

Jews and Hate Speech

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In the early 1940s, Ohio Congressman Martin Sweeney, a right-wing isolationist and devoted supporter of antisemitic priest and radio personality Charles Coughlin, brought a series of lawsuits against news outlets around the country. Sweeney claimed the media had injured his reputation by printing that he, like Father Coughlin, opposed the appointment of Judge Emerich Freed to the federal bench because Freed was Jewish.

The newspapers managed to have all of Sweeney's suits dismissed but one: that of the *Schenectady Union-Star* in New York. The court of appeals sided with the congressman, pointing to the state's large Jewish population as a key contextual factor in determining that the story about Sweeney did in fact expose him to public hatred. The *Union-Star* appealed to the Supreme Court, where Morris Ernst, the urbane, often bow-tied counsel of the American Civil Liberties Union, argued that Sweeney's use of libel lawsuits was a potentially destructive tool in the "hands of bigots and merchants of hate." When used by men like Sweeney, libel laws would—counter to their supposed purpose—immunize bigots from being publicly called out for their hatred. What Jews needed was the freedom to counter such hateful words in the marketplace of ideas. Ernst's argument was supported by a brief by the major national American Jewish organizations of the time (the American Jewish Committee, American Jewish Congress, B'nai B'rith, and Jewish Labor Committee), who collectively argued that despite the rising threat of antisemitism, the best way to combat evil was through education and open debate rather than the legislative suppression of "anti-Semitic preachments."

Throughout the twentieth century, in cases like *Sweeney* (or more famously *New York Times v. Sullivan* in 1964) in which individuals felt their "good name" had been tarnished, Jews were frequently on

the front lines of major free-speech cases, arguing that a democratic society like the United States needed a debate on public issues that was "uninhibited, robust, and wide-open."

But what about cases where the preachments of hate were directed against an entire group?

Jews were less unified in their responses to "group libel" (what we today call "hate speech") that maligned racial, ethnic, or religious minorities.

Some Jews felt that permissible speech was too wide open when it came to attacks on minority groups. For example, also during the 1940s, a thirty-something law professor named David Riesman, who would go on to make a name for himself for his studies in Sociology, was grappling with the *Sweeney* case and how to reconcile "democracy and defamation." With antidemocratic and antisemitic forces growing, especially but not only in Europe, Riesman worried that free speech was not truly free for all, since some groups "encounter[ed] obstacles rooted in inequalities of private wealth and power." Riesman strongly advocated for group libel laws, which would allow marginalized groups to seek "legal redress" against claims made by bigots, fascists, and antisemites.

Riesman's arguments resonated with Justice Felix Frankfurter. In 1952, in *Beauharnais v. Illinois*, the Supreme Court ruled that a leaflet castigating African Americans was not protected speech. White supremacist Joseph Beauharnais had distributed a petition calling on the mayor of Chicago to "halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro." He was convicted and fined for violating an Illinois law that barred defamatory pronouncements directed at a "class of citizens" based on race, color, creed, or religion. In upholding the Illinois law, the court reasoned that, like other categories of speech



Ben Shahn. Father Coughlin, 1939. Watercolor and ink. 15 1/2 in. x 12 in. Columbus Museum of Art, Ohio: Museum Purchase, Derby Fund, from the Philip J. and Suzanne Schiller Collection of American Social Commentary Art, 1930–1970. © 2020 Estate of Ben Shahn Licensed by VAGA at Artists Rights Society (ARS), NY

that fell outside the First Amendment—like obscenity, profanity, and insulting or “fighting words”—the value of Beauharnais’s contribution to civic discourse was so slight that it was outweighed by the interest in maintaining social order. And just as a state could (prior to *New York Times v. Sullivan* in 1964) punish a libelous “utterance directed at an individual,” it could punish the “same utterance directed at a defined group.” Frankfurter, who wrote the court’s opinion and cited Riesman in his footnotes, argued that “willful purveyors of falsehood” against racial and religious minority groups cause strife inconsistent with a “metropolitan, polyglot community.” There was no place for them in America.

And yet, American Jews as a whole did not take up Riesman and Frankfurter’s support for group libel laws. As a small, visible minority in the United States, it might have made sense for Jews to back laws like the one in Illinois, to be able to use such laws against antisemitic screeds lobbed against them. But whatever earlier interest American Jews had in group libel—during the 1940s as the specter of Nazism grew, or earlier in the 1910s when the major American Jewish organizations came into their own and advocated for group libel statutes and the philosopher Horace Kallen pushed for pluralism attuned to group-based recognition—by the second half of the century, Jews had come to overwhelmingly support individual rights, especially the right to speak and reply, over any type of group-based rights.

Famously, by the late 1970s, when the National Socialist Party of America marched in front of the village hall in Skokie, a heavily Jewish suburb of Chicago, it was Ernst’s ideological descendant, ACLU director Aryeh Neier, who advocated for the speech of those he hated (and hated him). Less famously, a few years earlier, Jewish organizations had disagreed—and split with major Black civil rights organizations like the NAACP—over how to deal with J. B. Stoner, a radical segregationist who claimed African Americans were not human beings: mobilize public opposition or wield the law against him?

Unlike other democracies, especially in Europe, the American aversion to hate speech laws may seem surprising. Despite America’s “metropolitan, polyglot”

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makeup, its minorities are expected to be able to handle degrading speech directed toward them by punching up. And perhaps somewhat surprisingly, American Jews—who might have reaped some benefits from a legal remedy like group libel when they were vilified as, say, gangsters, porn peddlers, or subversives—have not supported legislative prohibitions on hate speech directed at groups.

The issue of hate speech exemplifies a pattern of American Jewish liberalism. Unlike other minority groups that saw a path to equality through group-based arguments (often highlighting their race, color, creed, or religion), American Jews have largely downplayed such arguments in favor of individual freedoms. Jews wagered that the benefits of a liberal society that prizes the individual over the group—and allowed Jews to succeed individually without calling too much attention to their particularism as a group—outweighed any discomforts that might arise from allowing antisemitic opprobrium. Because of their racial/ethnic and economic place in American society, Jews had more choice than other minority groups about when—and when not—to advocate as a group. And since their success was always at least somewhat precarious, Jews feared that group-based protections like hate speech might unintentionally backfire and even incur further antisemitism (as the famed civil rights lawyer Louis Marshall feared in the 1920s, for instance, when he hesitated to take on the antisemitic auto magnate Henry Ford).

American Jews’ approach to issues of hate speech and freedom of expression rests, hopefully sturdily, on a belief that truth and toleration will win out in the long run over perversion and the bondage of irrationality.

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