HIST. 33, 36-37 (1974) (quoting 1935 N.J. LAWS 151, 2(a)). The group libel law was apparently passed as part of a broader effort by state officials to crack down on the German American Bund. See *id.*

<sup>294</sup> MASS. GEN. LAWS c.272, § 98c (1943); 28 MASS. L. Q. 104 (1943) (quoting the BOSTON HERALD, May 28, 1943).

<sup>295</sup> See WALKER, HATE SPEECH, *supra* note 4, at 52, 83; LEGAL RECOURSE

tempts to pass federal laws that aimed to ban group defamation from the federal mails, dating back to 1935.<sup>296</sup>

The fate of those laws that did make it onto the books indicates that the AJC's policy to oppose such laws was well suited to the times. The Massachusetts law had a slow death; prosecutions were brought under it at least until the 1950s.<sup>297</sup> The New Jersey law met a more sudden end. In *New Jersey v. Klapprott*,<sup>298</sup> following arguments presented by the ACLU, the New Jersey Supreme Court reversed the first conviction secured under the law, deeming the statute violative of freedom of expression as guaranteed in the Federal Constitution and the New Jersey State Constitution.<sup>299</sup> Moreover, the New Jersey Supreme Court specifically noted that the spoken libel that Klapprott was charged with deserved more protection than written libels.<sup>300</sup> This sentiment would assume some significance when the United States Supreme Court addressed the issue of group libel.<sup>301</sup>

While the very existence of such statutes shows that not all American Jews agreed with the AJC's views about group libel,<sup>302</sup> one New York case, *People v. Edmonson*,<sup>303</sup> illustrates particularly well the deliberations within the Jewish community about the wisdom of supporting group libel laws in

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AGAINST ANTI-JEWISH PROPAGANDA, *supra* note 282, at 3 (May 7, 1935).

<sup>296</sup> See WALKER, HATE SPEECH, *supra* note 4, at 83-86; Riesman, *Group Libel*, *supra* note 2, at 733 n.27; Symposium, *NCRAC Legislative Information Bulletin*, *Federal Group Libel Legislation: Should Jews and Jewish Organizations Support or Oppose?* 1, 7 (June 10, 1949) (on file with the American Jewish Congress archives) [hereinafter *Symposium*].

Interestingly, attempts to have Congress investigate Nazi and fascist groups in America led to the creation of the House Special Committee on Un-American Activities ("HUAC") in 1938, which soon switched its main focus to Communists. See WALKER, HATE SPEECH, *supra* note 4, at 60. The HUAC eventually took on arguably anti-Semitic overtones in its hunts for Reds.

<sup>297</sup> See Paul F. Ferguson, *A Consideration of the Massachusetts Group Libel Law*, 32 B.U. L. REV. 414, 416-17 (1952).

<sup>298</sup> 22 A.2d 877 (N.J. 1941).

<sup>299</sup> See *id.* at 883.

<sup>300</sup> See *id.* at 880.

<sup>301</sup> See *Beauharnais v. Illinois*, 343 U.S. 250, 266 n.23 (1951). See also Glaser, *supra* note 293, at 45.

<sup>302</sup> The Massachusetts group libel law illustrates this point well. It was passed by the Massachusetts state legislature after a single rabbi lobbied for it. See 28 MASS. L. Q., *supra* note 294, at 104.

<sup>303</sup> 168 Misc. 141, 4 N.Y.S.2d 257 (N.Y.C. Gen. Sess. N.Y. County 1938).

the 1930s. On June 8, 1936, New York mayor Fiorello LaGuardia issued a warrant for the arrest of anti-Semitic pamphleteer Robert Edmondson.<sup>304</sup> The charge was criminal libel.<sup>305</sup> LaGuardia reaped praise from Jewish newspapers, New York Jewish clubs, and American Jewish Congress President Stephen S. Wise, who criticized the AJC's stance against such prosecutions.<sup>306</sup> Wise wrote to LaGuardia, "[T]he sh-sh Jews who, instead of rejoicing over what you have done, are chiefly fearful lest, as they put it, Edmondson has his day in court—as if he had not had it already, through the publication of millions of pamphlets!"<sup>307</sup>

Yet before the *Edmondson* case came to trial, the American Jewish Congress changed its mind, and filed a brief, along with the AJC and several other Jewish groups, opposing the prosecution. It is unclear why the American Jewish Congress changed its mind. Perhaps the sheer amount of time that it took to prosecute the *Edmondson* case convinced it that group libel trials would be arduous, and therefore undesirable. Or, maybe the American Jewish Congress merely decided that the *Edmondson* case was inappropriate as a test case. In any event, the brief questioned "whether the cause of religious liberty and tolerance will be advanced by this particular prosecution" and stated that the organizations "are convinced that the true and effective reply to the propaganda of bigots lies not in the invocation of criminal libel laws but in a campaign of education fostered by all groups."<sup>308</sup> The judge ultimately ruled in favor of Edmondson, stating, "We must suffer the demagogue and the charlatan, in order to make certain that we do not limit or restrain the honest commentator on public

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<sup>304</sup> See Dov Fisch, *The Libel Trial of Robert Edward Edmondson*, 71 AM. JEWISH HIST. 79, 89 (1981).

<sup>305</sup> See *Edmondson*, 168 Misc. at 142, 4 N.Y.S.2d at 258.

<sup>306</sup> See Fisch, *supra* note 304 at 91-93. The American Jewish Congress that Wise headed was the organization's second manifestation. After the Versailles Treaty following World War I was ratified, the original Congress, mentioned in Part II, was disbanded. The new one was formed in 1922. See SACHAR, *supra* note 83, at 410.

<sup>307</sup> Fisch, *supra* note 304, at 93.

<sup>308</sup> Brief for the American Jewish Committee on Religious Rights and Minorities, The American Jewish Committee, The American Jewish Congress, and the Human Relations Committee of the National Council of Women at 2, 5, *Edmondson* 168 Misc. 141, 4 N.Y.S.2d 257 (N.Y.C. Gen. Sess. N.Y. County 1938) (on file with the American Jewish Committee archives, Legal Briefs, 1938).

affairs.<sup>309</sup> While the American Jewish Congress later reaffirmed its support for group libel laws,<sup>310</sup> it is significant that its dedication to the cause wavered during an actual prosecution.

The issue of group libel prosecutions vexed not only the Jewish community in America but also legal scholars. Between 1934 and 1954, numerous law review articles addressed the issue; they debated both the advisability and constitutionality of group libel statutes, and even proposed model statutes.<sup>311</sup> One of the most influential articles was David Riesman's 1942 article, *Democracy and Defamation: Control of Group Libel*.<sup>312</sup> Since it is generally acknowledged as the best defense of group libel statutes,<sup>313</sup> it deserves a closer examination.<sup>314</sup>

Riesman devoted much of the article to tracing the history of group libel and describing contemporary group libel law in America and Europe. Yet the importance of his work is not the

<sup>309</sup> *Edmondson*, 168 Misc. at 154, 4 N.Y.S.2d at 268.

<sup>310</sup> See *infra* notes 334-339 and accompanying text.

<sup>311</sup> See, e.g., Nathan D. Perlman & Morris Floscowe, *False Defamatory and Anti-Racial and Anti-Religious Propaganda and the Use of the Mails*, 4 LAW. GUILD REV. 13 (1944); Tanenhaus, *supra* note 2; Irving Wilner, *The Civil Liability Aspects of Defamation Directed Against A Collectivity*, 90 U. PA. L. REV. 414 (1942); *Abortive Efforts*, *supra* note 6; Note, *Constitutional Law: Curtailment of Speech Inciting to Race Hatred and the Protection of Minorities*, 42 COLUM. L. REV. 857 (1942); Note, *Freedom of Speech and Group Libel Statutes*, 1 BILL OF RIGHTS REV. 211 (1941) [hereinafter *Freedom of Speech*]; *Liability for Defamation*, *supra* note 6; *Statutory Prohibition*, *supra* note 6 (including proposed model group libel statute). The American Jewish Congress printed a bibliography which cites fifty such articles. See CLSA REPORTS, A SELECTED BIBLIOGRAPHY ON GROUP LIBEL (June 16, 1948) (on file with the American Jewish Congress archives). The ACLU also printed a defense of its decision to oppose group libel statutes. ACLU, *SHALL WE DEFEND FREE SPEECH FOR NAZIS IN AMERICA?* (1934).

<sup>312</sup> Riesman, *Group Libel*, *supra* note 2. The article was part of a trilogy of articles. The other two are Riesman, *Democracy and Defamation: Fair Game and Fair Comment I*, 42 COLUM. L. REV. 1085 (1942) [hereinafter *Riesman, Fair Game I*]; Riesman, *Democracy and Defamation: Fair Game and Fair Comment II*, 42 COLUM. L. REV. 1282 (1942) [Riesman, *Fair Game II*]. They dealt with political defamation directed against individuals.

<sup>313</sup> See WALKER, *HATE SPEECH*, *supra* note 4, at 79 ("The most important statement in support of restricting offensive racial and religious speech was a three-part series of articles by David Riesman, in 1942. Fifty years later these articles are still regularly cited as the principal authority on the subject.").

<sup>314</sup> See WALKER, *HATE SPEECH*, *supra* note 4, at 79-83. Walker suggests that Riesman's series is important mainly because it recognizes the importance of mass communication to changing public opinion in modern society, and the power of sociology to resolve group libel questions by examining the social context of any given case. See WALKER, *HATE SPEECH*, *supra* note 4, at 79-83.

historical examination, but rather the reasons he articulates for analyzing the topic in the first place. He argued that group libel statutes are necessary to protect democracy from fascist influences. While he recognized that Nazis used the law of defamation to help seize and maintain power,<sup>315</sup> he claimed that "[t]here is no inherent reason why it cannot be a weapon for democracy."<sup>316</sup> Yet his conception of democracy is peculiar.

For Riesman, democracy depended on the primacy of groups within a nation. "In the political as in the economic struggle," he argued, "modern democracy operates through the interplay of group activities, and it is through participation in groups that persons contribute to the social welfare and develop their individual capacities."<sup>317</sup> Therefore, according to Riesman, America needed to protect its groups in order to preserve democracy. As he stated, "[D]efamatory attacks on groups are attacks both on the pluralistic forces which make up a democratic society and derivatively on the individual members whose own status derives from their group affiliations."<sup>318</sup>

Yet this conception of a democracy based on group rights contradicted fundamental assumptions of American democracy. Indeed, Riesman recognized that his views did not jibe with those held generally, and he confessed, "[T]he traditions of individualism are more powerful in the United States than elsewhere."<sup>319</sup> This individualistic tradition has important consequences:

[D]efamatory attacks upon social groups are pretty much outside the scope of existing law [in America], and the discovery of an adequate defense for groups must cope not only with many technical obstacles but with the customary refusal of American law to appreciate the role of groups in the social process . . . . I am inclined, however, to suspect that it is the American heritage of middle-class individualistic liberalism, rather than these technical difficulties, which has so far impeded our creation of a vigorous public policy for the handling of group libels.<sup>320</sup>

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<sup>315</sup> See Riesman, *Group Libel*, *supra* note 2, at 728-30.

<sup>316</sup> Riesman, *Fair Game II*, *supra* note 312, at 1318.

<sup>317</sup> Riesman, *Group Libel*, *supra* note 2, at 731.

<sup>318</sup> Riesman, *Group Libel*, *supra* note 2, at 731.

<sup>319</sup> Riesman, *Group Libel*, *supra* note 2, at 730.

<sup>320</sup> Riesman, *Group Libel*, *supra* note 2, at 730-31, 734.



Riesman noted that American law had overcome technical obstacles to group libel prosecutions in certain instances, such as with corporations, partnerships, and labor unions.<sup>321</sup> Yet, "[w]here we are dealing with groups at large . . . there are no such handles for the law."<sup>322</sup>

Riesman concluded his article by addressing possible conflicts between increased prohibition of group libel and freedom of expression. He noted that the conflict may not be so great because the constitutional right only covered "fair comment," which might be accommodated by insisting that truth operate as a defense to any group libel prosecution.<sup>323</sup> But his main argument was not that the United States Constitution, as construed in 1942, could support group libel prosecutions. Rather, he argued that the circumstances of the day justified a reinterpretation of the Constitution so as to allow such prosecutions. He stated:

In the more or less democratic lands, however, the threat of fascism and the chief dangers to freedom of discussion do not spring from the "state," but from "private" fascist groups in the community . . . . In this state of affairs, it is no longer tenable to continue a negative policy of protection *from* the state; such a policy, in concrete situations, plays directly into the hands of the groups whom supporters of democracy need most to fear.<sup>324</sup>

Thus, Riesman articulated a bold advocacy of group libel. In his view, the American government had a duty to protect its constituent groups to uphold democracy. If that meant reconceptualizing American society to diminish the role of the individual and instead to grant primacy to social groups, so be it. With that social change done, any legal problems would take care of themselves.

There are two significant points to be drawn from Riesman's work. First, Riesman's vision of democracy exactly parallels Horace Kallen's vision of America—a vision based on groups formally recognized by the government. Riesman's defense of group libel laws, as the above quotation demonstrates, flows directly from this earlier group rights conception of

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<sup>321</sup> See Riesman, *Group Libel*, *supra* note 2, at 756-57, 761-63.

<sup>322</sup> Riesman, *Group Libel*, *supra* note 2, at 763.

<sup>323</sup> See Riesman, *Group Libel*, *supra* note 2, at 777-78.

<sup>324</sup> Riesman, *Group Libel*, *supra* note 2, at 779, 780.

American life. Second, and equally striking, is how little support existed by the 1940s for Riesman's group rights based conception of society.

Kallen's view of America had diminished by the end of the 1920s. At that time, American Jews had essentially pursued an individualistic conception of life in America and limited their group affiliations to voluntary associations. Thus, as his article explicitly recognized, Riesman's vision contradicted the social landscape of American life in the 1940s. Therefore, anyone who wished to use Riesman's reasoning to support stronger group libel laws might be forced into the position of advocating a fundamental reorganization of American society. And neither Americans in general nor American Jews in particular seemed inclined to undertake such a pursuit at so late a date. Indeed, as has been discussed earlier in this Article, American Jews decided to combat the rising anti-Semitism in America by advocating individual rights even more strongly than they had before.<sup>325</sup>

Also, advocacy of group libel laws, at least at an abstract level, did not need to be linked to group rights.<sup>326</sup> Instead, advocacy could be founded on individual rights.<sup>327</sup> But, under such a justification of group libel, the right of an individual to be judged free of group associations would be possible only by curtailing another individual's ability to speak freely. Thus, the increased popularity of freedom of expression in the 1930s<sup>328</sup> made it impossible to rely on the individualistic conception of group libel. Therefore, by the end of World War II, neither the individualistic nor the group rights conception of group libel laws seemed acceptable.

The law review articles that tried to defend group libel statutes quickly found themselves caught in the conundrum of reconciling group libel statutes with America's individualism and preference for freedom of expression. One of the defenses proffered tried to skirt the problem by the now-familiar method of linking group libel to breach of the peace.<sup>329</sup> Another defense tried to limit group libel laws to material circulated

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<sup>325</sup> See *supra* Parts III, VI.

<sup>326</sup> See *supra* Introduction, Part III.

<sup>327</sup> See *supra* Introduction, Part III.

<sup>328</sup> See *supra* notes 277-279 and accompanying text.

<sup>329</sup> See *Freedom of Speech*, *supra* note 311, at 224-25.

through the federal mails, arguing that because Congress might regulate materials carried in the mails, it should be free to use that power to filter out defamatory material.<sup>330</sup> These two approaches faced the severe limitation that the bulk of instances of group libel did not cause an immediate breach of the peace and/or did not circulate through the mails.

The defense that attacked the legal obstacles to group libel most directly was a model group libel statute published in a 1947 *Columbia Law Review* article, *Statutory Prohibition of Group Defamation*.<sup>331</sup> However, that defense was also lacking. Specifically, the model statute had three flaws: it allowed truth as a defense to libel (though it eliminated reasonable belief in the truth of the statement as a defense), it required the plaintiff or prosecutor to post a bond with the court to cover court costs if the defendant prevailed, and it provided only a retraction of the defamatory statement and an injunction on future defamatory statements as a remedy.<sup>332</sup> Therefore, even a remote chance that the defendant might prove the objective truth of his statement might be enough to deter prosecutions, since such an outcome might lend increased legitimacy to the statement. Moreover, the proposed sanction was relatively minor.

Thus, those articles purported to manipulate legal technicalities to reconcile group libel statutes with freedom of expression. But they ignored the underlying problems with group libel laws: any such statute could only be justified by relying on the group rights based conception of democracy, which was inconceivable to most Americans by the end of World War II, or, alternately, by relying on an individual rights based conception, which violated the right to free expression that was widely viewed as an almost sacred right. Because those articles' suggestions for group libel statutes avoided such vexing problems, it is not surprising that they were so weakly worded.

Aside from such flimsy defenses of group libel statutes, the only other option for how to deal with group libel available to American Jewish groups was to fully abandon efforts to prohibit group libel. This is largely what occurred at a 1949 symposium.

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<sup>330</sup> See Perlman & Ploscowe, *supra* note 311, at 20-23.

<sup>331</sup> See generally *Statutory Prohibition*, *supra* note 6.

<sup>332</sup> See *Statutory Prohibition*, *supra* note 6, at 608-12.

sium of Jewish groups. While the AJC decided to oppose group libel laws as early as 1935, other Jewish organizations took longer to develop a set policy about the topic. At the symposium, four major Jewish defense organizations expressed their views about group libel in response to a bill offered in Congress that would ban defamatory material from the mails and from interstate commerce.<sup>333</sup>

The American Jewish Congress supported the bill, while the AJC, the ADL, and the Jewish Labor Committee opposed the bill.<sup>334</sup> The American Jewish Congress drafted the bill<sup>335</sup> and included defenses of truth of the statement, reasonable belief in the truth of the statement, or the absence of an intent to create ill will.<sup>336</sup> In support of the bill, the American Jewish Congress argued that the Supreme Court had the power to punish libel and that these defenses guarded the bill against charges that it infringed upon freedom of speech.<sup>337</sup> It also argued that such a law was necessary because "racial defamation cannot be overcome merely by counter-propaganda."<sup>338</sup> Finally, it argued that lax enforcement of defamation and the publicity given to group defamers at their trials should not impede efforts to ban group libel.<sup>339</sup>

However, the AJC saw the law as severely limited because it would only affect group libel that passed through the mails.<sup>340</sup> But the AJC also opposed statutes with wider jurisdiction because of the role juries would play in the trial.<sup>341</sup> It feared that juries would acquit group libelers because Jews would be excluded from sitting on juries in group libel cases, because jurors would be sympathetic to free expression, and because jurors might harbor latent anti-Semitic feelings.<sup>342</sup> It

<sup>333</sup> See *Symposium, supra* note 296, at 1.

<sup>334</sup> See generally *Symposium, supra* note 296.

<sup>335</sup> The American Jewish Congress also wrote model group libel bills for states and municipalities. See, e.g., CLSA REPORTS, MODEL STATE GROUP LIBEL (Mar. 2, 1949); CLSA REPORTS, MODEL RACE HATRED ORDINANCE FOR MUNICIPALITIES (Nov. 26, 1947); CLSA REPORTS, PROPOSED REVISION OF INDIANA HATE BILL (Jan. 31, 1947) (all on file with the American Jewish Congress archives).

<sup>336</sup> See *Symposium, supra* note 296, at 1-2.

<sup>337</sup> See *Symposium, supra* note 296, at 2.

<sup>338</sup> *Symposium, supra* note 296, at 3.

<sup>339</sup> See *Symposium, supra* note 296, at 1-3.

<sup>340</sup> See *Symposium, supra* note 296, at 4.

<sup>341</sup> See *Symposium, supra* note 296, at 4.

<sup>342</sup> See *Symposium, supra* note 296, at 4.

also noted obstacles inherent in bringing even individual libel suits. Therefore, rather than support group libel statutes, the AJC recommended treating anti-Semitic outbursts with silence.<sup>343</sup>

The ADL expressed similar sentiments. However, it also feared "boomerang effects," whereby such laws might be used to censor the very groups they were designed to protect.<sup>344</sup> The ADL stated that it was unclear if "an effective statute can be drawn which copes with the evil of group libel without, at the same time, so threatening freedom of bona fide discussion of public questions as to react to the prejudice of the very minority groups which the statute is supposedly designed to protect."<sup>345</sup>

Also, the ADL noted that some group libel statutes, especially those making truth a defense to the libel charge, would actually cause further harm to the Jews by "turn[ing] the courtroom into a forum for discussion of such issues as whether or not Jews are evil."<sup>346</sup> Furthermore, the ADL noted that any group libel statute would necessarily "constitute a threat to legitimate discussion of public questions," and that efforts would be better spent combating anti-Semitism privately.<sup>347</sup> Moreover, the ADL was discouraged by the constitutional barriers that such statutes encountered.<sup>348</sup> Nonetheless, by 1949 anti-Semitism was at a "low ebb" in America.<sup>349</sup> Thus, in such a context, group libel statutes would cause more harm than good by impeding free expression.<sup>350</sup>

Significantly, even the American Jewish Congress, while defending the bill, still conceded the importance of freedom of expression. It stated that "[o]ur society holds dear the free market in ideas."<sup>351</sup> This recognition, if not acceptance, of First Amendment values also led the American Jewish Congress to oppose other federal group laws that were too restric-

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<sup>343</sup> See *Symposium, supra* note 296, at 3-5.

<sup>344</sup> See *Symposium, supra* note 296, at 6.

<sup>345</sup> *Symposium, supra* note 296, at 5.

<sup>346</sup> *Symposium, supra* note 296, at 6.

<sup>347</sup> *Symposium, supra* note 296, at 5.

<sup>348</sup> See *Symposium, supra* note 296, at 5-6.

<sup>349</sup> See *Symposium, supra* note 296, at 5-6.

<sup>350</sup> See *Symposium, supra* note 296, at 5-6.

<sup>351</sup> *Symposium, supra* note 296, at 2.

tive of freedom of speech.<sup>352</sup> The obstacles that freedom of expression created for group libel statutes were perhaps best summarized by the Jewish Labor Committee at the symposium. It stated:

For many years those active in the fight for civil liberties have sought in vain to draft legislation which would punish racial bigots, without at the same time opening the door for widespread attacks upon justifiable comment and upon civil liberties. The dilemma which has been caused is well illustrated by the proposed Federal bill drafted by the American Jewish Congress. In its anxiety to safeguard civil liberties, it is full of so many qualifications and limitations that, in our judgement, it cannot bring about the punishment of those who with professional skill spread racial prejudice and racial hatred. Yet, in all probability, fewer limitations could not be drafted without leaving a threat to civil liberties.<sup>353</sup>

The symposium is significant because it seemed to signal the end of group libel as a concern for American Jews, and for Americans generally. By 1949, the year of the symposium, the ascendance of individualism in American society coupled with the increasing importance of freedom of expression made defending group libel laws virtually impossible. Riesman noted that the "American heritage of middle-class individualistic liberalism"<sup>354</sup> stood in the way of such laws. While American Jews were extremely middle class and individualistic even by the time that Riesman wrote his article in 1942, those tendencies only increased as America moved on into the 1950s.<sup>355</sup> They had no reason to re-evaluate the American creed that had advanced them so far.

The response of American Jews to World War II illustrates how far American Jews had come in internalizing the primacy of individual rights.<sup>356</sup> Indeed, Riesman stated that the greatest threat to American democracy did "not spring from the 'state,' but from 'private' fascist groups."<sup>357</sup> However, to American Jews in the 1950s, this type of statement must have

<sup>352</sup> See *Symposium*, *supra* note 296, at 7; Phil Baum, *Good—And Bad—Group Libel Bills*, 16 CONGRESS WEEKLY 9 (1949) (on file with the American Jewish Congress archives).

<sup>353</sup> *Symposium*, *supra* note 296, at 7.

<sup>354</sup> Riesman, *Group Libel*, *supra* note 2, at 734.

<sup>355</sup> See SACHAR, *supra* note 83, at 646-57.

<sup>356</sup> See DINNERSSTEIN, *ANTI-SEMITISM*, *supra* note 158, at 150-74.

<sup>357</sup> Riesman, *Group Libel*, *supra* note 2, at 779.

seemed wrong. Not only did anti-Semitism and fascism in America decline dramatically after World War II, but the rise of the Cold War and McCarthyism also made the state seem like a very real threat to democracy. Jews were wary of Red-baiting and government witch hunts, with their possibly anti-Semitic overtones, especially in the aftermath of the Rosenberg espionage trials.<sup>358</sup> The AJC stated in its 1951 annual report that one Cold War bill, "if enacted into law . . . could be used to prosecute unjustly liberals and liberal organizations and could thus deal a great and unnecessary blow to freedom of speech."<sup>359</sup> Even sections of the federal government were wary of the growing suspicion of Communists in America. The United States President's Committee on Civil Rights, in its 1947 report to President Truman entitled, *To Secure These Rights*,<sup>360</sup> noted that "public excitement about Communism has gone far beyond the dictates of . . . good 'judgement' and 'calmness.' A state of near hysteria now threatens to inhibit the freedoms of genuine democrats."<sup>361</sup> Significantly, the report also opposed the enactment of group libel statutes, claiming, "Our purpose is not to constrict anyone's freedom to speak; it is rather to enable the people better to judge the true motives of those who try to sway them."<sup>362</sup> Thus, it seemed that the group libel debate had concluded, with the opponents of the statutes having won. However, the debate was not quite over, as is discussed next.

## VII. *BEAUHARNAIS V. ILLINOIS*

In 1952, the Supreme Court decided *Beauharnais v. Illinois*,<sup>363</sup> a 5-4 opinion written by Justice Frankfurter that upheld the constitutionality of an Illinois group libel statute. This

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<sup>358</sup> See SACHAR, *supra* note 83, at 623-41.

<sup>359</sup> THE AMERICAN JEWISH COMMITTEE, REPORT OF THE FORTY-FOURTH ANNUAL MEETING 37 (1951) (on file with the American Jewish Committee archives).

<sup>360</sup> UNITED STATES PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, *TO SECURE THESE RIGHTS* 49 (1947).

<sup>361</sup> *Id.*

<sup>362</sup> *Id.* at 51-53. Instead of advocating group libel statutes, the report suggested laws that required the identity of disseminators of any material to be widely distributed. See *id.*

<sup>363</sup> 343 U.S. 250 (1952).

was the first time that the Supreme Court—or at least the modern Court—had addressed group libel statutes.

The decision was a surprise for many reasons, particularly because it was decided against a backdrop of Supreme Court decisions that had seemed increasingly sympathetic to freedom of expression. For instance, in 1925 the Court invalidated a group libel statute on freedom of expression grounds in *Gitlow v. New York*,<sup>364</sup> and it reaffirmed its objections to prior restraints in 1931 in *Near v. Minnesota*.<sup>365</sup> Moreover, in 1937, the Court expanded First Amendment protection to unpopular political speech,<sup>366</sup> and in 1939 barred over-inclusive state regulation of leafleting in public places.<sup>367</sup> By comparison, the Court was less consistent in upholding freedom of expression in cases that might be read to implicate group libel more directly.<sup>368</sup>

For example, in *Cantwell v. Connecticut*,<sup>369</sup> the Court ruled that a Jehovah's Witness who attacked Catholicism by playing a record on a public street could not be punished for tending to commit a breach of the peace under the common law.<sup>370</sup> However, the Court left open two possibilities for regulating such speech: if a state passed a statute narrowly drawn to address conduct that would have a tendency to create a breach of the peace, or if an actual breach of the peace, defined

<sup>364</sup> 268 U.S. 652 (1925).

<sup>365</sup> 283 U.S. 697 (1931).

<sup>366</sup> See *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937).

<sup>367</sup> See *Schneider v. Irvington*, 308 U.S. 147 (1939).

<sup>368</sup> Many of the Court's First Amendment decisions were decided after 1938, the year *United States v. Carolene Products*, 304 U.S. 144 (1938), was decided, with its seminal footnote number four. Yet the theories contained in the footnote do not seem to offer a clear answer to the problem of group libel. Indeed, two of the footnote's dictates appear to clash on the issue of group libel. The first paragraph of the footnote claims that courts should step up judicial scrutiny "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments." *Id.* at 152. This would seem to mandate special protection for freedom of expression. But the third paragraph of the footnote states that similar increased scrutiny may be necessary to protect "discrete and insular minorities." *Id.* at 153. Drawn out to its logical conclusion, the third paragraph thus suggests that protecting defamed groups may be paramount. In any case, the Supreme Court did not directly address the footnote, or its potential contradictions, in its treatment of group libel cases.

<sup>369</sup> 310 U.S. 296 (1939).

<sup>370</sup> See *id.* at 300-01, 309-10.



not only as violent acts but also as "words likely to produce violence in others,"<sup>371</sup> had actually occurred. Thus, while the case was decided on the basis of free exercise of religion, it also had direct implications for freedom of expression.

However, in *Chaplinsky v. New Hampshire*,<sup>372</sup> the Court was less sympathetic towards a person who called a police officer a "God-damned racketeer" and "a damned Fascist." The Court unanimously sustained the defendant's conviction, stating that restricting fighting words, the lewd, the obscene, the profane, and the libelous has "never been thought to raise any constitutional problems."<sup>373</sup>

The Court seemed to back off of such a restrictive interpretation of speech in *Terminiello v. Chicago*.<sup>374</sup> There, the Court reversed the conviction of Arthur Terminiello,<sup>375</sup> who was arrested for breach of the peace, following a speech he made in which he "criticized various political and racial groups whose activities he denounced as inimical to the nation's welfare."<sup>376</sup> The majority opinion by Justice Douglas recognized that speech may have "unsettling effects."<sup>377</sup> Nonetheless, he noted that speech is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."<sup>378</sup> But, the *Terminiello* case did not decide the issue of whether Terminiello's speech actually provoked such a clear and present danger; instead, the Court held in favor of the defendant because a jury instruction gave too broad a definition of what constituted a breach of the peace.<sup>379</sup>

These cases convinced commentators that the Court would grant great deference to the First Amendment at the expense of libel and group libel laws. Commentators believed this because, while *Chaplinsky* and *Cantwell* at least theoretically

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<sup>371</sup> *Id.* at 307-08.

<sup>372</sup> 315 U.S. 568 (1942).

<sup>373</sup> *Id.* at 571-72.

<sup>374</sup> 337 U.S. 1 (1948).

<sup>375</sup> *See id.* at 5.

<sup>376</sup> *Id.* at 3.

<sup>377</sup> *Id.* at 2.

<sup>378</sup> *Id.* at 3, 4.

<sup>379</sup> *See Terminiello*, 337 U.S. at 4-5.

removed libel laws from the reach of the First Amendment, *Terminiello* showed that the Court, in practice, would look unfavorably on restrictions of a wide variety of speech. As was noted in the Introduction to this Article, one commentator decried that "in the eyes of the law the Jews do not exist as a group . . . [T]here is no effective remedy against their defamation as a group."<sup>380</sup> Similarly, the American Jewish Congress issued a memo in response to the *Terminiello* decision that illustrates how the organization interpreted the Supreme Court's evolving jurisprudence. The memo stated that "[t]he significance of the opinion, it is submitted, lies in the fact that the majority went to such unprecedented lengths to avoid affirming *Terminiello*'s conviction."<sup>381</sup> The AJC expressed similar predictions about the fate of group libel laws. In 1949 it noted that "[t]he trend of American jurisprudence has been to restrict the law of criminal libel rather than to extend it."<sup>382</sup>

Indeed, after the Illinois Supreme Court sustained the conviction of the defendant in the *Beauharnais* case,<sup>383</sup> the AJC and the ADL lamented:

The decision . . . in this case adds another confused facet to the already confusing group of decisions involving the limits of freedom of speech and press recently handed down by the highest courts of the land. It is difficult to see how this can be distinguished on its facts from the decision of the United States Supreme Court in the *Terminiello* case.<sup>384</sup>

Considering the Supreme Court's jurisprudence, and the prevailing view amongst those interested in group libel laws that the laws were on increasingly shaky constitutional footing, the Court's affirmance of *Beauharnais*'s conviction was quite unexpected. The reasoning of both Justice Frankfurter's majority opinion and of the dissents shows that the central themes of

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<sup>380</sup> Konvitz, *supra* note 1, at 188.

<sup>381</sup> Will Maslow, CLSA REPORTS 4 (May 19, 1949) (on file with the American Jewish Congress archives).

<sup>382</sup> MEMORANDUM ON GROUP LIBEL (1949) (on file with the American Jewish Committee archives, Civil Rights Department: Joint memoranda and other mailings 1950-52).

<sup>383</sup> See *People v. Beauharnais*, 97 N.E.2d 343 (Ill. 1951).

<sup>384</sup> JOINT MEMORANDUM: THE AMERICAN JEWISH COMMITTEE AND THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH 2 (Mar. 21, 1951) (on file with the American Jewish Committee Archives, Civil Rights Department, Joint memoranda and other mailings, 1950-52).

this Article, namely, (1) the link between group libel and group rights and (2) the tension between having a strong First Amendment and strong group libel laws, were on the minds of the justices as they addressed the issue of group libel for the first time.

In the case, the defendant, *Beauharnais*, was fined \$200 for distributing a petition urging the mayor of Chicago to stop the encroachment of blacks into white neighborhoods.<sup>385</sup> The petition specifically claimed, "If persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns, and marijuana of the negro surely will."<sup>386</sup>

*Beauharnais* was charged under a statute dating back to 1917, which provided:

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed, or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots . . .<sup>387</sup>

It is first important to note certain characteristics about the law itself. As the *Beauharnais* opinion illustrates, the law was passed during a lull between race riots in St. Louis.<sup>388</sup> While it is unclear if this specific bill was a result of direct lobbying by the ADL, it certainly bears the marks of the ADL's stance towards group libel. That is, the law's emphasis on defamation in movies and theaters echoes back to the ADL's concern in the late 1910s with anti-Semitic depictions of Jews in such venues.<sup>389</sup> Indeed, the ADL highlights that a model bill, which it drafted to combat discriminatory hotel advertisements, was adopted in Illinois in 1917.<sup>390</sup> Regardless of whether or not the law resulted directly from the ADL's efforts, it surely resembles bills for which the ADL lobbied, and

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<sup>385</sup> See *Beauharnais*, 343 U.S. at 251.

<sup>386</sup> *Id.* at 252.

<sup>387</sup> ILL. REV. STAT. 1949, ch. 38, § 471; see also *Beauharnais*, 343 U.S. at 259.

<sup>388</sup> See *Beauharnais*, 343 U.S. at 259-61.

<sup>389</sup> See *supra* Part III.

<sup>390</sup> See B'NAI B'RITH MANUAL, *supra* note 129, at 360-67.

it evidences the link between the *Beauharnais* case and the ADL's first attempts to prohibit group libel.

Frankfurter's opinion in *Beauharnais*<sup>391</sup> first noted that the Illinois group libel statute is essentially a variant of a criminal libel law; moreover, the statute essentially "paraphrases the traditional justification for punishing libels criminally, namely, their 'tendency to cause breach of the peace.'"<sup>392</sup> Thus, Frankfurter clarified that group libel, by its historical link to criminal libel, has a well-established justification—preserving the peace. However, in a footnote, Frankfurter stated that with group libel statutes, the "gravamen of the offense" is also injury to reputation of the defamed group.<sup>393</sup> Then, Frankfurter cited to *Cantwell* and *Chaplinsky* for the proposition that certain narrow categories of words, "the lewd and obscene, the profane, the libelous and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" deserve no First Amendment protection.<sup>394</sup> Frankfurter concluded this part of the opinion by completing the syllogism he had drawn up: (1) group libel is a form of libel; (2) libel is not protected by the First Amendment; (3) therefore, group libel is not protected by the First Amendment.

Frankfurter then analyzed the history that had prompted Illinois to pass the statute. He stated that Illinois had a history of racial strife, and that the statute was passed in a lull between two race riots in St. Louis, and two years prior to a week-long race riot in Chicago. Moreover, he recognized that, given the recurrent problem of racial strife, even if the specific group libel legislation at issue "will not help matters" it would be "out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power."<sup>395</sup> Essentially, in modern constitutional parlance, Frank-

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<sup>391</sup> Frankfurter was joined by Chief Justice Vinson, and Justices Burton, Clark, and Minton. Separate dissents, discussed in more depth later in this Part, were written by Justices Black, Douglas, Reed, and Jackson.

<sup>392</sup> *Beauharnais*, 343 U.S. at 254 (quoting *People v. Speilman*, 149 N.E. 466, 469 (Ill. 1925)).

<sup>393</sup> *Id.* at 254 n.3.

<sup>394</sup> *Id.* at 256-57.

<sup>395</sup> *Id.* at 262.

furter reasoned that there was a rational basis between the problem, racial strife and breach of the peace, and the state's remedy, passage of a statute permitting prosecution of group libel. Nothing more was required in light of Frankfurter's conclusion that the First Amendment did not protect group libel, and therefore, there was "explicit limitation on the state's power"<sup>396</sup> posed by the Constitution in this instance.

If Frankfurter's opinion had ended there, the *Beauharnais* holding, but not its reasoning, still would have been surprising. The case would merely represent a straightforward, if somewhat literal, application of the theories that the Court had previously established in *Cantwell* and *Chaplinsky*, which exempted certain types of speech, including libel, from First Amendment protections. Frankfurter's finding of a sufficient rational basis between race riots and group libel laws, again, was not so surprising.

However, the opinion continued, and it indicates that more than the power of a logical syllogism led Frankfurter to write the decision as he did. Although the following language is included in the part of the opinion that discussed the state legislature's possible rationales for passing the statute, it demonstrates that Frankfurter was aware of, and arguably approving of, the various justifications for group libel that have been discussed in this Article.

Frankfurter discussed the rights of the individual, stating that "[s]uch group-protection on behalf of the individual may, for all we know, be a need not confined to the part that a trade union plays in effectuating rights abstractly recognized as belonging to its members."<sup>397</sup> This, of course, resonates of the individual-based justification for group libel statutes, namely, that group libel violates the integrity of the individual by attributing to him the characteristics of his group, regardless of his own characteristics. This conception of group libel statutes seemed viable enough when viewed in isolation, but it became vulnerable in the face of an increasingly robust First Amendment, which created a tension between individual rights—the right to speak versus the right to be treated as an individual. Frankfurter was free to use the individual rights basis for

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<sup>396</sup> *Id.*

<sup>397</sup> *Beauharnais*, 343 U.S. at 263.

group libel statutes because he eliminated the tension by eliminating the First Amendment issue. That is, by holding that group libel was outside the bounds of First Amendment protection, Frankfurter was free to rely on the individual rights justification.

However, Frankfurter did not rely solely on the individual rights justification of group libel statutes. Rather, he was also aware of the group rights justification of group libel statutes, and he relied to some degree on that justification. For example, he stated:

It is not within our competence to confirm or deny claims of social scientists as to the dependence of the individual on the position of his racial or religious group in the community. It would, however, be arrant dogmatism, quite outside the scope of our authority in passing on the powers of a State, for us to deny that . . . a man's job and his educational opportunities and the dignity accorded him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits.<sup>398</sup>

This language does not wholly abandon the rights of individuals. Significantly, however, the language also notes how the reputation of the individual may be inextricably intertwined with the reputation of the group. The *Beauharnais* opinion brings to the foreground the special justification of group libel statutes that Frankfurter had acknowledged previously in the opinion, that such statutes protect the reputation of the group itself. Additionally, by explicitly relying on that justification, the opinion's reasoning hearkens back to the reasoning used by Riesman to justify group libel statutes, and, through Riesman, to Kallen's group-based conception of democracy. Indeed, Frankfurter cited Riesman's group libel article in the opinion,<sup>399</sup> and Frankfurter's reference, in the above passage, to "claims of social scientists," is essentially a nod to Riesman.<sup>400</sup> It is true, of course, that Riesman's theories constitute just one of the threads that Frankfurter wove into the

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<sup>398</sup> *Id.* at 262-63.

<sup>399</sup> *See id.* at 261 n.16.

<sup>400</sup> It is striking to note that this explicit reference by Frankfurter to "claims of social scientists" predates by almost two years the Supreme Court's famous statement in *Brown v. Board of Education*, 347 U.S. 483, 494 & n.11 (1954), that the works of Kenneth Clark and other psychologists buttressed its holding in that case.

*Beauharnais* opinion. However, this neither lessens the significance of the Supreme Court's recognition that group libel laws are intricately related to group rights, nor diminishes the official protection of those groups by the state that the case grants.<sup>401</sup>

Nonetheless, in his conclusion, Frankfurter reverted to more traditional legal grounds: holding that the law contained sufficient procedural safeguards, especially regarding the truth as a defense; that the law was not overly vague; and that the clear and present danger test had no bearing on this case because group libel was not protected by the First Amendment. The very end of the opinion, however, contains a slight surprise, considering the firm defense of group libel statutes contained in the body of the opinion. The *Beauharnais* case prohibited only written group defamations. In a footnote to the opinion, Frankfurter distinguished this case from *New Jersey v. Klapprott*,<sup>402</sup> in which the New Jersey Supreme Court held that a statute prohibiting *spoken* group libel violated the First Amendment. The implication seems to be that group defamation, whatever its ill effects on individuals and groups, cannot be regulated if it is spoken, rather than written. This distinction serves as a reminder of the boundaries that the Supreme Court would not cross to combat group libel, even if it could see virtues in the statutes.

Aside from Frankfurter's majority opinion, two of the four dissents deserve special mention.<sup>403</sup> The first is Justice

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<sup>401</sup> Frankfurter's concern for groups as groups also evidenced itself during the conference where the justices discussed the *Beauharnais* case. According to Justice Douglas' notes, Frankfurter stated, "[T]his statute extends [the] law of libel to a group to protect its rights against those who would like to liquidate the group." Notes of Justice Douglas, Dec. 1, 1951 (on file with the United States Library of Congress, Papers of William O. Douglas (in file entitled "No.118(d)—*Beauharnais v. Illinois* O.T. 51 Conference, Certiorari & Misc. Memos")). Given his chilling use of the word "liquidate," it seems that Frankfurter, like Riesman in the articles Frankfurt relied on, was concerned not only with groups in general but also with the fate of the European Jews during World War II specifically. Apparently, Justice Jackson, who served as prosecutor at the Nuremberg trials and whose *Beauharnais* dissent supported group libel statutes in theory, also was thinking of the Holocaust. He wrote, "Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and persecute, even to extermination, its minorities." *Beauharnais*, 343 U.S. at 304 (Jackson, J., dissenting).

<sup>402</sup> 22 A.2d 811 (N.J. 1941).

<sup>403</sup> The other two dissents are of less interest for the purposes of this Article.

Black's dissent, joined by Justice Douglas, which focused on what Black viewed as a violation of *Beauharnais*' First Amendment rights, not just of freedom of speech, but of his right to petition the government.<sup>404</sup> Thus, Black, in contrast to Frankfurter, recognized a direct conflict between group libel laws and First Amendment protections. Specifically, Black wrote, "Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment."<sup>405</sup>

Even more significantly, in his own dissent, Justice Douglas showed similar concern with the tension between libel laws and First Amendment values. He criticized the majority opinion because, in his view, it "represents a philosophy at war with the First Amendment—a consitutional interpretation which puts free speech under the legislative thumb."<sup>406</sup> Yet Douglas seemed to worry about more than just upholding free-speech values to protect the integrity of the First Amendment—Douglas seemed specifically concerned with the fate of minorities under a regime of limited free speech. Indeed, he wrote, "Today a white man stands convicted for protesting in unseemly language against our decisions invalidating restrictive covenants. Tomorrow a Negro will be hailed before a court for denouncing lynch law . . ."<sup>407</sup> Douglas concluded his dissent by stating that the majority decision "is a warning to every minority that when the Consitution guarantees free speech it does not mean what it says."<sup>408</sup>

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Justice Reed, joined by Justice Douglas, objected to the majority decision on the grounds that the language of the statute was too vague. *See Beauharnais*, 343 U.S. at 281-83. Finally, Justice Jackson's dissent noted that he had no theoretical objection to group libel laws, but that, in the case at hand, insufficient procedural protections were provided to *Beauharnais*. *See id.* at 303-05. Interestingly, Justice Jackson, while not opposed to criminal libel laws, noted that with regard to group libel statutes, "No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow." *Id.* at 304. Thus, like Douglas, Jackson was aware of the potentially adverse effect group libel laws could have on minorities.

<sup>404</sup> *See Beauharnais*, 343 U.S. at 267.

<sup>405</sup> *Id.* at 272 (Black, J., dissenting).

<sup>406</sup> *Id.* at 287 (Douglas, J., dissenting).

<sup>407</sup> *Id.* at 286.

<sup>408</sup> *Id.* at 287. One of Justice Douglas' law clerks stated the point in similar terms in a memo that he wrote to the Justice prior to the motion for rehearing in



The difference between Douglas' and Frankfurter's approaches could not be more stark. Their opinions make clear that both were concerned about the treatment of minorities. Yet Frankfurter, like Riesman, focused on the importance of protecting the group itself from slander, while Douglas, like much of the American Jewish community, focused on the benefits of free speech that accrued to individual members of minority groups. Ultimately, Frankfurter won the day.<sup>409</sup>

However, despite the surprise surrounding the outcome of the *Beauharnais* case, and the reasoning that Frankfurter invoked in justifying the group libel statutes, the decision did not spark a renaissance of group libel statutes. In fact, the Illinois legislature struck its group libel statute from the books in 1961.<sup>410</sup> By partly grounding his theory in group rights, Frankfurter made use of a theory that Americans had never accepted in large numbers. Indeed, Frankfurter's acknowledgment of the legitimacy of group rights stands in stark contrast to the statement made by President Wilson, decades earlier, that assimilation was a requirement for American citizens. And by the 1950s, American Jews, who had been the strongest advocates of group libel laws, had long since decided to pursue an individualistic conception of life in America. Thus, when the Supreme Court in 1952 finally articulated a defense of group

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the *Beauharnais* case. The clerk wrote:

This type of group libel statute could be used to suppress any unfavorable comment about any identifiable group . . . History teaches that in the past *libel laws* have been used to curb unfavorable public comment.

By recognizing the power to regulate, the Court has sown the seeds of a dangerous concept.

Memo for MLS to Justice Douglas, May 28, 1952 (on file with the United States Library of Congress, Papers of William O. Douglas, Box No. 217 (in file entitled "No.118(d)—*Beauharnais v. Illinois* O.T. 51 Conference, Certiorari & Misc. Memos")).

<sup>409</sup> But Frankfurter barely won it. According to Justice Douglas' notes, Justice Clark, who joined the majority in upholding the constitutionality of the Illinois statute, later decided that the statute was in fact unconstitutional. Douglas wrote in his notes, "Clark now thinks the statute is unconstitutional but votes to deny petition for rehearing." Justice Douglas' Docket and Voting Sheet for *Beauharnais*, Case No. 118 (on file with the United States Library of Congress, Papers of William O. Douglas, Box. No. 209 (in file entitled "OT 1951 Administrative Docket Book # 1-300")). Had Clark changed his mind sooner, Frankfurter's opinion would have been a minority opinion.

<sup>410</sup> KALVEN, *supra* note 3, at 7.

libel statutes partly based on group rights, whatever popular support for the idea that might have existed earlier had long since evaporated.<sup>411</sup>

Moreover, to the extent that the *Beauharnais* majority relied on individual rights, that justification of group libel statutes was quickly closed off by the still vigorous First Amendment. The Supreme Court's view towards the First Amendment is perhaps best shown by its decision in *New York Times v. Sullivan*.<sup>412</sup> There, the Supreme Court reversed a jury's libel award of \$500,000 on the basis that the award violated the First Amendment.<sup>413</sup> In holding that the award could not stand, the Court had to refute claims that libel was exempt from First Amendment protections. The Supreme Court held that it would violate the First Amendment for "a good-faith critic of government [to] be penalized for his criticism."<sup>414</sup> Consequently, although the Court left theoretically intact the exemption of libel from First Amendment protections, it showed that, in practice, the First Amendment would be treated deferentially.<sup>415</sup> Essentially, then, after the

<sup>411</sup> It is significant to note that Thurgood Marshall, then the head of the NAACP Legal Defense and Educational Fund, signed onto a brief in the *Beauharnais* case that asked the Supreme Court to reconsider its decision. See Petition for Rehearing, *Beauharnais v. Illinois*, 343 U.S. 350 (1952). Thus, the period's foremost legal representative of black Americans, who were both the target of the defamation in the case and a target of group libel generally, opposed group libel laws by the 1950s. Earlier in the century, however, the NAACP was more sympathetic to group libel legislation, especially in response to the racist portrayals in D.W. Griffith's film, *BIRTH OF A NATION*. See ROBERT L. ZANGRADO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909-1950*, 33-34 (1980).

<sup>412</sup> 376 U.S. 254 (1964).

<sup>413</sup> See *id.* at 292. For a full treatment of the history of the *New York Times v. Sullivan* case, see generally ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

<sup>414</sup> *Sullivan*, 376 U.S. at 292. In *Sullivan*, the Court specifically noted that its holding did not contradict *Beauharnais*. As the *Sullivan* Court stated:

In *Beauharnais v. Illinois*, the Court sustained an Illinois criminal libel statute as applied to a publication held to be both defamatory of a racial group and "liable to cause violence and disorder." But the Court was careful to note that it "retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel," for "public men, are, as it were, public property," and "discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled."

376 U.S. at 268 (citations omitted).

<sup>415</sup> For an elaboration of the theory that *Sullivan* had an adverse impact on the potential of *Beauharnais*, see FRANKLYN S. HAIMAN, *SPEECH AND LAW IN A FREE*

Supreme Court's belated approval of group libel statutes in *Beauharnais*, the issue disappeared from view, until more recent times.

## CONCLUSION

Given the current debate regarding hate speech and its regulation, it seems vital to remember that America has been down this road before. The discussions that exist about America's early group libel and hate speech laws have examined relatively narrow legal aspects of the issue. This Article has tried to show that attempts to decipher these early group libel laws can only take place after one understands the background social history. That background history indicates that group libel laws might be better understood as a manifestation of a group rights oriented conception of American society. This is illustrated by the shifting views held by American Jews towards the issue, whose attitudes towards the issue of group rights parallel their attitudes towards group libel statutes.

The background history discussed in this Article can be briefly summarized. Debates during the early 1900s about how immigrants should acculturate to life in America influenced whether group libel laws were viewed as desirable or not. American Jews, who showed a keen interest in the issue of group libel throughout, initially vacillated between pursuing individualistic and group-based conceptions of life in America. At first, both conceptions could support group libel statutes, and the laws achieved some success.

However, after the 1920s, several factors mitigated the continued support for such laws. First, the *Dearborn Independent* incident with Henry Ford showed that the courts would look upon group libel laws unfavorably, however strongly American Jews advocated them. Second, and more important for the purposes of this Article, Jews began to embrace an individualistic conception of life in America as they started to succeed economically and socially in America. As World War II approached, American Jews clung even more fiercely to individual rights as a means to prove their patriotism. The rise of

individualism amongst American Jews eliminated the defense of group libel laws based on group rights. Third, as Americans in general, and Jews in particular, began to place increased value in an individual's right to freedom of expression, a defense of group libel laws based on individual rights became untenable. Thus, by the time the anti-Semitism of World War II started to manifest itself, American Jews generally opposed group libel statutes. When the Supreme Court finally decided *Beauharnais*, with its reliance on group rights and a relatively restrained view of freedom of expression, support for the statutes had evaporated, and the case had little effect.

The group libel debate obviously did not end in the 1950s. The controversy in Skokie, Illinois in the 1970s, in which American Nazis attempted to march through a heavily Jewish suburb of Chicago, is perhaps the best known episode that renewed interest in the issue. More recent examples include support for university speech codes, the Supreme Court's *R.A.V. v. City of St. Paul* decision,<sup>416</sup> and, more generally, the increased awareness of the role speech plays in an increasingly multicultural society. The issue has become one of resurgent importance, and increased debate, in American society. There are obvious parallels that can be drawn between the historical debates regarding group libel laws and the contemporary debate. This Article's central point has been that America's historical experiences indicate that group libel laws seem best suited to a conception of society that views group rights generally in favorable terms. If this point drawn from America's past experiences informs today's debate on whether such laws are beneficial, the participants will hopefully be better equipped to continue the discussion.

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<sup>416</sup> 505 U.S. 377 (1992).

