

**Jews, Group Libel, and Free Speech in the United Kingdom and  
United States, 1912-1969**

**Shera Shefer Avi-Yonah**  
New College  
University of Oxford

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## Short Abstract

For more than half the 20<sup>th</sup> century, American and British Jews wrestled with a too-little-remembered proposal called group libel – the idea that defamation law should guard the reputation not just of individuals but of groups like themselves. Through group libel, American and British Jews debated and negotiated their relationship to the state and the law, as well as the bounds of their own identity. The first full-length study of the issue in either the British or American case, this thesis takes a comparative approach, showing how British Jews related ambivalently to legal tactics while American Jews embraced the law in their respective battles against antisemitism and fascism. It aims to show that law was an imperfect instrument even for those groups most enthusiastic about its uses. Nevertheless, legal measures' siren song called established Jews reluctant about more extreme action. Group libel proved the best of unenviable options for Jewish organizations like the Board of Deputies of British Jews, American Jewish Committee, and American Jewish Congress, who searched for new ways to fight against antisemites without disturbing the bounds of the established social order. Still, it proved too radical for the British and American governments. The thesis explores the history of ideas hotly debated today, such as the danger of antisemitism, the limits of free speech, and the utility (or lack thereof) of legal solutions to intergroup hatred. It aims to show the contours of these debates in an earlier time and to unearth their roots in doing so.

## Long Abstract

For more than half the 20<sup>th</sup> century, American and British Jews wrestled with a little-remembered proposal called group libel – the idea that defamation law should guard the reputation not just of individuals but of groups like themselves. Too often forgotten today, the possibility of outlawing libel against communities provoked debate and intense campaigning among Jews across the world for decades. Particularly as they watched in horror at the devolving situation of German Jews and later the Holocaust of European Jewry, by the 1940s the question of reforming defamation laws stood in for larger arguments over how best to fight against antisemitism, a discussion concentrated among English-speaking Jews and especially in the United States and United Kingdom. Over and over, British and American Jews puzzled over a set of questions. What was the role of the law in fighting against antisemitism? How should Jews define themselves before the courts – as a race, religion, ethnic group, or otherwise? What had gone wrong with German Jews' attempts to sue the Nazis as they gained power? How could non-Jews be convinced that such measures would not impede free political debate? They came to different answers at different times. While British and American Jewry never reached a definitive answer to the above questions, through the prism of group libel they continued to fight over them. Those debates form the subject of this thesis.

For an issue which was so important to Jews for a large part of the last century, the effort to make antisemitic speech a crime has been curiously underemphasized in the history of the period. This thesis is the first full-length study of the issue in either the British or American context. It takes a comparative approach, showing how British Jews related ambivalently to legal tactics while American Jews embraced the law in their respective battles against antisemitism. It also aims to show that the law was an imperfect instrument even for those groups most enthusiastic about its social uses. Nevertheless, legal measures' siren song called established Jews reluctant about more extreme action. Group libel proved the best of unenviable options for Jewish organizations like the Board of Deputies of British Jews, American Jewish Committee, and American Jewish Congress, who searched for new ways to fight against antisemites without disturbing the bounds of the established social order. Still, it proved too radical for the British and American governments. The thesis explores the history of ideas hotly debated today, such as the danger of antisemitism, the limits of free speech, and the utility (or lack thereof) of legal solutions to intergroup hatred. It aims to show the contours of these debates in an earlier time and to unearth their roots in doing so.

The subjects of group libel and anti-defamation touch multiple areas of historical scholarship, and indeed scholarship in other fields such as law, philosophy, and religion. Among them, this thesis particularly aims to equally contribute to and to link the fields of legal history and Jewish history, which have too often been viewed separately. Broader studies of American and British history of the period between 1912 and 1969 form the backdrop to many of the developments herein, especially the history of immigration and civil rights within both countries.

In the words of historian Hasia Diner, comparing British and American group libel campaigns reveals what was British about the British Jewish relationship to the law and what was American about the American Jewish one. This thesis argues that, reflecting the society around them but also their own communal politics, American Jews displayed an active relationship to the law.

They agitated for new legislation against significant resistance, they introduced bills over and over again even as they failed, and they brought court cases without assurance of victory or even with near assurance of failure. British Jews, or at least the Board of Deputies, were far more passive. The Board's leadership took up the question of group libel seriously only after the government convened its own committee to study defamation law. They refused to bring their own lawsuits against antisemites, instead privately lobbying the attorney general to sue on the Board's behalf, in part because the common law system made a bad outcome much riskier but also because of their own reticence. They accepted the government's claim that the Race Relations Act would cover Jews even though it did not include religion as a protected category. While the group libel campaign represented a relatively bold action for the Board, comparison with its American counterparts reveals a kind of legal minimalism to American Jews' legal maximalism. The elite of British Jewry did not want to define itself and its relationship to society in terms of the law; American Jews happily did so.

The thesis is based upon a variety of archival sources from the United States, United Kingdom, and Israel, combining them in new ways. Because of its focus on institutional politics, the bulk of primary source material came from the archives of the Jewish organisations central to the debate over anti-defamation in the United States and United Kingdom: The Board of Deputies, the Trades Advisory Council, the American Jewish Committee, the American Jewish Congress, and the Anti-Defamation League. The thesis also relies to a lesser extent on the personal papers of people central to the story of anti-defamation, such as Board of Deputies presidents Neville Laski and Selig Brodetsky, as well as the American lawyer Morris Ernst. Probably the most important American lawyer involved in group libel advocacy, Will Maslow, does not have personal archives, although many of his letters are available in the Congress's records. On the governmental side, the records of the Home Office, the Porter Committee on the Law of Defamation, the Race Relations Board, and the President's Committee on Civil Rights shed light on how typically non-Jewish officials received proposals for defamation reform. Finally, sources from Jewish newspapers and magazines which covered the issue extensively suggest the wider public reaction to the above groups' work. In the United States, this included the *Congress Weekly* and *Commentary*; in the United Kingdom, the archives of the *Jewish Chronicle* as well as its past issues are the essential press sources.

The thesis is divided into three parts, each composed of one chapter focusing on the United States and one focusing on the United Kingdom. Each begins with a section reviewing the key works of historiography and comparing the two Jewish communities' campaigns. It then moves into narrative. The first section covers the period roughly between the emergence of group libel in the 1910s and the peak of its support around 1940 (Chapters I and II). It attempts to answer the question of why Jewish organisations otherwise disinclined to support group rights adopted group libel – mainly as a means to fend off challenges for representative authority and, more sincerely, to address their own fears of the insufficient tools for fighting antisemitism available to them. At the beginning of the campaigns for group libel, the reasons why it came to prominence on both sides of the Atlantic were rather similar.

The second section examines two parallel “trials” of group libel, both of which represented its best chance at actual enactment and the beginning of the true divergence in British and American approaches to free speech. In 1945, the Board of Deputies presented the idea to the Porter

Committee on the Law of Defamation (Chapter IV). In 1948, several Jewish groups debated group libel before the Truman Administration's Committee on Civil Rights (Chapter III). In both cases, the government bodies rejected the idea, albeit for different reasons. In the United States, group libel "lost" because it had competed unsuccessfully with an alternative vision of the law grounded in First Amendment absolutism. In the United Kingdom, conversely, the Porter Committee and the political establishment rejected the idea that the law could or should combat hatred of minorities at all.

The third and final section examines how group libel's onetime advocates dealt with the rise of laws and court rulings designed with other minority groups in mind, notably African Americans and postwar immigrants from the former British colonies. In the United States, Jews' political coalition partners, civil libertarians and African American groups, favoured an individual rights-based approach that spelled group libel's demise (Chapter V). In the United Kingdom, Jews were largely left out of legal protections against "hate speech," despite often providing a historical justification for them. With the adoption of the Race Relations Act, the United Kingdom adopted an approach ill-suited to dealing with antisemitism, despite Jews' success in pushing for a provision against "incitement to racial hatred" (Chapter VI). While scholars have not discussed the Act and earlier campaigns for group libel in tandem, in British Jews' mind their largely unsuccessful attempts to win the Act's protection grew directly from that earlier work. In both the British and American cases, albeit for different reasons, rather than Jews deciding to move on from group libel, trends in the broader legal culture decided on their behalf. But the episode left a lasting imprint on British and American Jewry's relationship to the law.

## List of Abbreviations

| Abbreviation     | Definition                                                 |
|------------------|------------------------------------------------------------|
| ACLU             | American Civil Liberties Union                             |
| ADL              | Anti-Defamation League                                     |
| AJC              | American Jewish Committee                                  |
| AJCo             | American Jewish Congress                                   |
| Board            | Board of Deputies of British Jews                          |
| BUF              | British Union of Fascists                                  |
| CCR              | President's Committee on Civil Rights                      |
| CLSA             | Committee on Law and Social Action (AJCo)                  |
| GJC              | General Jewish Council                                     |
| JPC              | Jewish People's Council Against Fascism and Anti-Semitism  |
| NAACP            | National Association for the Advancement of Colored People |
| NCCL             | National Council for Civil Liberties                       |
| Porter Committee | Porter Committee on the Law of Defamation                  |
| TAC              | Trades Advisory Council                                    |

## Introduction

In November 1932, London's *Jewish Chronicle* published an article by its columnist Watchman titled "Having the Law of Them." "A suggestion [had] been recently advanced" by an acquaintance of his "to reform the law of defamation by making such conduct against a people or race legally actionable. My contemporary dubs this a 'novel' suggestion. It is, of course, as my readers will know, nothing of the sort."<sup>1</sup> In the United Kingdom, as Watchman noted, similar ideas had circulated for several years. Its lack of novelty aside, Watchman argued against the proposal:

What charges would be selected for legal action? Not the current small talk about Jewish character, surely! Not the supposed witticisms or caricatures of stage and screen! Shylock, ill understood as the character has been, could not have been a suitable case. If the few Jews who are supposed to have existed in this country in Elizabethan times had tried to 'have the law' of Shakespeare (to use the Bard's own phrase); they would, quite apart from their general legal position, been laughed out of court, as sinners against the literary light. Even our touchy coreligionists in America, who have succeeded in banishing 'The Merchant of Venice' from a number of school curricula, would not carry world-opinion with them, and possibly not the concurrence of Jews in other lands.<sup>2</sup>

Watchman did not call it as such, but the idea his friend proposed had a name: group libel. Far from disappearing after he published his column, it provoked near-constant debate among British and American Jews alike decades after 1932. Particularly as they watched in horror at the devolving situation of German Jews and later the Holocaust of European Jewry, by the 1940s the question of reforming defamation laws stood in for larger arguments over how best to fight against antisemitism, a discussion concentrated among English-speaking Jews and especially in the United States and United Kingdom. Over and over again, Anglo-American Jews puzzled over the same set of questions. What was the role of the law in fighting against antisemitism?

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<sup>1</sup> "In the Communal Armchair: Having the Law of Them," *Jewish Chronicle*, November 25, 1932, 13.

<sup>2</sup> Ibid.

How should Jews define themselves before the courts – as race, religion, ethnic group, or otherwise? What had gone wrong with German Jews’ attempts to sue the Nazis as they gained power? How could non-Jews be convinced that such measures would not impede free political debate? They came to different answers at different times, and in fact took divergent lessons from the German example. To group libel’s detractors, German Jews had tried to sue antisemites and only fuelled their rise to fame. To its proponents, they – and therefore British and American Jews – had simply lacked the right legal tools. While British and American Jewry never reached a definitive answer to the above questions, through the prism of group libel they continued to fight over them fiercely. Those debates and the questions they raised form the subject of this thesis.

What was group libel, and why did it consume so much energy for organisations trying to battle antisemitism? For an issue which was so important to Jews for a large part of the 20<sup>th</sup> century, the effort to make antisemitic speech a crime has been underemphasized in the history of the period. Some scholars have called group libel “forgotten,”<sup>3</sup> which is not strictly true – the idea continued to occasionally occur to Jewish groups through at least the 1990s<sup>4</sup> and has been the subject of at least one major recent series of lectures.<sup>5</sup> But while it was not entirely erased, it is safe to say group libel does not occupy the same position of primacy in debates over

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<sup>3</sup> Samantha Barbas, “The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws,” *Loyola University Chicago Law Journal* 297, no. 54 (2022): 297–340; James Loeffler, “An Abandoned Weapon in the Fight Against Hate Speech,” *The Atlantic*, June 16, 2019.

<sup>4</sup> Norman Redlich, ‘Group Libel, the American Constitution, and the Community of Nations: Can the Conflicting Values Be Reconciled?’ (Colloquium on Racial and Religious Hatred and Group Libel, Faculty of Law of Tel Aviv University, 1991).

<sup>5</sup> Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012). Waldron first delivered the ideas contained within this book as the annual Oliver Wendell Holmes Lectures at Harvard Law School in 2009.

antisemitism it once did. The days in which columnists like Watchman could be sure that most of their readers were well aware of it have passed.

American groups tended to call the idea “group libel” or “group defamation”; their British counterparts often used the term “community libel.” Both referred to the same idea: that where the law had traditionally protected insults against individuals or institutions, it should also extend to insults against a group of people defamed for their collective identity. Jews could sue over material which did not name any individual Jew, but which harmed their collective reputation, such as the *Protocols of the Elders of Zion*, transforming their ability to advocate before the courts. At times, the matter of group libel fit into a larger category of work Jewish organisations called “anti-defamation.” While libel and defamation themselves had specific legal meanings, lawyers and non-lawyers alike used them to refer to various efforts to use the law to fight against antisemitic writing and speech, some of which used the mechanism of defamation and others of which did not. The “libel” in group libel referred both to the use of libel law against defamatory sentiments and to the speech itself – that is, libels against Jews or other groups. Understanding this distinction, as well as the broader set of legal tools Jews considered as part of anti-defamation, broadens the set of actions meant by the term “group libel.” To understand it just in terms of tort law and defamation would be to cut out a whole group of tactics and legal reforms widely understood at the time to fall under its umbrella.

Protection against group libel was among the most persistent of a broader set of “group rights” sought by some Jews in the early 20<sup>th</sup> century. The turmoil over what rights minority groups should have reached its peak at the Paris Peace Conference of 1919, producing the later-

maligned Minorities Treaties.<sup>6</sup> The most notable of these treaties, the Polish Minorities Treaty, framed many of the rights of the country's minorities in terms of obligations the state owed them. For example, Poland assured "complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion."<sup>7</sup> In the Anglo-American world, many Jews rejected the notion of collective rights, particularly those established Jews who sought to distance themselves from ideas like Zionism and socialism. But even as group rights foundered in Britain and America, group libel remained.

Legal historian David Abraham has summarized three approaches to group rights. A group "may aspire to their own titular state, self-determination, where they predominate and act collectively; they may rely on the recognition and provision of reliable collective minority rights (with greater or lesser autonomy in a more or less territorially-defined multi-peopled space); or they may advocate for a regime of strong 'liberal,' non-discriminatory individual rights for all in which (significantly weakened) collective identities are lodged in the private sphere."<sup>8</sup> Group libel fit within the second conception of rights. Indeed, it emerged and found its first British and American advocates mainly among European immigrants familiar with the approach of multinational areas such as the Austro-Hungarian Empire.<sup>9</sup> However, as Evan Schultz has noted,

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<sup>6</sup> Jacob Robinson, Oscar Karbach, Max M. Laserton, et al., *Were the Minorities Treaties a Failure?* (Institute of Jewish Affairs of the American Jewish Congress and the World Jewish Congress, 1943).

<sup>7</sup> "Treaty between the Principal Allied and Associated Powers and Poland, signed at Versailles, June 28, 1919," Papers Relating to the Foreign Relations of the United States, The Paris Peace Conference, 1919, Volume XIII, U.S. Department of State. For additional context on the treaty and minority rights, see Carole Fink, *Defending the Rights of Others: The Great Powers, the Jews, and International Minority Protection, 1878-1938* (Cambridge University Press, 2004).

<sup>8</sup> David Abraham, 'Group Rights and Individual Minority Rights in Immigrant Societies, Then and Now', *Immigrants & Minorities* 39, nos 2-3 (2021): 186-223, <https://doi.org/10.1080/02619288.2021.2014325>.

<sup>9</sup> For more on the politics of Russian and Habsburg Jews and the ideas they would bring to the United States, see, e.g., Pierre Birnbaum, 'Salo Baron, the Golden Land, and the Refusal of a Lachrymose History', in *Tears of History* (New York: Columbia University Press, 2023), 11-52, <https://doi.org/10.7312/birn20960-003>; Jonathan Frankel, *Prophecy and Politics: Socialism, Nationalism, and the Russian Jews, 1862-1917* (Cambridge University Press,

group libel was eventually adopted even by people who vehemently disagreed with this approach to Jewish rights – those American and British Jews who preferred the third, assimilationist approach Abraham describes. Particularly in the British case, one interesting aspect of group libel was its adoption by the Board of Deputies, which often resisted the idea that Jews were a group apart in society at all. If the idea behind group libel – that Jews were a recognizable and separate legal personality – contradicted much of the Board’s self-conception, it was strange that they ever advocated for it. That tension, rather than being unresolvable, in fact explains the reason why group libel continued to compel Jews long after they had abandoned the broader idea of group rights – if they had ever supported it. Of group rights more broadly, the right to sue over antisemitic defamation was the most acceptable.

Today, the United States and United Kingdom’s defamation laws are mainly discussed in terms of their differences.<sup>10</sup> In fact, when the story of group libel began, they were much more similar.<sup>11</sup> Both derived from the English common law of defamation, stretching back to the 13<sup>th</sup> century. By the end of the period covered, however, they had diverged substantially, both from one another and from continental Europe. As the chapters on the United States show, an underappreciated aspect of group libel’s failure was that it ran into a larger legal trend of “constitutionalizing” defamation law. In a series of Supreme Court rulings culminating in the

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1981), <https://doi.org/10.1017/CBO9780511572494>; Jonathan Frankel, ed., *Assimilation and Community: The Jews in Nineteenth Century Europe* (Cambridge University Press, 2011).

<sup>10</sup> See, e.g., Ari Shapiro, “On Libel and The Law, U.S. And U.K. Go Separate Ways,” *National Public Radio*, March 21, 2015; For scholarly comparisons of the two systems which mainly emphasize their differences over the last 50 years, see Vincent R. Johnson, ‘Comparative Defamation Law: England and the United States’, *University of Miami International and Comparative Law Review* 24, no. 1 (2016); Michael Socha, ‘Double Standard: A Comparison of British and American Defamation Law’, *Penn State International Law Review* 23, no. 2 (2004).

<sup>11</sup> On the significant intellectual links between British and American jurists in the early 20<sup>th</sup> century, see David M. Rabban, *Law’s History: American Legal Thought and the Transatlantic Turn to History* (Cambridge University Press, 2013).

famous case *New York Times v. Sullivan*, the U.S. courts ensured that the First Amendment would protect an increasing proportion of speech.<sup>12</sup> This necessarily meant abandoning centuries of common law, something First Amendment maximalists were all too happy to do.<sup>13</sup> But it also meant focusing on the rights of individuals at the expense of groups.<sup>14</sup> Meanwhile, in the United Kingdom, the foundations of the common law of defamation remained relatively undisturbed, despite some major technical reforms in 1952.

## Historiography

The subjects of group libel and anti-defamation touch multiple areas of historical scholarship, and indeed scholarship in other fields such as law, philosophy, and religion. Among them, this thesis aims equally to contribute to and to link the fields of legal history and Jewish history, which have too often been viewed separately. Broader studies of American and British history of the period between 1912 and 1969 form the backdrop to many of the developments herein, especially the histories of immigration and civil rights within both countries.

The story of group libel has been the subject of limited recent scholarship, much of it exclusively focused on the American side of the debate. Law review articles by Schultz and Samantha

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<sup>12</sup> The most famous formulation of these changes is as a “rights revolution.” See Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998). For other surveys of this change, see, e.g. Anthony Lewis, *Freedom for the Thought That We Hate: A Biography of the First Amendment* (Basic Books, 2010); Norman L. Rosenberg, ‘Another History of Free Speech: The 1920s and the 1940s’, *Law and Inequality* 7, no. 3 (1989); Reuel E. Schiller, ‘Free Speech and Expertise: Administrative Censorship and the Birth of the Modern First Amendment’, *Virginia Law Review* 86, no. 1 (February 2000): 1, <https://doi.org/10.2307/1073955>.

<sup>13</sup> The “actual malice” standard established in *Sullivan* erased common law precedents regarding defamation of public officials. See, e.g., Harry Kalven, Jr., *The Negro and the First Amendment* (The Ohio State University Press, 1965); Harry Kalven, Jr., ‘The New York Times Case: A Note on “The Central Meaning of the First Amendment”’, *Supreme Court Review* 191 (1964): 192–221; Leonard Niehoff, ‘Three Puzzling Things about New York Times v. Sullivan: Beginning the Anniversary Conversation’, *Communications Lawyer* 29, no. 3 (2013): 10–14.

<sup>14</sup> See, e.g., David A. Hollinger, *Postethnic America: Beyond Multiculturalism* (Basic Books, 2000).

Barbas have treated the subject directly; both have taken a similar approach, chronicling group libel's "rise and fall."<sup>15</sup> Both end their accounts in 1952, with the Supreme Court case *Beauharnais v. Illinois*, which saw the Supreme Court affirm group libel's legality just as most American Jewish groups decided to stop pursuing it. Neither Barbas nor Schultz deal in depth with the specifically Jewish character of group libel campaigns, treating it almost as an incidental feature rather than the intellectual source for the idea of collective rights. Only one existing work of historical scholarship has focused on the international dimension of legal defences against antisemitism, David Fraser's *Nazi Antisemitism and Jewish Legal Defense*, which covers key court cases in the 1930s in the United Kingdom, Canada, the United States, and South Africa. Fraser's focus is what he terms the "Antisemitic International," the connected network of anti-Jewish movements in the Anglosphere, and Jewish responses to it. His method is connective rather than comparative; he writes that "the deployment of legal self-defense mechanisms was part of international knowledge exchange among Jewish representative bodies in the face of an antisemitic Nazi international."<sup>16</sup> Perhaps because he focuses only on the period from 1932 to 1939, he also cuts out much of the context for the court cases on which the book focuses, notably the origins of group rights and group libel.

Despite the relative lack of work focusing on group libel exclusively, the past decade has seen renewed interest in many of the subjects that animated its rise to prominence. Where liberalism and antisemitism were once viewed as conflicting societal impulses, historians have increasingly

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<sup>15</sup> Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws'; Evan P. Schultz, 'Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952', *Brooklyn Law Review* 66, no. 71 (2017).

<sup>16</sup> David Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense: The Turn to Law in Liberal Democracies, 1932-39*, (Routledge, 2024), 10.

identified Jew-hatred's liberal roots. In the American case, historians like James Loeffler and William Forbath have written about the relationship of American Jews to liberalism and its role in pushing them toward the law. Loeffler has argued for increased attention to Jewish "nationalism without a nation."<sup>17</sup> Group libel fits to some extent within that paradigm, representing a middle point between total assimilation and Zionism, as another of Loeffler's essays on minority rights suggests without naming it specifically.<sup>18</sup> Forbath has likewise attempted to rediscover the "forgotten" "Jewish constitutional moment" of 1919, focusing on the ideas about intermediate sovereignty eastern European Jews brought to the United States in the early 20<sup>th</sup> century.<sup>19</sup>

Another important strand of historiography, too little considered by Jewish historians, focuses on the history of free speech rights in the United States and United Kingdom. Regarding the former, the late Samuel Walker's histories of the American Civil Liberties Union (ACLU) and the concept of "hate speech" in American jurisprudence provide essential context for the ideas against which group libel's advocates had to battle, as does Harry Kalven, Jr.'s work on the First Amendment.<sup>20</sup> Key works in American legal history by Morton Horwitz and Duncan Kennedy on the rise and fall of "classical legal thought," as well as histories of the Supreme Court, particularly the Warren Court, show how group libel was perhaps doomed by larger forces over

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<sup>17</sup> James B. Loeffler, 'Nationalism without a Nation? On the Invisibility of American Jewish Politics', *The Jewish Quarterly Review* 105, no. 3 (Summer 2015): 367–98.

<sup>18</sup> James Loeffler, "'A Certain Type of Liberalism': Minority Rights in Jewish Liberal Discourse, 1848–1948", in *Jews, Liberalism, Antisemitism*, ed. Abigail Green and Simon Levis Sullam (Springer International Publishing, 2020), [https://doi.org/10.1007/978-3-030-48240-4\\_15](https://doi.org/10.1007/978-3-030-48240-4_15).

<sup>19</sup> William Forbath, 'The Jewish Constitutional Moment: Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism', paper presented at Law & Public Affairs Seminar, Princeton University, 1 April 2019.

<sup>20</sup> Kalven, Jr., 'The New York Times Case: A Note on "The Central Meaning of the First Amendment"'; Samuel Walker, *In Defense of American Liberties: A History of the ACLU* (Oxford University Press, 1990); Samuel Walker, *Hate Speech: The History of an American Controversy* (University of Nebraska Press, 1996).

which its Jewish proponents had little mastery.<sup>21</sup> David Rabban's more recent scholarship provides a valuable glimpse into the significant transatlantic exchange among jurists in the late 19<sup>th</sup> and early 20<sup>th</sup> century; his book *Free Speech in Its Forgotten Years* valuably widens the period in which scholars have generally considered free speech to be a live issue for American lawyers.<sup>22</sup> Rabban writes that "there was substantial adjudication of free speech issues throughout the state and federal judicial systems in the late nineteenth and early twentieth centuries. The decisions overwhelmingly rejected free speech claims. No court was more hostile to them than the United States Supreme Court."<sup>23</sup> The rising dominance of the First Amendment, as Rabban shows, was not a foregone conclusion. When group libel first emerged in the United States it faced a significantly less hostile legal atmosphere. Christopher Hilliard's work on free speech in Britain provides a valuable counterpoint, showing the persistence of an approach to speech rooted in the desire to protect the crown and the state.<sup>24</sup> Hilliard's writing is particularly valuable for its long timespan – unlike many American historians of group libel and minority rights, he has connected interwar debates over restrictions on speech with later debates over racial discrimination in the 1960s.<sup>25</sup> Yet group libel has not figured into our understanding of the relationship between Jews and the law, or indeed broader questions of the Anglo-American

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<sup>21</sup> See, e.g., Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 2006); Morton J. Horwitz, 'The Transformation of American Law. 2: 1870 - 1960: The Crisis of Legal Orthodoxy' (Harvard University Press, 1992); William M. Wiecek, *The Lost World of Classical Legal Thought: Law and Ideology in America, 1886-1937* (Oxford University Press, 2001).

<sup>22</sup> David M. Rabban, *Free Speech in Its Forgotten Years, 1870-1920* (Cambridge University Press, 1999).

<sup>23</sup> Idem., 'The State of Free Speech Doctrine in 1917', *Arizona State Law Journal* 50 (2018): 911-18.

<sup>24</sup> Christopher Hilliard, 'Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s-1960s', *The Journal of Modern History* 88 (December 2016): 764-96. See also Idem., 'Authors and Artemus Jones: Libel Reform in England, 1910-52', *Literature & History* 30, no. 1 (May 2021): 62-76, <https://doi.org/10.1177/03061973211007357>; Paul Mitchell, *The Making of the Modern Law of Defamation* (Hart Publishing, 2005).

<sup>25</sup> Hilliard, 'Words That Disturb the State.'

approach to free speech, as much as it warrants. This thesis is the first attempt to correct that omission.

The last relevant set of existing work examines the nature of Jewish political responses to antisemitism.<sup>26</sup> Leonard Dinnerstein's *Antisemitism in America* is still the essential survey of the American side, but, as Britt Tevis has written, "to the extent that American Jewish historians have examined antisemitism, it has been largely to dismiss it as a serious, lasting problem woven into the fabric of US history. The tendency to present antisemitism in the United States as atypical, momentary, and confined to private realms is especially noteworthy in several important surveys of American Jewish history."<sup>27</sup> Episodes such as the Leo Frank case, Henry Ford and Father Coughlin's distribution of the *Protocols* in the 1920s, the rise of the German-American Bund, and the Skokie march have received significant attention, but always as outliers in a broader tale of 20<sup>th</sup> century Jews' ever-rising status.<sup>28</sup> Another set of subtler forms of discrimination, particularly in elite university admissions<sup>29</sup> and in law and medicine,<sup>30</sup> has drawn historical interest, but again largely as part of a teleological march toward acceptance.<sup>31</sup> Tevis

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<sup>26</sup> See, e.g., Ezra Mendelsohn, *On Modern Jewish Politics* (Oxford University Press, 1993).

<sup>27</sup> Britt P. Tevis, 'Trends in the Study of Antisemitism in United States History', *American Jewish History* 105, nos 1–2 (2021): 255–84, <https://doi.org/10.1353/ajh.2021.0018>.

<sup>28</sup> The most notable formulation of this view is Ben Halpern, 'America Is Different', *Midstream* 1 (Autumn 1955): 39–52.

<sup>29</sup> See, e.g., Jerome Karabel, *The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale, and Princeton* (Houghton Mifflin, 2006); Eunice G. Pollack, ed., *Antisemitism on the Campus: Past & Present* (Academic Studies Press, 2011); Riv-Ellen Prell, 'Antisemitism without Quotas at the University of Minnesota in the 1930s and 1940s: Anticommunist Politics, the Surveillance of Jewish Students, and American Antisemitism', *American Jewish History* 105, no. 1–2 (2021): 157–88, <https://doi.org/10.1353/ajh.2021.0007>.

<sup>30</sup> See, e.g., Jerold S. Auerbach, 'From Rags to Robes: The Legal Profession, Social Mobility and the American Jewish Experience', *American Jewish Historical Quarterly* 66, no. 2 (1976): 278–81; Mariam K. Slater, 'My Son the Doctor: Aspects of Mobility Among American Jews', *American Sociological Review* 34, no. 3 (June 1969), <https://doi.org/10.2307/2092501>; Eli Wald, 'Jewish Lawyers and the U.S. Legal Profession: The End of the Affair?', *Touro Law Review* 36, no. 1 (2020), <https://digitalcommons.tourolaw.edu/lawreview/vol36/iss1/19>.

<sup>31</sup> For invocations of a mid-century "golden age" and discussion of antisemitism as exception rather than rule, see, e.g., Hasia R. Diner, *The Jews of the United States, 1654 to 2000*, (University of California Press, 2004); Jonathan D. Sarna, *American Judaism: A History*, (Yale University Press, 2019); Yuri Slezkine, *The Jewish Century* (Princeton University Press, 2019).

correctly calls for greater attention to the relationship between antisemitism and the U.S. state, as well as a greater sense that episodes such as Frank's trial may be exceptional without being aberrant. In many respects, she is arguing for American Jewish historians to do what Anglo-Jewish scholars have done for decades. The corpus of scholarship on British antisemitism and responses to fascism is large, including the work of historians like David Cesarani, Geoffrey Alderman, and Tony Kushner, but also more recent work by Daniel Tilles and Joshua Cohen.<sup>32</sup> Perhaps owing to the rich set of literary representations of Jews in Britain, another important group of books and articles from the field of literary studies has examined English antisemitism through the pages of novels, poetry, and plays.<sup>33</sup>

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<sup>32</sup> See, e.g., Geoffrey Alderman, 'English Jews or Jews of the English Persuasion? Reflections on the Emancipation of Anglo-Jewry', in *Paths of Emancipation*, ed. Pierre Birnbaum and Ira Katznelson (Princeton University Press, 1995), 128–56, <https://doi.org/10.1515/9781400863976.128>; Geoffrey Alderman, 'The Jewish Dimension in British Politics since 1945', *Journal of Ethnic and Migration Studies* 20, no. 1 (October 1993): 9–25, <https://doi.org/10.1080/1369183X.1993.9976403>; David Cesarani, 'The Politics of Anglo-Jewry between the Wars', in *Authority Power and Leadership in Jewish Politics*, ed. Daniel J. Elazar (University Press of America, 1991), 47–61; Nigel Copsey, 'Opposition to the New Party: An Incipient Anti-Fascism or a Defence Against "Mosleyitis"?'', *Contemporary British History* 23, no. 4 (December 2009): 461–75, <https://doi.org/10.1080/13619460903198093>; Nigel Copsey and Daniel Tilles, 'Uniting a Divided Community? Re-Appraising Jewish Responses to British Fascist Antisemitism, 1932–39', *Holocaust Studies* 15, no. 1–2 (June 2009): 163–87, <https://doi.org/10.1080/17504902.2009.11087232>; Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense*; Sharon Gewirtz, 'Anglo-Jewish Responses to Nazi Germany 1933–39: The Anti-Nazi Boycott and the Board of Deputies of British Jews', *Journal of Contemporary History* 26, no. 2 (April 1991): 255–76, <https://doi.org/10.1177/002200949102600204>; Richard Griffiths, *Fellow Travellers of the Right: British Enthusiasts for Nazi Germany 1933–1939* (Oxford University Press, 1983); Colin Holmes, *Anti-Semitism in British Society, 1876–1939*, (Routledge, 1979); Tony Kushner, *The Persistence of Prejudice: Anti-Semitism in British Society During the Second World War* (Manchester University Press, 1989); Tony Kushner, 'The Impact of British Antisemitism, 1918–1945', in *The Making of Modern Anglo-Jewry*, ed. David Cesarani (Wiley-Blackwell, 1990), 191–208; Gisela C. Lebzelter, *Political Anti-Semitism in England, 1918–1939* (Macmillan, 1978); Stephen H. Norwood, *Prologue to Annihilation: Ordinary American and British Jews Challenge the Third Reich*, (Indiana University Press, 2021); David Renton, *Fascism, Anti-Fascism, and Britain in the 1940s* (Macmillan, 2000); Elaine R. Smith, 'But What Did They Do? Contemporary Jewish Responses to Cable Street', *Jewish Culture and History* 1, no. 2 (December 1998): 48–55, <https://doi.org/10.1080/1462169X.1998.10511907>; Daniel Tilles, *British Fascist Antisemitism and Jewish Responses, 1932–40*, (Bloomsbury Academic, 2015); Idem., 'Neville Laski, Anglo-Jewry and the Crises of the 1930s', *Patterns of Prejudice* 53, no. 1 (January 2019): 23–36, <https://doi.org/10.1080/0031322X.2018.1536356>; Idem., 'VI. "Some Lesser Known Aspects:" The Anti-Fascist Campaign of the Board of Deputies of British Jews, 1936–40', in *New Directions in Anglo-Jewish History*, ed. Geoffrey Alderman (Academic Studies Press, 2019), 135–62, <https://doi.org/10.1515/9781618110558-007>.

<sup>33</sup> Bryan Cheyette, *Constructions of 'the Jew' in English Literature and Society: Racial Representations, 1875–1945* (Cambridge University Press, 1995); Didi Herman, *An Unfortunate Coincidence: Jews, Jewishness, and English Law* (Oxford University Press, 2011); Anthony Julius, *Trials of the Diaspora: A History of Anti-Semitism in England* (Oxford University Press, 2010).

Much of the literature on fascism and antisemitism in the Anglo-American world attempts to assess the questions of whether it posed a truly serious hazard. In examining the response to antisemitism rather than the act itself, I take for granted that, whether or not it posed a dire threat, many British and American Jews believed it did and acted accordingly. Where they could not agree was how to respond. Historians have paid significant attention to the clash between the Jewish left and establishment – the fighters of Cable Street and the cousinhood; the Jews of the Upper and Lower East Sides. Group libel sits uneasily within, and indeed complicates, this familiar dichotomy. It grew out of ideas associated with Jews who were mainly eastern European, left-wing, Yiddish-speaking, and collectivist. But it was eventually adopted by the most establishment-orientated of Jews, both British and American. It represented the attempt to expand the toolbox available to Jews against antisemites without fundamentally changing their relationship to the state – the most radical step the least radical Jews were willing to take.

## **Approach**

Historians have underexamined group libel and Jewish legal history in Britain and America; but they have also neglected the comparison between the two. More than 30 years ago, the historian of American Jewry Hasia Diner wondered at the lack of comparative Jewish history. For that most diasporic of peoples – one which had faced similar struggles in many places – comparison seemed an obvious tool, both for understanding Jewry globally as well as better particularizing each Jewish community. In Diner's words, "what is *American* about American Jewish history can ultimately be answered only by knowing what is French about French Jewish history, what is British about British Jewish history, what is Canadian about Canadian Jewish history, and so

on.”<sup>34</sup> She added that “wherever Jews found themselves they created communities, and those communities *always* faced the same questions: Who speaks for the Jews? Who determines membership in the community? How should Jews interact with one another? How do they confront the larger, non-Jewish society?...”<sup>35</sup> Since Diner’s essay, several historians have answered her call. The past decade has seen movements in Jewish history and legal history which have informed my approach. First, Jewish history has followed the general trend of global and transnational history in the field at large. Second, and more recently, Jewish legal history has grown as a subfield, both regarding religious Jewish law itself and Jews’ interaction with the law of the secular world.<sup>36</sup>

When thinking about how to treat a subject such as the group libel campaigns of the 20<sup>th</sup> century, I have attempted to let the material guide my approach as much as possible rather than imposing preexisting ideas onto it. While group libel was a subject of debate and discussion in many Jewish communities (and to a lesser extent among non-Jews), the debate occurred for the longest period and most vigorously in the United States and United Kingdom. In part because of their traditional resistance to restraints on speech, particularly political speech, neither country adopted continental-style “hate speech” laws after the Second World War.<sup>37</sup> This fuelled the continuation of discussion about the wisdom of group libel long after other Jewish communities

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<sup>34</sup> Hasia Diner, ‘Jewish Self-Governance, American Style’, *American Jewish History* 81, no. 3/4 (1994): 277–95.

<sup>35</sup> *Ibid.*, 278.

<sup>36</sup> See, e.g., Todd Endelman, ed., *Comparing Jewish Societies* (University of Michigan Press, 1997); Simon Rabinovitch, *Sovereignty and Religious Freedom: A Jewish History* (Yale University Press, 2024); Michal Rose Friedman, ‘Beyond Exceptionalism: Emerging and Comparative Trends in Modern Jewish History’, in *The Routledge Companion to Jewish History and Historiography* (Routledge, 2018); Abigail Green and Simon Levis Sullam, eds., *Jews, Liberalism, Antisemitism: A Global History* (Springer International Publishing, 2020), <https://doi.org/10.1007/978-3-030-48240-4>.

<sup>37</sup> Notably, Jewish leaders in West Germany opposed the introduction of that country’s stronger hate speech laws in the late 1950s. See Ann Goldberg, ‘Minority Rights, Honor, and Hate Speech Law in Post-Holocaust West Germany’, *Law, Culture and the Humanities* 17, no. 2 (2021): 224–45, <https://doi.org/10.1177/1743872117702822>.

had stopped debating it. I have chosen to focus on these two countries' debates over group libel rather than attempting a comprehensive survey of the issue for that reason.

In addition to taking a comparative view, I have also widened the period generally used to examine Jewish responses to fascism, beginning in 1912 with the passage of the first proto-group libel bills in the United States and ending with the passage of Britain's second Race Relations Act in 1968. Examining group libel only until its peak in the 1940s elides several of its key aspects. The first is its origins in the internal Jewish political struggles of the 1910s and 1920s, such as the debate over the formation of the American Jewish Congress. The second is its relationship to the idea of hate speech, which emerged as a widespread legal concept just as group libel was waning in prominence. As the story of the Race Relations Act shows, the creation of a new crime, hate speech, was less favorable to Jews than group libel would have been because it relied on the government to determine what speech was beyond the pale rather than Jews themselves. Group libel was not, as some scholars have suggested, a precursor to hate speech, but rather an entirely different legal idea which would have had different consequences.

Whatever the similarity of the questions they faced, the American and British Jews considering the role of the law in their efforts worked within two profoundly different legal cultures.

Observers of the United States including Thomas Paine and Alexis de Tocqueville have noted the prominence of lawyers and the law in its society. Paine wrote that "in America The Law is King"; de Tocqueville observed that its would-be aristocracy "is on the bench and at the bar."<sup>38</sup>

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<sup>38</sup> Thomas Paine, *Common Sense; Addressed to the Inhabitants of America, on the Following Interesting Subjects* (1776); Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (Saunders and Otley, 1835). Robert Kagan described the American way of law as "adversarial legalism," see Robert A. Kagan, *Adversarial Legalism: The American Way of Law, Second Edition* (Harvard University Press, 2019),

British lawyers, however eminent, could never occupy the same exalted position, possibly due to the presence of actual aristocrats or to the relative lack of need for the law to serve as a mediating institution for a diverse and constantly changing population. In the absence of an *ancien régime*, lawyers have occupied an ever-greater role in the shaping of the American republic, particularly since the end of the Civil War. For liberal Jews seeking to be the preeminent examples of their national type, this made a law degree a crucial step.<sup>39</sup> It also had a knock-on effect on the nature of Jewish politics, which lawyers came to dominate by the mid-20<sup>th</sup> century. The number of important Jewish leaders who were not lawyers, such as Stephen S. Wise, was dwarfed by the ranks of those who were.

Conversely in the United Kingdom, Jews entered the professions, including law, after the general contours of Jewish communal politics had already been established.<sup>40</sup> Not every Jewish organisation concerned with anti-defamation became involved in group libel advocacy. Even groups which were involved in scuffles over jurisdiction with the Board of Deputies on other matters were unusually deferential when it came to the subject. The Anglo-Jewish Association,

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<https://doi.org/10.4159/9780674242678>. For other studies of the law and lawyers' role in American society, see Gerard W. Gawalt, ed., *The New High Priests: Lawyers in Post-Civil War America* (Greenwood Press, 1984), <https://doi.org/10.5040/9798400691010>; Russell G. Pearce, 'Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of the American Lawyer's Role', 2001.

<sup>39</sup> An early version of this argument is contained within David Biale, *Power and Powerlessness in Jewish History* (Schocken Books, 1986). To Biale, the defining feature of modern Jewish politics is its hewing to the norms of the state in which Jews live, whether Israel or elsewhere. He writes that "the Jews have chosen the modern nation-state, whether in the form of the state of Israel or American democracy, as the best guarantee for their survival. That they have identified with the nation-state is no surprise, for they have always demonstrated a shrewd understanding of the political forms of each age, from partial sovereignty in imperial antiquity to corporate power in the Middle Ages." In Yehuda Kurtzer and Claire E. Sufrin, eds, *The New Jewish Canon* (Academic Studies Press, 2020), 160, <https://doi.org/10.2307/j.ctv1zjg9h6>.

<sup>40</sup> Todd Endelman, *The Jews of Britain, 1656 to 2000* (University of California Press, 2002), <https://doi.org/10.1525/california/9780520227194.001.0001>. Neville Laski, who assumed the Board's presidency in 1933, was not the first lawyer to serve in the role – the barristers Arthur Cohen and David Lindo Alexander had preceded him. But the 20<sup>th</sup> century did see an increasing number of lawyers lead the organisation; nearly every other Board president following Laski had legal training.

for example, heard from the Board about its work on group libel but never tried to study the issue independently. The legal head of the British Section of the World Jewish Congress took up the question more seriously, particularly before the Board officially endorsed group libel in 1945, but eventually submitted his own memorandum to the Board rather than begin a breakaway campaign.<sup>41</sup> The question of group libel within British Jewry was mainly a question for the Board.

American and British Jewish groups also worked within two quite different socio-legal environments. Indeed, attention to the non-Jewish context was a key feature of the type of Jewish politics practiced by most of the “elite” bodies which considered group libel. To only state that American groups were more active than their British counterparts would be too simple – their activity and passivity can only be judged relative to the boundaries that circumscribed their work.

In most cases, the differences between the American and British environment meant it was much easier for American Jewish groups to engage in open legal activism than for the Board of Deputies to do so. For example, as mentioned in the introduction, the relatively decentralised American legal system meant Jewish groups could lobby and bring court cases at the municipal, state, and federal levels. Early group libel activism was primarily centred on state and local laws and statutes; serious pushes for federal legislation began only around 1939. Group libel’s American advocates also benefited from a political and judicial system that was relatively open to lobbying – while the term originated in Britain, its use (and abuse) flowered in the 19<sup>th</sup> and

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<sup>41</sup> *Jewish Chronicle*, September 7, 1945, 1.

20<sup>th</sup> century United States, too.<sup>42</sup> The power to regulate speech, particularly before the Supreme Court took an increasing interest in “constitutionalizing” it, was invested in hundreds of different legislatures, councils, mayors’ offices, and courts, each one a site for potential change.<sup>43</sup> This made the stakes of any one attempt at combatting antisemitism through the law low and encouraged active experimentation on the part of Jewish groups. That some Jewish groups did not push for group libel even more stemmed not from lack of opportunity, but from ideological disagreement with the enterprise.

Conversely, in Britain, the Board of Deputies perhaps correctly viewed “testing” group libel via the courts as either infeasible or overly risky. It was infeasible in the case of parliamentary legislation due to a lack of interest from any of the major political parties until the establishment of the Porter Committee. It was risky due to the centralised nature of the U.K.’s common law system, which meant one badly-decided court case could have far-reaching ramifications. Moreover, the quasi-legislative power of the courts in the U.S., created via assuming the power to decide the constitutionality of legislation in *Marbury v. Madison*, did not exist in the British system.<sup>44</sup> The very nature of the British legal system meant judges were less able to deliver far-reaching change than was the American Supreme Court, with its powers of judicial review. Even under figures such as Chief Justice Coke who suggested the supremacy of the common law, “the courts mounted no direct challenge to the legal supremacy of Parliament.”<sup>45</sup> Judges were confined to interpreting Parliament’s will in most cases; while libel law had traditionally been

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<sup>42</sup> See, e.g., Elisabeth S. Clemens, *The People’s Lobby: Organizational Innovation and the Rise of Interest Group Politics in the United States, 1890 - 1925* (University of Chicago Press, 1997).

<sup>43</sup> Horwitz, *The Transformation of American Law*. 2.

<sup>44</sup> William Cornish et al., *The Oxford History of the Laws of England: Volume XI, The Legal System 1820–1914*, 1st edn (Oxford University Press, 2010), 44–45, 301–2, 338–39.

<sup>45</sup> William Cornish et al., *Law and Society in England 1750–1950* (Hart Publishing, 2019), 12.

mainly a matter for common law interpretation rather than statutes, it would have been impossible for the Board to strategically pursue changes to the common law via bringing individual cases.<sup>46</sup> In addition, the very step to reform the law of defamation in Parliament that caused the Board to consider lobbying for group libel meant that the potential path of advocating for change via the courts was largely closed. Group libel, or any meaningful change to the British approach to antisemitic speech, would be approved by Parliament or not at all. Working within a model in which the relevant power was invested in a single body, the Board assessed that it needed to wait for the right opportunity rather than attempting to create it proactively.

What looks like passivity on the Board's part from one vantage, then, may simply have been an ability to read its environment. However, it is also possible to take this line of thinking too far. In the thesis, I aim to distinguish between actions which grew from the Board's legitimate fear of misusing the very limited legal arrows in its quiver and those which represented an irrational fear of "rocking the boat" and may have indeed been effective. Most notably in my view, the Board chose not to push harder for anti-libel legislation during the Second World War itself and before the postwar Committee on Fascism, as Part II examines. Instead, it took at face value the idea that any change to speech law must come only through the Porter Committee.

Borrowing Diner's formulation, comparing British and American group libel campaigns reveals what was British about the British Jewish relationship to the law and what was American about the American Jewish one. Reflecting the society around them but also their own communal politics, American Jews displayed an active relationship to the law. They agitated for new

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<sup>46</sup> Ibid., 39-40.

legislation against significant resistance, they introduced bills over and over again even as they failed, and they brought court cases without assurance of victory or even with near assurance of failure. British Jews, or at least the Board of Deputies, were far less invested in legal strategies. The Board's leadership only took up the question of group libel seriously after the government convened its own committee to study defamation law. They refused to bring their own lawsuits against antisemites, instead privately lobbying the attorney general to sue on the Board's behalf. They accepted the government's claim that the Race Relations Act would cover antisemitic libel despite the weakness of its key provision. While the group libel campaign represented a relatively bold action for the Board, comparison with its American counterparts reveals a kind of legal minimalism to the American Jew's legal maximalism.<sup>47</sup> The elite of British Jewry did not want to define itself and its relationship to society in terms of the law; American Jews happily did so.

## Sources and Summary

The thesis is based upon a variety of archival sources from the United States, United Kingdom, and Israel. Because of its focus on institutional politics, the bulk of primary source material came from the archives of the Jewish organisations central to the debate over anti-defamation in the

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<sup>47</sup> This is not to say that the Board did not involve itself with legal matters – indeed, it lobbied the government extensively on issues such as education, Sunday trading, marriage certification, and immigration. It also served as a kind of extralegal body standing in for the government, for example vetting Sunday trading applications. But group libel was different from these other interventions, I would argue. Instead of a law that would reduce Jews' adversarial interactions with the courts and the state, as in the case of Sunday trading, it would have given them the opportunity to *increase* the measure of lawsuits they brought and therefore Jews' contact with the state. It would have represented a new type of engagement with the law, different from the above-described examples. For additional information of the Board's role as an intermediary, see David Feldman, 'Jews and the State in Britain, 1830-1930', in *Two Nations: British and German Jews in Comparative Perspective*, ed. M. Brenner, R. Liedtke, and D. Rechter (Mohr Siebeck, 1999), 141–61; Idem., *Englishmen and Jews: Social Relations and Political Culture, 1840-1914* (Yale University Press, 1994).

United States and United Kingdom: The Board of Deputies (the Board), the Trades Advisory Council (TAC), the American Jewish Committee (AJC), the American Jewish Congress (AJCo), and the Anti-Defamation League (ADL). To a lesser extent, I consulted the personal papers of people central to the story of anti-defamation, such as Board of Deputies presidents Neville Laski and Selig Brodetsky, as well as the American lawyer Morris Ernst. I regret that probably the most important American lawyer involved in group libel advocacy, Will Maslow, does not have personal archives, although many of his letters are contained in the AJCo's records. On the governmental side, the records of the Home Office, the Porter Committee on the Law of Defamation, the Race Relations Board, and the President's Committee on Civil Rights (CCR) shed light on how typically non-Jewish officials received proposals for defamation reform. I focused less on the internal correspondence of non-Jewish organisations which were tangentially involved in the group libel debates, such as the National Council on Civil Liberties in Britain and the ACLU in the United States, due to limited scope and because the argument of the thesis mainly concerns the intersection of Jewish politics and group libel specifically. Where relevant I quote from these organisations' statements before official bodies on the subject. Finally, I consulted sources from Jewish newspapers and magazines which covered the issue extensively. In the United States, this included the *Congress Weekly* and *Commentary*; in the United Kingdom, I relied on the archives of the editors of the *Jewish Chronicle* as well as its past issues. Because I was primarily interested in the workings of Jewish institutions, particularly establishment-oriented ones, it is on their archives that I have primarily based my work.

The thesis is divided into three parts, each composed of one chapter focusing on the United States and one focusing on the United Kingdom. Each begins with a section reviewing the key

works of historiography and comparing the two Jewish communities' campaigns. It then moves into narrative. In examining the question of group libel, narrative is key to understanding how and why the idea became such a significant part of Jewish legal work. The idea cropped up repeatedly, often rejected by Jewish groups several times before its moment arose. For that reason, I have chosen to organise the chapters narratively and to place the bulk of the comparative analysis in the section introductions so as not to interrupt the "story" of group libel.

The first section covers the period roughly between the emergence of group libel and the peak of its support. It attempts to answer the question of why Jewish organisations otherwise disinclined to support group rights adopted group libel – mainly as a means to fend off challenges for representative authority and, more sincerely, to address their own fears of the insufficient tools for fighting antisemitism available to them. At the beginning of the campaigns for group libel, the reasons why it came to prominence on both sides of the Atlantic were rather similar.

The second section examines two parallel "trials" of group libel, the moment which I argue represented its best chance at actual enactment and the beginning of the true divergence in British and American approaches to free speech. In 1945, the Board of Deputies presented the idea to the Porter Committee on the Law of Defamation. In 1948, several Jewish groups debated group libel before the Truman Administration's CCR. In both cases, the government bodies rejected the idea, albeit for different reasons. In the United States, group libel "lost" because it had competed unsuccessfully with an alternative vision of the law grounded in First Amendment absolutism. In the United Kingdom, conversely, the Porter Committee and the political establishment rejected the idea that the law could or should combat hatred of minorities at all.

The third and final section examines how group libel's onetime advocates dealt with the rise of laws and court rulings designed with other minority groups in mind, notably African Americans and postwar immigrants from the former British colonies. In the United States, Jews' political coalition partners, civil libertarians and African American groups, favoured an individual rights-based approach that spelled group libel's demise. In the United Kingdom, Jews were largely left out of legal protections against "hate speech," despite frequent invocations of the experience of German Jewry in the debates that produced those protections. With the adoption of the Race Relations Act, the United Kingdom adopted an approach ill-suited to dealing with antisemitism, despite Jews' success in pushing for a provision against "incitement to racial hatred." While scholars have not discussed the Act and earlier campaigns for group libel in tandem, in British Jews' mind their largely unsuccessful attempts to win the Act's protection grew directly from that earlier work. In both the British and American cases, albeit for different reasons, rather than Jews deciding to move on from group libel, trends in the broader legal culture decided on their behalf. Still, the episode left a lasting imprint on British and American Jewry's relationship to the law, in the former underlining their difficulties fitting in with existing legal categories and in the latter binding them ever closer to it.

## Part I: Discovering Group Libel

The first section of this thesis deals with the period roughly between 1919 and 1940, during which the idea of group libel came to American and British Jews' attention. It aims to answer two questions – why group libel became a subject of debate in the U.S. and U.K. and why at least some prominent Jewish organisations came to support it.

Efforts at anti-defamation work predate 1919, but debates surrounding the creation of the American Jewish Congress and curbs on speech during the First World War marked the beginning of the rights discourse which would fuel the group libel debates of later decades. Similarly, the onset of the Second World War in 1939 and the increasingly dire situation of continental Jewry radically heightened both American and British Jews' assessment of the need to fight antisemitic speech. Conversations around and efforts to enact group libel accelerated at the end of the period covered in the following two chapters.

Existing literature on group libel and group rights in the United States, notably articles by Barbas, Schultz, Forbath, Tevis, and Loeffler, correctly links their origins to the large wave of Jewish immigrants who came to the country in response to pogroms before the Immigration Act of 1921 limited their numbers.<sup>48</sup> They both enlarged the number of American Jews considerably

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<sup>48</sup> Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws'; Schultz, 'Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952'; Forbath, 'The Jewish Constitutional Moment: Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism'; William Forbath, 'Constitutionalism, Human Rights and the Genealogy of American Jewish Liberalism', in *The Law of Strangers: Jewish Lawyering and International Legal Thought in Historical Perspective*, ed. James Benjamin Loeffler and Moria Paz (Cambridge University Press, 2019); Britt P. Tevis, "'The People's Judge': Jacob Panken, Yiddish Socialism, and American Law', *American Journal of Legal History* 59, no. 1 (March 2019): 31–70, <https://doi.org/10.1093/ajlh/njy026>; Loeffler, "'A Certain Type of Liberalism'"; Loeffler, 'Nationalism without a Nation? On the Invisibility of American Jewish Politics'.

and brought new ideas about group identity and group rights. The notion of a Jewish *kehillah* or Sanhedrin which led to the formation of the American Jewish Congress and the concept of a Jewish Bill of Rights both resulted from the intellectual ferment brought about by this wave of immigration.<sup>49</sup> So too did the concept of group rights as outlined by immigrants like Horace Kallen, a German-born journalist who envisioned a United States in which “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>50</sup>

Group libel has figured less prominently, if at all, in existing account of Anglo-Jewish responses to fascism and antisemitism. Daniel Tilles’s work on the subject, while excellent, largely neglects the Board’s work on libel reform – in part because his book stops where this section does, with the internment of many British fascists in 1940.<sup>51</sup> Earlier accounts such as those by Colin Holmes, Gisela Lebzelter, Elaine Smith, and Sharon Gewirtz follow the same periodization, ending their accounts of responses to British fascism in 1939 or 1940.<sup>52</sup> By doing so, they ensure that group libel does not figure prominently; the Board’s Community Libel Subcommittee had barely begun its work before the war interfered. But the Board and British Jews did not stop caring about antisemitism once the Second World War began – although, of course, they had many other terrible problems to confront. Some of the work to stop domestic antisemitism paused or became irrelevant during the internment period, but notably not group

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<sup>49</sup> See, e.g., Arthur A. Goren, *New York Jews and the Quest for Community: The Kehillah Experiment, 1908-1922* (Columbia University Press, 1970).

<sup>50</sup> Schultz, ‘Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952’ 86.

<sup>51</sup> Tilles, *British Fascist Antisemitism and Jewish Responses, 1932-40*.

<sup>52</sup> Holmes, *Anti-Semitism in British Society, 1876-1939*; Gewirtz, ‘Anglo-Jewish Responses to Nazi Germany 1933—39’; Lebzelter, *Political Anti-Semitism in England, 1918-1939*; Smith, ‘But What Did They Do?’

libel advocacy, as Chapters II and IV show. That the Board continued to explore the issue even as it had so much else to do demonstrates the perceived importance of the matter.

If scholarship about British responses to fascist antisemitism underplays the changing role of the law, American scholarship often takes it for granted. In this first section, I hope to show that, rather than being respectively a minor or an obvious aspect of Jewish antifascism, discussions about whether to support group libel revealed the growing salience of the legal approach to both British and American Jews. Using the law – through lawsuits or the creation of new law – became a way for Jewish political organisations to expand their box of tools to fight antisemites without breaking from the state.

Given the central role lawsuits have lately played in American social movements, it is perhaps unsurprising that serious attempts to pursue collective defamation lawsuits in the 20<sup>th</sup> century began stateside. American Jewish groups experimented with proposing anti-defamation laws as early as 1912, seeking to sue or bring legislation banning discriminatory advertisements in hotels, resorts, theatres, and other leisure spaces.<sup>53</sup> British Jews, while also cognizant of the effect of such visible discrimination, were reluctant to confront it in court or to seek radical legal reform.

Even before the start of debates over group libel, then, differences between British and American Jews' approaches were apparent. Part of these differences owed to the founding circumstances of

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<sup>53</sup> Britt P. Tevis, "'Jews Not Admitted': Anti-Semitism, Civil Rights, and Public Accommodation Laws", *Journal of American History* 107, no. 4 (March 2021): 847–70, <https://doi.org/10.1093/jahist/jaaa461>; Schultz, 'Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952'.

their community organisations. The Board of Deputies, founded in 1760 but taking its modern form in 1835<sup>54</sup> – had never been dominated by lawyers, nor was it a legal defence organisation. It did lobby the government for or against various legislation, famously in the case of the Aliens Act 1905, but law was never its sole remit. The Board’s Law and Parliamentary Committee, through which much of the early group libel discussion would occur, often seemed designed to discuss *not* taking legal action, or at minimum mulling it for years before doing so.<sup>55</sup> Several of the major American Jewish organisations of the 20<sup>th</sup> century, by contrast, were steeped in the law from their birth. The American Jewish Congress and American Jewish Committee were filled with lawyers.<sup>56</sup> Even B’nai Brith – probably the least obviously legal of the American Jewish groups – ran an internal tribunal and filed affidavits on immigrant Jews’ behalf.<sup>57</sup> A rise in arms production tends to spur wars; a rise in the prominence of lawyers tends to spur lawsuits.

Of course, the very fact of being led by lawyers did not cause all American Jewish groups to support suing antisemites or advocating for group libel. Louis Marshall, probably one of the country’s most prominent lawyers and a co-founder of the AJC, opposed both measures.<sup>58</sup> But the alternative proposed by those who thought group libel unwise differed. In the United States, group libel had to compete with an alternative vision of the law espoused by the ACLU. Legal

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<sup>54</sup> See, e.g., Raphael Langham, *250 Years of Convention and Contention: A History of the Board of Deputies of British Jews, 1760-2010* (Vallentine Mitchell, 2010); Aubrey Newman, *The Board of Deputies of British Jews, 1760-1985: A Brief Survey* (Vallentine Mitchell, 1987).

<sup>55</sup> Board of Deputies of British Jews, *Annual Report of 1938*.

<sup>56</sup> Naomi W. Cohen, *Not Free to Desist: The American Jewish Committee, 1906-1966* (Jewish Publication Society of America, 1972); Shad Polier et al., *The Work of CLSA: A Bibliography, 1945-1957* (American Jewish Congress, 1947).

<sup>57</sup> Jonathan D. Sarna, ‘The Halakha According to B’nai Brith’, in *Rav Chessed: Essays in Honor of Rabbi Dr. Haskel Lookstein* (KTAV Publishing House, 2009), 165–82.

<sup>58</sup> Marshall’s views were complicated, but by the 1920s he opposed most manifestations of group libel. For more on his thinking, see Schultz, ‘Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952’; Matthew Silver, ‘Louis Marshall and the Democratization of Jewish Identity’, *American Jewish History* 94, no. 1–2 (June 2008): 41–69; Idem., *Louis Marshall and the Rise of Jewish Ethnicity in America: A Biography* (Syracuse University Press, 2013).

thinking rarely left the minds of American Jewish leaders – the question was how *best* to use the law. For the Board of Deputies, on the other hand, the law was not the only way to fight antisemitism. Nor was it for Anglo-Jewry more broadly. Other means of social and political activity appealed, particularly charity, educational work, and private entreaties to the government.

While the American Jewish population was larger and more geographically dispersed than was British Jewry, both groups' community organisations concentrated in their great cities, London and New York. But the social dynamics of Jewish political life were quite different from one another, in ways that would be consequential for the fate of group libel and group rights.

Whatever the reality on the ground, the Board of Deputies claimed to be the “representative” organisation of Anglo-Jewry; to non-Jews, it was the group to be consulted on Jewish matters. The Anglo-Jewish Association formed in 1871, to be sure, but it never seriously challenged the Board's preeminent status.<sup>59</sup> In the case of group libel, anyway, many of the relevant characters such as Neville Laski and A.S. Diamond were members both of the AJA and the Board but dealt with the issue through the latter.<sup>60</sup> As David Feldman noted in a survey of Jews' relationship to the state, the Board derived power from its relationship to the state above all else: “the authority conferred by the state upon that single Jewish body had important consequences for the Jews' capacity to represent themselves to successive governments. Anglo-Jewry possessed an acknowledged voice articulating its interests – or, at any rate, what the Board of Deputies conceived those interests to be. Furthermore, the centralisation of state sovereignty meant that in

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<sup>59</sup> David Loewe, ‘The Anglo-Jewish Association Past and Present’, in *For the Sake of Humanity*, ed. Alan Stephens and Ralph Walden (Brill Nijhoff, 2006), 203–16, <https://doi.org/10.1163/ej.9789004141254.i-394.50>.

<sup>60</sup> David Loewe, “The Anglo-Jewish Association Past and Present,” 211.

many instances the Board of Deputies was able to identify a single political and administrative body to which it could direct its energies.”<sup>61</sup>

American Jewry, larger and younger, never quite settled on a representative body. Partially this was due to the lack of a semi-aristocratic elite comparable to the old Jewish Cousinhood of London (despite the best efforts of New York’s assimilated German Jews to fill such a role).<sup>62</sup> Partially it owed to the longstanding tradition of religious freedom which meant American Jews did not have to rely on an elite group to win political rights.<sup>63</sup> Whatever the reason, throughout the period in which group libel was a going concern, the American Jewish Committee, American Jewish Congress, ADL, and other groups all played a part in advocacy before the government and courts. None would relinquish the banner of “representativeness.”

The relative lack of Jewish political groups capable of engaging in a lobbying campaign other than the Board delayed the adoption of group libel as a policy proposal in the United Kingdom.<sup>64</sup> Ironically, the group that eventually prompted the Board to seriously reconsider libel reform against its previous judgements was a body of its own creation, the Trades Advisory Council, which the board founded in 1938 to deal with the many issues Jews in the trades faced.<sup>65</sup>

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<sup>61</sup> Feldman, ‘Jews and the State in Britain, 1830-1930’.

<sup>62</sup> Forbath, ‘The Jewish Constitutional Moment: Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism’ 9-10. For more on the Cousinhood, see Chaim Bermant, *The Cousinhood: The Anglo-Jewish Gentry* (Macmillan, 1971).

<sup>63</sup> Washington famously wrote, “may the Children of the Stock of Abraham, who dwell in this land, continue to merit and enjoy the good will of the other Inhabitants; while every one shall sit in safety under his own vine and figtree, and there shall be none to make him afraid.” Letter from George Washington to the Hebrew Congregation in Newport, R.I., August 18, 1790.

<sup>64</sup> The other main body engaged in defence work, the Jewish People’s Council, was forced to confront the fact that only the Board had sufficient access to the government to pursue a campaign calling for officials to act against antisemitic propaganda. In April 1937, the JPC attempted to send a deputation to the Home Office to discuss antisemitism and was rebuffed. See Tilles, *British Fascist Antisemitism and Jewish Responses, 1932-40*, 172.

<sup>65</sup> Board of Deputies of British Jews, *Annual Report of 1938*, 55.

Reading the correspondence between the two often evokes a weary parent and their irksome adolescent. TAC, which sat on the Board's Defence Committee when it formed, constantly pushed the boundaries of what the Board saw as its remit. Still, the TAC would scarcely have dared to go before the Home Office or government to push for group libel without consulting its proverbial parent. If group libel's proponents were going to see the idea adopted in Britain, they would have to convince the Board of Deputies. The Board itself was also more reactive to non-Jews' opinions than the major American Jewish organisations. In addition to the TAC's endorsement of group libel, the real reason for the Board's creation of its Community Libel Subcommittee was a response to events which had little to do with Jewish rights. In 1939, as Chapter II shows, the government began a review of defamation law led by Lord Porter.<sup>66</sup> The government's committee mainly concerned itself with technical issues of defamation law rather than radical changes like those eventually proposed. But the very existence of such a committee legitimized the idea of proposing something. The confluence of Lord Porter's inquiry and the Board's determination to do something more about antisemitic defamation was a coincidence, but a convenient one for group libel's proponents.

In the United States, libel reform had its moment within several groups. This explains why it remained a salient issue well into the 1950s – its advocates had various institutions through which to do their work. The AJCo of the 1940s would become group libel's best and most sustained host, but it was no means the only one. At various points, the AJC, ADL, and Jewish Labor Committee all supported forms of the idea. Even the ACLU at one point attempted to draft

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<sup>66</sup> E. Hall Williams, 'Committee on the Law of Defamation: The Porter Report (Cmd. 7536/48)', *The Modern Law Review* 12, no. 2 (1949): 217–23.

a model group libel bill that would not contravene its commitment to unfettered free speech. As one group or another abandoned anti-defamation, another picked it up.

Particularly in this first period, though, the approach to group libel in the United States and United Kingdom was fundamentally more similar than different. The answer to the question posed in this Part – why did Jewish groups seriously consider group libel as a tactic against antisemitism? – is that legally based approaches had become increasingly compelling to them. Libel reform was seen by some Jews as a potentially transformative legal means through which antisemitic speech might be curbed. Crucially, even those Jewish leaders who were reluctant to adopt group libel specifically eventually came to entertain it because they preferred it to other solutions. Law, and libel law, would allow liberal Jewish groups to fight antisemites not through fundamental societal change, but rather through integrating themselves ever more with the state. Group libel could be many things to many Jews.

## Chapter I

### ‘The Quest for Legal Remedies’: Discovering Group Libel in America, 1912-1940

The idea of group libel proved tantalizing for American Jewish groups in the 20<sup>th</sup> century, cropping up in internal debates during each decade from the 1920s to the 1990s. Each time, it faced strong opposition, both from American Jews who favoured other responses to antisemitic speech and eventually from members of other advocacy groups working on minority rights and civil liberties. But for a variety of reasons explored further below, it continued to appeal to a section of American Jews who conceived of themselves – and wanted to be viewed by others – as a distinct interest group.

Existing literature on early efforts to enact group libel in the United States generally tells a story of its “rise and fall.”<sup>67</sup> Group libel and its antecedents won some support from Jewish groups in the 1920s, 1930s, and 1940s before losing out to the so-called “marketplace of ideas” and a more liberal, individual approach to minority rights. I hope to tell a different story – group libel itself may have fallen out of favor with Jewish groups and Americans generally, but it was instrumental in cementing their focus on legal tactics. Through the debates on group libel, American Jewish groups came to define the fight against antisemitism in legal terms and to view themselves through their relationship to the law. Group libel came to compete as a strategy not against non-legal approaches but against *different* legal approaches. More than a simple tale of support and then abandonment, this growing focus on the law and the First Amendment is the real significance of the group libel debates in the United States.

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<sup>67</sup> See, e.g., Barbas, ‘The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws’; Schultz, ‘Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952’.

The following chapter will explore these efforts in their earliest stage. The debate over legislating against antisemitic speech grew initially from two roughly contemporaneous developments, one domestic to the United States and the other international. The first was a series of curbs on speech during the First World War, which produced the “clear and present danger” test that would shape a century of First Amendment jurisprudence. The second was the fight to establish the AJCo in advance of the 1919 Paris Peace Conference. The debates over group libel, which continued until the eve of the Second World War, were essentially over whether the ideas of group rights advanced in Paris could or should be applied within the American constitutional system. What emerged was a decade of experimentation in which legal thinking overtook alternative solutions to occupy an ever-greater role in American Jews’ conception of the fight against antisemitism. While group libel itself waxed and waned in popularity, it was part of a greater story – the story of how American Jews came to do the work of self-definition through their relationship to law and the First Amendment.

### **The ‘Jewish Constitutional Moment’**

To understand Jewish groups’ approach to libel reform, it is first necessary to understand the institutions which competed to represent them. The American Jewish Committee was founded in 1906<sup>68</sup>, the Anti-Defamation-League in 1913<sup>69</sup>, and the ACLU in 1920.<sup>70</sup> The latter group, while not a Jewish organisation, would become extensively involved in group libel debates because

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<sup>68</sup> “American Jewish Committee,” YIVO Institute for Jewish Research; accessed November 30, 2023, <http://www.yivoarchives.org/index.php?p=collections/controlcard&id=33740>.

<sup>69</sup> “Our History and Mission,” Anti-Defamation League; accessed November 30, 2023, <https://www.adl.org/about/mission-and-history>.

<sup>70</sup> “ACLU History,” American Civil Liberties Union; accessed November 30, 2023, <https://www.aclu.org/about/aclu-history>.

they so often intersected with broader discussions of free speech and civil liberties. Each reflected a distinct approach to the relationship of speech and group rights; the story of group libel's failure to succeed in the U.S. is best understood as the story of one approach's growing supremacy, best espoused by the ACLU: that the response to hateful speech was more speech and that speech targeted against racial and religious groups should not be treated differently by courts than other remarks.

The AJC was the first of the key American Jewish organisations to form and the most closely analogous to the Board of Deputies. Its founders chiefly came from the class of well-off German Jewish New Yorkers who aspired to a kind of aristocratic status among American Jews and the *noblesse oblige* that accompanied it. The AJC would be their organ and, crucially as in the case of the Board, their putative representative to non-Jews; the historian Stuart Svonkin wrote of the AJC that the “small clique of German Jewish notables” who led it sought to lead American Jewry “in matters pertaining to politics, foreign affairs, and relations with the broader society.”<sup>71</sup>

Among its notable early leaders were men like Louis Marshall, discussed extensively in this chapter, as well as the banker Jacob Schiff and the scholar Cyrus Adler.<sup>72</sup> All three were German Jews, in Schiff's case from a famous rabbinical family.<sup>73</sup> Their social background was reflected in the AJC's political philosophy, which always sought to at once advocate for American Jews' interests and to emphasize that they were no different from their fellow Americans. For the AJC, any claim for Jews' rights was expressed in terms of seeking those which the Constitution

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<sup>71</sup> Stuart Svonkin, *Jews against Prejudice: American Jews and the Fight for Civil Liberties* (Columbia University Press, 1997).

<sup>72</sup> Naomi W. Cohen, *Encounter with Emancipation: The German Jews in the United States, 1830-1914* (Jewish Publication Society, 1984), 203–10; Jonathan D. Sarna, ‘Cyrus Adler and The Development of American Jewish Culture: The “Scholar-Doer” as a Jewish Communal Leader’, *American Jewish History* 78, no. 3 (1989): 391.

<sup>73</sup> Cohen, *Not Free to Desist: The American Jewish Committee, 1906-1966*.

allegedly afforded all Americans; legal or political innovations were advocated for on the odd basis that they in fact already existed.<sup>74</sup> Whether or not this was accurate, for the AJC's vision of American Jewish life it was an important fiction. Its founding in 1906 came in response to large-scale pogroms in the Russian Empire, but tellingly its early leaders sought to lobby the U.S. government on the issue rather than to engage in any kind of direct action.<sup>75</sup>

Several years later, the ADL was founded as part of the preexisting group B'nai Brith, notably by Jews outside the major urban centres of the East Coast.<sup>76</sup> It focused on combatting domestic antisemitism through a publicity campaign against poisonous press coverage to which the wave of new Jewish immigrants were subjected.<sup>77</sup> The ADL's main early goal was to stop the circulation of anti-Jewish sentiments in the press. Indeed, its leaders expressly eschewed lawsuits and legislative reform as tactics, believing influencing the media through financial boycotts and public opinion campaigns to be more effective.<sup>78</sup> Despite its name, it was initially the least involved of the three major organisations in the matter of group libel.

The AJCo, rather than the ADL, acted as a foil to the AJC's political vision when it came to group libel. Its founders sought to create a unifying organisation for collective politics that would represent the full breadth of viewpoints within the community on issues such as Zionism and assimilation. Understanding the nature of the AJCo's approach to group libel requires examination of the complicated bargains that attended its formation.

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<sup>74</sup> Nina Valbousquet, "'Un-American' Antisemitism?: The American Jewish Committee's Response to Global Antisemitism in the Interwar Period', *American Jewish History* 105, no. 1/2 (2021): 77–102.

<sup>75</sup> Cohen, *Not Free to Desist: The American Jewish Committee, 1906-1966*.

<sup>76</sup> Deborah Dash Moore, ed., *B'nai B'rith and the Challenge of Ethnic Leadership* (State University of New York Press, 2010), 102.

<sup>77</sup> *Ibid.*, 105.

<sup>78</sup> *Ibid.*, 108-9.

Forbath has called the period from 1915 through 1919 the “Jewish constitutional moment” within the United States.<sup>79</sup> He refers to this period as a struggle between the liberalism of the 19<sup>th</sup> century and the pluralism of the 20<sup>th</sup>. As two million Jews moved from the Russian Empire and eastern Europe to the United States, they brought with them emergent ideas about group rights and attracted the ire of non-Jews through their “foreignness.”<sup>80</sup> The 1905 revolution in Russia caused a wave of Jewish activists, both Bundist and Zionist, to come to the United States.<sup>81</sup> They brought with them the idea that Jews must advocate for national rights, whether within multinational federations or within their own Jewish state. For example, the founder of the New York Kehillah, Judah Magnes, delivered a sermon in 1909 called “A Republic of Nationalities” in which he called for a pluralistic United States where “each man as he strikes root here is no more obliged to yield his individuality, his race, his speech, his culture, his ideals, than he is obliged to yield his religion.”<sup>82</sup> The United States envisioned by Magnes and the *kehillah* movement he led could accommodate immigrants who did not “melt” into Americanness but rather retained their culture. Magnes’s Kehillah faltered by the late 1910s and he left New York for Mandatory Palestine in 1922,<sup>83</sup> but his ideas lived on through the demand for an American Jewish congress beginning in 1914, which drew huge crowds of recent Jewish immigrants to

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<sup>79</sup> Forbath, ‘The Jewish Constitutional Moment: Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism’.

<sup>80</sup> It would be difficult to list the books and articles covering the effect of this wave of immigration on American Jewish life, but as a starting point see, e.g., Sarna, *American Judaism*. For the role of immigration on Jewish legal thought specifically, see Forbath, ‘Constitutionalism, Human Rights and the Genealogy of American Jewish Liberalism’.

<sup>81</sup> See, e.g., Jonathan Frankel, *Prophecy and Politics: Socialism, Nationalism, and the Russian Jews, 1862-1917*, (Cambridge University Press, 2003), <https://doi.org/10.1017/CBO9780511572494>; Tony Michels, *A Fire in Their Hearts: Yiddish Socialists in New York* (Harvard University Press, 2005).

<sup>82</sup> Judah L. Magnes and Arthur A. Goren, *Dissenter in Zion: From the Writings of Judah L. Magnes* (Harvard University Press, 1982), 104.

<sup>83</sup> Magnes and Goren, *Dissenter in Zion*.

speeches about a “Jewish national program” in America.<sup>84</sup> The leaders of this new Congress movement, such as the socialist Isaac Hourwich, would cannily merge “Russian Diasporic nationalism to American constitutionalism.”<sup>85</sup> Their call for a Congress won the support of the most famous Jew in the United States, Justice Louis Brandeis, meaning Marshall and the AJC could no longer hope it would disappear like the Kehillah had. At President Wilson’s behest, the AJC went to the Paris Peace Conference as part of a unified, newly founded AJCo, bringing a “Jewish Bill of Rights” which accommodated some aspects of classical liberalism and pluralism alike. Producing the Bill and organising the first meeting of the Congress had required what the historian Arthur Goren called “three years of the most intense intracommunal political negotiations American Jews ever engaged in.”<sup>86</sup>

The AJC participated in the first meeting of the Congress but stopped doing so after the Peace Conference in Paris.<sup>87</sup> Within three years of its first founding, the AJCo as it was originally conceived disbanded at only its second full meeting; in 1922, it was reborn not as an umbrella group for all American Jewish organisations but as its own separate body.<sup>88</sup> Absent the need to placate the AJC, the AJCo developed a warmer stance toward Jewish nationalist aspirations in Palestine and, crucially, a greater willingness to advocate for group rights within the U.S., albeit without fully committing to the radical aspirations of figures like Hourwich.<sup>89</sup> These attempts at compromise were probably best represented by the politics of Brandeis, the towering figure of

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<sup>84</sup> Forbath, ‘The Jewish Constitutional Moment: Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism,’ 34.

<sup>85</sup> Ibid., 32.

<sup>86</sup> Arthur A. Goren, ‘The New York Kehillah’, *American Jewish History* 80, no. 4 (1991): 537.

<sup>87</sup> David Engel, ‘American Jewish Congress’, in *Encyclopedia of Jewish History and Cultures*, 2017, [https://referenceworks.brill.com/doi/10.1163/2468-8894\\_ejhc\\_COM\\_0024](https://referenceworks.brill.com/doi/10.1163/2468-8894_ejhc_COM_0024).

<sup>88</sup> Goren, ‘The New York Kehillah’, 537.

<sup>89</sup> Forbath, ‘The Jewish Constitutional Moment: Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism’, 26–28.

American Jewry during the first part of the century and an early force within the AJCo.<sup>90</sup> As Forbath has written, Brandeis “had never had any use for New York’s Reform Jewish elite and had long been inclined to see a Jacob Schiff or Louis Marshall as just another plutocrat and parvenu.”<sup>91</sup> Brandeis’s formulation of Jewish group identity and rights was different from that espoused by Bundist figures on the Lower East Side, to be sure; still, he sought to reshape American jurisprudence to better recognize the importance of groups, whether labour unions or racial and religious communities. He wrote that “free and equal individuals only develop in the context of free and equal groups; and such groups, in turn, need ‘group rights’ and ‘group equality’ ... happily, the true genius of the American Constitution was that it constituted us as a community of free and equal individuals constituted, in turn, by free and equal groups, nations and peoples.”<sup>92</sup> Whether or not this intellectual framing was accurate, it was elegant, and in Brandeis it had one of the U.S.’s smartest and most powerful advocates. There was no tension between American and Jewish identity, rather, the Constitution expressly granted the Jew the “right to his own peculiarities,”<sup>93</sup> including the right to make support for the Zionist project a key part of his public identity. There was nothing more American, in the AJCo’s formulation, than the right to act as an individual *or as a group* however one pleased. Other key figures in the early years of the AJCo, Stephen Wise and Felix Frankfurter, shared this melding of faith in group rights and faith in the constitution. It would prove a good home for group libel, which aimed at the same threading of the legal needle.

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<sup>90</sup> See, e.g., Jonathan D. Sarna, ‘Louis D. Brandeis: Zionist Leader’, *Brandeis Review* 11, no. 3 (1992): 22–27.

<sup>91</sup> Forbath, ‘The Jewish Constitutional Moment: Diaspora and Group Rights in the Making of American Jewishness and Modern Liberalism’, 35.

<sup>92</sup> *Ibid.*, 36–37.

<sup>93</sup> *Ibid.*, 39.

Forbath ends his story of the “constitutional moment” in 1919, writing that “Justice Brandeis’s defense of ‘group rights’ never ripened into a program of constitutional change in the U.S. During the interwar years, ‘group rights’ and ‘group equality’ continued to serve as a moral and rhetorical resource against the forces of ‘100% Americanism.’ As legal material, however, group, nationality, and minority rights remained lodged in the post-war treaties, where they stood for the increasingly vain hope of safeguarding vulnerable Jewish institutions and associations in eastern Europe.”<sup>94</sup> But the story of group libel in the United States, which began just as this “constitutional moment” ended, belies this interpretation. Indeed, group rights as exemplified by the push for libel reform won several surprising victories. That its advocates did not win complete victory – a federal group libel law or a favourable Supreme Court judgement – does not make their success any less relevant when evaluating the development of Jewish group rights advocacy between 1919 and 1940. The 1919 debates over the formation of the AJCo did not fossilise group rights, nor relegate it to Eastern Europe as Marshall had hoped. Rather, pluralists eventually seized on the law of libel as their best hope for enshrining some form of group rights in American law.

### **Jews and Jurisprudence**

Group libel’s birth also related to trends in American legal thought more broadly. The traditional story of American legal history held that beginning roughly around 1890, the “legal formalism” or “classical legal thought” of the 19<sup>th</sup> century began to wane in favor of Roscoe Pound’s sociological jurisprudence.<sup>95</sup> Pound and his intellectual allies, notably Supreme Court Justice

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<sup>94</sup> Ibid., 41.

<sup>95</sup> The key works in this field are Horwitz, *The Transformation of American Law*. 2; Kennedy, *The Rise and Fall of Classical Legal Thought*. For important revisions to Kennedy and Horwitz, see also Rabban, *Law’s History*. For the

Oliver Wendell Holmes Jr., eschewed their forebears and argued that “traditional conceptions of individualism and individual rights impeded the attention to collective interests required in the modern world.”<sup>96</sup> His ideas would transform American law, advancing widely-held critiques of decisions such as *Lochner v. New York* which had undermined Progressive Era legislation. While Rabban’s scholarship calls into question the caricature of late 19<sup>th</sup> century legal thought Pound proposed, the fact remains that at the very moment group libel emerged as a cause of some American Jews, they were not alone in thinking the 20<sup>th</sup> century required laws which would allow for advocacy on behalf of group interests.

During the First World War, the U.S. Congress passed the Espionage Act of 1917, one of several steps curtailing dissent against the war effort, in particular pamphlets opposing the draft.<sup>97</sup> In the 1919 case *Schenck v. United States*, brought by one such pamphleteer, Holmes wrote for the majority that the government could curtail speech that presented a “clear and present danger,” using the famous example of a man yelling “fire!” in a crowded theatre.<sup>98</sup> The Court affirmed similar limits on First Amendment rights in two other cases that year<sup>99</sup>, fuelling worries about a postwar anti-speech turn that hastened the rise of free speech advocacy. In opinions from this period, Holmes echoed his earlier concerns about the danger of false speech in *The Common Law*, namely that intent to cause harm was beside the point – the danger of falsities themselves formed the basis for the tort of libel.

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original texts on which this scholarship is based, see Oliver Wendell Holmes, Jr., *The Common Law* (Little, Brown, and Co., 1881); Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones Company, 1921).

<sup>96</sup> Rabban, *Law’s History*.

<sup>97</sup> Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime; from the Sedition Act of 1798 to the War on Terrorism* (Norton, 2005).

<sup>98</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>99</sup> Laura M. Weinrib, *The Taming of Free Speech: America’s Civil Liberties Compromise* (Harvard University Press, 2016), 6.

Soon, however, progressive and liberal groups helped push the Court to overturn its limits on subversive speech, ushering in an understanding that more speech – the “marketplace of ideas” – was a necessary part of a healthy democracy. These efforts were remarkably fruitful, if perhaps not precisely in the manner its often left-wing advocates initially intended. Weinrib writes in her history of the ACLU that the pro-speech “vision of civil liberties that prevailed by the Second World War was so successful as to become controlling.”<sup>100</sup> She also notes, though, that while the public faces of this movement were on the centre and left, the eventual shape of civil liberties and free speech jurisprudence owed much to conservative emphases on individual rights and the judiciary’s role as a check on government overreach. Even Holmes turned away slightly from his earlier position on antiwar speech as early as 1918 and 1919, under the influence of younger jurists like Learned Hand and Brandeis.<sup>101</sup> Another impulse was likewise at play – the American desire to emphasize statutory and Constitutional law rather than common law.<sup>102</sup>

The final trend which drove the beginnings of group libel advocacy was the entrance of American Jews into the professions in the late 19<sup>th</sup> century. Jewish lawyers made up less than ten percent of New York City bar members in 1885; by 1960, that figure had risen to more than 60

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<sup>100</sup> Ibid.

<sup>101</sup> See *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, Jr., O., dissenting). For material on Holmes, Learned Hand, and other key pieces of early free speech jurisprudence, see, e.g. Lawrence M. Friedman, *American Law in the 20th Century*, (Yale University Press, 2002), 142–43; Rabban, *Free Speech in Its Forgotten Years, 1870–1920*; Stone, *Perilous Times*; George Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (Oxford University Press, 1996).

<sup>102</sup> See other Holmes dissents, e.g. *United States v. Schwimmer*, 279 U.S. 644 (1929) (Holmes Jr., O., dissenting); *Baltzer v. United States*, 248 U.S. 593 (1918) (Holmes Jr., O., dissenting), unpublished memorandum distributed to the Court, via Rabban, *Free Speech in Its Forgotten Years, 1870–1920*; Sheldon M. Novick, ‘The Unrevised Holmes and Freedom of Expression’, *Supreme Court Review* 1991 (1991), <https://chicagounbound.uchicago.edu/supremecourtrev/vol1991/iss1/9>.

percent.<sup>103</sup> Shut out from existing firms, Jewish lawyers first worked as individual practitioners and then eventually founded their own to great success.<sup>104</sup> Observers of this phenomenon have often tried to claim a special affinity between Jews and the law, whether because of the nature of legal debate or the supposed Jewish commitment to justice.<sup>105</sup> Those claims are specious – it is more like that the late 19<sup>th</sup> and early 20<sup>th</sup> century simply provided American Jews their first opportunity to become lawyers through the growth of part-time and night law schools in New York and the willingness of some other, more traditional law schools to accept Jews.<sup>106</sup> Columbia Law School in particular would serve as the training ground for many of the figures involved in the group libel debate, located in New York City and therefore at the centre of American Jewish life.<sup>107</sup> Key figures in the group libel debates Marshall, Jerome Michael,<sup>108</sup> Will Maslow,<sup>109</sup> Arthur Garfield Hays,<sup>110</sup> and Osmond Fraenkel<sup>111</sup> all attended Columbia. (A rare exception, Morris Ernst attended a night law school.<sup>112</sup>) Beginning in the 1920s, Columbia became a hub for the teaching of “legal realism,” inspired by Pound and his ideas.<sup>113</sup> After a

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<sup>103</sup> Jerome E. Carlin, *Lawyers' Ethics; a Survey of the New York City Bar* (Russell Sage, 1966); Henry W. Taft, *Legal Miscellanies: Six Decades of Changes and Progress* (Macmillan, 1941). See also Eli Wald, ‘The Rise and Fall of the WASP and Jewish Law Firms’, *Stanford Law Review* 60 (2008). For more on Jews, exclusion, and law, see, e.g., Thomas L. Shaffer, ‘The Legal Ethics of Belonging’, *Ohio State Law Journal* 49 (1988), [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/567](https://scholarship.law.nd.edu/law_faculty_scholarship/567).

<sup>104</sup> Eli Wald, ‘Jewish Lawyers and the U.S. Legal Profession: The End of the Affair?’, *Touro Law Review* 36, no. 1 (2020): 9, <https://digitalcommons.tourolaw.edu/lawreview/vol36/iss1/19>.

<sup>105</sup> See, e.g., Marc Galanter, ‘A Vocation For Law? American Jewish Lawyers and Their Antecedents’, *Fordham Urban Law Journal* 26, no. 4 (1999): 1125–48.

<sup>106</sup> Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (Oxford University Press, 1977).

<sup>107</sup> Karabel, *The Chosen*.

<sup>108</sup> Silver, *Louis Marshall and the Rise of Jewish Ethnicity in America*.

<sup>109</sup> Dennis Hevesi, “Will Maslow, 99, Lawyer Who Fought Discrimination, Dies,” *New York Times*, February 27, 2007.

<sup>110</sup> Chelsea Dowell, “Village People: Arthur Garfield Hays,” *Greenwich Village Society for Historical Preservation*, December 15, 2016, <https://www.villagepreservation.org/2016/12/15/village-people-arthur-garfield-hays/>.

<sup>111</sup> David Margolick, “Osmond K. Fraenkel Dies at 94; Former Counsel to the A.C.L.U.,” *New York Times*, May 17, 1983.

<sup>112</sup> Alden Whitman, “Morris Ernst, ‘Ulysses’ Case Lawyer, Dies,” *New York Times*, May 23, 1976.

<sup>113</sup> Stewart Macaulay, ‘The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be”’, *Wisconsin Law Review*, no. 2 (2005), [https://law.wisc.edu/facstaff/macaulay/papers/new\\_versus\\_c2.pdf](https://law.wisc.edu/facstaff/macaulay/papers/new_versus_c2.pdf).

bitter debate which saw several faculty leave the school, “professors began to teach their subjects against the background of public law, legal history, and jurisprudence. More concrete was the change in the first-year curriculum: Personal Property was replaced with a course in Legal History. History also informed the foundations in other first-year courses, such as Criminal Law, Procedure, and Property, as well as Legislation, which was designed to show students that law was created through legislation and adjudication.”<sup>114</sup> For students such as Maslow, who would go on to lead the AJCo’s Committee on Law and Social Action, the turn to legal realism fuelled two beliefs: that social forces shaped the law, and therefore that the law could shape social forces. The origins of group libel, then, grew out of a series of broader developments in American Jewish life and American legal thought. It is no accident that it emerged as an American Jewish cause beginning in the 1910s.

The story of American Jewish efforts to proscribe antisemitic speech before the Second World War is one of experimentation. The structure of the American legal system, with its local, state, and federal laws, allowed group libel advocates – and even sceptical Jews concerned with antisemitism – to test their ideas in a multitude of jurisdictions. Even figures such as Marshall, associated strongly with the anti-group libel camp of American Jews, allowed that some local restrictions on physical manifestations of antisemitic speech might be useful. While in the 1920s, when Marshall was a dominant figure in American Jewish life, his vision of non-legal solutions predominated, over time that changed. By the end of the 1930s, fears of homegrown Nazism

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<sup>114</sup> “Law is not just for lawyers,” *Columbia Law School Report*, 2003, [https://web.archive.org/web/20081123013910/http://www.law.columbia.edu/law\\_school/communications/reports/spring2003/curric2](https://web.archive.org/web/20081123013910/http://www.law.columbia.edu/law_school/communications/reports/spring2003/curric2).

meant that when American Jews worried about antisemitism, they increasingly turned to the law for solutions.

### **The Origins of Group Libel in America**

The earliest attempts to combat antisemitic “speech” dealt mainly with explicit bars against Jewish patrons in various institutions. Throughout the decades of debate over group libel, antisemitism, and the First Amendment, curbing such signage remained the most widely popular cause among American Jews, accepted by even figures who detested the idea of limits on other forms of antisemitic speech. The first laws to prohibit barring Jews targeted not the act of restricting them from a space but the speech which advertised it. What galled some American Jews, notably Marshall, was not that they were not allowed in a certain playhouse or hotel. It was the physical manifestation of the rejection – the public signs which put antisemitic restrictions in front of Americans’ eyes as they walked through towns and cities.<sup>115</sup> Marshall believed that Jews should not seek to enter institutions which patently did not want them<sup>116</sup>; at the same time, he felt that open discrimination against Jews affected their ability to move through even non-hostile parts of society. Barring openly advertised discrimination offered the opportunity to move antisemitic speech behind closed doors – the best that could be done, in Marshall’s view.

While there were several earlier attempts to bring libel suits over insults against a collective just after the American Civil War, U.S. states enacted the earliest statutes targeting speech against

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<sup>115</sup> For an interesting discussion on physical versus spoken defamation, see Jeremy Waldron, ‘Dignity and Defamation: The Visibility of Hate’, *Oliver Wendell Holmes Lecture*, 2009.

<sup>116</sup> Silver, ‘Louis Marshall and the Democratization of Jewish Identity’.

specific groups in 1913.<sup>117</sup> That year, New York adopted a law prohibiting discriminatory advertisements at “inns, restaurants, hotels, eating houses, public conveyances, bath houses, barber shops, theatres, or music halls.”<sup>118</sup> The change, which both the American Jewish Committee and ADL had pushed for, aimed to reduce “Christians only” advertisements at hotels and other businesses. It served as a kind of focused reform to defamation law, allowing suits over a specific type of anti-group statement. As Schultz writes in an overview of group libel laws, the New York statute, which seven states adopted in the 1910s, did not actually force establishments to admit Jewish people. Rather, it simply prevented openly advertised discrimination against them.<sup>119</sup> This distinction suggests the rising importance of public speech to Jewish groups’ understanding of how to address antisemitism in the early 20<sup>th</sup> century. Increasingly, Jewish groups came to believe that the danger to American Jews began not with overt discrimination but with persuasive speech that spurred action. Targeting speech, therefore, meant targeting the root cause of antisemitism.

As noted above, Marshall, the head of the AJC and a onetime leader of both the AJC and AJCo, was a leading exponent of this trend. He believed speech like the “Christians only” signs served to distinguish Jews in the public sphere, reminding both them and, perhaps even more importantly in his mind, non-Jews, of their difference. Marshall wrote in 1906 that “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

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<sup>117</sup> Joseph Tanenhaus, ‘Picketing-Free Speech: The Growth of the New Law of Picketing from 1940 to 1952’, *Cornell Law Review* 38, no. 1 (1952).

<sup>118</sup> 1895 N.Y. Laws 1042.

<sup>119</sup> Jeffrey Gurock, ‘The 1913 New York State Civil Rights Act’, *AJS Review* 1 (1976): 93–120; Schultz, ‘Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952’.

insulting.”<sup>120</sup> He and other advocates of the advertising discrimination laws believed that making anti-Jewish sentiment less visible would allow Jews to better disappear into the “melting pot.” The goal of Jewish activism – a project which, despite devoting much of his time to, Marshall felt uneasy about – was to ensure that Jews would not need to be activists anymore. Discussing the creation of the AJC, Marshall wrote that “what I am trying to avoid more than anything else is, the creation of a political organisation, 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.”<sup>121</sup>

Given his reluctance about Jewish political organising writ large, Marshall’s position on the precise role of the law in fighting antisemitism had always been ambivalent. His biographer Matthew Silver wrote that “in the complicated Jazz age environment, Marshall struggled creatively to strike a balance between his principled defense of Jewish integration in the melting pot and his understanding of the Jewish need to create separate cultural, social, and educational resources.”<sup>122</sup> Rising antisemitism in the 1920s and the failure of the Minorities Treaties – for which Marshall had fought in Paris – to secure Jews’ political rights abroad challenged his deeply held conviction that Jews would integrate into their national communities given enough support and time. He came to explain the failure to uphold the Minorities Treaties in eastern Europe by arguing that the United States’s nonparticipation in the League of Nations and unfavourable economic conditions doomed what would otherwise have been a workable system. But within the United States, where the economy was thriving, he was pained to see that Jewish

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<sup>120</sup> Letter from Louis Marshall to Joseph Stolz, January 12, 1906, via Schultz, ‘Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952.’

<sup>121</sup> Ibid.

<sup>122</sup> Silver, ‘Louis Marshall and the Democratization of Jewish Identity,’ 61.

integration and the problem of antisemitism were not so simple.<sup>123</sup> Marshall, a leading Supreme Court litigator, had always supported the idea of individual Jews bringing lawsuits. Among his most famous cases was the 1914 defense of Leo Frank, whose plight spurred the creation of the ADL.<sup>124</sup> He was happy to represent Jews individually accused of various crimes. But when it came to lawsuits over collective defamation and to Jews' group rights, Marshall balked. His position on the limits of legal defence was tested over likely the most famous "group libel" of the 20<sup>th</sup> century: the *Protocols of the Elders of Zion*.

Despite the anti-discrimination laws New York and other states enacted in the 1910s, during the interwar period antisemitism and ethnic tensions increased sharply alongside the growth of nativist newspapers, pamphlets, and radio. Perhaps no media organ was more emblematic of these attitudes than Henry Ford's *Dearborn Independent*, published under his leadership from 1919 through 1927.<sup>125</sup> The *Independent* and the shifts it represented would force Marshall and Jewish groups to again take up the question of group libel. In May 1920, the *Independent* began publishing a series a series called "The International Jew: The World's Problem,"<sup>126</sup> spreading the content of the *Protocols*, an antisemitic forgery first published in Russia<sup>127</sup>, to an American

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<sup>123</sup> Ibid., 56-57.

<sup>124</sup> Marshall was always cognizant of the need for non-legal strategies to supplement lawsuits – during the Frank trial, he corresponded with colleagues about how a court victory would be useless without complementary efforts to influence public opinion extralegally. He also fundraised on behalf of Frank; charity and fundraising appeals were both key parts of his vision for anti-antisemitism. For more on the Frank case and its impact, see, e.g., Leonard Dinnerstein, *The Leo Frank Case*, (University of Georgia Press, 2008). Eugene Levy, "Is the Jew a White Man?": Press Reaction to the Leo Frank Case, 1913-1915', *Phylon* 35, no. 2 (1974): 212, <https://doi.org/10.2307/274709>.

<sup>125</sup> "Dearborn Independent (Dearborn, Mich.) 1901-1927," Library of Congress; accessed November 30, 2023, <https://www.loc.gov/item/2013218776/>.

<sup>126</sup> Victoria Saker Woeste, *Henry Ford's War on Jews and the Legal Battle Against Hate Speech* (Stanford University Press, 2012).

<sup>127</sup> Ibid.

subscriber base that would reach 900,000.<sup>128</sup> Marshall and other Jewish leaders recognized the danger the series posed but turned to public relations rather than the courts. The American Jewish Committee and other organisations published a pamphlet refuting the *Protocols* in December 1920 and a letter from prominent non-Jewish leaders like former Presidents Woodrow Wilson and William Howard Taft condemning the *Independent*'s series; they also promoted a boycott of Ford products and the newspaper.<sup>129</sup> Marshall and his allies considered pushing for a U.S. Congressional investigation of Ford and suing him personally for libel, but did not pursue either, in part due to worries that either course would bring additional national attention to the newspaper, the readership of which was concentrated in industrial cities where Ford had factories.<sup>130</sup>

Some Jewish groups eventually decided from 1921 to push for local group libel ordinances, often in areas where the *Independent* was popular, such as Boston, Chicago, Cincinnati, Cleveland, Columbus, Detroit, Pittsburgh, Toledo, and St. Louis. They were successful in several cases (Pittsburgh, Detroit, and Cleveland<sup>131</sup>), where cities enacted rules that prevented speech against members of racial or religious groups on the grounds that they would “create breaches of the peace” or “incite the ignorant to acts of aggression and brutality,” as the AJC wrote about a similar proposal in New York state.<sup>132</sup> Several ordinances also responded to the rising presence of the Ku Klux Klan in northern cities, such as Boston's 1923 “anti-Klan” statute.<sup>133</sup> While

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<sup>128</sup> “Henry Ford and Antisemitism: The Notorious ‘Dearborn Independent,’” American Jewish Archives; accessed November 30, 2023, <https://www.americanjewisharchives.org/snapshots/henry-ford-and-antisemitism-the-notorious-dearborn-independent/>.

<sup>129</sup> Woeste, *Henry Ford's War on Jews and the Legal Battle Against Hate Speech*.

<sup>130</sup> Ibid.

<sup>131</sup> Barbas, ‘The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws’.

<sup>132</sup> Robert S. Rifkind, ‘Confronting Antisemitism in America: Louis Marshall and Henry Ford’, *American Jewish History* 94, nos 1–2 (2008): 77, <https://doi.org/10.1353/ajh.0.0053>.

<sup>133</sup> Walker, *Hate Speech: The History of an American Controversy*.

enacted to protect minorities rather than the U.S. government, the reasoning for these laws drew on similar arguments to those the Supreme Court had used when supporting the Espionage Act – and drew similar protests from free speech advocates.

The mixed success in pushing for these local rules led Marshall – sensitive to the opinion of non-Jews – to shift the American Jewish Committee’s approach in 1921.<sup>134</sup> Marshall stated that he had changed his mind about even locally-targeted group libel measures, opposing legislative efforts to enact it and even lesser acts such as Congressional hearings about rising antisemitic propaganda. Hearings, in Marshall’s telling, “would enable our enemies to shovel into the record all kinds of stupid and inane charges, which, because introduced in the record, would find credence on the part of those who either lack intelligence or who possess the fanaticism which constitutes favorable soil for anti-Semitic propaganda.”<sup>135</sup> Even where Jewish activists secured local protections against antisemitic defamation, Marshall and the American Jewish Committee began refusing to use them. Trials, like hearings, might raise antisemites’ profile; the cure was worse than the disease.

Ford, for his part, quickly challenged the prohibitions. A judge ruled in the case challenging Cleveland’s group libel ordinance that the target of litigation should be newspaper distributors rather than publishers like Ford’s Dearborn Publishing Company, rendering the local group libel successes toothless in targeting the source of antisemitic material. The ADL had little interest in, for example, targeting newspaper sellers – its goal had been to target Ford directly in the places where his influence was greatest.

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<sup>134</sup> Barbas, ‘The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws’.

<sup>135</sup> Charles Reznikoff, *Louis Marshall: Champion of Liberty* (Jewish Publication Society, 1957), 351.

The city anti-discrimination rules also drew criticism from groups unsympathetic to Ford, though, such as the ACLU and the press, both of whom strenuously opposed a proposal to enact a state group libel bill in Ford's home state of Michigan. The ACLU wrote about the issue that "the way to combat such [antisemitic] views is by argument, not by prosecution," repeating their general position.<sup>136</sup> Of the Boston prohibition on Klan marches, the group added that if the city's mayor "could stop the Klan, he could lawlessly stop others he disliked – the Communists, birth control advocates, and pacifists."<sup>137</sup> Free speech advocates entirely rejected the premise that some speech was so dangerous that its effects could not easily be countered, or that some individuals were less able than others to do so because of groups to which they belonged.

### **Nazis in America?**

After legal and institutional setbacks such as the American Jewish Committee and ACLU's opposition, the group libel project lay fallow during the late 1920s and first several years of the 1930s. However, rising awareness of the threat Nazism posed and rising numbers of Nazi-affiliated organisations domestically forced a reconsideration of the idea, beginning the second phase of its life.

Between 1930 and 1939, hundreds of Nazi groups such as the Defenders of the Christian Faith and German American Bund formed in the United States, attracting more than 25,000 members nationwide.<sup>138</sup> They distributed pamphlets and circulars to spread the message through the mail

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<sup>136</sup> 'Shall We Defend Free Speech for Nazis in America', American Civil Liberties Union, October 1934.

<sup>137</sup> Ibid.

<sup>138</sup> Walker, *Hate Speech*, 38–39.

and on the radio. In 1939 a group of Canadian Jews wrote to ask their American counterparts' opinion on how to respond to one such pamphlet titled "Why Are the Jews Prosecuted for Their Religion?" and distributed by the National Unity Party of Toronto.<sup>139</sup> The request circulated among members of the Executive Committee of the General Jewish Council, an umbrella group composed of the AJC, AJCo, B'nai Brith (and therefore its affiliate, the ADL), and the Jewish Labor Committee. Nathaniel Goodrich, a staff counsel for the AJC<sup>140</sup>, sent the request to Carl J. Austrian<sup>141</sup>, a lawyer noted for distributing nearly \$400,000 to New Yorkers who lost bank deposits upon the closure of the Bank of the United States<sup>142</sup>, noting that it "bears the same title and is of the same style as a pamphlet that is being circulated widely in the United States."<sup>143</sup> Austrian then sent the request to the Columbia Law professor Jerome Michael, asking him to prepare a memo regarding relevant Canadian law.<sup>144</sup>

As he had in several previous cases, Michael advised the Canadians against bringing a lawsuit. His memo on Canadian criminal law notes that "to do so would involve a completely new application of such principles as in Canada there do not exist the persuasive judicial analogies that exist in a number of States in the United States," conceding that American Jews were well-placed to bring group libel lawsuits in certain jurisdictions.<sup>145</sup> However, Michael did recognize

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<sup>139</sup> National Unity Party of Toronto, "Why Are the Jews Prosecuted for Their Religion?," 1939, General Jewish Council Records, I-170, box 11, folder 3, Center for Jewish History, New York.

<sup>140</sup> "Lawyer Nathaniel Goodrich Dies," *Washington Post*, June 17, 2004.

<sup>141</sup> "Carl J. Austrian, Lawyer, Dies; Aided Depositors in Depression," *New York Times*, June 26, 1970.

<sup>142</sup> Ibid.

<sup>143</sup> Letter from Nathaniel Goodrich to Carl J. Austrian, February 28, 1939, General Jewish Council Records, I-170, box 11, folder 3, CJH.

<sup>144</sup> Letter from Carl J. Austrian to Jerome Michael, March 2, 1939, General Jewish Council Records, I-170, box 11, folder 3, CJH.

<sup>145</sup> Jerome Michael, "Criminal Law of Canada with Respect to Anti-Semitic Publication," 1939, General Jewish Council Records, I-170, box 11, folder 3, CJH. Michael was in fact, incorrect: the Manitoba state legislature had in 1935 enacted a group libel bill and Quebec had twice attempted to do so.

why the Canadians had asked the question in the first place, even though only a few hundred copies of the National Unity Party pamphlet had circulated north of the border: “The pamphlet itself is in terms directed to the American Jews and names only American Jews, but the material contained therein is applicable to all Jews and the prefatory remarks in the pamphlet so indicate,” he wrote.<sup>146</sup> The two statements reveal the tension felt even by American Jews who did not favor legal solutions to growing numbers of libels against them – the case law in most jurisdictions may not have supported bringing claims, but the harm at the core of the group libel project did. A pamphlet “directed against” one Jew or one group of Jews could impact the reputation of the Jewish community at large, even across borders. Indeed, while the pamphlet in question was written in the United States, it relied mainly on (fabricated or distorted) excerpts from Jewish religious texts, rendering its claims more universal than its provenance would suggest. But instead of attempting to test the matter in Canadian courts, the Americans advised their Canadian interlocutors to take an extralegal strategy, producing their own pamphlet painstakingly refuting “Why Are the Jews Prosecuted for Their Religion?” line by line.<sup>147</sup> This tactic had apparently little impact on the appeal of such sentiments, whether in the United States or Canada; membership in fascist organisations and the volume of antisemitic material circulated continued to increase throughout the 1930s.<sup>148</sup>

Despite reluctance from men like Michael, growing membership in antisemitic and racist groups domestically did spur some action in the 1930s. Just as in the 1920s, states, rather than the federal government, led efforts to restrict speech in response to the above-described trends. In an

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<sup>146</sup> Michael, “Criminal Law of Canada with Respect to Anti-Semitic Publication.”

<sup>147</sup> National Unity Party of Toronto, “Why Are the Jews Prosecuted for Their Religion?.”

<sup>148</sup> Leo Pfeffer, “Defenses Against Group Defamation,” February 1946, American Jewish Committee Collection, RG 347.17.10, box 93, folder 9, CJH.

effort to restrict the activities of the German American Bund, New Jersey in 1935 passed a law barring statements “creating or tending to create prejudice, hostility, hatred, ridicule, disgrace or contempt of people” based on their race or religion.<sup>149</sup> The law imposed a jail sentence of between 90 days and three years and a fine of up to \$5,000 both on people who made hateful statements and on the owners of halls and publications in which the statements were uttered or appeared.

Jewish groups had divergent positions about the wisdom of seeking legal recourse against antisemitism, but some did support the New Jersey law and similar legislation. The ADL and AJCo proposed various “anti-Nazi” group libel bills; the American Jewish Committee officially opposed them from 1935. The number of actual cases brought over such laws, even by the AJCo and ADL, was vanishingly small – why, then, would groups push for tools they (for the most part) did not intend to use? The archives furnish several possible explanations. First, as in the above case from Canada, Jewish groups often found specific reasons not to recommend a lawsuit in a particular case; perhaps they felt some future case might clear their bar. Second, Jewish groups may have hoped anti-Nazi laws would have a deterrent effect and would not need to be tested in court. Third – and most importantly – despite Marshall’s efforts Jewish groups’ vision of their work had become dominated by the law. They increasingly could neither envision inaction against Nazism nor action that did not include a significant legal component. Finally, national groups felt grassroots pressure from smaller Jewish organisations facing the direct consequences of local Nazi sympathies.<sup>150</sup> The Jewish Telegraphic Agency reported upon the

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<sup>149</sup> Walker, *Hate Speech*, 55.

<sup>150</sup> Robert Stone, “Taking Refuge in the Law,” *B’nai B’rith Messenger* (Los Angeles), January 12, 1935.

New Jersey law's near-unanimous passage in April 1935 that local "Jewish leaders in New Jersey were highly elated today over the new anti-Nazi law approved last night by Governor Harold G. Hoffman."<sup>151</sup> Indeed, the volume of requests to push for group libel prosecutions from local Jewish organisations to national groups like the AJC and ADL suggests that enthusiasm for legal action was a widespread phenomenon outside the headquarters of such groups.<sup>152</sup> In addition to the Canadian request, also in 1939 local leaders in Washington state wrote to ask Ambrose Duskow, counsel of the GJC, his opinion of whether to sue over antisemitic pamphlets circulating locally.<sup>153</sup> Duskow consulted several Washington and New York-area litigators, at least one of whom told him the case might present a good opportunity for a libel suit because the relevant pamphlet alleged founding father Benjamin Franklin was an antisemite using fabricated quotations, making it easier to disprove than comparable pamphlets.<sup>154</sup> Suing over the document might also deter its maker, the innocuously named American Publishing Society, which was responsible for numerous antisemitic pamphlets that made their way from Washington to New York City.<sup>155</sup> Duskow and his colleague William Cherin concluded, however, that despite the APS's reach, among the group of influential Jewish lawyers in New York they consulted "there

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<sup>151</sup> "Hail Anti-Nazi Law in Jersey," Jewish Telegraphic Agency, April 10, 1935. The New Jersey law was later declared unconstitutional by the state's Supreme Court in 1941 and, while it was good law, was used not against its intended target, the German American Bund, but against Jehovah's Witnesses for libelling members of other Christian groups, according to an American Jewish Committee memo of 1949. The memo cites this as evidence that group libels, even if they were constitutional, would harm third parties or Jews themselves rather than antisemites. However, that the American Jewish Committee and Jewish groups brought no prosecutions under the law may also have been evidence of self-censorship. Believing from the start they would lose, they did not bring cases in the first place, and then later used the lack of cases to argue against the laws over which they would have been brought.

<sup>152</sup> Several such letters are located in General Jewish Council Records, I-170, box 11, folders 2-6, CJH.

<sup>153</sup> Memorandum from Ambrose Duskow to Meyer, November 30, 1939, General Jewish Council Records, I-170, box 11, folder 1, CJH.

<sup>154</sup> Ibid.

<sup>155</sup> James W. Ford, "Anti-Semitism and the Struggle for Democracy," December 24, 1938, National Council of Jewish Communists, Collection of the Smithsonian National Museum of African American History and Culture, [https://transcription.si.edu/view/23248/NMAAHC-2010\\_55\\_96\\_002](https://transcription.si.edu/view/23248/NMAAHC-2010_55_96_002).

[was] unanimous agreement that institution of such a proceeding would give wide publicity to the forgery, which has received little circulation in the state of Washington.”<sup>156</sup>

National groups were also unable to stop individual Jews from bringing their own lawsuits under the state laws passed in the 1920s and 1930s. The lawyer and prominent Zionist Samuel Untermyer, a leader of the U.S. movement to boycott the Nazis, was involved in two of the very few criminal libel lawsuits brought in the early 1930s. Prosecutors indicted the Nazi-backed priest Francis Gross for libelling Untermyer in his book in 1934; the same year, he played a key role in the trial of Walter Kappe and William McLaughlin, the editors of a pro-Nazi German- and English-language newspaper published in New York. The newspaper had allegedly libelled the Jewish judge Joseph Goldstein, calling him “a lying criminal,” a “filthy lawyer,” and a “scurvy and unscrupulous prostitute before the bar.”<sup>157</sup> McLaughlin pleaded guilty and was set to serve a year-long sentence – a rare victory in a criminal libel suit. But Untermyer interceded on his behalf, asking for McLaughlin to be freed on the condition that his newspaper reverse its antisemitic editorial policy and print an apology to Goldstein.<sup>158</sup>

Actual lawsuits did not always go so well for Jewish plaintiffs. In 1936, New York City Mayor Fiorello La Guardia sent out a summons to arrest the active and notorious antisemite Robert Edmonson, who had spread various attacks against Jews (and people who he alleged to be

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<sup>156</sup> Letter from William B. Cherin to Ambrose Duskow, January 15, 1940, General Jewish Council Records, I-170, box 11, folder 1, CJH.

<sup>157</sup> “Nazi Editor Faces Criminal Libel Suit,” B’nai B’rith Messenger (Los Angeles), July 20, 1934, via Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense*.

<sup>158</sup> The result of the case echoed almost exactly Louis Marshall’s deal with Ford in the Sapiro libel suit. Marshall brokered a public apology from Ford in exchange for a settlement, to Sapiro’s chagrin. See Woeste, *Henry Ford’s War on Jews and the Legal Battle Against Hate Speech*.

Jewish) since at least 1902.<sup>159</sup> La Guardia relied on traditional common law arguments for criminal libel – that it posed a danger to public order. He wrote that “here, evidently, is not a case involving free speech but a breach of the peace against the state itself.”<sup>160</sup> Fraser and Dov Fisch’s accounts of the case cite numerous letters applauding La Guardia’s decision to indict Edmonson, from such groups as the ADL, “the Universal Christian Council and Friends of Democracy, the Association of Americans of German Origin, the Bronx Jewish Community Club, and the St. Louis post of the Jewish War Veterans of the United States.”<sup>161</sup> The AJC and the AJCo were absent; their own archives suggest they were not directly involved in the genesis of the case.<sup>162</sup> Stephen Wise, the AJCo’s honorary president, wrote a note congratulating La Guardia on the case, but he marked it “private and confidential” – not exactly an official stamp of approval from the AJCo.<sup>163</sup> He added that the case might anger what he called the “sh sh Jews,” namely, the AJC.<sup>164</sup> The indictment alleged Edmonson had libelled Labor Secretary Frances Perkins (whom he had incorrectly called Jewish), Dean of Barnard College Virginia C. Gildersleeve, and “all persons of the Jewish religion.”<sup>165</sup> A grand jury approved all three indictments, marking a notable victory for the legal theory of group libel.

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<sup>159</sup> This was in part prompted by his friend Samuel Dickstein. See Dov Fisch, ‘The Libel Trial of Robert Edward Edmondson: 1936–1938’, *American Jewish History* 71, no. 1 (1981): 79–102.

<sup>160</sup> “Religion in the Campaign,” *Wisconsin Jewish Chronicle*, June 19, 1936, via Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense*, 212.

<sup>161</sup> *Ibid.*, 213; Fisch, ‘The Libel Trial of Robert Edward Edmondson: 1936–1938’.

<sup>162</sup> Although the pro-Committee *American Hebrew* did applaud La Guardia’s decision in an editorial. *American Hebrew*, June 26, 1936, 3.

<sup>163</sup> Fisch, ‘The Libel Trial of Robert Edward Edmondson: 1936–1938,’ 93.

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

But for Jews thrilled by La Guardia's decision to indict Edmonson, the rest of the case was at best disappointing and at worst proof of the risks of pursuing antisemites in court. Edmonson's attorney contested the ideas behind group libel:

We don't know what a Jew is. They don't know themselves... There are ten thousand different kinds of Jews known today... Who are the real Jews? Are they Palestine readers of the Torah, or are they readers of the Talmud? Who knows what they are today? How can a man in New York be charged with libeling all Jews in the world? . . . How can the grand jury indict a man in New York City for libeling a Jew in China?<sup>166</sup>

Edmonson had only meant to attack "Socialist Jews, Communist Jews, Bolshevik Jews, and Mongol Jews," his lawyer said.<sup>167</sup> He was able to delay his trial for nearly two years, at which point many Jewish papers had stopped covering the case. While existing accounts of the case attribute the lack of coverage to boredom with the slow legal process, it is also possible voices within the Jewish community which disliked giving antisemites publicity won out. Oddly given his private congratulatory note to La Guardia in 1936, Wise's AJCo joined the ACLU, the American Committee on Religious Rights and Minorities, the Human Relations Committee of the National Council of Jewish Women and the AJC in asking for the case to be dismissed.<sup>168</sup> The "sh sh Jews" had evidently won the communal debates over the wisdom of La Guardia's decision to indict Edmonson. On May 10, 1938, the judge issued his verdict that Edmonson was not guilty on any of the three counts. Edmonson immediately published a celebratory pamphlet, writing that the decision was "a World Victory by National Patriotism and Freedom of Speech over International Jewish Communistic Socialism."<sup>169</sup> At least regarding free speech, the amici agreed. The judges' verdict explicitly cited the briefs filed by the ACLU and the Jewish organisations, writing that

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<sup>166</sup> Fisch, "The Libel Trial of Robert Edward Edmondson: 1936–1938," 96.

<sup>167</sup> Ibid., 97, citing the papers of the defense.

<sup>168</sup> Ibid., 98, citing amicus briefs to the case.

<sup>169</sup> Ibid., 99.

As is so well pointed out in the briefs submitted by amicus curiae, it is wiser to bear with this sort of scandal-mongering rather than to extend the criminal law so that in the future it might become an instrument of oppression. 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 affairs.<sup>170</sup>

Why Jewish groups would sabotage a case which – at least on the AJCo’s part – they had privately cheered is puzzling. Wise and the AJCo had clearly changed their mind about the practicality of pursuing Edmonson and the likelihood of success in court, if not also about the underlying substantive issues.

Jewish organisations before the war did attempt to develop non-legal methods for combatting antisemitism in the 1930s, to limited effect. The most prominent among these was a strategy of educating the broader public through public “replies” to common antisemitic statements, outlined in a 1935 memo produced for the AJC by its Lawyers’ Advisory Committee. Public trials “offer notoriety-seeking demagogues the very publicity upon which they thrive best,” the memo noted. It also drew on the example of Germany, where it stated that “the prosecution of a defamer ... added to the notoriety that he sought,” adding that Nazis had used trials as a platform to further spread their antisemitic propaganda.<sup>171</sup> Jewish groups were attentive to the negative example presented by Germany, frequently raised in refutations against prosecuting antisemites. Citing the failure of legal remedies to stop the Nazis – or even suggesting trial publicity had aided them – later became a common argument among American Jews arguing for an education-based approach to preventing a similar disaster from unfolding domestically.<sup>172</sup> American Jewish

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<sup>170</sup> Memorandum on Group Libel, March 1943, American Jewish Committee Collection, RG 347.17.10, box 17, folder 311, CJH, 5.

<sup>171</sup> American Jewish Committee, “Laws Affecting Racial and Religious Propaganda,” June 1935, 1; *Twenty-Ninth Annual Report* (New York: American Jewish Committee, 1936), 630-1.

<sup>172</sup> See, e.g., Memorandum on Group Libel, March 1943, American Jewish Committee Collection, RG 347.17.10, box 17, folder 311, CJH, 3.

Committee official S. Andhil Fineberg wrote in 1947 that “several hundred individual libel suits won by the Central Verein of Germany against anti-Semites were more helpful than hurtful to the Nazis who were brought to the book. That fact is incontrovertible in light of history. The cases, based upon anti-Semitic utterances, were won by Jews, but in each case the defendant found himself better known, his channels to the public improved, his following strengthened.”<sup>173</sup> However, opposition to lawsuits and arguments about trial publicity also predated widespread awareness of Nazism’s dangers in the United States. As seen above, figures like Marshall had made the same claims about trial publicity in the early 1920s. Rather than spurring opposition to group libel, then, the German example served more as proof for the American Jewish Committee that its anti-legislation impulses had been correct all along.

Despite the AJC’s attempts, “instant replies”<sup>174</sup> did not apparently slow the growth of antisemitic groups nor shift public perception of Jews. State and local Jewish groups sent numerous letters to national Jewish organisations inquiring about the possibility of bringing lawsuits over group defamation, even as the AJC continued to recommend against them.<sup>175</sup> Marshall and his colleagues may have wanted to leave legal strategies behind, but circumstances would not allow it. Instead, they were forced to restate their same arguments against group libel over and over to an audience increasingly convinced that the only way to solve social problems was through the law.

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<sup>173</sup> Memorandum from the Office of the Jewish Community Relations Council of Youngstown, Ohio to Members, August 6, 1947, American Jewish Committee Collection, RG 347.17.10, box 93, CJH, 1.

<sup>174</sup> For an explanation of the idea of instant replies, see Harold D. Lasswell and Nathan Leites, *The Language of Politics: Studies in Quantitative Semantics* (G.W. Stewart, 1949). Lasswell was a particularly influential theorist for those liberals who sought a way of countering propaganda without outlawing it, as later material on the Hutchins Commission shows.

<sup>175</sup> See, e.g., Letter from P. Allen Rickles to Ambrose Doskow, January 4, 1940, General Jewish Council Records, I-170, box 11, folder 2, CJH.

## **‘The Quest for Legal Remedies’**

In 1938, fearing that trends in Germany would spread to the U.S., the American Jewish Committee, American Jewish Congress, B’nai B’rith (out of which the ADL had formed), and Jewish Labor Committee formed the GJC to coordinate their efforts against antisemitism.<sup>176</sup> This merited a reconsideration of libel reform. The beginning of the Second World War in Europe had forced a change in strategy, as Jewish organisations and civil rights advocates acknowledged. Phillip Haberman, who headed B’nai Brith’s Eastern Regional Office during the 1940s, summarized this attitude in a 1941 memorandum to the GJC: “Free governments in Europe have been destroyed through the tactic of creating division among their peoples. In each instance the initial means was the deliberate incitement of religious and racial animosity. It is a matter of common knowledge that similar sinister efforts in like pattern have been at work in this country on a vast scale...they have been successful to the point of creating for discussion a so-called Jewish Problem...if it were to realize its ultimate possibilities, the guarantees of the [1919] Bill of Rights would be gone.”<sup>177</sup>

In 1939, the GJC tasked its Public Relations Committee with exploring whether to formally support three model group libel bills – one federal criminal bill, one federal civil bill, and one state bill.<sup>178</sup> The model legislation was largely the work of one of the committee’s members,

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<sup>176</sup> “General Jewish Council,” American Jewish Committee Collection, American Jewish Historical Society Archives, New York, United States of America, <https://archives.cjh.org/repositories/3/resources/13263>.

<sup>177</sup> Dictated Statement of Phillip Haberman, December 4, 1941, General Jewish Council Records, I-170, box 11, folder 13, CJH.

<sup>178</sup> Model Bills by Jerome Michael, 1939, General Jewish Council Records, I-170, box 11, folder 9, CJH.

Professor Michael, the Columbia Law academic.<sup>179</sup> Surprisingly, also in 1939 the ACLU took a similar step, appointing its own informal group libel committee composed of notable lawyers Arthur Garfield Hays, Whitney North Seymour, Karl Llewellyn, future Supreme Court Justice Thurgood Marshall and Socialist Party Leader Norman Thomas to consider Michael's proposals.<sup>180</sup> Roger Baldwin, one of the organisation's founders, was relatively warm to the idea that a differently-drafted piece of legislation could protect both free speech rights and minority rights, or, as he put it in one letter, that there existed a "race libel law that will work."<sup>181</sup> Both committees included members tied to Columbia Law, where "legal realism" and legal approaches to social problems had dominated since the 1920s.

The impetus for the work of these group libel committees was in large part external to the Council and ACLU. Interest in bills targeting group libel, particularly through the post, had grown among legislators; in April 1940, New Jersey Senator W. Warren Barbour introduced "a bill prohibiting the passage through the mails of matter tending to incite religious and racial hatreds."<sup>182</sup> A similar bill had been proposed in the U.S. House of Representatives as early as 1935 by New York Representative Samuel Dickstein.<sup>183</sup> Similar bills would crop up repeatedly in the early 1940s, most notably the Lynch Bill, and even after the end of the Second World War, in the case of the Javits-Klein Bill, Barrett Bill, and Davenport Bill, each of which were

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<sup>179</sup> Ibid.

<sup>180</sup> Letter from Lucille B. Milner to Jerome Michael, December 18, 1939, General Jewish Council Records, I-170, box 11, folder 2, CJH.

<sup>181</sup> Letter from Roger Baldwin to Victor Yarros, July 2, 1946, ACLU Papers, Vol. 2734; Letter from Roger Baldwin to Isaac Franck, July 23, 1941, ACLU Papers, Vol. 2308.

<sup>182</sup> *Congressional Record*, April 29, 1940, 5160.

<sup>183</sup> Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws', 317.

proposed in 1949.<sup>184</sup> All failed, in some cases after vigorous debate.<sup>185</sup> Both the GJC and the ACLU were somewhat dismayed by the Barbour Bill but could not ignore that the matter of group libel had spilled beyond the small circles which had discussed it since the 1910s.<sup>186</sup> The proposals drafted by Michael were an attempt to wrest control of the issue back into their own hands. While Barbour's bill was viewed as unlikely to pass, it was one of a flurry of state and federal proposals circulating in 1939 and 1940.<sup>187</sup> If group libel bills were going to win favour at any level, the Council and the ACLU wanted them to be ones they had written.

The GJC committee was predictably divided over whether to support one or more of Michael's group libel proposals. In a January 1940 preliminary report on its work to the council at large, five members of the committee "opposed the adoption of any legislation on the subject" and six supported proposed criminal bills.<sup>188</sup> In July 1940, Duskow, the GJC lawyer, wrote to Ohio-based Jewish official Robert Segal that there was "great divergence of opinion" among those tasked with considering whether to endorse it.<sup>189</sup>

While the committee did not keep minutes of its meetings, according to a later memorandum sometime in mid-1940 its members concluded they could not agree on any form of group

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<sup>184</sup> 'Group Libel Laws: Abortive Efforts to Combat Hate Propaganda', *The Yale Law Journal* 61, no. 2 (February 1952): 252; Joseph Tanenhaus, 'Group Libel and Free Speech', *Phylon (1940-1956)* 13, no. 3 (1952): 215.

<sup>185</sup> Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws', 317.

<sup>186</sup> See, e.g., Letter from Ambrose Duskow to James Allen, September 19, 1940, General Jewish Council Records, I-170, box 11, folder 1, CJH. Allen replied that the Department of Justice had no interest in group libel legislation, but the exchange shows he was well aware of the idea.

<sup>187</sup> Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws', 316–17.

<sup>188</sup> The criminal bills were also the most popular among lawyers whose opinion Lucille Milner solicited. See, e.g., Letter from John F. Finerty to ACLU, February 26, 1940, General Jewish Council Records, I-170, box 11, folder 6, CJH.

<sup>189</sup> Letter from Ambrose Duskow to Robert E. Segal, July 23, 1940, General Jewish Council Records, I-170, box 11, folder 5, CJH.

defamation legislation. By October, “the Public Relations Committee prepared a statement urging that the General Jewish Council oppose the adoption of any legislation on the subject of group libel.”<sup>190</sup> The committee’s memorandum supplied four reasons for its decision to oppose group libel bills which give a sense of the reasons for their stance. The first was that

the quest for legal remedies is basically a wrong approach to the problem; that libel actions can be justified only where they seek to redress wrongs to individual representations; that criminal libel in particular is an outworn remedy that should not be extended; that it is desirable that the characteristics and activities of large groups should be freely discussed; and that publication of the truth is the only proper means of dealing with falsehoods told about them in the course of such discussion.<sup>191</sup>

This essentially restated the ACLU’s position on the matter, demonstrating how the American Jewish Committee had moved closer to that organisation’s legal position. The ACLU had released a memorandum the previous year arguing that any extension of libel laws beyond the individual level was wrong, the claim repeated here.<sup>192</sup> That 1939 memo is contained within the GJC committee’s files alongside their 1940 conclusions, suggesting it directly informed the development of the anti-group libel committee members’ position. The second argument contained within the GJC memo was that “the issues presented are not simple questions of fact that lend themselves to trial under the common law rules of evidence,” making “the outcome of litigation uncertain and its value questionable.”<sup>193</sup> Unlike the fundamental critique above, here the committee relied on more practical considerations: Jewish plaintiffs would not be guaranteed to win group libel cases. Duskow and Michael had been disturbed by their survey of the results of German libel cases against Nazis, finding that even though the German courts had generally

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<sup>190</sup> Memorandum on Group Libel, October 1940, General Jewish Council Records, I-170, box 11, folder 9, CJH.

<sup>191</sup> Ibid.

<sup>192</sup> Memorandum of Law & Policy from ACLU on Libels against Race and Religion, April 1939, ACLU Papers, Vol. 211.

<sup>193</sup> Memorandum on Group Libel, October 1940.

looked favourably upon the idea of group libel, in the specific case of Jewish plaintiffs they rejected it.<sup>194</sup>

Third, the memorandum stated that

public misunderstanding as well as the likelihood of deliberate distortion of the facts must be anticipated at every stage, from the first endorsement of the bill through every case that may arise under it. Each proposal of this kind is attacked and publicized as an effort to suppress truth. Each attack on a group that is not followed by prosecution can be made the subject of defiant challenge. Each acquittal, no matter what the ground, can be publicly flaunted as a vindication of the defendant's statements. It is immaterial that all fair-minded men might agree that there was a satisfactory explanation for each of these events. That does not fully meet the objection that fuel would be added to the fire of the propagandists.<sup>195</sup>

Fourth, “even a conviction, by making the defendant a martyr, may aid rather than hurt his cause.”<sup>196</sup> These two points draw on similar logic as the 1935 Lawyers’ Advisory Committee statement, citing the potential secondary effects of group libel trials.

The committee presented its statement at a meeting of the GJC in October 1940, where the Council at large refused to approve it.<sup>197</sup> The reason given in meeting notes suggests that a large portion of Jewish leaders represented on the Council felt the ongoing war in Europe meant

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<sup>194</sup> Morris Waldman, the executive secretary of the AJC, had solicited a memorandum in 1935 on the German situation specifically. Memorandum from Walter Derenberg to Morris Waldman, May 5, 1935, Morris Waldman Files, EXO-29, box 15, folder 285, CJH: “When, therefore, a defamatory statement was made against the Prussian and Hessian officers in the war, every single officer was deemed to have been injured. In another case the Supreme Court held that every single police officer could deem himself injured and offended by a remark that most of the police officers who had lost their jobs were murderers and scoundrels. In another case, the Supreme Court decided that a remark that the taxes paid in a certain province were not used for their real purpose, was sufficient foundation for the institution of a criminal libel proceeding started by any one official of that province. Summing up, there can be little doubt that according to the decisions of the Supreme Court, the possibility of group libel or group slander is recognized under the German law...Oddly enough, however, and very much to the detriment of the Jewish community in Germany, the only case where the Supreme Court diverged from this well-settled principle was a case of group libel against the Jews.” For Derenberg’s role in the AJC, see American Jewish Committee Twenty-Eighth Annual Report, *American Jewish Year Book*, September 1936.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid.

<sup>197</sup> Memorandum on Group Libel, March 1943, General Jewish Council Records, I-170, box 11, folder 9, CJH.

rejection was not a viable option, whatever the committee's concerns. The meeting summary notes that "the fact that the United States is at war, and that the activities of the Fascist propagandists constitute a direct threat to the war effort by tending to create disunity among the different racial and religious groups in this country, may be deemed to call for a reconsideration of the stand against group libel legislation."<sup>198</sup> Jewish groups felt they could not afford inaction under such circumstances, and the committee report rejected libel reform without offering alternative solutions beyond what the Council had previously tried. But, repeating a pattern of ambivalence that had occurred since the 1920s, in response the Council endorsed neither group libel nor the AJC's rejection of it. The outcome of the October meeting ensured the groups it represented would continue to explore the issue without taking a conclusive position.

The ambivalent outcome may also have resulted from some procedural confusion at the meeting; Sigmund David wrote in a letter to Doskow afterward, "I honestly believe that the majority of the members of the General Jewish Council did not know exactly what they were for or against. For instance, Mr. Fabricant voted against my motion for a stronger bill, although he personally is in favor of a stronger bill. When I asked him why he voted against my motion, he said that Mr. Monsky at lunch said he didn't think it advisable at this time to have a group libel bill."<sup>199</sup> Indeed, uncertainty among lawyers involved in the matter was the rule rather than the exception: two other litigators involved in the debate wrote in 1939 and 1940 letters that they were "very far from feeling dogmatic about the matter"<sup>200</sup> and "by no means of a closed mind."<sup>201</sup> Even within

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<sup>198</sup> Ibid., 2.

<sup>199</sup> Letter from Sigmund David to Ambrose Doskow, May 2, 1940, General Jewish Council Records, I-170, box 11, folder 5, CJH.

<sup>200</sup> Letter from Grenville Clark to Jerome Michael, December 19, 1939, General Jewish Council Records, I-170, box 11, folder 5, CJH.

<sup>201</sup> Letter from Ambrose Doskow to Sigmund David, May 7, 1940, General Jewish Council Records, I-170, box 11, folder 5, CJH.

the ACLU's 1940 committee, Llewellyn, a Columbia Law School professor, was "not opposed to any change in the criminal libel law to attack the evil" his colleague Michael's proposed legislation sought to address.<sup>202</sup>

The ACLU's secretary Lucille Milner also sent Michael's model bills to various New York lawyers, whose comments on them include revealing insights regarding American attitudes toward libel law in 1939 and 1940 more broadly. One of the main questions for those involved in the group libel debates was what form a potential law might take. Michael's proposals covered each of the three main candidates considered in the late 1930s: a civil defamation bill, a criminal defamation bill, and a bill targeting material sent through the postal service. Most of the lawyers consulted by the GJC and the ACLU alike preferred the criminal bill to the civil one – a stance held even by those sceptical of group libel as a whole. Their attitude was that the whole enterprise was probably unwise, but if something were to pass into law, better the criminal proposal than the civil or the mail bills. John Finerty, one of the lawyers the ACLU consulted, wrote to Milner that his "reasons for not opposing in principle bills providing for criminal group libel lead me to oppose the bills in this respect drafted by Professor Michaels [sic]." In Finerty's opinion, there was a "justification for criminal group libel bills in order to correct the law of criminal libel." He added that "the common law doctrine of criminal libel [was] necessarily inconsistent with civil liberties, in failing to recognize truth as a defense. I consider even the statutory modifications of the doctrine still inconsistent with civil liberties, insofar as they make truth merely a matter of affirmative defense. I would advocate new criminal libel laws, so as to provide that only false statements could constitute criminal libel, thereby placing on the state the

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<sup>202</sup> Letter from Lucille B. Milner to Jerome Michael, December 20, 1939, General Jewish Council Records, I-170, box 11, folder 5, CJH.

burden of proving the falsity.”<sup>203</sup> Thurgood Marshall brought up similar points – he, too, felt the key issue with libel law as a whole was the placement of the burden of proof on defendants.<sup>204</sup>

Finerty’s and Marshall’s letters suggest one reason why even the ACLU – which had never supported group libel – could not quit the debate over it. As it stood in 1939, U.S. libel law was still primarily based in the English common law tradition. Particularly in criminal suits, judges often cited common law precedents as much as, if not more than, the First Amendment and the U.S. Constitution. The state and local laws of the 1910s and 1920s, as well as the anti-Nazi laws of the 1930s, remained good law because defamation was an area that had yet to be “constitutionalized” by the Supreme Court. The ACLU had long sought to change that fact.<sup>205</sup> It, and its allies, viewed the common law of libel as bad law, even dangerous law. By seeking “a race libel law that could work,” as Baldwin put it, the ACLU could use the debates over antisemitic speech to reshape the whole of U.S. libel law in its preferred direction. Indeed, when groups like the AJC abandoned advocating group libel, they were not abandoning the law as a strategy but rather subscribing to a different version of it, one which required as much change to the existing law as group libel would have.

Some members of the GJC may have rejected “the quest for legal remedies,” but they were increasingly a minority. As the fear of Nazism at home and abroad grew during the 1940s, American Jewish organisations turned again and again to the question of how the law could

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<sup>203</sup> Letter from John F. Finerty to ACLU, February 26, 1940.

<sup>204</sup> Memorandum from Thurgood Marshall to the ACLU on Group Libel Bills, March 7, 1940, General Jewish Council Records, I-170, box 11, folder 5, CJH.

<sup>205</sup> Alfred H. Kelly, ‘Constitutional Liberty and the Law of Libel: A Historian’s View’, *The American Historical Review* 74, no. 2 (1968): 429, <https://doi.org/10.2307/1853672>.

shield them. Group libel came to compete not with non-legal approaches such as education or persuasion in such debates, but rather with alternative visions of the law steeped in individual rights. This shift toward legal thinking would define a significant portion of American Jews' approach to antisemitism and to their own identity for the remainder of the 20<sup>th</sup> century.

## Chapter II

### A Double-Edged Weapon: The Emergence of Group Libel and the Board of Deputies, 1923-1939

According to its own records, the Board of Deputies first officially considered the possibility of libel reform in 1923, when Lucien Wolf and Charles Emanuel exchanged letters about the possibility of bringing libel charges against British antisemites. Wolf, already famous for his involvement in the Minorities Treaties and opposition to the Balfour Declaration,<sup>206</sup> wrote to Emanuel, the Board's solicitor, that "you will find that actions for slander on a community are a double-edged weapon. As a general rule you get a verdict but every now and then you come across an anti-Semitic Jury and you lose your case. This outweighs all the successes you may gain on the other side."<sup>207</sup>

Soon after this exchange, the Board commissioned a report by Emanuel on group defamation reform which concluded much the same. Surveying existing legislation and reform projects in other Jewish communities (mainly the United States, Canada, and Southern Africa), the 1925 report suggested the idea of Jews bringing collective lawsuits was both legally untenable and politically unwise.<sup>208</sup> In 1926, the Board's Parliamentary and Press Committees considered a motion brought by Samuel Finburgh "to amend the law of libel to protect religious communities, but it was unanimously resolved that independent action was impracticable, but that if a Bill

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<sup>206</sup> For additional discussion of Wolf's diplomacy, see Mark Levene, *War, Jews and the New Europe: The Diplomacy of Lucien Wolf, 1914-1919* (Oxford University Press, 1992).

<sup>207</sup> Letter from Lucien Wolf to Charles H.L. Emanuel, June 15, 1923, quoted in George Webber, "Memorandum on the Law of Libel Against Communities," July 1934, American Jewish Committee Paris Office Records, RG 347.7.41, box 62, folder 588, CJH.

<sup>208</sup> George Webber, "Memorandum on the Law of Libel Against Communities," July 1934, Board of Deputies Collection, ACC/3121/C/4/1, London Metropolitan Archives, London.

were introduced into Parliament on the subject the Committee would watch it.”<sup>209</sup> The matter was settled; no such legislation surfaced for the following ten years.

Yet during the decade after Wolf and Emanuel’s exchange, the Board considered the cause of defamation reform repeatedly. Where in the mid-1920s its leaders had concluded that the “double-edged weapon” was inadvisable, in the 1930s it changed tack, forming a small committee to consider group libel as part of its new “self-defence” infrastructure, the name the Board gave to anti-fascist work. This chapter will attempt to explain the Board’s ambivalence toward group libel and why it entertained the idea repeatedly despite its leaders’ scepticism. It will also situate the first years of the Board’s group libel efforts in the existing historiography of the group’s anti-fascist efforts in the 1930s. Historians of the Board in the 1930s have often debated two questions: how early the Board viewed British fascism as a serious threat and how effective its efforts were, particularly compared with the oft-valorised anti-fascist left. This chapter, while generally in agreement with recent scholarship arguing the Board was attentive to antisemitism earlier than previously thought, attempts to address a slightly different question – not when the Board began serious communal defence work, but why and how. Because the Board considered group libel anew every few years, the subject provides a kind of natural experiment for showing its changing attitude.

Over and over, the Board reconsidered group libel as a reactive measure, responding to threats to its political position as the representative of British Jewry. These came both from other Jewish organisations and from external organisations such as the National Council for Civil Liberties.

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<sup>209</sup> Ibid.

While not enamoured with group libel during this period, the Board and its president between 1933 and 1939, Neville Laski, worried that it would be adopted and perhaps even enacted by other groups which claimed to fight antisemitism and fascism. Even worse from the Board's point of view, some of these groups were associated with the left – whatever its own reservations about group libel, the Board did not want it to become coloured with the tinge of communism in the minds of government officials.

The period between 1933 and 1939 also proved to the Board the inadequacy of the tools at its disposal to fight antisemitism. In 1923, Emanuel wrote presciently that jury trials for libel were risky for Jews because of the very ambient antisemitism they sought to quash.<sup>210</sup> Nevertheless, during the 1930s the Board lobbied the Home Office and Attorney General to try fascists for seditious libel on the basis of their statements against Jews. In 1936, their advocacy succeeded, as the government brought a case against two notable fascists, Arnold Leese and Walter Whitehead. The trial made real Emanuel's and the Board's worst nightmares, as the jury let Leese and Whitehead off on all but the least serious charges. This episode would prove two things to the Board. First, that the existing law really was inadequate. Second, that any change to the criminal law would be risky because it would still involve jury trials. The Board would wrestle with these two contradictions for the whole of the 1940s, covered in Chapter IV. But their crystallisation in the 1920s and 1930s explains why group libel became a central issue to the debate over anti-fascism within the Board.

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<sup>210</sup> George Webber, "Memorandum on the Law of Libel Against Communities," July 1934, Board of Deputies Collection, ACC/3121/C/4/1, London Metropolitan Archives, London.

## **‘Not Necessary to Deal with Them’**

To understand the place of libel reform within the Board’s conception of anti-antisemitism work, it is worth examining what it supplanted. The position of the Board toward countering fascist speech, written or spoken, in the 1920s, was one of reluctance.

One prototypical example of this attitude was the refutations of the Protocols of the Elders of Zion published in *The Times* in 1921.<sup>211</sup> The *Protocols* were first published in the United Kingdom in 1920; they immediately found an audience, particularly among military and diplomatic men predisposed to antisemitism because of the perceived role of Jews in hastening the Russian Revolution.<sup>212</sup> Wolf, who two years later would note his opposition to libel reform, responded by putting together a book, *The Myth of the Jewish Menace in World Affairs*, which he also published as articles in the *Manchester Guardian*, the *Spectator*, and the *Daily Telegraph*. In Wolf’s introduction to his book, he wrote that he felt “shame” at having to refute the *Protocols* in the first place. “That reputable newspapers in this country should be seeking to transplant here the seeds of Prussian anti-Semitism, and that they should employ for this purpose devices so questionable and a literature so melodramatically silly, cannot but cause a sense of humiliation to any self-respecting Englishman. It is for this reason that I have strictly limited myself to an examination of the specific charges formulated by these publications. I cannot bring myself to believe that it is necessary to deal with them on a larger scale.”<sup>213</sup> Wolf’s appeal to a sense of English propriety was a good example of his and the Board leadership’s attitude toward

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<sup>211</sup> *The Times*, 18 August 1921, 16-17; also reprinted as a pamphlet, “*The Truth About the 'Protocols'. A Literary Forgery*,” London 1921.

<sup>212</sup> Lebzelter, *Political Anti-Semitism in England, 1918-1939*, 13–28.

<sup>213</sup> Lucien Wolf, *The Myth of the Jewish Menace in World Affairs; or, the Truth About the Protocols of the Elders of Zion* (Macmillan, 1921).

antisemitic libel. They felt it was counterproductive – and contrary to their sense of Englishness – to dignify such sentiments with a response. It was also ineffective. While Wolf may have argued point-by-point against the *Protocols*, he failed to prove his suspicion that they had been forged. That task was left to the *Times*, which printed a series of articles in 1921 correctly attributing the material contained within the Protocols to Maurice Joly’s *Dialogue aux Enfers entre Machiavel et Montesquieu, ou la Politique de Machiavel au XIXe siècle*. It was the *Times*’s articles, not Wolf’s book, that convinced the Protocols’ distributors at the *Morning Post* that they were indeed a forgery.<sup>214</sup>

The Board’s approach to antisemitic material circulating in the aftermath of the Russian Revolution was yet more cautious than Wolf’s. They were extremely reluctant to deal with all but the most extreme cases, and even then preferred to address them as narrowly as possible. In 1922, for example, the Board’s Parliamentary Committee heard complaints that Jews found it prohibitively difficult to secure insurance. It concluded that because the discrimination could be ascribed to the neighbourhoods in which Jews lived and the risk of the trades in which they worked, the practice was legitimate.<sup>215</sup>

When Wolf and Emanuel discussed and dismissed the possibility of “actions for slander on a community” in 1923, it was against the above-described backdrop. In the Board’s estimation, the possibility of bringing undue attention to the Jewish community was greater than the threat posed by libels against it. While the Board did prepare a survey of international work to secure group

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<sup>214</sup> Lebzelter, *Political Anti-Semitism in England, 1918-1939*, 21; Letter from H. A. Gwynne to J. Millen, 20 December 1920, Uncatalogued Collection, The National Archives, Kew.

<sup>215</sup> *Annual Report 1922*, Board of Deputies of British Jews (London, 1923), 30-31.

libel legislation, it did not pursue the matter any further. Of the Jewish community's attitude before 1936, Gisela Lebzelter wrote

when the first instances of undaunted anti-Semitism were reported, the *Jewish Chronicle* considered them evidence for an outdated bigoted narrowmindedness, a relic from the past, rather than an indicator of a significant change of attitude among the host society. Jewish self-confidence and trust in British institutions and traditions were hardly affected by sporadic exhibitions of hostility. Although Anglo-Jewry was indignant about insults to the community as a whole, it did not fear that its established rights could be effectively threatened. It was considered sufficient, therefore, to expose discriminations, which in turn would discredit the prejudiced.<sup>216</sup>

### **The Spread of 'Community Libel'**

During the same period in which the Board contended with pressure from other sections of British Jewry, the notion of group libel gained credence outside the small circle that was aware of it in the 1920s. The persistence of group libel despite many Jewish leaders' opposition was largely attributable to the work of two brothers: Rabbi Salis Daiches, the head of the Edinburgh Hebrew Congregation, and his brother Samuel Daiches, a rabbinical scholar and member of the Board, B'nai Brith, and the Anglo-Jewish Association.<sup>217</sup> Throughout the late 1920s and early 1930s, the Daiches argued that expanding libel law was the only appropriate response to the increasing tide of antisemitic speech within Britain. They were aided by a number of developments abroad, notably prosecutions for group libel in Egypt and the passage of relevant laws in Manitoba, Switzerland, and several U.S. states.<sup>218</sup> At least for Salis Daiches, the matter of libel was personal – in 1924, he and the *Chronicle* were jointly sued for allegedly defaming a man named Alexander Levinson, who claimed he was a rabbi and challenged Daiches's "Bolshie" leadership of his Edinburgh congregation. Daiches and the *Chronicle* eventually

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<sup>216</sup> Lebzelter, *Political Anti-Semitism in England, 1918-1939*, 30.

<sup>217</sup> K. Hannah Holtschneider, *Jewish Orthodoxy in Scotland: Rabbi Dr Salis Daiches and Religious Leadership* (Edinburgh University Press, 2019).

<sup>218</sup> Webber, "Memorandum on the Law of Libel Against Communities."

fended off the challenge, but it left the rabbi with a sense of the power of defamation law.<sup>219</sup> His son wrote in a 1955 remembrance of his father that “throughout the long months during which the Levinson case dragged on, my father continued to fulfil all his normal duties, preaching, lecturing, writing, advising. We children had no idea at the time of the great weight of anxiety that must have been pressing upon him...to him, his victory was another proof of the Tightness [sic] of his way of life, of his kind of synthesis.”<sup>220</sup> It was during this same period – from 1920 through 1924 – that the Daiches brothers began advocating for the cause of libel reform.<sup>221</sup>

It was likely no coincidence that the campaign began mostly outside the Board itself and outside London. For several years before the Daiches family took up the cause of libel reform, provincial Jewish groups had numbered among several parts of the community expressing increased dissatisfaction with the Board and its domination by a small segment of British Jewry.

Arguments over the undemocratic nature of the Board’s structure had come to a head between 1917 and 1919, when “a rebellion against the old ruling cliques within the community, and an attack by the provincial communities against the leadership in London” forced the Board to reform its constitution.<sup>222</sup> The right to elect a deputy to the Board extended from 1919 to a new group of secular organisations, B’nai Brith, the Council of United Jewish Friendly Societies (many of which mainly served immigrant Jews), and a host of other groups.<sup>223</sup> Women could be elected as institutional deputies. Non-citizens, however, could not. The reforms represented a step in the direction desired by critics of the Board, many of them Zionist, while far from

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<sup>219</sup> David Daiches, “My Father, and His Father: Rabbi in Scotland,” *Commentary*, December 1955, <https://www.commentary.org/articles/david-daiches/my-father-and-his-fatherrabbi-in-scotland/>.

<sup>220</sup> Ibid.

<sup>221</sup> For additional treatment of Salis Daiches’s role in advocating for Scottish Jewry, see, e.g. Holtschneider, *Jewish Orthodoxy in Scotland: Rabbi Dr Salis Daiches and Religious Leadership*.

<sup>222</sup> Geoffrey Alderman, *Modern British Jewry* (Clarendon Press, 1998), 248.

<sup>223</sup> Ibid., 249.

satisfying their demands. It meant that men like the Daiches family were somewhat involved in the Board while not yet occupying the main seats of power, particularly the officer roles. Any consideration of group libel and the strategy against anti-semitic speech in general would go through those committees, still led by the traditional power brokers.

The Daiches' conducted their campaign mainly outside the confines of the Board. In 1925, Salis Daiches convinced the Standing Committee of the Conference of Anglo-Jewish Preachers – of which his brother was also a member – to endorse sending a letter to the Board “and other representative bodies, conveying the feeling of [the Conference] of the advisability of taking steps to secure legislation for the protection of a group, community, or people against slander by the introduction of a Bill into Parliament amending the existing law of libel.”<sup>224</sup> It is interesting to consider why Salis Daiches did not simply go to the Board of Deputies directly with his proposal or route it through his brother. Instead, he first sought support from fellow rabbis. Perhaps he felt the Board would be friendlier to a request made by another formal body, in particular a religious one, instead of a single member of the community who was not a member of the body's inner circle.

In the record of the Standing Committee's July 1925 debate over the matter, Samuel Daiches said that “once there was a law that one must not libel a community, the very fact that such a law was on the statute book would act as a deterrent.”<sup>225</sup> His colleague Julius Hirsch replied with a common refrain of group libel opponents, “that a successful action might do more harm than good, as the libeller would go away with an added grievance against the Jews and would

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<sup>224</sup> *Jewish Chronicle*, July 17, 1925, 15.

<sup>225</sup> *Ibid.*, 17.

continue, within the law, his campaign of venom.”<sup>226</sup> This debate would repeat numerous times within the British Jewish community; the Board, broadly speaking, was willing to consider group libel in theory, but feared how it would work in practice. One reason for its reluctance was voiced by Hirsch: that libel trials would themselves fuel antisemites’ allegations of Jewish power and control. The other, as members of the Board would explicitly state later, was that the “wrong” Jews would be able to bring cases on behalf of the community.

Still, despite Hirsch’s complaint and with the support of both Daiches brothers, the resolution passed the Standing Committee and went on to the Board of Deputies for consideration. That same year, Finburgh, the Conservative Member of Parliament and member of the Board<sup>227</sup>, also proposed that the Board endorse group libel. The Board’s Parliamentary and Press Committee rebuffed Finburgh in December 1925 and the Anglo-Jewish Preachers in July 1926.<sup>228</sup> In the former decision, the Committee said it would support a group libel bill if it surfaced in Parliament but did not want to independently propose one. In the latter, it stated its rejection more forcefully, noting that such a measure would never pass, and, even if it did, would be “dangerous to bring into operation” because “the attacks on Jews are usually of such a general nature as to make them almost impossible to refute in toto.”<sup>229</sup> The double rejection closed the chapter on the Board and group libel in the 1920s and, as Lebzelter has noted, the rise in antisemitic literature prompted by the Russian Revolution momentarily quieted by the close of the decade.<sup>230</sup> Finburgh, for his part, refocused his efforts on promoting Zionism in the United

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<sup>226</sup> Ibid.

<sup>227</sup> Obituary for Samuel Finburgh, *Jewish Chronicle*, May 3, 1935.

<sup>228</sup> *Jewish Chronicle*, July 24, 1925, 5; *Jewish Chronicle*, July 30, 1926.

<sup>229</sup> *Jewish Chronicle*, July 30, 1926, 14.

<sup>230</sup> See, e.g., Lebzelter, *Political Anti-semitism in England, 1918-1939*; Sharman Kadish, *Bolsheviks and British Jews: The Anglo-Jewish Community, Britain, and the Russian Revolution* (F. Cass, 1992); Brendan McGeever, *Antisemitism and the Russian Revolution* (Cambridge University Press, 2019).

Kingdom, organising the Parliamentary Palestine Committee and leading a fight against the Aliens Amendment Act of 1927.<sup>231</sup>

Group libel did not lie fallow for long. The *Chronicle* continued to note cases brought by groups of Jews in its pages, including the unsuccessful indictment against Edmonson in New York, covered in Chapter I. One of its columnists lamented the lack of legal recourse against rising antisemitism that same year, writing that “it is to be regretted that there is no law” under which to punish “disseminating foul libel concerning our people.”<sup>232</sup> One reason for the seemingly undying appeal of group libel was simply that legal solutions more broadly had become a more prominent part of Jewish self-defence. The involvement of Jews – notably Lucien Wolf – in the negotiation of the 1919 Minorities Treaties had popularized the idea among Jews that they could win collective protection under the law.<sup>233</sup> Indeed, a *Chronicle* editorial about the Minorities Treaties published in 1920 noted that “perhaps our own impotence has possibly clothed these Treaties with too much virtue...we should like to see the League take one further step, and formulate a demand that the nations comprised within it should pass a law extending the law of libel to communities as well as individuals.”<sup>234</sup> In the article’s formulation, group libel was the logical next step in making concrete the protection promised by the Minorities Treaties. The Treaties had provided the intellectual fuel for Jews who sought to use the law to shield themselves. Fraser has called this “an emergent Jewish rights-advocacy movement” that sought to “concretize the promise, articulated by secular Jewish thinkers from the time of the radical

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<sup>231</sup> Geoffrey Alderman, *The Jewish Community in British Politics* (Oxford University Press, 1983), 110.

<sup>232</sup> *Jewish Chronicle*, May 9, 1930, 9.

<sup>233</sup> Levene, *War, Jews and the New Europe*.

<sup>234</sup> *Jewish Chronicle*, December 17, 1920, 6-7.

Enlightenment, of a world of universal values and equal rights.”<sup>235</sup> Despite the key role played by Wolf in both the Minorities Treaties and the Board, the two did not really intersect. The Board notably did not view group libel as the local manifestation of the rights it wanted Jews to have in what it viewed as less developed politics. There was little explicit intersection between the Board’s work on Jewish issues abroad and its consideration of group libel at home, a separation its leaders preferred.

Between 1930 and 1934, group libel proposals found some success elsewhere in the Jewish Anglosphere – including in places like Canada which shared a common legal system with the United Kingdom. These small victories were noted in the *Chronicle* and kept alive the hope that the Board could be convinced that it was feasible. In January 1931, the AJC wrote to the Board warning them about antisemitic pamphlets that had crossed the Atlantic and urging the Press Committee to reconsider its stance on libel reform.<sup>236</sup> The Board rejected the proposal, sending its American counterparts the same letter it had delivered to the Anglo-Jewish Preachers in 1926.<sup>237</sup> The following year, a group of South African Jews proposed their own version of a group libel bill.<sup>238</sup> Canadian Jews, subject to a flood of antisemitic propaganda flowing in from the United States, were also mulling whether libel reform could help them.<sup>239</sup> The *Chronicle* journalist Watchman wrote an extended column about the two proposals, noting that the Board had repeatedly deemed it infeasible. He asked “what charge would be selected for legal action! Not the current small talk about Jewish character, surely!...Take up any of the other favourite

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<sup>235</sup> Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense*. Fraser’s focus is mainly on legal reform as seen through “test” cases, rather than attempts to legislate. He focuses on those within the Jewish community who advocated forcefully for legal solutions rather than their detractors.

<sup>236</sup> *Jewish Chronicle*, January 23, 1931, 12-13.

<sup>237</sup> *Ibid.*

<sup>238</sup> *Jewish Chronicle*, November 25, 1932, 12-13.

<sup>239</sup> Webber, “Memorandum on the Law of Libel Against Communities.”

allegations against Jews. They are exploiters. How is one to prove a negative? And is a Law Court the best place to attempt it?”<sup>240</sup> Watchman preferred the solutions already in use. He urged British Jews to “use, in their own defense, not the Courts, but the printed word.” He also chastised the community for allowing pro-Jewish material such as the Pan-Europeanist Richard von Coudenhove-Kalergi’s 1901 anti-race theory treatise *Das Wesen des Anti-Semitismus* to go out of print in the United Kingdom.<sup>241</sup> “At present our practice is to refuse to buy the pro-Jewish book, and to deny the Gentile continued access to it. Better mend our ways in this respect than ‘have the Law’ of our detractors!”<sup>242</sup> The columnist’s assessment of the problem of antisemitic pamphlets was, in essence, that they did not pose a serious threat to British Jews. In the same column, he called American Jews who sought to limit productions of *The Merchant of Venice* “our touchy co-religionists.”<sup>243</sup> The column shows the continued strength of opposition within some parts of British Jewry to legal activism against British fascist antisemitism. As Watchman suggested, this attitude was rooted in the belief not just that group libel was unlikely to pass, but also in more a fundamental assessment that new action did not need to be taken against “current small talk about Jewish character.”<sup>244</sup> In 1932, this view was prominent enough to ensure that the Board and its allies would not consider new steps against antisemitism.

The events that would lead the Board to endorse group libel more than a decade thereafter began in 1934, not in London, but in Wolverhampton, Manitoba, and Egypt. In November 1933, Oswald Mosley, the founder of the British Union of Fascists, held one of his largest-yet rallies in

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<sup>240</sup> “Having the Law of Them: In the Communal Armchair,” *Jewish Chronicle*, November 25, 1932, 12-13.

<sup>241</sup> Ibid.

<sup>242</sup> Ibid.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid.

Wolverhampton, prompting the *Chronicle* to write that “the law allows a person to libel a community without fear of being challenged to justify his accusation before the Courts. Sir Oswald Mosley is safe in referring to ‘certain great Jewish interests’; but ‘interests’ have individuals promoting them. Why, then, does he not name the Jews who are imperilling the peace of the world?”<sup>245</sup> From the end of 1933, the *Chronicle* would be firmly on the side of those who sought to reform the country’s defamation law, suggesting, perhaps, broader shifts in the perception of the idea. Readers of the paper would have been more aware of “community libel” in 1934 than a decade prior, when Wolf and Emanuel corresponded about it. The paper ran extensive coverage of one of the first successful group libel bills, passed in the Manitoba provincial legislature in April 1934. It also covered a collective libel case brought by an Italian Jew, Umberto Jabes, against the German Club of Cairo, the main body distributing antisemitic propaganda in the area. Jabes “claimed that a booklet published by [the club] constituted a defamation against the Jewish race and therefore against himself personally.”<sup>246</sup> The court ruled in January 1934 that the case was “irreceivable,” not because libels against communities were not actionable, but rather because Jabes was not himself a member of the local Jewish community. In doing so, it opened the possibility that “if the booklet had been specifically directed at Egyptian Jewry, any member of that body would have been entitled to sue.”<sup>247</sup> Jabes’s counsel also cited a ruling from the reign of George II “that any member of the Jewish community was affected by a libel touching the whole of it.”<sup>248</sup> While the specific case in Egypt had failed on standing, the ruling was supportive enough to the theory of group libel to lead the *Chronicle* to opine in its favour.

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<sup>245</sup> *Jewish Chronicle*, November 24, 1933, 32.

<sup>246</sup> “The Cairo Libel Case: Court Decides Action ‘Irreceivable’,” *Jewish Chronicle*, January 26, 1934, 24-25.

<sup>247</sup> *Ibid.*

<sup>248</sup> *Ibid.*

In February 1934, Daiches wrote to the *Chronicle* complaining again about a lack of legislation against “a campaign of slander by paid agents” against British Jewry. In response, he argued, the Jewish community should advocate for “an Act of Parliament giving the representatives of a slandered community the right to sue the slanderer before a Court of Law, which would in many instances act as a deterrent.”<sup>249</sup> The *Chronicle* agreed, taking up Daiches’s idea in a “leaderette” editorial in its edition the following week, on February 23. The editorial read:

There seems to be a good deal to be said for [Daiches’s] view, and as it is at least arguable that the very existence of the suggested legislation would be sufficient in this country to prevent an intolerable abuse of civil liberties, cases of violation of the law would hardly ever, if ever, come up for hearing. Nor, it is important to add, would protection be sought for Jews alone. All creeds and communities would be accorded redress. It will not be denied that the subject is beset with difficulties, but neither can it be questioned that much water has flowed down the Thames, and much ink been spilled in newspaper offices, since last the matter was considered and shelved. A committee has now been set up by the Lord Chancellor to consider the revision of legal doctrines in the light of modern conditions. This should afford the Deputies an opportunity for reviewing their past attitude, and we are glad to know that they are alive to the possibility. It is time that community-libellers were refused a free run!<sup>250</sup>

In the column above the editorial, the *Chronicle* ran two articles that suggest the context for its position in support of libel reform. The first was titled “Critics at the Deputies” and detailed the failure of four critics to win support at a meeting of the Board of Deputies for a motion criticizing the Jewish community leadership’s inaction regarding the situation of German Jewry.<sup>251</sup> The *Chronicle* supported the Board, writing that there was essentially nothing that could have been done regarding Germany. Its staff wrote that “if any blame at all is to be laid at the doors of Jewish leaders it is in not courageously warning the Community beforehand of

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<sup>249</sup> *Jewish Chronicle*, February 23, 1934, 8.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

realities and preparing them and urging them on for a hard, sustained and prolonged fight.”<sup>252</sup>

Tellingly, though, the editorial then suggested that the Board should turn its attention away from Nazi Germany and toward lobbying its own government, writing “far better cultivate a smaller economy of communicativeness on whatever may be afoot, and concentrate on finding new weapons and sharpening the old.”<sup>253</sup> The other editorial in the column concerned a speech made by Mosley in Birmingham in which he said, “We will attack the alien forces in the City of London. Every producer lives under the tyranny of these alien forces. We will crack the whip over their heads.”<sup>254</sup> The crowd, the *Chronicle* reported, knew that when Mosley referred to aliens in the City of London, he meant Jews.

As the leaderette noted, 1934 was a potentially propitious time for the Board to reconsider libel reform, not because its own stance had necessarily changed (as subsequent years would reveal, it had not). External events had put defamation reform on the government’s agenda. A week before Daiches sent his letter to the *Chronicle*, the MP Alec Cunningham-Reid petitioned the Attorney-General and Lord Chancellor “to consider the revision of legal doctrines and decisions in the light of modern conditions the present position of the law of defamation, more especially in regard to libel actions against newspapers.”<sup>255</sup> The Solicitor General responded that the Lord Chancellor’s standing committee was “sufficiently occupied” with existing reform projects but would return to Cunningham-Reid’s suggestion.<sup>256</sup> It would eventually do so in 1938, when the Lord Chancellor appointed Lord Porter to head a special group on defamation reform. This was

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<sup>252</sup> Ibid.

<sup>253</sup> Ibid.

<sup>254</sup> Ibid.

<sup>255</sup> “The Law of Libel,” *The Times*, February 6, 1934.

<sup>256</sup> Ibid.

the chance for which the Board had long waited – they would not have to raise the question of group libel independently. Rather, they could participate in a discussion the government itself had begun.

Daiches's letter and Cunningham-Reid's entreaty to the government were the two pieces of context noted in a report by George Webber, the lawyer the Board asked in 1934 to reconsider group libel once more. Webber wrote that the Solicitor General's reply in particular spurred the Board to ask him to update Emanuel's 1926 survey of the law. He wrote that it was "in view of [his] reply that I have been asked to consider the whole subject."<sup>257</sup> The emphasis on the government, not Daiches and the *Chronicle*, is suggestive of the Board's posture toward pressure from the Jewish community. The exchange between Cunningham-Reid and the Attorney-General's office happened on February 5.<sup>258</sup> But, despite the editorial noting that the Board was "alive" to defamation reform, it was not until after the *Chronicle*'s endorsement on February 23 that the Board acted. The Board was as responsive to constituencies within the Jewish community as to the government's actions, if not more. But as Webber's comment demonstrated, it did not want to appear as such. In place of acknowledging its debt to the *Chronicle*, the Board preferred to cite *The Times*.

### **Mountains and Mole-hills**

The Board of Deputies' reconsideration of group libel in 1934 also owed to its new President, Neville Laski, who would become the single most important figure to the idea's story in the

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<sup>257</sup> Webber, "Memorandum on the Law of Libel Against Communities."

<sup>258</sup> "The Law of Libel," *The Times*, February 6, 1934.

United Kingdom. Laski was a member of one of Manchester's leading Jewish families, the son of businessman and Jewish leader Nathan Laski and the brother of the political scientist and Labour Party chair Harold Laski.<sup>259</sup> While himself of Lithuanian and Polish origin, Laski was elected to the Presidency of the Board with support from the old "cousinhood" and generally tended toward compromise and conciliation. By the time of his election, he was already a King's Counsel. An article from 1935 called him "a young K.C. with a brain of steel" who "will be a leading figure" in the law, and he was.<sup>260</sup> The same year, the *Manchester City News* spoke of his "superb youthful confidence in himself" upon quoting a long Latin passage at a dinner intended to be "jolly and lowbrow." The author "overheard an inquest in a far corner after the dinner in which the Laski vowel quantities were severely handled. But judges don't need to know Latin – they only need to have known it!"<sup>261</sup> The two articles' prediction came true; Laski did become a leading barrister and then a judge. Despite his fierce manner in the courtroom, within the Board Laski sought to mediate between its many factions. After winning the Presidency, he said that "I have no point of view except an open mind...I have no axe to grind...in the words of Speaker Lenthall when he greeted Charles the First, 'I have eyes to see; ears to hear and a tongue to speak as this House shall command.'"<sup>262</sup> Still, the *Jewish Telegraphic Agency* called his victory "a victory for the non-Zionist faction of the Board of Deputies. Mr. Laski is known to be a non-Zionist and in some circles is even regarded as an anti-Zionist."<sup>263</sup> It was to be the non-Zionists' last major victory electing a sympathetic President within the Board. More importantly for the

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<sup>259</sup> "Nathan Laski, Leader of British Jewry, Dead," *Jewish Telegraphic Agency*, October 22, 1941.

<sup>260</sup> "Young K.C. With a Brain of Steel," *Weekly Dispatch*, March 24, 1935, in Laski Family Records, Anglo-Jewish Archives, MS134/AJ33/191, Anglo-Jewish Archives, Hartley Library, University of Southampton, Southampton, England.

<sup>261</sup> Nathan Laski, "A Manchester Diary," *The Manchester City News*, May 25, 1935, in Laski Family Records, Anglo-Jewish Archives, MS134/AJ33/192, AJA.

<sup>262</sup> "Mr. Laski Elected President of Jewish Board of Deputies," *Daily News Bulletin*, *Jewish Telegraphic Agency*, January 16, 1933, in Laski Family Records, Anglo-Jewish Archives, MS134/AJ33/190, AJA, 2.

<sup>263</sup> "Neville Laski Elected President of Board of Deputies; Victory for Non-zionist Group," January 17, 1933.

matter of group libel, however, it put at the head of the Board a man with deep knowledge of the law and interest in how it might be used to fight antisemitism. Because his successor, Selig Brodetsky, was a mathematician with little interest in the law, Laski remained the dominant figure in the Board's legal activities through the 1940s and despite the many other changes within the Board during the same period.

After acquiescing to Daiches's demand, Laski and the Board's first step was to commission a fresh review of both developments in other Jewish communities and of the British case law. He selected for the task Webber, a barrister and reader in English Law at University College London who was actively involved in both the Board and B'nai Brith.<sup>264</sup> Webber began with a survey of the law in France, the Netherlands, the United States, Canada, Egypt, and Switzerland, noting that efforts to secure protection against group defamation had advanced considerably in these places since the mid-1920s.<sup>265</sup> In the case of the United States, Webber also asked the ADL to prepare an informal report on the state-by-state situation for the Board's consideration. The ADL in 1934 was in the process of advocating for a federal libel statute similar to the one the Board might consider, although the assistant to its president noted in a letter to Laski that "the ethical concept of free speech in the United States is probably slightly different than it is in England" given the American absence of historical prohibitions against libeling the church and monarchy.<sup>266</sup>

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<sup>264</sup> Marilyn Lehrer, "Our History," Jewish Literary Foundation, 2012, <https://jewishliteraryfoundation.co.uk/about-us/our-history>.

<sup>265</sup> Webber, "Memorandum on the Law of Libel Against Communities."

<sup>266</sup> Letter from A. Brussell, April 4, 1934, in Webber, "Memorandum on the Law of Libel Against Communities."

The English case law at the time noted that statements which purported to refer to a large group could, in fact, aim at an individual, allowing them to prove damage to their reputation. For Webber and the Board, though, that was an unsatisfying route to success in the courts. Webber wrote that “the Jewish community does not desire that an individual Jew should be able to recover damages for a libel reflecting on the Jewish people. It is desirous rather that such libels should cease or at least that the perpetrators of such libels should receive an exemplary punishment which would deter the rest.”<sup>267</sup> Because of this fear – of individuals using a potential group libel law to enrich themselves – Webber concluded that any charges sought against antisemites must be criminal, not civil.<sup>268</sup> His position also reflected the Board’s ongoing reluctance to actually *use* libel laws against the BUF and its allies. What the Board sought in 1934 was not to bring its adversaries to trial; it remained reluctant to give them the publicity or to risk losing a high-profile case. Instead, its leadership wanted a deterrent – it wanted to threaten antisemites with punishments that would never actually arrive. While existing law allowed for such criminal prosecutions for “breach of the peace” and seditious statements, actual prosecutions on those bases were vanishingly rare, meaning a change to the law was likely required.<sup>269</sup>

But, as Webber also noted, the political dimension of pushing for reform made such a prospect challenging. His report to the Board concluded with politics, noting that the Conservative

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<sup>267</sup> G.C. Webber, ‘Patterns of Membership and Support for the British Union of Fascists’, *Journal of Contemporary History* 19, no. 4 (1984): 575–606.

<sup>268</sup> *Ibid.*

<sup>269</sup> The main hope of group libel advocates when it came to the common law was a 1732 case, *Rex v. Osborn*, in which a pamphleteer had circulated the claim that Jews had killed a woman and newborn child. An apparently Jewish lawyer, Fazakerly, had brought the case, but the Court found that the pamphlet was “so general that no particular Persons could pretend to be injured by it.” Nevertheless, it found the case in Fazakerly’s favor because the pamphlet had directly caused several incidents of violence against Jews which breached the peace. On this precedent hung the legal theory that seditious libel could already accomplish what group libel sought to, except that the “breach of the peace” bar was so high and the task of proving causality so difficult. See *R v. Osborn*, W. Kel. 230, 25 English Reports 584 (1732).

government would likely be, at best, neutral toward the prospect of group libel. Any reform legislation would need to be a Private Member's Bill, Webber wrote; of its chances, he concluded that "the outcry against such a measure would be very large."<sup>270</sup> About the likely response of "Liberal and Labour" advocates of free speech – as well as the Conservative government – he wrote

Would they not say 'Are you not making a mountain out of a mole-hill? It is true that there are scurrilous attacks in country newspapers from time to time against what are alleged to be Jewish habits and practices. It is true that even in newspapers with a large circulation such implied attacks, usually carefully concealed under artistic sub-editorial headings, are not infrequently found, but England,' it would be said, 'is the last refuge of liberty in Europe, and it is contrary to English tradition to limit the freedom of speech. No right-minded men (it would be said) would believe these aspersions on the Jews. They will die of their own inanition. Why does not any other group or community ask for similar protection? In a country like England every group must run the gauntlet of criticism, and it would be contrary to English public policy to fetter free criticism, even though occasionally it does pass beyond the border.'<sup>271</sup>

Webber put these sentiments in the mouths of group libel's enemies, but, in some respects, he shared them. That he was able to imagine these rebukes suggests something about his and the Board's orientation toward political action. (Laski and the Board's leaders knew to whom they had assigned the task of preparing the report.) If something was unworkable based on the Board's own understanding of the likely non-Jewish response, it was simply not worth doing at all. The fact that, as Webber put it, group libel had by 1934 the support of "a large body of Jewish public opinion, which has found some expression in individual speeches of members of the Board of Deputies" was less important than the fact that it did not have the support of large body of *non-Jewish* public opinion.<sup>272</sup> Webber and the Board's leadership wanted to deal in the realm of the possible, or what they saw as possible. Indeed, by the end of the report Webber

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<sup>270</sup> Webber, "Memorandum on the Law of Libel Against Communities."

<sup>271</sup> Ibid.

<sup>272</sup> Ibid.

wrote from his own position the exact sentiments he had, a page prior, ascribed to others. The threat to British Jews consisted of “sporadic and ill-informed local attacks on the Jewish people;” fighting them openly would do “the Jewish people and the Jewish community in England more harm than good.”<sup>273</sup> Reading Webber’s report gives the impression that – despite all that had changed for Jews in the interim – the assessment of some members of the Board was identical to Wolf’s in 1923.

The Board’s 1935 Community Libel Committee met twice in December of that year to consider Webber’s report and the opinion of several other barristers it had consulted. Its unanimous conclusion was not necessarily a full-throated rejection of defamation reform, but rather an assessment that “it would not be possible to secure the passage through Parliament of so radical an alteration.”<sup>274</sup> Defamation reform had again failed to win the Board’s support.

### **Rex v. Leese**

In 1936, the problem of fascist antisemitism reached its peak. The events of that year, including the United Kingdom’s first “race libel” prosecution, would set the stage for the Board’s eventual change in position on group libel legislation. Webber had cautioned against bringing antisemites to court in “test cases,” arguing it could create damaging precedents and bring undue publicity to the defendants. Despite this reluctance, in August 1936 exactly such a trial began.

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<sup>273</sup> Ibid.

<sup>274</sup> “Memorandum on Community Libel,” June 12, 1940, Board of Deputies Collection, ACC/3121/C/4, LMA.

Unlike Mosley, whose British Union of Fascists had not always foregrounded overt antisemitism, Arnold S. Leese was perhaps the most explicitly virulent anti-Jewish campaigner in the United Kingdom during the 1930s. He had rebuffed Mosley's attempts to absorb his organisation, the Imperial Fascist League, in the early 1930s, feeling the BUF was insufficiently focused on the threat Jews posed to British society.<sup>275</sup> Soon, he became a frequent subject of fearful discussion in the pages of the *Chronicle*.<sup>276</sup> In July 1936, he published columns in the *Fascist*, the IFL's weekly journal, repeating the blood libel that Jews practiced ritual sacrifice of Christians during their Passover celebrations.<sup>277</sup> The Crown charged him and Walter Whitehead, his printer, with "printing a seditious libel concerning people of the Jewish faith and his Majesty's subjects of the Jewish faith,"<sup>278</sup> creating a public mischief, and other lesser charges related to promoting "disaffection" in August.<sup>279</sup>

Why the Attorney General chose to prosecute Leese and Whitehead for the rare charge of seditious libel remains unclear.<sup>280</sup> The American Jewish Year Book and *Chronicle* called the case against them the country's "first race libel" prosecution,<sup>281</sup> and, as Christopher Hilliard has noted, the British government would not again pursue a similar case until 1943.<sup>282</sup> Leese and the *Fascist's* reach was small, particularly compared to his rival Mosley.<sup>283</sup> The Board, while not

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<sup>275</sup> "Attack on Jews: Verdict of 'Guilty' on Two Counts," *The Times*, September 22, 1936, 11.

<sup>276</sup> Copsey and Tilles, 'Uniting a Divided Community?'; Griffiths, *Fellow Travellers of the Right*.

<sup>277</sup> "Attack on Jews: Verdict of 'Guilty' on Two Counts."

<sup>278</sup> *Ibid.*

<sup>279</sup> *Ibid.*

<sup>280</sup> The reasons for the charges are absent from the account of the case in Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense*, 266–67. Tilles's account of Laski's contacts with the Home Office also gives no hint that the Board prompted the prosecution; see Tilles, 'Neville Laski, Anglo-Jewry and the Crises of the 1930s'.

<sup>281</sup> Harry Schneiderman, 'Great Britain', *The American Jewish Year Book*, 1938.

<sup>282</sup> Christopher Hilliard, *A Matter of Obscenity: The Politics of Censorship in Modern England* (Princeton University Press, 2021).

<sup>283</sup> "Attack on Jews: Verdict of 'Guilty' on Two Counts."

explicitly opposed to the Government's case,<sup>284</sup> had not asked the Director of Public Prosecutions to charge Leese. It is more likely that the case arose out of increased pressure on the government to combat British fascism more broadly and increased surveillance of fascist meetings by the police. The *Times* suggested as much in its coverage of the initial charges against Leese and Whitehead, noting that Inspector Kitchener of Scotland Yard had brought copies of the *Fascist* to prosecutors' attention.<sup>285</sup>

Mosley and the BUF carefully modulated their language during this period in response to the government's increasing attention toward fascist antisemitism. This was particularly true after the Public Order Act came into effect in December 1936.<sup>286</sup> According to the Metropolitan Police's records, "the British Union of Fascists [Sir Oswald Mosley] has given a definite warning to its speakers to refrain from attacking the Jews at public meetings, it being emphasized that arrests of its members for Jewbaiting is likely to do the Fascist movement in this country more harm than good."<sup>287</sup> The BUF had suffered a severe setback the previous year when it lost the official support of Lord Rothermere and the *Daily Mail*; by some estimates, its membership dropped from 50,000 members in 1934 to 5,000 by the end of 1935.<sup>288</sup> Slowly, however, from 1936 through 1938 the Home Office tracked the BUF's recovery; while the party never again

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<sup>284</sup> See, e.g., Letter from Neville Laski to A.G. Brotman, August 20, 1936, Board of Deputies Collection, ACC/3121/E1/16, LMA.

<sup>285</sup> "Attack on Jews: Articles in Fascist Paper," *The Times*, August 15, 1936, 7.

<sup>286</sup> The Act had prohibited "any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace" as well as banning the public wearing of political uniforms. It had been largely crafted by Frank Newsam, a Home Office civil servant who had encountered the BUF after its members engaged in violent clashes at the Olympia rally in 1934. The rally was the proximate cause for the *Mail's* abandonment of the BUF and its 1934-5 crisis. See, Daniel Tilles, 'Bullies or Victims? A Study of British Union of Fascists Violence', *Totalitarian Movements and Political Religions* 7, no. 3 (2006): 327-46, <https://doi.org/10.1080/14690760600819499>. H. C. G. Matthew and B. Harrison, eds., 'Newsam, Sir Frank Aubrey', in *The Oxford Dictionary of National Biography* (Oxford University Press, 2004), ref:odnb/35219, <https://doi.org/10.1093/ref:odnb/35219>.

<sup>287</sup> Holmes, *Anti-Semitism in British Society, 1876-1939*, 198.

<sup>288</sup> Webber, 'Patterns of Membership and Support for the British Union of Fascists', 577.

reached its 1934 peak, it did recruit thousands of members in 1936, 1937, and 1938.<sup>289</sup> In the aftermath of the Battle of Cable Street alone, the party claimed to have recruited 2,000 new members, according to the Home Office's Special Branch.<sup>290</sup> The IFL, by contrast, was much smaller but had a later peak – in 1939.<sup>291</sup>

Leese and Whitehead's trial took place between September 19 and 22, 1936 at the Old Bailey.<sup>292</sup> Webber attended the trial and produced extensive notes of his impressions; the Board also ordered a full transcript of the proceedings.<sup>293</sup> Leese and Whitehead represented themselves, though the former was a veterinary surgeon and the latter a printer.<sup>294</sup> This was brilliant on their part, for it played into a longstanding British tradition of handling unrepresented defendants with kid gloves.<sup>295</sup> Webber wrote that Leese "must have known that being unrepresented he would be allowed wider latitude and that he could run the case on his own lines of 'commonsense.'"<sup>296</sup> Little known before the trial, Leese used his cross-examination as an opportunity to promote the very antisemitic theories at issue in the case. He asked Kitchener, the detective, whether there had been recent unsolved cases of child murder and whether it had "occurred to [him] that some of them may be cases of ritual murder by Jews?"<sup>297</sup> He also denied intending to cause any breach of the peace, claiming that "Bethnal Green is like tinder, waiting for the flame to be put to it. I

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<sup>289</sup> Ibid.

<sup>290</sup> Ibid. For more on the "Battle of Cable Street," a confrontation between Mosley's BUF and a variety of anti-fascists in 1936, see Tony Kushner and Nadia Valman, eds., *Remembering Cable Street: Fascism and Anti-Fascism in British Society* (Valentine Mitchell, 2000).

<sup>291</sup> See, e.g., J. Morell, 'The Life and Opinions of A.S. Leese,' Ph.D. diss., (University of Sheffield, 1974), 25. Via Renton, *Fascism, Anti-Fascism, and Britain in the 1940s*.

<sup>292</sup> "Attack on Jews: Verdict of 'Guilty' on Two Counts," *The Times*, September 22, 1936, 11.

<sup>293</sup> Snell and Son, Transcript of Rex v. Leese and Whitehead, August 14, 1936, Board of Deputies Collection, ACC/3121/C13/4/3, LMA.

<sup>294</sup> Ibid.

<sup>295</sup> George Webber, "Observations upon the Case of R. v. Leese and Whitehead," September 18 and 21, 1936, Board of Deputies Collection, ACC/3121/E1/16, LMA, 6.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

am not going to apply that flame. I suggest that this is not a criminal prosecution but a political prosecution in favour of the Jews.”<sup>298</sup> The *Times* reprinted Leese’s statements as part of his defence, bringing them before thousands of British readers who likely otherwise would never have known his name. The jury found Leese not guilty on the most serious charges of seditious libel and breach of the peace, convicting him of lesser offences instead. He was sentenced to six months in prison, which he used to write a pamphlet called “My Irrelevant Defense: Meditations Inside Gaol and Out on Jewish Ritual Murder.”<sup>299</sup> Whitehead, too, was found not guilty on all but one charge and paid a £20 fine.<sup>300</sup>

Both experienced barristers, Laski and Webber watched the prosecution and judge’s conduct with horror from beginning to end. The attorney general’s choice to bring four separate charges of sedition confused the jury. The prosecution “deserved a more vigorous handling” despite the “interests of British Justice not to press for a conviction particularly when the Defendants are not represented.”<sup>301</sup> Both judge and prosecutor allowed Leese to repeat his antisemitic opinions many times over the course of the trial without challenge, to such an degree that “Leese must have sensed that he was being given full rope and availed himself of it to the fullest extent.”<sup>302</sup> As Webber wrote, “he should, in my humble submission, never have been allowed to keep on reiterating the fact that he could have proved the truth of ritual murder.”<sup>303</sup> Even worse perhaps, while giving instructions to the jury, the “learned judge” gave the impression “that sedition and public mischief were simply two different ways of looking at the same thing,” despite the vast

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<sup>298</sup> Ibid.

<sup>299</sup> Schedule to Mr. Laski’s Memorandum to the Lord Chancellor’s Committee on the Law of Libel, 1948, Board of Deputies Collection, ACC/3121/C4, LMA.

<sup>300</sup> “Attack on Jews: Verdict of ‘Guilty’ on Two Counts,” *The Times*, September 22, 1936, 11.

<sup>301</sup> George Webber, “Observations upon the Case of R. v. Leese and Whitehead,” 3.

<sup>302</sup> Ibid., 4.

<sup>303</sup> Ibid.

difference in seriousness between the two charges.<sup>304</sup> The Attorney General supported this formulation, which led directly to the jury deciding to convict Leese only of the lesser charge. Webber, not one to express extreme views, wrote that he “respectfully and completely disagree[d]” with the prosecution’s approach.<sup>305</sup> The trial went so poorly in Webber’s mind that it cemented his opposition to trying antisemites as a strategy. He summed up the case by writing that “it would seem that the remedy of prosecution in such cases is one to be invoked only rarely and with discrimination, and even a successful prosecution might not really check the flood of abuse. Calumnies will have to be fought in other ways – by pamphlets, lectures, addresses, by the regular expression of enlightened non-Jewish opinion.”<sup>306</sup>

The failure to secure a conviction for seditious libel against Leese and Whitehead had two somewhat contradictory effects on the push for libel reform within the Board. It supported the idea that bringing antisemites to court was potentially inadvisable and made the Director of Public Prosecutions extremely reluctant to do so for the rest of the 1930s. But it also challenged the argument made by Webber and others that the existing law was sufficient in practice<sup>307</sup>; that, if antisemitism were to become truly dangerous, its propagators could be tried for seditious libel and “breach of the peace” without need for defamation reform. Laski apparently realized as much; although he remained sceptical of group libel, after the end of Leese’s trial he advocated to the Home Secretary reforming defamation law to prevent defendants from spreading falsehoods through their attempts to defend themselves against libel charges.<sup>308</sup>

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<sup>304</sup> Ibid.

<sup>305</sup> Ibid.

<sup>306</sup> Ibid.

<sup>307</sup> The *Chronicle* had also made this argument in its 1934 editorial on the Egyptian race libel case. “The Cairo Libel Case: Court Decides Action ‘Irreversible’,” *Jewish Chronicle*, January 26, 1934, 24-25.

<sup>308</sup> Letter from Neville Laski to Mark Selincourt, November 26 and 28, 1938, Board of Deputies Collection, ACC/3121/E3/247, LMA; “Interview with Mr J. F. Henderson.” See also Neil Barrett, ‘The Threat of the British

The trial also came as the Board faced increasing frustration over its perceived inaction regarding antisemitism. Tilles has noted that historians critical of the Board's anti-defamation work often fail to cite its archives, writing that "the omission of this evidence is particularly significant because, while aspects of the defence campaign aimed at improving the community's image were, by their nature, carried out in the public arena, much of the Board's anti-fascist activity, for equally good reason, took place privately and remained unpublicised."<sup>309</sup> In particular, Board leaders Laski and Board Vice-President Sir Robert Waley Cohen met with the Home Office and Metropolitan Police repeatedly in 1936 urging them to take action against antisemitic activity in the East End and elsewhere.<sup>310</sup> Still, while the Board's internal deliberations and clandestine meetings are now available to historians, they were not to British Jews in 1936. The *Chronicle* wrote in July that letters to the editor criticizing community leaders – implicitly the Board – had rapidly increased in number. Its editors opined that "the Fascist menace to Anglo-Jewry has gone a stage further."<sup>311</sup> The BUF declared at a Stoke Newington rally its intention "rid this country of the Jews."<sup>312</sup> Leese had spread the blood libel which would form the basis for his eventual trial. But the Board remained quiet. "The rank and file are awaiting with ebbing patience the lead that Sir Robert Waley Cohen has promised that they will give. Letters increasingly pour into this office urging immediate, energetic and comprehensive action by the official leaders of Jewry."<sup>313</sup> Moreover, the Board's activities – and those of Jewish organisations fighting antisemitism – had little apparent connection to the government's increasing action against British fascism. Rather,

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Union of Fascists in Manchester', *Jewish Culture and History* 1, no. 2 (1998): 64, <https://doi.org/10.1080/1462169X.1998.10511908>.

<sup>309</sup> Tilles, 'Some Lesser Known Aspects', 138.

<sup>310</sup> Ibid.

<sup>311</sup> "The Need for Jewish Defence," *Jewish Chronicle*, July 10, 1936, 16-17.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid.

the BUF had simply made a series of tactical errors that led to violence in 1934 – errors from which it could recover.

After Webber's report in 1934, group libel legislation remained a consistent demand for some elements of British Jewry. The pages of the *Chronicle* repeatedly invoked the idea when discussing antisemitic literature in 1938 and 1939, showing how it remained part of the discussion surrounding threats to British Jewry. At one meeting in 1936, for example, the Board deputy and barrister Moss Turner-Samuels said that the Board should have taken greater advantage of the government's clear willingness to act against the BUF. Turner-Samuels said "he hoped the idea was not gaining currency that they were going to cure the situation by these open-air meetings. In his view the only and ultimate way of mending this matter was for the Board, as a public authority, to see that the greater public authority, the Government, did its duty."<sup>314</sup> He added that the government's attitude suggested the Home Office believed "the sort of thing that the Fascists were doing was creating hate between different sections of His Majesty's subjects and that it was not only illegal, but criminal and could and should be punished," providing an opening for the Board to secure passage of a group libel measure.<sup>315</sup>

Prior to 1936, the Board had conducted its "self-defence" work jointly through its Parliamentary and Press Committees. In response to demands like those printed in the *Chronicle*, it formed a "Co-ordinating Committee" tasked with overseeing the Board's anti-defamation efforts as well as its cooperation with other Jewish organisations. In 1938, the Board would rename the group its Defence Committee. Historians have generally cited the work of this group when discussing

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<sup>314</sup> Ibid.

<sup>315</sup> *Jewish Chronicle*, October 2, 1936, 22.

the Board's fight against antisemitism, usually (with the exception of Tilles) to criticize it. Indeed, as the Board's annual report from 1938 demonstrates, the Defence Committee served more to reorganise existing work than to substantively change the Board's reactive approach to antisemitic activity.<sup>316</sup> Its repertoire consisted of holding open meetings to counteract fascist gatherings, distributing literature to combat antisemitic publications, and investigating "the alleged departure by individual Jews from the accepted standards governing business practice, relations between employers and employees, or of social behaviour."<sup>317</sup> Notably, the Board did not explicitly state its opposition to political fascism, only to its antisemitic elements.

As Turner-Samuels's comment exhibits, the Board was facing increasing pressure to change its tactics and strategy toward fascism. Some scholars, including Alderman, Endelman, and Cesarani, have been sharply critical of the Board's work during this period, arguing that its bourgeois, assimilationist posture blinded it to the danger fascism posed for working class British Jews, many of whom had arrived in the United Kingdom during the wave of immigration that took place between 1881 and 1914.<sup>318</sup> Indeed, the Board established the Defence Committee four years after the formation of the British Union of Fascists.<sup>319</sup> One common explanation for the delay proffered by historians of the Board's work is that antisemitism was not central to the BUF's ideology in its first active years. In his summary of the Board's 1930s anti-fascist efforts, for example, Tilles wrote that "although elements of the community had been involved in opposing the BUF from its earliest days – even before it had adopted an anti-Jewish position – it

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<sup>316</sup> *Annual Report 1938*, Board of Deputies of British Jews (London, 1939), 53-56.

<sup>317</sup> *Ibid.*, 31.

<sup>318</sup> Alderman, *The Jewish Community in British Politics*; David Cesarani, 'The Transformation of Communal Authority in Anglo-Jewry, 1914-1940', in *The Making of Modern Anglo-Jewry* (Blackwell, 1990); Endelman, *The Jews of Britain, 1656 to 2000*. Alderman, *The Jewish Community in British Politics*. Cesarani, 'The Transformation of Communal Authority in Anglo-Jewry, 1914-1940'.

<sup>319</sup> Tilles, 'Some Lesser Known Aspects.'

was only in 1935-6, as Mosley's Blackshirts initiated their viciously anti-Semitic 'East End campaign,' that Anglo-Jewry as a whole was forced to consider a concerted and systematic response."<sup>320</sup> For example, it was only in 1936 that Mosley changed the name of his party to the British Union of Fascists and National Socialists.<sup>321</sup> Where previously those sympathetic to Hitler formed merely one faction in Mosley's movement, that year the party as a whole pivoted toward Germany. Where it had once spoken primarily about "aliens" menacing Britain, it now explicitly invoked the danger posed by British Jews. But more recent studies, including Tilles's, have argued that the Board's officials were indeed alarmed and attempted to change course well before the onset of the Second World War. Laski, its president from 1933 to 1939, when the official Community Libel committee formed, was a keen observer of antisemitic activity on the continent and may have felt the Board was not doing enough. The rise of the Nazi Party in Germany – and the role propaganda and anti-Jewish speech had played in it – made similar speech a more urgent danger for the British Jewish establishment. It was this understanding that led Laski and Waley Cohen to meet with the Home Secretary and police throughout the mid-1930s.

However, as Alderman, Endelman, and Cesarani's work suggests, the Board's reconsideration of defamation law between 1934 and 1939 may have stemmed in large part from trends internal to British Jewry rather than a changing assessment of the nature of antisemitism in the United Kingdom. The 1930s was a period in which the Board of Deputies' status within the Jewish community and especially its defence work were repeatedly challenged. The Board had never been the exclusive political representative of British Jews, despite its protestations to the

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<sup>320</sup> Ibid.

<sup>321</sup> Lebzelter, *Political Anti-Semitism in England, 1918-1939*, 103.

contrary. It was, variously, too London-centric, too religious, too dominated by the cousinhood. It would always be subject to “turf wars.” The rise of fascism at home and abroad brought fresh urgency to these longstanding struggles. While the Board had always faced political alternatives within British Jewry, criticism of the organisation had mounted over its failure in 1933 to support a boycott of German goods. Laski said of the proposed boycott that “so long as there is the slightest chance (and there is some chance) of an amelioration of the situation, we must do nothing and say nothing which can be misinterpreted [by the Nazis] to further their political goals.”<sup>322</sup> But the boycott continued without the board, largely as a result of Yiddish-language campaigning in the East End<sup>323</sup>; in September 1933, an organisation formed to coordinate it, the Jewish Representative Council for the Boycott of German Goods and Services.<sup>324</sup> Meetings about the boycott – many of them attended by Jewish trade unionists and Zionists shut out of the Board – provided a launching pad for alternative political groups. The Jewish Labor Council, a group of trade unionists dedicated to fighting fascism, formed in 1934.<sup>325</sup> The Jewish People’s Council Against Fascism and Anti-Semitism, which shared founding members with the JLC, formed in 1936.<sup>326</sup> Both worked with non-Jewish anti-fascist organisations, challenging the Board’s self-conceived status as the sole representative of British Jewry to non-Jews. On the issue of fascist antisemitism, the Board was threatened with competition. It would need to act, or risk ceding yet more political ground to the emergent alternatives within the Jewish community. Even worse, perhaps, it would risk losing its role as liaison between Jews and the British political establishment.

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<sup>322</sup> Board of Deputies Meeting Minutes, March 26, 1933, Board of Deputies Collection, ACC/3121/A/26, LMA.

<sup>323</sup> Gewirtz, ‘Anglo Jewish Responses to Nazi Germany 1933-39’.

<sup>324</sup> Ibid.

<sup>325</sup> Lebzelter, *Political Anti-Semitism in England, 1918-1939*.

<sup>326</sup> Elaine Smith, ‘Class, Ethnicity and Politics in the Jewish East End, 1918-1939’, *Jewish Historical Studies* 32 (1992 1990): 355–69.

Group libel, despite the flaws pointed out by Wolf and Webber, proved an attractive solution to the above problems. By its very nature, it would allow the Board to serve as the official representative of all British Jews in the eyes of the law, formalising the organisation's relationship both to its constituency and to the state. It would shift the fight against fascism from community activism in the East End – not an area in which the Board was traditionally strong – to the friendlier territory of Parliament, the Home Office, and the courts. The libel committee also emerged (and reemerged) during a period in which lawyers were increasingly dominant within the Board's ranks. Laski's and other prominent members' legal background may have drawn them more toward solutions based in the law. (This dynamic calls to mind Abraham Maslow's famous statement that "if the only tool you have is a hammer, you tend to see every problem as a nail.")<sup>327</sup> Neither of the two presidents of the Board in the 1920s, conversely, were lawyers – Lionel de Rothschild and Osmond d'Avigdor-Goldsmid.<sup>328</sup> Indeed, the trend of Board presidents with legal backgrounds favouring legal projects would continue well into the 1950s. After the Porter Committee's rejection of group libel reform in 1948, Board president Abraham Cohen (a non-lawyer) abandoned the project and his successor Barnett Janner (a lawyer) took it up again.<sup>329</sup>

In 1936, the Board relented to outside pressure and established the Co-ordinating Committee.<sup>330</sup>

From 1938, this would be known as the Defence Committee; it was the body through which all

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<sup>327</sup> Abraham H. Maslow, *The Psychology of Science: A Reconnaissance* (Gateway Editions, 1966), 15–16.

<sup>328</sup> *Annual Report 1937*, Board of Deputies of British Jews (London, 1938).

<sup>329</sup> HC Deb 27 June 1952 vol. 502, cc2749-58.

<sup>330</sup> Tilles, 'Some Lesser Known Aspects', 136. For an account of the Committee's formation, see also *Annual Report 1937*, Board of Deputies of British Jews, 68-69.

group libel-related matters passed from that point on. Laski chaired the Committee at its inception, aided by Gordon Liverman, a longtime Board official and Justice of the Peace.<sup>331</sup> But another key figure, nominally not on the committee itself, merits mention and would play a key role in the story of group libel: Sidney Salomon. A veteran of the First World War wounded at Passchendaele, Salomon served as the Defence committee's secretary and later the Press Officer of the whole Board.<sup>332</sup> He was an avid historian, both of British Jewry and of the Board itself. In 1938, for example, he published *The Jews of Britain*, intended to highlight Jewry's positive impact on British society.<sup>333</sup> Salomon, not a lawyer, was always more interested in the educational approach to fascist antisemitism. Looking back on the Board's early defence work in the 1930s, he wrote that it was

compelled to undertake what may be called a system of education which would open the eyes of their Christian fellow citizens to the real implications of the Nazi policy and to remind them continually that the persecution of the Jews was only the precursor to the persecution of the Christian Churches and all religion generally, and was a blind to hide the real aim of the Nazis, the domination of the Continent of Europe. The difficulties of the situation and the delicate manner in which it had to be handled does not seem even now to have been realised by some critics of the Defence Committee.<sup>334</sup>

Indeed, the early work of the Defence Committee focused much more on strategies other than group libel or lawsuits in general, a tendency further fuelled by the Leese debacle. Laski worked tirelessly behind the scenes to lobby the Home Office and to undertake personal investigations of fascists.<sup>335</sup> But the committee as a whole was primarily interested in "preventative educational

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<sup>331</sup> "Maurice Gordon Liverman, B'nai B'rith President in England, Killed in Crash," *Jewish Telegraphic Agency*, July 27, 1951; *Annual Report 1938*, Board of Deputies of British Jews, 27.

<sup>332</sup> Michael Jolles, 'A Chronological Survey of the Collective Biography of British Jews', *Jewish Historical Studies* 50, no. 1 (2019), <https://doi.org/10.14324/111.444.JHS.2018V50.007>.

<sup>333</sup> Sidney Salomon, *The Jews of Britain* (Jarrolds, 1938).

<sup>334</sup> Sidney Salomon, "The Jewish Defence Committee: Some Lesser Known Aspects of its Work," 1939, Laski Family Records, Anglo-Jewish Archives, MS134/AJ33/158, AJA, 4.

<sup>335</sup> Minutes of Meeting Held on June 17, 1937, between Board of Deputies and Home Office, 1937, in Laski Family Records, Anglo-Jewish Archives, MS134/AJ33/109, AJA.

work.”<sup>336</sup> Salomon steered the committee away from legal tactics and toward education until the outbreak of the Second World War.

### **‘The Good Name of Anglo-Jewry’**

After the failure of the Leese trial and Webber’s report, the pressure on the Board built up without a response between 1936 and 1939. Contemporaneous developments, not just the Board’s formation of the Defence Committee, led to the beginning of its first genuine effort to enact group libel. First, the Government began an unrelated inquiry into defamation reform in 1938, charging Lord Samuel Porter with overseeing a review of a complex and unwieldy branch of the law.<sup>337</sup> Porter and his committee would eventually comment on issues as arcane as the distinction between libel and slander in the common law and as intelligible as whether to allow for prosecutions over libels against the deceased. The committee’s work was intended to be comprehensive and to provide the basis for a major legal reform of defamation. Even for sceptical members of the Board, including Webber, the opportunity presented by the Porter Committee’s formation was tempting.

Second, in addition to establishing the Co-ordinating Committee, the Board created what it called the TAC, formed of representatives from various trades in which British Jews commonly worked.<sup>338</sup> The group aimed at “eliminating friction in industry between Jews and non-Jews.”<sup>339</sup> It served as the liaison between the Board and trade unions and advocated for British Jews who

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<sup>336</sup> Salomon, “The Jewish Defence Committee: Some Lesser Known Aspects of its Work,” 14.

<sup>337</sup> Williams, ‘Committee on the Law of Defamation: The Porter Report (Cmd. 7536/48)’.

<sup>338</sup> *Annual Report 1938*, Board of Deputies of British Jews.

<sup>339</sup> *Ibid.*

had for years complained of discrimination at work.<sup>340</sup> It was also a way for the Board to fight emerging alternative groups in the East End, many of whom had extensive connections among Jewish tradesmen. The TAC brought into the Board's fold men who had been previously excluded from its brand of politics. Two of its founding members, Maurice Orbach<sup>341</sup> and Noah Barou,<sup>342</sup> had been involved in left-wing organisations like the Fabian Society and were both avowed Zionists.<sup>343</sup> Relatedly, in 1939 a Zionist slate led by Selig Brodetsky took over the leadership of the Board, in an election that shocked and dismayed Laski, the outgoing president.<sup>344</sup> Brodetsky's presidency ushered in a new era for the Board, both in relation to the Zionist project and, as is less appreciated, to domestic concerns such as defamation.

Each of these three developments meant that – unlike in previous cases – the Libel committee appointed by the Board in 1939 would be different than its predecessors. On September 22, the TAC met and unanimously resolved “that the present is an appropriate time for pressing for legislation to be passed making the defamation of a community or group actionable at law” and that the Board should again obtain legal opinions on the matter from one Jewish and one non-Jewish barrister-at-law.<sup>345</sup> While Laski suggested that Webber should again prepare one of the two memoranda, the Board did not heed his advice. Instead, it charged Emanuel with the task.<sup>346</sup>

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<sup>340</sup> Kurt M. Jameson, “The Trades Advisory Council – countering antisemitism and fascism in 20th-century Britain,” UCL Special Collections, February 3, 2022, <https://blogs.ucl.ac.uk/special-collections/2022/02/03/the-trades-advisory-council-countering-antisemitism-and-fascism-in-20th-century-britain/>.

<sup>341</sup> “Maurice Orbach Dead at 76,” *Jewish Telegraphic Agency*, April 27, 1979.

<sup>342</sup> Papers of Dr. Noah Barou, AJA.

<sup>343</sup> Ibid.

<sup>344</sup> See, e.g., Langham, *250 Years of Convention and Contention*.

<sup>345</sup> Meeting Minutes, Trades Advisory Council, September 22, 1939, Board of Deputies Collection, ACC3121/C/4/2, LMA.

<sup>346</sup> Letter from Charles. H. L. Emanuel to A.G. Brotman, July 4, 1940, Board of Deputies Collection, ACC3121/C/4/2, LMA.

His work would begin a long process, interrupted by war, that resulted in the Board's eventual support for group defamation before Lord Porter's committee.

Perhaps less than suggesting an actual change in the Board's attitude toward anti-fascist activity, the initial decision to form the Community Libel Committee suggests that its leadership was alive to the increasing challenge of serving two masters, the Jewish community and the non-Jewish elite, during the rise of fascism. While the Board had always faced difficulties balancing its inward- and outward-facing roles, the mid-1930s presented more serious demands for political alternatives within British Jewry than ever before. At the same time, the Board did not want to erode its ability to present what it deemed a respectable face before the government. The Board's prewar archives suggest that the formation of the Community Libel Standing Committee was evidence of its desire to appease certain members of the Jewish community, not a genuine change in opinion.

Reputation – the core question at the heart of libel proceedings – was likewise the commodity in which the Board of Deputies traded. In one of its numerous papers on the subject, the Board's files note that nothing less than “the good name of Anglo-Jewry” was at stake.<sup>347</sup> Nothing was more important than that good name, of which the Board saw itself as the sole true guardian. The debate over the Board's actions in the mid-to-late 1930s has largely centred on questions of degree and timing: how seriously it took the fascist threat compared to other Jewish groups, and how early. But the response to Daiches and the reestablishment of the libel committee in 1934 – before even the meetings with the Home Secretary Tillet cited – show that the substance of the

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<sup>347</sup> Memorandum on Community Libel, 1940, Board of Deputies Collection, ACC/3121/C/4/2.

Board's approach to antisemitism was also changing. In response to its own assessment of the threat, outside pressure, and its understanding of the nature of fascist activity, the Board began attempting to seek out novel tools for its fight. Group libel was foremost among them.

## Part II: Group Libel on ‘Trial’

Making a case of neat symmetry, in 1947 and 1948 both British and American advocates of group libel argued before government committees. In London, after a long delay the Porter Committee finally took up its work to reform British defamation law, hearing testimony from the Board and others. In Washington, the Truman Administration set up the Committee on Civil Rights, for which group libel numbered among dozens of proposals for improving the legal status of minorities in the United States. It heard testimony from all the key players in the group libel debates, as well as groups which had been less involved but nonetheless took a position.

While neither committee was a courtroom, the events of 1947 and 1948 did represent a kind of trial for group libel. In the United Kingdom, attempts to push for anti-defamation laws during the war were met with firm denial on the basis that the committee had yet to complete its study. The Board’s leaders knew by 1945 that winning Lord Porter to their cause was likely their best, if not only, chance to make defamation reform possible. The Truman committee testimony was not as high stakes but nonetheless represented a serious opportunity to put group libel on the U.S. government’s civil rights agenda.

While they did not always invoke it, it would be impossible to explain both American and British Jewish leaders’ postwar approach to speech without reference to the collapse of German democracy and its tragic implications for Jews. Particularly in Britain, the dark lessons drawn from German Jewry’s experience transformed Board leaders’ approach to anti-defamation, finally pushing them to endorse group libel in 1945 after no fewer than three previous reports rejecting the idea. This may seem a small change, but for the Board it represented a new

willingness to take direct legal action against antisemitism. The shift also continued some of the patterns displayed in Chapter II, where the Board took belated steps in response to the complaints of other sectors of the British Jewish community. Authority and control were never far from the Board's mind, as their interactions with groups like the TAC show.<sup>348</sup>

A large part of the literature on Jewish anti-fascism and Jewish politics in the United Kingdom focuses on the period up until 1939; much less has been written about the Board's and other groups' actions during and especially immediately after the war. Gil Rubin's work on planning for the postwar order is a welcome exception to this overall trend, but it focuses on how American and British Jews envisioned postwar life in the future state of Israel and eastern Europe rather than in their own nations.<sup>349</sup> Even as they spent most of their time focused on the tragedy occurring in Europe, some British and American Jews also thought about what the postwar world might mean for them. In particular, they refocused on group libel as a means to ensure they would never be put in the same position as continental Jews. One goal of this section is to emphasize this aspect of British and American Jews' reaction to the Second World War, mainly to show how it changed their attitudes toward anti-defamation. While the chapters largely focus on events several years after the end of the war in 1945, it nevertheless forms their inescapable backdrop.

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<sup>348</sup> See, e.g., an extended scuffle between the TAC and the Board over the proposed creation of "professional sections" within the former. Memorandum on Deputation to the Parliamentary Committee of the Board of Deputies, October 19, 1943, Trades Advisory Council Archives, TAC 4/1, UCL Special Collections, London. "The deputation was kept waiting an hour and a quarter...the interruptions were very hostile, and before the presentation of the general case those who questioned demanded specific instances and concrete examples of how Professional Sections could assist in the work of the Council."

<sup>349</sup> Gil Rubin, 'The Future of the Jews: Planning for the Postwar Jewish World, 1939-1946.' Ph.D. diss. (Columbia University, 2017).

A further tendency of the literature on British Jews in the latter half of the 1940s is to focus intensively on their reaction to events in the British Mandate and the nascent state of Israel. To be sure, events such as the “Sergeants affair” in 1947 drove and shaped immediate postwar attitudes to Jews in Britain.<sup>350</sup> A recent doctoral thesis by James Sunderland, for example, notes how events in Palestine spurred widespread if relatively diffuse antisemitism within Britain.<sup>351</sup> Relatedly, much of the literature on the Board of Deputies from 1939 through 1948 focuses on the “takeover” of the Board by Zionists, beginning with Brodetsky’s election to its presidency. But the matter of group libel shows that, in fact, the alleged hostile takeover did not necessarily transform every aspect of the Board’s work. Brodetsky, a mathematician rather than a lawyer, largely left the matter of anti-defamation to the men who had dealt with it during the Board’s previous, non-Zionist era. One helpful aspect of examining the group libel episode in greater detail is that it shows how the question of the Jewish state did not necessarily pervade every aspect of Jewish politics.

Similarly, in the literature on American Jews during the late 1940s themes other than those discussed in Chapter IV predominate: the Holocaust and its aftermath, Zionism, and Jews’ role in civil rights movements other than their own. Instead of retreading these themes, examining group libel allows for insight into American Jews’ competing visions of diasporic life. Events in Europe and Palestine were not absent, but neither did they overtake all else. Instead, various

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<sup>350</sup> James Sunderland, “When Terror Works: The case of Jewish Terrorism in Mandate Palestine, 1944-1948,” Ph.D. diss., (University of Oxford, 2024), 199-203. Ambient hostility was such that even most British church leaders opposed the country’s policy toward the would-be Jewish state; see Tony Kushner, *The Holocaust and the Liberal Imagination: A Social and Cultural History* (Blackwell, 1994).

<sup>351</sup> Ibid.

Jewish groups argued fiercely over their relationship to the Constitution and whether the best response to latent antisemitism would be grounded in individual or group rights.

Neither body before which Jews went to plead for anti-defamation protections had been created for that purpose.<sup>352</sup> Instead, both in the United States and the United Kingdom, Jewish groups sought unsuccessfully to seize a moment of postwar reflection to make a case for their rights. In both countries, they had sympathisers in the government – the British Committee on Fascism and several members of the CCR understood the need to prevent antisemitism from fuelling homegrown fascism.<sup>353</sup> But neither the Porter Committee nor the CCR were perfect vehicles through which to enact group libel.

Studies of English defamation law have noted the bevy of issues with which Porter and his group had to contend, most of which had nothing to do with group rights. These included the different case law on libel (written defamation) and slander (spoken defamation), differences between English and Scottish law, new media such as broadcast, and the nature of damages in civil suits.<sup>354</sup> Historians such as Paul Mitchell, who has written an excellent primer on defamation in the 20<sup>th</sup> century, have tended to focus on these other aspects rather than group defamation and the Jews. Writing about the problem of “unincorporated” groups, Mitchell does not mention Jews or antisemitism, instead focusing more on the case law as it related to trade unions, companies, political parties, and even families.<sup>355</sup> Understandably, he and other legal historians

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<sup>352</sup> The Porter Committee was part of an increasing trend in the use of judge-led groups to recommend law reform in response to the chaotic and often contradictory nature of the common law. See E. C. S. Wade, ‘The Machinery Of Law Reform’, *The Modern Law Review* 24, no. 1 (1961): 3–17, <https://doi.org/10.1111/j.1468-2230.1961.tb00650.x>.

<sup>353</sup> Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’.

<sup>354</sup> Report of the Committee on the Law of Defamation, Cmd. 7536 (London, 1948).

<sup>355</sup> Mitchell, *The Making of the Modern Law of Defamation*, 50.

have tended to focus on the aspects of Porter's work which actually did become law, such as the idea of an offer to "make amends" as a means of resolving disputes and the committee's effect on literature.<sup>356</sup> Another reason for the elision of group libel might be the field's reliance on judicial decisions as sources – as this thesis discusses, the Board of Deputies was highly reluctant to bring "test cases" before the courts, meaning their campaign was waged mostly through other means.

The CCR similarly was created with African Americans rather than Jews in mind. Literature on the Committee by historians such as Steven White and Kevin J. McMahon focus mainly on the racial dimension of its work, particularly as it related to the integration of the Armed Forces.<sup>357</sup> In general, however, the Committee's work has been understudied, although Karen Tani has written that it represented a step in the "path toward legalism" and the so-called "rights revolution" of postwar America.<sup>358</sup>

This set of chapters aims to integrate the history of British and American Jews' reaction to the end of the war with the legal histories of the Porter Committee and the Committee on Civil Rights. Jewish groups failed to get the Porter Committee and the CCR to support group libel because in part it was a side concern for both committees; preventing antisemitism was not their goal and would have likely required a much different set of legal reforms than they were willing

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<sup>356</sup> See, e.g., Michael Douglas et al., 'The Evolution and Devolution of the Offer to Make Amends Regime in Australian Defamation Law', *University of New South Wales Law Journal* 46, no. 3 (2023), <https://doi.org/10.53637/LSWB4166>; Hilliard, 'Authors and Artemus Jones'.

<sup>357</sup> Kevin J. McMahon, 'Constitutional Vision and Supreme Court Decisions: Reconsidering Roosevelt on Race', *Studies in American Political Development* 14, no. 1 (April 2000): 20–50; Steven White, *World War II and American Racial Politics: Public Opinion, the Presidency, and Civil Rights Advocacy* (Cambridge University Press, 2019).

<sup>358</sup> Karen M. Tani, 'Rights as a "Live, Motivating Principle": The Path toward Legalism', in *States of Dependency: Welfare, Rights, and American Governance, 1935–1972*, (Cambridge University Press, 2016), 81–112.

to consider. But the reasons for group libel's failure in the two contexts were different, as this section aims to show. It matters not just that British and American officials rejected group libel, but why they did so.

Group libel's British and American advocates had differing responses to the beginning of the war itself. In the United States, the AJCo viewed the conflict with Nazi Germany as an opportunity, reframing anti-defamation as a "win the war" effort. This idea increased support for libel reform even outside the Jewish circles to which it had often been confined, including from several major labor organisations.<sup>359</sup> It also led to one of the movement's notable successes, the passage of a group libel law in Massachusetts in 1943 against the strenuous complaints of the ACLU.<sup>360</sup> In response, group libel's detractors realized they would have to redouble their efforts, particularly as a version of group libel targeting the distribution of material through the postal system came before the U.S. Congress, also in 1943.<sup>361</sup> The defeat of that effort, the Lynch Bill, stopped some of the AJCo's momentum, but it did not deter its staff. They realized correctly that the war itself provided a chance to argue that antisemitism was unpatriotic.

The Board of Deputies responded to the war with the opposite approach, perhaps understandably given the much greater degree to which they experienced its direct effects. The internment of many of group libel's would-be targets as well as the failure of the case against Leese deflated their desire to pursue libel reform during the war, even as sympathy for Jews and their plight

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<sup>359</sup> See, e.g., *Declaring Certain Papers, Pamphlets, Books, Pictures, and Writings Nonmailable, Before the Subcommittee of the Committee on the Post Office and Post Roads*, 78th Cong., 1<sup>st</sup> Sess. (1943) (statement of Abraham Welanko, International Worker's Order, Newark, N.J.).

<sup>360</sup> Massachusetts General Laws c. 272, § 98c (1943). See also Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws', 319; Walker, *Hate Speech*, 82–83.

<sup>361</sup> Osmond Fraenkel, 'The Lynch Bill—A Different View', *Law Guild Review* 12, no. 13 (1944).

may have improved their chance of success. Moreover, tentative attempts to raise the issue in Parliament failed – the government had decided it would not consider “piecemeal” libel reform until the Porter Committee resumed its work. Crucially, many members of the Board accepted this defeat and chose not to push further.

When the Porter Committee and the CCR convened and delivered their 1948 reports, despite the apparent opportunity they posed, group libel’s hour had passed. Both committees rejected the idea of libel reform as a means of ensuring minority protections. The Porter Committee outright dismissed group libel, writing that while antisemitic defamation was “deplorable,” “the law as it stands affords as much protection as can safely be given.”<sup>362</sup> The CCR simply elided it (and the issue of speech altogether), focusing on areas in which civil rights groups had displayed greater unity in pushing for reform. As a result, defamation and libel fell off the list of legislative priorities for which civil rights advocates would fight until the passage of the Civil Rights Acts of 1957 and 1964. The arena of battle over speech rights in the United States would shift decisively from Congress to the Supreme Court, although jurists had been slowly reshaping that area of law since at least 1919.<sup>363</sup> This was unfortunate for group libel’s proponents; they would have been much likelier to win backing from members of Congress than from the emerging majority on the Court, which would create the “rights revolution” in the decades to come.<sup>364</sup>

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<sup>362</sup> Report of the Committee on the Law of Defamation, Cmd. 7536 (London, 1948), 11-12.

<sup>363</sup> See, e.g., *Schenck v. United States*, 249 U.S. 47 (1919), often considered the beginning of the 20<sup>th</sup> century revolution in the Court’s conception of the First Amendment.

<sup>364</sup> Geoffrey R. Stone and David A. Strauss, *Democracy and Equality: The Enduring Constitutional Vision of the Warren Court* (Oxford University Press, 2020).

While both committees rebuffed group libel, they did so for different reasons. The legal environments in which British and American Jews advocated for their collective rights were becoming more distinctive, as examination of this period shows. In the United Kingdom, the Porter Committee ultimately concluded that “the law as it [stood]” was sufficient. In the United States, while the CCR did not even mention group libel in its final report, it rejected group libel not in favour of the status quo but rather in favour of a competing vision of the law, one grounded in individual rights. These two “verdicts” demonstrate the divergent approach of American law when it came to defamation and minorities, one which was certainly not in favour of “the law as it [stood].” There would be transformation in the United States, just not in the direction of group rights. In the United Kingdom, however, British Jews would have to content themselves with the law as it existed – in practice, with no legal solutions at all.

## Chapter III

### A Near Miss?: Debating Group Libel in Postwar America, 1940-1948

Two years after the Board of Deputies went at last before the Porter Committee, group libel's American advocates had a chance to make their own case before the U.S. government. President Truman had announced in December 1946 a Committee on Civil Rights, charged with recommending what solutions might ameliorate a vicious spate of postwar racism.<sup>365</sup> The group sought out not just African American civil rights leaders, but also members of other American minority groups concerned with anti-discrimination, including Jews. This wide remit led it to consider the debate over group libel.

The players who had been involved in discussions about antisemitic defamation since the 1920s each sent men to Washington, D.C. to meet with Truman's group: the American Jewish Committee, the American Jewish Congress, the ADL, and the ACLU. The American Jewish Committee sent its president, John Slawson, during his life a member of several Presidential committees, as well as the author of "Studies in Prejudice."<sup>366</sup> The American Jewish Congress sent Maslow, the director of its Committee on Law and Social Action. The ADL sent Alexander Miller, the director of its Southeastern Regional Office in Atlanta, Georgia, and Paul Richman, the head of its Washington office.<sup>367</sup> Finally, the ACLU sent Arthur Garfield Hays, its cofounder

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<sup>365</sup> Steven F. Lawson, "To Secure These Rights, Part VI: The Creation of the President's Committee on Civil Rights," Truman Library Institute, 2004. For more on the work of the CCR broadly, see White, *World War II and American Racial Politics*.

<sup>366</sup> Joan Cook, "John Slawson, 93, Retired Leader of American Jewish Committee," *New York Times*, December 14, 1989.

<sup>367</sup> Richman only gave testimony before subcommittee number 3.

and in 1947 one of the most famous civil rights lawyers in the country (and the son of two German Jews)<sup>368</sup> and Osmond Fraenkel, its general counsel.

Each went to the committee's offices at 1712 G Street in Washington, just next to the White House in a nondescript building which later housed the American Automobile Association.<sup>369</sup> Before the war, the Department of Labor had rented the same building as offices for the Bureau of Labor Statistics; when it moved to a nearby office, 1712 housed the brand new Social Security Administration.<sup>370</sup> In many respects, the CCR represented a continuation of the work which had been done in the building before – the work of the New Dealers. Its members included academics, such as Robert K. Carr, Frank Porter Graham, and John Sloan Dickey; union men Boris Shishkin and James Carey; businessmen Charles Edward Wilson and Charles Luckman; Black activists Channing Heggie Tobias and Sadie Alexander; and religious leaders Rabbi Roland Gittelsohn, Henry Knox Sherrill, and Bishop Francis J. Haas. Truman was also careful to include two southerners in Graham and activist Dorothy Tilly. Franklin Delano Roosevelt Jr. and Francis P. Matthews, both of whom had and would serve in various Democratic administration roles, and ACLU lawyer Morris Ernst rounded out the committee's membership. The committee, created by executive order rather than legislation, typified Truman's cautious and conservative approach to civil rights; in Dickey's assessment, it was "a typically Truman kind of committee, not very far out on the edges."<sup>371</sup> In particular, Truman spurned the more radical Black activists

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<sup>368</sup> "Arthur Garfield Hays Dies at 73, Counsel to Civil Liberties Union," *New York Times*, December 15, 1954. For additional material on the fault lines within the interwar ACLU and Hays's role, see Laura Weinrib, "Law, History, and the Interwar ACLU's Jewish Lawyers," in *In Between and Across*, ed. Kenneth W. Mack and Jacob Katz Cogan, 1st ed. (Oxford University Press, 2024), 269–98, <https://doi.org/10.1093/oso/9780197680995.003.0013>.

<sup>369</sup> Steve Cady, "Munich Looks Good for the Olympics," *New York Times*, September 21, 1971.

<sup>370</sup> *Office Building Rented by Department of Labor*, photograph, DC History Center, 1931.

<sup>371</sup> Lawson, "To Secure These Rights," citing William E. Juhnke, 'Creating a New Charter of Freedom: The Organization and Operation of the President's Committee on Civil Rights, 1946-1948,' Ph.D. diss., (University of Kansas, 1974), 60.

whose protests had played a part in prompting the creation of the committee as well as any Southerner who opposed desegregation entirely.<sup>372</sup> Several of the committee's members were Jewish, but only incidentally. Gittelson was picked more for his work during the war, including a famous sermon on Iwo Jima, than because Jewish issues were at the front of the administration's mind. Ernst mainly represented the ACLU, having been part of the organisation's shift toward free speech maximalism, although as Weinrib has noted this position was not unrelated to his Jewish identity.<sup>373</sup> Nevertheless, the committee had a wide mandate that included not just anti-Black racism but also discrimination against Japanese Americans, Native Americans' rights, the U.S.'s overseas territories, labor relations, and even antisemitism. The various Jewish groups called before the CCR had been solicited for dual purposes; first, because they had a longstanding record of supporting civil rights in various forms, especially the ADL, and second, because, perhaps more than any group other than Black Americans themselves, they had spent decades working on the problem of how best to counter hatred and discrimination. It was within this context that group libel came up before the committee.

As in the United Kingdom, the Second World War and its aftermath tested the parties on the various sides of the group libel debate. It both provided advocates their clearest chance at success in the form of the CCR and fuelled the trends that would largely doom it. However, because of the nature of the CCR, compared to the Porter Committee's rejection of the idea in 1948 the American story took a rather more philosophical turn. The Porter Committee was explicitly focused on the law; it could reject group libel merely on the merits of its legality, ignoring the question of discrimination and the status of minority groups altogether (although, as Chapter VI

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<sup>372</sup> Lawson, "To Secure These Rights."

<sup>373</sup> Weinrib, 'Law, History, and the Interwar ACLU's Jewish Lawyers', 269–98.

will show, the U.K. would later have its own debate over such topics during the adoption of the Race Relations Act). The CCR was not solely a legal reform body, nor were all of its members lawyers. Rather than simply the question of how to enshrine civil rights in the law, it took up yet loftier issues such as the question of how to build a fair society in the aftermath of war. In his form letter to potential deponents, Carr, the CCR's executive secretary and one of Truman's main speechwriters, suggested some of the topics which interested the group – none of which were as granular as, say, the technicalities of libel reform. Instead, the committee asked about such matters as “the responsibility of the federal government for the protection of civil rights.”<sup>374</sup> In doing so, it invited more than a debate over group libel. The CCR, intentionally or not, provided a forum for Jewish organisations to argue for their vision of how to end antisemitism in America.

This chapter will briefly detail the state of the U.S. debate over group libel during the Second World War itself and the positions of the major groups in the immediate postwar years. It will then focus mainly on the debate before the CCR over group libel. The hearings held on April 30 and May 1, 1947, while not a court proceeding, did represent a test for competing visions of speech rights and group rights. Broadly speaking, at one extreme was the ACLU, fiercely individualistic. At the other was the AJCo, the lone major group still committed to libel reform. In the middle were the AJC and ADL, both of which had changed their institutional views considerably during the 1930s and 1940s. Before the CCR they each laid out their opinion of how minority groups should be treated by the American government, backed by difficult experience.

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<sup>374</sup> Letter from Robert K. Carr to John Slawson, April 15, 1947, box 10, record group 220, Records of the President's Committee on Civil Rights, Harry S. Truman Presidential Library, Independence, Missouri.

## Democracy and Defamation

After the General Jewish Council's failure to adopt a definite position in 1940, the debate continued during the war years in other forums. The American Jewish Committee and ACLU continued to oppose various suggested group libel bills and the American Jewish Congress continued to advocate for them. The latter was joined both by trade unionists and the American Communist Party and by legislators who saw domestic ethnic and religious divisions as dangerous to the war effort.<sup>375</sup> Wartime fears of anti-minority sentiments' political effects won group libel new allies within politics and academia, broadening its support outside American Jewry. Solicitor General Francis Biddle spoke in favour of the measure in a 1940 speech to the American Association of Law Schools.<sup>376</sup> And in 1943 and 1944, the Lynch Bill proposed prohibiting the U.S. Postal Service from disseminating material provoking racial or religious hatred.<sup>377</sup>

Biddle's stance is particularly interesting because he was a member of the ACLU who, like many free speech expansionists, felt the United States government had gone too far in prosecuting

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<sup>375</sup> Regarding trade unions, see, e.g., *Declaring Certain Papers, Pamphlets, Books, Pictures, and Writings Nonmailable, Before the Subcommittee of the Committee on the Post Office and Post Roads*, 78th Cong., 1<sup>st</sup> Sess. (1943) (statement of Abraham Welanko, International Worker's Order, Newark, N.J.). The same logic about ameliorating domestic tensions did not apparently apply to segregation between Black and White Americans, according to those lawmakers – notably in the armed forces, which would only integrate after the end of the Second World War. Rather, the state and federal legislators were focused on the threat posed by divisions among non-Black Americans, some of whom, including Jewish and Catholic Americans, benefited from some of the privileges of Whiteness while still being viewed as outside the White Protestant ideal. For more on the experience of Black soldiers, see Matthew F. Delmont, *Half American: The Epic Story of African Americans Fighting World War II at Home and Abroad* (Viking, 2022). For material on the changing nature of whiteness in the early 20<sup>th</sup> century, see Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race*, (Harvard University Press, 2002).

<sup>376</sup> Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws.'

<sup>377</sup> Ibid.

subversive speech during the First World War. The year after his speech, on the 152<sup>nd</sup> anniversary of the Bill of Rights, after being appointed acting attorney general, Biddle said that “although we had fought wars before, and our personal freedoms had survived, there had been periods of gross abuse, when hysteria and fear and hate ran high, and minorities were unlawfully and cruelly abused...every man...who cares about freedom must fight [to protect it] for the *other* man with whom he disagrees.”<sup>378</sup> During this period, Biddle and the Roosevelt administration were caught between their convictions and charges they were being too soft on proto-Nazi elements within American society, fears that led the Department of Justice in 1940 to arrest the leaders of the antisemitic Christian Front in New York.<sup>379</sup> Still, Biddle’s pro-group libel speech came before he became acting attorney general, before he was accused of being too soft on subversion, and, most importantly, before the U.S. entered the Second World War following the Pearl Harbor attack. That he took such a position suggests there was openness within even the ACLU’s ranks toward group libel, as the organisation’s request for model bills also demonstrated. Indeed, in 1940, members of the GJC took an at-times harder line on civil liberties than even the ACLU. This disconnect suggests that certain Jewish groups, perhaps fearing accusations of dual loyalty, felt they needed to be more free speech-loving than the free speech lobby itself. The GJC committee memo is among the more full-throated defences of First Amendment absolutism available from the early 1940s.

The most prominent legal scholar supporting group libel during the war – and likely its most famous advocate since Brandeis – was a University of Buffalo law professor named David Riesman, who would later become famous for his study of mass communications *The Lonely*

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<sup>378</sup> Geoffrey R. Stone, ‘Free Speech and World War II’, *Journal of Policy History* 35, no. 4 (2023): 524–48.

<sup>379</sup> Ibid.

*Crowd*.<sup>380</sup> His Columbia Law Review series “Democracy and Defamation,” published in 1942, laid out the case for group libel and was often cited in subsequent years by both its proponents and detractors.<sup>381</sup> Riesman estimated that, at the time he wrote, one third of American families regularly received “fascistic” literature.<sup>382</sup> He noted that United States jurisdictions had made various attempts, notably the New Jersey law, to address the issue, using not libel but “peripheral controls which bear upon the problem...[such as] blasphemy and similar protections for religious belief and indirectly for religious groups, disorderly conduct and its related misdemeanours, and so on.”<sup>383</sup> By 1942, he wrote, these laws had mostly failed because of the “legislative and administrative complexities of a solution for any sort of political defamation.”<sup>384</sup> But these technical issues were not the main barrier to a successful remedy against group libel. As the opposition within the General Jewish Council and the ACLU showed, it was “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>385</sup> Rather than try to skirt or accommodate the issue of the growing primacy of individualistic free speech as legal doctrine, as the AJC had, Riesman confronted the issue head on, arguing that the ACLU and its allies had swung too far in one direction. The ACLU understood that Riesman’s articles made the most compelling case against its own approach to civil liberties; their publication caused a stir within the organisation, whose board initially sought to convene a conference to discuss them before cancelling it. The directors wrote that “no other document, so

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<sup>380</sup> “David Riesman, Sociologist Whose ‘Lonely Crowd’ Became a Best Seller, Dies at 92,” *New York Times*, May 11, 2002.

<sup>381</sup> David Riesman, ‘Democracy and Defamation: Control of Group Libel’, *Columbia Law Review* 42, no. 5 (1942): 727, <https://doi.org/10.2307/1117690>.

<sup>382</sup> *Ibid*.

<sup>383</sup> *Ibid*.

<sup>384</sup> *Ibid*.

<sup>385</sup> *Ibid*.

far as we are aware, has stated the case for a new orientation to civil liberties in such challenging terms.”<sup>386</sup>

The ACLU directors were right to be afraid. Riesman’s arguments shaped the content of the first group libel bill passed during the war, enacted at the behest of the American Jewish Congress: a Massachusetts 1943 anti-hate law stating that “any false, written or printed material with the intent to maliciously promote hatred of any group of persons in the commonwealth because of race, color or religion shall be guilty of libel.”<sup>387</sup> His arguments refocused the discussion of group libel bills nationwide. Before the 1940s, advocates for such measures were content to see them passed in various guises, including those that did not actually reform defamation law. Before 1940 “group libel” is better thought of as a term for all laws and ordinances barring speech against racial and religious groups, not just those which dealt with libel and defamation. Existing city- and state-level measures, such as those in Denver, Cincinnati, and New York State, often relied on police power, prohibiting anti-group speech that breached public order. Other laws, such as the 1913 New York hotel law and a West Virginia law regarding movie and theatre advertisements, targeted particular types of speech or contexts in which hateful speech against minority groups was common. While Jewish groups and group libel advocates conceived of both aforementioned types of laws as “group libel,” they were using the word libel in its colloquial sense, referring to the false nature of the speech at issue rather than the legal standard used to bar that speech.

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<sup>386</sup> ACLU Statement, August 27, 1942, Reel 9, ACLU Papers (microfilm edition, 1976), via Rosenberg, ‘Another History of Free Speech: The 1920s and the 1940s’, 354–55.

<sup>387</sup> Massachusetts General Laws c. 272, § 98c (1943).

Political scientist Joseph Tanenhaus noted in a 1950 survey of group libel that the 1943 Massachusetts law was probably the first successful law to explicitly use *defamation law* to stem hateful speech.<sup>388</sup> Analogues in other jurisdictions, including the 1935 New Jersey bill and city-level ordinances of the 1910s, aimed at a similar effect. But only the Massachusetts law explicitly tied hate speech to the tort of libel, responding to the same type of event – race riots and racist marches – but taking a new tack. Writing several years after the law’s passage, Tanenhaus speculated that this was because of a growing understanding that the previous attempts to pass anti-hate speech bills rested on shaky legal ground, particularly as the Supreme Court and judiciary at large began to assert the primacy of the First Amendment as never before.<sup>389</sup> Libel, however, had yet to be connected to constitutional free speech rights in the manner we are used to today – that would not occur in full until the 1960s. Rather than relying on public safety or other justifications, as earlier attempts at preventing anti-group speech had done, “statutes extending the law of defamation have a *prima facie* advantage over other possible legislative attempts to control the disparagement of racial and religious groups...the law of defamation is so deeply rooted in Anglo-American legal tradition...confused, outdated, illogical the law may seem; yet it retains a measure of the certainty and predictability so essential to a democratic jurisprudence. Lawyers and judges are largely aware of what the law of defamation can be made to do, and what it cannot.”<sup>390</sup> His analysis failed to anticipate that defamation law’s long history did not immunise it from radical transformation. Just as group libel advocates like Tanenhaus saw defamation as a fruitful site for potential reform, so too did First Amendment expansionists. By 1964, *Times v. Sullivan* would raise the bar for public figures to win libel suits,

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<sup>388</sup> Joseph Tanenhaus, ‘Group Libel and Free Speech’, *Phylon* (1940-1956) 13, no. 3 (1952): 215, <https://doi.org/10.2307/271187>.

<sup>389</sup> *Ibid.*

<sup>390</sup> *Ibid.*

a radical break from the English tradition of defamation and a foundational plank of the modern speech environment in the United States.

Wartime also saw the media used to spread libels change, leading to another type of “group libel” bill. Where Jewish groups once contended with Father Coughlin’s voice on the radio waves and Henry Ford’s *Independent* pages fluttering outside car dealerships, they now discussed the rise of antisemitic pamphlets distributed by mail. The new focus on the U.S. Postal Service’s role in facilitating antisemitic and racist sentiments was both responsive to domestic hate groups’ behaviour and convenient: because the postal service was a federal agency, the government had comparatively good tools at its disposal to address the problem. Lawmakers could not, even given wartime restrictions on speech, shut down newspapers for railing against Jews. They could, however, restrict the same sentiments from arriving in Americans’ mailboxes. The idea of an anti-hate mail bill percolated among Jewish groups as early as 1935; one of the three model bills Michael produced for the ACLU was a mail restriction bill, which circulated widely among groups like the National Community Relations Advisory Council. Between 1940 and 1949, Congress made at least four attempts to use the federal government’s control of interstate commerce and the postal system to restrict speech.<sup>391</sup>

During the same period, left-wing groups, in particular trade unions, became increasingly interested in group libel’s ability to protect their members from identity-based harm. Group libel was a trade union problem, both because of its potential to divide workers and because many

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<sup>391</sup> Barrett Bill, H.R. 3908, 81st Cong., 1st Sess. (1949); the Davenport Bill, H.R. 3882, 81st Cong., 1st Sess. (1949); the Javits-Klein Bill, H.R. 2269, 81st Cong., 1st Sess. (1949); and the Lynch Bill, H.R. 2328, 78th Cong., 2nd Sess. (1943).

union rank-and-file were members of minority groups. Much of their advocacy was focused on the Lynch Bill in 1943 and 1944, which they supported via newspaper editorials and congressional testimony. The Congress of Industrial Organizations (CIO) testified in favour of the Lynch Bill before the U.S. Congress; the Daily Worker newspaper, the American Communist Party's organ, endorsed the same bill. The American Federation of Labor's statement of support yoked the war effort to the need to protect minorities domestically: "to win this war of survival, the utmost unity is essential. To achieve maximum production of war materials to help safeguard the lives of our armed forces . . . the utmost unity is needed on the home front."<sup>392</sup> The bill failed, in part because of opposition from groups like the National Association for the Advancement of Colored People (NAACP) and ACLU, but it helped rouse significant support for group libel outside the narrow legal and advocacy circles to which it had previously been confined.<sup>393</sup>

Seeing an opportunity to link group libel and wartime fears of ethnic division, the lone remaining national Jewish organisation supporting group libel – the AJCo – stepped up its efforts. In August 1945, after the Lynch Bill's failure, the AJCo formed its Committee on Law and Social Action.<sup>394</sup> The CLSA made explicit a previously implicit divide between the AJC and ADL and the AJCo over the anti-hate speech tactics honed by the groups formed since the 1920s. A summary of its first decade of activity notes that "at its inception, the program envisioned for the CLSA represented a radical innovation because of our profound belief that the traditional methods of combatting anti-Semitism were failing; that attempts to counter anti-Semitic propaganda and discrimination by argument or to create so-called favorite climates of opinion

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<sup>392</sup> *Declaring Certain Papers, Pamphlets, Books, Pictures, and Writings Nonmailable, Before the Subcommittee of the Committee on the Post Office and Post Roads*, 78th Cong., 1<sup>st</sup> Sess. (1943) (statement of Abraham Welanko, International Worker's Order, Newark, N.J.).

<sup>393</sup> *Ibid.*

<sup>394</sup> Shad Polier et al., *The Work of CLSA: A Bibliography, 1945-1957* (American Jewish Congress, 1957).

with regard to Jews or tolerance were largely ineffectual. We believed that the time had come for a fresh and more dynamic approach to the problem.”<sup>395</sup> A large part of this work involved group libel, to which a whole section of the summary is devoted. Between 1945 and 1948, the CLSA’s members went on a large media campaign to promote both new group libel measures and – in another break from precedent – utilization of the existing group libel statutes passed in the 1910s through 1930s. Its employees, notably CLSA staff member Leo Pfeffer, published articles in the Jewish press and general interest magazines such as the *New Republic*.<sup>396</sup> They wrote memos and briefs to Congress, the Federal Communications Commission, and the Supreme Court. They circulated model bills at the state and federal level, some of which were promoted as “win-the-war” tactics.<sup>397</sup> (A bill introduced in New York aimed to “help paralyze enemy-inspired attempts to stir up discord and disruption of the home front” and would have barred material promoting “hatred of any group because of race, color, or creed”; a 1945 Florida statute forbade anonymous literature exposing “any religious group to hatred, contempt, ridicule or obloquy” for the same reason.) They even considered filing test cases – a still-rare occurrence decades into the group libel debate. Behind this flurry of activity lay the CLSA philosophy about how best to approach antisemitism. The ADL and AJC had argued that the wider population would become more tolerant through education, rendering the law unnecessary. In 1945, the AJCo rejected that thesis. Instead, its members argued, “transforming the practices and habits of our society and changing public policy in many areas in which discrimination operates would therefore do more than eliminate specific discriminatory practices. Such a program, by establishing new norms of conduct as expressed in law, would have a long-range effect on public attitudes and

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<sup>395</sup> Ibid.

<sup>396</sup> Ibid.

<sup>397</sup> Barbas, ‘The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws’, 318.

prejudice.”<sup>398</sup> Changes in policy would lead to changes in practice, rather than the reverse. The AJCo’s work during the mid-1940s was successful in winning support outside the world of American Jewish lawyers’ committees. It harnessed wartime sentiments to pass laws such as the Massachusetts anti-hate bill. It also won support from journalists like Damon Runyon, who wrote in a column about the Lynch bill that it would rid the American postal system of “conscienceless persons who seem to make a regular business of creating and spreading ... hatred.”<sup>399</sup>

### **‘The Objectives of the Law’**

One of the last concerted efforts to win broad support for group libel came in 1947, as the Truman Administration’s CCR considered a variety of measures to strengthen domestic protections for minorities.<sup>400</sup> The committee’s final recommendations led directly to the integration of the armed services and federal workforce, both hugely consequential steps for African Americans and minority groups more broadly. However, the committee also favourably mentioned a variety of other proposals from civil rights and advocacy groups, including group libel.

The CCR, in addition to the full committee, also included three subcommittees which held their own separate hearings and reported back to the full body. Much of the discussion about speech and defamation occurred before the full CCR; the remainder was mainly before its third

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<sup>398</sup> Polier, Pfeffer, and Maslow, ‘The Work of CLSA: A Bibliography, 1945-1957.’

<sup>399</sup> Barbas, ‘The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws’.

<sup>400</sup> “Executive Order 9808 of December 5, 1946, Establishing the President’s Committee on Civil Rights,” Code of Federal Regulations (1946).

subcommittee, charged with examining ways to reduce “subversive activities.”<sup>401</sup> Those interested in reforms like group libel legislation had, as discussed above, become increasingly focused on the problem of distribution, particularly by mail, as well as the legal rules for what information extreme organisations were obligated to provide. The ADL, while not supportive of group libel per se, was warmer toward the idea of restricting the spread of extremist material in the federal postal system.<sup>402</sup> In this context, despite not itself focusing on libel reform, between the discussions of speech generally before the full CCR and the discussions of ideas similar to the Lynch Bill before the third subcommittee, the process provided a forum for Jewish groups to hash out the ideas of the decade when it came to group rights and combatting antisemitism.

The CCR began soliciting testimony from Jewish groups in March 1947, a few months after it began its overall work. Several of its members would have already been quite familiar with debates surrounding group rights, particularly Ernst. He and Hays, who would eventually testify for the ACLU before the CCR, were part of a movement within the organisation toward a specific vision of the role of free speech and its relationship to minority groups within American society.<sup>403</sup> The best way to protect minorities was to allow, even to protect, all speech short of that which incited physical violence. This vision was not only the best because of the specific circumstances of the 1930s and 1940s, in the ACLU’s view it was the only vision of free speech sanctioned by the First Amendment. This move was eventually so successful as to seem obvious;

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<sup>401</sup> Letter from Alexander F. Miller to J. Dunham, May 16, 1947, Records of the President’s Committee on Civil Rights, box 10, record group 220, TPL.

<sup>402</sup> Testimony of Paul Richman to President’s Committee on Civil Rights, April 30, 1947, Records of the President’s Committee on Civil Rights, box 16, record group 220, TPL, 116-154.

<sup>403</sup> Weinrib terms it thusly, speaking specifically about Ernst and Hays’ work in the 1930s ACLU: “Above all, for the ACLU’s Jewish lawyers, casting civil liberties as core to American democracy served to deflect accusations of foreignness and to construct a shared, if imagined, cultural heritage.” Weinrib, ‘Law, History, and the Interwar ACLU’s Jewish Lawyers.’

by the 1950s and 1960s, the Supreme Court would repeatedly endorse it.<sup>404</sup> However, the ACLU's success should not elide the work it did to make its vision the mainstream view. Ernst in particular saw advocating for expansive free speech – and crushing ideas like group libel – as crucial to American Jews' position in society. Through cheerleading for free speech and defending antisemitic extremists, Jews would render ridiculous accusations of un-American sympathies, made on the basis that they were potential Zionists, Communists, or simply foreign. Ernst was of the view that “Zionism breeds anti-Semitism,”<sup>405</sup> shared by many of his liberal, assimilated colleagues (although not by his mentor Brandeis).<sup>406</sup> His presence on the committee did not bode well, then, for advocates of even indirect restrictions on antisemitic speech through the post like the Lynch Bill.<sup>407</sup>

Still, the CCR solicited the opinions of a wide range of American Jews, both those who had worked with and agreed with Ernst and those who believed antisemitic speech could not simply be left alone to fester. Riesman himself did not give testimony before the CCR, but his views were well-represented by the AJCo's Maslow. As the former head of the CLSA, Maslow had

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<sup>404</sup> Interestingly, as a *Yale Law Journal* article from 1949 points out, the ACLU was considerably less successful in nearly every other civil rights-related endeavour it pursued, particularly compared to groups like the NAACP. Outside free expression, the ACLU lost or chose not to bring many cases related to issues such as employment discrimination and poll taxes. “Both in the courts and the legislatures, the ACLU has rarely succeeded in winning positive victories in new areas of civil rights. But, as a shield for the traditional rights of free expression and thought, the ACLU has made its most significant contribution.” The article attributed the ACLU's failure in winning court cases and especially securing the passage of civil rights legislation to its small staff and limited funding – both problems the organisation would remedy in subsequent years. See ‘Private Attorneys General: Group Action in the Fight for Civil Liberties’, *The Yale Law Journal* 58, no. 4 (1949): 574, <https://doi.org/10.2307/793083>.

<sup>405</sup> “Arthur Garfield Hays Tells Judaism Council Meeting Zionism Breeds Anti-semitism,” *Jewish Telegraphic Agency Daily News Bulletin*, Oct. 28, 1949.

<sup>406</sup> On Brandeis's role in American Zionist discourse, see, e.g., Sama, ‘Louis D. Brandeis: Zionist Leader’.

<sup>407</sup> “The only reason I am willing to fight for the rights of reactionaries is the present state of affairs in this country,” he responded. “Practically speaking it is the only sound position to get the results you want— at least in this country and at this particular period.” Statement of Judge Nathan D. Perlman (vice president, American Jewish Congress), Hearings Before the Committee on The Post Office and Post Roads, House of Representatives, 78<sup>th</sup> Congress, March 16, 1944, 124, via Weinrib, ‘Law, History, and the Interwar ACLU's Jewish Lawyers’, 2024, 292.

been instrumental in drumming up support for group rights in the mid-1940s. As noted above, the CLSA had some success at the state level securing the passage of group libel bills – one benefit group libel’s American advocates had was the multitude of jurisdictions in which they could test their ideas.

Maslow was group libel’s most important American advocate, and indeed one of the pioneers of Jewish political lawyering. Born in Kiev, Maslow had a biography familiar to historians of American Jewry in the 20<sup>th</sup> century. His father and mother were a tailor and a midwife, respectively; their son would become one of the U.S.’s most prominent civil rights lawyers. Like many mid-century civil rights activists, Maslow’s politics formed in the great crucible of the New Deal. He worked for the National Labor Relations Board as a trial examiner from 1937 to 1943 and thereafter for the Fair Employment Practices Commission.<sup>408</sup> He then took those lessons to the AJCo after the U.S. Congress shut the FEPC down, forming the CLSA in 1945 and later serving as its President. A colleague of Maslow’s attributed the whole focus of Jews on the law to his work at the CLSA. Maslow rejected the educational approach to antisemitism: “He believed you didn’t have to wait and try to get people to do things through exhortation. He saw law as the ultimate educating force.”<sup>409</sup> The AJCo hired him specifically to imitate the kind of legal defense employed by the ACLU and NAACP in service of Jews’ rights.<sup>410</sup> From Maslow, as a lawyer for the ADL recalled, American Jews “learned to use the law as a major weapon to

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<sup>408</sup> Dennis Hevesi, “Will Maslow, 99, Lawyer Who Fought Discrimination, Dies,” *The New York Times*, February 27, 2007.

<sup>409</sup> Nathaniel Popper, “Law as Social Action: A Life in Advocacy Recalling Five Jewish Justices,” *The Jewish Daily Forward*, January 9, 2004.

<sup>410</sup> *Ibid.*

obtain rights.”<sup>411</sup> The CCR, filled with New Dealers and focused on legal reform, was the perfect venue for Maslow (and the CLSA) to try his tactics.

The section below details each major instance in which the issue of group libel came up before the full CCR and its subcommittees. Such detail is essential because it provides a contemporaneous picture of how each major actor in the debate felt during the span of a two-day period in 1947. It suggests how these groups’ leaders felt about defamation reform after the war, but also paints a portrait of their approach to the problem of antisemitism more broadly. In soliciting these groups’ opinions on civil rights, the CCR explicitly asked them to reflect on more than the granular aspects of various proposals – it sought out their position on the very nature of equality and prejudice in American society. In a representative letter to the AJC, the CCR asked its opinion on

the responsibility of the federal government for the protection of civil rights; the wisdom of using criminal sanctions as a means of safeguarding rights; the adequacy of existing federal legislation; the need for new legislation; and the extent to which criminal sanctions should be supplemented by educational activities designed to promote a healthier climate for civil liberty...The Committee would also like to have the benefit of your experience in dealing with prejudice – its nature, its causes, and effective techniques for combatting [it].<sup>412</sup>

While the CCR hearings were not adversarial, the panel’s members did at times challenge attestants to justify their positions on the disagreements which since the 1910s had divided various actors in the group libel debate: the relative success of legal versus educational initiatives, the constitutional issues raised by libel reform, and the groups’ interpretation of recent history in Nazi Germany. By providing a forum for such discussions at a high level, the

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<sup>411</sup> Ibid.

<sup>412</sup> Letter from Robert K. Carr to John F. Slawson, April 15, 1947, Records of the President’s Committee on Civil Rights, box 10, record group 220, TPL.

CCR meetings furnish an excellent way to understand the state of Jewish politics in the postwar period. They also represented a rare chance for Jewish groups to argue for their vision and to see it possibly endorsed by the administration – the CCR was genuinely interested in far-reaching reform and in Jewish groups’ experiences of prejudice. Other than the Congressional panel which debated the Lynch Bill and occasional amicus briefs before the Supreme Court, these groups could scarcely have wished for a better opportunity to advocate for their programs.

The issue of group rights surfaced mainly in two days of hearings the CCR held on April 30 and May 1, 1947. On the first day, the committee spoke with Hays of the ACLU; on the second it heard from Slawson, Maslow, and Miller. Two weeks prior, Richman of the ADL had also discussed the subject of libel reform briefly, although his testimony focused mainly on the economic sources of domestic Nazi-backed propaganda during the 1930s.<sup>413</sup> Richman had worked extensively during that period with the Department of Justice and Senate to track and consider how to stem pro-Nazi organisations within the U.S.; he told the CCR that, like Marshall and others, he was “very much in favor of a law of prohibition against the things when I first started out, today I am more or less a disciple of Morris Ernst in the field.”<sup>414</sup> Namely, Richman began the 1930s as a group libel advocate and ended them against the measure. Instead, he had come before the CCR to recommend another legislative proposal, one which would have required “hate groups” to register themselves and their funding source but not limited their speech or activities in any way unless they turned violent.<sup>415</sup> This was a version of the “Ernst

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<sup>413</sup> List of Witnesses to be Heard by Subcommittee No. 3, April 15, 1947, Records of the President’s Committee on Civil Rights, box 19, record group 220, TPL.

<sup>414</sup> Testimony of Paul Richman to President’s Committee on Civil Rights, April 30, 1947, Records of the President’s Committee on Civil Rights, box 16, record group 220, TPL, 119-120.

<sup>415</sup> *Ibid.*, 123.

proposal,” backed by the ACLU, which would have required any group attempting “to influence ideas in the marketplace of thoughts” to register with the government and disclose its funding sources.<sup>416</sup> Richman sought a more limited version, arguing that asking essentially all groups (even religious ones) to register would create unnecessary bureaucracy. Richman’s test for which groups should qualify was itself indebted to the ideas behind group libel, though; he told the subcommittee that “defamation” and “entering into controversial fields” should be the tests for registration and disclosure.<sup>417</sup> In essence Richman proposed identifying organisations which engaged in group libel, monitoring them and investigating whether they used foreign-source funding rather than prosecuting them.

Richman’s argument naturally raised the question of why, if he believed groups needed similar remedies against defamation to individuals, he stopped short of endorsing extensions of the existing individual protections.<sup>418</sup> He suggested that in some cases “an individual can respond effectively either through the courts,” and in others “to compensate the members of a group the opposition ought to be forced to register.” But, as the CCR’s Shishkin pointed out, forcing hate groups to register their funding would not necessarily stop them from spreading hate speech. Richman scarcely answered this point – in response, he repeated his belief that the government

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<sup>416</sup> Ibid., 125; for a fuller statement of the proposal, see Morris Ernst, Memorandum to the President’s Committee on Civil Rights Subcommittee No. 3, Records of the President’s Committee on Civil Rights, box 18, record group 220, TPL. The document is unsigned, but the committee’s interim report on April 17, 1947, attributes it to Ernst.

<sup>417</sup> Testimony of Paul Richman to President’s Committee on Civil Rights, April 30, 1947, 129.

<sup>418</sup> Ernst was actually absent from most of the CCR’s meetings due to an extended illness, including those meetings regarding the question of group libel in April and May 1947. See Interim Report of Subcommittee No. 3, April 17, 1947, Records of the President’s Committee on Civil Rights, box 18, record group 220, TPL, 2. “Work of the Subcommittee has been handicapped, of course, by the unfortunate illness of Mr. Ernst. We learned only yesterday that he is still in the hospital and will probably remain there for another two or three weeks.”

should “require these people to register and give the source of their income when they start going after Jews or Catholics or groups.”<sup>419</sup>

Richman failed to justify why he believed the problem of group defamation merited a remedy which resembled a weaker and less direct version of group libel, but for which the punishment consisted of government monitoring rather than monetary damages. The details of his exchange with Shishkin are revealing in that they show how groups like the ADL which had an official position against group libel laws were still compelled by the promise of legal and quasi-legal solutions. The ACLU and ADL may have opposed group libel itself, but they could not entirely eschew the idea behind it – of using the machinery of the law to fight racism, antisemitism, and other forms of group hatred. The principle of “full disclosure” became a way to tacitly admit issues with unfettered freedom of speech without explicitly doing so.

The CCR began its day on May 1 by hearing from Miller, a deputy director of the ADL.<sup>420</sup> The CCR did not ask him about group libel specifically; on the subject of legislation, he told them that “our collective viewpoint” would be established by Maslow of the AJCo.<sup>421</sup> By 1947, the ADL itself by 1947 had diverted its efforts from its early focus on antisemitism (or, as Miller put it, on “the sensitivity on the part of a number of Jewish people to certain caricatures which were appearing on the stage and screen at that time.”)<sup>422</sup> Instead, it worked mainly on educational and mass media initiatives, both within “our own group,” B’nai Brith,<sup>423</sup> and with the population as a

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<sup>419</sup> Ibid.

<sup>420</sup> The ADL’s chief, Richard Gutstadt, had been scheduled to speak but suffered a heart attack the previous day. Testimony of Alexander F. Miller, Transcript of Proceedings of President’s Committee on Civil Rights, May 1, 1947, Records of the President’s Committee on Civil Rights, box 16, record group 220, TPL, 2.

<sup>421</sup> Ibid., 15.

<sup>422</sup> Ibid., 3.

<sup>423</sup> Ibid., 5.

whole. It took up some individual cases of discrimination, some against Jews and some against Black Americans. It also collected information on the workings of hate groups – the main work Miller discussed before the CCR. The ADL in general may have waffled on the group libel matter, but on the whole it had always been the least interested of any of the Jewish groups.

Maslow, by contrast, came to the CCR with group libel at the front of his mind. He laid out the AJCo's view of antisemitism in direct contrast to Miller and the ADL's, and indeed to all the other organisations involved. The CLSA did not believe in investigating individual hate groups and their workings.<sup>424</sup> More radically, it was also uninterested in educational approaches to antisemitism: "we don't engage in the so-called educational programs. One reason is that we have very little faith in the effectiveness of such programs and, secondly, we believe that what value there is in such work is now being handled by other agencies."<sup>425</sup> The CLSA, which Maslow directed, had been founded to "utilize the forces of law and social control in fighting against racism, and the approach, therefore, is essentially a legal and legislative approach."<sup>426</sup> To the degree that Maslow advocated for action other than passing new laws, it was to enforce what was already on the books.<sup>427</sup> He and the AJCo rejected the idea that billboards and cartoons would move antisemites and sympathisers.

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<sup>424</sup> Testimony of Will Maslow, Transcript of Proceedings of President's Committee on Civil Rights, May 1, 1947, Records of the President's Committee on Civil Rights, box 16, record group 220, TPL, 22.

<sup>425</sup> Ibid.

<sup>426</sup> Ibid., 23.

<sup>427</sup> Ibid. Maslow was particularly concerned with the ineffectiveness of the Department of Justice's Civil Rights Division. He believed it could do much more, mainly through amicus briefs but also through opening new test cases, to influence the Supreme Court's statutory interpretation of existing law. Testimony of Will Maslow, Transcript of Proceedings of President's Committee on Civil Rights, May 1, 1947, 31-37.

Maslow recommended a battery of new legislation to the CCR: an act repealing poll taxes, a Federal anti-lynching law, a fair employment law, a general anti-discrimination statute, a fair education act, a fair housing act, and a group libel act.<sup>428</sup> Maslow ended his time before the CCR with a passionate defence of the idea, likely the strongest ever before such an influential governmental group.<sup>429</sup> The problem with antisemitic group defamation – which, while “at its lowest ebb” since the 1930s, was still present in the U.S.<sup>430</sup> – was not merely its harm toward its targets, Maslow argued. Rather group defamation harmed the workings of American democracy as a whole; “We learned from bitter experience in Germany that fascist groups begin their assault upon democracy by exploiting latent prejudices against the Jews and other minorities. Democrats in Europe wrung their hands while political extremists made a mockery of free speech.”<sup>431</sup> The “clear and present danger” rule in place in the U.S. from 1919<sup>432</sup> was not a sufficient safeguard, as the German example proved: “when the danger becomes so clear and present that the courts see it, it will be too late for governmental measures.” Maslow cannily argued that precisely because “organized defamation” quieted after the war

we can afford to take time to rethink the problem of how to allow complete, unfettered discussion of public issues and at the same time prevent the willful spread of group libels. We believe there is no Constitutional right willfully to spread group libels known to be false for the purpose of inciting group hatred. Today no Federal law exists to punish or prevent such fraudulent statements. Such legislation is necessary.<sup>433</sup>

The AJCo’s position was to push for the fullest expression of group libel – a federal criminal law prohibiting the distribution of defamatory material via interstate commerce (in the 1940s, such distribution would have been almost entirely via the postal system).<sup>434</sup> This was similar to the

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<sup>428</sup> Ibid., 37-38.

<sup>429</sup> Ibid., 43.

<sup>430</sup> Ibid.

<sup>431</sup> Ibid.

<sup>432</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

<sup>433</sup> Testimony of Will Maslow, Transcript of Proceedings of President’s Committee on Civil Rights, May 1, 1947, 44.

<sup>434</sup> Ibid.

Lynch Bill. It did, however, have one crucial difference from that proposal. The Lynch Bill focused on holding the U.S. Postal Service accountable for preventing the spread of hateful material, thereby avoiding potentially risky trials where antisemites could claim the truth of their statements as a defence before a jury. The AJCo did not shy away from such trials in theory; Maslow was focused not just on limiting the circulation of antisemitic material but also on personally sanctioning antisemites. For a Jewish political group, whether in the U.S. or U.K., this was unusually risk seeking. The war had moved Maslow, the CLSA, and the AJCo to believe that the urgency of prosecuting antisemites outweighed their attendant dangers.<sup>435</sup>

In its afternoon session on May 1, the CCR heard the case against group libel, made by AJC vice president Slawson, its general counsel Newman Levy, and the head of its department of education, Henry McCarthy. The latter's presence hinted at the AJC's overall approach to antisemitism – it focused not mainly on the law, but rather on the alternative of education. While the AJC supported many of the proposed laws which sought to help African Americans, such as the anti-lynching bill, the anti-poll tax bill, and so on, when it came to antisemitism it believed in the educational approach.<sup>436</sup> It supported neither group libel legislation nor lesser solutions such as the Ernst disclosure proposal, which Slawson said would “mean setting up a colossal

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<sup>435</sup> Maslow's statements won support from several other witnesses who spoke before the CCR, including the famed civil rights lawyer Charles Houston, who had worked closely with him and told the committee that “I will probably touch [on the need for legislation] as I go through the statement that I want to make; but for detail, I think I can adopt the statement of the American Jewish Congress by Will Maslow.” It is unclear whether Houston was referring to Maslow's remarks about the need to fight discrimination generally or specific proposals such as libel reform. His later comments to the CCR suggest general agreement with the need to secure group rights as a matter of national security. Testimony of Charles Houston, Transcript of Proceedings of President's Committee on Civil Rights, May 1, 1947, box 16, record group 220, Records of the President's Committee on Civil Rights, Harry S. Truman Presidential Library, Independence, Missouri, 111-113.

<sup>436</sup> Testimony of John F. Slawson, Transcript of Proceedings of President's Committee on Civil Rights, May 1, 1947, Records of the President's Committee on Civil Rights, box 16, record group 220, TPL, 56.

administrative and enforcement agency” for only marginal gain.<sup>437</sup> States which did not have laws preventing speech that directly led to violence – based on the “clear and present danger” test – should enact them. Short of that, “the eradication of racial and religious prejudice is basically an educational process, and not a legal one.”<sup>438</sup> After the AJC turned away from group libel advocacy, it became invested in studying the problem of antisemitism using the tools of social science. It founded a Scientific Research Department; it commissioned studies; it tested materials.<sup>439</sup> All of this work sought to support the educational method of combatting antisemitism. Slawson admitted to the committee the department’s results were not yet conclusive in determining exactly how such educational programs would work (or if they were effective at all). He said that he “confidently expect[ed] that in due time its observations and findings, together with those of other organisations and scientists, will supply that insight into the true, basic nature of anti-Semitism which will make it possible to devise the remedies which, hopefully, will wipe out the disease.”<sup>440</sup> The AJC’s research initiatives were, as his comments show, a case of the tail wagging the dog. The group first decided it preferred education to legislation. It then sought to create a body of evidence to justify that decision.<sup>441</sup> To the extent that the AJC did provide a concrete picture of why suing antisemites was unwise, it merely cited the irrationality of the underlying beliefs. Levy quoted before the CCR an opinion article by the eminent judge Learned Hand who, like many of group libel’s opponents, feared antisemites’ ability to win over juries. In Hand’s view, and the AJC’s, for a legal approach to work the libellous statements in question would need to be disproven by evidence. But “the passions

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<sup>437</sup> Ibid.

<sup>438</sup> Ibid.

<sup>439</sup> Ibid., 50.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid., 74, citing Learned Hand, *The Saturday Review of Literature*, Mar. 15, 1947, 23-24.

which lie at the root of such utterances do not have their basis in evidence, and will not yield to it; and any issues capable of being presented in a court which do depend on evidence would have to go back far into history and be quite beyond the grasp of a jury of men and women unskilled in such inquiries.”<sup>442</sup> Antisemitic statements bore a surface resemblance to libel against individuals. They could likewise cause societal danger, the centuries-old basis for defamation laws.<sup>443</sup> But the similarities stopped after a certain point; the fundamental nature of hatred against groups was too complex to be explained within the format of a trial. At least one member of the CCR appeared sceptical of the AJC’s view of libel reform, the southern liberal Graham. Several others expressed scepticism of education’s efficacy in the face of discrimination compared to legislation.<sup>444</sup> Whether group libel specifically would win over the CCR remained unclear during the hearings, but after the AJC’s testimony its members were broadly unconvinced of the argument for educational approaches alone.

The final group involved in the libel debates before the CCR was the measure’s most effective opponent, the ACLU. Perhaps because it was not an explicitly Jewish group, or perhaps because it was simply the private group which most singlehandedly influenced discussions of free speech in the 20<sup>th</sup> century U.S., the ACLU’s vision of the law regarding speech reigned. Its opposition to group libel came from a different source than the AJC’s. It did not believe that legal solutions to discrimination were inadvisable; in fact, it advocated for a far-reaching program of legislation as

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<sup>442</sup> Ibid.

<sup>443</sup> The classic article on this subject, which touches both on U.S. law and its English origins, is Robert C. Post, ‘The Social Foundations of Defamation Law: Reputation and the Constitution’, *California Law Review* 74, no. 169 (1986): 691–742.

<sup>444</sup> See, e.g. Testimony of John F. Slawson, Transcript of Proceedings of President’s Committee on Civil Rights, May 1, 1947, 66.

well as for the overturning of Supreme Court precedents.<sup>445</sup> It did not avoid the constitutional arguments against group libel by focusing on education and psychology; it confronted the legal questions at hand directly. Fraenkel, the ACLU's general counsel, told the CCR that "naturally, it is essential to deal with the problem, not merely from the legal and legalistic point of view. However, as a lawyer, I will address myself chiefly to the legal aspects of the problem; and it seems to me that there has been failure, not only because the laws which have been passed were inadequate, but also because many of the laws that were passed were either held unconstitutional, or otherwise emasculated by the courts."<sup>446</sup> To the extent that he spoke about "trying to accomplish the objectives of the law" by other means, he envisioned basically legalistic processes of "education, conciliation, and, if necessary, by the judicial process."<sup>447</sup> His rejection of group libel – and the ACLU's as a body – was born less from faith in education than from a rejection of a specific view of the law.<sup>448</sup> Fraenkel and the ACLU did not emphasise opposition to group libel in their presentations before the CCR; with their own colleague Ernst on the committee, they perhaps felt they did not need to. Ernst's illness during key sessions in April and May 1947 eventually ended; by the time the committee had its final meetings in Hanover, N.H., the ACLU could be assured its views would be well represented.

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<sup>445</sup> On Harlan and the overturning of the Reconstruction Civil Rights Acts see Testimony of Osmond Fraenkel, Transcript of Proceedings of President's Committee on Civil Rights, May 1, 1947, Records of the President's Committee on Civil Rights, box 15, record group 220, TPL, 91.

<sup>446</sup> Ibid., 92.

<sup>447</sup> Ibid., 93.

<sup>448</sup> Ibid., 104.

## The Stewart Memorandum

Given the presence of committee members like Ernst, it is natural to imagine the CCR rejected group libel immediately. But in fact, the committee entertained the idea more seriously than even Maslow could have hoped. A month after the Jewish groups testified before the CCR, its research director Milton Stewart prepared a memorandum for Carr and the committee recommending what he called “an alternative way of dealing with group defamation.”<sup>449</sup> Stewart’s consideration of the issue marked the moment group libel’s American advocates came closest to winning Presidential support during the roughly 30-year span of their work.

Stewart’s memorandum provides a useful glimpse into the extent to which the argumentative work done by the organisations previously involved in the group libel debate had succeeded. He began with a list of three rights relevant to the discussion (rights not in the explicit Constitutional sense, but rather in the Constitution-inflected sense in which U.S. political figures often invoked them). They were freedom of “public expression” without fear of retribution, freedom “to form intelligent, enlightened judgments on the basis of as many facts and opinions as can reasonably be made available,” and what certain groups called “the civil right to be free from defamation.”<sup>450</sup> The first two rights, in Stewart’s view, were incontestable. He was less sure whether the third was actually a right or simply the natural result of a society in which the first two existed. If Stewart was sceptical of minority group’s legal right to be free from defamation, it raised the question of why he entertained group libel at all. However, the memorandum suggests that, despite the ACLU’s arguments, Stewart was not entirely convinced that the open

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<sup>449</sup> Milton D. Stewart (with the assistance of Nancy Wechsler and Rachel Sady), “Memorandum to Members of the President’s Committee on Civil Rights on Group Defamation and Civil Rights,” June 5, 1947, Berman Archive, Stanford University, Stanford, California, <https://searchworks.stanford.edu/view/vd186rv4601>.

<sup>450</sup> Ibid., 1-2.

marketplace model of speech would adequately protect the first two rights. In particular, he evinced a postwar anxiety that victory over the Nazi enemy had not necessarily inoculated the United States from falling victim to antisemitic fervour.

Stewart suggested that, while free speech advocates often directed their attention to the first right – to speak unfettered – in the mid-century environment the second right to form educated opinions was more crucial and more endangered. He combined analysis of legal arguments with references to sociology, psychology, and research on the mass media. Such research had grown in prominence in American discussions of politics since the group libel debates of the 1930s and shows why 1947 was in some ways a particularly opportune time for its proponents. Also in 1947, after four years of work the privately sponsored Hutchins Commission released its report *A Free and Responsible Press*, a watershed moment in the U.S. media's conception of its role in society which paved the way for the rising quality of journalism in the latter half of the century.<sup>451</sup> Sponsored by publisher Henry Luce and chaired by University of Chicago President Robert Hutchins, much like Stewart's memorandum the report drew on sociological theories to argue for the press's special role in preserving a stable democratic society. It served as a de facto industry-wide code of ethics, bringing into widespread use concepts such as journalistic objectivity and the need for the press to regulate itself heavily.<sup>452</sup> Stewart would have almost surely been familiar with the report, released in March 1947 to great media attention, as he wrote his memorandum.<sup>453</sup> Its authors warned that unless newspaper owners worked against

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<sup>451</sup> See, e.g., Margaret Blanchard, *Revolutionary Sparks: Freedom of Expression in Modern America* (Oxford University Press, 1992); Victor Pickard, *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (Cambridge University Press, 2015); Betty Houchin Winfield, *FDR and the News Media* (Columbia University Press, 1994).

<sup>452</sup> Pickard, *America's Battle for Media Democracy*.

<sup>453</sup> David Shedden, "Today in Media History: In 1947, the press reported on the Hutchins Commission report," *Poynter*, March 27, 2015.

consolidation and took their role in civic society seriously, the U.S. faced a crisis. They wrote that “no democracy will indefinitely tolerate concentration of private power, irresponsible and strong enough to thwart the democratic aspirations of the people. If these giant agencies of communication are irresponsible, not even the First Amendment will protect their freedom from government control. The Amendment will be amended.”<sup>454</sup> Citizens had a right to truthful information which had been put into peril by the rise of mass media, they asserted.

Stewart would likely also have been familiar with a growing body of research on the nature of authoritarianism’s spread in Europe, another argument he referenced when discussing the merits of protections against group defamation. He almost assuredly would have read the Hutchins Report; at minimum, the Hutchins Commission provided the CCR with some of its internal materials on issues like full disclosure rules before the release of their final work.<sup>455</sup> The AJC itself had sponsored research on the subject, most famously the series *Studies in Prejudice* which led to the 1950 publication of *The Authoritarian Personality*.<sup>456</sup> Already in 1947 the series had produced a variety of work on the psychological and sociological nature of prejudice, much of which the AJC provided to the CCR as part of its testimony.<sup>457</sup> The CCR also heard testimony on the nature of prejudice from researchers like Columbia professor Paul F. Lazarsfeld, the director of the Bureau of Applied Social Research.<sup>458</sup>

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<sup>454</sup> Commission on the Freedom of the Press, *A Free and Responsible Press: A General Report on Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books*, ed. Robert D. Leigh (University of Chicago Press, 1947).

<sup>455</sup> The interim report on this matter was provided to Subcommittee No. 3 even before the Hutchins report was released, see Zechariah Chafee, Jr., “Compulsory disclosure: from Government of Mass Communication, & forthcoming report from the Commission on the Freedom of the Press,” March 27, 1947, Records of the President’s Committee on Civil Rights, box 16, record group 220, TPL.

<sup>456</sup> T.W. Adorno et al., *The Authoritarian Personality* (Harper and Brothers, 1950).

<sup>457</sup> Testimony of John F. Slawson, Transcript of Proceedings of President’s Committee on Civil Rights, May 1, 1947.

<sup>458</sup> Testimony of Paul F. Lazarsfeld, Transcript of Proceedings of President’s Committee on Civil Rights, May 1, 1947, Records of the President’s Committee on Civil Rights, box 15, record group 220, TPL, 71-73; Lazarsfeld had

Stewart's attention to these fields rather than solely the legal questions at play made him significantly more receptive to the idea of group libel. He wrote a defence of group libel based as much in sociology as in pure legal principles<sup>459</sup>:

Those who argue for anti-defamation laws say, in effect, that 'The American society cannot run the risk of widespread group defamation. We are told that in time, history, relying on a free market place of opinion, will vindicate the reputations of defamed minority groups. Such vindication will be bitter indeed if it comes after the groups – and the fabric of democracy – have been destroyed by their defamers.' In support of this point of view several factual arguments may be adduced. Group tensions in our time, for a variety of reasons, are probably more serious and widespread than ever before. Racial and religious minority groups whose forebears had low status as immigrants or slaves have reached the point where they are demanding full social equality for themselves and their children. The general level of psychological tension in America, as elsewhere in the world, is high as a result of deep socio-economic crises, that hate propaganda has a greater chance of success than before. We have ever present in our minds the successful manipulation of group hatreds by the Nazis to achieve the death of German democracy and their own rise to absolute power. This is important because it has raised serious doubts in the minds of those who were persuaded that mass irrationality was no longer a serious social problem in the Western world. Civil rights, those who urge action argue, cannot flourish when sowers of hatred are free to plant seeds of prejudice.

Then there are the obvious imperfections in American communications process. Giant media of communication cover the land. The concentration of control of the great networks of newspapers, radio stations and movie theaters is on the increase. There is an apparent inequality of access to the forming of public opinion, which has resulted in the loss of faith in the possibility of a free and legitimate competition of ideas. The clash of conflicting opinions is a frustrating chimera when one of the opinions is shouted in newspapers which reach ten million readers, while the others must whisper to tens of hundreds through leaflets. Finally, the wide dispersion of printing presses has made it possible for hate mongers to operate anonymously in the crevices of the opinion-forming mechanism. This is important because the democratic theory of decision-making postulates the right of the citizen to make up his mind with full information about the competence and self-interest of those who try to persuade him.<sup>460</sup>

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worked with Jewish groups extensively to test the effects of educational material – such as a series of cartoons featuring the antisemitic “Mr. Biggott.” He found, as he told the CCR, that such material could backfire; a prejudiced individual would misinterpret them or deny their truth rather than address his or her own underlying attitudes.

<sup>459</sup> Brandeis's famous 1908 brief in *Muller v. Oregon* (before his appointment to the Supreme Court) pioneered the use of social science in arguments and briefs. See Paul L. Rosen, *The Supreme Court and Social Science* (University of Illinois Press, 1972), 44–45.

<sup>460</sup> Milton D. Stewart, “Memorandum to Members of the President's Committee on Civil Rights on Group Defamation and Civil Rights,” 2-3.

Stewart was clearly persuaded by Maslow's arguments about recent history; namely, that had free speech maximalists followed their program in Weimar Germany, they would have failed to prevent the rise of the Nazis. Waiting for a breach of the "clear and present danger" rule would have meant waiting too long. This reading of history led Stewart to support at least some version of group libel in his memorandum. Despite the recent American victory against Nazi Germany, the postwar moment was fertile ground for the argument that the country remained vulnerable to becoming like its erstwhile enemy. Truman had formed the CCR itself because of this postwar insecurity over whether the victory over fascism abroad would turn out to be Pyrrhic. Stewart did not merely have antisemitism in mind when making this argument; he envisioned African American groups taking advantage of his proposed remedies as much if not more than American Jews. The perceived similarity between the former situation of European Jews and the present situation of African Americans made the CCR and the Truman administration unusually receptive to the idea of extraordinary measures – even more so than during the war itself. (Stewart was no ordinary researcher; he was also one of Truman's key speechwriters during this period.)<sup>461</sup>

But Stewart did incorporate some criticisms of group libel, stopping short of endorsing either the Lynch postal bill or the CLSA's proposal. Inspired by Harold Lasswell's "Instant Reply" plan, formulated in 1914 in his book *Democracy Through Public Opinion*, Stewart made three suggestions. The first was based on the "instant reply" principle and the popularization of the ACLU's "more speech is better speech" ideas; it would have mandated that publishers of "hate propaganda" print a reply from the libelled group. Stewart's second innovation was to create a

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<sup>461</sup> Steven F. Lawson, "To Secure These Rights, Part X: The Committee Deliberates," *Truman Library Institute*, 2004.

federal “Advisory Committee” of representatives from minority groups which would make the decision of whether to reply on their behalf or to let the libel go unchallenged.<sup>462</sup> Finally, his memorandum endorsed the Ernst disclosure proposal discussed by the ADL’s Richman in his meeting with the committee. Some scholars have interpreted the memorandum as a rejection of group libel; Samantha Barbas writes that Stewart endorsed the idea that “the solution to group defamation was counter-speech,” siding with the ACLU and the anti-group libel lobby.<sup>463</sup> This is too simplistic a reading, and one which ignores the extent to which Stewart agreed with much of Maslow’s testimony in spirit. Stewart did reject the idea of jury trials of antisemites, agreeing perhaps with the dangers identified by Judge Hand. But the section quoted above demonstrates clearly – as does the reaction of various groups to Stewart’s proposal – that it was viewed as a partial victory for group libel. The ACLU and AJC argued explicitly that pre-empting dangerous speech was unnecessary; the “clear and present danger” test of violence was a sufficient safeguard. Stewart disagreed. This departure did not lead him to an endorsement of group libel, but it did represent a significant break from ACLU-backed orthodoxy.

While during the mid-1940s “group libel” advocates had indeed become more focused on defamation law as a specific remedy, they continued to use the term to refer to all measures that would effectively curb hateful speech. Stewart’s proposals were not precisely what the AJCo would have hoped for, but they did recommend such measures as requiring parties that used the postal service to distribute material to identify themselves and their funding source. Rather than rejecting the AJCo’s position entirely, his report is better viewed as attempting to find a middle ground between the positions of free speech advocates and group rights advocates.

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<sup>462</sup> Harold D. Lasswell, *Democracy Through Public Opinion* (Banta Publishing, 1941).

<sup>463</sup> Barbas, ‘The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws’.

Stewart sent the proposal out to the various groups for commentary early in the summer of 1947 as he worked to write the first draft of the CCR's final report, *To Secure These Rights*. One indication that his ideas were close to those held by group libel's advocates was how vociferously the AJC rejected them. Slawson sent Stewart an extensive letter on July 7 outlining issues with his ideas and writing that "after serious consideration we have concluded that his suggestion is unworkable and we regret that we cannot agree with it."<sup>464</sup> His first point of disagreement raised a key issue in the group libel debate, one core to understanding it both in the U.S. and U.K. If Stewart's envisaged committee formed, each minority group would send a representative – leading naturally to the question of who counted as a Jew and who best represented Jews.<sup>465</sup> Even if every group which purported to represent American Jewry – for example, the AJC, AJCo, and ADL – sent its own representative to the committee, they would be unlikely to agree which antisemitic statements merited a reply and of what the reply should consist. Even if they did agree to reply and settled on an appropriate statement, the "instant reply" proposal still raised the issue of whether answering antisemitic comments simply broadcast them further. "There could be no assurance, indeed, there would be no likelihood, that an answer to the original piece, even if sent in bulk to the same consignee as the original piece, would be distributed at all, and, if it were, it would certainly not reach the same persons as the original piece. On the contrary, it would fall into the hands of many persons who never heard of the original statement and thereby do more harm than good."<sup>466</sup> Finally, if the representatives of a minority group chose not to reply to a certain comment, "the offending publication could argue

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<sup>464</sup> "The American Jewish Committee Memorandum on Group Defamation to the President's Committee on Civil Rights," Records of the President's Committee on Civil Rights, box 10, record group 220, TPL.

<sup>465</sup> Ibid., 1-2.

<sup>466</sup> Ibid., 3.

that since the law gave the minority a right to answer, and the right was not taken advantage of, the libels inferentially were true.”<sup>467</sup> The AJC’s response made clear that it supported neither the AJCo’s idea that the law must curb nonviolent speech nor the ACLU’s suggestion that more speech was better. Any legal approach to antisemitism would simply worsen the issue.

Maslow and the AJCo were dissatisfied with Stewart’s proposal, too. The CLSA prepared a memorandum in response and asked Carr to distribute it to the entire CCR.<sup>468</sup> Its letter concluded that Stewart’s attempt to satisfy all the groups involved in the libel debates represented a “half-way house” proposal. Only a federal group libel law, enforceable in the courts, would do: “We concede that a criminal statute outlawing malicious and false defamatory material creates certain risks of hampering full discussion of public issues. We submit, however, that the certain gains outweigh the speculative risks. We maintain that only a Federal group libel statute can prevent the dissemination of anti-racist propaganda.”<sup>469</sup>

Carr denied Maslow’s request to circulate the CLSA document; he wrote that “Mr. Stewart’s proposal has always been regarded by us as an extremely experimental or tentative one...Frankly, there is no need for such a course of action for there is at the present time no indication that the Committee looked upon the Stewart proposal with any great favor.”<sup>470</sup> The AJC need not have opposed it so vociferously, as it turned out. When exactly the CCR set the

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<sup>467</sup> Ibid., 4.

<sup>468</sup> Letter from Will Maslow to Robert K. Carr, June 13, 1947, Records of the President’s Committee on Civil Rights, box 10, record group 220, TPL.

<sup>469</sup> Will Maslow and the Committee on Law and Social Action, Memorandum to the President’s Committee on Civil Rights Regarding Compulsory Reply Statute for Group Libel, June 11, 1947, American Jewish Congress Records, RG 347.17.10, box 97, folder 47, CJH.

<sup>470</sup> Letter from Robert K. Carr to Will Maslow, June 19, 1947, Records of the President’s Committee on Civil Rights, box 10, record group 220, TPL.

matter of group libel and the Stewart proposal aside is unclear, though it must have happened in June 1947. Group libel did not appear on the agenda for the committee's meetings on June 30 and July 1 in Hanover, N.H. On July 8, after the CCR report was mainly drafted, Carr wrote in a belated reply to Slawson that he was "very happy to have this analysis of Mr. Stewart's proposal...[but] it remains unlikely that the committee will make a recommendation in this direction."<sup>471</sup>

The CCR was perhaps the last real opportunity for federal "hate speech" reform in the United States – in fact, it came as several European countries were considering their first hate speech laws in response to their own postwar concerns regarding minority rights.<sup>472</sup> The divergent paths taken by European, British, and American policymakers during this crucial moment underlay major differences in their approaches to hate speech through the rest of the 20<sup>th</sup> century and indeed the present day. Most of Europe – and newly forming international bodies – took a firm line on "hate speech," essentially enacting something equivalent to group libel measures. The United States and, to a lesser extent, the United Kingdom, did not, choosing instead to strengthen individual rights and bolster the "marketplace" approach to speech.

As support for group libel peaked shortly after the Second World War, within the AJC existing scepticism from free speech absolutists hardened. During this period, probably the closest group libel proposals came to winning widespread support, the AJC, the ACLU, and the NAACP continued to oppose them. Even the threat of racial violence was not enough to deter these

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<sup>471</sup> Letter from Robert K. Carr to John Slawson, July 8, 1947, Records of the President's Committee on Civil Rights, box 10, record group 220, TPL.

<sup>472</sup> Switzerland, an understandable exception to war-driven trends, had already put a "group libel" bill on its books in 1938, as American advocates noted then.

groups from their firmly pro-speech stance – each believed that advocacy for their members’ individual rights would be a more successful path to justice than attempting to win group protections. The judiciary increasingly supported this position, including Brandeis, who during the 1910s had so strongly advanced group libel and group rights more broadly.<sup>473</sup> Beginning in the 1940s the judiciary and civil rights groups (excepting the AJCo) began a mutually reinforcing cycle. The more the judiciary affirmed individual First Amendment rights, the more civil rights groups had to rely on them. The more civil rights groups relied on pushing for individual rather than collective rights, the more the liberal judiciary strengthened them.<sup>474</sup>

This helps to explain another key feature of Jewish groups’ – and social movements’ – activism during this period: the increasingly exclusive reliance on legal remedies.<sup>475</sup> The American Jewish Committee and ADL had, since their founding, been dominated by lawyers in their executive ranks. But for the first several decades of their existence, they tended to rely less on lawsuits than in the 1940s and after, a trend that only accelerated with the beginning of the liberal Warren Court in 1953. Within pro-group libel organisations like the AJCo, lawsuits were a natural outgrowth of a more aggressive approach to antisemitism, as the CLSA memo makes clear. For the AJC, which had always been reluctant to use laws that promoted group rights, it was only when the law protected individuals that it became more “usable.”

The increased focus on domestic discrimination during the Second World War proved fruitful for the AJCo and group libel advocates. But their moment of opportunity was short-lived; after the

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<sup>473</sup> Brandeis wrote in 1915 that “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.” See Louis Brandeis, “The Jewish Problem: How to Solve It,” Speech to the Eastern Council of Reform Rabbis, April 25, 1915, 1.

<sup>474</sup> See, for example, the numerous successful cases brought by civil rights groups during this period and amicus briefs supporting successful parties in cases which they did not themselves bring.

<sup>475</sup> Auerbach, *Unequal Justice*.

war and the Allies' victory, the conditions that had allowed for a surge in support for group libel waned. In their place came concerns about McCarthyism and restrictions on free speech.

Even the last Jewish group to support federal group libel legislation, the AJCo, began to turn away from it in a 1949 meeting of the GJC members. During a debate over reintroduced postal restriction bills, the AJCo's official statement conceded the importance of First Amendment concerns. It would eventually stop endorsing group libel bills entirely.

These changes coincided not just with greater deference to free speech in left-of-centre circles as the Communists and union leaders who had once boosted the Lynch Bill became more worried about McCarthyistic crackdowns on free expression than anti-minority sentiments. They also came up against an assimilationist moment within American Jewry. The 1940s saw the greatest-yet rate of American Jews officially changing their names to sound less "ethnic," both among new immigrants and also, curiously, families who had come to the United States years earlier.<sup>476</sup> Kirsten Fermaglich attributes this desire in part to the increasing reach of the administrative state during and after the Second World War – draft officers and private military contractors frequently encouraged Jewish recruits to formalise unofficial "American" names they had previously used when applying for housing or employment. "The price of participation in World War II for many men and women was an expensive visit to City Court and the permanent loss of a name that might identify you as Jewish to coreligionists or to family members," she notes.<sup>477</sup> Similarly, the educational and housing opportunities available to American men through the GI

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<sup>476</sup> Kirsten Lise Fermaglich, *A Rosenberg by Any Other Name: A History of Jewish Name Changing in America* (New York University Press, 2018).

<sup>477</sup> Idem., "Roundtable on Antisemitism: Schlepping the State Back In," Society for U.S. Intellectual History Blog, March 26, 2019.

Bill after the war were premised on ideas about Americanness and assimilation to which Jews may well have felt obliged to subscribe.

Legal historians have written for decades about the rise of free speech in mid-century jurisprudence, culminating in cases like *Times v. Sullivan* and *National Socialist Party of America v. Village of Skokie*. The leaders of Jewish groups, many of whom were themselves lawyers, were not immune to this free speech fever. The individualistic conception of speech rights that became dominant appealed to men and women who shared Marshall's theory of Jews' place in American society. To be a Jewish American meant not just eschewing group rights in favour of individual ones but actively working to ensure the latter's primacy. That Jewish groups even pushed for group libel at all speaks to the urgency they felt during a period of rising antisemitism. While it may seem a muted response to the mass murder of millions of European Jews, the campaign for group libel did represent a break from groups like the AJC's previous stance toward antisemitic acts, leading them to acknowledge and even push for Jews' rights as a collective with distinct interests.

## Chapter IV

### A Matter of Timing: Group Libel, the Porter Committee, and the Board of Deputies, 1939-1952

In September 1945, the Board of Deputies at last presented its recommendation to a government committee that the United Kingdom should adopt a group libel law.<sup>478</sup> On the surface, the Second World War appeared not to change the Board's approach as much as one might expect. Several of the personalities key to the effort remained the same, foremost among them its former President Neville Laski. Its cautious tone and emphasis on group libel as mainly a deterrent to antisemites rather than a tool Jews intended to use remained. But beneath that seemingly unchanging surface lay years of roiling debate.

Pressure from various corners of British Jewry led the Board to reconstitute its Community Libel Standing Committee in 1943 and to seek new legal opinions on the issue from such legal lights as Oxford professor of jurisprudence A. L. Goodhart, as well as from familiar voices who had previously rejected the idea.<sup>479</sup> By 1944, the Committee, and the Board, voted against recommending group libel for the third time in ten years, albeit because they felt it was politically infeasible rather than because they opposed it in principle.<sup>480</sup> Then, amazingly, less than a year later the Board reconstituted the body yet again. This final effort at last led it to endorse a group libel proposal for the Board to recommend to the Porter Committee in the summer of 1945.<sup>481</sup>

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<sup>478</sup> Memorandum on Community Libel Presented to the Lord Chancellor's Committee on the Law of Libel, September 15, 1945, Board of Deputies Collection, ACC/3121/C4/4, LMA.

<sup>479</sup> Letter from Sir Robert Waley Cohen to A.G. Brotman, October 21, 1943, Board of Deputies Collection, ACC/3121/C4/3/1, LMA. See also Letter from A.G. Brotman to Neville Laski, May 10, 1943, Board of Deputies Collection, ACC/3121/C4, LMA.

<sup>480</sup> Note on Community Libel, May 24, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>481</sup> *Ibid.*, 3-4.

The convoluted manner in which the Board came to present its case before the Porter Committee – and its efforts to enact group libel for the remainder of the 1940s – reflected significant internal dissension. On the matter of defamation, the Board’s officials repeatedly reversed their decisions and changed their minds on details large and small. They were torn between their own reluctance to take radical action and their desire to fend off accusations of inaction. Much like in the 1930s, they often appeared to keep pursuing the matter because they feared other groups would step in if they did not. For example, the Board excoriated the head of the British Section of the World Jewish Congress – founded after of the Board’s refusal to affiliate with the WJC upon its creation – for daring to consider its own report to the Porter Committee.<sup>482</sup> But the Board’s defence officials also had sincere reasons for changing their minds about group libel. As Laski, the preeminent voice in Board discussions of the law, wrote, group libel might finally be possible “in light of the lessons we have all learnt in these long years of tragedy.”<sup>483</sup>

The wartime period and immediate postwar years saw the peak of the Board of Deputies’ advocacy for group libel, culminating in 1948 with the Porter Committee’s rejection of the idea and the failed prosecution of fascist James Caunt. Those same years saw British Jews and others pursue legal solutions to antisemitism at the international level, with various factions advocating concepts such as crimes against humanity and genocide and pushing for the eventual adoption of international human rights treaties.<sup>484</sup> The Board itself thought actively about such issues during the war; its Foreign Affairs Committee was involved in drafting imagined postwar treaties as

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<sup>482</sup> Letter from Selig Brodetsky to A.L. Easterman, August 7, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>483</sup> Letter from Neville Laski to Sidney Solomon, May 20, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA, 2.

<sup>484</sup> See Levene, *War, Jews and the New Europe*; James Benjamin Loeffler, *Rooted Cosmopolitans: Jews and Human Rights in the Twentieth Century* (Yale University Press, 2018).

early as 1941-2. Some might argue that group libel was the domestic version of such international efforts and that it represented a new recognition of Jewish group identity in the face of the Holocaust. The evidence suggests otherwise. Board leaders may have adopted group libel as a tactical tool, but in their hearts, they did not change their view of Jews' place in British society. Theirs was not a British version of the "minority rights" for which some of them advocated elsewhere. When speaking to government officials, the Board often professed to view Jewishness as a religious identity whose adherents did not need to be treated differently by the state. Its leaders may have genuinely believed this argument, they may have recognized it as persuasive to non-Jewish officials, or both. In practice, despite their pleas regarding "private" nature of Judaism, the Board had sought and won a raft of changes to public life to accommodate Jews, ones which often put it in the role of interlocutor between the state and the Jewish population.<sup>485</sup> The notion of "private" Judaism was a powerful rhetorical tool more than a reality, which served to suggest that in making concessions to Jews, the government was not changing the character of the public sphere but merely allowing private citizens to conduct their lives freely in the liberal tradition. However, the areas of policy in which the Board sought to intervene were limited to what the State deemed acceptable. When group libel was first proposed, the Board deemed it too extreme a case of differentiating Jews in the public sphere – puncturing the useful fiction that the state did not (and need not) treat them differently in any respect. But by 1939, opinions among the British establishment on the acceptability of state intervention against propaganda had shifted in response to the rise of the Nazis. Ever responsive, the Board sensed this change and began to shift in kind. When there was little chance of group libel even being entertained as a policy, the Board rejected it. But if there was going to be real

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<sup>485</sup> Feldman, 'Jews and the State in Britain, 1830-1930', 149–52; Feldman, *Englishmen and Jews*, 66–69.

action on the government's part against antisemitic or fascist speech, the Board felt an imperative to be involved.

### **1939: A Turning Point**

While the Board on its face did not take significant action that year, 1939 was a turning point in its assessment of group libel. The Board's actions on antisemitic propaganda were mostly responsive to pressure from other members of the British Jewish community – the editors of the *Jewish Chronicle*, prominent rabbis such as the Daiches brothers, and others. In typical fashion this pressure forced the Board to promise to reexamine the matter, before ultimately rejecting it for the same reasons it always had: its perceived political and legal infeasibility. In response to individual letters from British Jews inquiring about libel reform, the Board often sent around Webber's and Laski's respective reports concluding it was an ill-fated idea. However, the pressure did not go away. As would-be alternative power centres arose within British Jewry, particularly the TAC, Jewish Labor Council, and Jewish People's Council, promoting group libel became a way to express dissatisfaction with the Board's approach to propaganda.<sup>486</sup> Even after the wartime internment of many leading antisemites, pro-group libel sentiment remained an issue for the Board in its attempt to prevent "rogue" Jews from advocating reforms it did not support.

By 1940 combatting antisemitism "had assumed its place as the greatest of the Board's priorities" after the formation of the Defence Committee.<sup>487</sup> The Board's own records show not

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<sup>486</sup> Henry Srebnik, "The British Communist Party's National Jewish Committee and the Fight against Anti-Semitism during the Second World War," in *The Politics of Marginality: Race, the Radical Right and Minorities in Twentieth Century Britain*, ed. Tony Kushner and Kenneth Lunn (Routledge, 1990); Kushner, *The Persistence of Prejudice*.

<sup>487</sup> Geoffrey Alderman, *Modern British Jewry* (Clarendon Press, 1998), 285.

that it cared less than other groups about the threat posed by antisemites, but rather that it held substantively different views about the best way to respond. Where the JPC and similar groups saw the opportunity to use the BUF's strategies against it, namely by holding counter protests and leafletting in the streets, the Board's leadership felt such confrontations only fuelled fascists' desire for publicity. More importantly, though, where the JPC saw the government as an enemy of anti-fascist work, the Board had long believed in cooperation. It would have in many respects been easier for Board officials to abandon or at least reduce its lobbying before the Home Office and Parliament. That the Board chose both to attempt to lobby within the Anglo-Jewish community and outside of it demonstrates that it viewed having a multi-pronged strategy as essential. Its interactions with the Porter Committee demonstrate the difficulty of the Board's external work. But its own archives show that its lobbying within British Jewry was far from easy.

Just after the beginning of the war, in November 1939, the TAC – nominally affiliated with the Board and therefore publicly associated with it – met and endorsed group libel, to the Board's chagrin. In response, the Defence Committee created a small subgroup consisting of Laski, Isaac Landau, Barnett Janner (the future President of the Board and MP), and Emanuel. This reconsideration marked the first step in the Board's eventual decision to endorse group libel before the recently convened Porter Committee, despite the fact that the Porter Committee shut down for the war before the Board could present to it.<sup>488</sup>

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<sup>488</sup> Letter from A.G. Brotman to Israel Mattuck, January 26, 1943, Board of Deputies Collection, ACC/3121/C4, LMA, 2.

Another reason for the Board's reconsideration of libel reform beginning in 1939 was the growing adoption of the idea among other Jewish communities, several of whom sought its advice. The Board corresponded with counterparts in South Africa and Canada, the former of whom seriously attempted to enact a group libel statute.<sup>489</sup> Its officials closely watched the passage of a version of group libel in the Netherlands and helped a German researcher at the World Jewish Congress prepare a study of legislative approaches similar to group libel. The report the unnamed researcher produced suggests that 1939 was group libel's "moment" in many Jewish communities, as the formal beginning of the war stoked fears about the power of propaganda. He wrote to the Board and American Jewish groups that "as legislative measures appear to be one of the most important means to curb the activities of the hate-mongers, we consider it vital for our affiliates in the various countries to be informed of legislative developments in other countries. For this reason, we would greatly appreciate if you would inform us of any development in your own country, whether it relates to new or to the application of existing legislation, so that we may benefit from it and bring it to the notice of other affiliates."<sup>490</sup> His key point, one common to many of the efforts to enact protections from antisemitic libel in late 1939, was that the law might save Jews from their adversaries. Legislative and legal measures were at the forefront of Jews' minds, from Cape Town to Amsterdam, and because British and American Jews had been early to the question, they were often the first contacts for their counterparts. In March 1940, for example, Elias Tscherikower wrote to Brotman asking for help with a legal case against the authors of a book insinuating his

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<sup>489</sup> Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense*, 99.

<sup>490</sup> Report of Interview with Prime Minister J.B. Hertzog and the South African Board of Deputies, April 22, 1936, Board of Deputies Collection, ACC/3121/C4, LMA.

late friend Shalom Schwarzbart had been a Soviet agent.<sup>491</sup> The book was not merely libellous toward Schwarzbart – although in France, the notable country in which one can libel the dead, that would have been enough – it was also “libellous for Jews in general.” Tscherikower therefore sought Brotman’s advice, hoping to pursue a group libel test case in France.<sup>492</sup> The letter shows that Jews outside the U.K. saw the Board as a central part of the fight against propaganda. This impression was heightened by London’s status as a global publishing centre – many pieces of material which made their way to the continent, including the book about Schwarzbart, were first printed in London.<sup>493</sup>

Board officials’ comments on Emanuel’s 1940 report on libel reform suggest that they took increasing interest in international developments regarding speech restrictions when formulating their domestic approach. In response to a draft of the memorandum circulated to select Board members, Defence committee member A.S. Diamond noted that “recent legislation abroad” allowed group libel cases to proceed without the possibility of defence by justification, which would have allowed defendants to refute charges by proving the substantial truth of the speech in question. Diamond also called Emanuel’s attention to legislative developments in France and

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<sup>491</sup> Tscherikower, one of the founders of the historic research preservation organisation YIVO (*yidisher visnshaftlekher institute*), and his wife managed to flee Paris to the United States several months later. He died in 1943.

<sup>492</sup> Letter from Elias Tscherikower to A.G. Brotman, March 11, 1940, Board of Deputies Collection, ACC/3121/C4, LMA.

<sup>493</sup> Ibid. The accusation levelled against Schwarzbart – that he was a Soviet agent – is part of a strain that had plagued British Jews since the 1917 Russian Revolution. This theme is treated at length in Kadish, *Bolsheviks and British Jews*. See also Fraser, *Nazi Antisemitism and Jewish Legal Self-Defense*; David Engel, ed., *The Assassination of Symon Petliura and the Trial of Scholem Schwarzbard 1926–1927: A Selection of Documents* (Vandenhoeck & Ruprecht, 2016). It emerged in Emanuel’s 1940 report for the Board, in which he wrote that “There was little known anti-semitism here until the Russian pogroms drove to these shores a considerable number of refugees of the Jewish religion. This led to an agitation against aliens, to a confusion between the terms aliens and Jews, and to the commencement of a campaign in which the large number of those who objected to foreigners enlisted the support of the few who disliked Jews because they were Jews.” Charles H.L. Emanuel, “The Defamation of Communities: Instructions to Counsel to Advise,” Board of Deputies Collection, ACC/3121/C4, LMA.

Manitoba, asking whether Emanuel had checked other Canadian provinces' laws. While earlier Board-commissioned reports had surveyed developments abroad, by 1940 it paid a higher level of attention, even taking cues from external legislative efforts as never before. The need to collaborate during wartime, as evidenced by the voluminous correspondence between the Board and the World Jewish Congress, the Alliance Israélite Universelle, the American Jewish Committee's Paris office, and others, spilled over into its previously siloed defamation reform efforts. What had been a conversation among English-speaking Jews, mainly in the U.K. and U.S., although also in Canada and South Africa, had internationalised. This perhaps had the effect of normalising group libel for reluctant Board members such as Laski – seeing that it could happen elsewhere, albeit in countries with quite different legal systems, gave cautious British Jews the ability to pursue it more wholeheartedly. Just as they often relied on external cues from non-Jews within the U.K., so too did they seek affirmation from Jewish legal efforts abroad.

Emanuel's report reflected this attention to events abroad, surveying legislation as it stood in 1940. It also showed that while the Board now favoured some sort of libel reform for instrumental reasons, it had not fully accepted the philosophy behind group libel. Emanuel wrote that

The Jews in this country are a small body, numbering perhaps 400,000 souls, the majority living or working in 4 or 5 of the great cities, the rest being scattered in small provincial areas, some containing not more than a score of Jews. Except that they have a common and distinctive religion they are a normal part of the general population. They have no common aims – apart from their religion – to signal them out for adverse criticism. They are of no particular political creed, that is to say they appear, as voters and, in a few cases, as parliamentary candidates or representatives, in the various political parties indiscriminately. They are found in the various professions, in wholesale and retail businesses; they are employers, and, in considerable numbers, employees. However, being a small minority, often identifiable by appearance and a certain number of them having arrived here as refugees from persecution and not entirely educated here, distinguishable by their diction and earmarked by their observance of their religion, they are a recognizable

body to that extent ‘different,’ and being different and distinguishable, it would not be difficult, even in this country, to create prejudice against them by the dissemination of false and prejudicious information about them.<sup>494</sup>

What does such a statement suggest about the Board’s view of Jews’ group identity in 1940, or rather, how it wanted to present Jews to the general public? Before even beginning to discuss the nature of the antisemitic threat, Emanuel felt the need to argue that, aside from their religious beliefs, Jews were not a distinctive group. He emphasized the small and scattered nature of the Jewish community – ignoring the concentration of Jews in London.<sup>495</sup> He sought to make Jews unremarkable before discussing the remarkable threats against them. Indeed, the report placed at least some blame for antisemitism in the U.K. on the “certain number” of British Jews who had arrived in the country in the 20<sup>th</sup> century. They, with their strange accents, their ghettos, and their concentration in certain businesses, had punctured the illusion the Board sought to create, making measures such as group libel potentially necessary. Emanuel went on to write that the Russian Revolution created antisemitism in the U.K.: it “led to an agitation against aliens, to a confusion between the terms aliens and Jews, and to the commencement of a campaign in which the large number of those who objected to foreigners enlisted the support of the few who disliked Jews because they were Jews.”<sup>496</sup> All these caveats came before a word about the issue of libels against British Jews – about the BUF, about the “flood of defamation” to which Jews were subjected, and about the public meetings which had chilled them as Europe went to war. Jews’ group identity had never been more salient, but the Board did not believe in foregrounding it. Instead, it made the argument that, while Jews were not really a separate group, group libel was

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<sup>494</sup> Charles H.L. Emanuel, “The Defamation of Communities: Instructions to Counsel to Advise,” 1.

<sup>495</sup> Alderman, *The Jewish Community in British Politics*, 127.

<sup>496</sup> Charles H.L. Emanuel, “The Defamation of Communities: Instructions to Counsel to Advise,” 1. See Kadish, *Bolsheviks and British Jews*; McGeever, *Antisemitism and the Russian Revolution*. This connection may have actually be true on some level – or at the very least, the Russian Revolution transformed antisemitism in Britain and elsewhere, as did the influx of refugees fleeing Russian antisemitism from the right and the left alike beginning in the late 19<sup>th</sup> century.

the only solution to insults which falsely portrayed them as such. In doing so the Board came to acknowledge, after many years of resistance, that antisemites could have a greater ability to define Jews than Jews themselves. The question of Jews' group identity – even if they resisted it – might not be for them to decide.

That the behaviour and status of some British Jews could affect their collective reputation distressed the Board of Deputies. Since the debate over the Aliens Act 1905, and particularly after the Russian Revolution, the Board had worried about the reputational impact of new Jewish immigrants on the image of British Jews as a whole. One appealing aspect of group libel legislation, under which the Board imagined only it would have standing to sue on Jews' behalf, was that it allowed the Board to manage how the Jewish community refuted allegations against new immigrants. If errant Jews drew criticism, under group libel laws, the Board would be able to respond officially. Group libel would further enshrine a role the Board viewed as increasingly important as British Jewry diversified.

The Board's work in 1939 had little effect because of circumstances outside its control. Laski, still president until December of that year, sent a short memorandum to Lord Porter and his colleague Justice Birkett. "Confidentially," he heard they read it, but before things could progress further the outbreak of the Second World War suspended their review of defamation law.<sup>497</sup>

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<sup>497</sup> Draft Letter from Neville Laski to Dr. Epstein, May 25, 1943, Board of Deputies Collection, ACC/3121/C4, LMA.

## The Politics of Free Speech

The Board of Deputies was not alone in recognizing group libel as a potential solution to the problem of fascist propaganda in the late 1930s. Outside the British Jewish establishment, and despite the Porter Committee's decision to pause its work, the advent of war led to several other groups taking an interest in the debate over group libel. As Hilliard has recounted in a study of speech debates before and after the war, the Communist Party of Great Britain and NCCL both recognized the danger posed by antisemitic propaganda by the late 1930s. The NCCL first considered proposing restrictions on such speech in 1936, ultimately deciding not to do so.<sup>498</sup> It instead lobbied both the Metropolitan Police and Home Office to take further action against the BUF and its allies, both before and after the enactment of the Public Order Act.<sup>499</sup> But during the war, especially after a 1943 conference on fascism, the group came to believe further legislation was the only solution to countering antisemitic speech. Having been rebuffed by the police in efforts to curb the BUF before the war, it eventually came to take a similar approach as the

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<sup>498</sup> Christopher Hilliard, 'Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s', *The Journal of Modern History* 88, no. 4 (2016): 764–96, <https://doi.org/10.1086/688836>. The proposal the NCCL considered had been put forward by the Jewish People's Council, which, as noted above, had been steeped in the intercommunal debates over group libel and formed in that crucible. It seems that one of their first acts was to look outside the Jewish community for allies who might support group libel, perhaps seeing that even rising fascism was failing to move the Board of Deputies.

<sup>499</sup> John Stevenson, "The BUF, the Metropolitan Police and Public Order," in Kenneth Lunn and Richard C. Thurlow, eds., *British Fascism: Essays on the Radical Right in Inter-War Britain* (Routledge, 1980). Stevenson wrote that "a letter from the National Council for Civil Liberties to the Metropolitan Police in June 1937 complained that 'serious and well substantiated allegations were made of organised hooliganism, intimidation and physical assaults by fascists and of the failure of the police to give adequate protection to Jews and non-Jews alike'." The police commissioner and Metropolitan Police more broadly were highly sceptical of the NCCL, viewing it as a potential front organisation for the Communist Party. This scepticism fuelled their rejection of the group's efforts and perhaps underlines why the Board was not particularly engaged with other groups interested in the same questions of how to use the law against antisemites. Even the smallest association with suspected left-wing groups would probably have been as dangerous to its ability to work with the government as cleaving to the fascists themselves.

Board of Deputies, focusing its efforts on convincing the Porter Committee to revise the U.K.'s defamation law.<sup>500</sup>

The Board was wary of association with any group it deemed left-wing or even “political.” This meant the Defence Committee shunned the Communist Party but also extended to the NCCL. Salomon, the Board’s longtime Defence secretary, expressed his concern in 1936, rejecting an invitation from the NCCL to speak at a conference of groups discussing how to counter Mosley and the BUF. He wrote that “by its Constitution, the Board can have no political interests or affiliations, and although it is not explicitly stated in your letter that the Conference will have any particular political tinge, they would prefer, in the first instance, to appoint an observer only, leaving until a later date the question of whether they can appoint a delegate.”<sup>501</sup> Despite repeated assurances from NCCL officials Ronald Kidd and Elizabeth Allen that theirs was a “non-party organization,” the Board maintained its distance.<sup>502</sup> By 1943, Allen admitted to Board delegate Gordon Liverman that the NCCL “was a political body.”<sup>503</sup> Later on, in 1947, the Defence Committee agreed to partially fund the NCCL’s work on the condition that the donation remained secret.<sup>504</sup> Because of these fears, which persisted through the 1950s, despite the interest of some non-Jews in group libel the Board did not want to openly cooperate on a campaign for reform. At most it provided private support and updates about its conversations with MPs and the Home Office.

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<sup>500</sup> “Anti-semitism and Fascism,” National Council for Civil Liberties, August 1943, Board of Deputies Collection, ACC/3121/E1/75/1, LMA.

<sup>501</sup> Letter from Sidney Salomon to Ronald Kidd, Esq., October 19, 1936, Board of Deputies Collection, ACC/3121/E1/75/1, LMA.

<sup>502</sup> Letter from Ronald Kidd, Esq. to Sidney Salomon, October 22, 1936, Board of Deputies Collection, ACC/3121/E1/75/1, LMA.

<sup>503</sup> Note from Gordon Liverman, October 17, 1943, Board of Deputies Collection, ACC/3121/E1/75/1, LMA.

<sup>504</sup> Letter from Frank Renton to Elizabeth Acland Allen, May 6, 1947, Board of Deputies Collection, ACC/3121/E1/75/1, LMA.

Within British Jewry, the early years of the war did not stop a steady trickle of requests to the Board that it take action on the group libel matter despite the Porter Committee's pause. Several of these came from outside London, but also from those within the London Jewish community who had not previously been a part of the libel debates in the 1920s and 1930s. In September 1942 the Manchester Communal Council held a meeting to discuss the problem of antisemitism.<sup>505</sup> One of its leaders, Israel Davis, wrote to Brodetsky that enacting group libel legislation before the end of the war would "sound the Death Knell of Anti-Semitism. I feel sure that you, Sir, along with the Members of the Law and Parliament Committee could frame a suitable resolution for submission to the Prime Minister & to the Minister of Home Securities pointing out to them how essential it was for the welfare of Anglo-Jewry to have such an Act placed upon the Statute Book."<sup>506</sup> Similarly, in May and June 1943, the Parliamentary Subcommittee of the Glasgow Jewish Representative Council met to consider its own endorsement of group libel.<sup>507</sup>

The Glasgow committee's proposal made the argument for action during wartime in a slightly different manner than did the Board of Deputies. It attempted to answer the main objection raised by group libel's critics, namely that, even during extraordinary circumstances, it was too great an impingement on free discourse. It used "win the war" arguments similar to those employed at the same time in the U.S.:

In other countries the anti-Semitic movements have now become branches of the Hitlerite movement, and their avowed policy is also to establish a new form of government, under

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<sup>505</sup> Letter from Israel Davis to Selig Brodetsky, September 15, 1942, Board of Deputies Collection, ACC/3121/C4, LMA.

<sup>506</sup> Ibid.

<sup>507</sup> Letter from Michael Black to A.G. Brotman, June 8, 1943, Board of Deputies Collection, ACC/3121/C4, LMA.

which no political opinions or freedom of speech would be allowed. It is therefore perfectly clear that anti-Semitism has ceased to be merely a Jewish concern but has become a problem for all sections of the community in every country. It is quite true that legislation to cope with this would not be introduced in war-time, but more importance should probably be attached to the advisability of lobbying in Parliament and elsewhere for the purpose of creating a frame of mind which would encompass this new conception. In other words, it can be said that anti-Semitism is no longer a legal issue in the narrow sense but has become a political issue of the first magnitude.

It is essential to keep in mind the fact that one of the Allied war aims, as expressed in the Atlantic Charter, is to maintain freedom of speech, as well as other freedoms. Anti-Semitism is fiercely opposed to these aims, and from this standpoint it can be argued that the matter is not unconnected with Allied war and peace.<sup>508</sup>

Pressure on the Board to consider group libel during the war even emerged from the Commons.

In 1942, the Conservative MP Daniel Lipson asked the Attorney-General whether the government might consider a group defamation law. He had solicited the Board's advice beforehand, particularly copies of the three reports it had produced. Exactly as the Board had feared, the Attorney General told Lipson the government would not consider "legislation to deal with one particular aspect of the law of defamation."<sup>509</sup> Lipson responded by noting that the situation at home and abroad had radically changed since the Porter Committee began meeting; surely, in his mind, the government could consider amending its position in light of the war. He specifically noted that "in several countries this legal protection is provided."<sup>510</sup> But the Attorney General was unmoved, telling Lipson he could raise that point with the Committee when it resumed.

Behind the government's desire not to bring "piecemeal" legislation lay more ideological reasons for opposing group libel protections. Group libel's detractors were not without persuasive power.

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<sup>508</sup> Note on Group Libel, May 25, 1943, Board of Deputies Collection, ACC/3121/C4, LMA.

<sup>509</sup> HC Deb 18 February 1942 vol 377 cc1791.

<sup>510</sup> Ibid.

Its proponents could appeal to the government's desire to protect minority groups, but its opponents could raise perhaps an even more powerful ideal: the protection of civil liberties. The Board obtained a letter from 1939 which laid out this position, sent from the Army officer and fascist politician R. D. B. Blakeney to Board member and chair of the London Area Council for Combating Anti-Semitism Cyril Picciotto. Picciotto had sought out Blakeney for a public debate on group libel and fascism – an example of the kind of pre-war strategy of combatting antisemitism through discussion and education rather than the courts and Parliament. Blakeney declined:

The matter raises a question of public interest, in view of the general demand for an amendment to our law of libel...

Until just under three years ago, a debate such as you desired might have been easily arranged, had both sides been willing, though naturally if one party did not wish to debate, there was no harm in the refusal...

Such was the state of affairs until the 21st September 1936 when Mr. Arnold Leese, Editor of the 'Fascist,' was sentenced to six months imprisonment at the Central Criminal Court for certain Statements he made in the July issue of the 'Fascist' regarding Jews. In his pamphlet entitled 'My Irrelevant Defence' he states that he went to court very fully prepared to justify what he had published, but he was forbidden by the Judge to use this line of Defence, and during his cross-examination of the only witness who appeared against him the Judge intervened with the remark: 'The truth of a libel is no defence, I must point out again.' Again, the Attorney General, who was acting as prosecuting Counsel interrupted another question put to the same witness by the remark: 'In my submission it is correctly laid down that the defendant is in no case allowed to prove the truth of a seditious libel as a justification for having published it.' The Judge then said: 'That is the law as I understand it,' and made clear to Mr. Leese that to proceed further in such a line of defence would be contempt of court....

Now what has been the result? The movement pursues an embittered and accelerated course underground; in fact it might be said that in this case, as in the early days of Christianity, 'the blood of the Martyrs is the seed of the Church.' The unexpectedly heavy sentence imposed has in fact made a martyr of Mr. Leese, and if there is one phenomenon everybody is noticing nowadays, it is that the man in the street is becoming thoroughly anti-Jew. I refuse to employ the misnomer 'anti-Semitic.' The average 'Jew' seen in ever-increasing numbers in the streets of London nowadays has very little Semitic blood in his veins.

If any attempt be made further to limit our ever-diminishing liberties by questioning our rights to express beliefs at private meetings, we shall be within measurable distance of having a [Soviet secret police agent] in our midst, and the attempt will be met with uncompromising resistance...<sup>511</sup>

Blakeney's letter demonstrates why the Board continued to be reluctant regarding libel reform. Jewish institutions saw Leese's conviction on only lesser charges and brief prison sentence as proof that only the most extreme antisemites would face prosecution and that the law of seditious libel was insufficient for all but these edge cases. As noted in Chapter II, the Board's leaders had been anxious about the decision to charge Leese, fearing exactly the above-expressed counterreaction from those like Blakeney. But even a single prosecution provided British fascists with an opening to say their civil liberties had been violated, an argument that held significant sway with the government. The Attorney General would not pursue a seditious libel case between 1939 and 1943, despite a wartime environment in which sedition would likely be easier to prove.<sup>512</sup>

Deliberations on the next case after Leese's, the 1943 prosecution of Glaswegian Alexander Ratcliffe, demonstrate that many government officials shared at least some of Blakeney's opinions regarding seditious libel prosecutions. The fundamental importance of civil liberty had, of course, a long history in English law and philosophy, from Milton to Mill.<sup>513</sup> But in the late

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<sup>511</sup> Letter from R.B.D. Blakeney to Cyril Picciotto, May 19, 1939, Board of Deputies Collection, ACC/3121/C4, LMA.

<sup>512</sup> Again, this case raised the differences between Scottish and English libel law – the eventual charges were based on Ratcliffe's distribution of his pamphlet "The Truth About the Jews" in England rather than its initial publication in Scotland. The case shows why Scottish Jews, particularly those in Glasgow, were particularly keen to see group libel enacted, since they had even less legal protection from libels than provided by English common law. See Hilliard, 'Words That Disturb the State'.

<sup>513</sup> See, e.g., John Stuart Mill, "On Liberty," in *The Basic Writings of John Stuart Mill: On Liberty, the Subjection of Women, and Utilitarianism*, (Modern Library, 2002); John Milton, *Areopagitica and Other Writings*, (Penguin Books, 2014). For a recent treatment of this history, see Faramerz Dabhoiwala, *What Is Free Speech?: The History of a Dangerous Idea* (Harvard University Press, 2025).

nineteenth and early twentieth centuries, issues of speech and violence became particularly associated with sentiments criticizing groups such as the Irish, Catholics, landlords, and so on. The British establishment defended such statements strongly, arguing that just because they could cause violence, that did not exclude them from a healthy public discourse. So, when the statements again Jews were said to do the same, antisemites like Blakeney could tap into a rich vein of existing sentiment against limiting such words.<sup>514</sup> When the question of whether to prosecute Ratcliffe in England arose, Attorney General Sir Donald Somervell wrote that the mere possibility of violence as a result of speech was plainly insufficient to constitute an offence, even during the war. “Party strife in times of acute controversy, attacks on landlords, or Roman Catholicism, on employers or bankers, and, in the old days, almost every Home Rule speech made on the wrongs of Ireland, might be said to have been intended to promote ill will and hostility.”<sup>515</sup> Additionally, Somervell agreed with Blakeney that the lack of a justification defence in seditious libel prosecutions created a further opening for fascists to argue they were being silenced: Government lawyers could “easily be put into a very unfavourable position if they seek to rule out evidence and the defence is able to say, The prosecution know this is true but are asking you to state that it is seditious and a crime.”<sup>516</sup> Not all government officials shared this position, hence the eventual decision to prosecute Ratcliffe. Sir Oscar Dowson at the Home Office wrote that the wartime environment should lead the government to act more strongly than it might otherwise. He wrote in his memorandum on the case that

the fact that there is no violence or disorder does not mean that no disturbance to the State can result from the persistent persecution of a particular class of quiet and law-abiding citizens by a campaign of outrageous allegations. Such publications, if repeated

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<sup>514</sup> Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’; Jon Lawrence, ‘The Transformation of British Public Politics After the First World War’, *Past & Present* 190, no. 1 (1 February 2006): 185–216, <https://doi.org/10.1093/pastj/gtj002>.

<sup>515</sup> Hilliard, ‘Words That Disturb the State’.

<sup>516</sup> *Ibid.*

over and over again, have (as in the case of advertisements) some effect on the minds of even perfectly rational people and this produces exactly the result against which this branch of the law of seditious libel was aimed – the exciting of ill-will between one class and another and, as a consequence of this, the disturbance of the government.<sup>517</sup>

Had Dowson's opinion won out more often, British Jews would likely have had fewer complaints about seditious libel's limits. But in most circumstances Somervell's view prevailed. The desire to maintain a semblance of liberty – at least when it came to the question of protecting specific minority groups – was a powerful argument. It summoned a long intellectual tradition, as well as a probable lack of love for Jews among officials. But even for those in the government more inclined to see the dangers of antisemitism, officials like Somervell could argue that such legal rationales could easily be applied to against a large and diverse group of political causes, with at least one of which his opponents likely agreed. This background, with which Laski was undoubtedly familiar, makes clear why, when asked by Brotman about the possibility of a carved-out group libel bill during the war, he had one word for the idea: "hopeless."<sup>518</sup> Yet, once again, the story of group libel and the Board was not yet over.

### **Endorsing Group Libel**

During the summer of 1944, increasing agitation within the Jewish community led the Board to appoint another group libel committee, chaired by Diamond. In a later Board memorandum summarizing the process, B. B. Lieberman, who served on the committee, wrote that the decision was made because, while the Board's previous rejections of group libel were unanimous, "the Community on the whole was not satisfied, and justifiably so, in view of the increasing vigour of

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<sup>517</sup> Ibid.

<sup>518</sup> Letters between A.G. Brotman and Neville Laski, February 1942, Board of Deputies Collection, ACC/3121/C4, LMA.

the attacks on the Community made by the various Fascist organisations.”<sup>519</sup> Lieberman also suggested another reason the Board set up the new committee in 1944 – not just its concern about community sentiment, but also concern about the NCCL’s increasing interest in the issue. The Board was wary of the idea that any organisation, even if it was not Jewish, would take up the cause of group libel on British Jews’ behalf. The 1944 committee was the first Board group to endorse group libel, and for that reason alone is worth note. But Lieberman’s summary of its conclusions also shows the Board’s assessment of the political climate during the war. The report, presented in July 1944, “was on the whole more favourably inclined and indeed suggested that there might be an amendment in the Criminal Law, to include Community Libel as an offence. At the same time, the Committee was of the opinion that there was no chance of such a bill being passed by the Legislature and they were very doubtful even if such a bill were passed that it would be effective in preventing the oral dissemination of anti-Semitic propaganda, for the Committee was of the general opinion that the repute of the Community could only be enhanced and protected by public opinion, and not by legislation.”<sup>520</sup> The Board, and particularly the group of lawyers on the 1944 committee, still rejected the idea of legislative solutions to antisemitism. Laski led this circle, joined by Webber, Diamond, Salomon, and Brotman. Laski and Salomon’s later correspondence suggests that, by 1944, their opposition grew more from their belief in its political and legal infeasibility than from disagreement with its substance. Laski consistently expressed the most pessimistic view of any Board official about the chance of group libel becoming law; he was also the most experienced barrister of the group and no stranger to institutional politics.

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<sup>519</sup> Note on Community Libel, May 24, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA, 1.

<sup>520</sup> Ibid., 3.

A minority of the other members of the 1944 committee, who were not in Laski's circle, remained unhappy with its decision against seeking new legislation in Parliament.<sup>521</sup> As Salomon would write in 1945, given the repeated cycles of consideration, agitation, and reconsideration, the Defence Committee and Board were keen for "the Community to feel that we on our part have left nothing undone."<sup>522</sup> Its members wanted to ensure that the Jewish community perceived it as taking the matter of antisemitic defamation seriously. As a result, even after the 1944 committee ended its work, Salomon and the Board's defence officials set up a standing committee with many (although not all) of the same members that would "stand by" and wait for an indication from the government that the Porter Committee intended to resume its work as the end of the war in Europe came increasingly into view.<sup>523</sup> Lieberman, rather than Diamond, chaired this committee, which soon received the news for which the Board was waiting.

On May 7, 1945, the day before V.E. Day, Salomon wrote to Laski about a report in *The Times* that Lord Porter intended his committee to resume work. It was instantly clear to both men that the Board should prepare to testify, this time recommending group libel rather than remaining equivocal as it had in 1939. The immediacy of Solomon's reaction supports the idea that even previous opponents of group libel within the Board had come to support it by the middle of the war; they were simply waiting for the appropriate chance.

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<sup>521</sup> Ibid.; Letter from F.R. Bienenfeld to Sidney Salomon, May 30, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>522</sup> Letter from Sidney Salomon to Neville Laski, October 19, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>523</sup> In the words of one deputy the Porter "Committee originated from a demand to restrict rather than to extend the existing causes upon which libel actions are founded - a demand engineered by the owners of newspapers." Memorandum from L.J. Hydleman to Standing Sub-committee on Community Libel, June 4, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

After more than 20 years of internal deliberation, the Board of Deputies had decided to support group libel reform. But what exactly did that mean? Group libel, or “community libel” in the Board’s parlance, could encompass a wide variety of legal changes that allowed groups to sue for defamation. Having rejected the idea for so long, the Board’s internal committee suddenly faced the issue of what, exactly, they had come to support. Because the Porter Committee was primarily concerned with technical legal issues, a vague proposal would not succeed. Instead, the Board – mainly Laski, Salomon, and Webber – had to formulate a specific legal measure. The committee spent the spring and summer arguing over what form of group libel Lord Porter and his colleagues would be most likely to endorse. Despite taking place over such a short period, this was in many regards as difficult a task as deciding whether to back group libel had been. (In fact, in the United States, debates over the exact nature of group libel proposals consumed more time than debates over the idea generally – more evidence of American Jewish groups’ overall warmer attitude toward legal mechanisms.)

The Board committee considered two tacks. British courts divided the law of defamation into two parts, civil and criminal. Under the civil offence, private citizens sued for damages; under the criminal one, the state sought a jail sentence for the defendant.<sup>524</sup> It was unclear to the Board’s committee under which umbrella a group libel proposal should fall. Suggesting criminalizing group libel – of which seditious libel was a part – would mean Jews who wanted to bring complaints would have to convince a jury, something which had caused issues in the Leese and Whitehead cases. After bitter experience at that trial, Laski and Webber had little appetite for leaving the question of antisemitic speech up to juries rather than judges. On the other hand, the

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<sup>524</sup> On this distinction, see Mitchell, *The Making of the Modern Law of Defamation*, 8, 29, 47-51.

civil law raised its own issues. The Board was loath to give the impression that Jews sought monetary damages to compensate for antisemitism. Moreover, the bar for bringing civil charges was lower, meaning that any British Jew might be able to bring a case of the community's behalf. Neither option was perfect; in the end, most of the committee preferred the Scylla of criminal libel to the Charybdis of civil libel. This suggested the persistence of the Board's reluctance toward the whole enterprise of banning antisemitic speech. Laski and Webber were not actually convinced that Jews could win jury trials in Britain – if anything, they felt Jews were likely to lose. But they were more worried about the perception that Jews sought financial gain than about crafting an actually practicable legal reform. Even after nominally endorsing group libel, the Board saw it more as a deterrent than as an actual remedy for antisemitic speech. The very existence of the law would be a comfort rather than a real tool. Laski, never friendly to the whole idea of group libel, wrote of the draft proposal to the Porter Committee that “the discard of a civil remedy and the suggestion of a criminal sanction is a practicable approach, which has in light of the lessons we have all learnt in these long years of tragedy a real chance of sympathetic consideration.”<sup>525</sup> Webber, the other lawyer who had dismissed the idea of group libel since 1934, likewise wrote that “it demands, and will no doubt receive, serious consideration before the Porter Committee.”<sup>526</sup>

The Standing Committee and Defence Committee also agonized over how much to foreground the danger of antisemitism in their proposal. The draft report included a long section about the danger antisemitic speech posed to British society at large, particularly after the war. But not

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<sup>525</sup> Letter from Neville Laski to Sidney Salomon, May 20, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>526</sup> Letter from George Webber to Sidney Salomon, May 31, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

every member of the committee thought such context would convince the Porter Committee. Deputy Harry Samuels wrote that all references to Russia should be omitted, lest they raise the spectre of Jewish association with communism.<sup>527</sup> Samuels added that every reference to Jewish suffering specifically needed to be placed in terms of how it harmed non-Jews. In a section about the role of defamatory speech in Hitler's rise, "greater emphasis should be laid on the fact that defamation against Jews was both in his rise to power + during his regime deliberately used as the most effective means of carrying out his policy."<sup>528</sup> F.R. Bienenfeld, another member of the committee, shared similar concerns.<sup>529</sup> "It seems highly improbable if not impossible that the Committee as a legal body will discuss such political questions" as antisemitism, he wrote.<sup>530</sup> Instead of presenting group libel as a measure grounded in the unique historical threat of fascism, it should be couched as a longstanding gap in the law. "The letter to be sent to the Porter Committee should start, without any further introduction, from the point that it is a shortcoming of the present law that groups, especially religious and racial groups, can be publicly offended without any possibility on their part to defend their numbers."<sup>531</sup> The "man in the street" would be more likely to support the idea of patching up the law than of passing

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<sup>527</sup> Letter from Harry Samuels to Sidney Salomon, May 30, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>528</sup> Ibid.

<sup>529</sup> Bienenfeld was a venerable Viennese lawyer who had fled Austria to Zurich and then to London. He often argued with other members of the Standing Committee, favouring civil rather than criminal remedies. See *AJR Information*, Association of Jewish Refugees, September 1956, 8. He was also heavily involved with the British Section of the World Jewish Congress, that thorn in the Board of Deputies' side. He later authored a pamphlet on group libel for the WJC with a fellow Austrian émigré, Paul Weis, expressing his views. See Paul Weis and F.R. Bienenfeld, *Protection Against Group Defamation: Present Law and Its Extension* (World Jewish Congress British Section, 1944). He also sought to prompt the WJC to make its own representation to the Porter Committee, reflecting his position that a criminal libel remedy was preferable. This enraged the Board, which castigated the WJC for interfering in matters, with Salomon writing to Board President Selig Brodetsky that "there was considerable resentment expressed at this announcement" at a meeting of the Standing Committee "as it is obviously a subject that affects Anglo-Jewry alone." Note to Selig Brodetsky, August 3, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>530</sup> Letter from F.R. Bienenfeld to Sidney Salomon, May 30, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>531</sup> Ibid.

measures designed to help Jews fight antisemitism. He “will never understand that a Jew who is reproached for having committed a ritual murder would be able to prosecute by civil action of libel, whilst the statement that all Jews are prepared to commit such a murder is not actionable by any person.”<sup>532</sup> The idea of a “gap” to be filled rather than a radical change likewise arose in committee member L. J. Hydleman’s comments on the report. Hydleman wrote that he was “strongly in favour of our adopting the attitude that the law does not necessarily require actual altering for our purpose but that experience shows there is a ‘gap’ or ‘looseness’ which is allowing anti-semites to spread mischief contrary to public interest and intentions.”<sup>533</sup>

Despite Hydleman’s concerns, in May 1945 the Standing Committee was more convinced than ever before that group libel might actually be possible. By July, the Defence Committee officially endorsed the proposed presentation, voting in favour by 13 votes to three. All that remained was to sway the Porter Committee. This proved a difficult task.

### **Before the Porter Committee**

To Salomon, the Defence Committee secretary, it was obvious who should make the Board’s case: Laski, the most prominent barrister involved in the Board and its former president, who wrote in May that he was “of course prepared to appear” before the committee.<sup>534</sup> He went with several of his longtime Board colleagues: Gordon Liverman, the Board’s treasurer, Lieberman,

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<sup>532</sup> Ibid.

<sup>533</sup> Memorandum from L.J. Hydleman to Standing Sub-committee on Community Libel, June 4, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>534</sup> Letter from Neville Laski to Sidney Salomon, May 13, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

the chair of the Community Libel subcommittee, Brotman, the Board's secretary, and Salomon.<sup>535</sup>

When they went before the committee at long last on September 27, 1945, Laski and the Board officials met a group that had probably scarcely thought about group libel. It was certainly not their main interest in the law of defamation – as the Board officials well knew, the Porter Committee had been set up at the urging of the press barons who were concerned about the profusion of libel suits they faced.<sup>536</sup> Porter's compatriots included Birkett, that same year an alternate judge at Nuremberg, the author and free speech advocate E.M. Forster, the journalist F.J. Mansfield, and others.<sup>537</sup> Their central focus was plainly the effect of defamation law on the press rather than antisemitism. Nonetheless, they gave the Board a sympathetic hearing.

In making its case, the Board sought to depict group libel as both the natural solution to the intractable issue of antisemitic speech and as anything but a step away from the tradition of British free speech. Group libel could not be so radical if the Board, a reasonable institution with which the government had long worked, was advocating for it. When introducing its testimony to the Porter Committee in 1945, the Board began by defining itself as “the representative body of Anglo-Jewry...and the statutory authority recognised by the Government in various matters regulating the affairs of the Anglo-Jewish community.”<sup>538</sup> From even this brief statement several

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<sup>535</sup> Transcript of Board of Deputies Presentation before Porter Committee on the Law of Defamation, September 27, 1945, Jewish Defence Committee Records, 1658/7/3/2/41, Wiener Holocaust Library, London, 10.

<sup>536</sup> “Committee on the Law of Defamation: Minutes of Evidence,” July 19, 1939, E.M. Forster Papers, 32/1/C, King's College, Cambridge, England, 447, via Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’, 764.

<sup>537</sup> Transcript of Board of Deputies Presentation before Porter Committee on the Law of Defamation, September 27, 1945, 9.

<sup>538</sup> Memorandum and Oral Evidence presented by the Board of Deputies of British Jews before Porter Committee on the Law of Defamation, September 15, 1945, Jewish Defence Committee Records, 1658/7/3/2/34, WHC.

aspects of the Board's reasons for continuing to pursue group libel from 1939 onward become clear. The Board defined Englishness and Jewishness as equally important to its identity; to the extent that the Board worried about who its constituents were, those worries were often expressed in terms of Jewish immigrants failing to be sufficiently English rather than its community failing to be sufficiently Jewish.<sup>539</sup> The Board also relied heavily on external validation of its authority. When Liverman – who delivered the above remark to the Porter Committee – noted that the Government recognised the Board's authority, he was drawing out an important part of its self-image. During political struggles such as that over the Aliens Act, the Board strained to compete with Jewish immigrant activist groups and friendly societies.<sup>540</sup> Even before the two World Wars, the Board did not have a monopoly on political power within Anglo-Jewry. It could and did, however, carve out a niche as a Jewish group that was palatable to non-Jewish elites.

These dynamics placed additional importance for Board officials on interactions like those with the Porter Committee. Being viewed by non-Jewish power brokers as “reasonable” was core to the Board's self-image as a body that would both represent Jewish interests and improve the image of British Jews held by the population at large. Moreover, Board officials felt that without cooperation from the government, the Anglo-Jewish community could not fight antisemitism's spread. To that end, when Board officials went before the Porter Committee in September 1945, they claimed confidently to speak for the entire British Jewish community. That claim was itself part of the Board's strategy, a posture which would both allow government officials to take their

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<sup>539</sup> Langham, *250 Years of Convention and Contention*, 151.

<sup>540</sup> David Feldman, “Jews and the British Empire, c. 1900,” *History Workshop Journal* 63 (2007): 70–89; Lloyd P. Gartner, *The Jewish Immigrant in England, 1870-1914*, (Wayne State University Press, 1960).

lobbying seriously, address internal complaints about the Board's response to antisemitism, and put a respectable face on the Jewish community to sceptical outsiders. As the Board made its presentation calling for the enactment of a group libel provision, it was arguing not just in favour of that law, but in favour of its own outlook on the place of Jews in British society.

Lord Porter himself was probably the member of the committee who received the idea of group libel most warmly. For several of the other members, however, it was a strange idea that would warp what they viewed as essential parts of British tradition. One major difference in Laski's and the Committee's view was the evidence on which they relied. Repeatedly, Laski brought up actual examples in which the existing law had failed – first and foremost the Leese prosecution for seditious libel, but also the many antisemitic statements which had never led to a prosecution:

If I may say so, in the cool atmosphere of this room one's appreciation of the position is nothing like as effective as it is when one lives in these conditions. Of course, I have been a little removed from them since 1940 and I have only seen the high-lights, but I do desire to say – and I hope you will trust me – that during the whole of the 7 years that I was President some offensive incident came daily to my notice. These people had no check upon them at all; little presses sprang up all over the country to such an extent that in quite harmless quarters if you told people that Jews had tails they would believe it: You have to live in it to appreciate it. I am not saying that that is an argument for legislation, I am only saying it is one of the provoking things that bring us here.<sup>541</sup>

But where Laski invoked Jews' actual experience, the Committee responded with hypotheticals. The Board's proposal suggested criminalizing libels against bodies of people "distinguishable by race, creed, or colour."<sup>542</sup> Did that apply to the Church of England? What about Mosley's BUF itself – were its members not distinguishable by race and creed? What about Jehovah's

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<sup>541</sup> Transcript of Board of Deputies Presentation before Porter Committee on the Law of Defamation, September 27, 1945, 13-14.

<sup>542</sup> Ibid., 14.

Witnesses? Methodists and Mormons? The Nazis?<sup>543</sup> Birkett, a Methodist priest in addition to being a judge, said that

As one who has been brought up in Methodism, I have been interested to read the attacks which Sydney Smith made upon Methodism in an amusing way. The national life would lose a great deal if you cut out all that sort of thing. What you want is not protection against ridicule or criticism, to which everybody is subject, but this intolerable wrong which is striking at the very public order and public life. I think what you are seeking is a very special protection against something which has arisen in the last few years and to which nobody ought to be subject?<sup>544</sup>

The various comparisons raised by the Committee showed the difficulties of the Board's position. On one hand, it could not claim that it wanted special protection for Jews. On the other, asking for protection for broader communities led to comparisons which bore little similarity to the position British Jews had faced in the 1930s. Finding the exact line of what speech was acceptable and what was not proved difficult as the Board made its case. Lieberman summarized the Board's case by saying that "if you call all Jews murderers, bloodsuckers, people who ought to be exterminated, that should be an offence, but as the law stands you cannot do anything about it."<sup>545</sup> It was not just the content of the speech in question but its repetition, over and over, cementing the negative view of Jews: "supposing book after book were written calling Welshmen thieves, defaming the whole community time after time, we should call it an offence."<sup>546</sup> But the committee refused this idea; it believed libel was designed to target a single act of speech rather than a campaign.

After answering the committee's questions, the Board's officials had a variety of reactions.

Hydleman said that "whatever the outcome, and I think it will be hopeful – I consider we have

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<sup>543</sup> Ibid., 14-23.

<sup>544</sup> Ibid., 23.

<sup>545</sup> Ibid., 24.

<sup>546</sup> Ibid.

made an excellent job of this so far.”<sup>547</sup> The Standing Committee’s internal memorandum on its presentation to Porter first summarized the hearing given to the Board as of “a most sympathetic character,” but this statement was revised in a later version to state that “the Committee showed a sympathetic interest and understanding of the problems raised.”<sup>548</sup> But tellingly Laski himself, who had the most experience with the government and in hearings, was pessimistic. He wrote in October that he did not “think the Committee intend to make any positive recommendation.”<sup>549</sup> For a few weeks after the presentation, the Board considered whether it should revise its proposal to address some of the Porter Committee’s concerns. Laski felt even this would not lead to a positive outcome; Lieberman wrote that Laski should draft a revised submission anyway. “He want[ed] the Community to feel that we on our part have left nothing undone in the way of approaching H.M. Government on this matter.”<sup>550</sup> The Board’s actions from 1944 onward were as much about placating concerns within the Jewish community as winning actual legal changes. Everything had to be done, if not because of the chance of success, then because many of the Board’s constituents demanded it.

### **‘A Chance of Approval’**

The Porter Committee’s verdict took longer to arrive than the Board or the committee itself could have expected. After the presentations in the fall of 1945, the Committee took three years

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<sup>547</sup> Letter from L.J. Hydleman to Sidney Salomon, December 6, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>548</sup> Draft of Memorandum on Presentation to Porter Committee, October 11, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA; Memorandum on Presentation to Porter Committee, October 16, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>549</sup> Letter from Neville Laski to Sidney Salomon, October 17, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>550</sup> Letter from Sidney Salomon to Neville Laski, October 19, 1945, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

to release its recommendations for legislative reform. Occasionally during that period the Board made inquiries about when they might expect an update; Salomon wrote to MP John Platts-Mills in November 1947 that “the delay seems incredible. Let us hope that when [the report] is produced, it will be worthwhile.”<sup>551</sup> In the intervening years, the Board did not merely sit on its hands and wait – if anything, it became more committed to legal solutions during this period than ever before or since. It sought to seize upon wider postwar concerns about the prevalence of fascism, concerns which led the Attlee government to establish a Committee on Fascism made up of several Cabinet officials at the end of 1945.<sup>552</sup> Where the Porter Committee had been indifferent to group libel, the fascism committee was interested in its possibilities. In 1946, Home Secretary James Chuter Ede asked the Board of Deputies for a copy of its presentation to the Porter Committee as part of a wide-ranging review of what might be done to limit fascist speech.<sup>553</sup>

In early 1946, Ede asked several Home Office officials to review the case law of seditious libel with an eye toward fighting domestic fascism. The Home Office considered two main paths. First, it could pursue legal changes such as those the Board advocated – hence why Ede requested the Board’s memorandum. Second, it could try yet another test case. They chose this second path, ending yet another legislative chance for group libel in the United Kingdom. Ede and his colleagues had free speech concerns about group libel, to be sure, but their actual reason for not pursuing legislative reform was a fear that even raising the issue in Parliament would

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<sup>551</sup> Letter from Sidney Salomon to John Platts-Mills, MP, 1947, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

<sup>552</sup> Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’, 775.

<sup>553</sup> Letter from Sidney Salomon to Kenneth Diplock, June 19, 1948, Board of Deputies Collection, ACC/3121/C4/3/1, LMA.

draw attention to the wide remit the common law currently gave governments to prosecute seditious libel. As the Home Office's internal memorandum noted, the existing law armed "the Government with wide powers, but those powers cannot in practice be used unless the jury is convinced that their use is really necessary for the preservation of public order. Therefore, the greater the danger to public order becomes, the wider are the Government's powers for suppressing seditious activities: the more tranquil or stable the country is the less use can in practice be made by the Government of these wide powers."<sup>554</sup>

After decades of debate, the Leese and Ratcliffe cases, a world war, and a Holocaust, those debating libel reform still argued over a set of crucial questions. Foremost among them was the sufficiency of existing libel laws. To those against libel reform and what would eventually be called "hate speech" laws, it was a tool that could be used in extreme cases where an actual breach of the peace occurred. The goal of speech regulation, under this view, was only to prevent social disorder which affected the broader public. Harm to specific, smaller communities, not to mention words which affected the social situation but did not spill into violent action, were regrettable but not a matter for the law. To group libel's proponents, which by 1945 included much of the British Jewish establishment, preventative legal measures were necessary. The risk of speech to their well-being existed well before it turned into action; existing measures had proved mixed at best. In 1947, as it waited for the Porter Committee and the Committee on Fascism's verdicts, the Defence Committee circulated an internal note pointing out that "there has been for some time past, within the Community, a growing demand that the Government

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<sup>554</sup> "Cabinet: Committee on Fascism: Memorandum by the Home Secretary," 1946, Home Office Records, HO 45/25588, TNA, via Hilliard, 'Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s', 776.

should legislate against anti-Semitism. A Law which would condemn racial hatred, dissemination of propaganda against any particular race or creed, and against all movements calculated to undermine national morale and common decency, would have a chance of approval.”<sup>555</sup>

The Home Office disagreed. It preferred to try the courts rather than the House of Commons. As reactions to the Leese and Ratcliffe cases demonstrated, at the heart of these disagreements were the divergent interpretations of the actual seditious libel cases the government had brought against fascists. To the Board of Deputies, the Leese and Ratcliffe cases had been failures. Leese had been acquitted on several major charges and had used his brief prison sentence to propagandize against Jews. The government, on Somervell and the Solicitor General’s advice, had eventually decided not to prosecute Ratcliffe, in part owing to the issue of jurisdiction.<sup>556</sup> To fascists themselves but also to those in the government, Leese’s case had been a relative success; the government had been able to send him to prison and, shortly thereafter, to wartime internment.<sup>557</sup> After the war, when the Attlee government had come into power, the new Cabinet felt it was time to try a test case once more. The Committee on Fascism framed the issue as one of national interest rather than protecting minority groups – antisemitism, particularly in the British military, could easily spill into fascism.<sup>558</sup> Lord Chancellor William Jowitt even wrote that the situation necessitated a potential “departure from the established liberal tradition of

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<sup>555</sup> “Note on Anti-Semitism from the Legal Angle,” January 30, 1947, Board of Deputies Collection, ACC/3121/C4/3/4, LMA.

<sup>556</sup> *The Scotsman*, April 23, 1943. For more on the BUF in Scotland, see Henry Maitles, ‘Blackshirts Across The Border: The British Union Of Fascists In Scotland’, *The Scottish Historical Review* 82, no. 1 (2003): 92–100, <https://doi.org/10.3366/shr.2003.82.1.92>.

<sup>557</sup> See, e.g., Griffiths, *Fellow Travellers of the Right*.

<sup>558</sup> Hilliard, ‘Words That Disturb the State’.

freedom of speech.”<sup>559</sup> In order to bring a new case, the government would have to break from Somervell’s idea that seditious libel had to cause actual disorder – an endorsement of the prophylactic approach to speech regulation. The Home Office civil servant Sir Frank Newsam went as far as to say that “Fascism or Nazism in this country has no future unless it can stir up hatred against certain sections of the community.”<sup>560, 561</sup> In theory these two ideas, when combined, formed the intellectual basis for group libel: the need for preventative measures and the recognition of the need to protect specific communities within British society via the law. However, group libel also required a third acknowledgement – that the existing law could not accomplish those tasks. The Board’s key members regarding the law, Laski and Webber, did not share Newsam’s belief that the common law could be interpreted to allow for preventative seditious libel prosecutions. The Leese result was proof that it could not. But because some in the Attlee government did not see the Leese and Ratcliffe cases as failures, the Home Office and Attorney General decided to try a seditious libel prosecution once more. In 1948, they finally settled on a target: James Caunt.

Caunt’s case is typically remembered by historians as part of domestic backlash to the actions of Jewish militias in Mandatory Palestine. The writings which eventually formed the basis of the libel case against Caunt criticized British Jews as complicit in the hanging of two British prisoners by the Irgun. Caunt wrote that British and American Jews should “disgorge their ill-gotten wealth in trying to dissuade their brothers in the United States from pouring out dollars to

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<sup>559</sup> Minutes of Committee on Fascism, January 3 and 25, 1946, Home Office Records, HO 45/25588, TNA, in Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’.

<sup>560</sup> Note from Oscar Dowson to Frank Newsam, January 25, 1946, Home Office Records, HO 45/25588, TNA.

<sup>561</sup> Richard C. Thurlow, *Fascism in Britain: From Oswald Mosley’s Blackshirts to the National Front* (Tauris, 2009), 204-5. See also Dave Renton, *Fascism, Anti-Fascism, and Britain in the 1940s*, (Macmillan, 2000), 73-74.

facilitate the entrance into Palestine of European Jewish scum, a proportion of whom will swell the ranks of the terrorist organisation and thus carry on the murderous work which British Jewry professes to abhor.”<sup>562</sup> Initial proceedings against Caunt began in October 1947 in Morecambe, where he had published his incendiary leader. The Board sent Laski and Webber to observe it against the wishes of the prosecutor, Denis Gerrard, who believed their presence might undermine his case by suggesting Jewish influence on the government’s decision to bring charges.<sup>563</sup> Still, he was able to make the case for a jury trial to be held in Liverpool.

As Hillard points out in his account of the case, despite the shift in interpretation advanced by Newsam and the Committee on Fascism, Gerrard’s arguments were based in interpretations of the common law of seditious libel similar to Somervell’s. He said that, regardless of whether Caunt’s statements were true, he had intended them to cause readers to harm Jews. In the pretrial proceedings he had suggested he might argue that, regardless of intent, Caunt’s statements were objectively seditious, but by the time of the trial itself Gerrard retreated to safer legal ground. Laski noted ruefully that, in doing so, he had “committed himself to an interpretation of the law which placed a very heavy burden on the Prosecution.”<sup>564</sup> He had also diverged from the legal ideas which had spurred the Committee on Fascism to suggest bringing the test case against Caunt in the first place. In a post-mortem of the case, which ended in Caunt’s acquittal<sup>565</sup>, another Home Office official wondered why Gerrard abandoned his and the government’s initial

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<sup>562</sup> “Mustard,” *Morecambe and Heysham Visitor*, August 6, 1947, in James Caunt, *An Editor on Trial* (Morecambe Press, 1947).

<sup>563</sup> Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’, 780.

<sup>564</sup> “Rex v. Caunt,” Home Office Records, HO 45/25588, TNA, in Hilliard, ‘Words That Disturb the State’. For additional information on the case and reactions to it, see James Sunderland, ‘When Terror Works: The Case of Jewish Terrorism in Mandate Palestine, 1944-1948,’ Ph.D. diss., (University of Oxford, 2024), 199–203.

<sup>565</sup> “Groups in Britain Ask Government Action to Strengthen Anti-fascist Legislation,” *Jewish Telegraphic Agency*, November 24, 1947.

argument that Caunt's words were seditious regardless of his intent. He concluded that Gerrard simply misread the jury. The Board's reading was different – rather than just a prosecutorial misfire, the Caunt case was proof, yet again, that seditious libel (and existing law) would never work against antisemites. Even for sceptics such as Laski, it fuelled the desire to effect change in Parliament.

Despite the highly public failure of the Caunt case, officials still cited seditious libel as a means to protect British society from its most dangerous elements. At a time when the results of letting fascism go unchecked were clear, what can explain their belief that the status quo was enough? They often admitted to each other that sedition was near impossible to prove while citing it as sufficient to groups like the Board who sought legal reforms. Privately more candid, those serving in both Conservative and Labour governments believed nonlegal societal norms, rather than legal measures, would stop the growth of British fascism. Fundamentally it was not just group libel in which they did not believe, but rather the entire project of using legal means to bound the outer edges of acceptable speech. That would later change, as Chapter VI will demonstrate, albeit too late for group libel.

### **'As Much Protection as Can Safely Be Given'**

Throughout 1946, 1947, and 1948, the Board waited anxiously for the Porter Committee's report. At times, its officials wondered if it was simply not part of the national character to take pre-emptive action. Having spent a decade leading the Board's defence efforts, Salomon wrote in 1946 that "there is, as you know, a certain trait in the English character which is commendable, but also dangerous. We are too ready to sympathise and find excuses for an opponent whom we

have defeated.”<sup>566</sup> He cited the government’s decision to release Mosley from internment – which he had only entered in 1940 – on medical grounds as an example of this sympathy for one’s adversaries. In 1948, the Board released a report on antisemitism ruefully summarizing the lessons of the Caunt failure, writing that juries would probably never be friends to British Jews.<sup>567</sup>

These gloomy statements presaged the Porter Committee’s verdict, which arrived in October 1948. It rejected reform to criminalise “community libel” outright. In its report, the Porter Committee made the connection between the concept of group defamation and British Jews explicit, taking as fact the Board’s reports of antisemitic activity. It wrote that various groups had brought to its attention a “considerable body of evidence” dealing with “what may conveniently be described as Group Defamation.”<sup>568</sup> The most “widespread and deplorable” examples of defamatory conduct against whole groups brought before the committee “were directed against the Jews; but complaints were also made to us of unfounded vilification of particular trades,” the report added.<sup>569</sup> Notably, the Porter Committee and the Board of Deputies differed in the term they used to refer to legal proposals which would expand civil libel to cover insults against bodies of people. In its own work, including the subcommittee which oversaw lobbying efforts in front of the Porter group, the Board always termed its proposed expansion one that would cover “community libel.” The legal difference between written libel, spoken slander, and the overarching category of defamation often confused interested parties. In fact, owing to popular

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<sup>566</sup> Sidney Salomon, “Anti-Semitism in Great Britain: A Survey,” February 1946, Board of Deputies Collection, ACC/3121/C4/7/1, LMA, 4.

<sup>567</sup> “Legislation Against Fascism,” March 18, 1948, Board of Deputies Collection, ACC/3121/C4/5, LMA.

<sup>568</sup> Report of the Committee on the Law of Defamation, Lord Chancellor’s Office Records, LCO 2/4858, LMA, 11-12.

<sup>569</sup> Ibid.

lack of understanding of the terms, the Porter Committee and government officials would spend years wondering whether to end any existing legal distinctions between libel and slander, collapsing them either under the term libel or defamation (as was already the case in Scotland).<sup>570</sup> But the difference between a “group” and a “community” deserves additional attention. It suggests that the Porter Committee and the Board of Deputies had very different attitudes when it came to the nature of insults against collectives, differences which were at the heart of the Board’s advocacy and the committee’s ultimate rejection.

For the committee, however, collapsing the distinction between one and many people was a far stranger idea. Porter and his colleagues were not accustomed to accounting for a “community” in the law, choosing instead to deal with the concept of a “group,” a framework which allowed them to equate British Jews and members of certain trades in their legal analysis. To wit, the Porter report rejected the group libel proposals, writing that “much as we deplore all provocation to hatred or contempt for bodies or groups of persons with its attendant incitement to violence, we cannot fail to be impressed by the danger of curtailing free and frank – albeit, hot and hasty – political discussion and criticism.”<sup>571</sup> In the committee’s view, the group libel proposals would invariably have prohibited “perfectly proper criticisms of particular groups or classes of persons.”<sup>572</sup> While the report allowed that the insults about which the Board complained were “widespread and deplorable,” its authors believed that the criminal tort of seditious libel was the

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<sup>570</sup> See, e.g., Letter from William Jowitt to Attorney General Hartley Shawcross, February 19, 1949, Lord Chancellor’s Office Collection, LCO 2, TNA: “It is of course true that the distinction between libel and slander is illogical but, broadly speaking, spoken statements are forgotten sooner than written statements. *Litera scripta manet.*”

<sup>571</sup> Report of the Committee on the Law of Defamation, Lord Chancellor’s Office Records, LCO 2/4858, TNA, 11.

<sup>572</sup> *Ibid.*

appropriate sanction and that “the law as it stands affords as much protection as can safely be given.”<sup>573</sup>

### **Free Speech Resurrected**

The Porter Committee had rejected group libel on technical grounds. Even more consequentially, perhaps, the postwar moment of willingness to prosecute fascist speech had also passed. Where in 1946 the Home Office officials had debated possible limits on free speech in service of national wellbeing, they had moved on. In February 1949, Jowitt and Attorney General Hartley Shawcross (later the head of the second Royal Commission on the Press) exchanged a series of instructive letters on the matter. In draft remarks prepared for a meeting of Cabinet officials, Shawcross wrote that “it used to be thought that to stir up hatred in that way constituted the offence of sedition but recent decisions have suggested that the utterances complained of must be calculated to create a breach of the Peace. That is difficult to establish.”<sup>574</sup> But Shawcross opposed legislation to correct the issue, whether dealing with civil or criminal libel, believing that if “a proper sense of responsibility is exercised” such action would be unnecessary. He added that “to stir up dissatisfaction and ill will between different classes simply on grounds of race, colour or religion is an offence against the interest of the country. That ought to be sufficient without making it an offence against the law.”<sup>575</sup> Jowitt was less sure that legislation would be unnecessary, although he felt it should concern seditious libel rather than civil libel, fearing that members of minority groups like British Jews would use any change to the latter to

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<sup>573</sup> Ibid., 12.

<sup>574</sup> Hartley Shawcross, “LIBEL,” Memorandum to Cabinet, February 1949, Lord Chancellor’s Office Collection, LCO 2, TNA, 4.

<sup>575</sup> Ibid.

enrich themselves. He replied to Shawcross before the Cabinet meeting that “if attacks are made, say on the Jews, it is surely wrong that any individual Jew should be able to recover damages. But if this attack is made with the object of stirring up disaffection and ill-will, why should not the writer be punished, altogether apart from the likelihood of a breach of the peace?”<sup>576</sup> Jowitt ultimately agreed with the Porter Committee that British Jews should turn to criminal libel, even writing that he “might just have a word about these matters before I put my paper in” before the Cabinet.<sup>577</sup> Still, there is no evidence that Jowitt did so following his exchange with Shawcross, and criminal libel reform along such lines did not feature in the Defamation Act 1952.<sup>578</sup>

The proposition that these objectionable instances of Jew-hatred should be classed as seditious libel showed that the Board’s wish to represent the British Jewish community before the law was unconvincing to the committee members. Moving antisemitic incidents from the realm of civil to criminal defamation would have shifted the ability to assess whether incidents had caused harm from British Jews themselves to the legal establishment – that is, men like Shawcross and the committee members, many of whom were established barristers.

As Shawcross and Jowitt acknowledged, the Porter Committee’s suggestion that groups like Jews turn to the existing criminal tort of seditious libel was unrealistic. Since their peak during the period of the Star Chamber in the 15<sup>th</sup> through 17<sup>th</sup> centuries, prosecutions for sedition had almost always been brought against people who threatened not a single group of British citizens, but the crown, government, or population as a whole. Even post-1832, after which seditious libel

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<sup>576</sup> Letter from William Jowitt to Hartley Shawcross, February 19, 1949, 2.

<sup>577</sup> Ibid.

<sup>578</sup> Lord Chancellor’s Office Collection, National Archives, Richmond, England.

indictments had become extremely rare<sup>579</sup>, the test for a successful criminal prosecution remained a “breach of Peace,” a bar which Shawcross correctly implied most lawyers would have said anti-Jewish statements did not clear.<sup>580</sup> Jowitt’s implication that criminal prosecutions would take care of the Board’s concerns belied the legal realities British Jews faced. In fact, the Board has previously attempted to encourage the government to explore indicting Mosley and other British fascists with little luck.<sup>581</sup> In the Community Libel Standing Committee records, various members of the Defence Committee often complained that the government consistently refused to enforce the criminal libel laws against antisemites, citing conversations with the Home Office about the matter.<sup>582</sup> Even on the rare occasions in which antisemites were indicted for seditious libel, they were found not guilty. After the failure of the case against Caunt, the Communist Party MP Phil Piratin asked Under-Secretary of State for the Home Department Kenneth Younger “whether, in view of the present legality, as established in the case of *Rex v. Caunt*, of antisemitic statements, he will take steps to revise the law in order to prohibit antisemitic activities of every kind.”<sup>583</sup> Younger replied that he needed to wait for a full transcript of the proceedings. When Platts-Mills and fellow Labour MP Harry Hynd repeated the question one month later, in December 1947, to Ede, he directed them toward the previous response although the transcripts had by then been released.<sup>584</sup> Seditious libel, then, may have been a pretext for legal charges against antisemites in theory, but in practice all parties involved knew it was a weak one.

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<sup>579</sup> The Hon Mr. Justice Ronan Keane et al., *Consultation Paper on the Crime of Libel* (The Law Reform Commission, 1991).

<sup>580</sup> Shawcross, “LIBEL.”

<sup>581</sup> “Community Libel and British Jewry,” 1945, Jewish Defence Committee Records, 1658/7/3/2/32, WHC.

<sup>582</sup> Ibid.

<sup>583</sup> Philip Piratin and Kenneth Younger, HC Deb 20 November 1947, 5<sup>th</sup> ser., vol. 444, cc208W.

<sup>584</sup> John Platts-Mills, Harry Hynd, and James Ede, HC Deb 1 December 1947, 5<sup>th</sup> ser., vol. 445.

While the Porter Committee, Shawcross, and Jowitt all wrote about the seriousness with which they took the Board of Deputies' complaints, each essentially conceded that they viewed other considerations as more important than remedying Jews' concerns. For the committee, the proposal would have curtailed free exercise of speech – what looked objectionable in 1947 (i.e., homegrown fascism) might soon be merely “free and frank – albeit, hot and hasty” political speech.<sup>585</sup> Porter's group considered neither a change to the civil nor the criminal defamation law necessary. Shawcross took a bolder view but believed that British civil society would provide the solution to “ill will” against minority groups. Jowitt believed the law should punish those responsible for inciting racial hatred but favoured changing the bar for criminal libel because civil law would allow “any individual Jew” to recover damages.<sup>586</sup>

The Board was frustrated but clearly sensed the change in attitude toward free speech and defamation reform. In a 1948 memorandum, an unnamed Board official (possibly Salomon) wrote that

the expression ‘freedom of speech’ has become a meaningless fetish, for there is no such thing as absolute freedom. If there were, there would be no reason for a law of libel or slander. The only difficulty has always been to define a ‘Community,’ and it is, therefore, suggested that the definition should be any body or group of persons distinguishable by race, creed or colour. This would satisfy those who regard the Jews as a religious body, those who regard the Jews as a separate nationality, while at the same time it would protect the coloured races.<sup>587</sup>

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<sup>585</sup> Report of the Committee on the Law of Defamation, Lord Chancellor's Office Records, LCO 2/4858, TNA, 11.

<sup>586</sup> It is quite possible Jowitt's comment betrayed an anti-Jewish stereotype of Jews as profit-seekers. That said, he was also writing as Government officials debated how to deal with defamation plaintiffs motivated by financial concerns more broadly. As the Porter Committee report noted, the group was established in 1939 in part to consider complaints about whether “the law and practice of defamation are said to be...too favourable to those who, in colloquial language, may be described as ‘gold-digging’ plaintiffs.” For example, defendants were barred from bringing evidence “that the plaintiff [had] already recovered damages in respect of other libels to the same purport or effect,” allowing so-called “serial plaintiffs” to sue multiple newspapers for printing the same information.

<sup>587</sup> “Legislation Against Fascism,” March 18, 1948, Board of Deputies Collection, ACC/3121/C4/5, LMA, 2.

Salomon echoed these ideas in a letter he wrote about efforts to see whether, instead of banning fascist speech, the government would consider banning fascist meetings: “there never has been an absolute right of freedom of speech, there is indeed no such thing as absolute liberty, for John Stuart Mill has emphasized there can be no real liberty without restraint on those who attempt to attack the liberty of others.”<sup>588</sup>

The Board did not give up on group libel – indeed, its soon-to-be President Barnett Janner had been a staunch proponent of the idea and served on the various Standing Committees considering the issue from 1939. As an MP, against the recommendations of the Porter Committee, Janner attempted to insert group libel into the Defamation Bill which implemented its recommendations. By the time the Commons considered the Bill, the government had changed, possibly offering an opportunity for a change in policy. Such hopes quickly died. The Conservative Attorney General, Sir Lionel Heald, staunchly opposed Janner’s efforts, telling the committee drafting the Bill that while “the Caunt case was most unfortunate, it should be remembered that the Jury were giving consideration to scurrilous statements about Jews at a time when there was a high state of feeling in the country.”<sup>589</sup> Heald, the Home Office, and the Lord Chancellor had “differences of opinion” on the issue, but had ultimately come to the conclusion that there were “no differences of policy” between the new government and previous government on the issue of group libel. As Webber, the author of the Board’s 1934 group libel report, wrote in 1949, “the Porter Committee was representative and liberal, and yet would have no amendment. Nor would the Home Sec., last January. A new agitation now would lead us

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<sup>588</sup> Sidney Salomon, “Anti-Semitism in England,” July 2, 1947, Jewish Defence Committee Records, 1658/7/3/2/63, WHC.

<sup>589</sup> Summary of Proceedings in Standing Committee, March 1952, Board of Deputies Collection, ACC/3121/C4/7/2, LMA.

nowhere and would, indeed, be harmful. All we can do is to see that the present law is effectively carried out.”<sup>590</sup> Group libel, at least in the sense of defamation reform, was over in the United Kingdom.

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<sup>590</sup> Letter from George Webber to Standing Committee, January 19, 1949, Board of Deputies Collection, ACC/3121/C4/3/4, LMA, 2.

### Part III: Anti-Defamation Transformed?

Unlike previous sections, the final two chapters deal with relatively different time periods.

Chapter V, focusing on the United States, follows the immediate aftermath of the AJCo's failure to spur the CCR to support anti-defamation reform as part of its civil rights agenda. Chapter VI, focusing on the United Kingdom, moves forward in time to the 1960s, examining the role of Jews in the shaping of the Race Relations Act. While these two periods may seem more disparate than earlier sections, they allow for comparison of several key questions. First, what was the relationship between Jewish advocates of group libel and the law after the apparent failures in 1948? Second, as Britain and America took up the question of racial discrimination, what was the role of Jews who had thought about related issues of law, belonging, and identity for decades? The inactivity of the Conservative governments of the 1950s on these questions – as well as the increasingly apparent effects of immigration by the last years of that decade – meant that politicians in the U.K. re-examined hate speech later than did the U.S. Congress. But when they did confront the question of racial discrimination and speech, they faced many of the same issues regarding the limits of the law.

The relationship between Jews and civil rights legislation has been the subject of an extensive literature, correctly noting the key role played by Jewish organisations in working with and for African Americans. Murray Friedman termed the 1940s and 1950s the “Jewish phase of the civil rights revolution” in 1981, an interpretation that has shaped the historiography in the decades since.<sup>591</sup> More recently, historians such as Marc Dollinger have re-evaluated Friedman's original contention, finding that even in the “golden age” of Black-Jewish cooperation, the relationship

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<sup>591</sup> Murray Friedman, ‘A New Direction for American Jews’, *Commentary*, December 1981.

was more fraught than typically thought.<sup>592</sup> Eric J. Sundquist's *Strangers in the Land: Blacks, Jews, Post-Holocaust America* is an indispensable text for understanding how African Americans and Jews understood each other in the postwar period, although it focuses more on exploring the relationship through literary representation than it does the law.<sup>593</sup> Other important studies of the period include Hasia Diner's *In the Almost Promised Land: American Jews and Blacks, 1915–1935*, which covers an earlier phase of the relationship, Cheryl Lynn Greenberg's *Troubling the Waters: Black-Jewish Relations in the American Century*, Eric Goldstein's *The Price of Whiteness: Jews, Race, and American Identity*, and Cornel West and Jack Salzman's *Struggles in the Promised Land: Toward a History of Black-Jewish Relations in the United States*.<sup>594</sup> While the idea of a honeymoon between African Americans and Jews has been contested, nearly every historian writing on the subject has agreed that Jews, particularly Jewish lawyers, played a key role in the civil rights movements of the 20<sup>th</sup> century.

However, the intellectual relationship between the earlier debates over group libel and Jewish civil rights advocacy has figured relatively little in this historiography, despite Dollinger's invocation of group rights as a general concept and Greenberg's comparison of Black and Jewish approaches to free speech.<sup>595</sup> Jewish lawyers did not forget their own fierce debates over group

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<sup>592</sup> Marc Dollinger, 'Is It Good for the Jews? Black Power and the 1960s', in *Black Power, Jewish Politics* (New York University Press, 2024), <https://doi.org/10.18574/nyu/9781479826988.003.0005>.

<sup>593</sup> Eric J. Sundquist, *Strangers in the Land: Blacks, Jews, Post-Holocaust America* (Harvard University Press, 2009).

<sup>594</sup> Hasia R. Diner, *In the Almost Promised Land: American Jews and Blacks, 1915-1935*, Johns Hopkins paperbacks ed (Johns Hopkins University Press, 1995); Cheryl Lynn Greenberg, *Troubling the Waters: Black-Jewish Relations in the American Century* (Princeton University Press, 2010); Eric L. Goldstein, *The Price of Whiteness: Jews, Race, and American Identity* (Princeton University Press, 2008); Jack Salzman and Cornel West, eds., *Struggles in the Promised Land: Toward a History of Black-Jewish Relations in the United States* (Oxford University Press, 1997).

<sup>595</sup> Marc Dollinger, *Quest for Inclusion: Jews and Liberalism in Modern America* (Princeton University Press, 2000); Cheryl Lynn Greenberg, 'Civil Rights, Free Speech, and Group Libel', in *Minority Relations* (University Press of Mississippi, 2016), 65–101, <https://doi.org/10.14325/mississippi/9781496810458.003.0003>.

rights when considering the rights of other groups. Nor was the fight over African Americans' civil rights unrelated to the decision to finally abandon group libel. In examining the relationship between Jewish advocacy for civil rights in the 1950s and Jewish advocacy for group libel, this section hopes to show that Jewish groups' abandonment of group rights was in part *because* the civil rights coalition, especially African American groups, sought an individual rights-based approach. Such dynamics were not new to the early 1950s. Jews had fought against Jim Crow since the early 20<sup>th</sup> century (including Marshall and the ADL). As earlier chapters have shown, individual rights had also been the preferred approach of many Jewish groups and non-Jewish groups staffed by Jews such as the ACLU. But the push for the Civil Rights Acts in the late 1940s and early 1950s sharpened these debates. They forced the last remaining holdouts in favor of group libel, first and foremost Maslow and the AJCo's CLSA, to choose between their coalitional allies and their commitment to the idea.

The usual explanation for American Jews' wholesale abandonment of group libel by 1960 was that they felt McCarthyistic suppression of speech was a greater threat than antisemitic hate speech. But the AJCo, the central body advocating group libel in the 1940s, formally abandoned group libel several years after the peak of the Second Red Scare. McCarthyism and communism alone, though important, do not explain its changing policy. A second somewhat misunderstood dynamic is Jewish groups' relationship to the Supreme Court's verdict in favor of group libel. Barbas and Schultz's accounts note the non-reaction of Jewish groups to the 1952 majority opinion authored by Justice Felix Frankfurter in *Beauharnais v. Illinois* ruling that group libel laws were constitutional.<sup>596</sup> But for seasoned court-watchers like Maslow, the minority opinions

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<sup>596</sup> Barbas, 'The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws'; Schultz, 'Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952'.

of the four dissenting justices in the case told a more important story. Chapter V will demonstrate that the AJCo's abandonment of group libel was as much about its practical understanding of the changing winds of Court opinion as Maslow's shifting personal views.

In the United Kingdom, the connection between the Race Relations Act and British Jews has received some, if insufficient, attention.<sup>597</sup> Gavin Schaffer's article on Section 6, the key part of the Act which made incitement to racial hatred a crime, briefly touches upon the invocation of Jewish suffering as a motivation for lawmakers as well as Jewish advocacy for inclusion in the law.<sup>598</sup> Erik Bleich's comparative study of race legislation in Britain and France notes that "most of the relatively low-level pressure for anti-incitement provisions emanated from the Jewish community."<sup>599</sup> He also writes that since 1965, "anti-incitement provisions have taken a consistently low profile compared to issues of access racism and concerns about color."<sup>600</sup> Hilliard correctly links Jewish advocacy for the incitement provision to prewar debates over seditious libel and group libel, but his focus is mainly the government's approach to free speech rather than Jews' approach to antisemitism.<sup>601</sup> Raphael Langham's history of the Board includes a brief mention of its attempt to ensure the Act would cover Jews and the Home Secretary's assurances, but leaves the matter largely unexplored.<sup>602</sup> Langham writes that in 1968 "the

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<sup>597</sup> On the Act generally, see Anthony Paul Lester and Geoffrey Bindman, *Race and Law*, Penguin Education (Harmondsworth: Penguin Books, 1972); Ira Katznelson, *Black Men, White Cities: Race, Politics, and Migration in the United States, 1900-30 and Britain, 1948-68* (Oxford: Oxford University Press, 1973); Simon Peplow, 'The "Linchpin for Success"? The Problematic Establishment of the 1965 Race Relations Act and Its Conciliation Board', *Contemporary British History* 31, no. 3 (3 July 2017): 430–51, <https://doi.org/10.1080/13619462.2016.1261697>.

<sup>598</sup> Gavin Schaffer, 'Legislating against Hatred: Meaning and Motive in Section Six of the Race Relations Act of 1965', *Twentieth Century British History* 25, no. 2 (2014): 251–75, <https://doi.org/10.1093/tcbh/hws053>.

<sup>599</sup> Erik Bleich, *Race Politics in Britain and France: Ideas and Policymaking since the 1960s* (Cambridge University Press, 2003), <https://doi.org/10.1017/CBO9780511615580>.

<sup>600</sup> *Ibid.*, 52.

<sup>601</sup> Hilliard, 'Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s'.

<sup>602</sup> Langham, *250 Years of Convention and Contention*.

government confirmed that Jews were covered by the Act,” but mentions the topic only glancingly.<sup>603</sup> Joshua Cohen’s article on the Holocaust and antifascist activity in 1960s Britain also briefly mentions Board president Barnett Janner’s comments in Parliament about antisemitism and the Act.<sup>604</sup> Most directly, in a recent article Joseph Finlay discusses British Jews’ role in the passage of the Acts in detail; however, he is mainly concerned with merely showing the connection between Jews and the acts rather than placing it in a lineage of Jews’ preexisting relationship to speech and the law.<sup>605</sup>

In practice, though, despite the government’s assurance, Jews continued to have significant difficulties winning the protection they sought, as Chapter VI shows. The chapter presents a fuller picture of the role and context of Jewish advocacy for the Act and the difficulties of categorizing Jews under British law. Broadly, the Race Relations Act episode shows the Board’s changing attitude regarding anti-defamation, or rather, the changing societal attitudes to which the Board responded. As Tony Kushner has noted in his study of Holocaust memory, during the debates over the Act, the Holocaust was still not openly and frankly discussed even by many British Jews. It was not until 1968, for example, that the BBC aired its documentary on the Warsaw Ghetto, the first major national treatment of the subject.<sup>606</sup> Even a book on “the politics of marginality” co-edited by Kushner himself shifts after 1945 from discussing Jews to

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<sup>603</sup> Ibid.

<sup>604</sup> Joshua Cohen, “‘Somehow Getting Their Own Back on Hitler’: British Antifascism and the Holocaust, 1960–1967”, *Fascism* 9, nos 1–2 (2020): 121–45, <https://doi.org/10.1163/22116257-09010004>.

<sup>605</sup> Joseph Finlay, ‘British Jews and the Race Relations Acts’, in *Anti-Racism in Britain*, ed. Saffron East et al. (Manchester University Press, 2024), <https://doi.org/10.7765/9781526171122.00013>; Joseph Finlay, ‘Between Religion and Ethnicity: How Jews Navigated Race Relations in Postwar Britain’ (University of Southampton, 2023).

<sup>606</sup> Cohen, “‘Somehow Getting Their Own Back on Hitler’”; Kushner, *The Holocaust and the Liberal Imagination*, 254–55.

discussing other minorities.<sup>607</sup> Due to the work of several Jewish groups including the Board, Jews were a part of debates over the Race Relations Act, but it would be an overstatement to say they were among its primary intended beneficiaries.

The Board's involvement in the Race Relations Act is best understood not in isolation but as a continuation of its earlier advocacy for group libel. The discussions around the Act represented the first real chance since the disappointment of the Defamation Act 1952 to fight back against antisemitic speech, something the Board recognized. But the Board's approach to law and antisemitism remained a fundamentally responsive one. In the 1930s, the Board waited until the government itself began Lord Porter's review to seriously entertain the question of group libel. Similarly in the 1950s and 1960s, various individual attempts to pass Private Member's Bills targeting hate speech foundered. It was only after the subject of racial hatred became a priority for reasons unrelated to Jews that the Board began to advocate for new legal protections.

As one contemporaneous commentator noted, the use of the law against racial hatred played a larger role in the United States than the United Kingdom. Writing about the Race Relations Act 1965, law professor Cedric Thornberry wrote that "the investigation into the idea of law as an instrument of social engineering seems to be as firmly anchored on the other side of the Atlantic as the Statue of Liberty."<sup>608</sup> What was true for the United States as a whole was true for American Jewry. The story of group libel's failure is the story of the law's success in engulfing American Jewish activism.

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<sup>607</sup> Tony Kushner and Kenneth Lunn, eds., *The Politics of Marginality*, (Routledge, 2012), <https://doi.org/10.4324/9780203043653>.

<sup>608</sup> Cedric Thornberry, 'Commitment or Withdrawal? The Place of Law in Race Relations in Britain', *Race* 7, no. 1 (July 1965): 73–85, <https://doi.org/10.1177/030639686500700106>.

Comparing Jewish activism regarding racial hatred across the Atlantic is complicated by the disparate nature of the issues at play. As Chapter IV shows, in the United States the question of African Americans' rights was the central subject of political and societal debate immediately after the end of the Second World War. Furthermore, because of American legal and political culture – and the enshrinement of racism in the law – the relevance of law to racial issues was never in question. For better or worse, few Americans argued against the idea that the civil rights movement was ultimately a legal struggle to be lost or won in Congress and the courts. In the United Kingdom, however, as Thornberry's article showed, many questioned whether racial prejudice was even amenable to legal solutions. Racial issues became a prominent subject of political debate over several years in response to postwar immigration, meaning the British legislative debates covered in this section took place more than a decade after the American ones. The following chapters are not an account of the different place of racial issues in postwar America and Britain. Nor do they attempt to compare British and American Jews' role in those debates. Instead, they examine how debates over hatred of other groups affected Jews' relationship to group libel and the law.

For British and American Jews, legislation against racial hatred raised a similar set of issues. By 1960, both the Board of Deputies and all major American Jewish groups had stopped seriously pursuing defamation reform. At the same time, however, British and American politicians began to reconsider their approach to hate speech, often invoking the Jews of 1930s Germany while not mainly targeting contemporary antisemitic speech. The suddenly broad salience of issues which Jews had long debated among themselves raised the question of how to approach legal bars against hate speech once more.

This period also saw the divergence of British and American approaches to speech rights. Under the Supreme Court led by Earl Warren, more and more speech became covered by the First Amendment, making old English common law precedents play a significantly smaller role in libel jurisprudence. The court cemented the “constitutionalization” of defamation law in 1962, delivering the decision in *Times v. Sullivan*.<sup>609</sup> British law similarly underwent a significant change, albeit in a different direction. Where American jurists increasingly eschewed the idea of laws against “hate speech,” British legislators maintained a more ambivalent stance. The United Kingdom did not go as far as continental Europe in legislating against speech, but beginning with the Race Relations Acts it did not take the firm stance against prior restraints as did the United States.

Neither American nor British Jews, as it turned out, were really in control of the direction their countries’ speech laws would take. Despite extensive involvement in court cases and legislative battles over defamation, the primary way in which Jews shaped the broad trends described above was as a historical exemplar. To the extent that Jewish suffering was invoked in debates over the Race Relations Acts or civil rights law, it was more as cautionary tale than contemporary subject. Because of American Jewish organisations’ investment in the law, this probably had a greater effect on them than it did the Board of Deputies. The AJCo and ADL had become so enamoured with the law that perhaps they were compelled to abandon group libel and group rights once the Supreme Court did. Their ability to advocate for such concepts – and for Jewish group identity – using extralegal means was limited. Some American Jews recognized this, as Chapter V’s

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<sup>609</sup> Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (Vintage Books, 1992).

section on Menahem Boraisha shows, but the consensus remained in favour of legal strategies of activism.

For the Board of Deputies, legal questions were less crucial. As in earlier periods, the Board was a fundamentally conservative body when it came to legal strategy. Still, the attempts to ensure that the new Race Relations Act would cover Jews demonstrate the frustrated relationship between British Jews and the legal system. The Board may have been comparatively less committed to the law than its American counterparts, but that did not mean it would pass up opportunities to win new legal protections when they arose. Unlike in previous cases in which the Board was able to assert a quasi-official role in determining how the law should apply to British Jews, when it came to free speech the government was unwilling to allow any external group to determine what was objectionable. Only the Attorney General could bring cases of incitement and only where the accused provably intended to stir up racial hatred could the Crown secure a conviction. In practice, this left the Board in the same position as before the passage of the Act – bringing objectionable material to the government, begging for action, and waiting for often disappointing results.

Group libel failed in the United States and United Kingdom for different reasons, but at the core of both processes were questions of power. In both nations, albeit in different manners, the right to speech was revealed to be qualitatively different than other rights in the view of the state. Both governments were absolutely unwilling to cede control over it. For example, where the British government was willing to allow the Board of Deputies some autonomy in the important realms of education or even marriage, governments both Labour and Conservative were unwilling to

give away any control over what speech should be disallowed. In the American case, the same was true of the Supreme Court. Minority groups could advocate for themselves in a variety of spheres, but one lesson from the group libel debates may be that where goes control over speech goes power. In the case of the United Kingdom, that power lay with the Attorney General. In the case of the United States, in practice it lay with the courts themselves. Speech turned out to be an area, perhaps one of very few areas, where *only* the government could determine the bounds of what was acceptable, not affected groups or even individual citizens. Often this argument was made in service of protecting free speech, but of course in both systems not all speech was free. Instead, it seems more likely that determining what speech should be prohibited was seen as a fundamental source of state power, even if members of the government did not say so explicitly. Given the origins of libel law as a means to prohibit speech against the crown and church, that the state wanted to guard the right to police speech perhaps should not have surprised the Board.

## Chapter V

### Beyond Their Control: The American Jewish Congress and the End of Group Libel, 1948-1958

In January 1951, a signal of group libel's lessening appeal came from an unexpected source. David Riesman, whose 1942 law review articles had provided the intellectual basis for much of the group libel activism of the 1940s, published a condemnation of contemporary American Jewish activism in *Commentary* magazine, founded by the AJC in 1945 as an organ for debates over American Jewish life.<sup>610</sup> Riesman contended that American Jews had become "militant" in their fight against antisemitism, seeking to destroy not just documents like the Protocols but also masterpieces such as *Oliver Twist* and *The Merchant of Venice* and artists such as Walter Giesecking and Wilhelm Furtwängler.<sup>611</sup> In doing so, they had selected a strategy doomed to fail, for in his view Jews had "no chance whatsoever of wiping out anti-Semitism by force, although maybe some Jews, underneath fantastic fears, nourish even more fantastic hopes."<sup>612</sup> He acknowledged that less than a decade prior, he had argued that "it might be practicable to draw a line between group libel of the Jews which included false statements of fact – such things as are now peddled by Curt Asher and William Dudley Pelley – and works of art in which Jews are dealt with perhaps unsympathetically, but as part of a whole picture of life."<sup>613</sup> But moving forward, Riesman believed no restraints on antisemitic speech – whether serious or not in his view – were practical. Instead, American Jews should ignore fears of over-assimilation and

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<sup>610</sup> "Organizational History," Commentary Archive Collection, Harry Ransom Center, University of Texas at Austin Archives, Austin, Texas.

<sup>611</sup> David Riesman, "The 'Militant' Fight Against Anti-Semitism: Education and Democratic Discussion Is the Better Way," *Commentary*, January 1951.

<sup>612</sup> Ibid.

<sup>613</sup> Ibid.

throw their lot in with “our tradition of civil liberty.”<sup>614</sup> They should recognize that “their fate as Jews in America is largely beyond their control.”

As many realize, Jewish well-being depends on the health of society as a whole, and only anti-Semites will claim that Jews are powerful enough to save or sink America. And it is relatively futile for Jews to address themselves to hardened anti-Semites as an audience. Why should the anti-Semite listen to the Jew, especially when the latter speaks, not as one human being to another, but through the mass media of communication? We are always better off in devoting ourselves to talking to people who, at least in part, want: to hear us. I think we should take our motto from William Blake: ‘When I tell any Truth,’ he said, ‘it is not for the sake of convincing those who do not know it, but for the sake of defending those that do.’<sup>615</sup>

Riesman’s article was puzzling in the level of support it ascribed to measures like group libel; in 1951, the CLSA (which he critiqued by name in *Commentary*) was one of few organisations which still supported it. He pilloried group libel for seeking to attack sentiments mainly expressed on the walls of public toilets.<sup>616</sup> Rather than “year[ning] for action,” it was merely “the distorted reflection of – and rebellion against – middle-class piety” created by Jews’ scolding attitudes.<sup>617</sup> Riesman and the ACLU – which he eventually rejoined after decades of protest in 1978<sup>618</sup> – would by 1960 win an apparently total victory in convincing American Jewry of group libel’s inadvisability. The CLSA continued to pursue dozens of different methods of combatting antisemitism, but group libel vanished from its agenda. By 1960 the AJCo formally denounced group libel and the pursuit of group, rather than individual, rights in general.

Riesman’s article hinted at the usual explanation for the AJCo’s abandonment of group libel in the early 1950s when he wrote that “every threat or presumed threat to Jews anywhere in the

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<sup>614</sup> Ibid.

<sup>615</sup> Ibid.

<sup>616</sup> Ibid.

<sup>617</sup> Ibid.

<sup>618</sup> Walker, *Hate Speech*, 99. Walker cites Letter from David Riesman to Norman Dorsen, September 1, 1978, Dorsen Papers, New York University Law School Archives, New York.

world can be converted into a lever for the ‘militant’ minority of Jewish organizational life, much as Russian threats to American interests anywhere reinforce the power of our self-proclaimed militant anti-Communists to put a blanket of ‘unity’ over American life as a whole.”<sup>619</sup> Fear of association with communism led Jews to abandon any hints of collectivism in their rhetoric and actions and to double down on the most “American” of attitudes: individualism. That American Jews, including the erstwhile socialists of the Lower East Side, had begun to assimilate and disperse did not help.

This chapter narrows the focus of earlier sections on various American Jewish organisations to examine probably the most important one to the group libel campaign in the 1940s: the American Jewish Congress. From 1945, when the AJCo formed the Committee on Law and Social Action, it became the main and eventually the last broad-based Jewish group to endorse the type of anti-defamation work discussed in this thesis. While sometimes joined in doing so by the ADL or the Jewish Labor Committee, though never by the AJC, it was within the AJCo that group libel lived and ultimately died. In its earliest years, the CLSA employed more civil rights attorneys than the Department of Justice.<sup>620</sup>

This “rise and fall” narrative obscures the actual changes which occurred within the AJCo after the failure of group libel to gain traction before the U.S. Congress and the CCR. Jewish groups were indeed afraid that the push for group speech rights would be interpreted as a defence of communists (and as proof of the canard that Jews secretly supported them). To be sure, the rise of McCarthy and the Cold War did figure in Jewish groups’ calculation of how to approach

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<sup>619</sup> Riesman, “The ‘Militant’ Fight Against Anti-Semitism: Education and Democratic Discussion Is the Better Way.”

<sup>620</sup> Walker, *Hate Speech*, 192. Citing author’s own interview with Maslow.

speech. But the influence of the Second Red Scare is not the whole story, as this chapter aims to show. Instead, I argue that the focus on the law itself and the politics of minority coalition-building necessarily meant Jewish groups would have abandoned group libel and group rights, even had the threat of communism never arisen.

### **An Alternative Vision of Jewish Politics**

Maslow's position, while dominant, was not the sole view within the CLSA's staff. Some members of the CLSA and the AJCo continued to believe in the old idea of a Jewish *kehillah* which had animated its creation. As the CLSA debated its future, a key figure representing this camp was a man named Menahem Boraisha, who wrote a memo to the AJCo outlining a return to the body's intellectual roots in February 1947. While the AJCo had not even met with the CCR at the time he wrote it, Boraisha's memo nevertheless shows that dissenting voices existed within the organisation about the direction of its work. Boraisha was born in Lithuania and emigrated to the United States shortly after the beginning of the First World War.<sup>621</sup> In New York, he worked as a journalist and playwright in the Yiddish press and theatre popular among the new wave of eastern European Jews who had gathered in the city's Lower East Side.<sup>622</sup> He also travelled to Soviet Russia and became involved in the push for the AJCo's formation.<sup>623</sup> From 1933 until 1947, he worked for its magazine, the *Congress Weekly*, which had provided a forum for many of the group's statements on the nature of speech and Jewish rights.

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<sup>621</sup> "Boreysho, Menakhem," *Congress for Jewish Culture*.

<sup>622</sup> Ibid.

<sup>623</sup> Ibid.

Its earliest proponents had intended the AJCo to be a truly representative umbrella organisation for the diverse array of American Jews. But Boraisha argued that, by 1947, it had become indistinguishable from its counterparts and its influence had declined. He wrote that “in the course of the last few years the resemblance between the American Jewish Congress and other defense organizations [had] increased.”<sup>624</sup> The AJCo was no longer the sole group publishing a magazine on American Jewish life after the AJC’s founding of *Commentary*. On campuses, B’nai Brith’s expansion of the Hillel Foundations had outcompeted it.<sup>625</sup> And in the realm of Zionist activism, it was no longer the only, or even the main, way in which American Jews could support the nascent Jewish state.<sup>626</sup>

Was Boraisha complaining about mere turf wars? Not exactly. He had substantive reasons to be concerned about how the AJCo’s waning influence might change the overall trajectory of American Jewish politics. In his summary, the AJCo’s mission rested on two pillars: advocacy for Zionism and “Jewish rights in the Diaspora.”<sup>627</sup> Boraisha believed a solution to the “Palestine crisis”<sup>628</sup> was coming quickly and that the World Zionist Organization would play a leading role in bringing it about, rather than any domestic group. But the nature and the future of Jewish rights within the United States was a more serious concern. If the AJCo played a supporting role in the discussion of rights discourse after the war, Boraisha feared it would be drowned out by

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<sup>624</sup> Menahem Boraisha, Memorandum to the Executive Officers of the American Jewish Congress, February 1947, Records of the American Jewish Congress, I-77, box 185, folder 5, CJH.

<sup>625</sup> “History of Hillel,” *Hillel*. Hillel had begun as a single organisation in 1923 at the University of Illinois, Urbana-Champaign, before spreading to dozens of American college campuses over the subsequent decades. Hillels played a crucial role in the immediate years after the Second World War, helping Jewish veterans transition to undergraduate life and working against campus antisemitism. For more on the history of the Hillel Foundation and particularly its role in the mid-1940s, see Harry Kaplan, “The B’nai Brith Hillel Foundations—Retrospect and Prospect,” *The Jewish Forum*, October 1944.

<sup>626</sup> Boraisha, Memorandum to the Executive Officers of the American Jewish Congress.

<sup>627</sup> Ibid.

<sup>628</sup> Ibid., 2.

the numerous other groups who sought to shape this key question. In particular, Boraisha was concerned about the growing focus on the law as well as the AJCo's receding role broadly – two issues he saw as intimately connected.

Today, after the extermination of a third of our people defense alone becomes utterly meaningless if it does not spell survival. Suppose our CLSA wins all its battles and all the Jewish boys and girls who are trying to enter colleges and get positions in commerce, industry and the professions are no longer confronted with numerus clausus, discriminations, etc., along with the removal of the obstacles to economic and social integration with the environment, will we also remove the obstacles to complete cultural assimilation. From the point of view of historic Jewish existence CLSA and CCI have meaning only inasmuch as their programs are paralleled with another program that will strengthen the Jewish self-awareness of those whom we are liberating from persecution. Without such a parallel program the CLSA work might as well be taken over by any non-Jewish organization.<sup>629</sup>

Boraisha identified that the formation of the CLSA in 1945 only formalized the growing turn to law in American Jewish thinking, one which would ironically cause the failure of group rights activism. As conceptualized in 1919, Jewish group rights would not be contained within any one nation's existing legal system or constitutional approach to minorities.<sup>630</sup> Instead, they would derive their authority from the power of the Jewish community, creating new frameworks and institutions such as the Educational Committees in Poland. But the partial coopting of the Congress movement by the existing American Jewish establishment meant that increasingly group rights – like protections against group libel – would have to be circumscribed within the U.S. Constitution and existing discourse on the interaction between libel and the First Amendment. When Jewish groups initially explored group libel reforms, and indeed roughly

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<sup>629</sup> Ibid.

<sup>630</sup> The idea of group rights for Jews was not invented out of whole cloth in 1919. The interaction between Jewish law and the law of the countries in which they lived has a long and fascinating history, best encapsulated in the halakhic idea of *dina de-malkhuta dina* (DDM). Suzanne Stone's work summarizes the history of this issue, for example, S. L. Stone, 'Religion and State: Models of Separation from within Jewish Law', *International Journal of Constitutional Law* 6, nos 3–4 (2008): 631–61, <https://doi.org/10.1093/icon/mon028>. See also Liliana Ruth Feierstein and Daniel Weidner, eds, *Diaspora and Law: Culture, Religion, and Jurisprudence beyond Sovereignty* (De Gruyter, 2023), <https://doi.org/10.1515/9783111062631>.

until the period in which Boraisha wrote, it was not clear the two were incompatible. The Supreme Court had not yet adopted the strict position on free speech it would by the 1960s, led by Justices William O. Douglas, Hugo Black, and later William J. Brennan, Jr. and the Court under Chief Justice Earl Warren.<sup>631</sup> But perceptive observers like Boraisha could see that the focus on the law would necessarily lead Jews away from group rights, even if they were nominally constitutional. Legal tactics were a kind of cuckoo in the AJCo's nest. They diverted energy from distinctively Jewish work, forcing the group to make all its arguments for Jewish rights in terms the overwhelmingly non-Jewish courts and legislatures would understand.

Boraisha's proposed solution was for the AJCo to leave legal defence to other groups and to refocus its energies on the "the great problem facing world Jewry after World War II...that of safeguarding Jewish historic continuity in the democracies."<sup>632</sup> He envisioned a new type of *kehillah*, one which would restore "a deep sense of Jewish belonging"<sup>633</sup> through economic integration, philanthropy, politics, foreign affairs, and cultural and spiritual matters. The political aspect, which in the form of the law had in practice become the AJCo's focus, would be the least important along with foreign affairs. Instead, Boraisha felt the AJCo should focus its energies mainly on the last goal:

An integrated community does not imply the obliteration or abolition of any ideological differences between groups and parties. What it does imply is the establishment of a common ground on which religious and secular people, orthodox and reform, Zionists and Socialists could work together. Within the frame of a Jewish Palestine the ultra-orthodox of Old Jerusalem and the Communists of the Kvutzot must co-exist and collaborate. What can serve as an integrating force under Diaspora conditions? In previous centuries it was religion. What can substitute for the high common denominator

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<sup>631</sup> Walker, *Hate Speech*.

<sup>632</sup> Boraisha, Memorandum to the Executive Officers of the American Jewish Congress, 3.

<sup>633</sup> Ibid., 5.

of religion in our own days? The only remaining substitute is the concept of peoplehood.<sup>634</sup>

Boraisha imagined a whole system of Jewish schools and universities, of community councils and business groups. He wanted the AJCo to wean itself from the law and return to the original vision for which many of its early advocates had hoped. Unfortunately, Boraisha would not live to see the results of what he proposed. He died in 1949, two years after writing the memorandum to the CLSA.<sup>635</sup> Nor would the AJCo take his advice. In fact, it did just the opposite, doubling down on legal work and – as Boraisha feared – abandoning group identity and group rights as a consequence.

### **A Love Affair with the Law**

As Riesman noted, the CLSA was the key organisation still advocating for group rights in 1950. Existing accounts of the “fall” of group libel tend to note merely that by 1952, when the Supreme Court ruled that an Illinois group libel law was constitutional in *Beauharnais v. Illinois*, Jewish groups including the AJCo failed to react in any visible way. But group libel did not merely disappear from the CLSA’s agenda in a puff of smoke. Instead, the group’s future was the subject of fierce internal debate. Questions about the CLSA’s direction emerged within the body after two key failures in 1948-1950. The first, as Chapter III notes, was the failure to persuade the CCR to endorse group libel or similar measures such as postal restriction. The second was the failure of the CLSA’s carefully designed group libel bill to win even modest support within Congress – it did not even exit the committee stage, and unlike the Lynch Bill, it was not the

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<sup>634</sup> Ibid., 10.

<sup>635</sup> Menahem Boraisha Papers, RG 641, CJH,  
<http://www.yivoarchives.org/index.php?p=collections/controlcard&id=32999>.

subject of a significant hearing. These two setbacks challenged not just the CLSA's position on group libel, but also its fundamental approach toward antisemitism. If group rights were no longer feasible (although, as seen below, not everyone in the CLSA believed this to be true), what was the appropriate role of the law in American Jewish advocacy? Riesman, for his part, argued that Jews could not really fight antisemitism as a class. Instead, he wrote, they should work toward a more tolerant society as individuals and hope to reap the benefits as a group. The CLSA would eventually take this approach, becoming no different from the AJC and indeed taking its cues from the ACLU when it came to antisemitic speech and the law. But for a time in the early 1950s, it occupied a kind of middle ground not sufficiently reflected by the narrative of group libel's "rise and fall." Maslow and his colleagues publicly quit group libel, but not the idea behind it: that American Jews deserved rights as a group and that the law was their path to win those rights.

In June 1949, Maslow, the CLSA leader who had been key in the formation of the AJCo's legal strategy, testified in favour of a civil rights bill before the Senate Judiciary Committee.<sup>636</sup> His statements showed the AJCo had little intention of heeding Boraisha's warning of two years prior. Maslow told the committee that "it is recognized throughout the world that the constitution of the United States contains the broadest kind of guarantees of democracy. Its sweeping commands of equality establish a firm basis for true freedom. To the extent that democracy is incomplete today in America, it is because the precepts of the constitution are not everywhere

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<sup>636</sup> Typically, he testified alongside Herbert Levi of the ACLU – the two groups would be increasingly aligned throughout the 1950s. *Congressional Record*, June 22, 1949, D418.

fully implemented.”<sup>637</sup> The AJCo’s annual report of 1949 likewise emphasized law and the Constitution as the guarantees of American Jewish rights, rather than the internal strength of the Jewish community. The report, written by Maslow, noted that “where, until recently, the American Jewish Congress had to fight alone on many fronts, many Jewish and non-Jewish organizations are now participating fully in that struggle. Joint action in legislative campaigns can now be organized on most major civil rights issues. Several important bodies have begun to adopt the practice of the brief amicus, and crucial test cases before the courts are being supported by a broader cross-section of civic organizations than formerly.”<sup>638</sup> A brief list of the AJCo’s activities from 1948 and 1949 shows it busied itself with legal work: drafting and sponsoring legislation; organising state, local, and national campaigns for the passage of legislation seen to be favorable to Jews; testifying before Congress and other bodies; preparing and launching test cases; sending public comments to administrative agencies; conducting surveys to provide the “raw material”<sup>639</sup> for legal action; and providing information about the “general campaign.”<sup>640</sup> Evidently, it was a good time to be a lawyer within the AJCo. The AJCo began even nominally non-legal work such as commissioning studies and sending out surveys for the purpose of legal fodder.

Increasingly, the goal of this legal work was not really to transform the law to accommodate Jews’ unique position, as group libel advocates envisioned. Instead, the AJCo sought to work within the legal framework established by others and to play a supporting role in the overall

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<sup>637</sup> Statement of Will Maslow before Sub-Committee of Committee on Judiciary of the U.S. Senate regarding S. 1725, A Bill to Protect and Secure the Civil Rights of Persons in the United States, June 22, 1949, Records of the American Jewish Congress, I-77, box 185, folder 22, CJH, 2.

<sup>638</sup> “Achievement and Challenge: A Report on the American Jewish Congress,” November 9-13, 1949, Records of the American Jewish Congress, I-77, box 185, folder 24, CJH, 21.

<sup>639</sup> Ibid., 22.

<sup>640</sup> Ibid.

campaign for civil rights. This step back had already been somewhat apparent when Maslow testified before the CCR – the great majority of his recommendations dealt with discrimination against African Americans rather than Jews. Afterward it accelerated dramatically.

In 1948, the AJCo had begun publishing annual reports on its “over-all achievements or setbacks in the fight for civil rights and against discrimination and the invasion of civil liberties,”<sup>641</sup> showing how it had begun to speak the ACLU’s language, tying civil rights to civil liberties. Oddly, despite the strong opposition of civil libertarians, Maslow connected the AJCo’s 1948 group libel bill to the fight against Cold War-fuelled defamation of Jews as pro-Soviet. He wrote that “the present attack on civil liberties, if unchecked, is likely to enlist or to inspire anti-Semitic defamation in its support in increasing measure. In the light of that fact, an American Jewish Congress group libel bill was introduced in the House of Representatives by five Congressmen of both major parties early in February.”<sup>642</sup> The AJCo viewed its bill as “the first measure of its kind likely to meet the test of constitutionality.”<sup>643</sup> It avoided the key issue of prior restraints on publication, resembling a watered-down version of the Lynch Bill by seeking to prevent interstate transmission of group libels rather than their initial publication.<sup>644</sup> Even so, Maslow glumly wrote that the bill was unlikely to pass. Restrictions on anti-minority speech were the one area of law in which civil rights groups balked. “The deeply-rooted opposition of American liberals to any legislative measures which may limit, in however remote a fashion, freedom of speech and communication [made] the task of enlisting support among those groups which

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<sup>641</sup> “Achievement and Challenge: A Report on the American Jewish Congress,” 22.

<sup>642</sup> *Ibid.*, 27.

<sup>643</sup> *Ibid.*, 28.

<sup>644</sup> Lynch Bill, H.R. 2328, 78th Cong. (1943).

normally favor anti-racist laws a very difficult one.”<sup>645</sup> Maslow did not completely foreclose the possibility of future success, however. He wrote only that the passage of a group libel bill seemed unlikely “within the near future.”<sup>646</sup>

### **The FCC and Alternative Pathways to Group Libel**

In fact, the CLSA did not give up on restricting antisemitic speech, as its reports show. It merely retreated to the tactics of the 1910s and 1920s, focusing on individual cases, mainly state and local, rather than attempting to secure support for a sweeping federal law. Maslow focused in particular on radio licenses issued by the Federal Communications Commission. During the Second World War, the FCC began to forbid on-air editorialising in a policy called the Mayflower Doctrine (after the case which inspired it).<sup>647</sup> Jewish groups, including the AJC and the AJCo, had been key supporters of the doctrine. The FCC was able to enforce the rule through its license-granting powers, which in practice allowed it to control who could reach the U.S.’s then-all-important airwaves. In 1949, at the time of Maslow’s writing, the Fairness Doctrine replaced Mayflower, allowing editorialising so long as the license-holder presented all sides of an issue fairly. Additionally, FCC rules allowed it to grant (or refuse to grant) licenses based on “public convenience, interest or necessity,” which some agency lawyers interpreted as a broad mandate to reject subversive and even bigoted applicants.<sup>648</sup> Maslow realized that the FCC rules gave Jewish groups another way to combat group libel. Since the years of Father Coughlin, radio had been a key medium for the distribution of antisemitism. The CLSA may not have been able

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<sup>645</sup> “Achievement and Challenge: A Report on the American Jewish Congress,” 28.

<sup>646</sup> Ibid.

<sup>647</sup> Pickard, *America’s Battle for Media Democracy*.

<sup>648</sup> Arthur Krock, “Press Freedom Threat via the Daily News,” *Report of the National Association of Broadcasters*, November 25, 1946, 923-924.

to outlaw antisemitic speech on the basis of group defamation, but under the Fairness Doctrine they could argue it was slanted. If antisemites refused to present the Jewish position – as Maslow expected they would – the FCC would revoke their license. Without needing to pass a single law or face a single judge in court, the CLSA could erase group libel on the radio.

In order to evaluate when Jewish organisations actually took up or abandoned the project of group libel, it is crucial to take a relatively expansive view of the term's meaning. If group libel referred only to the idea of reforming defamation law to prevent libel and slander against communities such as Jews, the 1948 bill represented the end of the CLSA's advocacy for the idea. But if activities which targeted the *same speech by other legal means* also fall under the "group libel" umbrella, the project continued later. Maslow and the CLSA's own grouping of their work supports the latter approach, the one which I aim to take. Any effort to impose prior restraint on antisemitic speech, whether through defamation reform or through distribution channels such as the FCC, suggests that the idea was alive later than previous surveys have shown. The project of petitioning to revoke radio licenses came in Maslow's summary just after his dim assessment of the group libel bill, under the same heading of "Defamation." The nature of opposition to group libel also supports a broader view of the idea. The ACLU did not oppose group libel per se – in fact, as its founder Baldwin wrote earlier in the 1940s, at some juncture it wanted to find "a race libel law that [would] work."<sup>649</sup> The intellectual core of its opposition – and what it sought to destroy in the courts – was to prior restraints in any form.

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<sup>649</sup> Letter from Roger Baldwin to Victor Yarros, July 2, 1946, ACLU Papers, Vol. 2734; Letter from Roger Baldwin to Isaac Franck, July 23, 1941, ACLU Papers, Vol. 2308.

Properly understood, then, what Maslow did in 1948 was a tactical retreat from the group libel project rather than a surrender. Until the “near future” passed, the bulk of anti-defamation work would have to take place not in Congress, as the brief window of postwar opportunity led him to hope, but in local jurisdictions and before administrative agencies like the FCC.<sup>650</sup> From 1946, the CLSA took up two major cases in this area. First, it sought to persuade the FCC to revoke the license of Los Angeles-area radio station KMPC “for ‘slanting the news against the Jews.’”<sup>651</sup>

The second case the CLSA spearheaded was more significant and more controversial within Jewish organisations. Typically, it was centred in New York. In 1946, Maslow and the CLSA learned that the *New York Daily News* sought five radio licenses in New York and New Jersey to expand beyond its print offering.<sup>652</sup> The FCC had been forced by Congressional pressure to end an unwritten policy of denying radio licenses to newspapers, on the tacit basis that doing so would concentrate power in the hands of their owners.<sup>653</sup> The tabloid *Daily News* had been a bugbear for American Jews in New York City since its founding in 1919.<sup>654</sup> Previously a socialist and a New Dealer, its owner Joseph Medill Patterson had turned against Roosevelt at

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<sup>650</sup> In our time, in which Congress passes fewer and fewer pieces of major legislation, Maslow’s strategy is familiar. Particularly after the Supreme Court decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), later reversed by *Loper Bright Enterprises v. Raimondo*, 603 U.S. (2024), administrative agencies like the FCC had ever-greater latitude to interpret the law through the processes of rulemaking and adjudication. In turn, social reformers have often made the same pivot as did Maslow – taking their case to the executive branch rather than to legislators. For more on the transformation of American law and the increasing salience of institutions other than Congress, see, e.g., Tomiko Brown-Nagin, “Elites, Social Movements, and the Law: The Case of Affirmative Action,” *Columbia Law Review* 105, no. 5 (2005): 1436–1528. William N. Eskridge and John A. Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press, 2010). Joel F. Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (Academic Press, 1978). Edward L. Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press, 2007). As Rubin points out, some of the most perceptive observers of this change have been its harshest critics – conservatives who saw how social movements were well-positioned to advocate before the administrative state.

<sup>651</sup> “Achievement and Challenge: A Report on the American Jewish Congress,” 28.

<sup>652</sup> Arthur Krock, “Press Freedom Threat via the Daily News.”

<sup>653</sup> *Ibid.*

<sup>654</sup> Matthew Pressman, ‘The New York *Daily News* and the History of Conservative Media’, *Modern American History* 4, no. 3 (2021): 219–38, <https://doi.org/10.1017/mah.2021.17>.

the outset of the Second World War, joining the America First movement and putting his paper's full weight behind it. The paper eventually came to support the war, adopting a militaristic stance, but nevertheless maintained a scepticism of the very elite class from which Patterson came.<sup>655</sup> While Patterson died in 1946, just as the radio license issue had begun, the *Daily News* maintained his late politics of populist conservatism until the 1990s. Its period of stringent conservatism, from 1940 through 1960, coincided with its highest readership; its Sunday print circulation peaked in 1947, reaching 2.4 million Americans.<sup>656</sup>

As its broader political outlook might suggest, the *Daily News* was also a font of antisemitism. Matthew Pressman writes in an article about the paper's influence on American conservatism that denigrating Jews was part of its broader attempts to construct an "us versus them" attitude among readers.<sup>657</sup> Its editorialists attempted to distance themselves from overt antisemitism by putting statements against Jews in the mouths of others. Nonetheless it spread such sentiments to a huge audience; a 1941 editorial noted that "we think we're being pushed into this war all right, against the wishes of most of us. But we think Lindbergh is mistaken in saying the Jews are a major factor in pushing us in."<sup>658</sup> Another editorial from the same year decried efforts to "hang an anti-Semitic label on all who oppose sending millions of young Americans, Jews and Gentiles alike, overseas to settle another of Europe's wars."<sup>659</sup> By 1945, the paper was more explicit. Writer John O'Donnell attributed the decision to dismiss General George S. Patton from command in Germany to "the secret and astoundingly effective might of this republic's foreign-

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<sup>655</sup> Ibid.

<sup>656</sup> Alan Feuer, "The Daily News Layoffs and Digital Shift May Signal the Tabloid Era's End," *New York Times*, September 27, 2015.

<sup>657</sup> Ibid.

<sup>658</sup> "Conversation Piece," *New York Daily News*, Sept. 18, 1941, 31.

<sup>659</sup> "What Is Anti-Semitism?" *New York Daily News*, Sept. 10, 1941, 31.

born political leaders – such as Justice of the Supreme Court Felix Frankfurter, of Vienna, White House administrative assistant Dave (devious Dave) Niles alias Neyhus and the Latvian ex-rabbinical student now known as Sidney Hillman.”<sup>660</sup> All three men were Jewish. In response to the editorial – too blatant for even the most conservative American Jews – the ADL produced flyers condemning the “*Daily Noose*” and telling Patterson not to “become a cheap imitation of Hitler.”<sup>661</sup> The O’Donnell editorial was squarely the type of group libel which concerned American Jews most. But absent wider defamation laws, they were without many tools to stop it (other than flyers of limited circulation and letters to the editor).

The CLSA continued to work concertedly on the issue of FCC licenses in subsequent years. It both sought to prompt the agency to deny license applications to those with a history of antisemitic statements and to revoke the licenses of stations which broadcast antisemitic programs. While the group continued to propose group libel bills in Congress in 1949 and 1950<sup>662</sup> and to pursue libel cases against individuals, lobbying administrative agencies took up a larger and larger share of its anti-defamation work. In 1949 alone, the AJCo partnered with local groups to ask the FCC to revoke the license of radio preacher Bill Denton in Akron, Ohio; Dr. William Watson in Clearwater, Florida; and evangelist Mordecai F. Ham in 32 stations across

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<sup>660</sup> John O’Donnell, “Capitol Stuff,” *New York Daily News*, Oct. 3, 1945, 4.

<sup>661</sup> Pressman, ‘The *New York Daily News* and the History of Conservative Media,’ citing *Anti-Daily News* pamphlets and flyers, undated, Joseph Medill Patterson Papers, folder 10, box 36, Lake Forest College Library Archives and Special Collections, Lake Forest, Illinois.

<sup>662</sup> American Jewish Congress and National Association for the Advancement of Colored People, “Civil Rights in the United States in 1949: A Balance Sheet of Group Relations,” 1950, Records of the American Jewish Congress, box 185, folder 33, American Jewish Historical Society, New York, United States of America, 62-63; American Jewish Congress and National Association for the Advancement of Colored People, “Civil Rights in the United States in 1950: A Balance Sheet of Group Relations,” 1951, Records of the American Jewish Congress, I-77, box 185, folder 33, CJH, 88.

the Southwest.<sup>663</sup> The strategy proved more successful than many of the AJCo's other anti-defamation efforts. In the Akron case, the AJCo withdrew its petition after receiving assurances from station management. In the Clearwater case Watson cancelled his petition for transfer of ownership of the station. The Ham case, probably the most significant because of his reach, the strategy worked less well – by the end of 1949, the FCC had yet to hold a hearing.

The CLSA joined another prominent case between 1948 and 1951, in which the Radio News Club of Southern California sought to block the FCC from renewing radio licenses held by G.A. Richards, whose Detroit-area channel had once employed Father Coughlin.<sup>664</sup> Twenty-five of Richards' former employees joined the case, alleging Richards had

sought to fabricate stories which would degrade and discredit those whom he disliked; that he instructed his news staff to emphasize even insignificant items if they reflected adversely upon individuals or groups which were the special targets of his personal animosities; that he tried to link Jews and Jewish groups with communism and organized crime; and that he commanded his entire news force, on pain of dismissal, to conform to these policies.<sup>665</sup>

In its filing with the FCC, the AJCo specifically cited the Mayflower rule, arguing it barred Richards' stations from ordering "that news comments on that station would be 'slanted' in a manner which would stir up racial and religious hatred against the Jews."<sup>666</sup> The case drew significant media attention; Richards' defenders included J. Edgar Hoover, the American Legion,

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<sup>663</sup> For more on Ham's influence in particular in the South, see Handler, *Social Movements and the Legal System*. See also Dinnerstein, *Antisemitism in America* (Oxford University Press, 1995).

<sup>664</sup> American Jewish Congress and National Association for the Advancement of Colored People, "Civil Rights in the United States in 1950: A Balance Sheet of Group Relations," 86. See also "Freedom of the Airwaves," *The Harvard Crimson*, November 27, 1950 and *Penalty for Patriotism: A Battle for Freedom of Speech*, unpublished pamphlet, 1950, accessed via <https://www.locussolusrarebooks.com/pages/books/206884/right-wing-radio/penalty-for-patriotism-a-battle-for-freedom-of-speech>.

<sup>665</sup> American Jewish Congress and National Association for the Advancement of Colored People, "Civil Rights in the United States in 1950: A Balance Sheet of Group Relations," 86.

<sup>666</sup> "Roberts Hits KPMC Defense; Insists News Slant Fight, Not Economy, Forced Exit," *Billboard*, March 20, 1948, 1-2.

and the Veterans of Foreign Wars.<sup>667</sup> The case exemplified the often convoluted intersection of antisemitism, backlash against the New Deal, the Second World War, and the Second Red Scare typical of the late 1940s and early 1950s. Richards' critics accused him of bias against Jews, but mainly of bias against the Roosevelt and Truman administrations and slanderous reports about military personnel he disliked.<sup>668</sup> One employee said, for example, that Richards had instructed him "to make General Bennett Meyers seem a Jew."<sup>669</sup> His supporters countered that the FCC investigation was a Jewish and Communist plot led in part by the Roosevelt family itself as retribution for Richards' stations' criticism of its actions.<sup>670</sup> Members of Congress took both sides of the case on the merits,<sup>671</sup> but their responses as a whole also signalled growing backlash against the FCC's power from an unusual mix of critics. The FCC hearings attracted attention both from McCarthyites concerned about its political leanings and, more quietly, from groups interested in stopping the spread of racist and antisemitic material. It also made enemies of civil libertarians at the ACLU and their allies in the civil rights movement. The National Association of Broadcasters – whose guidelines the AJCo had used in previous filings to prompt license revocations – condemned the hearings as an overreach of the agency's power. In the middle were some of the major Jewish groups, led by the AJCo. The National Community Relations Advisory Council, which represented local Jewish groups, released a statement on behalf of the AJCo,

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<sup>667</sup> "Freedom of the Airwaves," *The Harvard Crimson*. "The Detroit hearings, before they are finished, may bring out Richards' answers to these charges; so far his attorney has claimed that the whole business is a smear attempt. Meanwhile, Richards has rallied to his side a large number of organizations, such as the American Legion and the Veterans of Foreign Wars. These groups have praised the community services of his three stations highly, but Clyde A. Lewis, head of the V.F.W., did say Richards "at times is given to indiscreet personal remarks."

<sup>668</sup> Ibid.

<sup>669</sup> Ibid.

<sup>670</sup> Ibid.

<sup>671</sup> See, e.g., Lorian K. Francis, "Licenses Given Three Richards Radio Stations," *Los Angeles Times*, November 29, 1951, 25; *Detroit Jewish News*, November 24, 1950, 18; Warren B. Francis, "Ban Urged on FCC Overreach," *Los Angeles Times*, May 16, 1951, 17; Plea to Silence Radio KMPC Filed With FCC, *Los Angeles Evening Citizen News*, May 15, 1951, 11; "Antisemitism Charges Made at FCC Hearing," *Associated Press*, March 15, 1950; "Rap Roberts, FCC Witness in Congress," *Pasadena Independent*, May 5, 1950, 67; "Radio Owner Says F.C.C. is Capricious," *New York Times*, June 9, 1950.

ADL, Jewish Labor Committee, and Jewish War Veterans defending the FCC's authority. In their view, the NAB betrayed "a basic misunderstanding of the necessary and natural functions which the FCC must serve if it is responsibly to acquit itself of its obligations to the American people."<sup>672</sup>

Considering the swirling controversies it attracted, the Richards case ended somewhat bathetically. Just days before the FCC could reach a final ruling on whether to suspend his radio licenses – after initially revoking them during the more than three-year-long hearing process – Richards died.<sup>673</sup> While his heirs inherited the licenses and therefore the case, his abrupt death meant the commissioners never issued a ruling on the charges of antisemitism at issue. Los Angeles-based KPMC Radio, one of the three contested stations, cancelled a flagship Sunday evening news broadcast helmed by James Fifield, "who had been criticized for anti-Catholic and anti-Jewish statements on his broadcasts."<sup>674</sup> Alongside assurances "that the stations would be operated in the public interest,"<sup>675</sup> the government took this as a sufficient gesture of goodwill. Despite the heirs' somewhat contradictory statement that "Richards' policies would continue," it renewed the licenses and closed the matter which had consumed so much time and administrative energy.<sup>676</sup> As the AJCo's own summary of the case pointed out, this marked a somewhat unsatisfying end to the matter, which could easily lead to the stations' reemergence as a locus for antisemitic speech.<sup>677</sup>

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<sup>672</sup> *Detroit Jewish News*, November 24, 1950, 18.

<sup>673</sup> "Services Wednesday for George A. Richards," *Detroit Free Press*, May 29, 1951, 10.

<sup>674</sup> American Jewish Congress and National Association for the Advancement of Colored People, "Civil Rights in the United States in 1951: A Balance Sheet of Group Relations," 1952, Records of the American Jewish Congress, I-77, box 185, folder 33, CJH, 118.

<sup>675</sup> *Ibid.*

<sup>676</sup> *Ibid.*

<sup>677</sup> Maslow wrote in American Jewish Congress and National Association for the Advancement of Colored People, "Civil Rights in the United States in 1951: A Balance Sheet of Group Relations," 116: "Nevertheless, there is ample

Petitioning the FCC neared a perfect method of attacking of group libel for fearful Jewish organisations. Hearings before the commission, while nominally public, drew less negative press attention than trials might. They also avoided the potential danger of facing a judge or jury hostile to Jews. The men and women of the FCC were staunch New Dealers likely to be sympathetic to the CLSA's concerns. Moreover, taking an expansive view of the agency's ability to interpret "public convenience, interest or necessity" significantly expanded their own power, giving officials a powerful self-interested motive to adjudicate the AJCo's complaints. The ADL and AJC's concerns about the group libel idea should nominally have been addressed by the FCC workaround. Yet, despite Maslow's initially successful strategy, the AJCo was usually alone or joined only by local Jewish groups in its petitions to the FCC. While in the Richards case it had the NCRAC and ADL's backing, the groups did not launch a campaign together with remotely similar scope to the previous attempts at enacting group libel.

Roughly at the same time, the ACLU was pursuing its maximalist strategy on free speech as fervently as ever. In 1949 the group helped to defend a defrocked priest, Arthur Terminiello, whom the city of Chicago had charged for breaching the peace after he gave a violent and racist speech to a crowd of 800 members of the Christian Veterans of America.<sup>678</sup> The case, *Terminiello v.*

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evidence of more latent forms of racism. Scattered instances of openly expressed bigotry on the part of members of the United States Congress went far to explain the apathy of that body as a whole towards civil rights legislation. The reluctance of government officials to deal firmly with those who fan intergroup hatred was also seen in the three-year long proceeding before the Federal Communications Commission in the matter of three radio stations controlled by George A. Richards who had systematically used them to propagate his racial and religious prejudices. Following his death in 1951, the Commission dismissed the proceeding without making any effective effort to insure [sic] that there would be a real and not merely verbal change in the policy of the stations."

<sup>678</sup> *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); For more on the case and controversies over it within the ACLU, see, e.g. Samantha Barbas, 'The Story of *Beauharnais v. Illinois*', *Journal of Free Speech Law* 419, no. 2 (2023), [https://digitalcommons.law.buffalo.edu/journal\\_articles/1152/](https://digitalcommons.law.buffalo.edu/journal_articles/1152/). Walker, *Hate Speech*.

*City of Chicago*, showed that the ACLU was beginning to win over the nation's highest court and therefore the battle over prior restraints at large. The Supreme Court decided 5-to-4 in Terminiello's favor; Justice Douglas wrote for the majority that "a function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."<sup>679</sup> Again, the AJCo and the ACLU were on opposite sides of the issue, with the former filing an amicus brief urging the court to uphold Terminiello's conviction and the latter's brief arguing for a reversal.<sup>680</sup>

The ACLU was delighted by the verdict and later framed it as part of an inexorable judicial march toward its vision of free speech.<sup>681</sup> In fact, Douglas's ruling was relatively narrow. The arguments before the court focused intensely on the content of Terminiello's speech and whether it "was composed of derisive, fighting words, which carried it outside the scope of the constitutional guarantees."<sup>682</sup> But the Court reached no conclusion on that question – in fact, its ruling scarcely addressed the content of what Terminiello said. Instead Douglas and the majority ruled that instructions given to the jury were overly broad and unconstitutional because they had defined the phrase "breach of the peace" as words which "[stir] the public to anger, [invite]

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<sup>679</sup> *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), 4.

<sup>680</sup> The ACLU and the AJCo were not always on opposite sides of Supreme Court cases during the explosion of amicus briefs which followed the end of the Second World War. For example, in the case of the "Hollywood Ten" against the House Un-American Activities Committee, both were part of nearly forty organisations who weighed in on the defendants' behalf. By 1949, the profusion of briefs overwhelmed the Court, which decided it would only accept nongovernmental amicus briefs of which the parties to the case had approved or which the filing organisation could prove would present information neither party had in their arguments. The amended rule came into effect after *Terminiello*. For more on the profusion of briefs as a tool of advocacy around 1945-1950, see Fowler V. Harper and Edwin D. Etherington, 'Lobbyists Before the Court', *University of Pennsylvania Law Review* 101, no. 8 (1953): 1172.

<sup>681</sup> 'Why the American Civil Liberties Union Defends Free Speech for Racists and Totalitarians' (American Civil Liberties Union, 1978).

<sup>682</sup> *Terminiello v. City of Chicago*, 337 U.S. 1 (1949), 3.

dispute, [bring] about a condition of unrest, or [create] a disturbance.”<sup>683</sup> Douglas wrote that “freedom of speech, though not absolute...is nevertheless 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>684</sup> But he also mentioned that the Court’s ruling hung on a previous case which had found that if any part of a state statute was unconstitutional, all convictions over the statute were null.<sup>685</sup> Had the city’s lawyers properly defined breach of the peace, the Court may have ruled against *Terminiello*. Moreover, the narrowness of the ruling and the bare majority of justices suggest that the ACLU had not completed its task. Chief Justice Fred Vinson, Frankfurter, Robert H. Jackson, and Harold H. Burton voted against *Terminiello* and between them wrote three dissenting opinions.<sup>686</sup> Broader judicial victory eluded the ACLU, albeit only for a decade.

The changing composition of the Court and its increased interest in free speech did not help the AJCo. As the venue for fighting over group libel shifted from Congress and administrative agencies to the Supreme Court, the advantage increasingly went to the ACLU. The Court was naturally interested in “constitutionalizing” defamation law and expanding the scope of the First Amendment to cover more and more categories of speech.<sup>687</sup> Doing so expanded what several

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<sup>683</sup> *Ibid.*

<sup>684</sup> *Ibid.*, 4.

<sup>685</sup> *Stromberg v. California*, 283 U.S. 359 (1931). The idea behind the ruling, as Douglas wrote in *Terminiello*, was that “since the verdict was a general one, and did not specify the ground upon which it rested, it could not be sustained. For one part of the statute was unconstitutional, and it could not be determined that the defendant was not convicted under that part.”

<sup>686</sup> *Terminiello v. City of Chicago*, 337 U.S. 1 (1949).

<sup>687</sup> See Walker, *Hate Speech*. For more on the transformation of the Supreme Court under Chief Justice Earl Warren, see, e.g. Archibald Cox, *The Warren Court: Constitutional Decision as an Instrument of Reform* (Harvard University Press, 1974); Morton J. Horowitz, *The Warren Court and the Pursuit of Justice: A Critical Issue* (Hill and Wang, 1998); Robert G. McCloskey, *The Modern Supreme Court* (Harvard University Press, 1972), <https://doi.org/10.4159/harvard.9780674428508>.

justices viewed as the American tradition of liberty and, conveniently, the Court's own power. This shift demonstrated how group libel advocates' focus on the law was counter to their own goals. If the Supreme Court had the choice between a vision of law which would expand their authority (by making disputes over libel law a constitutional question) and a vision which would leave the matter in the hands of juries, perhaps it was always going to choose the former. Boraisha, the AJCo official, may have been correct when he assessed that for Jewish groups interested in preserving minority rights, legal strategies were a something of a poisoned chalice. That aside, it is also possible they faced an impossible situation over which they had no control. The historian of the ACLU Samuel Walker wrote about the period beginning in 1952 that "the emergence of the Supreme Court as a maker of national policy stands as one of the most important changes in modern American history."<sup>688</sup> In a history of the Court during Warren's period as Chief Justice, during which most of the transformation occurred, Archibald Cox wrote that "hardly a political question arose...that was not converted into a legal question."<sup>689</sup> But by actively participating in this transformation to the exclusion of other activities, those in the AJCo who supported group rights – including Maslow himself – did themselves few favours.

### **The Fall of Group Libel?**

If not after the failures of 1948, when did Maslow and the AJCo give up on group libel altogether? And why did the precise timing matter? The tone of the CLSA's annual pamphlets took a marked turn between its 1951 and 1952 editions. The 1950 and 1951 pamphlets were the last in which the AJCo took new actions before the FCC or proposed new group libel bills. By

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<sup>688</sup> Walker, *Hate Speech*.

<sup>689</sup> Cox, *The Warren Court*; Horwitz, *The Warren Court and the Pursuit of Justice*.

1952 and 1953 the “Group Defamation” sections of the reports mainly included summaries of antisemitic defamation itself without further comment on actions the AJCo took or explanation for the change. The AJCo appeared to greet both success and failure serenely. When the action against Richards ended, it barely editorialized.<sup>690</sup> Even more notably, when no less than the Supreme Court of the United States ruled a group libel bill was constitutional, it had little to say.

The end of group libel activism in the United States is generally – and to some extent inaccurately – tied to the 1952 Supreme Court case *Beauharnais v. Illinois*.<sup>691</sup> Joseph Beauharnais was the president of a Chicago-based group called the White Circle League of America, one of many such small white supremacist groups which distributed racist and antisemitic literature in the early 1950s. As a result of the early campaigning of Jewish groups in the 1910s in response to race riots in Chicago, Illinois was one of several states with a law prohibiting publication of material which “exposes the citizens of any race, color, creed, or religion to contempt, derision, or obloquy.”<sup>692</sup> While minority groups had rarely attempted to use the law, Beauharnais’s pamphlets were egregious enough to mark a rare exception. Attempting to reverse neighbourhood integration of Black and white Chicagoans, they threatened to provoke actual violence in state officials’ eyes.

Beauharnais won the ACLU’s support in his fight to challenge the Illinois law, although not without reluctance on the organisation’s part.<sup>693</sup> It had already lost members as a result of

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<sup>690</sup> American Jewish Congress and National Association for the Advancement of Colored People, “Civil Rights in the United States in 1951: A Balance Sheet of Group Relations,” 118.

<sup>691</sup> See, e.g., Barbas, ‘The Rise and Fall of Group Libel: The Forgotten Campaign for Hate Speech Laws’. Schultz, ‘Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952’.

<sup>692</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952), 25.

<sup>693</sup> Barbas, ‘The Story of Beauharnais v. Illinois’, 429.

previous decisions to defend “race-baiters” and antisemites such as Terminiello in 1949. After arguments within the organisation, though, it sent one of its best litigators to help Beauharnais – likely because, in addition to principle, it was sure the case would lead the Supreme Court to strike down the remaining state group libel laws.<sup>694</sup>

That the Court approved the old Illinois law as its erstwhile advocates changed their mind was not as ironic as is usually supposed by historians examining the case. Beneath the court’s headline ruling approving the group libel statute was a not-inconsiderable deal of disagreement. Reading the fully four dissents by each member of the Court’s minority, it would have been obvious to interested groups that a generational change had begun when it came to the Court’s view of free speech and the First Amendment.

The author of the Court’s majority opinion, Frankfurter, held a view of hate speech steeped in the political culture of the Lower East Side. Born in Vienna to a distinguished line of rabbis, Frankfurter moved to New York at the age of 12 in 1894.<sup>695</sup> There, he witnessed the rich mixture of trade unionism, socialism, and Jewish idealism which had produced the AJCo itself.<sup>696</sup> As a young lawyer, he helped to found the ACLU and supported its early work against police brutality and in favor of due process.<sup>697</sup> But Frankfurter was an older style of left-liberal justice than would come to dominate the Warren Court: he at once favoured progressive policies and judicial restraint. The political victories he envisioned would be won mainly outside the courtroom.<sup>698</sup>

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<sup>694</sup> Ibid., 430. The Court had ruled some state group libel laws unconstitutional in *Klapprott v. United States*, 335 U.S. 601 (1949), hence the ACLU’s confidence.

<sup>695</sup> For a recent appraisal of Frankfurter, see Brad Snyder, *Democratic Justice: Felix Frankfurter, the Supreme Court, and the Making of the Liberal Establishment* (W. W. Norton & Company, 2022).

<sup>696</sup> Ibid.

<sup>697</sup> Ibid.

<sup>698</sup> Ibid.

This combination produced an idiosyncratic mix of judicial opinions. In 1940, Frankfurter rejected a claim that Jehovah's Witnesses' First Amendment rights should allow them not to salute the U.S. flag, a decision which was overturned three years later. Even in the latter case, Frankfurter wrote that he agreed politically but not judicially with the majority. The court's role was not to weigh "the wisdom or evil" of laws, including those with which its justices vehemently disagreed.<sup>699</sup> In 1951, as part of a majority upholding the conviction of Communists who had plotted to overthrow the U.S. government, he added that the justices were "not legislators, that direct policy-making [was] not our province."<sup>700</sup>

It was little wonder, then, that Frankfurter would defer to states' ability to enact group libel laws if they so chose. His opinion in *Beauharnais* surveyed the long history of libel in the common law and concluded that

The precise question before us, then, is whether the protection of 'liberty' in the Due Process Clause of the Fourteenth Amendment prevents a State from punishing such libels – as criminal libel has been defined, limited and constitutionally recognized time out of mind – directed at designated collectivities and flagrantly disseminated. There is even authority, however dubious, that such utterances were also crimes at common law. It is certainly clear that some American jurisdictions have sanctioned their punishment under ordinary criminal libel statutes. We cannot say, however, that the question is concluded by history and practice. But if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group unless we can say that this [is] a willful and purposeless restriction unrelated to the peace and wellbeing of the State.<sup>701</sup>

The Illinois statute, in Frankfurter's view, was plainly not "a willful and purposeless restriction."<sup>702</sup> Notably, Frankfurter and later justices differed in the legal history on which they drew when discussing free speech and defamation. For Frankfurter, the relevant law was the

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<sup>699</sup> *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

<sup>700</sup> *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>701</sup> *Beauharnais v. Illinois*, 258.

<sup>702</sup> *Ibid.*

common law of libel, rooted in centuries of English precedents such as those which the Board of Deputies often mulled an ocean away.<sup>703</sup> It was not – crucially – the First Amendment, which Frankfurter’s opinion does not mention. His framing of the legal question contrasted with Justice Hugo Black’s; Black wrote a searing dissent arguing that “today’s case degrades First Amendment freedoms.”

The Court’s holding here and the constitutional doctrine behind it leave the rights of assembly, petition, speech and press almost completely at the mercy of state legislative, executive, and judicial agencies. I say ‘almost’ because state curtailment of these freedoms may still be invalidated if a majority of this Court conclude that a particular infringement is ‘without reason,’ or is ‘a willful and purposeless restriction unrelated to the peace and well being of the State.’ But lest this encouragement should give too much hope as to how and when this Court might protect these basic freedoms from state invasion, we are cautioned that state legislatures must be left free to ‘experiment’ and to make ‘legislative’ judgments. We are told that mistakes may be made during the legislative process of curbing public opinion. In such event, the Court fortunately does not leave those mistakenly curbed, or any of us for that matter, unadvised. Consolation can be sought, and must be found, in the philosophical reflection that state legislative error in stifling speech and press ‘is the price to be paid for the trial and error inherent in legislative efforts to deal with obstinate social issues.’ My own belief is that no legislature is charged with the duty or vested with the power to decide what public issues Americans can discuss. In a free country, that is the individual’s choice, not the state’s. State experimentation in curbing freedom of expression is startling and frightening doctrine in a country dedicated to self-government by its people. I reject the holding that either state or nation can punish people for having their say in matters of public concern.<sup>704</sup>

In Black’s ideal country, speech would be “the individual’s choice, not the state’s.” It would also be the Court’s. The four dissenting justices, in contrast to Frankfurter and the majority, sought to bring the scope of protections against defamation under their own purview. If libel remained a matter of common law, the Court would have relatively little to do with shaping it. If it came under the umbrella of the First Amendment, the justices would be able to remake it. Black made

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<sup>703</sup> Especially *R v. Osborn* (1732). Frankfurter was an Anglophile and spent time at Oxford, both as a student and as a visiting faculty member.

<sup>704</sup> *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (Black, H., dissenting).

this competition between his vision and Frankfurter's historically-rooted restraint explicit, writing that the "limited scope of the law of criminal libel is of no small importance...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>705</sup> He framed group libel as an attempt to unduly expand common law to forbid Constitutionally-protected activity. In reality, the reverse was the case. In railing against group libel and other restrictions on speech, Black and the judicial minority sought to expand Constitutional law into areas only the common law had touched. He ended his dissent with Pyrrhus's prescient words: "if there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'"<sup>706</sup>

Seeing which way the wind blew, Jewish groups heeded Black's dissent rather than Frankfurter's majority opinion. They did not seek to use the Court's blessing of group libel to limit antisemitic speech. By autumn 1955, Maslow wrote an article titled "The Uses of Law in the Struggle for Equality" which argued for legal approaches to essentially every civil rights question *but* hate speech. He wrote that "law used to be contrasted with education as an instrument of social change, and almost always was given an inferior role. But in certain situations the absolute fiat of government is now deemed more effective than education in bringing about social change."<sup>707</sup> Education could come after law to ameliorate resistance, but in the field of civil rights, law was supreme: "We have learned that a change in basic attitudes need not precede a radical innovation in group relations. The innovation can be started without prior consent, provided that adherence

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<sup>705</sup> Ibid.

<sup>706</sup> Ibid.

<sup>707</sup> Will Maslow, "The Uses of Law in the Struggle for Equality," *Social Research* 22, no. 3 (1955). <http://www.jstor.org/stable/40982427>, 299.

is made mandatory and efforts are made concomitantly by education and persuasion to induce acceptance.”<sup>708</sup> Maslow cited victories in the fields of school segregation, housing, military service, employment, voting rights, and land ownership. Namely, he cited each area about which the CLSA had testified to Truman’s Commission on Civil Rights *except group libel*. He wrote that “when all is said and done, some problems are susceptible of a legal solution alone. One may freely debate the relative advantages and disadvantages of seeking to curb anti-Semitic rabble-rousers by group libel legislation. On the other hand, if one is considering a change in the immigration practices of the United States, one must inescapably think of legislation; immigration policy is fixed by statute, and can be changed only by a later statute.”<sup>709</sup> Group libel and hate speech were the sole exception to an otherwise total reliance on the law as an instrument for social change. Maslow, while not explicitly opposed to group libel laws, appeared to concede they would not be a major part of the struggle for civil rights in the mid-1950s.

By 1958, the AJCo at last changed its position, marking the true end of group libel advocacy as a plank of any major American Jewish organisation.<sup>710</sup> It gave two reasons for the change to its longstanding position:

Any approach to the problem of anti-Semitic defamation and tolerance which does not reach the root of the evil – disrespect for law – will almost certainly prove ineffectual. Indeed, it may well aggravate the gravity of the evil, for it would give rise to the erroneous impression that effective measures are being undertaken to meet the evil, and thus may well delay the employment of what are really effective measures. All proposals that have been suggested must therefore be tested against the criterion of whether they reach the basic disease of disrespect for law or merely the superficial symptoms of defamation and vandalism.

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<sup>708</sup> Ibid.

<sup>709</sup> Ibid., 312-13.

<sup>710</sup> Statement of the American Jewish Congress before Sub-Committee No. 2 of Committee on Judiciary of the U.S. Senate regarding Civil Rights Bills Pending in the House of Representatives, July 27, 1955, Records of the American Jewish Congress, I-77, box 187, folder 18, CJH, 6.

It follows too that all approaches to the problem of defamation and violence must be sought within the framework of constitutional limitations. One of the most regrettable consequences of the anxiety bordering on panic that has in some communities accompanied exaggerated accounts of the race hate publications and anti-Semitic vandalism has been the expressed readiness on the part of many well-meaning persons to advocate short cuts with constitutional guarantees in order to apprehend the anti-Semites and suppress their anti-Semitism. It is ironic that in the effort to suppress lawlessness, lawless measures should be urged. Our Constitution is indivisible; the same Bill of Rights that guarantees equality of education and access to the ballot secures freedom of expression and due process of law.<sup>711</sup>

By this logic, defamation was the one form of anti-minority action legal measures would not remedy. The first reason stated above flew entirely in the face of the organisation's and Maslow's other writings about the nature of racism and antisemitism. The second reason is closer to the true explanation for the AJCo's about-face. Rather than concluding suddenly that group libel would not reduce antisemitic speech, it had come to believe it was not constitutional. The AJCo now rejected every form of group libel legislation, including the postal bills it had introduced as late as 1949. Postal bills, its platform stated, were perhaps even more dangerous than other types of group libel legislation. First, they employed prior restraints on speech, "a type of censorship which has been deemed particularly offensive in American traditions from a period even antedating our Constitution."<sup>712</sup> Second, they placed the power to decide what was libelous in the hands of unelected bureaucrats rather than the courts. They "would confer upon a non-elected, administrative official almost complete discretion to decide what shall and what shall not be distributed through the mails, thus giving him as a practical matter a life and death power over all mass media published in the nation. Finally, the publisher or author of a challenged publication would be deprived of the protection of a jury trial, to which even a group libel penal statute entitles him."<sup>713</sup> The ACLU itself could not have stated its opposition better. In 1958,

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<sup>711</sup> Ibid.

<sup>712</sup> Ibid., 8.

<sup>713</sup> Ibid.

Maslow was the AJCo's general counsel; in 1960, he would become its president. The change in the organisation's position happened not because of a change in personnel but because of a change of heart. By 1961, Maslow would write that the AJCo and ACLU's positions on religious liberty cases "were almost identical" and that the two groups "have jointly brought test cases, jointly filed briefs amicus and worked together in countless ways."<sup>714</sup>

Between 1955 and 1958, Maslow and the AJCo went from simply omitting group libel from their list of priorities to outright opposing it. The usual explanation for this change is that Jewish groups like the AJCo were afraid of McCarthyism and sought to fend off accusations of Jewish associations with communism. But Jews had been afraid of exactly that since the late 1940s, if not since the First Red Scare of 1917 and after.<sup>715</sup> The fact that it took the AJCo another ten years to officially disavow group libel, combined with the group's continuing love for legal tactics, suggest that something else was at play. The additional factor was the AJCo's and other Jewish group's growing commitment to a coalitional approach to group rights, one in which the traditional approach to Jewish rights would need to be balanced against the approach other minority groups preferred.<sup>716</sup> The shift from a group rights-based approach to an individualistic approach occurred because that was the approach favoured by American Jews' main allies: the ACLU, of course, but more crucially the NAACP. The leading African American civil rights groups had always opposed group libel, going back to their own testimony before the CCR and

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<sup>714</sup> Will Maslow, "The Legal Defense of Religious Liberty—The Strategy and Tactics of the American Jewish Congress," September 1961, Records of the American Jewish Congress, I-77, box 188, folder 22, CJH, 7.

<sup>715</sup> Ibid.

<sup>716</sup> See, e.g. Greenberg, 'Civil Rights, Free Speech, and Group Libel'. Svonkin, *Jews against Prejudice: American Jews and the Fight for Civil Liberties*. A classic assessment of the relations between the two groups is David Levering Lewis, 'Parallels and Divergences: Assimilationist Strategies of Afro-American and Jewish Elites from 1910 to the Early 1930s', *The Journal of American History* 71, no. 3 (December 1984): 543, <https://doi.org/10.2307/1887471>.

to Thurgood Marshall's comments to the ACLU when it attempted to draft a group libel statute in 1940.<sup>717</sup> (Marshall signed onto a brief in *Beauharnais* asking for a reconsideration of the case.)<sup>718</sup> They believed much of their own speech would be caught in its dragnet. Additionally, they had never subscribed to the group rights approach, steeped as it was in European Jewish ideas of collective, even national, rights. If the AJCo wanted to join the broader civil rights struggle led by African Americans, they would have to put aside their old ways. That is precisely what they did.

In fact, the AJCo's own material from the mid-1950s speaks much more to this shift in the civil rights coalition than it does about McCarthyism (although the two were not unrelated). In the same pamphlet disavowing group libel, the AJCo wrote that

Even more damaging and more dangerous than an exaggerated view of the extent of anti Semitic defamation and vandalism, is a distorted perspective of its nature. A completely false picture emerges if defamation and violence against Jews and Jewish property are detached from the general background out of which they come and considered as an isolated phenomenon. The Jews are not the sole victims of race hate literature and Jewish communal buildings are not the only structures that have been bombed or vandalized. The extent of damage done to public schools and churches during the past year far exceeds that suffered by synagogues, and the number of bombed private homes, owned or occupied almost entirely by Negroes, is greatly in excess of the number of bombed communal buildings. Of the dynamitings that occurred in the South in the past three years, two-thirds involved homes.

The anti-Semitic defamation and vandalism that has broken out must be considered an aspect of the general outbreak of lawlessness in the South since the United States Supreme Court's racial desegregation decisions. The two are inextricably interrelated and any effort to meet the problem of anti-Semitism without attacking the underlying lawlessness that gives rise to it will necessarily be futile and self-defeating.<sup>719</sup>

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<sup>717</sup> Memorandum from Thurgood Marshall to the ACLU on Group Libel Bills, March 7, 1940, General Jewish Council Records, I-170, box 11, folder 5, CJH.

<sup>718</sup> Petition for Rehearing, *Beauharnais v. Illinois*, 343 U.S. 350 (1952), via Schultz, 'Group Rights, American Jews, and the Failure of Group Libel Law 1913-1952', 143.

<sup>719</sup> Statement of the American Jewish Congress before Sub-Committee No. 2 of Committee on Judiciary of the U.S. Senate regarding Civil Rights Bills Pending in the House of Representatives, 4-5.

Antisemitism in the United States, in this telling, was not its own problem or even the main problem but rather a symptom of anti-Black racism concentrated in the American South. This was a stronger version of the AJCo's discussion of the relationship between racism and antisemitic defamation in 1951, when the CLSA pamphlet stated that "those groups which make it their business to peddle anti-Semitic, anti-Negro and anti-Catholic literature...produce a large number of publications but none have wide circulation or substantial financial support. Negroes, however, are rarely the target of this kind of organized and deliberate vilification."<sup>720</sup> Similar dynamics had played out within the ADL, albeit a decade earlier, which focused its testimony before the CCR mainly on discrimination against African Americans rather than antisemitism.

The yoking of American Jewish rights to civil rights as a whole recalls Riesman's statement that group libel advocates should realize that "their fate as Jews in America is largely beyond their control." He may well have been right. Trends within the Supreme Court and public opinion were increasingly not on group libel's side. Still, merging the struggle for Jewish rights to that of Black civil rights did not simply mean creating a coalition of minority groups. It meant leaving behind the idea of collective rights before the law altogether. American Jewish groups would join the great civil rights struggle, but they would join it as individuals rather than as a nation. Boraisha's vision, which he did not live to test, would remain an overlooked alternative in American Jewish politics.

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<sup>720</sup> American Jewish Congress and National Association for the Advancement of Colored People, "Civil Rights in the United States in 1951: A Balance Sheet of Group Relations," 115.

## Chapter VI

### A Poor Fit: Group Libel and Race Relations Legislation, 1964-1969

In 1952, a death knell seemingly rang for group libel as the Defamation Act – based substantially on the recommendations of the Porter Committee – passed into law.<sup>721</sup> Several Board members who were also MPs attempted to convince their colleagues to override Porter’s recommendations, but perhaps predictably they failed.<sup>722</sup> Although the Board of Deputies maintained the Community Libel Standing Committee throughout the 1950s, its efforts to raise the issue’s salience after major defamation reform had just passed found little support.<sup>723</sup> If antisemitic material was going to be outlawed, by the end of the decade it was clear that it would not be through the mechanism of libel law. This may seem an unimportant distinction – as other parts of this thesis have noted, Jews seeking group libel protections were often semi-agnostic about the exact legal means through which they could achieve their goal. In the United States, Maslow and the CLSA were happy to target antisemitic libels either through administrative actions such as limiting its spread via the mail and radio or through defamation reform.

This chapter aims to show that, particularly in the British case, the mechanism mattered. Unlike the United States, the United Kingdom did eventually pursue a form of anti-hate speech legislation, which the Board supported and even shaped in part. But the legislation was a poor match for the problems they faced. This was not group libel, which would have allowed minority

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<sup>721</sup> Mitchell, *The Making of the Modern Law of Defamation*, 257. The debate over group libel’s inclusion in the act is HC Deb 27 June 1952 vol 502 cc2749-58. The clause ended up being struck because of the confusion over whether it would allow for community libel claims.

<sup>722</sup> Ibid.

<sup>723</sup> Letters from Sidney Salomon to Barnett Janner, February 20, 25, 26, and 28, 1952, Board of Deputies Collection, ACC/3121/C4/6/2, LMA. Salomon and Janner discussed lobbying MPs to join Janner in asking questions in the Commons about antisemitic speech circulating in the early 1950s.

groups themselves to bring claims of defamation. It was a new offence with many of the same features that made the existing law inadequate in the Board's eyes. The lesson the government had apparently taken from previous failed cases, such as those of Leese and Caunt, was to be even stricter in deciding which hatemongers to prosecute. By creating the new crime of incitement rather than building on the existing law of libel, the Act ensured that targeted groups themselves, such as Jews, would have no ability to bring lawsuits over racial hatred on their own. The Board attempted to secure more (or rather, any) control over whether lawsuits would be brought, even in an advisory capacity; such a role would have been in line with previous instances of the British government giving the organisation a voice in determining how the law would treat Jews.<sup>724</sup> But the government's resistance to allowing any external input on matters of hate speech revealed a difficult truth – the case of speech was different to that of other legal matters. Because of the perceived fundamental nature of free speech to British law and society, the government would allow no suggestion that minority groups themselves should determine which speech acts merited prosecution. This meant that when it came to antisemitic libel, the Race Relations Act represented a death knell rather than a new beginning for group libel. It allowed the government to appear to take new steps against hate speech without fundamentally changing the existing paradigm which already determined prosecutions for seditious libel and public order violations. The flaws of both those measures to really deal with antisemitic speech – as cases covered earlier in this thesis show – were twofold. First, only the government's law officers, who largely did not believe in pre-emptive measures to fight dangerous speech, could decide when to bring a claim. Second, the bar for conviction was so high as to be nearly unsurpassable. Of course, in the eyes of governments, both Labour or Conservative, these were

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<sup>724</sup> Eugene Charlton Black, *The Social Politics of Anglo-Jewry, 1880-1920* (Blackwell, 1988), 105; Feldman, *Englishmen and Jews*, 66–69; Feldman, 'Jews and the State in Britain, 1830-1930', 149–52.

not necessarily flaws. Indeed, they were welcome features for those who believed almost no speech should be barred, certainly not speech with no clear connection to physical violence. This stance put the government firmly in opposition to the Board.

Given another nominal chance to secure speech reform, the Board again took cues from the government's wishes. Their campaigning continued to occur mostly behind the scenes, and they declined the chance to work with a new spate of anti-fascist groups founded in the early 1960s. The Board did convince the government to include some of its desired clauses in the Act, but in practice it did not lead to greater success in securing prosecutions, let alone convictions, over antisemitic speech. Initially seen as a chance to enact group libel, the move toward a different paradigm of anti-hate speech law in Britain in fact cemented its failure. It validated the Board's longstanding assumption that the British political and legal system could not (or would not) accommodate greater legal activism on its part.

### **The Race Relations Act and British Jews**

After Labour's victory in the 1964 general election, passing legislation to combat racial prejudice became a priority for the new government. The intended beneficiaries of what would become the Race Relations Act 1965 were mainly new immigrants from Britain's former colonies; between 1953 and 1962, 272,450 immigrants came to the U.K. from the West Indies, 75,850 from India, and 67,330 from Pakistan.<sup>725</sup> After their arrival, these non-white immigrants faced racism and severe limits on their participation in British society – they were barred from rental properties,

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<sup>725</sup> Andrew Thompson, "How has Britain's Post-War Experience of Immigration Shaped the Contemporary Debate on Integration?," *COMPAS*, October 20, 2014.

shunned in pubs, and rejected from jobs. Their ability to participate in society was curtailed at every level. In 1963, the Bristol Bus Boycott fought against a “colour bar” on hiring non-white crew members, eventually forcing the Bristol Omnibus Company to scrap its ban.<sup>726</sup> However, the campaign’s success drew attention to the continued presence of such bans in many other areas. Race riots swept Notting Hill in 1958, threatening Black families’ safety and drawing the nation’s attention to slogans such as “Keep Britain White.”<sup>727</sup> The first Wilson government aimed to attack these barriers, but also to discourage anti-immigrant speech. The Race Relations Act represented the United Kingdom’s first real attempt to limit speech against specific minority groups, something many continental European nations had done in the aftermath of the Holocaust.<sup>728</sup>

Literature on the Race Relations Act increasingly mentions Jews’ role in lobbying for it, including with regard to the key provision banning incitement.<sup>729</sup> However, viewing that advocacy without the previous history of British Jews’ relationship to speech and the law fails to show why the act represented an end rather than a beginning for British Jews. The Board of Deputies may have been involved in details of the Act, but its overall shape was designed to

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<sup>726</sup> Marge Dresser, “The Colour Bar in Bristol, 1963,” in *Patriotism: The Making and Unmaking of British National Identity* (1989), (Routledge, 1989), 358–386.

<sup>727</sup> Joe Mullhall, “Windrush to Notting Hill: Race and Reactions to Non-White Immigration,” in *British Fascism After the Holocaust*, 1st ed., (Routledge, 2021), 136–165.

<sup>728</sup> For a description of these laws, particularly in France and Germany, see Erik Bleich, ‘From Race to Hate’, in *Hate, Politics, Law*, (Oxford University Press, 2018), 15–33, <https://doi.org/10.1093/oso/9780190465544.003.0002>.

<sup>729</sup> For a more extensive discussion of the historiography, see the introduction to this section of the thesis. See also Christopher Stephen Byrne, “‘The Jew Has Been Persecuted Because He Is a Jew’: The Discursive Construction, Disruption, and Reconstruction of “The Jew” in Race Relations Legislation and Situation Comedy, 1965–1976’ (University of Southampton, 2025); Finlay, ‘Between Religion and Ethnicity: How Jews Navigated Race Relations in Postwar Britain’; Finlay, ‘British Jews and the Race Relations Acts’; Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’; Schaffer, ‘Legislating against Hatred’.

ensure that it would not be able to occupy its desired role of intermediary between British Jews and the state.

This chapter charts the waxing of the first British antidiscrimination laws and the waning of group libel in Anglo-Jewish politics. The Board largely ceased advocating for libel reform after it was not included in the Defamation Act 1952. The ideas which had animated the project, however, remained. British Jewish responses to the Race Relations Acts demonstrate the long tail of the group libel campaign and its meaning beyond the strict definition of defamation reform. Legal tactics and a law-centred approach to the problem of antisemitism remained part of the Board of Deputies' and other Anglo-Jewish groups' thinking, but they remained rightly sceptical about the possibility of radical legal change.

At the time of these debates, the position of British Jews in society was changing. The destruction of the East End during German bombing campaigns accelerated the process of Jewish migration to London's suburbs, a process that likewise occurred in the Jewish communities of Manchester, Leeds, and Glasgow. The latter communities began to shrink, furthering the London-centric nature of British Jewish life.<sup>730</sup> These changes and others brought about an economic transformation of British Jewry, heralding Jews' move from running the small businesses of the Jewish East End to entering the professional-managerial class.<sup>731</sup> By the time the Wilson government began considering race relations reform in 1965, British Jews were no longer central to discussions about minority protections. This was not necessarily because fear

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<sup>730</sup> Endelman, *The Jews of Britain, 1656 to 2000*, 231-2.

<sup>731</sup> Ibid. See also, e.g., S.J. Prais and M. Schmool, 'The Social-Class Structure of Anglo-Jewry', *Jewish Journal of Sociology* 17 (1975); Harold Pollins, *Economic History of the Jews in England* (Associated University Press, 1982).

of antisemitism within the establishment had lessened – in fact, it increased in the immediate postwar period and continued to be a concern for the Board of Deputies and its Defence Committee.<sup>732</sup> The British fascist revival of the 1960s targeted new immigrants, to be sure, but had not left behind the antisemitism of its past. In response, the Board undertook yet another unsuccessful fight, using much the same approach it had during the group libel era. Its efforts to secure protection under the nascent Race Relations Act were the child of the group libel fight and met a similar end.

The Board of Deputies also underwent a generational change in the 1950s, as eminences like Laski receded and a new generation came into power (although, as seen below, the Board continued to rely on Laski's legal knowledge). The central figures in the new era of pushing for restrictions on antisemitic speech were both members of Parliament for Labour, Maurice Orbach and Barnett Janner. Janner served as the Board's president from 1955 until 1964; Orbach was the first and longstanding head of the TAC. Their ascendance kept the matter of group libel alive after 1952 when Laski, Brotman, and others would have probably abandoned it. It also cemented the Board's Zionist bent after the turmoil of the 1940s. Janner and Orbach worked both publicly in their roles as MPs and behind the scenes in Parliament to push for greater attention to antisemitism in the 1950s. In 1952, for example, Janner got into a testy exchange with then-Attorney General Lionel Heald and Labour MP Harold Lever about whether a provision in the Defamation Bill addressing "defamation of undefined groups" could be construed as allowing

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<sup>732</sup> For examples of commentary on this trend, see, e.g. Louise London, *Whitehall and the Jews, 1933-1948: British Immigration Policy, Jewish Refugees and the Holocaust*, (Cambridge University Press, 2000); Mulhall, *British Fascism after the Holocaust: From the Birth of Denial to the Notting Hill Riots 1939-1958*; Tony Kushner, "The British and the Shoah," *Patterns of Prejudice* 23, no. 3 (1989): 3–16. The literature on events in British Palestine and, after 1948, the newly established Israeli state, is sizable. However, not all the growth in postwar antisemitism can be attributed to reactions to events abroad; some of it merely reflected the fact that Mosley's successors had never truly given up their fight.

claims of group libel.<sup>733</sup> Janner and Charles Hale, the clause's author, insisted it could; Lever (who had introduced the Bill) and the government disagreed. The matter proved sufficiently controversial that Hale agreed to drop the clause entirely in the interest of seeing the bill pass.

### **Trafalgar Square, 1962**

After its failure to persuade the Porter Commission to recommend group libel reform, the Board of Deputies returned to the two existing legal tools at its disposal. These were advocating for prosecutions for seditious libel, which remained vanishingly rare, and pushing for charges over violations of the Public Order Act. The latter had proved helpful in quashing the BUF before the start of the Second World War, although the conflict itself played a major role in doing so because it led to the internment of several fascist leaders. The Board was aware that seditious libel was a weak tool even when used, hence its previous advocacy for libel reform and for group libel protections. Cases such as the government's failed prosecution of Caunt had proved to the government what the Board and some British Jews had known since they began campaigning for libel reform in the 1920s – that seditious libel was practically impossible to prove. After Caunt's acquittal, the attorney general rejected a series of requests from the Board and other groups complaining about British Nazism. He wrote about one offending copy of *National Socialist*, the movement's magazine, that he was "very firmly of the view that unsuccessful prosecution does more harm than no prosecution at all."<sup>734</sup> Nonetheless, the Board continued to try to persuade the

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<sup>733</sup> HC Deb 27 June 1952 vol 502 cc2749-58; The ambiguity stemmed from the meaning of "undefined persons." In Janner's view, this could mean groups like Jews. In Heald and Lever's, it referred only to small groups of unnamed defendants who could nonetheless be identified by the libel or slander in question. For a humorous illustration of the latter legal issue in the common law, see Alan P. Herbert, *Uncommon Law: Being Sixty-Six Misleading Cases Revised and Collected in One Volume*, (Methuen, 1982), 82–89.

<sup>734</sup> Ibid.

government to pursue such prosecutions. Their letters to the Home Office, which they knew would almost certainly be futile but sent consistently, are indicative of one of the major effects of the group libel matter. The idea of group libel specifically may have failed, but the idea of using legal tactics to fight antisemitism remained.<sup>735</sup> The Board continued to bring complaints from British Jews to the Home Office's attention in the 1950s and 1960s, even after it stopped advocating for changes to the existing law. The subjects of its letters were the generation of British fascists who had inherited the movement from Mosley, particularly its new leaders Colin Jordan and John Tyndall. As Joshua Cohen points out, more than Mosley it was his extreme colleague Arnold Leese who moulded the new generation of far-right figures, providing "continuity between interwar and 1970s' fascism. Although he died in 1956, Leese's views influenced [Jordan] and [Tyndall], two of the most important far-right figures in the 1960s."<sup>736</sup> As Chapter II notes, Leese had been the subject of a seditious libel prosecution in 1936; a jury found him and a co-conspirator not guilty of that and other serious charges, fining them only for lesser offences.

Cohen also raises the issue of the Holocaust and how it affected antifascist activity in the 1960s. Two notable antifascist organisations began their work in 1962, the 62 Group and the Yellow Star Movement. Holocaust memory was central to both groups' self-image, although, as Cohen notes, "the YSM's symbolism was more focused on contemporary anti-racist solidarity than the experience of Jews under the Nazis."<sup>737</sup> As for their tactics, "the two organisations differed markedly in their antifascism. The 62 Group used violence to confront fascists and intelligence

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<sup>735</sup> (Although the *Jewish Chronicle* continued to mention it in various editorials.)

<sup>736</sup> Cohen, "Somehow Getting Their Own Back on Hitler", 127.

<sup>737</sup> Ibid., 122.

work to undermine its opponents. The [YSM] eschewed violence, adopting peaceful protests (although individual members were involved in violent confrontations) and a mass petition campaign for anti-racist legislation.”<sup>738</sup> Neither “prefer[ed] to target fascism through legal means.”<sup>739</sup> The Board’s Defence Committee took a dim view of these new groups, downplaying their presence at fascist events.<sup>740</sup>

In the summer of 1962, the Board began to receive reports that the Metropolitan Police had issued a permit for a major neo-Nazi rally to be held in Trafalgar Square on July 1. The event represented a step up from previous fascist events, both due to its location and planned size. It terrified the Board, which felt publicity for the event might give antisemites a recruitment opportunity. Top Board officials peppered the Police and Home Office with letters pleading for them to shut down the rally. It went forward nonetheless, and while it did serve as a venue for exactly the virulent antisemitic speech the Board feared, it did not gain sufficient publicity to buoy Jordan and the British National Socialists. One teenage columnist in the *Jewish Chronicle* wrote that “the four massive bronze lions that have guarded Nelson’s column in Trafalgar Square for close on 100 years have seen many speakers come and go. In Trafalgar Square you can say anything. But to hear a call to people to ‘Free Britain from Jewish Control’ and a glorification of Hitler’s name at a Nazi meeting in Trafalgar Square just 17 years after a war had defeated Hitler and his Nazis must have made even those solid black lions stir.”<sup>741</sup> Many members of the Anglo-Jewish establishment shared his sentiment; even if Jordan’s movement was small, its symbolism was chilling. The Board began advocating for the government to prosecute Jordan and his

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<sup>738</sup> Ibid., 133.

<sup>739</sup> Ibid., 134.

<sup>740</sup> Ibid.

<sup>741</sup> *Jewish Chronicle*, July 6, 1962.

associates for either seditious libel or, more likely, Public Order Act Section 5 violations.<sup>742</sup> The government assented, eventually securing a nine-month sentence for Jordan and several others.<sup>743</sup> Despite this rare victory under the old law of seditious libel, the Board was frustrated with Jordan's short sentence. Existing law remained an inadequate tool.

Men other than Jordan continued to trouble the Board. For example, it repeatedly asked the Home Office to prosecute Martin Webster, who had been distributing copies of the "National Socialist" and shouting its slogans outside the Notting Hill tube station throughout the spring of 1964. Interestingly, unlike some of the other subjects of the Board's complaints, Webster had been prosecuted over violations of the Public Order Act but was able to win an appeal by arguing that he was merely advertising the newspaper.<sup>744</sup> Various Board officials, including Brotman and Janner, wrote to the Metropolitan Police and Home Office during 1963 and 1964, with the aim of passing along complaints about "National Socialist" and its distributors. They also enlisted allies – including then-MP Margaret Thatcher – to echo its requests for action, perhaps judging that such entreaties might go farther if they came from non-Jewish as well as Jewish sources.<sup>745</sup>

Cases like Webster's disappointed the Board because, despite the Public Order Act's effectiveness against the BUF in the 1930s, it was a law that at its heart dealt with policing action rather than speech. As the Home Office's letter about Webster suggests, like seditious libel, even

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<sup>742</sup> Section 5 of the 1936 Act was the salient language for most prosecutions of antisemites – it read "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned shall be guilty of an offence." It carried a fine of £50 or three months' imprisonment, or both.

<sup>743</sup> "Colin Jordan Returns to Nazi Leadership in Britain," *Jewish Telegraphic Agency*, June 4, 1963.

<sup>744</sup> Letter from J.C.H. Holden to A.G. Brotman, March 20, 1964, Board of Deputies Collection, ACC/3121/E4/403, LMA.

<sup>745</sup> Letter from Monty (Home Office official) to Margaret Thatcher, October 8, 1963, Board of Deputies Collection, ACC/3121/E4/403, LMA.

the strengthened Public Order Act was designed only to stop hate speech from spilling into political violence, not to stop it from being expressed in the first place. Home Office official J.C. H. Holden wrote that “to go further and make racial or religious hatred or its incitement a punishable offence in all circumstances, would be to introduce a political censorship – even if one which many people would support – and the much more difficult subjective test of what a person meant by any words he used.”<sup>746</sup> But without such tools, in practice antisemites like Webster and Jordan could often argue that they did not intend to threaten public order even if, had they won increased support, they would have happily done so. Only the Attorney General could bring cases of seditious libel or Public Order Act violations, and the government was not concerned with the inherent dangers of political speech so long as it did not spill into action.<sup>747</sup> The Board’s view of speech was different in two respects. First, its officials worried that, by the time British neo-Nazis took action, it would be too late to stop them. Second, and more importantly, the Board felt that speech was dangerous to the public good (and the good of British Jews) even when it had no apparent, immediate result. Holden’s comment was telling – in order to punish speech beyond the obvious category which directly incited violence, the legal system would have to answer the question “of what a person meant by any words he used.”<sup>748</sup> But unlike the Board, the Home Office was consistently unwilling to investigate the implications of fascists’ words beyond their surface meaning.

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<sup>746</sup> Letter from J.C.H. Holden to A.G. Brotman, March 20, 1964, Board of Deputies Collection, ACC/3121/E4/403, LMA, 2.

<sup>747</sup> Copy of Race Relations Act, 1965, Race Relations Board Collection, CK2, TNA; Letter from John Hobson to Barnett Janner, February 28, 1964, Board of Deputies Collection, ACC/3121/E4/403, LMA. Hobson, the Attorney-General from 1962 through 1964, was probably the official who gave the Board the warmest response regarding potential prosecutions over “National Socialist.” He wrote to Janner that he had forwarded material from the Board to the Director of Public Prosecutions and made enquiries to the Court about why Webster’s appeal had been allowed.

<sup>748</sup> Letter from J.C.H. Holden to A.G. Brotman, March 20, 1964, Board of Deputies Collection, ACC/3121/E4/403, LMA.

## Matters of Intent

In reaction to the re-entry of neo-Nazi speech to British public space, the Board attempted to reassert the need to limit anti-Jewish remarks. Its campaign bore similarity to the group libel efforts of decades past, which had often been catalysed by external events such as the unrelated decision of the government to set up the Porter Committee. Similarly, it was the opportunity presented by the Wilson government's interest in race relations that led the Board to get involved. As in previous cases, the Board was a reactive (if not entirely ineffective) institution.

On January 14, 1965, Secretary of State for the Home Department Frank Soskice – the son of a Russian Jewish lawyer<sup>749</sup> – met with a group of Board of Deputies officials “to discuss racial discrimination and incitement” in connection with the forthcoming bill.<sup>750</sup> At the meeting, Brotman presented a memorandum written by its Race Relations Working Group outlining the group's position on the future Race Relations Act. The document Brotman gave Soskice explicitly framed the Board's advocacy as the continuation of its efforts to enact group libel legislation. It noted that “the two principal legal provisions at present governing this field, namely the law against seditious libel and the Public Order Acts are both in our view inadequate.”<sup>751</sup> As for the new Bill, the Board requested that it “should be so framed as to cover both the written and the spoken word, as well as pictorial representations, likely to incite hatred against any group of citizens by reason of, or by reference to, their origins whether racial, ethnic or religious.”<sup>752</sup> Lest Soskice think hatred of Jews was a problem of the past, the memorandum

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<sup>749</sup> Finlay, ‘British Jews and the Race Relations Acts’, 130.

<sup>750</sup> For additional discussion of this campaign, see Bleich, *Race Politics in Britain and France*, 51.

<sup>751</sup> “Observations on Racial Discrimination and Incitement to Racial Hatred,” Board of Deputies of British Jews, January 6, 1965, Board of Deputies Collection, ACC/3121/C/13, LMA.

<sup>752</sup> Ibid.

included a list of antisemitic publications that had circulated around the U.K. in the early 1960s. They included the productions of the Greater Britain Movement, the National Socialist Movement, and the British National Party.<sup>753</sup> Most of these organisations were small in both membership and reach, but in the Board's view any amount of antisemitic material "conditioned" the population to view Jews as less than human.<sup>754</sup> The Board's presentation stated its position on the debate over speech and action explicitly using the example of the Jordan case. The High Court's ruling had made clear that the law as it existed tested only "the effect of the speaker's words on the audience actually present, and whether they were likely to be provoked to violent reaction."<sup>755</sup> But it failed to deal with situations in which the speaker's entire audience agreed with his or her words but were "not likely to react violently." In the Board's view, the government should not "ignore the possible long term effects of such speeches, whether or not these effects are violent."<sup>756</sup> Notably, the Board did not recommend allowing groups such as itself to bring cases over incitement, perhaps knowing the government would refuse such a request. It did, however, address another aspect of the future Act which would prove difficult: the bar for a conviction and use of the justification defence. After its difficult experiences with Leese, Caunt, and now Jordan, the Board knew well that antisemites could use the court setting to their advantage, and indeed to further spread the claims that were the very basis for their trial. For any legislation dealing with incitement to have its intended effect, the Board argued that "it should not be a possible defence that the matter complained of was true and that publication was in the public interest." The Board clearly had cases like Leese's in mind when it added that

if it were open to the defendant to attempt to prove the truth of the matter as a defence, such a person, *especially if not represented by counsel*, would have virtually free roving

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<sup>753</sup> Ibid.

<sup>754</sup> Ibid.

<sup>755</sup> "Observations on Racial Discrimination and Incitement to Racial Hatred," 2.

<sup>756</sup> Ibid.

commission both by cross examination and by adducing evidence to bring in any known or suspected crime or wrongdoing by Jews since time began. Such a course of action would do an enormous amount of harm when widely reported, even if the defendant were nevertheless convicted.<sup>757</sup>

Soskice received the Board, but he did not incorporate all of its recommendations into the draft Bill presented to Parliament in April 1965.<sup>758</sup> Some aspects of the Bill were very welcome for the Board – it explicitly focused on both written and spoken statements, regardless of whether they immediately endangered public order. While not as expansive as group libel proposals, the Bill’s explicit inclusion of the written word addressed a longstanding complaint of the Board’s, concerned as it was about pamphleteers like Martin Webster. Other aspects were disappointing. The Bill stipulated that “no prosecution for such an offence shall be instituted in England or Wales except by or with the consent of the Attorney General.”<sup>759</sup> Additionally, the wording of the offence made clear that the conviction would necessitate not only distributing or saying “matter or words likely to stir up hatred against that section on grounds of colour, race, or ethnic or national origins” but also “intent to stir up hatred.”<sup>760</sup> The bar of intent had been one of the most difficult aspects of the existing law; as the Board pointed out to Soskice, the accused could simply claim that they sincerely believed in the truth of their words and had not intended harm. But it was not a point on which the government would budge. As much as it felt pressure from groups like the Board, it felt pressure even more keenly from those who worried Section 6 – the incitement clause – would impinge upon freedom of speech and expression. In his speech

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<sup>757</sup> “Observations on Racial Discrimination and Incitement to Racial Hatred,” Board of Deputies of British Jews, January 6, 1965, Board of Deputies Collection, ACC/3121/E4/403, LMA, 5.

<sup>758</sup> HC Deb 01 June 1965 vol. 713 cc1653-6.

<sup>759</sup> Draft of Race Relations Bill, 1965, Race Relations Board Collection, CK2, TNA.

<sup>760</sup> Ibid.

introducing the bill, Soskice drew the connection between the would-be Act and speech law directly, saying

it would be a tragedy of the first order if our country, with its unrivalled tradition of tolerance and fair play as between one man or woman and another and perfect respect for the rights and personal worth and dignity of the individual, should see the beginnings of the development of a distinction between first and second class citizens and the disfigurement which can arise from inequality of treatment and incitement to feelings of hatred directed to the origins of particular citizens, something for which they are not responsible. It is equally the country in which we cherish the right of the freest possible discussion and debate within the limits of the law of libel, blasphemy and sedition and the avoidance of disorder.<sup>761</sup>

Soskice summarised the precise concerns the Government had previously had when considering and rejecting group libel proposals, namely, the balance between preventing “incitement to feelings of hatred” and free speech. He also noted that libel and public order law were the existing limits on such behaviour.

Their concerns aside, Board officials fought vigorously for the passage of the Act in Parliament, fending off accusations that it unduly impinged upon free speech and invoking Jews’ own painful experience with racial propaganda. Janner, the Labour MP for Leicester North West, had finished his term as President of the Board of Deputies the previous year, in 1964. He served as the Board’s primary advocate for Jewish causes in Parliament in the 1950s and 1960s, including during the debate over the Race Relations Act. Janner began his May 3 speech by invoking the history of Jews in Nazi Germany, arguing that “the Weimar Republic in Germany, under the plea that freedoms must be respected, took no heed of the vile abuses and the principles or the lack of principles of those who were exercising them.”<sup>762</sup> His speech echoed many of the sentiments he had expressed during his argument over the “undefined persons” clause of the Defamation Bill in

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<sup>761</sup> HC Deb 03 May 1965, vol. 711, cc926-1059.

<sup>762</sup> Ibid.

1952, expressing a powerful and emotional call for legislating against antisemitism. He noted that much of the Nazis' propaganda was considered "legitimate" under German law; he cited echoes of their words in English neo-Nazi material, including the claim that "'We are not anti-semitic – we are anti-Jewish.'"<sup>763</sup> Janner's point was intended mainly to respond to members sceptical of the bill's limits on free speech. Similarly, group libel's other advocates, such as Fenner Brockway, who had repeatedly pushed for it in Parliament during the 1950s, supported the Bill despite its perceived inadequacies. Brockway and Janner both complained that the bill's text did not explicitly include religion as a protected category and that it did not cover areas such as private employment and housing. But ultimately, they believed it was a good enough first attempt.<sup>764</sup> Despite numerous concerns from members both Labour and Tory about the bill's vague wording and potential incursion on free speech – as well as Brockway's and others' concerns that it did not go far enough – it became law in December 1965.<sup>765</sup>

## The Law in Practice

Still, despite the decision to restrict the Act to racial and ethnic discrimination, rather than religious and to place a high bar for both bringing and winning charges of incitement, many officials remained clear that it should at least in theory cover antisemitic speech. After the

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<sup>763</sup> Ibid. Janner's distinction is interesting in light of more recent scholarly debates regarding whether and when to use the term "antisemitism" or "anti-Judaism." See, e.g. David Nirenberg, *Anti-Judaism: The Western Tradition*, (Norton, 2014). Susannah Heschel, 'Historiography of Antisemitism versus Anti-Judaism: A Response to Robert Morgan', *Journal for the Study of the New Testament* 33, no. 3 (2011): 257–79, <https://doi.org/10.1177/0142064X10396142>. Herman, *An Unfortunate Coincidence*. The manner in which he used the two terms implies that antisemitism was racial in character and anti-Judaism religious; switching to the latter would have allowed speakers to claim they were merely attacking Jews in the latter capacity and therefore outside the scope of the Race Relations Act.

<sup>764</sup> HL Deb 26 July 1965, vol. 268, cc1021-68. Brockway had attempted several times in the 1950s to introduce a bill against racial discrimination and was alive to its harm for Jews. See Finlay, 'British Jews and the Race Relations Acts', 126.

<sup>765</sup> Colin McGlashan, "Race Bill 'virtually useless,'" *The Observer*, April 11, 1965.

passage of the Act, in 1966 the Race Relations Board sent a series of memoranda to its local Conciliation Committees, the groups that would serve as hearing bodies for complaints in their area. The case of Jewish complainants was mentioned explicitly in both draft and final versions of the memoranda, mainly authored by Race Relations Board employee G. H. Roberts:

4. The subsection does not apply to discrimination on religious grounds. It is possible that a person against whom discrimination was alleged might seek to show that it was practised on the grounds of the person's religion rather than his race or colour, ~~e.g. in the case of a Jewish person~~; but it may be expected that the true motive would be revealed in the course of enquiry into the allegation.<sup>766</sup>

Roberts also sought comments from fellow government lawyers such as G. L. Bindman, who commented that "it was the clear intention that Jews were covered by the Act and perhaps this might be stated."<sup>767</sup> It is unclear whether Roberts further revised the instructions to reflect Bindman's concern, but even the earlier drafts make clear that at least some cases of antisemitic behaviour should clearly fall within the scope of the Act. In practice, however, Jews' claims were not found actionable despite the documented intent of the government. A survey of complaints to the Race Relations conciliation committees in their first two years of operation, 1966 and 1967, reveals a variety of responses to complaints related to Jews. Below is a table of four complaints made by, or in one case against, British Jews through the end of 1967.

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<sup>766</sup> G.H. Roberts, Memoranda from Race Relations Board to Local Conciliation Committees, Memorandum No. 1, Function of local conciliation committees, June 1966, Commission for Racial Equality Collection, CK2, TNA.

<sup>767</sup> Letter from Solicitor to G.H. Roberts, June 21, 1966.

**Table 5.1 Complaints Involving Jews to Conciliation Committees, 1966-1967**

| <b>Complainant</b>                                                       | <b>Issue</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | <b>Response by Committee</b>                                                                                                                                                                                                                                                                    |
|--------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Miss Sherbant Jeeverjee,<br>81 Sandmere Road, London,<br>S.W.4 (11.7.66) | Miss Jeeverjee, an Indian from Kenya, called at Gaywood House...she complained of “a racist Jewish conspiracy” against her on the part of the staff and students of the Faculty of Medicine at King’s College, London. She entered King's College in 1962 and between March 1964 and November 1965 she successively either failed or failed to sit 2nd. M.B. or conjoint examinations. She attributed her failure to the racist views of the “predominantly Jewish” staff and harassment by the “many” Jewish students. | I advised her that her complaint was clearly outside the scope of section 1 of the Act and suggested that she should consult her M.P, Margaret McKay. Miss Jeevarjee accepted the situation fairly readily, 'though I fear that it is psychiatric help that she needs above all. <sup>768</sup> |
| Miss G.R. Beckles,<br>London, S.W.5. (29.9.66)                           | Circulation to musicians and music teachers of an anti-Semitic leaflet “Music in England” alleging that the music industry in this country is Jewish-controlled.                                                                                                                                                                                                                                                                                                                                                        | Leaflet forwarded to Attorney-General (30.9.66) and complainant thus informed. <sup>769</sup>                                                                                                                                                                                                   |
| Mr. P. Lacey, London N.W.3.<br>(14.11.66)                                | Receipt of anti-semitic circular originating from the Christian Nationalist Crusade, Los Angeles.                                                                                                                                                                                                                                                                                                                                                                                                                       | Forwarded to Attorney-General (14.12.66) for advice and comments. <sup>770</sup>                                                                                                                                                                                                                |
| Mr. H. Benedikt, London,<br>N.W. 4, (Jewish student),<br>(13.2.67)       | Discrimination in education, the complainant being forced to take important examinations on 14th and 15th June which are Jewish holidays.                                                                                                                                                                                                                                                                                                                                                                               | Wrote (14.2.67) explaining that the complaint is outside the scope of the Board and advising complainant to raise the matter with his Member of Parliament. <sup>771</sup>                                                                                                                      |

<sup>768</sup> Conciliation Officer’s Letter, London Conciliation Committee Records, July 12, 1966, Commission for Racial Equality Collection, CK2, TNA.

<sup>769</sup> Record of Complaints, London Conciliation Committee Records, 1966-1967, Commission for Racial Equality Collection, CK2, TNA.

<sup>770</sup> Ibid.

<sup>771</sup> Ibid.

These early responses highlight the challenge raised by the nature of the first Race Relations Act when it came to actual incidences of antisemitic speech. As the Board itself acknowledged, most discrimination against British Jews in the 1960s was in the form of speech and therefore should have been addressed mainly through the incitement provision.<sup>772</sup> However, the ability to bring charges under Section 6 was tightly controlled by the Attorney General and the Crown Prosecution Service.<sup>773</sup> Unlike many other aspects of the initial Act, the state's control over prosecutions was impervious to lobbying; "it required nearly a decade of pressure from the Race Relations Board and the Community Relations Commission to secure even unofficial channels to influence the process of prosecutions for incitement."<sup>774</sup> Not only did the legislation expose Jews to juridical interpretation if a case came to trial, it restricted their ability to decide which behaviour merited legal action. Where group libel would presumably have increased the Board's power by allowing it to bring defamation lawsuits on behalf of British Jewry, the Race Relations Act decreased its ability to do so. The Jordan case proved, in the Board's mind, that even one successful prosecution of a notable antisemite could have a wider positive effect. It wrote to the Home Office that it "had noticed a certain diminution in offensive references" to Jews and that "the outcomes of the Colin Jordan case at Devon Assizes may have been largely responsible for this."<sup>775</sup> But increasingly it appeared that the Jordan prosecution was an outlier.

According to the Race Relations Board's own data, between the committee's beginnings in October 1966 and the end of the following year, it rejected a large majority of the complaints

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<sup>772</sup> Letter from Michael Fidler to James Callaghan, December 21, 1967, Board of Deputies Collection, ACC/3121/E4/403, LMA.

<sup>773</sup> Schaffer, 'Legislating against Hatred', 257.

<sup>774</sup> Ibid.

<sup>775</sup> Letter from Michael Fidler to James Callaghan, December 21, 1967, Board of Deputies Collection, ACC/3121/E4/403, LMA.

brought to it. Of 641 complaints brought during that time, the committees investigated 167 and rejected 474. Very few of the latter were dismissed because they concerned religion – just two in 1967, per the data.<sup>776</sup> As a Board of Deputies official later noted, the law’s record over the subsequent decade was not much better. From 1965 to 1976, “when the law was amended to remove from the prosecution the burden of proving subjective intent, only 20 prosecutions were brought: four of them against blacks (successfully) and the rest against whites, with acquittals in over a third of the cases.”<sup>777</sup> Many instances of the committee’s inability to investigate stemmed from the fact that the police and private institutions were not covered, including private landlords, employers, shops, and clubs. But they also grew from the near-impossible bar of intent placed on the prosecution in Section 6 cases. These obvious failures spurred the Wilson government to reassess the Act less than two years into its tenure. It also provided the Board of Deputies a chance to lobby one last time for stronger laws against antisemitic speech.

### **Seeking Revisions**

As Brockway had predicted, the Act’s deficiencies became increasingly obvious during the first year of its implementation. But electoral politics provided an opening to those who had advocated for a stronger bill in the first place: Labour’s victory in the 1966 general election allowed the second Wilson government to seek a revised Race Relations Act.

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<sup>776</sup> Record of Complaints, London Conciliation Committee Records, 1966-1967, Commission for Racial Equality Collection, CK2, TNA.

<sup>777</sup> J. Gewirtz, ‘The Case for a Group Libel Law in Great Britain’, in *Minorities: Community and Identity*, ed. C. Fried (Berlin, Heidelberg: Springer Berlin Heidelberg, 1983), 377.

It had become clear to officials from the local conciliation committees to Baron Mark Bonham-Carter, chairman of the Race Relations Board, that the original act had excluded two sites where racial minorities felt discrimination most often: employment and housing. As noted above, in its first year of operation, the Race Relations Board rejected numerous complaints over discrimination in hiring decisions and housing searches because they fell outside the scope of the 1965 Act. For example, racial minorities were repeatedly refused mortgages or quoted extremely high interest rates on loans. Some councils required that recent immigrants have a longer residence period in the U.K. than citizens to secure a place on municipal housing wait lists. Non-white school leavers frequently found it difficult to secure good quality training posts.<sup>778</sup>

Despite the relatively few complaints Jews made to the conciliation committees, the Board recognized that the forthcoming revisions to the Act provided them an opportunity. They extended the tenure of the working group which had been set up before the original legislation, which included Orbach, who sat on the Commons Standing Committee on Race Relations, charged with considering the new draft of the bill. Many of the working group's members had also been intimately involved in earlier speech regulation efforts, including familiar figures such as Laski and Webber.<sup>779</sup>

The Board's committee homed in on two main areas of the original Race Relations Act it sought to change. First was the question of more explicitly including religion as a protected category. In May 1968, Orbach and Home Secretary James Callaghan argued over whether Jews had been

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<sup>778</sup> Letter from John Gollan to Roy Jenkins, June 1, 1966, Commission for Racial Equality Collection, CK2, TNA.

<sup>779</sup> List of Members of the Deputation to the Home Secretary, January 14, 1965, Board of Deputies Collection, ACC/3121/C/13, LMA.

excluded in practice from the Act and, indeed, whether they needed to be included at all. Orbach had been sent by the Board to emphasize that Jews still faced economic discrimination and that “the word religion must be spelled out in the Bill” to protect them.<sup>780</sup> He said that, despite the assurances of the Home Secretary to Jewish leaders, categorizing Jews as an “ethnic group” was inaccurate. Callaghan responded that Jews’ position in British society was a success story: “The position of the Jews has improved dramatically, certainly since I was a very young man, and I think that that is a mark of the growing civilisation of the world and also a mark of the fact that every community is capable of absorbing and assimilating people when they have sufficient history and sufficient time to do so.”<sup>781</sup> He then said that the 1965 act had “a healthy influence” on British Jews and that he had shown examples of this effect to Jewish leaders. It is unclear what Callaghan was referring to – likely not cases brought to the Race Relations Board, since as noted above there were few and most were rejected. Perhaps he meant that the existence of such legislation itself had a halo effect on British Jewry; if so, the Board of Deputies evidently did not agree. Orbach’s suggestion about religion was eventually ruled out of order in Parliament.<sup>782</sup>

However, more consequentially, the Board of Deputies focused on the “incitement to racial hatred” clause. The crime addressed the precise problem with which the Board and British Jews had taken issue since the 1910s: the objectionable behaviour against which the whole group libel campaign had been launched. The *Chronicle* tied the Board’s interest in the section to its libel

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<sup>780</sup> Extracts from the House of Commons, Standing Committee B, May 9, 1968, Board of Deputies Collection, ACC/3121/C/13, LMA.

<sup>781</sup> Ibid.

<sup>782</sup> Memorandum to Board of Deputies on Progress of Race Relations Bill, May 23, 1968, Board of Deputies Collection, ACC/3121/E4/403, LMA. Callaghan did apparently meet with the Board of Deputies later the same month to reassure them. In a letter to him after the meeting, the Board’s president, Solomon Teff, wrote that he was “reassured by your much appreciated special reference to Jews.” Letter from Michael Fidler to James Callaghan, May 24, 1968, Board of Deputies Collection, ACC/3121/E4/403, LMA.

advocacy, writing that “the introduction of this offence was prompted by the absence in English law of any remedy for group libel.”<sup>783</sup>

To constitute incitement, a statement had to be not merely hateful against a protected group; it had to cause a “likely breach of the peace.”<sup>784</sup> In practice this meant that even the most extreme threats – such as those spoken at the Trafalgar Square neo-Nazi rally in 1962 – would not contravene the Race Relations Act even if the targeted group was covered by the legislation. In the Board’s view, this made reforming Section 6 even more important than adding religious discrimination to the act. For example, the police dismissed Jews’ complaints after the 1962 National Socialist rally by saying that while the “party was inciting and provocative, they were not of much account and should be regarded more as a nuisance than as a danger.”<sup>785</sup>

In December 1967, Michael Fidler, then the President of the Board, sent a letter to Callaghan requesting that Section 6 be strengthened as part of the revised Act. In doing so, the Board was working in opposition to both free speech groups but also other minority groups (as in the United States, where the AJCo had diverged from the NAACP). Fidler wrote that he had “seen press reports that representatives of immigrant associations have recently called at the Home Office for consultations to the Race Relations Act [urging] the exclusion from the Act of the present provisions against racial incitement.”<sup>786</sup> In the Board’s view, “this would be a retrograde step.” While the Board’s members “still [had] reservations on certain aspects of Section 6,” those

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<sup>783</sup> *Jewish Chronicle*, May 16, 1968.

<sup>784</sup> Letter from J.C.H. Holden to A.G. Brotman, March 20, 1964, Board of Deputies Collection, ACC/3121/E4/403, LMA.

<sup>785</sup> Notes of Interview at Scotland Yard, May 10, 1962, Board of Deputies Collection, ACC/3121/E4/403, LMA.

<sup>786</sup> Letter from Michael Fidler to James Callaghan, December 21, 1967, Board of Deputies Collection, ACC/3121/E4/403, LMA.

mainly related to ways in which it was not strong enough, as it would soon tell Callaghan in person. But that view was plainly not shared by other groups lobbying for a stronger revised Act in other respects. Several of the leaders of the Campaign Against Racial Discrimination (CARD), which had been instrumental in pushing for the act, were adamant that the anti-incitement clause be removed because they feared it would mainly lead to prosecutions of minorities for anti-white speech.<sup>787</sup> The authors of the survey of race relations legislation *Colour and Citizenship*, while only released in 1969, also expressed this view. The report's authors were strongly critical of Section 6 – indeed, one of the few explicit legal recommendations they made was for its repeal.<sup>788</sup> They had a variety of complaints about the incitement provision, including some the Board itself had long debated, such as whether trials for incitement would spread racist material far beyond its original circulation. But they also objected more fundamentally to the use of the law as a punitive measure, writing that “the inclusion of Section 6 in legislation concerned with race relations creates a false impression that the race relations legislation as a whole is penal...it also encourages the public to conclude wrongly that racial discrimination and racial propaganda are closely connected, and, similarly, that the law against racial discrimination is a curtailment of freedom of expression.”<sup>789</sup> Nevertheless, in a meeting with Home Office officials in March 1968, the Board repeated its desire for a stronger Section 6 which removed the need for proving intent and expanded channels for bringing claims beyond the Attorney General's office.<sup>790</sup>

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<sup>787</sup> Kennetta Hammond Perry, *London Is the Place for Me: Black Britons, Citizenship, and the Politics of Race*, (Oxford University Press, 2015), 265–66; Schaffer, ‘Legislating against Hatred’, 271–73.

<sup>788</sup> Eliot Rose, *Colour and Citizenship: A Report on British Race Relations* (Oxford, 1969), 687–88.

<sup>789</sup> *Ibid.*, 688.

<sup>790</sup> Board of Deputies Press Release, March 6, 1968, Board of Deputies Collection, ACC/3121/E4/403, LMA.

The Board's request to reform Section 6 was even less successful than its attempts to add religion to the new Bill. On February 6, Bonham-Carter sent a telegram to his colleague John Lyttle assessing the Board's proposal in advance of the meeting. He made clear in his message to Lyttle that the Board of Deputies' plea was unlikely to find a sympathetic audience within the government. His message read in full:

I see that the delegation from the Board of Deputies is shortly to call upon the Home Secretary. All they propose to do, as far as I can see, is ask him to strengthen Section 6 of the Race Relations Act, which does seem pretty idiotic.

Do you think it would be worth getting in touch with Anthony Lester or anyone else?

Secondly, do you think we should warn the Home Office?<sup>791</sup>

Callaghan was less dismissive than Bonham-Carter, albeit still opposed to changing Section 6. He sent the Board's Defence committee a letter outlining his position, which was essentially that strengthening the section would present serious free speech concerns. To the extent that antisemitic and neo-Nazi groups were active in Britain, events like Jordan's imprisonment and the mere passage of the Race Relations Act had, in Callaghan's view, made them "very much more restricted and cautious."<sup>792</sup> Callaghan said that, if such groups became a bigger problem in the future, it would be easy to produce a short bill amending Section 6.<sup>793</sup> But in 1968, any amendments would be unwise. Notably, despite the desire of some groups for getting rid of Section 6 altogether, the government did want to retain it. Its opposition to the Board's proposals was more because it did not want to draw attention to the wide latitude the existing law gave the government to prosecute speech. Callaghan wrote that "inclusion in the new Race Relations Bill

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<sup>791</sup> Telegram from the Board of Deputies of British Jews to Hugh Bonham-Carter and John Lyttle, February 6, 1968, Commission for Racial Equality Collection, CK2, TNA.

<sup>792</sup> Letter from James Callaghan to Victor Mishcon, March 20, 1968, Board of Deputies Collection, ACC/3121/E4/403, LMA.

<sup>793</sup> Letter from James Callaghan to Michael Fidler, March 18, 1968, Board of Deputies Collection, ACC/3121/E4/403, LMA.

of an amendment of section 6 would also give publicity to dying or dormant organisations which their leaders would probably welcome. It would also open up debate on the Bill to the whole field of racial incitement and restrictions on freedom of speech.”<sup>794</sup> The government’s difference of opinion from the Board then, came less from queasiness about restrictions on speech than from its desire to retain the exclusive power to decide what speech was objectionable. The existing legislation was vague enough to allow the government significant discretion, even if it mostly used that discretion to reject complaints. Home Office and legal officials wanted to hold their power in reserve, saving it for a situation in which it might prove useful.<sup>795</sup> The activity of antisemitic groups in the late 1960s was not that situation.

At the heart of the government and the Board of Deputies’ different positions on the Race Relations Bill lay two interpretations of the situation of British Jewry and British antisemitism in the mid-1960s, raising again the debate over pre-emptive measures. In the government’s view – as espoused by Callaghan and others – fascist threats should not be confronted until they gained substantial power beyond small rallies and limited-run publications distributed outside Tube stations. In the Board’s view, allowing even those small actions normalized Jew-hatred. Even if society at large did not agree with Jordan and his allies, seeing them allowed to pass unchecked amounted to tacit acceptance. Of course, subsequent years mainly proved Callaghan rather than the Board of Deputies right in the sense that the British neo-Nazi parties did not become a significant political force. But at least some of their ideas and attitudes toward the “other” in society persisted and were even adopted as part of the political mainstream. While the

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<sup>794</sup> Letter from James Callaghan to Michael Fidler, March 19, 1968, Board of Deputies Collection, ACC/3121/E4/403, LMA.

<sup>795</sup> Hilliard, ‘Words That Disturb the State: Hate Speech and the Lessons of Fascism in Britain, 1930s–1960s’, 776.

government was correct in a narrow sense, its thesis of how to confront hatred of the other was not borne out. It is hard to assess whether the Board's more expansive view – whether in the form of group libel, Section 6 reform, or otherwise – would have worked better simply because it was never seriously attempted.

In the years after the failure to secure changes to the Race Relations Act, the Board of Deputies and allied organisations such as the Society of Labour Lawyers<sup>796</sup> and the TAC underwent a rhetorical change when they spoke about minority rights. Where at least through the mid-1960s they viewed themselves as primary actors – victims of discrimination – increasingly they spoke about minority rights as something to be secured with Jews' help for other groups. In this formulation, Jews' historical experience of antisemitism positioned them to advocate on others' behalf. By the end of 1968, the Board's Race Relations Working Group turned to organising a conference the goal of which was to “consider the most appropriate means for the Anglo-Jewish community to assist in the integration of the coloured people in this country, to improve race relations, and to report and recommend accordingly.”<sup>797</sup> It stated that “the primary task for the Jewish community is to ‘educate itself’” about racial hatred.<sup>798</sup> The same conference report referenced the Board's attempts to strengthen Section 6 but did not mention they had failed nor suggest those efforts would continue. Indeed, the heading under which the lobbying was grouped read “The Lessons of Jewish Immigration and Integration in the U.K.”,<sup>799</sup> suggesting the days of advocacy had passed by. By 1970, the only Race Relations Act case on which the *Jewish*

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<sup>796</sup> Ibid., 790.

<sup>797</sup> *Improving Race Relations – A Jewish Contribution*, Working Party on Race Relations of the Board of Deputies of British Jews, 1969, ACC/3121/C/13/11, LMA.

<sup>798</sup> Ibid., 9.

<sup>799</sup> Ibid., 7.

*Chronicle* reported was brought against the *Brighton Evening Argus* over an advertisement which specified the applicant must be a Jew.<sup>800</sup>

One question the Race Relations Act episode raises is whether more or different action on the Board's part would have been effective. As Schaffer has pointed out, the government guarded the power to determine which speech was actionable jealously. Even the Race Relations Board itself lobbied for ten years before being able to *advise* on prosecutions for incitement.<sup>801</sup> This, Callaghan's letter, and the Home Office's own internal correspondence, suggest that there was little the Board could have done to convince the government to amend Section 6 in its desired direction. Specifically, the government was entirely unwilling to allow minorities such as Jews to bring lawsuits over hate speech, no matter their form. Had the Board been asking for positive accommodations in the public sphere, as did Sikhs who sought to wear their turbans, or in fact as had British Jews who wanted to trade on Sundays, the British state may have looked more kindly on their requests, including in the courts.<sup>802</sup> But asking the state to police negative acts against a community, particularly when doing so raised freedom of speech concerns, was a step too far.

The Board's failure to secure an expansion of Section 6 of the Race Relations Act was its last major attempt to formalise the underlying idea of group libel: that antisemitic speech should be outlawed, and that Jews should try to secure legal group rights. The Board did not stop its "Jewish Defence" work after the mid-1960s, to be sure, but it did accept that its legal toolbox

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<sup>800</sup> *Jewish Chronicle*, March 29, 1970.

<sup>801</sup> Schaffer, 'Legislating against Hatred', 257–58.

<sup>802</sup> David Feldman, 'Why the English like Turbans: Multicultural Politics in British History', in *Structures and Transformations in Modern British History*, 1st edn, ed. David Feldman and Jon Lawrence (Cambridge University Press, 2011), 282, 293–94.

would not meaningfully change. To the extent that it had a role in bringing antisemites to justice, it would be through private requests to the government, not bringing cases to court itself. The government refused to adopt the Board's opinion on the harm of speech campaigns, instead choosing to view each speech act as if it occurred in a vacuum. Also crucially, it was unwilling at least until the mid-1970s, to remove the burden of intent, giving the accused significant latitude to argue for their innocent belief in the truth of their statements. These decisions on the government's part meant that the Race Relations Act did not represent a significant step toward the kind of legislation the Board had wanted when it advocated for group libel. In some ways, by nominally addressing the issue without dealing with these substantive points, it was actually a step in the opposite direction.

The Race Relations Act may have initially seemed to the *Chronicle* and others as a kind of triumph for group libel, but in fact spelled its end. The legislation wrested the power to decide what speech constituted incitement from minority groups, giving it solely to the government. This raised the same issues as had seditious libel and the Public Order Act, under which even if the Board had wanted to bring cases against antisemites they would not have had standing. While some members of the Board remained interested in group libel through the 1980s, in practice the law had left them behind.

## Conclusion

Group libel did not disappear in 1969, and it would be possible to continue the history discussed here. For example, the proposed Nazi march on a town full of Holocaust survivors in Skokie, Illinois raised substantial questions over antisemitism and group libel in the 1970s in the same state whose group libel law the Supreme Court had sanctioned in *Beauharnais*.<sup>803</sup> Across the Atlantic, in 1983 Board of Deputies Defence Committee head Jacob Gewirtz wrote an article proposing a return to group libel advocacy after concluding that the Race Relations Acts had failed when it came to antisemitic speech.<sup>804</sup> But after the mid-1960s, the postwar window during which speech laws were in flux and subject to transformative change had closed. American law firmly enshrined content-neutral principles by the time the Supreme Court handed down *Times v. Sullivan*. A year later, the British government chose to create new offences through the Race Relations Act rather than rely on the law of defamation. Instead of assigning the responsibility of determining what speech was objectionable to minority groups themselves, the Act reserved that power for the government. It focused on the speaker's intent rather than banning speech per se. It eschewed the concept of group reputation and group rights inherent to libel reform, instead choosing to create an arguably flimsier idea of "incitement" which centred on the motives and actions of perpetrators rather than the impact of their actions on targeted populations.<sup>805</sup>

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<sup>803</sup> David Renton, *No Free Speech for Fascists: Exploring "No Platform" in History, Law and Politics*, Routledge Studies in Fascism and the Far Right (London: Routledge, Taylor & Francis Group, 2021), 54–60. The ACLU's decision to defend neo-Nazis' right to march led to the withdrawal of 25 percent of its members, including David Riesman. See Walker, *Hate Speech*. For a summary of the critique levelled against the organisation – which bears much similarity to group libel advocates' ideas – see Irving Louis Horowitz and Victoria Curtis Bramson, 'Skokie, the ACLU and the Endurance of Democratic Theory', *Law and Contemporary Problems* 43, no. 2 (1979): 328, <https://doi.org/10.2307/1191205>; 'Group Vilification Reconsidered', *The Yale Law Journal* 89, no. 2 (December 1979): 308, <https://doi.org/10.2307/795839>. Old group libel state statutes also led to various lawsuits, as in the 1988 case of *Stump vs. New York*.

<sup>804</sup> Gewirtz, 'The Case for a Group Libel Law in Great Britain.'

<sup>805</sup> The law led to very few successful prosecutions in the first decades of its existence, even after attempts to reduce the burden on the prosecution. Moreover, as Chapter VI notes, Jews were not the "hated" group in any of the cases. See Gewirtz, 377–78. "Between 1965 and 1976, when the law was amended to remove from the prosecution the

In the decades after *Beauharnais* and the Race Relations Acts, group libel transitioned from live issue to largely academic debate. While various groups occasionally proposed returning to the issue in both the United States and United Kingdom, it lost its onetime ubiquity in discussions of speech and antisemitism. Instead of advocating for group libel, American and British Jews largely submitted to the paths of dealing with hate speech their countries had respectively chosen. In the United States, that meant the path of individual rights, of Constitutional veneration, and of proud liberalism. In the United Kingdom, it meant something less than the wide protections for minorities of Europe and more than the wide berth given to bigots stateside. “Incitement to racial hatred,” the key phrase in British law, eventually expanded to include religion in 2006, but not primarily with Jews in mind.<sup>806</sup> But group libel, too, was a poor fit for two Jewish communities who did not want to be viewed as groups apart. More to the point, the Jews who advocated for it had matters wrong. Social changes such as the end of antisemitism rarely emanate from changes in the law; rather, changes in the law are born from them.

If American and British Jews were alike in their nations’ rejection of group libel, they were less similar in how the debate affected their relationship to the law. Through the group libel debate, they created two cultures with respect to legal tactics against antisemitism: one in which the law was a last resort, and one in which it was the basis of self-definition. If the episode proves one thing, it is perhaps that Riesman was right to say that American and British Jews did not have

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burden of proving subjective intent, only 20 prosecutions were brought: four of them against blacks (successfully) and the rest against whites, with acquittals in over a third of the cases...since 1976, despite the amendment of the law designed to improve the chances of conviction, there have been only sixteen prosecutions, scarcely an improvement over the preceding twelve years, even if the ratio of successful prosecutions to failures (13:3) has increased (10).”

<sup>806</sup> Racial and Religious Hatred Act 2006, c. 1; in 1986, the Public Order Act abolished old offenses against rioting and created a new offense of “acts intended or likely to stir up racial hatred.” See Public Order Act 1986, c. 64. For more context on the 2006 bill, see “Racial and Religious Hatred Act 2006,” *The Guardian*, January 19, 2009.

control over the path their societies took with regard to minority rights. But they certainly did not help the matter by cleaving so closely to the bounds of acceptable behaviour. The focus on the law and the state as source and guarantor of rights was not neutral, as Boraisha pointed out in his memorandum to the AJCo in 1947.<sup>807</sup> It came at the exclusion of other tactics which would have required time, energy, and resources for Jewish organisations. To be sure, Jewish groups did (and do) engage in the educational activities with which legal activity was often contrasted. But they have less often questioned whether education and law are the sole means through which antisemitism can be fought. Moreover, as the British example particularly shows, because of Jews' unique position at the boundaries of race, religion, nation, and ethnicity, if the law is not made with them in mind, it is unlikely to deal well with the problems they face.

The above dynamics form a key part of the 20<sup>th</sup> century history of antisemitism in the Anglosphere; likewise, they show the value of comparing Jewish communities usually discussed in isolation. By tracing Jews' relationship to the law, we can understand that seemingly obvious choices, such as American Jews' view of their rights primarily in terms of the Constitution, were once the subjects of extensive disagreement. A comparative history of group libel in Canada and South Africa would also be possible. Similarly, Jews in civil law jurisdictions such as Sweden, France, and Hungary debated it at various points during the period from 1912 to 1969.<sup>808</sup> While I sought to focus on the two countries where Jews pursued defamation reform most vigorously, I hope this thesis has the secondary effect of adding to the idea's growing prominence within 20<sup>th</sup>

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<sup>807</sup> Menahem Boraisha, Memorandum to the Executive Officers of the American Jewish Congress, February 1947, Records of the American Jewish Congress, I-77, box 185, folder 5, CJH.

<sup>808</sup> See, e.g. Letter from Dr. Ernest Munkácsi to American Jewish Committee Paris Office, December 9, 1947, American Jewish Committee Paris Office Records, RG 347.7.41, box 62, folder 588, CJH, and other correspondence in the same box between Jewish groups in the above-mentioned places and the AJC's Paris and London offices.

century historiography. Through group libel, Jews debated two things: to what extent they were really a “group” and how the law should treat them. This makes the issue a rich source for those interested in broad questions of discrimination, antisemitism, and the law. For American and British Jews, group libel was the path untraveled during largely peaceful years. Present debates over speech raises the question of whether they were prudent to abandon it, or merely lucky.

In December 1991, the Faculty of Law at Tel Aviv University held a conference on “racial and religious hatred” and group libel.<sup>809</sup> One of the featured speakers, the law professor Norman Redlich, titled his remarks “Group Libel, the American Constitution, and the Community of Nations.”<sup>810</sup> After his death in 2011, Redlich’s obituary in the *New York Times* called him “a quiet luminary of the New York legal community.” Perhaps quiet in personality, his career had seen him enter into many of the country’s loudest debates. He worked on the commission investigating President John F. Kennedy’s assassination; he advocated for prisoners on death row to receive *pro bono* defense; he was part of a civil liberties group stauncher in its defense of speech than the ACLU.<sup>811</sup> He also served on the AJCo’s governing board.<sup>812</sup> Despite, or perhaps because of, his civil libertarian bona fides, Redlich went to the Tel Aviv conference in 1991 to make an unusual argument for an American lawyer: that Americans should be less self-focused. He noted that “American lawyers, particularly constitutional lawyers, are so immersed in American Constitutional doctrine that the mere mention of the words ‘speech’ or ‘rights’ evokes

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<sup>809</sup> In light of the issues with the Race Relations Act, note that by the end of the century religion was less often omitted from this phrase in order to cover all possible types of anti-Jewish sentiment.

<sup>810</sup> Norman Redlich, “Group Libel, the American Constitution, and the Community of Nations: Can the Conflicting Values be Reconciled?,” December 29-31, 1991, Records of the American Jewish Congress, I-77, box 379, CJH, 1.

<sup>811</sup> Paul Vitello, “Norman Redlich, Ex-Dean of N.Y.U. Law School, Dies at 85,” *New York Times*, June 11, 2011.

<sup>812</sup> Norman Redlich, *The Nation*, <https://www.thenation.com/authors/norman-redlich/>.

an intellectual reaction related entirely to American Constitutional doctrine.”<sup>813</sup> By contrast, after the explosion of international human rights law, “even a limited review of international covenants [makes] clear that group libel, and speech that advocates or incites racial and religious hatred, is regarded by the international community as unprotected speech that should be subjected to legal sanctions.”<sup>814</sup> The body of speech law which emerged after the Holocaust had transformed jurisprudence in many countries, but not in the United States, where since Holmes introduced his “clear and present danger” doctrine, “American courts have argued over the degree of closeness between the words and the consequences, the intent of the speaker, and the nature of the precise words.”<sup>815</sup> The same could be said for British courts, despite the Race Relations Acts and subsequent legislation. This distinction hints at the fundamental question over which American and British Jews had long wrestled when debating anti-defamation and group libel: When antisemitic speech does not immediately spill over into action, how dangerous is it? As Redlich pointed out, especially in continental Europe the answer had become: “very.” “Unlike the American legal system, which continues to view such speech as the expression of an idea, the international community considers it, as Americans consider obscenity, to be a form of expression that is devoid of ideas and that is a form of an impermissible act, namely, discrimination on grounds of race or religion.”<sup>816</sup> The United States’s attitude, by contrast, was “probably a luxury that American society can afford.”<sup>817</sup>

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<sup>813</sup> Norman Redlich, “Group Libel, the American Constitution, and the Community of Nations: Can the Conflicting Values be Reconciled?” 1.

<sup>814</sup> *Ibid.*, 3.

<sup>815</sup> *Ibid.*, 6.

<sup>816</sup> *Ibid.*, 8.

<sup>817</sup> *Ibid.*, 9; As Redlich noted, the United States added a caveat to its signing of the Convention on the Elimination of All Forms of Racial Discrimination that stated the Constitution’s protection for individual rights and free speech. “Nothing in the Convention shall be deemed to require or to authorize legislation or other action by the United States of America incompatible with the provisions of the Constitution of the United States of America.” See The International Convention on the Elimination of All Forms of Racial Discrimination, signed on behalf of the United States, September 28, 1966.

Just as in 1991, when Redlich mused about debates over campus speech at the conference, historians' growing interest in group libel, Jews, and the law today is inseparable from debates over whether Americans, and indeed Britons, can still afford the luxury of their beliefs. He correctly pointed out that two factors made wide free speech protections possible in the United States: the lack of direct experience of a conflagration such as the Holocaust, and relative consensus about the odiousness of hateful sentiments. The government did not need to ban hate speech if most Americans and British citizens rejected it of their own accord. It remains to be seen if both those factors will hold as the 21<sup>st</sup> century matures.

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MS 119 Selig Brodetsky Papers

MS 137 Anglo-Jewish Association

MS 238 British Section of the World Jewish Congress

MS 175 Chief Rabbi Hertz Papers

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FAD41 Records of the American Jewish Committee Paris Office

I-170 General Jewish Council Records

EXO29 Records of the American Jewish Committee Executive Offices

RG347 American Jewish Committee Records

I-77 Records of the American Jewish Congress

I-172 National Jewish Community Relations Advisory Council Records

Central Archive of the History of the Jewish People (Jerusalem, Israel)

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ACC/3121/B/5 Neville Laski, Selig Brodetsky, Adolph Brotman correspondence

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HO376 Home Office files

LO2 Law Officers' Department files

LCO2 Lord Chancellor's Office files

LCO13 Lord Chancellor's Office files

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